



The State Bar *of California*

OPEN SESSION

AGENDA ITEM

54-121 JANUARY 2019

REGULATION AND DISCIPLINE COMMITTEE ITEM III.B

DATE: January 25, 2019

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

FROM: Melanie J. Lawrence, Interim Chief Trial Counsel

SUBJECT: Office of Chief Trial Counsel Amendments to the Standards for Attorney
Sanctions for Professional Misconduct: Return From Public Comment and
Request for Approval

EXECUTIVE SUMMARY

The Office of Chief Trial Counsel (OCTC) proposes several amendments to the Standards for Attorney Sanctions for Professional Misconduct as a result of the adoption of new Rules of Professional Conduct by the Supreme Court, which went into effect on November 1, 2018.

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. One public comment was received during the comment period. The public comment is provided in Attachment C.

In addition to the public comment period, OCTC met with representatives of the State Bar Court and the Association of Discipline Defense Counsel (ADDC) approximately seven times between October and January to get feedback on OCTC's proposed changes to the Standards and to inform our final proposal. Five of the proposed Standards have been submitted to the Regulation and Discipline Committee in a separate item for circulation for public comment. Items that have already been circulated for public comment and have not substantially changed as a result of our discussions with the State Bar Court and the ADDC are in this proposal. While this proposal is submitted by OCTC and the proposed changes are advocated by OCTC, much consideration was given to the opinions of the State Bar Court and the ADDC.

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 new Rules of Professional Conduct adopted by the Supreme Court require some changes to the Standards. Some changes are not substantive, for example, changing citations to rule numbers or changing the term “member” to “lawyer.” Other changes require the addition of language from the new rules to existing standards or the creation of new standards. In some Standards, we have included language that would apply to violations of either the new or old rules. In addition to changes required by the rule changes, we have proposed a change to Standard 2.10, regarding the unauthorized practice of law, is not the result of a rule change. We do not believe that the proposed changes rise to the level of a major policy change or philosophical shift.

The original Regulation and Discipline Committee agenda item (III.A. – Sep 2018) had blue underlines for insertions and ~~red strikeouts~~ for excised language. In this version, we have preserved the original blue underlines and ~~red strikeouts~~, but where we have added language as a result of our discussions with discipline-system partners, we have flagged that with green underlines. Similarly, we have marked additional deletions with ~~deep-red strikeouts~~.

DISCUSSION

This item proposes numerous amendments to the Standards for Attorney Sanctions for Professional Misconduct as a result of the adoption of new Rules of Professional Conduct by the Supreme Court and to eliminate the use of the term “member” consistent with the purely regulatory nature of the State Bar.

This item proposes changes to eliminate the use of the term “member” and adopt the term “lawyer” or “licensee” in Standards 1.2, 1.4, 1.6, 1.7, 1.8, 2.6, 2.8, 2.9, 2.10, and 2.14.

Where the Standards set out discipline for violation of a specific rule, we have substituted the new rule number, but the Standard will continue to apply to violations of the old rules. Where the Standards set out discipline for specific conduct we have used the language from both the new and old rules so that the Standard will apply to violations of the new and old rules.

In addition, the following changes are proposed:

1. Standard 1.2

The proposal would remove the definition of “Member” and insert a definition of “Lawyer.” The definition of “Lawyer” is adapted from Business and Professions Code section 6157(b).

The proposal would add the term “Tribunal” because the term is used in the proposed modified Standard 2.12. The definition is the same definition used by the new terminology rule (rule 1.0.1(m)).

2. Standard 2.3

In addition to unconscionable and illegal fees, new rule 1.5 [Fees for Legal Services] adds specific prohibitions on contingency fees in family law matters and when representing a criminal defendant. It also discusses when a true retainer is permitted and requires that the client consent in writing after disclosure that the client will not be entitled to a refund of all or part of the fee. OCTC believes that violations of this type belong in paragraph (b) of this Standard (i.e., suspension or reproof).

After consulting with the State Bar Court and the ADDC, we altered our proposal to clarify the violations to which Standard 2.3(b) would apply. We did not deem this to be a substantial change and therefore we do not believe that this Standard needs to go back out for an additional period of public comment.

3. Standard 2.6

Substantive changes include altering paragraphs (a) and (b) to cover rules 1.8.2 [Use of Current Client’s Information] and 1.18(b) [Duties to Prospective Client]. Proposed new paragraph (c) would address new rule 4.4, which addresses an attorney's duties regarding inadvertently transmitted writings.

Following our discussions with the discipline system partners, we removed “the magnitude of” from subdivisions (a) and (b) because it was unnecessary. However, we do not believe that this is a substantive change and therefore we do not believe that this standard needs to go back out for public comment.

4. Standard 2.7

The proposed addition of paragraph (d) defines performance and communication, so that this Standard matches many new rules dealing with these issues.

Following our discussions with the State Bar Court and the ADDC, we made non-substantive changes to our proposal. We do not believe that this Standard needs to go back out for public comment.

5. Standard 2.8

The proposed standard incorporates language addressing improper partnerships and operating organizations involved in the practice of law with non-lawyers. The new rule (rule 5.4 [Financial and Similar Arrangements with Nonlawyers]) combines old rules 1-310 [forming or engaging in a partnership with non-lawyer] and 1-320 [financial arrangements with non-lawyers] into one rule. However, the prohibition on compensation for referrals is covered by rule 7.2 [Advertising] not by new rule 5.4.

There have been no changes to this proposed standard since it was sent out to public comment.

6. Standard 2.9

The proposed modification to both paragraphs adds the delay of litigation language from the new rule 3.2.

There have been no changes to this proposed standard since it was sent out to public comment.

7. Standard 2.10

This change is not required by the change to the California Rules of Professional Conduct, but is proposed to eliminate a source of confusion in the current standards. Currently, due to the citation to California Business and Professions Code section 6007, a literal reading of Standard 2.10 makes it applicable only to unauthorized practice of law (UPL) in California. The proposed modification makes the Standard applicable to UPL by a California lawyer in another jurisdiction as well as in California.

While this proposed change is consistent with rule 5.5 and *In the Matter of Wittenberg* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 418,424 [finding standard 2.10(a) most apt for engaging in UPL in another jurisdiction], this change is not strictly required by the new rules because the old rules also prohibited California attorneys from practicing law or holding themselves out to practice law in jurisdictions where they were not authorized to practice law. Instead of applying Standard 2.10, Standard 2.12(a) [Disbarment or actual suspension] was applied to UPL in non-California jurisdictions (via BPC 6068(a)). Application of different standards to the same conduct based on where the conduct occurred was confusing. OCTC's proposal is meant to eliminate that confusion. The move to apply Standard 2.10 instead of Standard 2.12 does not involve a change in the presumed sanction as both call for disbarment or actual suspension.

During our discussion with the State Bar Court and the ADDC, the biggest point of controversy on this proposed Standard was that the Standard did not track the rule in that the Standard creates two presumed sanctions based on the cause of the attorney's ineligibility to practice law. The rule does not differentiate between unauthorized practice of law based on the nature of the ineligibility. However, this differentiation of sanctions was put in place by the taskforce in 2015 and we believed that a more significant alteration of the standard may represent a major policy shift that was beyond the scope of our authorization.

Following our discussions with the State Bar Court and the ADDC, we made non-substantive changes to our proposal. We do not believe that this Standard needs to go back out for public comment.

8. Standard 2.12

The proposed modification of this rule adds rule 3.4(f) [knowingly disobey an obligation under the rules of a tribunal] to Standard 1.12(a). This violation was inserted in this standard because the conduct is analogous to, or includes, violating a court order.

There have been no changes to this proposed standard since it was sent out to public comment.

9. Standard 2.14

We initially proposed substantive changes to this standard, but following our discussions with the ADDC and the State Bar Court, at this time, we have decided to withdraw the substantive changes we proposed to this Standard.

10. NEW Standard 2.20

Paragraph (a) of the proposed new Standard 2.20 addresses Business and Professions Code section 6131. Business and Professions Code section 6131 states that every attorney who violates that section “is guilty of a misdemeanor and, in addition to the punishment prescribed therefor, shall be disbarred.” During our discussions with the State Bar Court and the ADDC, the ADDC argued that because the statute said the attorney “is guilty,” a finding of guilt was required (i.e., a conviction) before discipline could be imposed. However, this language is substantially similar to other criminal statutes that set out the elements of a criminal offense. A conviction is not required to discipline an attorney for a violation of Business and Professions Code section 6131. (*Price v. State Bar* (1982) 30 Cal.3d 537 [two-year actual suspension although no conviction].) The ADDC thought that disbarment was too harsh given that there was no conviction involved. Based on *Price* and the statute, discipline is appropriate for a violation even when the violation does not result in a conviction and disbarment is the presumed sanction.

Proposed new paragraphs (b) and (c) are for violations of Rule 8.4(b) for criminal acts that are not being prosecuted as a conviction referral or for which there is no conviction. The ADDC expressed concern that there was no definition of the phrases “criminal act” in the standard. Similarly, the ADDC expressed concern about the use of the phrase, “fitness as a lawyer,” in Standard 2.20(c), which applies to criminal acts that do not reflect on the lawyer’s honesty but otherwise reflects on the lawyer’s fitness. However, Rule 8.4(b) uses the phrases “criminal act” and “fitness as a lawyer” 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.

The ADDC also expressed concern regarding the burden of proof that would be used to prove a criminal act, however rule 5.103 of the Rules of Procedure of the State Bar of California makes clear that “The State Bar must prove culpability by clear and convincing evidence.”

During our discussions, we discussed the possibility of providing a wider range of discipline along with a list of factors impacting the length of discipline; however, we ultimately rejected that approach. In so doing, we noted that Standard 2.20(b), which applies to criminal acts reflecting on the lawyer’s honesty, tracks Standard 2.12(a), which applies to violations of 6068(a).

Similarly, Standard 2.20(c), which applies to criminal acts reflecting on the individual’s fitness as a lawyer, tracks Standard 2.16(b), which applies to criminal convictions not involving moral turpitude but involving “other conduct warranting discipline.”

There have been no changes to this proposed standard since it was sent out to public comment.

Public Comment

A prior version of this proposal was circulated for public comment. That proposal called for the same changes as this proposal except for the green underlined text and ~~deep red strikeouts~~. One public comment was received during the public comment period for the proposal.

The comment is generally supportive of the changes, but points out specific areas with which the drafter believes that the Standards should be changed, including Standard 1.7(a) and Standard 2.3(a). These two standards, however, were not substantively altered by OCTC’s proposal, and the changes that the commenter suggests would constitute a major policy change or philosophical shift. As a result, OCTC believes that the commenter’s suggestions are not appropriate for inclusion in this proposal.

The public comment is reproduced in its entirety in Attachment C.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

Title IV, Part A, Standard 1.2
Title IV, Part A, Standard 1.4
Title IV, Part A, Standard 1.6
Title IV, Part A, Standard 1.7
Title IV, Part A, Standard 1.8
Title IV, Part B, Standard 2.3
Title IV, Part B, Standard 2.6
Title IV, Part B, Standard 2.7
Title IV, Part B, Standard 2.8
Title IV, Part B, Standard 2.9

Title IV, Part B, Standard 2.10
Title IV, Part B, Standard 2.12
Title IV, Part B, Standard 2.14
Title IV, Part B, Standard 2.20

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 and Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees approve the amendments to the Standards for Attorney Sanctions for Professional Misconduct as set forth in Attachment A; and it is

FURTHER RESOLVED, that the amendments to the Standards for Attorney Sanctions for Professional Misconduct is effective immediately and will apply to all pending and future cases.

ATTACHMENT(S) LIST

- A.** Proposed Amended Standards for Attorney Sanctions for Professional Misconduct (Clean Version)
- B.** Proposed Amended Standards for Attorney Sanctions for Professional Misconduct (Redline Version)
- C.** Public Comment

ATTACHMENT A – Proposed Amended Standards for Attorney Sanctions for Professional Misconduct (Clean Version)

1.1 PURPOSES AND SCOPE OF STANDARDS

The Standards For Attorney Sanctions For Professional Misconduct (the “Standards”) are adopted by the Board of Trustees 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. The Standards help fulfill the primary purposes of discipline, which include:

- (a) protection of the public, the courts and the legal profession;
- (b) maintenance of the highest professional standards; and
- (c) preservation of public confidence in the legal profession.

Rehabilitation can also be an objective in determining the appropriate sanction in a particular case, so long as it is consistent with the primary purposes of discipline.

The Standards are based on the State Bar Act, the published opinions of the Review Department of the State Bar Court, and the longstanding decisions of the California Supreme Court, which maintains inherent and plenary authority over the practice of law in California. Although not binding, the Standards are afforded great weight by the Supreme Court and should be followed whenever possible. The Supreme Court will accept a disciplinary recommendation that is consistent with the Standards unless it has grave doubts about the propriety of the recommended sanction. If a recommendation is at the high end or low end of a Standard, an explanation must be given as to how the recommendation was reached. Any disciplinary recommendation that deviates from the Standards must include clear reasons for the departure.

The Standards do not apply to: non-disciplinary dispositions such as admonitions and agreements in lieu of discipline; resignations; involuntary inactive enrollments; interim suspensions after conviction of a crime; or suspensions for nonpayment of State Bar fees, failure to comply with child support orders, or tax delinquencies.

Eff. January 1, 1986. Revised: January 1, 2007; January 1, 2014; July 1, 2015.

1.2 DEFINITIONS

- (a) “Lawyer” means a licensee of the California Supreme Court, the State Bar of California, or a person who is admitted in good standing and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof and includes any agent of the lawyer, law firm, or law corporation doing business in the state.
- (b) “Disbarment” is termination from the practice of law and from holding oneself out as entitled to practice law. The license issued by the Supreme Court or State Bar ceases and the licensee’s name is stricken from the roll of attorneys.
- (c) “Suspension” can include a period of actual suspension, stayed suspension, or both:
 - (1) “Actual suspension” is a disqualification from the practice of law and from holding oneself out as entitled to practice law, subject to probation and attached conditions. Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until specific conditions are met. Actual suspension for two years or more requires proof, satisfactory to the State Bar Court, of rehabilitation, fitness to practice, and present learning and ability in the general law before a lawyer may be relieved of the actual suspension. The State Bar Court can require this showing in other appropriate cases as well.
 - (2) “Stayed suspension” is a stay of all or part of a suspension. Stayed suspension is generally for a period of at least one year. A suspension can be stayed only if it is consistent with the primary purposes of discipline.
- (d) “Public Reprimand” is a public censure or reprimand. A public reprimand may include conditions.
- (e) “Private Reprimand” is a censure or reprimand that is not a matter of public record unless imposed after the initiation of formal disciplinary proceedings. A private reprimand may include conditions.
- (f) “Interim Remedies” are temporary restrictions imposed by the State Bar Court on a lawyer’s ability to practice law. They are imposed in order to protect the public, the courts, and the legal profession until such time as the issues can be resolved through formal proceedings.
- (g) “Prior record of discipline” is a previous imposition or recommendation of discipline. It includes all charges, stipulations, findings and decisions (final or not) reflecting or recommending discipline, including from another jurisdiction. It can be discipline

imposed for a violation of a term of probation or a violation of a Supreme Court order requiring compliance with rule 9.20 of the California Rules of Court.

- (h) “Aggravating circumstances” are factors surrounding a lawyer’s misconduct that demonstrate that the primary purposes of discipline warrant a greater sanction than what is otherwise specified in a given Standard.
- (i) “Mitigating circumstances” are factors surrounding a lawyer’s misconduct that demonstrate that the primary purposes of discipline warrant a more lenient sanction than what is otherwise specified in a given Standard.
- (j) “Probation” is a period of time under which a lawyer is subject to State Bar supervision. Probation may include conditions that further the primary purposes of discipline.
- (k) “Conditions” are terms with which a lawyer must comply as part of a disciplinary sanction. They relate to a lawyer’s misconduct and the facts and circumstances surrounding the misconduct and serve the primary purposes of discipline.
- (l) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

Eff. January 1, 1986. Revised: January 1, 2007; January 1, 2014; July 1, 2015.

1.3 DEGREES OF SANCTIONS

Subject to these Standards and the laws and rules governing the conduct of disciplinary proceedings, the following sanctions may be imposed upon a finding of misconduct:

- (a) disbarment;
- (b) actual suspension;
- (c) stayed suspension;
- (d) public reproof;
- (e) private reproof; or
- (f) any interim remedies or other final discipline authorized by the Business and Professions Code.

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

1.4 CONDITIONS ATTACHED TO SANCTIONS

Conditions attached to a reproof or probation may require a lawyer to:

- (a) make specific restitution or file a satisfaction of judgment;
- (b) take and pass a professional responsibility examination;
- (c) undergo treatment, at the lawyer's expense, for medical, psychological, or psychiatric conditions or for problems related to alcohol or substance abuse;
- (d) complete, at the lawyer's expense, educational or rehabilitative work regarding substantive law, ethics, or law office management;
- (e) complete probation, subject to reporting requirements;
- (f) give notice to affected parties, including clients, co-counsel, opposing counsel, courts or other tribunals; or
- (g) comply with any other conditions consistent with the primary purposes of discipline.

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

1.5 AGGRAVATING CIRCUMSTANCES

The State Bar must establish aggravating circumstances by clear and convincing evidence. Aggravating circumstances may include:

- (a) a prior record of discipline;
- (b) multiple acts of wrongdoing;
- (c) a pattern of misconduct;
- (d) intentional misconduct, bad faith or dishonesty;
- (e) misrepresentation;
- (f) concealment;
- (g) overreaching;
- (h) uncharged violations of the Business and Professions Code or the Rules of

Professional Conduct;

- (i) refusal or inability to account for entrusted funds or property;
- (j) significant harm to the client, the public, or the administration of justice;
- (k) indifference toward rectification or atonement for the consequences of the misconduct;
- (l) lack of candor and cooperation to the victims of the misconduct or to the State Bar during disciplinary investigations or proceedings;
- (m) failure to make restitution; or
- (n) high level of vulnerability of the victim.

Eff. January 1, 1986. Revised: January 1, 2007; January 1, 2014; July 1, 2015.

1.6 MITIGATING CIRCUMSTANCES

A lawyer must establish mitigating circumstances by clear and convincing evidence. Mitigating circumstances may include:

- (a) absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur;
- (b) good faith belief that is honestly held and objectively reasonable;
- (c) lack of harm to the client, the public, or the administration of justice;
- (d) extreme emotional difficulties or physical or mental disabilities suffered by the lawyer at the time of the misconduct and established by expert testimony as directly responsible for the misconduct, provided that such difficulties or disabilities were not the product of any illegal conduct by the lawyer, such as illegal drug or substance abuse, and the lawyer established by clear and convincing evidence that the difficulties or disabilities no longer pose a risk that the lawyer will commit misconduct;
- (e) spontaneous candor and cooperation displayed to the victims of the misconduct or to the State Bar;
- (f) extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct;
- (g) prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement;

- (h) remoteness in time of the misconduct and subsequent rehabilitation;
- (i) excessive delay by the State Bar in conducting disciplinary proceedings causing prejudice to the lawyer; or
- (j) restitution was made without the threat or force of administrative, disciplinary, civil or criminal proceedings.

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

1.7 DETERMINATION OF APPROPRIATE SANCTIONS

- (a) If a lawyer commits two or more acts of misconduct and the Standards specify different sanctions for each act, the most severe sanction must be imposed.
- (b) If aggravating circumstances are found, they should be considered alone and in balance with any mitigating circumstances, and if the net effect demonstrates that a greater sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a greater sanction than what is otherwise specified in a given Standard. On balance, a greater sanction is appropriate in cases where there is serious harm to the client, the public, the legal system, or the profession and where the record demonstrates that the lawyer is unwilling or unable to conform to ethical responsibilities.
- (c) If mitigating circumstances are found, they should be considered alone and in balance with any aggravating circumstances, and if the net effect demonstrates that a lesser sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a lesser sanction than what is otherwise specified in a given Standard. On balance, a lesser sanction is appropriate in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the lawyer is willing and has the ability to conform to ethical responsibilities in the future.

Eff. January 1, 1986. Revised: January 1, 2014.

1.8 EFFECT OF PRIOR DISCIPLINE

- (a) If a lawyer has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust.
- (b) If a lawyer has two or more prior records of discipline, disbarment is appropriate in the following circumstances, unless the most compelling mitigating circumstances

clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct:

1. Actual suspension was ordered in any one of the prior disciplinary matters;
 2. The prior disciplinary matters coupled with the current record demonstrate a pattern of misconduct; or
 3. The prior disciplinary matters coupled with the current record demonstrate the lawyer's unwillingness or inability to conform to ethical responsibilities.
- (c) Sanctions may be imposed, including disbarment, even if a lawyer has no prior record of discipline.

Eff. January 1, 2014.

PART B. SANCTIONS FOR SPECIFIC MISCONDUCT¹

The presumed sanction for any specific act of misconduct is a starting point for the imposition of discipline, but can be adjusted up or down depending on the application of mitigating and aggravating circumstances set forth in Standards 1.5 and 1.6, and the balancing of these circumstances as described in Standard 1.7(b) and (c). For any specific act of misconduct not listed in Part B, please refer to Standards 2.18 and 2.19.

Eff. July 1, 2015.

2.1 MISAPPROPRIATION

- (a) Disbarment is the presumed sanction for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate.
- (b) Actual suspension is the presumed sanction for misappropriation involving gross negligence.
- (c) Suspension or reproof is the presumed sanction for misappropriation that does not involve intentional misconduct or gross negligence.

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

2.3 ILLEGAL OR UNCONSCIONABLE FEE

- (a) Actual suspension of at least six months is the presumed sanction for entering into

¹ The term "reproof" includes public or private reproof.

an agreement for, charging, or collecting an unconscionable fee for legal services.

- (b) Suspension or reproof is the presumed sanction for entering into an agreement for, charging, or collecting an illegal fee for legal services, or other violations of rule 1.5(c) – (e).

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

2.4 BUSINESS TRANSACTIONS, PECUNIARY INTERESTS ADVERSE TO A CLIENT

Suspension is the presumed sanction for improperly entering into a business transaction with a client or knowingly acquiring a pecuniary interest adverse to a client, unless the extent of the misconduct and any harm it caused to the client are minimal, in which case reproof is appropriate. If the transaction or acquisition and its terms are unfair or unreasonable to the client, then disbarment or actual suspension is appropriate.

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

2.6 BREACH OF CONFIDENTIALITY OR MISUSE OF CONFIDENTIAL INFORMATION

- (a) Suspension is the presumed sanction when a lawyer intentionally reveals client confidences or secrets, or uses a current, former, or prospective client's information to the disadvantage of the client, depending on the harm to the current, former, or prospective client or clients, unless the current, former, or prospective client gives informed consent.
- (b) Reproof is the presumed sanction when a lawyer recklessly or through gross negligence reveals client confidences or secrets, or uses a current, former, or prospective client's information to the disadvantage of the client, depending on the harm to the current, former, or prospective client or clients, unless the current, former, or prospective client gives informed consent.
- (c) Suspension or reproof is the presumed sanction when a lawyer violates rule 4.4 regarding a lawyer's duties concerning inadvertently transmitted writings depending on the harm to the party whose information is inadvertently disclosed.

Eff. July 1, 2015.

2.7 PERFORMANCE, COMMUNICATION OR WITHDRAWAL VIOLATIONS

- (a) Disbarment is the presumed sanction for performance, communication, or withdrawal violations demonstrating habitual disregard of client interests.
- (b) Actual suspension is the presumed sanction for performance, communication, or

withdrawal violations in multiple client matters, not demonstrating habitual disregard of client interests.

- (c) Suspension or reproof is the presumed sanction for performance, communication, or withdrawal violations, which are limited in scope or time. The degree of sanction depends on the extent of the misconduct and the degree of harm to the client or clients.
- (d) Performance in this Standard includes, but is not limited to, any of the following: the duties of diligence; competence; supervision; duties regarding disbarred, suspended, or involuntary inactive attorneys; duties of subordinate attorneys; and duties to an organization. This includes, but is not limited to rules 1.1; 1.3; 1.13; 5.1; 5.2; 5.3; 5.3.1. Communication in this Standard includes, but is not limited to any of the following: communications with clients, communications of settlement offers, disclosure of professional liability, communications with prospective clients, communications with unrepresented persons, and communications with represented persons. This includes, but is not limited to, Business and Professions Code 6068(m), rules 1.2, 1.4, 1.4.1, 2.1, 4.2, 4.3.

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

2.8 PARTNERSHIP OR FEE-SPLITTING WITH NON-LAWYERS

Actual suspension is the presumed sanction when a lawyer enters into a partnership or other organization that practices law with a non-lawyer, allows a non-lawyer to own, direct, or control a professional corporation or other organization that practices law, shares legal fees with a non-lawyer, or any other violation of rule 5.4. The degree of sanction depends upon the extent to which the misconduct interfered with an attorney-client relationship and the extent to which the lawyer failed to perform legal services for which he or she was employed.

Eff. July 1, 2015.

2.9 FRIVOLOUS LITIGATION

- (a) Actual suspension is the presumed sanction when a lawyer counsels or maintains a frivolous claim or action for an improper purpose or uses means that have no substantial purpose other than to delay or prolong the proceeding or cause needless expense, resulting in significant harm to an individual or the administration of justice. Disbarment is appropriate if the misconduct demonstrates a pattern.
- (b) Suspension or reproof is the presumed sanction when a lawyer counsels or maintains a frivolous claim or action for an improper purpose or uses means that have no substantial purpose other than to delay or prolong the proceeding or cause needless expense resulting in harm to an individual or the administration of justice.

Eff. July 1, 2015.

2.10 UNAUTHORIZED PRACTICE OF LAW

- (a) Disbarment or actual suspension is the presumed sanction when a lawyer engages in the unauthorized practice of law or unlawfully holds himself or herself out as entitled to practice law while he or she is on actual suspension for disciplinary reasons in the jurisdiction where the lawyer practices or holds himself or herself out as entitled to practice law or is on involuntary inactive enrollment under Business and Professions Code section 6007 or other law in the relevant jurisdiction. The degree of sanction depends on whether the lawyer knew he or she was not entitled to practice law.
- (b) Suspension or reproof is the presumed sanction when a lawyer engages in the unauthorized practice of law or unlawfully holds himself or herself out as entitled to practice law while he or she is not licensed to practice law in that jurisdiction, is on voluntary inactive status, or on suspension for non-disciplinary reasons (including, but not limited to non-payment of fees or non-compliance with legal education requirements) in the jurisdiction where the lawyer practices or holds himself or herself out as entitled to practice law. The degree of sanction depends on whether the lawyer knew he or she was not entitled to practice law.

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

2.11 MORAL TURPITUDE, DISHONESTY, FRAUD, CORRUPTION, OR CONCEALMENT

Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the practice of law.

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

2.12 VIOLATION OF OATH OR DUTIES OF AN ATTORNEY

- (a) Disbarment or actual suspension is the presumed sanction for disobedience or violation of a court or tribunal order related to the lawyer's practice of law, the attorney's oath, or the duties required of an attorney under Business and Professions Code section 6068(a)(b)(d)(e)(f) or (h) and rule 3.4(f).
- (b) Reproof is the presumed sanction for a violation of the duties required of an

attorney under Business and Professions Code section 6068(i),(j),(l) or (o).

- (c) Violations of the duties required of an attorney under Business and Professions Code section 6068(m) or (n) are covered in Standard 2.7.
- (d) Violations of the duties required of an attorney under Business and Professions Code section 6068(c) or (g) are covered in Standard 2.9.

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

2.14 VIOLATION OF CONDITIONS ATTACHED TO DISCIPLINE

Actual suspension is the presumed sanction for failing to comply with a condition of discipline. The degree of sanction depends on the nature of the condition violated and the lawyer's unwillingness or inability to comply with disciplinary orders.

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

2.16 CRIMINAL CONVICTIONS NOT INVOLVING MORAL TURPITUDE

- (a) Actual suspension is the presumed sanction for final conviction of a felony not involving moral turpitude, but involving other misconduct warranting discipline.
- (b) Suspension or reproof is the presumed sanction for final conviction of a misdemeanor not involving moral turpitude but involving other misconduct warranting discipline.

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

2.17 CRIMINAL CONVICTION FOR SPECIFIC MISDEMEANORS

- (a) Disbarment is the presumed sanction for final conviction of a misdemeanor specified in Business & Professions Code section 6131, where a public prosecutor aids in the defense of a defendant.
- (b) Disbarment or actual suspension is the presumed sanction for final conviction of a misdemeanor specified in Business and Professions Code sections 6128-6129 and 6153.

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

2.18 VIOLATION OF OTHER ARTICLE 6 STATUTES

Disbarment or actual suspension is the presumed sanction for any violation of a provision of

Article 6 of the Business and Professions Code not otherwise specified in these Standards.

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

2.19 VIOLATION OF RULES IN GENERAL

Suspension not to exceed three years or reproof is the presumed sanction for a violation of a provision of the Rules of Professional Conduct not specified in these Standards.

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

2.20 VIOLATION OF A CRIMINAL ACT THAT REFLECTS ADVERSELY ON THE LAWYER'S HONESTY OR FITNESS AS A LAWYER IN OTHER RESPECTS

- (a) Disbarment is the presumed sanction for violation of Business & Professions Code section 6131 even if the violation does not result in a conviction.
- (b) Disbarment or actual suspension is the presumed sanction for a criminal act that reflects on the lawyer's honesty if Standards 2.15, 2.16, or 2.17 do not apply.
- (c) Suspension or reproof is the presumed sanction for a criminal act that does not reflect on the lawyer's honesty, but reflects on the lawyer's fitness as a lawyer, if Standards 2.15, 2.16, or 2.17 do not apply.

ATTACHMENT B – Proposed Amended Standards for Attorney Sanctions for Professional Misconduct (Redline Version)

1.1 PURPOSES AND SCOPE OF STANDARDS

The Standards For Attorney Sanctions For Professional Misconduct (the “Standards”) are adopted by the Board of Trustees 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. The Standards help fulfill the primary purposes of discipline, which include:

- (a) protection of the public, the courts and the legal profession;
- (b) maintenance of the highest professional standards; and
- (c) preservation of public confidence in the legal profession.

Rehabilitation can also be an objective in determining the appropriate sanction in a particular case, so long as it is consistent with the primary purposes of discipline.

The Standards are based on the State Bar Act, the published opinions of the Review Department of the State Bar Court, and the longstanding decisions of the California Supreme Court, which maintains inherent and plenary authority over the practice of law in California. Although not binding, the Standards are afforded great weight by the Supreme Court and should be followed whenever possible. The Supreme Court will accept a disciplinary recommendation that is consistent with the Standards unless it has grave doubts about the propriety of the recommended sanction. If a recommendation is at the high end or low end of a Standard, an explanation must be given as to how the recommendation was reached. Any disciplinary recommendation that deviates from the Standards must include clear reasons for the departure.

The Standards do not apply to: non-disciplinary dispositions such as admonitions and agreements in lieu of discipline; resignations; involuntary inactive enrollments; interim suspensions after conviction of a crime; or suspensions for nonpayment of State Bar fees, failure to comply with child support orders, or tax delinquencies.

Eff. January 1, 1986. Revised: January 1, 2007; January 1, 2014; July 1, 2015.

1.2 DEFINITIONS

- (a) ~~“Member” is a member of the State Bar of California.~~ “Lawyer” means a licensee of the California Supreme Court, the State Bar of California, or a person who is admitted in good standing and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof and includes any agent of the lawyer, law firm, or law corporation doing business in the state.
- (b) “Disbarment” is termination from the practice of law and from holding oneself out as entitled to practice law. ~~Membership in~~ The license issued by the Supreme Court or State Bar ceases and the ~~member’s~~ licensee’s name is stricken from the roll of attorneys.
- (c) “Suspension” can include a period of actual suspension, stayed suspension, or both:
- (1) “Actual suspension” is a disqualification from the practice of law and from holding oneself out as entitled to practice law, subject to probation and attached conditions. Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until specific conditions are met. Actual suspension for two years or more requires proof, satisfactory to the State Bar Court, of rehabilitation, fitness to practice, and present learning and ability in the general law before a ~~member~~ lawyer may be relieved of the actual suspension. The State Bar Court can require this showing in other appropriate cases as well.
 - (2) “Stayed suspension” is a stay of all or part of a suspension. Stayed suspension is generally for a period of at least one year. A suspension can be stayed only if it is consistent with the primary purposes of discipline.
- (d) “Public Reproval” is a public censure or reprimand. A public reproval may include conditions.
- (e) “Private Reproval” is a censure or reprimand that is not a matter of public record unless imposed after the initiation of formal disciplinary proceedings. A private reproval may include conditions.
- (f) “Interim Remedies” are temporary restrictions imposed by the State Bar Court on a ~~member’s~~ lawyer’s ability to practice law. They are imposed in order to protect the public, the courts, and the legal profession until such time as the issues can be resolved through formal proceedings.
- (g) “Prior record of discipline” is a previous imposition or recommendation of discipline. It includes all charges, stipulations, findings and decisions (final or not) reflecting or

recommending discipline, including from another jurisdiction. It can be discipline imposed for a violation of a term of probation or a violation of a Supreme Court order requiring compliance with rule 9.20 of the California Rules of Court.

- (h) “Aggravating circumstances” are factors surrounding a ~~member’s~~ lawyer’s misconduct that demonstrate that the primary purposes of discipline warrant a greater sanction than what is otherwise specified in a given Standard.
- (i) “Mitigating circumstances” are factors surrounding a ~~member’s~~ lawyer’s misconduct that demonstrate that the primary purposes of discipline warrant a more lenient sanction than what is otherwise specified in a given Standard.
- (j) “Probation” is a period of time under which a ~~member~~ lawyer is subject to State Bar supervision. Probation may include conditions that further the primary purposes of discipline.
- (k) “Conditions” are terms ~~that with which~~ a ~~member~~ lawyer must comply ~~with~~ as part of a disciplinary sanction. They relate to a ~~member’s~~ lawyer’s misconduct and the facts and circumstances surrounding the misconduct and serve the primary purposes of discipline.
- (l) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

Eff. January 1, 1986. Revised: January 1, 2007; January 1, 2014; July 1, 2015.

1.3 DEGREES OF SANCTIONS

Subject to these Standards and the laws and rules governing the conduct of disciplinary proceedings, the following sanctions may be imposed upon a finding of misconduct:

- (a) disbarment;
- (b) actual suspension;
- (c) stayed suspension;
- (d) public reproof;
- (e) private reproof; or
- (f) any interim remedies or other final discipline authorized by the Business and Professions Code.

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

1.4 CONDITIONS ATTACHED TO SANCTIONS

Conditions attached to a reproof or probation may require a ~~member~~-lawyer to:

- (a) make specific restitution or file a satisfaction of judgment;
- (b) take and pass a professional responsibility examination;
- (c) undergo treatment, at the ~~member's~~-lawyer's expense, for medical, psychological, or psychiatric conditions or for problems related to alcohol or substance abuse;
- (d) complete, at the ~~member's~~-lawyer's expense, educational or rehabilitative work regarding substantive law, ethics, or law office management;
- (e) complete probation, subject to reporting requirements;
- (f) give notice to affected parties, including clients, co-counsel, opposing counsel, courts or other tribunals; or
- (g) comply with any other conditions consistent with the primary purposes of discipline.

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

1.5 AGGRAVATING CIRCUMSTANCES

The State Bar must establish aggravating circumstances by clear and convincing evidence. Aggravating circumstances may include:

- (a) a prior record of discipline;
- (b) multiple acts of wrongdoing;
- (c) a pattern of misconduct;
- (d) intentional misconduct, bad faith or dishonesty;
- (e) misrepresentation;
- (f) concealment;
- (g) overreaching;

- (h) uncharged violations of the Business and Professions Code or the Rules of Professional Conduct;
- (i) refusal or inability to account for entrusted funds or property;
- (j) significant harm to the client, the public, or the administration of justice;
- (k) indifference toward rectification or atonement for the consequences of the misconduct;
- (l) lack of candor and cooperation to the victims of the misconduct or to the State Bar during disciplinary investigations or proceedings;
- (m) failure to make restitution; or
- (n) high level of vulnerability of the victim.

Eff. January 1, 1986. Revised: January 1, 2007; January 1, 2014; July 1, 2015.

1.6 MITIGATING CIRCUMSTANCES

A ~~member~~ lawyer must establish mitigating circumstances by clear and convincing evidence. Mitigating circumstances may include:

- (a) absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur;
- (b) good faith belief that is honestly held and objectively reasonable;
- (c) lack of harm to the client, the public, or the administration of justice;
- (d) extreme emotional difficulties or physical or mental disabilities suffered by the ~~member~~ lawyer at the time of the misconduct and established by expert testimony as directly responsible for the misconduct, provided that such difficulties or disabilities were not the product of any illegal conduct by the ~~member~~ lawyer, such as illegal drug or substance abuse, and the ~~member~~ lawyer established by clear and convincing evidence that the difficulties or disabilities no longer pose a risk that the ~~member~~ lawyer will commit misconduct;
- (e) spontaneous candor and cooperation displayed to the victims of the misconduct or to the State Bar;
- (f) extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct;

- (g) prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement;
- (h) remoteness in time of the misconduct and subsequent rehabilitation;
- (i) excessive delay by the State Bar in conducting disciplinary proceedings causing prejudice to the ~~member~~lawyer; or
- (j) restitution was made without the threat or force of administrative, disciplinary, civil or criminal proceedings.

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

1.7 DETERMINATION OF APPROPRIATE SANCTIONS

- (a) If a ~~member~~lawyer commits two or more acts of misconduct and the Standards specify different sanctions for each act, the most severe sanction must be imposed.
- (b) If aggravating circumstances are found, they should be considered alone and in balance with any mitigating circumstances, and if the net effect demonstrates that a greater sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a greater sanction than what is otherwise specified in a given Standard. On balance, a greater sanction is appropriate in cases where there is serious harm to the client, the public, the legal system, or the profession and where the record demonstrates that the ~~member~~lawyer is unwilling or unable to conform to ethical responsibilities.
- (c) If mitigating circumstances are found, they should be considered alone and in balance with any aggravating circumstances, and if the net effect demonstrates that a lesser sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a lesser sanction than what is otherwise specified in a given Standard. On balance, a lesser sanction is appropriate in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the ~~member~~lawyer is willing and has the ability to conform to ethical responsibilities in the future.

Eff. January 1, 1986. Revised: January 1, 2014.

1.8 EFFECT OF PRIOR DISCIPLINE

- (a) If a ~~member~~lawyer has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline

would be manifestly unjust.

- (b) If a ~~member~~ lawyer has two or more prior records of discipline, disbarment is appropriate in the following circumstances, unless the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct:
 - 1. Actual suspension was ordered in any one of the prior disciplinary matters;
 - 2. The prior disciplinary matters coupled with the current record demonstrate a pattern of misconduct; or
 - 3. The prior disciplinary matters coupled with the current record demonstrate the ~~member's~~ lawyer's unwillingness or inability to conform to ethical responsibilities.
- (c) Sanctions may be imposed, including disbarment, even if a ~~member~~ lawyer has no prior record of discipline.

Eff. January 1, 2014.

PART B. SANCTIONS FOR SPECIFIC MISCONDUCT²

The presumed sanction for any specific act of misconduct is a starting point for the imposition of discipline, but can be adjusted up or down depending on the application of mitigating and aggravating circumstances set forth in Standards 1.5 and 1.6, and the balancing of these circumstances as described in Standard 1.7(b) and (c). For any specific act of misconduct not listed in Part B, please refer to Standards 2.18 and 2.19.

Eff. July 1, 2015.

2.1 MISAPPROPRIATION

- (a) Disbarment is the presumed sanction for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate.
- (b) Actual suspension is the presumed sanction for misappropriation involving gross negligence.
- (c) Suspension or reproof is the presumed sanction for misappropriation that does not involve intentional misconduct or gross negligence.

² The term “reproof” includes public or private reproof.

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

2.3 ILLEGAL OR UNCONSCIONABLE FEE

- (a) Actual suspension of at least six months is the presumed sanction for entering into an agreement for, charging, or collecting an unconscionable fee for legal services.
- (b) Suspension or reproof is the presumed sanction for entering into an agreement for, charging, or collecting an illegal fee for legal ~~services.~~services, or other violations of rule 1.5(c) – (e).

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

2.4 BUSINESS TRANSACTIONS, PECUNIARY INTERESTS ADVERSE TO A CLIENT

Suspension is the presumed sanction for improperly entering into a business transaction with a client or knowingly acquiring a pecuniary interest adverse to a client, unless the extent of the misconduct and any harm it caused to the client are minimal, in which case reproof is appropriate. If the transaction or acquisition and its terms are unfair or unreasonable to the client, then disbarment or actual suspension is appropriate.

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

2.6 BREACH OF CONFIDENTIALITY OR MISUSE OF CONFIDENTIAL INFORMATION

- (a) Suspension is the presumed sanction when a ~~member~~lawyer intentionally reveals client confidences or ~~secrets.~~secrets, or uses a current, former, or prospective client's information to the disadvantage of the client, depending on ~~the magnitude of the~~ harm to the current, former, or prospective client or clients, unless the current, former, or prospective client gives informed consent.
- (b) Reproof is the presumed sanction when a ~~member~~lawyer recklessly or through gross negligence reveals client confidences or ~~secrets.~~secrets, or uses a current, former, or prospective client's information to the disadvantage of the client, depending on ~~the magnitude of~~ the harm to the current, former, or prospective client or clients, unless the current, former, or prospective client gives informed consent.
- (c) Suspension or reproof is the presumed sanction when a lawyer violates rule 4.4 regarding a lawyer's duties concerning inadvertently transmitted writings depending on the harm to the party whose information is inadvertently disclosed.

Eff. July 1, 2015.

2.7 PERFORMANCE, COMMUNICATION OR WITHDRAWAL VIOLATIONS

- (a) Disbarment is the presumed sanction for performance, communication, or withdrawal violations demonstrating habitual disregard of client interests.
- (b) Actual suspension is the presumed sanction for performance, communication, or withdrawal violations in multiple client matters, not demonstrating habitual disregard of client interests.
- (c) Suspension or reproof is the presumed sanction for performance, communication, or withdrawal violations, which are limited in scope or time. The degree of sanction depends on the extent of the misconduct and the degree of harm to the client or clients.
- (d) Performance in this Standard ~~means violations, including~~ includes, but is not limited to, ~~of~~ any of the following: the duties of diligence; competence; supervision; duties regarding disbarred, suspended, or involuntary inactive attorneys; duties of subordinate attorneys; and duties to an organization. (See e.g., This includes, but is not limited to rules 1.1; 1.3; 1.13; 5.1; 5.2; 5.3; 5.3.1.) Communication in this Standard ~~means violations including~~ includes, but is not limited to of any of the following: communications with clients, communications of settlement offers, disclosure of professional liability, communications with prospective clients, communications with unrepresented persons, and communications with represented persons. (See e.g., This includes, but is not limited to, Business and Professions Code 6068(m), rules 1.2, 1.4, 1.4.1, 2.1, 4.2, 4.3.)

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

2.8 PARTNERSHIP OR FEE-SPLITTING WITH NON-LAWYERS

Actual suspension is the presumed sanction when a ~~member~~ lawyer enters into a partnership or other organization that practices law with a non-lawyer, allows a non-lawyer to own, direct, or control a professional corporation or other organization that practices law, shares legal fees with a ~~non-lawyer~~ non-lawyer, or any other violation of rule 5.4. The degree of sanction depends upon the extent to which the misconduct interfered with an attorney-client relationship and the extent to which the ~~member~~ lawyer failed to perform legal services for which he or she was employed.

Eff. July 1, 2015.

2.9 FRIVOLOUS LITIGATION

- (a) Actual suspension is the presumed sanction when a ~~member~~ lawyer counsels or maintains a frivolous claim or action for an improper ~~purpose,~~ purpose or uses means that have no substantial purpose other than to delay or prolong the proceeding or cause

needless expense, resulting in significant harm to an individual or the administration of justice. Disbarment is appropriate if the misconduct demonstrates a pattern.

- (b) Suspension or reproof is the presumed sanction when a ~~member-lawyer~~ counsels or maintains a frivolous claim or action for an improper ~~purpose~~, purpose or uses means that have no substantial purpose other than to delay or prolong the proceeding or cause needless expense resulting in harm to an individual or the administration of justice.

Eff. July 1, 2015.

2.10 UNAUTHORIZED PRACTICE OF LAW

- (a) Disbarment or actual suspension is the presumed sanction when a ~~member-lawyer~~ engages in the unauthorized practice of law or unlawfully holds himself or herself out as entitled to practice law while he or she is on actual suspension for disciplinary reasons in the jurisdiction where the lawyer practices or holds himself or herself out as entitled to practice law or is on involuntary inactive enrollment under Business and Professions Code section ~~6007(b)-(e)~~, 6007 or other law in the relevant jurisdiction. The degree of sanction depends on whether the ~~member-lawyer knowingly engaged in the unauthorized~~ knew he or she was not entitled to practice ~~of~~ law.
- (b) Suspension or reproof is the presumed sanction when a ~~member-lawyer~~ engages in the unauthorized practice of law or unlawfully holds himself or herself out as entitled to practice law while he or she is not licensed to practice law in that jurisdiction, is on voluntary inactive ~~status~~status, or ~~actual-on~~ suspension for non-disciplinary reasons (e.g., including, but not limited to—such as—non-payment of fees or MCLE non-compliance with legal education requirements) in the jurisdiction where the lawyer practices or holds himself or herself out as entitled to practice law. The degree of sanction depends on whether the ~~member-lawyer knowingly engaged in the unauthorized~~ knew he or she was not entitled to practice ~~of~~ law.

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

2.11 MORAL TURPITUDE, DISHONESTY, FRAUD, CORRUPTION, OR CONCEALMENT

Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the ~~member's~~ practice of law.

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

2.12 VIOLATION OF OATH OR DUTIES OF AN ATTORNEY

- (a) Disbarment or actual suspension is the presumed sanction for disobedience or violation of a court [or tribunal](#) order related to the ~~member's~~ [lawyer's](#) practice of law, the attorney's oath, or the duties required of an attorney under Business and Professions Code section 6068(a)(b)(d)(e)(f) or ~~(h)~~ [\(h\) and rule 3.4\(f\)](#).
- (b) Reproval is the presumed sanction for a violation of the duties required of an attorney under Business and Professions Code section 6068(i),(j),(l) or (o).
- (c) Violations of the duties required of an attorney under Business and Professions Code section 6068(m) or (n) are covered in Standard 2.7.
- (d) Violations of the duties required of an attorney under Business and Professions Code section 6068(c) or (g) are covered in Standard 2.9.

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

2.14 VIOLATION OF CONDITIONS ATTACHED TO DISCIPLINE

Actual suspension is the presumed sanction for failing to comply with a condition of discipline. The degree of sanction depends on the nature of the condition violated and the ~~member's~~ [lawyer's](#) unwillingness or inability to comply with disciplinary orders.

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

2.16 CRIMINAL CONVICTIONS NOT INVOLVING MORAL TURPITUDE

- (a) Actual suspension is the presumed sanction for final conviction of a felony not involving moral turpitude, but involving other misconduct warranting discipline.
- (b) Suspension or reprobation is the presumed sanction for final conviction of a misdemeanor not involving moral turpitude but involving other misconduct warranting discipline.

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

2.17 CRIMINAL CONVICTION FOR SPECIFIC MISDEMEANORS

- (a) Disbarment is the presumed sanction for final conviction of a misdemeanor specified in Business & Professions Code section 6131, where a public prosecutor aids in the defense of a defendant.

- (b) Disbarment or actual suspension is the presumed sanction for final conviction of a misdemeanor specified in Business and Professions Code sections 6128-6129 and 6153.

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

2.18 VIOLATION OF OTHER ARTICLE 6 STATUTES

Disbarment or actual suspension is the presumed sanction for any violation of a provision of Article 6 of the Business and Professions Code not otherwise specified in these Standards.

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

2.19 VIOLATION OF RULES IN GENERAL

Suspension not to exceed three years or reproof is the presumed sanction for a violation of a provision of the Rules of Professional Conduct not specified in these Standards.

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

2.20 VIOLATION OF A CRIMINAL ACT THAT REFLECTS ADVERSELY ON THE LAWYER'S HONESTY OR FITNESS AS A LAWYER IN OTHER RESPECTS

- (a) Disbarment is the presumed sanction for violation of Business & Professions Code section 6131 even if the violation does not result in a conviction.
- (b) Disbarment or actual suspension is the presumed sanction for a criminal act that reflects on the lawyer's honesty if Standards 2.15, 2.16, or 2.17 do not apply.
- (c) Suspension or reproof is the presumed sanction for a criminal act that does not reflect on the lawyer's honesty, but reflects on the lawyer's fitness as a lawyer, if Standards 2.15, 2.16, or 2.17 do not apply.

ATTACHMENT C – Public Comment

Submitted by John R. via email on November 6, 2018:

Generally, I like the changes. The standards appear much clearer to me than before. However, I believe there should be some additional guidance particularly to the application of Standard 1.7(a). I do not believe it is appropriate for the State Bar to stack charges like criminal prosecutors do. A single act can place a licensee in jeopardy under multiple sections in the Standards. For example, the unlicensed practice of law in another state: when a pro hac vice application is pending (or worse, when the magistrate in New Jersey busted my special appearance, my local counsel declined general representation, which made me ineligible to practice in the middle of a sanction motion against my client. By luck only, I had a friend in the gallery who stepped up). UPL in another jurisdiction can occur by administrative error. The member knows he/she is not authorized; the pro hac vice application is in the clerk's office; the judge wants to act now, and local counsel is not really up to speed. It is a violation. But, the actual damage (as opposed to potential damage) to the client is negligible. Additionally, UPL is conduct which is prejudicial to the administration of justice. The way the standards are written, even if one might obtain leniency (no turpitude) for UPL due to administrative error, one will still be suspended due to prejudice to the administration of justice. Thus, the licensee's violation is singular, but the standards several. Greater clarity would be appreciated.

I personally disagree that the standard punishment for charging an unconscionable fee should be actual suspension (Standard 2.3). The multiple factors used to determine an unconscionable fee are the same standards for determining a reasonable fee. It is only a matter of degree. What one attorney, or judge, finds to be reasonable, another could find to be unconscionable under the same set of facts. If the rules included the unconscionable standards of contract law (procedural and substantively unconscionable) then one would be on notice of the behavior prohibited. The vagueness of the rule itself does not justify an actual suspension as the default discipline. Read the quote from *Herrscher v State Bar*. Read the thirteen factors. Try to reconcile the fact that the quote from *Herrscher* (fraud and overreaching) is only one of the thirteen factors. (Also note that the second listed factor is still fraud). Consequently, one can violate the rule without fraud and overreaching if the other eleven factors weigh in that direction. If there was fraud or overreaching the licensee should certainly be suspended. If the licensee quoted an excessively high rate considering the many factors (maybe she did not want the gig) and the consumer agreed, that could be unconscionable, but not worthy of suspension. The presumed discipline should include language such as "charging an unconscionable fee, which involves fraud or overreaching." Or, use a reasonable attorney standard, such as "charging a fee that any reasonable attorney would consider unconscionable," is presumptively disciplined by actual suspension.

The vagueness of the rule was not cured by the new notes. Vague standards fail to provide fair warning so that people may conform to the rule. A stiff presumed disciplinary standard is therefore inappropriate. This is not much different from "loiterers who fail to provide credible and reliable identification to an officer on request shall be punished by not more than 180 days confinement and a fine not to exceed \$1,000." Who is a loiterer? What is credible and

reliable? Kolendar v Lawson What is “unconscionable” under the rule? Reasonable minds may differ.