



The State Bar *of California*

OPEN SESSION AGENDA ITEM SEPTEMBER 2019 REGULATION AND DISCIPLINE COMMITTEE III.A

DATE: September 19, 2019

TO: Members, Regulation and Discipline Committee

FROM: Suzanne Grandt, Assistant General Counsel, Office of General Counsel

SUBJECT: Proposed State Bar Rule on Monetary Sanctions: Request to Circulate for Public Comment

EXECUTIVE SUMMARY

The State Bar of California (State Bar) Regulation and Discipline Committee (RAD) is asked to authorize a 30-day public comment period for proposed rule 5.137 of the Rules of Procedure of the State Bar.¹ The proposed rule sets forth guidelines for the imposition and collection of sanctions to be ordered by the California Supreme Court when imposing the suspension or disbarment of an attorney. A prior version of proposed rule 5.137 was submitted to the California Supreme Court for approval. After receiving comments from the California Supreme Court, staff worked closely with the State Bar Court to redraft the proposed rule. Staff now seeks authorization for an additional 30-day public comment period.

BACKGROUND

Business and Professions Code section 6086.13,² effective January 1, 1994,³ requires that the State Bar, with the approval of the California Supreme Court, adopt rules setting forth guidelines for the imposition and collection of monetary sanctions to be imposed in connection with suspension or disbarment of attorneys. The full text of the statute is as follows:

¹ All further references to rule are to the Rules of Procedure of the State Bar unless otherwise indicated.

² All further references to section are to the Business and Professions Code unless otherwise indicated.

³ This statute was promulgated in 1992, and initially applied to State Bar Court orders only. In 1993, the statute was amended by Assembly Bill 2205 to specify that the disciplinary orders came from the California Supreme Court. The new amendment became effective on January 1, 1994.

(a) Any order of the Supreme Court imposing suspension or disbarment of a licensee of the State Bar, or accepting a resignation with a disciplinary matter pending may include an order that the licensee pay a monetary sanction not to exceed five thousand dollars (\$5,000) for each violation, subject to a total limit of fifty thousand dollars (\$50,000).

(b) Monetary sanctions collected under subdivision (a) shall be deposited into the Client Security Fund.

(c) The State Bar shall, with the approval of the Supreme Court, adopt rules setting forth guidelines for the imposition and collection of monetary sanctions under this section.

(d) The authority granted under this section is in addition to the provisions of Section 6086.10 and any other authority to impose costs or monetary sanctions.

(e) Monetary sanctions imposed under this section shall not be collected to the extent that the collection would impair the collection of criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney. In the event monetary sanctions are collected under this section and criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney are otherwise uncollectible, those penalties or judgments may be reimbursed from the Client Security Fund to the extent of the monetary sanctions collected under this section.

In order to ensure full compliance with section 6086.13, subdivision c, staff drafted proposed rule 5.137, which was authorized for a 60-day public comment by RAD at its July 19, 2018 meeting. A copy of the July 2018 RAD Agenda Item attaching the original proposed rule is provided as Attachment C.⁴

The public comment period began on August 2, 2018, and closed on October 2, 2018. The State Bar received one public comment. The full text of the public comment and the State Bar's response is contained in the November 2018 RAD agenda item, provided as Attachment D. On November 15, 2018, the Board of Trustees approved the submission of proposed rule 5.137 to the California Supreme Court for approval.

The State Bar submitted proposed rule 5.137 to the California Supreme Court on December 20, 2018. On February 20, 2019, Jorge Navarrete, Clerk and Executive Officer of the California Supreme Court, informed State Bar Executive Director Leah Wilson that the California Supreme Court would not be approving the proposed rule as drafted. The California Supreme Court urged the State Bar to re-draft the rule, working closely with the State Bar Court, and re-submit the proposed rule after an additional window of public comment.

State Bar staff worked closely with the State Bar Court to revise proposed rule 5.137 to assure clarity and consistency in the State Bar Court's imposition of monetary sanctions. The revised

⁴ The 30-day public comment period referenced in the agenda was modified to 60 days during the RAD meeting.

proposed rule is provided as Attachment A. A document comparison showing the changes between the original proposed rule submitted to the California Supreme Court and the revised proposed rule is provided as Attachment B.

DISCUSSION

A. Definition of “Violation”

Subsections (A), (C), and (D) of proposed rule 5.137 largely track the statutory language of section 6086.13 with some important additions. First, section 6086.13, subdivision (a) does not specify whether the \$50,000 maximum for monetary sanctions is per disciplinary order or per individual respondent. Proposed rule 5.137(A) clarifies that the maximum \$50,000 referred to in the statute is per disciplinary order.

The statute does not define the term “violation.” Without a definition, “violation” could be interpreted as applying to either an individual count charged against a respondent in a complaint or to each transaction described within a count. Subsection (B) defines the term “violation” to mean “each count (including its subparts) contained in a Notice of Disciplinary Charges for which the State Bar Court has found the licensee culpable, or each violation of a rule or statute the attorney admits to have violated in a stipulation.” This definition was chosen to make clear that “violation” means a violation of the State Bar Act or the Rules of Professional Conduct. The Office of Chief Trial Counsel (OCTC) charges one violation per count contained in a Notice of Disciplinary Charges. Similarly, with respect to stipulations, each “conclusion of law” being stipulated to is an independent violation of the State Bar Act or the Rules of Professional Conduct.

B. Guidelines for Imposition of Monetary Sanctions

Subsection (E) sets forth the specific guidelines for the imposition and collection of monetary sanctions. This subsection provides the State Bar Court with broad discretion in determining the amount of monetary sanctions depending on the specific facts and circumstances of the discipline case. While the proposed rule has suggested sanctions ranges per order based on the nature of the discipline, it also specifies that “the State Bar Court may, in its discretion, deviate from the ranges set forth in this subsection to a maximum of \$5,000 for each violation, and \$50,000 for each disciplinary order.” (Proposed rule 5.137(E)(3).) Deviations should be reasonably based on the facts and circumstances for each case. Ibid.

For example, for a disbarment case with five serious misconduct violations, the State Bar Court may determine it is appropriate to recommend \$25,000 in monetary sanctions total (\$5,000 per violation). This amount is over the suggested guideline range of \$5,000 per disbarment order, but within the \$50,000 maximum per disciplinary order authorized by section 6086.13, subdivision (a).

The proposed rule further provides that “if the same conduct is encompassed by two or more separate violations, the Court generally should not impose more than one monetary sanction

for that conduct. Instead, the Court should consider the most serious applicable violation for that conduct.” (Proposed rule 5.137(E)(3)(b).) This is analogous to California Penal Code section 654, which provides that the same punishable act cannot be punished under more than one provision of law. This language was added because there may be one disciplinary order containing multiple violations for the same conduct. In such cases, the State Bar Court should consider the most serious violation when determining the sanctions amount, rather than imposing two separate sanctions per violation.

C. Waivers, Payment Plan, and Extensions of Time for Payment

Subsection (E)(4)-(5) specifies how monetary sanctions may be waived, in whole or in part, or the time for payment extended, for specified good cause or in the interests of justice.⁵ Specifically, subsection (E)(4) provides that the State Bar Court may use its discretion to waive costs or extend time to pay based on “on a finding of financial hardship, special circumstances, whether a licensee’s ability to pay criminal or civil judgments arising out of the discipline case is adversely affected, for good cause, or in the interests of justice.”

Subsection (E)(5) permits the licensee and OCTC to stipulate to a waiver, payment plan and/or an extension of time for payment which must be approved by the State Bar Court. Subsection (E)(6) provides a way for the licensee to affirmatively seek such relief in the State Bar Court, following the procedures set forth in the State Bar Rules of Procedure (currently, rule 5.130).

D. Payment in Full Must be Made Prior to Reinstatement

Subsection (F) specifies that monetary sanctions must be paid in full as a condition of reinstatement or return to active status, unless time for payment is extended. This ensures that monetary sanctions are treated the same as all other payment imposed as part of a disciplinary order by the California Supreme Court. (See Business and Professions Code, section 6140.5 [payment of client security fund reimbursement is a condition of continued practice and/or reinstatement]; Business and Professions Code, section 6140.7 [unless time for payment is extended, disciplinary costs shall be paid as a condition of reinstatement or return to active membership].)

Lastly, subsection (G) states that imposed monetary sanctions are enforceable as a money judgment. This assures that the State Bar is able to undertake appropriate collection activities necessary to enforce its legal rights to all court ordered payments.

FISCAL/PERSONNEL IMPACT

If adopted, the proposed rule may provide additional funding to the State Bar Client Security Fund. (Business and Professions Code, section 6054, subdivision (a).) The proposed rule may necessitate additional resources in OCTC and the State Bar Court in order to assess monetary

⁵ These subsections were modeled after section 6086.10, which provides that licensees may be granted such relief from the State Bar Court from the payment of imposed disciplinary costs.

sanctions recommendations, handle respondents' challenges to sanctions, and evaluate respondents' requests for sanctions waivers, reductions, or payment plans.

STRATEGIC PLAN GOALS & OBJECTIVES

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

Objective: d. Support adequate funding of the Client Security Fund.

RECOMMENDATION:

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

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

ATTACHMENT(S) LIST

- A.** Proposed rule 5.137
- B.** Redline from previously submitted proposed rule 5.137
- C.** July 2018 RAD Agenda Item regarding proposed rule 5.137
- D.** November 2018 RAD Agenda Item regarding proposed rule 5.137

Rules of Procedure of the State Bar of California

Rule 5.137

Imposition and Payment of Monetary Sanctions (Bus. & Prof. Code, § 6086.13.)

(A) The Supreme Court May Order Monetary Sanctions

In any disciplinary proceeding in which the licensee is ordered actually suspended, disbarred, or resigns with charges pending, the Supreme Court may order the payment of a monetary sanction not to exceed \$5,000 for each violation, to a maximum of \$50,000 per disciplinary order.

(B) Violation Defined

For the purposes of this rule, “violation” means each count (including its subparts) contained in a Notice of Disciplinary Charges for which the State Bar Court has found the licensee culpable, or each violation of a rule or statute the attorney admits to have violated in a stipulation.

(C) Monetary Sanctions Payable To Client Security Fund

Imposed monetary sanctions collected under this rule shall be deposited into the Client Security Fund.

(D) Monetary Sanctions and Criminal Penalties or Civil Judgments

Monetary sanctions shall not be collected to the extent that collection would impair the collection of criminal penalties or civil judgments arising out of transactions connected with discipline of the licensee. If monetary sanctions are collected and such criminal penalties or civil judgments are otherwise uncollectible, those penalties or judgments may be reimbursed from the Client Security Fund to the extent of the monetary sanctions collected.

(E) Guidelines for Imposition and Collection of Monetary Sanctions

- (1) In any disciplinary proceeding described in subdivision (A), the State Bar Court shall make recommendations to the Supreme Court regarding monetary sanctions and shall provide reasons for its recommendation.
- (2) To determine the appropriate monetary sanction to recommend pursuant to subdivision (A), the State Bar Court shall consider all facts and circumstances of the discipline case and be guided by the following amounts as a total sanction per Supreme Court order:
 - (a) For disbarment: up to \$5,000.

- (b) For an actual suspension: up to \$2,500.
- (c) For a resignation with charges pending: up to \$1,000.

- (3) The State Bar Court may, in its discretion, deviate from the ranges set forth in subdivision (E)(2) to a maximum of \$5,000 for each violation, and \$50,000 for each disciplinary order.
 - (a) Deviations from these ranges should be reasonably based on the facts and circumstances of each discipline case.
 - (b) If the same conduct is encompassed by two or more separate violations, the Court generally should not impose more than one monetary sanction for that conduct. Instead, the Court should consider the most serious applicable violation for that conduct.
- (4) The State Bar Court may, in its discretion, recommend that the monetary sanction be waived, in whole or in part, or be paid in installments, or the time to pay be extended based on a finding of financial hardship, special circumstances, whether a licensee's ability to pay criminal or civil judgments arising out of the discipline case is adversely affected, for good cause, or in the interests of justice. The burden of proof by preponderance of the evidence will be on the licensee to provide financial records and/or other proof. The State Bar Court must state reasons for its ruling.
- (5) The Office of Chief Trial Counsel of the State Bar may enter into a stipulation with the licensee regarding whether monetary sanctions should be ordered or waived; if ordered, in what amount; whether a payment plan or extension of time will be allowed, and the specifics of such plan or extension. All stipulations must be accepted and approved by the State Bar Court.
- (6) A licensee may seek relief from an order of monetary sanctions, an extension of time to pay the sanctions, or request a compromise of judgment, through a motion filed with the State Bar Court, following the motion procedure and based on the grounds set forth in the Rules of Procedure of the State Bar. The burden of proof by preponderance of the evidence will be on the licensee to provide financial records and/or other proof to support the motion. The State Bar Court must state reasons for its ruling.
- (7) Payment of restitution must be made in full before payment of any monetary sanctions.

(F) Reinstatement. Monetary sanctions shall be paid in full as a condition of reinstatement or return to active status, unless time for payment is extended pursuant to this rule.

(G) Collection. Imposed monetary sanctions ordered under this rule are enforceable as a money judgment.

Rules of Procedure of the State Bar of California

Rule 5.137

Imposition and Payment of Monetary Sanctions ~~(Bus. & Prof. Code, § 6086.13.)~~

(A) The Supreme Court May Order Monetary Sanctions

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

~~(B) Violation Defined~~

~~For the purposes of this rule, “violation” means each count (including its subparts) contained in a Notice of Disciplinary Charges for which the State Bar Court has found the licensee culpable, or each violation of a rule or statute the attorney admits to have violated in a stipulation.~~

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

~~Imposed~~ If the Supreme Court orders the payment of monetary sanctions ~~collected under this rule, the funds~~ shall be deposited into ~~made payable directly to~~ the Client Security Fund by the respondent.

~~(D)(C)~~ Determination of Monetary Sanctions and Criminal Penalties or Civil Judgments Sanction Amounts

~~Monetary sanctions shall not be collected to the extent that collection would impair the collection of criminal penalties or civil judgments arising out of transactions connected with discipline of the licensee. If monetary sanctions are collected and such criminal penalties or civil judgments are otherwise uncollectible, those penalties or judgments may be reimbursed from the Client Security Fund to the extent of the monetary sanctions collected.~~

~~(E) Guidelines for Imposition and Collection of Monetary Sanctions~~

- a. ~~In any disciplinary proceeding described matter in subdivision (A), which the State Bar Court shall make recommendations to the Supreme Court regarding monetary sanctions and shall provide reasons for its recommendation.~~
- b. ~~To determine the appropriate monetary sanction to recommend pursuant to subdivision (A), the State Bar Court shall consider all facts and circumstances of the discipline case and be guided by the following amounts as a total sanction per Supreme Court order:~~
- ~~1. For disbarment: up to \$5,000.~~
 - ~~2. For recommends that an actual suspension: up to \$2,500.~~
 - ~~3. For a resignation with charges pending: up to \$1,000.~~
- c. ~~The State Bar Court may, in its discretion, attorney be ordered to pay monetary sanctions, the amount shall be determined using the ranges found in subsection (F) and considering the factors set forth in subsection (G). Recommended sanctions that deviate from the ranges set forth in subdivision (E)(2) to a maximum of \$5,000 for each violation, and \$50,000 for each disciplinary order.~~
- ~~(a) Deviations from these ranges should be reasonably based on the facts and circumstances of each discipline case.~~
- ~~(b) If the same conduct is encompassed by two or more separate violations, the Court generally should not impose more than one monetary sanction for that conduct. Instead, the Court should consider the most serious applicable violation for that conduct.~~

~~(4) must include a justification for the exception. The State Bar Court may, in its discretion, recommend that the Supreme Court allow respondent to pay monetary sanction be waived, in whole or in part, or be paid in sanctions in installments, or the time to pay that they be extended waived based on a finding of upon financial hardship, special circumstances, whether a licensee's ability to pay criminal or civil judgments arising out of the discipline case is adversely affected, for good cause, or in the interests of justice. The burden of proof by preponderance of the evidence will be on the licensee to provide financial records and/or other proof. The State Bar Court must state reasons for its ruling.~~

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

~~(5) The Office of the Chief Trial Counsel of the State Bar may enter into a stipulation with the licensee respondent or make a recommendation regarding whether any monetary sanctions should be ordered or waived; if ordered, in what amount; whether a payment plan or extension of time will be allowed; and the specifics of such plan or extension.~~

~~All, using the guidelines set forth in subsection (F) and (G). Such stipulations must will be accepted and approved subject to approval by the State Bar Court.~~

(E) Respondent's Financial Hardship

~~(6) A licensee~~Respondent may seekbe granted relief, in whole or in part, from an order ~~of assessing~~ monetary sanctions, or may be granted an extension of time to pay ~~the these~~ sanctions in the discretion of the State Bar Court, upon grounds of hardship, special circumstances, other good cause or if collection of monetary sanctions, or request a compromise of judgment, will impair a respondent's ability to pay criminal penalties or civil judgments arising out of transactions connected with the respondent's discipline. Respondent may seek relief from monetary sanctions through a motion filed with the State Bar Court, following the motion procedure ~~and based on the grounds~~ set forth in ~~the Rule 5.130(B)-(E) of the State Bar Rules of Procedure of the State Bar.~~ The burden of proof ~~by preponderance of the evidence~~ will be on the ~~licensee~~respondent to provide financial records and ~~or~~ other proof ~~to in~~ support of the motion. ~~The State Bar Court must state reasons for its ruling.~~

~~g. Payment of restitution must be made in full before payment of any monetary sanctions.~~

~~(F) **Reinstatement.** Monetary sanctions shall be paid in full as a condition of reinstatement or return to active status, unless time for payment is extended pursuant to this rule.~~

~~(F) **Collection.** Imposed monetary sanctions ordered under this rule are enforceable as a money judgment.~~ **Monetary Sanction Ranges**

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

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

(G) Factors To Be Considered

The State Bar Court will consider the following factors, in regards to any current or prior misconduct, in setting the amount of a sanction within the appropriate range in subsection (F):

1. Whether there was an intentional misappropriation of money;
2. The amount of the direct or indirect monetary loss to any victim(s);

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

OPEN SESSION AGENDA ITEM

JULY 2018 RAD ITEM IIIE

DATE: July 19, 2018

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

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

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

EXECUTIVE SUMMARY

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

BACKGROUND

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

FISCAL/PERSONNEL IMPACT

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

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

STRATEGIC PLAN GOALS & OBJECTIVES

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

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

RECOMMENDATION

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

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

ATTACHMENT(S) LIST

A. Text of proposed State Bar Rule of Procedure 5.137

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

Rule 5.137 Imposition of Monetary Sanctions

(A) The Supreme Court May Order Monetary Sanctions

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

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

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

(C) Determination of Monetary Sanction Amounts

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

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

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

(E) Respondent's Financial Hardship

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

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

(F) Monetary Sanction Ranges

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

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

(G) Factors To Be Considered

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

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

NOV 2018 RAD ITEM II.B

NOV 2018 Board of Trustees, ITEM 54-123

DATE: 11/15/2018

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

FROM: Suzanne Grandt, Assistant General Counsel, Office of General Counsel

SUBJECT: Proposed State Bar Rule of Procedure, rule 5.137: Return from Public Comment and Request Submission to California Supreme Court for Approval.

EXECUTIVE SUMMARY

At its July 2018 meeting, the State Bar Regulation and Discipline Committee ("RAD") authorized a 60-day public comment period for a proposed State Bar Rule setting forth guidelines for the imposition and collection of sanctions to be ordered by the California Supreme Court when imposing suspension or disbarment of an attorney. The proposal was submitted pursuant to Cal. Bus. & Prof. ("B & P") Code, § 6086.13, which requires the State Bar to adopt such a rule, to be approved by the California Supreme Court. The State Bar received one public comment during the 60-day public comment period.

This agenda item responds to the one public comment received and makes a non-substantive clarification to the proposed State Bar Rule. Staff recommends approval of the proposed State Bar Rule of Procedure, rule 5.137 for submission to the California Supreme Court.

BACKGROUND

On July 19, 2018 RAD authorized a 60-day public comment period for a proposed State Bar Rule setting forth guidelines for the imposition and collection of sanctions to be ordered by the California Supreme Court when imposing suspension or disbarment of an attorney. The public comment period began on August 2, 2018, and closed on October 2, 2018.

The State Bar received one public comment, from David C. Carr. The full text of this comment is provided as Attachment A.

DISCUSSION

i. Return from Public Comment

The one public comment regarding proposed rule 5.137 is from attorney David C. Carr. See Attachment A. Mr. Carr opposes the proposed rule on three separate grounds. **First**, he argues it is premature to draft a rule until the California Supreme Court directs the State Bar to do so, which it has not done in 25 years. **Second**, he asserts that the rule is at odds with the principles of the attorney discipline system, which is public protection and not punishment. **Third**, he notes that the State Bar already has a difficult time collecting costs from disciplined attorneys, making it impractical that the State Bar will see any benefit to its Client Security Fund (“CSF”), the ultimate recipient of the sanctions pursuant to B & P Code, § 6086.13.

As to his first concern, Mr. Carr is correct that the California Supreme Court must authorize the imposition of monetary sanctions. However, proposed rule 5.137 was drafted pursuant to B & P Code, § 6086.13, which **requires** that the State Bar adopt rules setting forth guidelines for the imposition and collection of monetary sanctions. There is nothing in this statute to suggest that the State Bar must wait until direction from the California Supreme Court. Rather, the State Bar must adopt rules “with the **approval** of the California Supreme Court” (emphasis added). As such, the State Bar has drafted a rule, which it will submit to the California Supreme Court for approval. It is then up to the California Supreme Court to determine whether such a rule is appropriate at this time.

As to his second concern, Mr. Carr is also correct that there is significant legislative history and case law emphasizing that the primary purpose of attorney discipline is public protection. However, the State Bar is acting pursuant to a state law, which requires it to adopt specified rules. See B & P Code, § 6086.13. The State Bar is not authorized to ignore this legislative mandate for policy reasons.

In any event, the legislature has already determined that certain costs imposed in connection with attorney disciplinary proceedings are consistent with the public protection purpose of the State Bar. In 2003, the legislature added subsection(e) to B & P Code, § 6086.10, the statute requiring disciplinary orders to include payment of disciplinary costs. Subsection (e) states:

In addition to other monetary sanctions as may be ordered by the Supreme Court pursuant to Section 6086.13, costs imposed pursuant to this section are penalties, payable to and for the benefit of the State Bar of California, a public corporation created pursuant to Article VI of the California Constitution, to promote rehabilitation and to protect the public. This subdivision is declaratory of existing law.

Lastly, as to Mr. Carr's third concern, the State Bar recognizes the practical difficulty in collecting costs from disciplined attorneys. This difficulty does not justify non-compliance with B & P Code, § 6086.10.

ii. Clarification to Proposed State Bar Rule of Procedure, rule 5.137

Staff recommends a non-substantive addition to proposed State Bar Rule of Procedure, rule 5.137. Proposed rule 5.137(G) lists factors to be considered by State Bar Court in setting the amount of recommended sanctions. Staff recommends adding language to clarify that the State Bar Court may consider past misconduct when applying the listed factors.

A red-lined version of proposed State Bar Rule of Procedure, rule 5.137 is provided as Attachment B. A clean, revised version of proposed State Bar Rule of Procedure, rule 5.137 is provided as Attachment C.

FISCAL/PERSONNEL IMPACT

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

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

STRATEGIC PLAN, GOALS, & OBJECTIVES

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

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

RECOMMENDATION

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

RESOLVED, that staff submit to the California Supreme Court for approval proposed State Bar Rule of Procedure, rule 5.137, attached hereto as Attachment C.

ATTACHMENT(S) LIST

A. Text of David C. Carr's Public Comment

B. Redline of proposed State Bar Rule of Procedure, rule 5.137

C. Proposed State Bar Rule of Procedure, rule 5.137

ATTACHMENT A

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October 2, 2018

Via email: suzanne.grandt@calbar.ca.gov

Suzanne C. Grandt
Office of General Counsel
180 Howard St.
San Francisco, CA 94105

Re: Monetary Sanctions in Disciplinary Proceedings .

Dear Ms. Grandt:

This comment pertains to the proposal to adopt State Bar Rule of Procedure 5.137 to implement monetary sanctions in discipline proceedings consistent with Business & Profession Code section 6986.13.

I oppose the rule as and urge the Board of Trustees not to approve it. It is premature to draft rules until the Supreme Court directs the State Bar to do so. It has not done so in almost 25 years. Because the statute represents an explicitly punitive sanction, at odds with the long-established law, any major change in policy should be at the direction of the Supreme Court. The statute clearly states that rules may only be promulgated at the direction of the Supreme Court.

One of the most firmly established principles of the attorney discipline proceedings is that its exists solely to protect the public, the justice system, confidence in profession and high professional standards, and does not exist for the purpose of punishment (Standard 1.1 Standards for Attorney Sanctions of Professional Misconduct; *In re Vaughan* (1922) 189 Cal. 491, 496.) The California Supreme Court early discerned the danger of confusing the two (see *Marsh v. State Bar of Cal.*, (1934) 2 Cal. 2d 75, 78: “It must first be noted that although the word ‘punishment’ is frequently used, the discipline of an attorney is not punitive in character.)

The Legislature recently reinforced at least part of this bedrock principle by amending Business and Professions Code section 6001.1 to provide that “Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”

25 years ago the Legislature gave the State Bar a different direction in the form of Business and Professions Code section 6086.13, which purportedly instructs the State Bar to draft the rules that the subject of this comment.

The source of this Legislative direction is lost in the mists of State Bar history but probably originated in the report of the Discipline Evaluation Committee aka the Alarcon Committee, a blue-ribbon panel headed by former Federal Judge Richard Alarcon that issued its report in 1994. Or maybe some other commission, report or State Bar study; there have so many that they begin to blur with the the passing years. Many of the Alarcon Commissions recommendations were acted on, and this is probably one of them.

While some perfunctory work was done to promulgate regulations pursuant to 6068.13(c), the effort was abandoned sometime in 1995 after negative public comment to the first version and never resumed until this year. No one seemed to notice until recently. The reasons why the State Bar ignored this seeming Legislative mandate are unknown, at least to the authors of the current proposal.

I don't know the reasons either, but my own reaction, as a prosecutor in the Office of Chief Trial Counsel in 1994 was that the imposition of monetary sanctions, even for the noble purpose of funding the Client Security Fund, was punitive and incompatible with the principle that discipline is not intended to be punitive. Discipline is not intended to be pain-free, quite the opposite, but if discipline, with all its consequences, is greater than necessary to protect the public, it is unfair and improper.

That is the principle and the ease with which we lapse into describing it as "punishment" (as the *Marsh* court noted) shows the difficulty in drawing that line. In the name of protecting the public, we have embraced inflicting much pain on disciplined attorneys, including the imposition of ruinous costs, especially if you seek to defend yourself, and the prospect of perpetual public professional ignominy. There has to be a point where discipline becomes so onerous that even the broadest definition of public protection doesn't cover it. But a discipline system that is constantly being prodded to be more aggressive in protecting the public might not see it.

Early case law referred to the discipline process as being quasi-criminal (*Vaughan*, at 496; *In re Ruffalo* (1968) 390 U.S. 544, 551). But the judicial response to attempts to apply criminal law concepts, like double jeopardy and restrictions on search and seizure, to discipline was to emphasize its limited nature as public protection "The purpose of disbarment proceedings is not to punish the individual but to determine whether the attorney should continue in that capacity" [citation] 'in short, to reform the offender or else remove him from practice' [citation] *Emslie v. State Bar* (1974)11 Cal. 3d 210, 225.)

What makes a sanction punitive? The Ninth Circuit had this to say in *In Re Dyer*:

We recently explained the difference between civil sanctions and criminal sanctions: Civil penalties must either be compensatory or designed to coerce compliance [citation]. In contrast,

“a flat unconditional fine totaling even as little as \$50” could be criminal “if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance,” and the fine is not compensatory. [citation] This is so regardless of whether the non-compensatory fine is payable to the court or to the complainant. [citation]. Whether the fine is payable to the complainant may, however, be one relevant factor in determining whether the fine is compensatory or punitive

In re Dyer, 322 F.3d 1178, 1192 (9th Cir. 2003). *Dyer*, a bankruptcy case the Ninth Circuit was tasked with reviewing an order imposing punitive damages under 11 U.S.C. section 105(a).

The *Dyer* court, noting that the court’s power under the statute was limited to measures necessary and appropriate to carry out the provision of title 11, held that the Bankruptcy Court’s were limited to imposing civil remedies appropriate for civil contempt, compensatory or compliance-inducing but not punishment for bad conduct.

Section 6086.13 provides that monies collected pursuant to the statute shall be paid to Client Security Fund but that they shall not be collected if that would affect criminal penalties or civil judgment and could even be used to satisfy those penalties or judgments. The purpose outlined in the statute is neither compensatory or compliance-inducing; it is fine, levied as punishment, in most cases to be used to pay the claims of individuals who have no connection to the misconduct.

Moreover, proposed Rule of Procedure 5.137 provides that the amount of the fine increases with the degree of discipline and suggests a list of factors to be considered in setting the recommended fine, including:

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

Every factor on this list shows that the intent to the statute and underlying rule is to punish bad people, and the badder, the more punishment.

The Legislature, of course, can enact a statute directing the State Bar to expand the purposes of

Suzanne C. Grandt
October 2, 2018
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discipline to include punishing bad people, even if for the ostensible purpose of funding the Client Security Fund. But that decision should belong the Supreme Court in the exercise of its power in this area.

That purpose is chimerical, anyway, given the very difficult time the State Bar has had even collecting its costs from disciplined attorneys. Expecting to collect large amounts of money from a group after you have impaired their ability to earn of living does not make a lot of sense. Even if these monetary sanctions are approved, they will never make a significant dent in the amounts of money needed to keep the Fund operating in a timely way. Raising the \$40 per year that each licensee pays into the fund seems politically impossible for some reason but that reason does not justify enacting a set of rules at odds with the fundamental purposes of the discipline system.

The Board of Trustees should decline to approve proposed Rule 5.137 and await direction from the California Supreme Court.

Very Truly Yours,

A handwritten signature in cursive script, appearing to read "David C. Carr".

David C. Carr

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

Rule 5.137 Imposition of Monetary Sanctions

(A) The Supreme Court May Order Monetary Sanctions

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

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

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

(C) Determination of Monetary Sanction Amounts

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

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

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

(E) Respondent's Financial Hardship

A Respondent may be granted relief, in whole or in part, from an order assessing monetary sanctions, or may be granted an extension of time to pay these sanctions in the

ATTACHMENT B

discretion of the State Bar Court, upon grounds of hardship, special circumstances, other good cause or if collection of monetary sanctions will impair a respondent's ability to pay criminal penalties or civil judgments arising out of transactions connected with the respondent's discipline. Respondent may seek relief from monetary sanctions through a motion filed with the State Bar Court, following the motion procedure set forth in Rule 5.130(B)-(E) of the State Bar Rules of Procedure. The burden of proof will be on the respondent to provide financial records and other proof in support of the motion.

(F) Monetary Sanction Ranges

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

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

(G) Factors To Be Considered

The State Bar Court will consider the following factors, [in regards to any current or prior misconduct](#), in setting the amount of a sanction within the appropriate range in subsection (F):

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

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ATTACHMENT C

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