



# The State Bar *of California*

## **Background information on Progressive Discipline**

**Prepared for the Ad Hoc Commission on the Discipline System's  
Fairness Subcommittee**

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## **Standard 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.

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.

- For a more comprehensive and historical explanation for the creation of the standards, see the original introduction to the 1986 standards.

### **Standard 1.7 - Effective of Prior Discipline – effective Jan. 1, 1986, to Dec. 31, 2013**

- (a) If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline as defined by standard 1.2(f), the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.
- (b) If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of two prior impositions of discipline as defined by Standard 1.2(f), the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate.
- (c) None of these standards shall require a prior record of discipline as a prerequisite for imposing any appropriate sanction, including disbarment, authorized by these standards for an offense of professional misconduct.

## 2014 Revisions to Standards

The Standards, including Standard 1.7, were substantially revised and re-numbered, effective Jan. 1, 2014.

- Standard 1.7 was re-numbered 1.8, and significant changes were made to subsection (b)'s "three-strikes rule"(as it was commonly referred to), because it was rarely followed, and the new version comported with actual practice.
- Following the adoption of the new Standards, the Board of Trustees appointed a Disciplinary Standards Task Force to determine what additional changes, if any, needed to be made to the Standards.
- In its Nov. 2014 report to the Board of Trustees, the task force did not recommend any further revisions to Standard 1.8.

### **Standard 1.8 - Effective of Prior Discipline – effective Jan. 1, 2014**

(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.

The three circumstances in Standard 1.8(b) support the presumption of disbarment because they establish that the attorney's continued status as a member of the State Bar is inconsistent with the purpose of disciplinary proceedings to afford protection to the public, maintain the integrity of the legal profession, maintain high professional standards for attorneys and preserve public confidence in the legal profession.

## **The American Bar Association: Progressive Discipline Standards Since 1986**

### **8.0 Prior Discipline Orders**

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving prior discipline.

#### **8.1 Disbarment is generally appropriate when a lawyer:**

- (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or
- (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

**8.2** Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

#### **8.3 Reprimand is generally appropriate when a lawyer:**

- (a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or
- (b) has received an admonition for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

**8.4** An admonition is generally not an appropriate sanction when a lawyer violates the terms of a prior disciplinary order or when a lawyer has engaged in the same or similar misconduct in the past.