



The State Bar *of California*

AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

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To: Members, Ad Hoc Commission on the Discipline System

From: Justin Ewert, Principal Program Analyst
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Subject: Adoption of Progressive Discipline Recommendations

EXECUTIVE SUMMARY

The Ad Hoc Commission on the Discipline System (AHCDS) was created to review the changes that have been proposed and implemented in the Office of Chief Trial Counsel since 2016 and evaluate their impact on public protection. The 26 member AHCDS focused on the impact of these reforms on a number of key aspects of the discipline system, including:

- Procedural justice and the experiences and perceptions of the system by complaining witnesses and respondents;
- Workload and operational efficiency of case processing;
- Case prioritization and differentiated case-flow management; and
- The efficacy of the system for preventing future attorney misconduct.

The AHCDS divided into two subcommittees, fairness and effectiveness, and then further into working groups to review specific areas of focus and come up with recommendations to be reviewed by the full commission. The fairness subcommittee reviewed the **Standards for Attorney Sanctions** (“progressive discipline”) and recommended the formation of the progressive discipline working group to review discipline standards and the impact of prior discipline. The six-member working group did not develop any recommendations.

BACKGROUND

Prior to the progressive discipline working group’s formation, the fairness subcommittee reviewed the findings of the [State Bar study on racial disparities](#) in the discipline system. The

goals of the study were to determine if there were disparities in discipline and identify the factors that contribute to those disparities. The study analyzed attorneys that were admitted to practice from 1990 to 2009. The study found that without controlling for other factors, there was disproportionate discipline against black male attorneys. Black male attorneys were three times as likely to be placed on probation, and almost four times as likely to be disbarred as compared to their white male counterparts.

The study found several factors that contributed to disparities. Prior complaints had a large impact on future discipline. Counsel representation, firm size, and rates of complaints all contributed to the disparities in the system.¹

This research motivated the interest in exploring modification of the Standards for Attorney Sanctions (referred to as “progressive discipline” informally) as a remedy to historical disparities in attorney discipline.

PROGRESSIVE DISCIPLINE

[Standard 1.8](#) of the State Bar California Rules of Procedure states that “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.” The rationale for progressive discipline is that a prior record of discipline is a significant aggravating factor in determining the appropriate level of discipline. The Supreme Court has held that the degree of discipline imposed must be sufficient to deter future wrongdoing by the respondent.² These standards were adopted by the Board of Trustees to establish the means to determine the level of discipline and ensure consistency in discipline proceedings.³

The working group reviewed standard 1.5 which details aggravating circumstances; these circumstances include a prior record of discipline, multiple acts of wrongdoing, a pattern of misconduct, concealment, and significant harm to the client. Standard 1.6 details mitigating circumstances, which include absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to reoccur, lack of harm to a client, extreme emotional difficulties, extraordinary good character, remoteness in time of the misconduct and subsequent rehabilitation, and restitution was made without threat of force or administrative action.

¹ The State Bar followed up this study by contracting with Professor Christopher Robertson of the University of Boston to come up with potential reforms to address disparities in the discipline system. The follow-up [report](#) identified 12 potential reforms to the discipline system. The fairness subcommittee received a presentation on the report’s findings and reform implementation.

² *In re Morse* (1995) 11 Cal.4th 184, 210

³ Standard 1.1 states “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.”

RECOMMENDATIONS

The working group discussed modifying the standards. One suggestion was to change the language in standard 1.8 in the following clause: “must be greater than the previously imposed sanction”. Specifically, working group members suggested changing “must” to “may” to allow for discretion when considering prior discipline. The working group also discussed additions to standard 1.6 mitigating factors.

Arguments in favor of amendments to standards 1.8 and 1.6 include:

- Prior discipline may be the result of disparities in the discipline system and changes to the standards could help reduce the impact of prior disparities on current outcomes⁴; and
- Changes to the standards will allow for greater judicial discretion and increase fairness in the system.

Arguments against modification include:

- The Supreme Court has consistently expressed support for the standards and progressive discipline; and
- Increasing discretion as to whether or not to consider prior discipline may have the unintended impact of increasing disparities in the system due to implicit bias.

The working group met twice, and the full AHCDs also discussed the topic at its January 25, 2022, meeting. Some members of the full commission supported modifying standards, but the discussion did not lead to specific recommendations. Due to the standards’ complexity and the multitude of issues involved, the working group did not generate recommendations.

⁴ The working group reviewed an analysis of attorneys who were disbarred between 2015 and 2021. Half had no prior formal discipline and 40 percent were previously on probation. Small sample sizes and lack of racial-ethnic data on disciplined attorneys prevented drawing conclusions about any racial disparities in previous discipline among disbarred attorneys.