



The State Bar of California

OPEN SESSION AGENDA ITEM 60-4 MARCH 2024

DATE: March 21, 2024

TO: Members, Board of Trustees
Sitting as the Regulation and Discipline Committee

FROM: Michelle Cramton, Clerk of the State Bar Court
Kathy Sher, Projects Attorney, State Bar Court

SUBJECT: Proposed Amendments to the Standards for Attorney Sanctions for Professional Misconduct Relating to the Effect of Prior Discipline (Standard 1.8): Request to Circulate for Public Comment

EXECUTIVE SUMMARY

Consistent with the Board's direction at its January and September 2023 meetings, this item seeks authorization to circulate for public comment amendments to the State Bar Rules intended to implement the Ad Hoc Commission on the Discipline System recommendation to modify the Standards for Attorney Sanctions for Professional Misconduct to permit the greater exercise of judicial discretion with regard to progressive discipline.

BACKGROUND

At its January 19, 2023, meeting, the Board directed staff to "to analyze and consider modifications to Standards 1.6 and 1.8 to permit the greater exercise of judicial discretion with regard to progressive discipline."

The Board received staff's update on its work on this directive at its September 20, 2023, meeting. As reported at that meeting, a State Bar Court (SBC) working group had developed a proposal for changes to Standard 1.8 to give SBC judges greater discretion with regard to the imposition of progressive discipline, solicited input on that proposal from both the Office of Chief Trial Counsel (OCTC) and the Association of Discipline Defense Counsel (ADDC), and made revisions in response to this input to arrive at a revised proposal.

This agenda item seeks authorization to circulate for public comment the proposed changes to Standard 1.8 developed in accordance with the Board's prior guidance.

DISCUSSION

The State Bar Standards for Attorney Sanctions for Professional Misconduct apply a policy of progressive discipline, generally requiring that each successive disciplinary proceeding in which culpability is found should result in more severe sanctions than the last. In accordance with this policy, Standard 1.8 (a) states, "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 Ad Hoc Commission's Progressive Discipline Working Group explored modifications to the discipline standards as a means of preventing the perpetuation of historical disparities in attorney discipline. Because prior discipline may reflect disparities in treatment, inflexible requirements to apply more severe sanctions to those with prior disciplinary histories can exacerbate those patterns.

In light of these concerns, the Board directed staff to analyze and consider modifications to Standards 1.6 and 1.8 to permit the greater exercise of judicial discretion with regard to progressive discipline at its January 2023 meeting.

The SBC working group that was established to take up the Board's charge looked at several specific aspects of the language of Standard 1.8 that limit the SBC's flexibility in cases where there has been prior misconduct:

- First, the Standard is mandatory: if a lawyer has a prior record of discipline, the sanction must be greater than the previously imposed sanction, unless certain factors apply.
- Second, for an exception to be made to the requirement for progressive discipline to be applied, the prior misconduct must be both remote in time and not serious enough so as to make the imposition of progressive discipline manifestly unjust.
- Third, the Standard does not allow for consideration of the seriousness of the current misconduct. Finally, Standard 1.8 does not allow for consideration of any other factors that might make imposition of progressive discipline unjust.

The working group developed draft language modifying these aspects of the rule, and adding a requirement that in any case where the SBC does not recommend or impose a sanction greater than the previously imposed sanction, the court must state its reasons for the lesser sanction.

The proposed amendments to Standard 1.8 are attached in clean text (Attachment A) and in redline showing the changes from current Standard 1.8 (Attachment B). The proposed amendments to Standard 1.8:

- Change the language from stating that the sanction for successive discipline “must” be greater than the previously imposed sanction to instead state that it “should” be greater than the previously imposed sanction, unless specified factors apply;
- Allow consideration of the severity of the current misconduct in determining whether to apply progressive discipline;
- Allow consideration of other circumstances that would make imposition of greater discipline unjust;
- Give the court discretion not to impose greater discipline when any of the specified factors apply;
- Require the court to state its reasons for not imposing a greater sanction when the lawyer has a record of prior discipline.

The proposed amendments are intended to give State Bar Court judges greater discretion to decide when progressive discipline is not appropriate, while ensuring transparency by requiring that the reasons for that decision are stated.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF PROCEDURE

Title IV, Part A, Standard 1.8

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- d. 1. Align and implement recommendations of the Special Discipline Case Audit Committee and the Ad Hoc Commission on the Discipline System.

RECOMMENDATIONS

Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees sitting as the Regulation and Discipline Committee authorizes staff to make available for public comment, for a period of 45 days, proposed amendments to Standard 1.8 of the Standards for Attorney Sanctions for Professional Misconduct as set forth in Attachments A and B; and it is

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

ATTACHMENTS LIST

- A.** Proposed Amendments to Standard 1.8 – Clean Version
- B.** Proposed Amendments to Standard 1.8 – Redline to Current Standard 1.8

Proposed Amendments to Standard 1.8 – Clean Version

1.8 EFFECT OF PRIOR DISCIPLINE

(a) If a lawyer has a single prior record of discipline, the sanction should be greater than the previously imposed sanction unless the prior discipline was remote in time, the previous or current misconduct was not sufficiently serious to warrant greater discipline, or there are other circumstances that would make imposing greater discipline unjust. In matters in which a lawyer has a single prior record of discipline and the court is not recommending or imposing a sanction greater than the previously imposed sanction, the court must set forth its reason(s) for not imposing a greater sanction.

(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.

Proposed Amendments to Standard 1.8 – Redline to Current Standard 1.8**1.8 EFFECT OF PRIOR DISCIPLINE**

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(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:

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