AGENDA ITEM

MAY 2010
Proposed Amendments to the Standards for Attorney Sanctions for Professional Misconduct – Request for Release for Public Comment

DATE: April 19, 2010

TO: Members of the Board Committee on Discipline Oversight

FROM: Russell G. Weiner, Interim Chief Trial Counsel

SUBJECT: Proposed Amendments to the Standards for Attorney Sanctions for Professional Misconduct – Request for Release for Public Comment

---

EXECUTIVE SUMMARY

The Office of The Chief Trial Counsel submits proposed revisions to the Standards for Attorney Sanctions for Professional Misconduct. The revisions are intended to (1) revise the Standards so as to comport with decisional law issued after the enactment of the Standards, (2) create greater uniformity in State Bar Court suspension recommendations and (3) adopt a broader description of aggravating and mitigating circumstances based on ideas contained in the American Bar Association's Model Standards for Imposing Lawyer Sanctions.

This item seeks authorization from the Committee to release the proposed revisions for a 60-day public comment. The proposed amendments are set forth in Exhibit A, with deleted text in strikethrough font and added text in bold font.

BACKGROUND

Effective January 1, 1986, this Board adopted the Standards for Attorney Sanctions for Professional Misconduct (Rules of Procedure of the State Bar, title IV; hereinafter "Standards"). They have been a great success.

The Supreme Court promptly and consistently approved their application to discipline matters, describing them as guidelines for use by the State Bar (*Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550). The Court stated that the Standards "… promote the consistent and uniform application of disciplinary measures. Hence, we have said that 'we will not reject a recommendation arising from application of the Standards unless we have grave doubts as to the propriety of the recommended discipline....' " (*In re Lamb* (1989) 49 Cal.3d 239, 245 quoting from *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366). The Supreme Court has directed the State Bar to consider the Standards in every case and to follow them "whenever possible" (*In re Young* (1989) 49 Cal.3d 257, 277, fn. 11) unless there is a "compelling reason" not to do so (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 191). The Court has also directed the State Bar to provide reasons for any departure from the Standards (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5). In its most recent attorney discipline case, the Supreme Court reiterated its position that the Standards are entitled to "great weight" (*In re Silverton* (2005) 36 Cal.4th 81, 89-92).

The Standards have not been substantively revised in the intervening 24 years. The Office of the Chief Trial Counsel believes that: (1) some specific Standards should be revised in accordance with the manner in which they have actually been applied in the decisional law, (2) the Standards should be amended to facilitate greater uniformity in State Bar Court suspension recommendations and (3) the Standards governing aggravating and mitigating factors should be revised to more closely follow the American Bar Association model standards and Supreme Court precedent.

DISCUSSION

1. Standard 1.2(b) [Aggravating Circumstances]

Standard 1.2(b) [1] sets forth the aggravating circumstances for determining the appropriate

---

[1] Standard 1.2(b) provides as follows:

"Aggravating circumstances" is an event or factor established clearly and convincingly by the State Bar as having surrounded a member's professional misconduct and which demonstrates that a greater degree of sanction than set forth in these standards for the particular act of professional misconduct found or acknowledged is needed to adequately protect the public, the courts and legal profession.

Circumstances which shall be considered aggravating are:

- **(i)** the existence of a prior record of discipline and the nature and extent of that record (see also Standard 1.7);
- **(ii)** that the current misconduct found or acknowledged by the member evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct;
- **(iii)** that the member's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching, or other violations of the State Bar Act or Rules of Professional Misconduct; or if trust funds or trust property were involved, refusal or inability to account to the client or person who is the object of the misconduct for improper conduct toward said funds or property;

discipline sanction. The Office of the Chief Trial Counsel believes that Standard 1.2(b) should be amended to include additional aggravating circumstances. These are circumstances which are well established by California case precedent and, in most cases, included as aggravating circumstances in the ABA's Standards for Imposing Lawyer Sanctions.

The Office of the Chief Trial Counsel proposes to modify Standard 1.2(b) by adding the following aggravating factors:

- **Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency.** (Standard 9.2 (c) of the ABA's Standards for Imposing Lawyer Sanctions.)

  This aggravating factor is consistent with established California case law. (See e.g. *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45 [unrestrained personal abuse and disruptive conduct characterized petitioner's conduct during State Bar proceeding]; *Weber v. State Bar* (1988) 47 Cal3d 492, 507 [contemptuous attitude toward the State Bar disciplinary proceeding is relevant to the determination of an appropriate sanction]; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 697 [State Bar referee could consider an attorney's refusal to take the witness stand as ordered by the referee an aggravating circumstance.][2])

  Other jurisdictions also consider this an aggravating circumstance.[3]

- **Refusal to acknowledge wrongful nature of conduct.** (Standard 9.2 (g) of the ABA's Standards for Imposing Lawyer Sanctions.)

  This aggravating factor is consistent with established California case law. (See e.g. *Alberton v. State Bar* (1984) 37 Cal.3d 1, 11, fn 18; *In re Silverton* (2005) 36 Cal.4th 81, 93 ["To the contrary, the most extraordinary aspect of this proceeding is petitioner's apparent lack of insight into the wrongfulness of his actions."]; *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14.)

  Other jurisdictions also consider this an aggravating circumstance.[4]

(iv) that the member's misconduct harmed significantly a client, the public or the administration of justice;

(v) that the member demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct; or

(vi) that the member displayed a lack of candor and cooperation to any victims of the member's misconduct or to the State Bar during disciplinary investigation or proceedings.

[2]In *Frazier*, the review department failed to find the attorney's refusal to take the witness stand an aggravating circumstance given that she was following the advice of counsel and the law was not clear at the time. (*Id.* at 699.)

[3]See e.g. Standard 9.22(f) of the Michigan Standards for Imposing Lawyer Sanctions; *People v. Crist* (Col. 1997) 948 P2d 1020, 1021.

- **Substantial experience in the practice of law.** (Standard 9.2(i) of the ABA's Standards for Imposing Lawyer Sanctions.)

  This aggravating factor is consistent with established California case law. (See *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 283; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 807.)

  Other jurisdictions also consider this an aggravating circumstance.[5]

- **Illegal conduct, including that involving the use of controlled substances**. (Standard 9.2 (c) of the ABA's Standards for Imposing Lawyer Sanctions.)

  This aggravating factor is also consistent with California case law. (See e.g. *In re Demergian* (1989) 48 Cal.3d 284, 295.) Further, our Standards already exclude as mitigation extreme emotional or physical difficulties which is the product of illegal conduct. (Standard 1.2(e)(iv).)

  Other jurisdictions also consider this an aggravating circumstance.[6]

- **Defaulting during the State Bar proceedings.** The Supreme Court already finds this to be an aggravating circumstance. (See e.g. *Conroy v. State Bar* (1990) 51 Cal.3d 799, 805-806.) Having a separate circumstance as aggravation gives respondents notice that this is an aggravating circumstance and emphasizes the importance of participating in the proceedings. A significant number of disciplinary proceedings go by default. Defaults disrupt the process, unnecessarily burden the State Bar Court and the Office of the Chief Trial Counsel, and respondents need to know that it will be considered aggravation in the proceedings.

2. Standard 1.2(e) [Mitigating Circumstances]

Standard 1.2(e) sets forth mitigating circumstances for determining the appropriate discipline sanction.[7] The Office of the Chief Trial Counsel believes that Standard 1.2(e) should be amended

---

[4]See e.g. Standard 9.22(h) of the Michigan Standards for Imposing Lawyer Sanctions; *People v. Pautler* (Col. 2001) 35 P.3d 571, 586; *In re Disciplinary Proceedings Against Lopez* (Wa. 2005) 106 P.3d 221, 232; *In re White-Steiner* (Ariz. 2009) 198 P.3d 1195, 1199.

[5]See e.g. Standard 9.22(j) of the Michigan Standards for Imposing Lawyer Sanctions; *In re Paulson* (Or. 2003) 71 P.3d 60, 63; *In re Disciplinary Proceedings Against Lopez* (Wa. 2005) 106 P.3d 221, 232; *People v. Hindman* (Col. 1998) 958 P.2d 463, 464.

[6]See e.g. Standard 9.22(l) of the Michigan Standards for Imposing Lawyer Sanctions; *People v. Crist* (Col. 1997) 948 P.2d 1020, 1021; *In re Stein* (N.J. 1984) 483 A.2d 109, 117.

[7]Standard 1.2(e) provides as follows:

"Mitigating circumstances" is an event or factor established clearly and convincingly by the member subject to a disciplinary proceeding as having caused or underlain the member's professional misconduct and which demonstrates that the public, courts, and legal profession would be adequately protected by a more lenient degree of sanction than set forth in these standards for the particular act of professional misconduct found or acknowledged.

Circumstances which shall be considered mitigation are:

to include additional mitigating circumstances. These circumstances are already established by California case precedent and one of them is included as a mitigating circumstance in the ABA's Standards for Imposing Lawyer Sanctions. Also, the Office of the Chief Trial Counsel seeks to amend current Standard 1.2(e)(ix) because the Office of the Chief Trial believes it is too vague as currently written and could be interpreted in a manner that is not consistent with the purposes of attorney discipline sanctions.

The Office of the Chief Trial Counsel proposes to modify Standard 1.2(e) by adding or revising the following mitigating circumstances:

- **Inexperience in the practice of law.** (Standard 9.3 (f) of the ABA's Standards for Imposing Lawyer Sanctions.)

  This mitigating factor is consistent with California case law. (See e.g. *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366; *Segretti v. State Bar* (1976) 15 Cal.3d 878, 888; *Recht v. State Bar* (1933) 281 Cal. 352, 355.)

  Other jurisdictions also consider this an a mitigating circumstance.[8]

- **Evidence of voluntary community service which is established by the testimony of at**

(i) absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious;

(ii) good faith of the member;

(iii) lack of harm to the client or person who is the object of the misconduct;

(iv) extreme emotional difficulties or physical disabilities suffered by the member at the time of the act of professional misconduct which expert testimony establishes was directly responsible for the misconduct; provided that such difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse; and further provided that the member has established through clear and convincing evidence that he or she no longer suffers from such difficulties or disabilities;

(v) spontaneous candor and cooperation displayed to the victims of the member's misconduct and to the State Bar during disciplinary investigation and proceedings;

(vi) an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct;

(vii) objective steps promptly taken by the member spontaneously demonstrating remorse, recognition of the wrongdoing found or acknowledged which steps are designed to timely atone for any consequences of the member's misconduct;

(viii) the passage of considerable time since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation; or

(ix) excessive delay in conducting disciplinary proceedings, which delay is not attributable to the member and which delay prejudiced the member.

[8]See e.g. Standard 9.32(g) of the Michigan Standards for Imposing Lawyer Sanctions; *People v. D'Acquisto* (Col. 2006) 146 P.3d 1041,1046; *In the Matter of Reciprocal Discipline of Page* (Or. 1998) 955 P.2d 239, 243.

least one independent corroborating witness [or other reliable documentary evidence] other than the accused attorney.

California law has long considered community service a mitigating factor. (See e.g. *Porter v. State Bar* (1990) 52 Cal.3d 518, 529.) The State Bar Court often interprets this mitigation under Standard 1.2(e)(vi) ["an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's conduct"]. (See *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 359.) However, community service appears to be a different mitigating factor than the one stated under Std.1.2(e)(vi) and, therefore, should have its own standard.

Further, the Office of the Chief Trial Counsel believes that the Standard should be clarified to require that respondents establish community service mitigation by at least one corroborating witness. This will prevent inconsistent application of this mitigation standard.

The State Bar Court has on occasion given respondents mitigation credit for community service even though the respondent provided no evidence other than their own testimony that they are engaging in community service. (See e.g. *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840.) Other times, the court has not given this mitigation any weight because it was based on the respondent's own testimony. (See e.g. *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 13.)

Requiring corroboration is consistent with an attorney's obligation to prove mitigation by clear and convincing evidence. (Standard 1.2(e).) It is also consistent with Standard 1.2(e)(vi)'s requirement that evidence of the attorney's good character be attested to by a wide range of references. Further, it is consistent with Evidence Code section 412's requirement that weaker and less satisfactory evidence be viewed with distrust when it is offered by a party having the power to produce stronger and more satisfactory evidence.

- **Excessive delay in conducting disciplinary proceedings.** Excessive delay that prejudices the respondent is already considered in mitigation of discipline. (Standard 1.2(e)(ix); *Hawkins v. State Bar* (1979) 23 Cal.3d 622, 628.) However, there is some confusion as to when this mitigating factor applies and, therefore, the Office of the Chief Trial Counsel suggests that the standard be amended to clarify that it requires more than just delay. The Office of the Chief Trial Counsel requests that the language "*and was followed by convincing evidence of rehabilitation"* be added to Standard 1.2(e)(ix).

  The current standard states that the delay must prejudice the member. The State Bar Court, however, appears to give respondents this credit even when there is no evidence of prejudice.[9] The Supreme Court has done this also.[10]

  However, Standard 1.3 states that the purposes of disciplinary proceedings and the sanctions is to protect the public, the courts, and the legal profession; maintain high

[9] See e.g. *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 13 [finding no prejudice but giving the delay mitigating credit].

[10] *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 132.

professional standards; and preserve public confidence in the legal profession. Providing mitigation credit merely because there has been a delay does not serve any of these purposes. However, delay followed by convincing evidence of rehabilitation does constitute a valid mitigating circumstance.

Further, requiring rehabilitation is consistent with Standard 1.2(e)(viii), which provides that passage of time since the misconduct occurred may be mitigating when accompanied by convincing proof of subsequent rehabilitation.

In fact, many times the delay is the result of OCTC receiving new complaints and the desire to obtain a global resolution of an attorney's matters. Thus, delay alone, even if excessive, should not be sufficient to obtain this mitigation. Proof of rehabilitation and prejudice should be required.

3. Proposed Standard 1.8: Effect of Default

The Office of the Chief Trial Counsel believes there should be a separate standard or sanctions for attorneys who default in a proceeding. Given that defaults comprise a significant portion of the court's caseload, the Office of the Chief Trial Counsel suggests a new Standard 1.8:

> "In default proceedings, disbarment shall be imposed unless the offense is so minimal in severity that imposing disbarment would be manifestly unjust and in those cases the discipline shall be at the high end of the applicable standard**."**

The Supreme Court has disbarred attorneys who defaulted even though they had no prior record of discipline. (See *Bowles v. State Bar* (1989) 48 Cal.3d 100 [default, violations in six client cases and issuing NSF checks].)[11] In disbarring a defaulting attorney, the Supreme Court has considered an attorney's failure to appreciate the charges or to comprehend the importance of participating in the disciplinary proceedings. (*Conroy v. State Bar* (1990) 51 Cal.3d 799, 805-806.)

4. Standard 1.4(c): Suspension from the Practice of Law

Standard 1.4[12] describes the various disciplinary sanctions available in State Bar proceedings. The Office of the Chief Trial Counsel believes that Standard 1.4(c) should be amended to make suspension recommendations more consistent.

---

[11]The most common default proceedings involve attorneys who violate California Rule of Court 9.20 (requiring suspended attorneys to notify clients, opposing counsel and the courts of their suspensions). These default proceedings invariably result in disbarments in accord with Supreme Court precedent (*Lydon v. State Bar* (1988) 45 Cal.3d 1181). The proposed standard is not intended to affect this longstanding practice.

[12]Standard 1.4 provides as follows:

"1.4 DEGREES OF SANCTION AVAILABLE

5. Stayed Suspension. Most suspension orders include a period of suspension that is stayed on condition that the attorney must comply with conditions of probation. In these cases, the period of stayed suspension is not imposed unless the attorney violates probation. The current standard states that stayed suspension should be ordered for periods of one to five years. However, some judges have sometimes recommended shorter periods, and their rationale for doing so has not always been clear.

The Office of the Chief Trial Counsel believes that stayed suspensions should be imposed for a minimum of one year, thus creating a strong incentive for the attorney to comply with probation. If the attorney violates probation, the court should have the discretion to impose at least one year of suspension ─ although it would have discretion to impose less. The court should not have its options limited until it knows the extent and nature of the probation violation.

In order to assure consistency, the Office of the Chief Trial Counsel believes stayed suspension should be imposed in increments of one year. The maximum period of stayed suspension should be four years, since the suspension might otherwise exceed the five-year waiting period for disbarred lawyers to seek reinstatement (rule 662(b), Rules Proc. State Bar).

"Subject to these standards and the rules and laws which govern attorney disciplinary proceedings conducted by the State Bar, the following sanctions are available upon a finding or acknowledgment by a member of professional misconduct:

(a) Admonition.

(b) Reproval.

(c) Suspension from the practice of law:

> (i) —stayed suspension: the execution of suspension may be stayed for a period of from one year to five years only if such stay and performance of specified rehabilitative or probationary duties by the member during the period of the stay or probation is deemed consistent with the purposes of sanctions imposed upon the member as set forth in standard 1.3;
> (ii) —actual suspension: suspension from the practice of law for a period of not less than thirty (30) days. Normally, actual suspensions imposed for a two (2) year or greater period shall require proof satisfactory to the State Bar Court of the member's rehabilitation, present fitness to practice and present learning and ability in the general law before the member shall be relieved of the actual suspension; or
> (iii) —a stayed suspension which includes an actual suspension as a condition thereof.

(d) Disbarment.

(e) Any interim remedies or final discipline as authorized by section 6007(h), Business and Professions Code."

6. Actual Suspension. The current standard states that the minimum period of actual suspension is 30 days, but does not specify what increments should be imposed for longer suspensions. Over the years, both the Supreme Court and the State Bar Court have specified odd periods of actual suspension (e.g., 45 days, 75 days, even 89 days). The Office of the Chief Trial Counsel recommends that the standard should be amended to require that actual suspension be imposed in the following standard increments of 30 days, 60 days, 90 days, 180 days, one year, 18 months, two years, three years, and four years. We are recommending a maximum suspension period of four years because suspensions might otherwise last as long as the minimum waiting period for disbarred lawyers to seek reinstatement (see Rule 662, Rules Proc. State Bar setting forth a five-year waiting period).

We are also recommending that the Standard be modified to recognize that the State Bar Court always recommends proof of rehabilitation as a condition of return to active status following a suspension for two years or longer, and has discretion to do so for shorter suspensions.

7. Rule 9.20 Compliance. The State Bar Court has the option of ordering suspended attorneys to comply with California Rule of Court 9.20. When rule 9.20 compliance is ordered, suspended attorneys must notify clients, opposing counsel and courts of their suspensions, and must return files and unearned fees. The Standards do not specify when rule 9.20 compliance should be ordered, but the State Bar's longstanding practice is to order rule 9.20 compliance whenever the actual suspension is for 90 days or more (*In the Matter of Johnson* (Review Dept. 1997) 3 Cal. State Bar. Ct. Rptr. 585, 590), although the Supreme Court once required compliance as part of a 45-day suspension order (*In re Wren* (1983) 34 Cal.3d 81, 90). Sometimes, judges have recommended 75 or 89 day suspensions to avoid the rule 9.20 requirement. However, the Office of the Chief Trial Counsel believes clients deserve to receive notice whenever their attorney is being suspended for longer than 60 days. This is especially true, given the modern trend toward fast track litigation. Therefore, the Office of the Chief Trial recommends that the standard be amended to require rule 9.20 compliance whenever the actual suspension exceeds 60 days.

8. Standard 1.7: Effect of Prior Discipline

Standard 1.7(b)[13] requires that attorneys be disbarred on the third occasion that they receive professional discipline "unless the most compelling mitigating circumstances clearly predominate." This "most compelling" language suggests that Standard 1.7(b) would be applied in virtually every case in which an attorney receives a third disciplinary sanction. However, the Board's intent to create a disbarment presumption has not come to fruition. Rather, the courts

[13] Standard 1.7(b) provides as follows:

"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."

have not followed the strict language of Standard 1.7(b), but instead have created four interrelated exceptions that apply even when true mitigating circumstances are not present.

First, the Supreme Court has declined to apply Standard 1.7(b) in the absence of a "common thread" between the current and past cases sufficient to establish "a habitual course of conduct" (*Arm v. State Bar* (1990) 50 Cal.3d 763, 780). In contrast, the Supreme Court applied Standard 1.2(b) in disbarring an attorney whose behavior demonstrated "…a pattern of professional misconduct and an indifference to this court's disciplinary orders…" (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 607).

Second, the Review Department and the Supreme Court have declined to apply Standard 1.7(b) when the prior disciplinary record was not "sufficiently severe" (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 (first prior was for single client abandonment; second prior was for violation of reproval conditions); *Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 (declining to disbar even though no mitigation because priors were not sufficiently strong). However, in *In the Matter of Shalant* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 828, the Review Department disbarred an attorney under Standard 1.7(b) even though the attorney had never received actual suspension in any of his four prior disciplines.

Third, the Review Department has declined to recommend disbarment when it deemed the current misconduct to be insufficiently serious (see e.g., *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229 (30-day suspension imposed on attorney with three prior impositions of discipline who practiced law while suspended); *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523 (11-month suspension imposed on attorney with four prior disciplines who violated probation conditions)).

Finally, the Review Department and the Supreme Court have examined the chronology of the priors, specifically, to determine whether the respondent had received multiple opportunities to conform his or her conduct to professional standards. For example, in *In the Matter of Miller* (1990) 1 Cal. State Bar Court Rptr. 131, 136, the Review Department declined to recommend disbarment where the prior discipline was imposed *after* the newest misconduct was committed. Similarly, in *Natali v. State Bar* (1988) 45 Cal.3d 456, 468-469, the Court declined to apply Standard 1.7(b) because discipline in the second prior had not been formally imposed at the time the third matter was presented for decision.

Consistent with these authorities, the Office of the Chief Trial Counsel proposes that Standard 1.7(b) be amended to mandate disbarment under the circumstances recognized by decisional law. Disbarment would be required if each of the following circumstances are established:

First, the respondent must have received two discrete prior impositions of discipline, i.e., the conduct giving rise to the second and third impositions of discipline must have occurred after discipline was imposed for the misconduct giving rise to the first and second impositions of discipline.

Second, the prior record of discipline must have been sufficiently serious. This can be shown in one of two ways: Either the current misconduct when taken together with the prior misconduct evidences a pattern of misconduct and/or indifference to disciplinary orders; or the prior discipline included a period of actual suspension of one year or longer.

Third, either the current misconduct must be sufficiently serious to justify the imposition of actual suspension in the absence of prior discipline or there is actual harm to the client.

If these circumstances are present, the State Bar Court should recommend disbarment in virtually every case. Thus, the proposed amended standard deletes the "most compelling mitigating circumstances" escape clause. Nevertheless, as explained above, the court is permitted to depart from the Standards in unusual circumstances. Therefore, the court will be able handle a sui generis situation in which it might be unjust to disbar a respondent pursuant to the amended standard.[14]

10. Standard 2.2(b): Offenses Involving Entrusted Funds or Property

Standard 2.2(b)[15] requires a minimum three month actual suspension be imposed for *any* violation of rule 4-100, Rules of Professional Conduct.[16] The trust account violations described

---

[14]Obviously, in cases involving very serious misconduct, the State Bar Court can recommend disbarment even when attorney does not have a significant prior disciplinary history (Std. 1.7(c); *In re Rivas* (1989) 49 Cal.3d 794, 802).

[15]Standard 2.2(b) provides as follows:

"Culpability of a member of commingling of entrusted funds or property with personal property or the commission of another violation of rule 4-100, Rules of Professional Conduct [Preserving Identity of Funds and Property of a Client], none of which offenses result in the willful misappropriation of entrusted funds or property shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances."

[16]Rule 4-100 provides as follows:

"(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

"(1) Funds reasonably sufficient to pay bank charges.

in rule 4-100 are quite serious and almost invariably justify the minimum three-month suspension (or more).

However, some violations of rule 4-100 can be comparatively less serious. For example, an attorney can violate rule 4-100(B)(3) by failing to provide a client with a timely accounting for advanced attorney fees, even though the attorney is not required to keep those fees in a trust account and even though the fees have all been earned (see *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758). An attorney can also be found culpable under rule 4-100(B)(3) merely for failing to maintain records, even if there is no commingling, misappropriation or failure to promptly pay the client (see *In the Matter of Respondent Z* (1999) 4 Cal. State Bar Ct. Rptr. 85). These violations may result in low level discipline when the attorney has no prior record of discipline and does not cause harm to the client. For example, the attorney in *Respondent Z* received only a private reproval. Therefore, the Office of the Chief Trial Counsel proposes Standard 2.2(b) be modified to authorize reprovals or suspensions for these violations of Rule 4-100(B).

> "(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

"(B) A member shall:

> "(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.
>
> "(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
>
> "(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar."
>
> "(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

"(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members."

11. Proposed Standard 2.3.1: Offenses Involving Sexual Relations with Clients

In 1989, the Legislature directed the State Bar to adopt a rule of professional conduct governing sexual relationships between attorneys and clients (Bus. & Prof. Code 6106.8).[17] The Legislation further provided that a violation of the rule would warrant suspension or disbarment. In response, the State Bar and the Supreme Court adopted Rule of Professional Conduct 3-120.[18]

---

[17]Section 6106.8 provides as follows:

(a) The Legislature hereby finds and declares that there is no rule that governs propriety of sexual relationships between lawyers and clients. The Legislature further finds and declares that it is difficult to separate sound judgment from emotion or bias which may result from sexual involvement between a lawyer and his or her client during the period that an attorney-client relationship exists, and that emotional detachment is essential to the lawyer's ability to render competent legal services. Therefore, in order to ensure that a lawyer acts in the best interest of his or her client, a rule of professional conduct governing sexual relations between attorneys and their clients shall be adopted.

(b) With the approval of the Supreme Court, the State Bar shall adopt a rule of professional conduct governing sexual relations between attorneys and their clients in cases involving, but not limited to, probate matters and domestic relations, including dissolution proceedings, child custody cases, and settlement proceedings.

(c) The State Bar shall submit the proposed rule to the Supreme Court for approval no later than January 1, 1991.

(d) Intentional violation of this rule shall constitute a cause for suspension or disbarment.

[18]Rule 3-120 provides as follows:

(A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(B) A member shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

The Standards, which predate both section 6106.8 and rule 3-120, do not expressly discuss the appropriate sanction for improper sex with clients. Further, the catchall provision in Standard 2.10 sets reproval or suspension as the appropriate sanction for violations not otherwise mentioned in the Standards.

In these circumstances, it would be appropriate to adopt a Standard that reflects the Legislative directive that this offense requires suspension or disbarment. Indeed, given the gravity of the offense (see Bus. & Prof. Code § 6106.8(a)), the Office of the Chief Trial Counsel submits that the minimum sanction should be actual suspension.

FISCAL / PERSONNEL IMPACT: None

BOARD BOOK/ ADMINISTRATIVE MANUAL IMPACT: None

RECOMMENDATION

The Office of the Chief Trial Counsel recommends that the amendments set forth in Attachment A be released for a 60-day public comment. The State Bar will notify the interested stakeholders, i.e., attorneys specializing in representing members in disciplinary proceedings and all local bar association groups.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Board Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Board Committee on Discipline Oversight releases the proposed amendments to the Standards for Attorney Sanctions For Professional Misconduct, set forth in Attachment A, for a 60-day period of public comment;

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 revisions.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

ATTACHMENT A: PROPOSED REVISIONS TO THE STANDARDS FOR ATTORNEY SANCTIONS FOR PROFESSIONAL MISCONDUCT

STANDARD 1.2(b)

"Aggravating circumstance" is an event or factor established clearly and convincingly by the State Bar as having surrounded a member's professional misconduct and which demonstrates that a greater degree of sanction than set forth in these standards for the particular act of professional misconduct found or acknowledged is needed to adequately protect the public, courts and legal profession.

Circumstances which shall be considered aggravating are:

- **(i)** the existence of a prior record of discipline and the nature and extent of that record (see also standard 1.7);
- **(ii)** that the current misconduct found or acknowledged by the member evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct;
- **(iii)** that the member's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching, or other violations of the State Bar Act or Rules of Professional Misconduct; or if trust funds or trust property were involved, refusal or inability to account to the client or person who is the object of the misconduct for improper conduct toward said funds or property;
- **(iv)** that the member's misconduct harmed significantly a client, the public or the administration of justice;
- **(v)** that the member demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct;
- **(vi)** that the member displayed a lack of candor and cooperation to any victims of the member's misconduct or to the State Bar during disciplinary investigation or proceedings;
- **(vii) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the State Bar Court;**
- **(viii) refusal to acknowledge wrongfulness of conduct;**
- **(ix) substantial experience in the practice of law;**
- **(x) illegal conduct, including that involving the use of controlled substances; or**
- **(xi) defaulting during the State Bar Court proceeding.**

STANDARD 1.2(e)

"Mitigating circumstance" is an event or factor established clearly and convincingly by the member subject to a disciplinary proceeding as having caused or underlain the member's professional misconduct and which demonstrates that the public, courts, and legal profession would be adequately protected by a more lenient degree of sanction than set forth in these Standards for the particular act of professional misconduct found or acknowledged.

Circumstances which shall be considered mitigation are:

(i) absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious;

(ii) good faith of the member;

(iii) lack of harm to the client or person who is the object of the misconduct;

(iv) extreme emotional difficulties or physical disabilities suffered by the member at the time of the act of professional misconduct which expert testimony establishes was directly responsible for the misconduct; provided that such difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse; and further provided that the member has established through clear and convincing evidence that he or she no longer suffers from such difficulties or disabilities;

(v) spontaneous candor and cooperation displayed to the victims of the member's misconduct and to the State Bar during disciplinary investigation and proceedings;

(vi) an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct;

(vii) objective steps promptly taken by the member spontaneously demonstrating remorse, recognition of the wrongdoing found or acknowledged which steps are designed to timely atone for any consequences of the member's misconduct;

(viii) the passage of considerable time since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation;

(ix) excessive delay in conducting disciplinary proceedings, which delay is not attributable to the member and which delay prejudiced the member **followed by convincing proof of subsequent rehabilitation;**

(x) inexperience in the practice of law; or

(xi) voluntary community service which is established by the testimony of at least one independent corroborating witness or other reliable documentary evidence other than the accused attorney.

STANDARD 1.4 DEGREES OF SANCTION AVAILABLE

Subject to these standards and the rules and laws which govern attorney disciplinary proceedings conducted by the State Bar, the following sanctions are available upon a finding or acknowledgment by a member of professional misconduct:

(a) Admonition.

(b) Reproval.

(c) Suspension from the practice of law:

(i) —stayed suspension: ~~the execution of suspension may be stayed for a period of from one year to five years~~ **A member may be suspended from the practice of law for one year, two years, three years, or four years, with execution of the suspension stayed,** ~~only~~ if such stay and performance of specified rehabilitative or probationary duties by the member during the period of the stay or probation is deemed consistent with the purposes of sanctions imposed upon the member as set forth in standard 1.3;

(ii) —actual suspension: **A member may be suspended** ~~suspension~~ from the practice of law for a period of ~~not less than thirty (30) days.~~ **30 days, 60 days, 90 days, 180 days, one year, 18 months, two years, three years, or four years. A member who is suspended from the practice of law for more than 60 days must be ordered to comply with rule 9.20, California Rules of Court.** ~~Normally, actual suspensions imposed for a two (2) year or greater period shall require proof satisfactory to the State Bar Court of the member's rehabilitation, present fitness to practice and present learning and ability in the general law before the member shall be relieved of the actual suspension~~
A member who is suspended for two years or longer must be ordered to prove rehabilitation, present fitness to practice law and present learning and ability in the general law as a condition of relief from the suspension. A member who is suspended for less than two years may be required to prove rehabilitation present learning and ability in the general law as a condition of relief from the suspension;

(iii) —a stayed suspension which includes an actual suspension as a condition thereof.

(d) Disbarment.

(e) Any interim remedies or final discipline as authorized by section 6007(h), Business and Professions Code."

STANDARD 1.7 EFFECT OF PRIOR DISCIPLINE

(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~~ **must** be disbarment**, irrespective of mitigating circumstances,** ~~unless the most compelling mitigating circumstances clearly predominate~~**: if each of the following three circumstances applies:**

First, the respondent must have received two discrete prior impositions of discipline, i.e., the conduct giving rise to the second and third impositions of discipline must have occurred after discipline was imposed for the misconduct giving rise to the first and second impositions of discipline.

Second, the prior record of discipline must have been sufficiently serious. This is established when either (1) the current misconduct when taken together with the prior misconduct evidences a repetitive course of misconduct and/or indifference to disciplinary orders; or (2) the prior discipline included a period of actual suspension of one year or longer.

Third, the current misconduct must either (1) be sufficiently serious to justify the imposition of actual suspension in the absence of prior discipline or (2) involve harm to a client or the victim of the misconduct.

(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.

PROPOSED STANDARD 1.8 [DEFAULTS]

In default proceedings, disbarment shall be imposed unless the offense is so minimal in severity that imposing disbarment would be manifestly unjust and in those cases the discipline shall be at the high end of the applicable standard.

STANDARD 2.2 OFFENSES INVOLVING ENTRUSTED FUNDS OR PROPERTY

(a) Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.

(b) Culpability of a member of commingling of entrusted funds or property with personal property**,** ~~or~~ the commission of another violation of rule 4-100**(A)**, Rules of Professional Conduct **or a violation of rule 4-100(B)(1) or (B)(4)**, none of which offenses result in the wilful misappropriation of entrusted funds or property**,** shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances.

(c) Culpability of a member for violating rule 4-100(B)(2) and (B)(3) shall result in reproval or suspension.

PROPOSED STANDARD 2.3.1: OFFENSES INVOLVING SEXUAL RELATIONS WITH CLIENTS

Culpability of a member of a willful violation of rule 3-120, Rules of Professional Conduct, shall result in actual suspension or disbarment.