

AGENDA ITEM

JULY 126

Reaffirmation of Board's
commitment to the primary
purposes of State Bar
disciplinary proceedings and
sanctions

Date: June 30, 2009

To: Members of the Board Committee on Regulation,
Admission and Discipline

From: Russell G. Weiner, Interim Chief Trial Counsel

Subject: Reaffirmation of Board of Governors' commitment
to establish and monitor disciplinary policies
that support the primary purposes of the
disciplinary proceedings conducted by and
of sanctions imposed by the State Bar of
California

EXECUTIVE SUMMARY

In adopting the resolutions below, Board Committee on Regulation, Admissions and Discipline Oversight and the Board of Governors are reaffirming their commitment to the Sanction Standards, reaffirming their support for the policy of the Office of the Chief Trial Counsel to seek disciplinary sanctions consistent with the Sanction Standards, and stating their support for the California Commission on the Fair Administration of Justice's October 18, 2007 report and recommendations on reporting misconduct.

DISCUSSION: PRIMARY PURPOSES OF DISCIPLINARY PROCEEDINGS AND SANCTIONS

Under the Standards for Attorney Sanctions for Professional Misconduct ("Sanction Standards"), "[t]he primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed upon a finding or acknowledgment of a member's professional misconduct are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession." (Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.3.)

Furthermore, the Supreme Court, emphasizing these multiple purposes for the imposition of discipline, has stated repeatedly, "We begin by looking to the purpose of sanctions for attorney misconduct. 'The primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed . . . are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.'" (*In re Morse* (1995) 11 Cal.4th 184, 205. See also, *In re Silverton*

(2005) 36 Cal.4th 81, 91; *In re Brown* (1995) 12 Cal.4th 205, 217; *Garlow v. State Bar* (1982) 30 Cal.3d 912, 916.)

The Office of the Chief Trial Counsel strives to seek disciplinary sanctions consistent with the Sanction Standards adopted by the Board of Governors and approved by the Supreme Court.

***DISCUSSION: PROFESSIONAL RESPONSIBILITY AND ACCOUNTABILITY OF
PROSECUTORS AND DEFENSE LAWYERS***

On October 18, 2007, the California Commission on the Fair Administration of Justice (“CCFAJ”) issued a report and recommendations on reporting misconduct (formerly titled “Professional Responsibility and Accountability of Prosecutors and Defense Lawyers”). In that report, the CCFAJ recommended that the State Bar include in its annual report on the State Bar of California Discipline System, the number of Reportable Actions received from Courts pursuant to each of the four categories in Business and Professions Code Section 6068.7, subdivision (a). (Those four categories are (1) a final order of contempt imposed against an attorney that may involve grounds warranting discipline; (2) whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney; (3) the imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than \$1,000; and (4) the imposition of any civil penalty upon an attorney pursuant to Section 8620 of the Family Code). The CCFAJ further recommended that the State Bar specifically indicate the number of those Reportable Actions that were related to the conduct of prosecutors and defense lawyers by County and that defense lawyer data be reported to distinguish public defenders, contract defenders, appointed lawyers, and privately retained lawyers and that prosecutor data be reported to distinguish district attorneys and city attorneys.

The Office of the Chief Trial Counsel can current identify the number of Reportable Actions related to the conduct of prosecutors and defense lawyers by County and can include this information in its 2009 Discipline System Report. The Office of the Chief Trial Counsel can manually track the defense lawyer data in a way that distinguishes public lawyers from private lawyers and can include this data in its 2009 Discipline System report. The Office of the Chief Trial Counsel can also manually track the Reportable Actions received against prosecutors in a way that distinguishes district attorneys from city attorneys and that further distinguishes California attorneys general from United States attorneys general and can include this data in its 2009 Discipline System Report.

Information distinguishing public defenders from contract defenders and appointed lawyers from privately retained lawyers, however, is not regularly included in the Reportable Actions that the Office of the Chief Trial Counsel receives from the Courts. The Office of the Chief Trial Counsel will attempt to manually distinguish these attorneys and, if successful, will report the information in the 2009 Discipline System Report.

In its report, the CCFAJ also recommended changes to Canon 3D of the California Code of Judicial Ethics, which would require the Courts to report to the State Bar any egregious misconduct committed by an attorney in a criminal proceeding, and for the State Bar to include the data on the Reportable Actions received for the Courts pursuant to each of the seven categories contained in the

revised Canon 3D in the same way as the Reportable Actions received from Courts pursuant to each of the four categories in Business and Professions Code Section 6068.7, subdivision (a). (Under the revised Canon 3D, the seven categories of “egregious conduct” include but are not limited to (1) a willful misrepresentation of law or fact to a Court; (2) appearing in a judicial proceeding while intoxicated; (3) engaging in willful unlawful discrimination in a judicial proceeding; (4) willfully and in bad faith withholding or suppressing exculpatory evidence (including impeachment evidence) which he or she is constitutionally obligated to disclose; (5) willful presentation of perjured testimony; (6) willful unlawful disclosure of victim or witness information; and (7) failure to properly identify oneself in interviewing victims or witnesses.)

If Canon 3D is amended and implemented in such a way as to allow the Office of the Chief Trial Counsel to identify the number of Reportable Actions received pursuant to the amended Canon 3D related to the conduct of prosecutors and defense lawyers by County, it will include this information in its 2009 Discipline System Report. If Canon 3D amended and implemented in such a way as to allow the Office of the Chief Trial Counsel to track the Reportable Actions received pursuant to the amended Canon 3D related to the conduct of defense lawyers and in such a way as to allow the Office of the Chief Trial Counsel to distinguish public defense lawyers from private defense lawyers, public defenders from contract defenders, and court-appointed lawyers from privately retained lawyers, the Office of the Chief Trial Counsel will include this data in its 2009 Discipline System report. If Canon 3D is amended and implemented in such a way as to allow the Office of the Chief Trial Counsel to track the Reportable Actions received pursuant to the amended Canon 3D related to the conduct of prosecutors and in such a way as to allow the Office of the Chief Trial Counsel to distinguish district attorneys from city attorneys and California attorneys general from United States attorneys general, the Office of the Chief Trial Counsel will include this data in its 2009 Discipline System report.

PROPOSED BOARD COMMITTEE RESOLUTION

In adopting the resolutions below, Board Committee on Regulation, Admissions and Discipline Oversight is recommending that the Board of Governors reaffirm its commitment to the Sanction Standards, reaffirm its support for the policy of the Office of the Chief Trial Counsel to seek disciplinary sanctions consistent with the Sanction Standards, and state its support for the California Commission on the Fair Administration of Justice’s October 18, 2007 report and recommendations on reporting misconduct.

RESOLVED, the Board Committee on Regulation, Admissions and Discipline Oversight, hereby recommends to the Board of Governors that it reaffirm its commitment to establishing and monitoring disciplinary policies that support the primary purposes of the disciplinary proceedings conducted by and of the sanctions imposed by the State Bar of California, specifically, the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.

RESOLVED, the Board Committee on Regulation, Admissions and Discipline Oversight, hereby recommends to the Board of Governors that

it reaffirm its support of the Office of the Chief Trial Counsel's policy to seek disciplinary sanctions consistent with the Standards for Attorney Sanctions for Professional Misconduct as adopted by the Board of Governors and approved by the Supreme Court.

RESOLVED, the Board Committee on Regulation, Admissions and Discipline Oversight, hereby recommends to the Board of Governors that it direct State Bar staff to identify the number of Reportable Actions related to the conduct of prosecutors and defense lawyers that it receives, and annually report this data by County and in a manner that distinguishes those Reportable Actions received against public defense attorneys, private defense attorneys, district attorneys, city attorneys, California attorneys general and United States attorneys general.

RESOLVED, the Board Committee on Regulation, Admissions and Discipline Oversight, hereby recommends to the Board of Governors that it direct State Bar staff to determine whether, of those Reportable Actions related to the conduct of defense lawyers, it can distinguish between those Reportable Actions received against public defenders from contract defenders and those Reportable Actions received against appointed lawyers from privately retained lawyers and, if so, to annually report this data by County and in a manner that distinguishes those Reportable Actions.

RESOLVED, the Board Committee on Regulation, Admissions and Discipline Oversight, hereby recommends to the Board of Governors that it recommend to the Judicial Council that it amend Canon 3D of the California Code of Judicial Ethics in a manner consistent with the recommendation of the California Commission on the Fair Administration of Justice in its October 18, 2007 report and recommendations on reporting misconduct and in a manner that would allow the Office of the Chief Trial Counsel to: (1) identify the number of Reportable Actions received pursuant to each of the seven categories in the amended Canon 3D related to the conduct of prosecutors and defense lawyers by County; (2) track the Reportable Actions received pursuant each of the seven categories in the amended Canon 3D related to the conduct of defense lawyers in a way that distinguishes public defense lawyers from private defense lawyers, that distinguishes public defenders from contract defenders and that distinguishes court appointed lawyers from privately retained lawyers; (3) track the Reportable Actions received pursuant each of the seven categories in the amended Canon 3D related to the conduct of prosecutors in a way that distinguishes district attorneys from city attorneys and that distinguishes California attorneys general from United States attorneys general.

This item is on the Board Committee on Regulation, Admissions and Discipline Oversight's agenda for its scheduled meeting on Thursday, July 16, 2009. The Committee's recommendation will be reported to you at your meeting on Friday, July 17, 2009.

PROPOSED BOARD RESOLUTION

RESOLVED, the Board of Governors reaffirms its commitment to establishing and monitoring disciplinary policies that support the primary purposes of the disciplinary proceedings conducted by and of the sanctions imposed by the State Bar of California, specifically, the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.

RESOLVED, the Board of Governors reaffirms its support of the Office of the Chief Trial Counsel's policy to seek disciplinary sanctions consistent with the Standards for Attorney Sanctions for Professional Misconduct as adopted by the Board of Governors and approved by the Supreme Court.

RESOLVED, the Board of Governors directs State Bar staff to identify the number of Reportable Actions related to the conduct of prosecutors and defense lawyers that it receives, and annually report this data by County and in a manner that distinguishes those Reportable Actions received against public defense attorneys, private defense attorneys, district attorneys, city attorneys, California attorneys general and United States attorneys general.

RESOLVED, the Board of Governors directs State Bar staff to determine whether, of those Reportable Actions related to the conduct of defense lawyers, it can distinguish between those Reportable Actions received against public defenders from contract defenders and those Reportable Actions received against appointed lawyers from privately retained lawyers and, if so, to annually report this data by County and in a manner that distinguishes those Reportable Actions.

RESOLVED, the Board of Governors recommends to the Judicial Counsel that it amend Canon 3D of the California Code of Judicial Ethics in a manner consistent with the recommendation of the California Commission on the Fair Administration of Justice in its October 18, 2007 report and recommendations on reporting misconduct and in a manner that would allow the Office of the Chief Trial Counsel to: (1) identify the number of Reportable Actions received pursuant to each of the seven

categories in the amended Canon 3D related to the conduct of prosecutors and defense lawyers by County; (2) track the Reportable Actions received pursuant each of the seven categories in the amended Canon 3D related to the conduct of defense lawyers in a way that distinguishes public defense lawyers from private defense lawyers, that distinguishes public defenders from contract defenders and that distinguishes court appointed lawyers from privately retained lawyers; (3) track the Reportable Actions received pursuant each of the seven categories in the amended Canon 3D related to the conduct of prosecutors in a way that distinguishes district attorneys from city attorneys and that distinguishes California attorneys general from United States attorneys general.