PUBLIC COMMENTS ON PROPOSED NEW RULE 216.5
AND PROPOSED AMENDMENT TO RULE 803
RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA

From: David Matt [lodlm1248@gmail.com]
Sent: Sunday, July 05, 2009 2:48 PM
To: Berrio, Itzel
Subject: Proposed New Rule 216.5 and Proposed Amendment to Rule 803, Rules of Procedure re Victim Statements

This is a good proposal, one the Bar should support.

David L. Matt
SBN 101 826

From: Robert [rbkjd@hotmail.com]
Sent: Thursday, July 23, 2009 5:37 PM
To: Berrio, Itzel
Subject: proposal re unsworn victim statements

I do not handle State Bar cases, and have never faced charges. However, while it may be appropriate for victims to have opportunity to address the court to explain the damage suffered by them as a result of the misconduct, I dont think unsworn, written statement is fair. They should be allowed to appear and testify subject to cross exam, or at a minimum, swear under penalty of perjury, what they claim in writing. Any such sworn statements should be reqd to be served on the Respondent at least 30 days before the hearing, so time would be available to gather evidence etc, to controvert anything said.

I think the Bar court needs to especailly comport itself with fairness and due process, given its status in the legal field.

Robert

From: Jonathan Stein [jonathan@jonathangstein.com]
Sent: Thursday, July 23, 2009 7:32 PM
To: Berrio, Itzel
Subject: Proposed New Rule 216.5 and Proposed Amendment to Rule 803, Rules of Procedure re Victim Statements

Dear Itzel Berrio:

I write in opposition to this new proposed rule. Allowing unsworn testimony without the ability to cross examine undermines the fundamental principle of our legal system. I think this proposed rule and amendment need to not be supported.

Sincerely,

Jonathan

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July 23, 2009

Itzel D. Berrio
Office of the Chief Trial Counsel
The State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Public Comment by the Association of Disciplinary Defense Counsel:
Proposed New Rule 216.5 and Proposed Amendment to Rule 803

Dear Ms. Berrio:

The Association of Disciplinary Defense Counsel opposes the proposal by the Office of the Chief Trial Counsel ("OCTC") and the Board of Governors Committee on Regulation, Admission and Discipline Oversight ("RAD Committee") to add Rule 216.5 to the Rules of Procedure of the State Bar and to modify Rule 803. The proposed modifications would allow OCTC to submit written victim statements in lieu of live testimony in order to show harm to the victim for the purpose of determining aggravation during the level of discipline phase of State Bar Court trials. We oppose these modifications to the Rules of Procedure because they are unnecessary and inconsistent with the rights of respondent attorneys. The reasons for our opposition are set forth below.

I. The proposal violates the rights of respondent attorneys.

These modifications would interfere with a respondent attorney's right to defend himself. *In re Ruffalo*, 390 U.S. 544 (1968), guarantees procedural due process to attorneys in disciplinary proceedings because such proceedings are quasi-criminal in nature. While procedural due process in disciplinary proceedings may not be coextensive with procedural due process in criminal cases, it certainly extends to the attorney's right to cross-examine witnesses against him. Eliminating the right to cross-examination is not would not be permissible even in a civil case (*Dole Bakersfield v. Workers Compensation Appeals Board* 64 Cal. App. 4th 1273, 1277 (1998)), where procedural protections for the defendant are substantially lower than in quasi-criminal disciplinary proceedings.

Section 6085(d) of the Business & Professions Code expressly gives the respondent the right "[t]o examine and cross-examine witnesses." Section 6049(c) of the Business & Professions Code provides that all parties in a disciplinary hearing have a right to produce witnesses by subpoena. This proposed rule is an attempt to create an exception to those statutes.

We do not believe that the State Bar can create a rule of procedure that contradicts the provisions of the State Bar Act.

Further, allowing OCTC to put on victim testimony by written statements would raise serious questions about the reliability of factual findings made by the State Bar Court. The proposed victim statements would be hearsay, currently inadmissible in State Bar Court under the Evidence Code. "Hearsay evidence is inadmissible because it is considered too unreliable for the trier of fact to use to prove or disprove disputed issues of fact. . . . The lack of trustworthiness of hearsay evidence comes from the fact that veracity and accuracy cannot be tested through (a) the presence of the declarant under oath, where the *current* trier of fact can observe the declarant's demeanor, or (b) cross-examination of the declarant by the adverse party." Bernard S. Jefferson, *Jefferson's California Evidence Benchbook* (4th ed. 2009), §1.6. There is nothing special about alleged victims of attorney misconduct that makes their hearsay any more reliable than any other witness. This is especially true because the alleged victim is often the person who filed the complaint against the attorney in the first instance.

The Review Department of the State Bar Court has recognized the importance of subjecting level of discipline evidence to the same standards as any other evidence in a disciplinary trial. In *Matter of Burns*, the Review Department rejected character evidence presented by the respondent in the form of written declarations. The court explained that "[c]haracter evidence is important on the issue of the degree of discipline, and the credibility of the witnesses *should be weighed the same as any other witness*." 3 Cal. State Bar Ct. Rptr. 406, 411-12 (Rev. Dep't 1995) (emphasis added). OCTC now asks the Board of Governors to create a special exception for level of discipline evidence that will be used against respondent attorneys. But, just like character evidence, there is no reason that evidence of harm to victims should not be "weighed the same" as any other evidence.

In addition, allowing such inadmissible hearsay testimony risks infecting not just the level of discipline phase of the trial; it could infect the entire trial. Proposed Rule 216.5(b) allows the written victim statements only after a finding of culpability has been made. However, in practice, the Hearing Department often hears level of discipline evidence either concurrent with the culpability evidence, or at the conclusion of the culpability phase of the trial, but before actually making a culpability finding. Thus, there is a material risk that these unreliable victim statements, which are not subject to cross-examination, will infect the entire trial, resulting in more appeals and more reversals.

We recognize that the proposal attempts to address these issues by allowing the court, upon the showing of good cause by respondent attorney, to require OCTC to produce the witness at trial. As discussed above, there is virtually always good cause to allow cross-examination of a witness called by OCTC.[1] Requiring a motion before OCTC must produce the witness will

[1]Perhaps, if the respondent attorney admits that the victim was harmed, there might not be good cause for cross-examination. But in those situations, the witness's testimony will either be (continued . . .)

increase the amount of motion practice before the Hearing Department, take up valuable court time and slow down the trial process. And, if the Hearing Department properly acknowledges the attorney's right to cross-examine witnesses against him, this exception will subsume the rule.

But, the more serious risk is that the Hearing Department will not allow attorneys to cross-examine witnesses against them. If the Hearing Department does not allow respondent attorneys to cross-examine the witnesses against them, the rights of respondent attorneys will be prejudiced. The fact that, upon a showing of good cause, Rule 216.5 permits, *but does not require*, the court to order production of the witness magnifies this risk. The prejudice would in most cases be irremediable, because once there are findings by the Hearing Department, they carry great weight.

But, this proposal would also lead to more appeals to both the Review Department and the Supreme Court, because respondent attorneys would seek to challenge the denial of their right to cross-examine witnesses against them. Section 6083(c) of the Business & Professions Code permits a petition for Supreme Court review where the State Bar Court action is "erroneous or unlawful." If this proposed rule is implemented, it will certainly create a class of challenges based on the action of the State Bar Court being "unlawful." These additional appeals would further bog down the disciplinary system.

In short, the State Bar should not seek to diminish the procedural due process rights of respondent attorneys to confront and cross-examine witnesses against them, nor should it depart from centuries of hearsay jurisprudence emphasizing the unreliability of out-of-court statements.

II. The proposal is a solution in search of a problem.

The proposed modifications to the Rules of Procedure seek to solve a problem that does not exist. While OCTC's desire to protect victims of attorney misconduct is commendable, there is no evidence that victims (and alleged victims) of misconduct suffer any hardship by appearing as witnesses against an attorney. If the State Bar is going to make such a drastic change to the Rules of Procedure, one that ignores centuries of due process and hearsay case law, there ought to be substantial empirical evidence that the new rules solve a real and significant problem. As it stands now, it does not appear that the OCTC or the RAD Committee have done *any* empirical research on the hardship suffered by alleged victims who are required to attend trial.

Further, even without this rule, in cases where the victim's testimony is uncontested, the victim's in-court testimony should be unnecessary for one of three reasons. First, if the testimony is uncontested, and OCTC drafted the Notice of Disciplinary Charges to give the

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(. . . continued)
rendered irrelevant by an admission in the respondent's answer, by a fact stipulation between respondent and OCTC covering the admitted harm to the victim, or by a stipulation allowing the victim to testify by written statement.

respondent attorney proper notice of the charges against him, the respondent attorney will have already admitted in his or her answer that the conduct harmed the victim. Second, if the attorney does not contest OCTC's claim of victim harm, the pre-trial stipulation of facts should include findings concerning the harm to victims. Third, if the attorney does not have good cause to cross-examine the victim, nothing prevents the parties from stipulating to the admissibility of a written victim statement.

III. The proposal is inappropriately one-sided in favor of OCTC.

Even if the Board of Governors adopts a victim statement proposal, it should not adopt this proposal in its current form. As written, the proposal allows OCTC to put into evidence a written statement of a person who "has been harmed by conduct" of an attorney. It is not uncommon, however, for OCTC to prosecute an attorney *despite the fact that the clients were not harmed.* Yet, this proposal does not permit a respondent attorney to submit a written statement from an *alleged victim* stating that they were in fact *not harmed* by the attorney's conduct. There is absolutely no reason to distinguish between written statements by victims who claim to have been harmed by an attorney's conduct and written statements by alleged victims who claim not to have been harmed by an attorney's conduct.

IV. The proposal creates ambiguities that will complicate pretrial procedure.

The proposed rule creates ambiguities as to whether OCTC must list in its pretrial statement the witnesses whose testimony will be presented by way of a victim statement. Under Rule 1223(g) of the Rules of Practice, OCTC's pretrial statement must list "all witnesses likely to be called." If OCTC took the position such witnesses did not need to be listed, then respondent attorneys would not only be robbed of their due process right to cross-examine witnesses, but would also be robbed of the opportunity to depose the witness and be prepared at trial to rebut such hearsay statements.

If the Board of Governors adopts this proposal, the proposed rule should be modified to clarify that any such witness must be identified in the pretrial statement, that the pretrial statement must indicate whether OCTC intends to present the witness's testimony through a written victim statement and that a respondent attorney may impeach the written victim statements with deposition testimony.

V. The proposal will derail the Alternative Discipline Program process.

The Alternative Discipline Program ("ADP") is designed to help attorneys who have substance abuse or mental health problems. An attorney may be admitted into the ADP if he or she submits a stipulation of facts and law, and certain other conditions are met. For example, the judge must conclude that the current charges against the attorney do not amount to moral turpitude, dishonesty or corruption that has resulted in significant harm. The victim statement proposal will add a new paragraph (b) to Rule 803, which will allow a person who has been

harmed by the stipulated conduct to submit a written statement stetting forth the nature and extent of the harm.[2]

In addition to the due process and reliability issues already discussed, several other problems arise in the ADP context. Under this proposal, the victim statement will be submitted to the court along with, or after, the stipulation. Any attorney who wishes to enter the ADP will be required to stipulate to culpability without knowing whether the Bar will also submit a victim statement that either contradicts the stipulation or which supports a finding of moral turpitude or significant harm. Respondent attorneys would be forced to play a kind of Russian Roulette with their ADP applications, stipulating to culpability while not knowing what evidence will be used against them in determining whether or not they are eligible for the ADP. Therefore, it will be nearly impossible for a respondent attorney who is interested in entering the ADP to evaluate the risk of the court concluding that he or she is not eligible. As a result, many respondent attorneys may choose to litigate their cases rather than gamble with the ADP program. Not only does this clog up the Bar Court with cases that would otherwise be resolved by stipulation, it also discourages attorneys with substance abuse or mental health problems from seeking help.

Furthermore, a respondent attorney will have no opportunity to rebut the charges made in the victim statement. In the trial context, the attorney at least has the opportunity to put on his or her own evidence that contradicts the witness statement, and can request that the court order the victim to appear. In the ADP context, the attorney would have *no opportunity* to rebut the witness statement in any manner. There is, therefore, no way for the attorney, or the court, to test the credibility of the victim statement. The risk of an angry victim exaggerating, or simply being dishonest, is too great to allow such statements with no opportunity for rebuttal. Such a policy would only reduce the reliability of the Bar Court's decisions.

VI. The Proposal will jeopardize reciprocal discipline in all other jurisdictions.

Most state and federal jurisdictions have reciprocal discipline provisions that are similar to California's. One basis on which to refuse reciprocal discipline is the absence of due process. Every jurisdiction in the United States considers the absence of the right to cross-examination to be an example of lack of due process. *See, e.g., Kaur v. Holder*, 561 F.3d 957 (9th Cir. 2009) (Noonan, J., concurring) ("To conclude that a process is fundamentally fair in which cross-examination is precluded is to say a circle is a square"). As shown above, California case law deems the right of cross-examination to be fundamental to the right of due process. In the

[2]It is unclear what happens to existing paragraphs (b) and (c) of Rule 803 under this proposal. The proposed revision submitted for public comment does not include existing paragraphs (b) and (c) in the new Rule 803. However, the proposed rule also does not show the deletion of these paragraphs using strikethrough text. Because the proposal does not indicate that these sections have been removed, we assume that they will remain part of Rule 803, and are to be renumbered as paragraphs (c) and (d). If this assumption is incorrect, this proposal should be resubmitted for public comment with accurate and complete information concerning the scope of the proposal, and an explanation of why existing paragraphs (b) and (c) are being deleted.

absence of that right, any discipline imposed by California will have little or no recognition in the rest of the country.

Conclusion

We fully support the State Bar's mission to protect the public, the courts and the legal profession; to maintain high professional standards by attorneys; and to preserve public confidence in the legal profession. We object to this proposal because we believe it undermines rather than promotes the Bar's mission.

There is no empirical evidence supporting a conclusion that the right to cross-examine a witness during a disciplinary trial interferes with (rather than promotes) the State Bar's mission. To the contrary, centuries of precedent establishing the importance of due process and the unreliability of hearsay evidence support a conclusion that protection of the public, the courts and the legal profession would be seriously undermined by adoption of this proposal.

We ask the Board of Governors to recognize that fundamental fairness in the disciplinary process is critical to fulfillment of the State Bar's mission. In recognition of those values, we conclude by asking the Board of Governors to reject this effort to eliminate from State Bar disciplinary proceedings basic and well-recognized legal protections afforded by due process and the hearsay rule.

Very truly yours,

Noah Rosenthal

Noah S. Rosenthal, on behalf of the
Association of Disciplinary Defense Counsel

cc: ADDC Executive Committee

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July 24, 2009

Itzel D. Berrio
Office of the Chief Trial Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105

VIA FAX (415-538-2214) and US MAIL

RE: Amendments/Adoption of Rules 105, 216.5, & 803,
State Bar Rules of Procedure

Dear Ms. Berrio:

The Orange County Bar Association (OCBA) has reviewed the proposed amendments to the Rules of Procedure and makes the following comments:

Proposed Amendment to Rule 105 (Motions) - The proposed amendment would authorize the use of replies in support of a motion and would lower the time for filing any opposition from ten (10) to seven (7) calendar days. Any reply would have to be filed and served within three (3) days from service of the opposition. While the OCBA is in favor of the proposal to add replies to the list of authorized papers, we are not in favor of reducing the time for filing/serving opposition papers. Instead we recommend that the time for filing/serving opposition remain the same as currently set at ten (10) days. It seems unfair to reduce the time for opposition papers while at the same time giving the moving party extra time to file a reply. Since the opposing side only gets one chance at arguing their position we believe that fairness requires that they be given the same time as currently allotted for the full 10 days from service. We do not believe the additional times allowed by this amendment in total will significantly delay any trial/hearing proceedings.

Proposed New Rule 216.5 (Victim's Declaration) - The OCBA is in favor of adopting standards for use of victim's statements in disciplinary proceedings. However, we recommend that (a) the title of this Rule be changed to "Victim Impact Statement" to coincide with the terminology used in criminal proceedings and to clarify that formal "declarations" are not being required; and (b) the last sentence be changed to provide that upon a finding of good cause the Court "shall" require the Office of the Chief Trial Counsel to produce the victim(s) at the mitigation/aggravation phase of the hearing for purposes of cross-examination. This latter change appears necessary in order to comply with due process requirements and prevent a trial Judge from denying a request for cross after the respondent has already satisfied the "good cause" requirement. As written, the last sentence only presents an illusory right to cross-examination.

Proposed Amendment to Rule 803 (Disposition; Deferral of Imposition - Alternative Disposition Program) - The OCBA is in favor of this amendment which would add procedures for submission of written statements by victims in these proceedings after entry of stipulations as to wrongful conduct. Since no evidentiary hearings take place in these stipulated & expedited proceedings then no cross-examination issues necessarily are involved.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Michael G. Yoder
2009 President

July 27, 2009

Board of Governors of the State Bar of California
180 Howard St.
San Francisco, CA 94105

Attn: Itzel Berrio

Opposition to Proposed New Rule 216.5 and
Opposition to Proposed Amendment to Rule 803

Dear Ms. Berrio:

I believe that the proposed new rules 216.5 and 803 violate holdings in *Conway v State Bar* (1989) 47 Cal 3rd 1107 and *Willner v Committee on Character* (1963) 373 U S 96, along with express provisions of Bus & Prof 6085(d) and Bus & Prof 6049(c). Therefore, the proposal should be defeated.

The California Supreme Court stated in *Conway v State Bar* (1989) 47 Cal 3rd 1107, 1118, that hearsay can be used in State Bar disciplinary cases if authorized by statute. There is no authorizing statute to support these proposed rules. The Board of Governors cannot overrule *Conway* with a Rule of Procedure.

To the contrary, Bus & Prof 6085(d) expressly gives the respondent the right, "To examine and cross-examine witnesses." The Board of Governors cannot overrule a provision of the State Bar Act with a Rule of Procedure.

Furthermore, Bus & Prof 6049(c) provides that all parties in a disciplinary hearing have a right to produce witnesses by subpoena. The proposed rules purport to take away from respondents, the right to call a complainant to testify. Once again, The Board cannot overrule a provision of the State Bar Act with a Rule of Procedure.

Conway permitted an inactive enrollment procedure that used sworn declarations without cross examinations. But *Conway* reasoned that an absence of cross examination in a temporary inactive enrollment under Bus & Prof 6007, did not violate due process, since cross examination would be available in the main discipline case. *Conway* also noted that the Respondent had an opportunity to respond to the declarations in the inactive enrollment case. The proposed rule would violate both of those principles. The Board does not have authority to overrule a published Supreme Court case with a Rule of Procedure.

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In *Willner v Committee on Character* (1963) 373 U S 96, 103 -104, the U S Supreme Court stated that procedural due process would require the right of cross examination in a case that result in loss of an attorney's license. *Willner* applied that right to an admissions case in the State of New York. There is thus a federal right to cross examination in a state disbarment case. The Board of Governors cannot overrule a United States Supreme Court case with a Rule of Procedure.

In addition to being contrary to the law, these proposed rules denigrate the three stated purposes of attorney discipline

• **protection of the public, the courts and the legal profession.** Nobody is protected when attorneys can be prosecuted on a lower standard of evidence than all other legal proceedings. There is no public protection when a person with an axe to grind is asked to speak negatively against a respondent. The writer knows that there will be no cross examination. The writer knows that there are no consequences for lying. Thus, this proposal invites lies, half truths, and spiteful statements in lieu of admissible evidence.

• **maintenance of high professional standards by attorneys.** In all other cases, attorneys cannot use hearsay or unsworn statements as evidence. High professional standards are eroded if the system permits a lower level of evidence in attorney disciplinary cases.

• **preservation of public confidence in the legal profession.** There are probably people who favor short cuts when an attorney is the target of discipline. But the true message of these proposals is that attorneys believe they are not subject to the same rules as everyone else. Thus, in the long run, these proposals reduce public confidence in the profession.

These proposals would erode the legitimacy of the discipline system. They are poor public policy. I believe they are illegal too. They should be defeated.

Very truly yours,

Jerome Fishkin
(e-mail signature)

JEROME FISHKIN

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July 28, 2009

Itzel D. Berrio
Office of the Chief Trial Counsel
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180 Howard Street
San Francisco, CA 94105

Re: Proposed Addition of Rule 216.5 and Amendment to Rule 803 of the Rules of Procedure of the State Bar of California

Dear Members of the RAD Committee:

We write in opposition to this proposal, which overturns years of disciplinary jurisprudence established by the Supreme Court requiring a minimum levels of due process in connection with proceedings to discipline an attorney.[1]

The right to practice law is a valuable property right that cannot be revoked in an unfair manner absent due process.[2] The right to practice law is sufficiently valuable as to require the full "panoply of legal protection."[3]

Inherent in Anglo American Jurisprudential law is the right of cross examination. Allowing untested and self-serving hearsay evidence into disciplinary proceedings, via victims statements, is without precedent in State Bar disciplinary proceedings although hearsay is admissible in Rule X admission proceedings, since it occurs before the attorney is vested with a license.

According to the proposal, these suspect victims statements are limited to ADP proceedings, but they can be admitted **in any proceeding**. These statements are not under penalty of perjury. In contrast, when a witness testifies in a State Bar proceeding, they are sworn to tell the truth. This proposal lacks any safeguards to verify that the proposed victim's statements are minimally truthful.

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[1] *In Re Ruffalo* (1968) 390 U.S. 544.

[2] *Emslie v. State Bar* (1974) 11 Cal. 3d 210.

[3] *Giddens v. State Bar* (1981) 28 Cal.3d 730, 170 Cal. Rptr. 812, 621 P.2d 851; *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 64 Cal. Rptr. 785.

Consequently, the proposal is contrary to expressed legislative intent designed to guarantee that complaining parties at the State Bar are truthful. In 1990, the legislature enacted Business and Professions Code § 6043.5, which maintains that the filing of a false and malicious complaint at the State Bar constitutes a misdemeanor. It was enacted to prevent false complaints against lawyers, and demonstrates that the legislature is concerned with truthful complaints, as opposed to hearsay statements. To allow unsworn statements would be contrary to the goals of Business and Professions Code § 6043.5.

The admission of untested statements is also redundant. Judges at the State Bar Court already consider harm to a victim in the determination of culpability under express procedural rules of the State Bar Court. However, attorneys are permitted the constitutional right of cross examination in such proceedings. We do not see how victim statements enhance the system, aid in the determination of truth, or assist in the resolution of issues.

Sincerely yours,

James I. Ham
Chair, Los Angeles County
Bar Association Committee on
Professional Responsibility and
Conduct

STATE BAR COURT OF CALIFORNIA
180 HOWARD STREET, 6th FLOOR, SAN FRANCISCO, CA 94105

COLIN P. WONG
Chief Administrative Officer
(415) 538-2233

September 1, 2009

Itzel D. Berrio
Office of the Chief Trial Counsel
180 Howard Street
San Francisco, California 94105

Re: Proposed New Rule 216.5 and Proposed Amendment to Rule 803, Rules of Procedure re Victim Statements

The State Bar Court appreciates the opportunity to respond to the proposed new Rules of Procedure of the State Bar, rules 216.5 and 803(b), regarding the submission of a victim's written statement during the mitigation/aggravation phase of a disciplinary proceeding. We do not question the significance of allowing a party injured by an attorney's misconduct to testify about any harm suffered. However, we are concerned that the proposal would conflict with the existing burden of proof in disciplinary proceedings and unintentionally restrict judicial discretion. In order to prevent any potential negative impact on the discipline system, we believe that the proposed amendments to the rules are unnecessary, and as currently drafted should not be adopted.

The nature and extent of harm suffered by the victim of an attorney's misconduct is one of the recognized aggravating factors to be considered in determining the appropriate degree of discipline to be imposed. (Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(iv).) In a significant number of cases, the victim of an attorney's misconduct is called to testify as a complaining witness at trial. Once on the stand, the victim is provided the opportunity to testify as to the harm, if any, he or she has suffered. Requiring a victim's live testimony during a contested trial provides: 1) the opportunity for cross-examination by the adverse party, and (2) a credibility determination by the judge. In those rare cases where these factors are not at issue, the parties can agree to submit evidence of harm by a victim's declaration signed under penalty of perjury.

Although the State Bar Court is unaware of any problems with the existing procedure we are concerned that the proposed amendments conflict with the existing burden of proof. Existing law provides that harm, like all aggravating and mitigating factors, must be shown by clear and convincing evidence to be considered. (Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b) and (e); see *In re Morse* (1995) 11 Cal.4th 184, 206.) Despite this well-established burden of proof, the proposal provides that the judge "must consider" a victim's written statement. As drafted, the proposal appears to require a judge to give weight to a statement of harm even if the harm has not been established by clear and convincing evidence. Since consideration of a factor in

aggravation that has not been sufficiently proven would be inconsistent with existing standards and Supreme Court case law, the proposal may create unnecessary confusion.

We are also concerned that the proposal attempts to limit or remove judicial discretion by mandating the admissibility and consideration of evidence. The judges should be permitted to make appropriate rulings based on the evidence before them, including credibility, relevance and ultimately admissibility. At a minimum, the court believes that the language in the proposal that the statement "must be admitted" should be replaced with the discretionary "may be admitted." This modification would allow judges to continue to control the proceedings while setting forth a clear directive that, in most cases, these statements should be admitted.

In sum, since the issues surrounding aggravating and mitigating factors are clearly established by existing standards and Supreme Court case law, the court questions the appropriateness of adding a different standard for one factor in the Rules of Procedure of the State Bar.

Respectfully submitted,

Colin P. Wong