AGENDA ITEM

JULY 121 - Proposed Amendments to the Standards for Attorney Sanctions for Professional Misconduct – Request for Adoption Following Public Comment

DATE: July 2, 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 Adoption Following Public Comment

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EXECUTIVE SUMMARY

At its May 13, 2010 meeting, the Board Committee on Discipline Oversight ("DOC Committee"), voted to release revisions to the Standards for Attorney Sanctions for Professional Misconduct as proposed by the Office of The Chief Trial Counsel for public comment. The revisions of the Office of The Chief Trial Counsel 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. The proposed amendments are set forth in Exhibit A, with deleted text in strikethrough font and added text in bold font.

The DOC Committee released the proposed revisions for a 60-day public comment, which means public comments may arrive as late as July 15, 2010. To date, the Office of the Chief Trial Counsel has only received one set of public comments, which are attached as Exhibit B. The Office of the Chief Trial Counsel has responded to those comments below, as well as other concerns raised by the DOC Committee at its May 13 meeting.

Should the Office of the Chief Trial Counsel receive additional comments, the office will provide the DOC Committee and the Board of Governors with a supplemental agenda item with a copy of the additional comments attached.

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 are considered by many to 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 opinion, 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. The Office of the Chief Trial Counsel's proposed changes are detailed in Exhibit A.

PUBLIC COMMENT

As of the date of this agenda item, the State Bar has received only one set of public comments. These public comments were submitted by Pansky Markle Ham LLP and were joined by the Law Office of Jonathan Arons; Jerome Fishkin, Esq. of FishkinSlatter LLP; discipline defense attorney Howard Melamed; former State Bar Court Judge and former member of the Association of Discipline Defense Counsel Joanne Robbins; the Law Office of Zachary D. Wechsler; and the Association of Discipline Defense Counsel. Please find a copy of the comments attached as Exhibit B.

A. Procedural Objections.

In the public comments that were submitted by Pansky Markle Ham LLP, James Ham argues that consideration of the proposal should be delayed, first, to allow the new Chief Trial Counsel (OCTC) to express his opinion, second, to await the deliberations of the American Bar Association and, third, to allow for the formation and report of a committee.

OCTC believes that these revisions should go forward without significant delay because they will be helpful in resolving cases in our backlog. In two instances, the proposals would *reduce* the level of discipline required by the standards and thereby harmonize the standards with

case law. After adoption of the revisions, OCTC would be able to enter certain lower-level settlements without violating the requirements of the standards.

With respect to the new Chief Trial Counsel, Mr. Towery has indicated his approval of this item and his agreement that it be considered at the upcoming board meeting. Please find attached as Exhibit C a copy of Mr. Towery's June 30, 2010 letter to William Hebert, Chair of the Board Committee on Discipline Oversight, in which Mr. Towery indicates his position that delaying the adoption of this proposal is unnecessary.

Mr. Ham also argues that this is a one-sided proposal by OCTC. But, as noted above, OCTC has proposed several changes that will make the standards more lenient, i.e., by adding two new mitigating factors and by loosening both the standard governing the imposition of sanctions on attorneys with two prior records of discipline and the standard governing trust account violations.

B. Comments concerning Specific Proposals.

Mr. Ham's letter only specifically addresses about half of the proposals. He states that time constraints made him unable to set forth all of his concerns. Presumably, Mr. Ham has addressed the proposals that he finds the most objectionable.

1. Bad Faith Obstruction of Disciplinary Proceedings.

Mr. Ham argues that this proposed aggravating factor duplicates the existing aggravating factor for failing to cooperate. In fact, the proposed standard differentiates between two discrete types of aggravating conduct that have long been recognized in the law ─ one type involving active conduct, the other passive. Thus, an attorney can engage in "bad faith obstruction" of State Bar proceedings by actively filing repeated frivolous motions or making false or abusive statements (e.g., *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 189 (abuse of discovery and frivolous motions); *Weber v. State Bar* (1988) 47 Cal.3d 492 (patently frivolous lawsuit against State Bar demonstrated contemptuous attitude toward disciplinary proceedings)). In contrast, an attorney can "fail to cooperate" by ignoring the State Bar proceedings or failing to follow procedures or orders, or failing to respond to discovery requests (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507 (failure to appear at State Bar trial demonstrates a contemptuous attitude toward disciplinary proceedings)).

In short, this proposal does not create a new aggravating circumstance, but instead more carefully spells out the types of misconduct that can be found in aggravation. OCTC believes that this clarifying amendment will provide guidance to the parties and the Court, and will place respondents on notice that obstructionist tactics may be deemed aggravating.

2. Refusal to Recognize Wrongfulness of Conduct.

In the second paragraph of his argument, Mr. Ham admits that lack of insight and remorse is an established aggravating circumstance under the law. However, he argues that this

factor is already covered by Standard 1.2(b)(v)—"indifference to rectification or atonement for consequences of misconduct."

Again, the proposal is not intended to create a new aggravating factor, but instead to provide guidance in distinguishing between two types of conduct that have long been deemed aggravating. Thus, a respondent generally shows "indifference to rectification or atonement" by failing to take concrete steps outside of the State Bar Court (e.g., failing to repay stolen money or return client files, etc). In contrast, a respondent's refusal to recognize the wrongfulness of his or her conduct is generally shown by opinions expressed, usually at the disciplinary hearing.

Citing no examples, Mr. Ham also claims that the "refusal to recognize wrongfulness" standard is subject to prosecutorial abuse. He argues, and we agree, that respondents should be free to present non-frivolous arguments to the State Bar Court. However, as the case law shows, the State Bar Court only applies this aggravating circumstance when the respondent's argument is made in objective bad faith. For example, in the context of an attorney who engaged in false advertising, the Supreme Court has said:

> [Respondent Morse] was requested by the Attorney General and a district attorney to stop misleading the public. He refused, forcing the authorities to obtain an injunction. (This itself required an expenditure of public funds.) He was ordered to pay a total of $800,000 in penalties and restitution. He appealed. He lost. He sought our review. He did not get it. He went to the United States Supreme Court. He was turned away. He also sued those seeking to protect the public. He lost that case as well. He appealed again. He lost again. He was ordered to pay several thousands of dollars in sanctions. Even now, he continues to assert that he should not be disciplined. *Of course, Morse, like any attorney accused of misconduct, had the right to defend himself vigorously.* Morse's conduct, however, reflects a seeming unwillingness even to consider the appropriateness of his statutory interpretation or to acknowledge that at some point his position was meritless or even wrong to any extent. Put simply, Morse went beyond tenacity to truculence.
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> (*In re Morse* (1995) 11 Cal.4th 184, 209 (emphasis added)).

A further application of this aggravating factor may be found in the Hearing Department's pending recommendation in the *Marshall* case. (A copy of the Hearing Department's decision in *Marshall* is attached as Exhibit D.)

3. Substantial Experience In the Practice of Law.

Citing no authority, Mr. Ham argues that substantial experience in the law should not be an aggravating factor. However, as stated in our initial memorandum, this factor has been recognized as aggravating both in California case law and the American Bar Association Standards. The reason is that experienced practitioners should be expected to know both the law and their ethical responsibilities. When an experienced practitioner commits misconduct, we

must conclude that the violation was deliberate or at least reckless. (It is worth noting that the proposal includes the adoption of a mitigating circumstance for misconduct committed by inexperienced practitioners.)

4. Excessive Prosecutorial Delay.

Mr. Ham argues that excessive delay should be retained as a mitigating factor even when there is no proof that the respondent has become rehabilitated in the interim. Mr. Ham argues, and we agree, that a delay can prejudice a defendant's defense. However, the remedy for such prejudice is to *dismiss* the charges when the prejudice makes it impossible for the respondent to have a fair trial. When the prejudice is not sufficient to deprive the respondent of a fair trial, the mere showing of delay should not automatically result in a reduction in the sanction imposed upon the respondent. This would provide a windfall to the respondent at the cost of public protection.

OCTC recognizes that there are situations in which reasonable delay is appropriate, e.g., when State Bar investigations are abated pending the resolution of related criminal or civil trial proceedings, or when a case is delayed to allow for the completion of other pending investigations involving the same respondent. (See e.g. *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 311 [five-year delay not unreasonable when most of the delay justified by the pendency of a civil action; *Blair v. State Bar* (1989) 49 Cal.3d 762, 774 [In regard to 2½ year delay between filing of complaint and disciplinary charges, "The State Bar must be allowed an adequate time to investigate charges and decide whether to commence disciplinary charges. This is especially so in this case, where three separate matters were brought to the State Bar's attention."].)

5. Disbarment For Third Imposition of Discipline.

Current standard 1.7(b) requires disbarment whenever a respondent is disciplined for the third time. OCTC's proposal would substantially relax this so-called "Three Strikes" standard, by making it applicable to a smaller number of cases. Instead of applying to all third discipline cases, the standard would only be imposed in cases passing three tests spelled out in the proposal, i.e., the priors must be discrete in time, the priors must be serious in nature, and the current misconduct must be sufficiently serious. The three tests are spelled out in specific terms, based upon Supreme Court and State Bar Court precedent.

Mr. Ham argues that the proposal is at odds with Supreme Court precedent, but does not explain why. And, despite the fact that this language is derived in large part from Supreme Court and reported Review Department decisions, he also argues that the language in the proposed Standard is vague. Mr. Ham claims (citing no authority or other support) that three strikes concepts have been "greatly discredited and criticized as irrational and unfair." Yet, the Supreme Court has applied the current three strikes standard in appropriate circumstances (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 607; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 (A prior record of discipline "…is indicative of a recidivist attorney's inability to conform his or her conduct to the profession's ethical norms")). The proposed standard is consistent with and faithful to the Supreme Court's mandate that we

"reform the offender or else remove him from the practice." (*Giddens v. State Bar* (1981) 28 Cal.3d 730, 734, quoting earlier case). Finally, Mr. Ham also states that the ABA standards do not contain such a concept. In fact, the ABA standards state that disbarment is generally appropriate for repeat offenders (see ABA Standard 8.1).[1]

6. Trust Fund Violations.

Current Standard 2.2(b) requires a 90-day minimum suspension for all violations of the trust fund rule (Rule of Professional Conduct 4-100). OCTC's proposal would substantially relax the standard by allowing less discipline to be imposed for some violations not involving misuse of entrusted funds. Mr. Ham argues that the rule should be made even more lenient, so that private reprovals can be imposed for actual trust money violations. However, as Mr. Ham recognizes (page 5, last full par.), the standards are only guidelines. In really mitigated cases, the State Bar Court has discretion to impose less than the 90-day minimum (see *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. 119). However, the standards should reflect the normal level of discipline for a given type of misconduct. OCTC believes a 90-day suspension, not a private reproval, is the normal level of discipline to be imposed for trust money violations (see *Aronin v. State Bar* (1990) 52 Cal.3d 276, 191 (applying the 90-day suspension standard for trust account violations)).

7. Sexual Relations With Clients.

OCTC proposes a standard whereby attorneys who engage in improper sexual relations with their clients will receive some period of actual suspension. Mr. Ham opposes this proposal, arguing that there is no history of insufficient discipline being imposed in such cases. However, this argument misapprehends the purpose of the standards. The standards are not intended to increase discipline levels,[2] but to provide guidance to the Courts and parties, and to ensure consistency in the application of the disciplinary system. We note, by the way, that violations of the sex-with-clients rule may result in long actual suspensions or, as in the Hearing Department's pending recommendation in the *Marshall* case in which the respondent was found to have had sexual relations with incarcerated clients, disbarment. (A copy of the Hearing Department's decision in *Marshall* is attached as Exhibit D.)

FISCAL / PERSONNEL IMPACT

Adoption of the proposed revisions to the Standards would not have any fiscal or personnel impact upon the State Bar of California.

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[1] ABA Standard 8.1 provides: "Disbarment is appropriate when a lawyer:
"(a) intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession; or
"(b) has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct."

[2] There is one exception ─ the proposal to require disbarment in default cases.

BOARD BOOK/ ADMINISTRATIVE MANUAL IMPACT

Adoption of the proposed revisions to the Standards would not have any impact upon the Board Book or the Administrative Manual of the State Bar of California.

PROPOSED BOARD COMMITTEE RESOLUTION

The Office of the Chief Trial Counsel has recommended to the Board Committee on Discipline Oversight that it adopt the following resolution:

> **RESOLVED**, following expiration of the public comment period with one public comment having been received, that the Board Committee on Discipline Oversight, hereby recommends to the Board of Governors that it adopt the proposed revisions to the Standards for Attorney Sanctions for Professional Misconduct, in the form attached hereto as Exhibit A

The Office of the Chief Trial Counsel has recommended to the Board of Governors that it adopt the following resolution:

PROPOSED BOARD RESOLUTION

> **RESOLVED**, following expiration of the public comment period with one public comment having been received, and upon recommendation of the Board Committee on Discipline Oversight, the Board of Governors hereby adopts proposed revisions to the Standards for Attorney Sanctions for Professional Misconduct, in the form attached hereto as Exhibit A

Attachments

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 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, four years, or five 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.

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June 16, 2010

VIA FACSIMILE – (415) 538-2284
AND FIRST-CLASS MAIL

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

Re: Proposed Amendments to the Standards for Attorney Sanctions for Professional Misconduct

Dear Ms. Berrio:

Pansky Markle Ham LLP is joined by the Law Office of Jonathan Arons, Jerome Fishkin, Esq. of FishkinSlatter LLP, discipline defense attorney Howard Melamed, former State Bar Court Judge Joanne Robbins, the Law Offices of Zachary D. Wechsler, and the Association of Discipline Defense Counsel, in comment on the proposed amendments to the standards for attorney sanctions for professional misconduct (the "Standards").[1] Because of the importance of these issues, and because the Office of Chief Trial Counsel is the proponent of the changes, we are copying the Board of Governors with the full text of our comments.

A. Consideration of the Proposed Amendments Should be Postponed to Allow Newly Appointed Chief Trial Counsel Opportunity to Provide Input and Set Policy at the Office of Chief Trial Counsel

The State Bar has appointed James Towrey as Chief Trial Counsel. Mr. Towrey should be allowed the opportunity to conduct a review of the policies and procedures of the Office of Chief Trial Counsel, and should be allowed to review these policy recommendations and decide whether, and to what extent, the standards for attorney sanctions for professional misconduct should, or need to be, amended.

[1] The signatories to this letter and their offices provide legal ethics compliance advice and State Bar disciplinary defense to attorneys. Combined, these attorneys have considerably in excess of 140 years' experience in legal ethics and disciplinary defense. The Association of Discipline Defense Counsel is the California association for attorneys who represent other lawyers in disciplinary, admissions and regulatory proceedings before the State Bar of California and the California Supreme Court.

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EXHIBIT B

There is no urgency associated with the current proposal. In fact, a re-write of the Standards will likely be necessary as a result of the pending revisions to the Rules of Professional Conduct. Thus, it makes sense to postpone consideration of this proposal until after the newly appointed Chief Trial Counsel has an opportunity to set policy at the Office of Chief Trial Counsel.

B. Consideration of the Proposed Amendments Should be Postponed Because the Recommendations are Based on 25 Year Old ABA Standards that are Presently Under Review

California's Standards have been in effect since January 1, 1986. The ABA's Standards are just as old. While we agree that some revisions to the Standards are warranted, the pending proposal is based in large part on the proposition that "the Standards governing aggravating and mitigating factors should be revised to more closely follow the American Bar Association model standards and Supreme Court precedent." (*See* Memorandum dated April 19, 2010 from Russell G. Weiner, Interim Chief Trial Counsel to the Board Committee on Discipline Oversight regarding Proposed Amendments to the Standards for Attorney Sanctions for Professional Misconduct – Request of Release for Public Comment, at 2.)

The proposed amendments rely heavily on the ABA Standards. Those standards, however, are also outdated, so much so that the National Association of Bar Counsel ("NOBC") and the Association of Professional Responsibility Lawyers have established a Joint Subcommittee to re-examine and suggest amendments to the ABA Standards.

The State Bar should not enact "new" standards based on 25 year old ABA Standards that are equally outdated and are now in the first stages of revision.

C. The Proposed Amendments were Unilaterally Proposed by the Office of Chief Trial Counsel without Prior Consultation or Input from Experienced Discipline Defense Counsel and other Relevant Participants

The proposed amendments have been offered by the Office of Chief Trial Counsel without prior consultation or input from experienced discipline defense counsel and, to our knowledge, other relevant participants. The exclusion of interested participants in the development of rules and standards, such as the current proposal, and the relegation of those interests to the "public comment" period following development and presentation of proposals to the Board of Governors, is inimical to a rational rule-making process.

One must search hard to find rulemaking procedures in judicial and legal systems that exclude relevant parties from participation in the initial development of proposed rules and procedures. Indeed, in virtually every other setting, such proposals are an outgrowth of a collaborative effort, where interested parties participate in the development process, before proposals are presented to the decision making body for approval and distribution for public comment. Bench/Bar committees are *de rigueur* when Rules of Court are being drafted, in both civil and criminal proceedings.

The State Bar of California should be particularly sensitive to this problem. It harms the administration of justice, and undermines public confidence, when the agency charged with enforcement of attorney discipline issues proposals without regard to proper vetting and without involving interested participants in the critical formative stages of the process, excluding for example the perspective of defense counsel with years of experience and who can be expected to approach issues from a different vantage point. It cannot be assumed that career prosecutors are equipped to articulate and present the concerns of experienced discipline defense counsel, or the views of participants other than prosecutors.[2] Indeed, prior to the adoption of the current Rules of Procedure of the State Bar, members of the Respondent's Bar were full participatory members of the Advisory Rules Revision Committee, appointed by the Presiding Referee of the State Bar Court, which studied and drafted the proposed rules for approximately two years before recommendations were made by the State Bar Court to the Board of Governors.

The Board of Governors should require the Office of Chief Trial Counsel ("OCTC") to seek the input, suggestions and comment of the defense bar and from other interested parties before presenting rulemaking proposals for consideration and adoption by the Board.

D. Comments Specific to Individual Proposed Amendments

1. 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).

California already recognizes lack of cooperation during the investigation of attorney misconduct or resulting State Bar proceedings as an aggravating circumstance. *See* Calif. Standards § 1.2(b)(vi). The current proposal is duplicative of the existing rule. *See also* B&P Code 6068(i) (imposing a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding).

If the Board of Governors adopts this proposal, the existing "lack of cooperation" standard should be repealed as duplicative and unnecessary.

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

We have serious concerns with this proposed broad standard. There are numerous documented cases where OCTC prosecutors have argued to the State Bar Court, and to the Review Department, that a Respondent has "refused" to acknowledge the wrongful nature of his or her conduct because he or she zealously presented good faith legal arguments in defense. This practice is wrong, and it should not be

[2] Nor should the proponent of a proposal be allowed to summarize the record of public comment for the Board of Governors. An obvious conflict of interest exists when the proponent of a proposal is allowed to summarize comments which may be adverse to the proposal.

encouraged. A standard allowing prosecutors to seek additional attorney discipline based on an "aggravating circumstance" of refusing to acknowledge the wrongful nature of the attorney's conduct is subject to great abuse, and has the effect of chilling legitimate advocacy on behalf of a Respondent.

Lack of remorse is already identified as a factor in determining the appropriate degree of discipline. *See, e.g.,* California Standards § 1.2(b)(v) (aggravating circumstance where member demonstrates indifference toward rectification of or atonement for consequences of misconduct); *In the Matter of Wolff* (Review. Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1 (court considers respondent's demonstrated indifference and lack of remorse regarding the consequences of her misconduct as additional aggravation); *In the Matter of Shalant* (Review. Dept. 2005) 4 Cal. State Bar Ct. Rtpr. 829 (finding, under existing California Standard 1.2(b)(v), that respondent "showed a lack of remorse and indifference toward atonement").

OCTC has not offered empirical data or other reliable evidence establishing the need for a revision to this Standard. The case law relied upon by OCTC in its memorandum to the Board proposing to broaden the use of the lack of remorse standard present extreme and unusual circumstances. These cases do not justify the adoption of a proposed standard that is so vulnerable to abuse and misapplication.

If the Board of Governors adopts this proposal, it should make clear that this aggravating circumstance may not be premised on the assertion of non-frivolous, good faith arguments presented by a Respondent in his or her defense. The rule should further provide that misuse of this aggravating circumstance by the OCTC constitutes a factor in mitigation, since the imprudent application of this standard will tend to chill a Respondent's legitimate right of defense and increase the cost of defense.

3. Substantial experience in the practice of law (Standard 9.2(1) of the ABA's Standards for Imposing Lawyer Sanctions).

A long history of discipline-free law practice, coupled with present misconduct which is not deemed serious is a mitigating circumstance. *See* California Standards § 1.2(e)(i). It is not clear why "substantial experience in the practice of law" should be an aggravating circumstance, or under what circumstances this proposed standard would be applicable. It is respectfully suggested that the discipline imposed on an attorney who is culpable of misconduct should be sufficient, and should not be enhanced simply because the attorney has practiced law for many years.

4. Excessive delay in conducting disciplinary proceedings (California Standard 1.2(e)(ix)).

Excessive delay in conducting disciplinary proceedings is an existing mitigating circumstance. Unfortunately, however, it is a circumstance that the OCTC will rarely, if ever, acknowledge in settling

cases, and is a circumstance rarely used as a mitigating factor by the State Bar Court.[3] OCTC proposes to make it even more difficult to apply this rarely applied mitigating circumstance by also requiring "convincing proof of rehabilitation." Those two concepts, however, are analytically and logically distinct.

The backlog of pending investigations and cases at OCTC has only grown over the past five years. Much of this backlog has been reconfigured through the creation of new processing categories, such as the "notice open" category. The fact remains that a very large number of cases are not promptly investigated and, if appropriate, resolved or prosecuted, in less than three years.

The law has long recognized that excessive delay can be highly prejudicial to a litigant. Memories fade. Witnesses disappear. Documents are destroyed or misplaced. These are "all the impediments the statute of limitations was designed to avoid. (*Chase Securities Corp. v. Donaldson* (1945) 333 U.S. 304, 314 [89 L.Ed. 1628, 1635, 65 S.Ct. 1137].)" *See Munoz v. Davis* (1983) 141 Cal.App.3d 420, 430. *See also Nogart v. Upjohn Co.* (1999) 21 Cal.4th 383, 396 (statutes of limitations are neither disfavored nor favored in the law, the public policies of repose and disposition on the merits are *equally* strong). Limitations periods are regularly imposed in criminal, as well as civil settings.

The current "statute of limitations" applicable to State Bar proceedings (Rule 51 of the Rules of Procedure) has a great number of exceptions to the running of the time bar. As a consequence, Rule 51 typically does not operate to prevent the prosecution of stale matters.

Rather than adopt the OCTC's proposal, the Board of Governors should adopt measures requiring the OCTC to clean up its back log of stale cases, and impose a real and substantive statute of limitations to protect the public policy interest in repose and deter the improper and prejudicial prosecution of stale claims.

5. Standard 1.7 – the "Three Strikes" concept and the effect of prior discipline.

Current Standard 1.7(b) provides that attorneys may be disbarred on the third occasion that they receive discipline. This is not mandatory, however, because the Standards present guidelines requiring adjustment based upon the unique facts of each case. *See In re Silverton* (2005) 36 Cal. 4th 81(the Standards are not binding, but promote consistency in discipline); *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980 (the standards do not mandate specific discipline but are guidelines; they are not to be followed in talismanic fashion); *In re Young* (1989) 49 Cal. 3d 257, 267; *Snyder v. State Bar* (1990) 49 Cal. 3d 1302, 1310-1311; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 126. Ultimately, to determine the level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. *Connor v. State Bar* (1990) 50 Cal. 3d 1047, 1059.

[3] Notably, the OCTC is critical of the California Supreme Court's decision in *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 132. However, as OCTC acknowledges, this Supreme Court precedent is inconsistent with OCTC's proposal to make it more difficult to acknowledge improper and excessive delay in prosecution as a mitigating circumstance. *Chefsky* is also controlling authority and a premise of OCTC's proposals is to conform the Standards to precedent.

OCTC's memorandum to the Board of Governors proposing these amendments states that the purpose of the proposed amendments is to conform California's Standards more closely to ABA Standards and to existing court precedent. However, the ABA Model Standards for Imposing Lawyer Sanctions do not include a "three strikes" provision. Moreover, rather than following existing Supreme Court precedent, OCTC's proposal appears to challenge and disagree with that precedent. The Supreme Court's guidance on this subject is at odds with OCTC's proposal.

Mandatory sentencing guidelines and "three strikes" concepts have been greatly discredited and criticized as irrational and unfair. A mandatory requirement here would be unfair and could result in disproportionate discipline in cases involving misconduct of comparable character.

OCTC's proposal is also practically flawed. OCTC proposes that Standard 1.7(b) be applied if the prior record of discipline is "sufficiently serious." OCTC's definition of "sufficiently serious" is extremely vague. A "pattern of misconduct" can mean nothing more than two prior violations. Likewise, "indifference to disciplinary orders" is too amorphous and slippery a concept to be consistently and fairly applied. In effect, the standard can mean anything.

The Board of Governors should reject the "three strikes" proposal as imprudent.

6. California Standard 2.2 – offenses involving entrusted funds or property.

California Standard 2.2 deals with trust account violations under Rule 4-100 of the Rules of Professional Conduct. Standard 2.2 presents an excellent example of why inflexible mandatory standards are unreasonable and impracticable. Under Standard 2.2, attorneys who make honest and innocent trust account mistakes, and who remedy those mistakes when they are caught, are still exposed to the threat of draconian punishment. There are clear and substantial differences between mistakes, negligent trust account errors, gross negligence and intentional misappropriation from an attorney trust account. Supreme Court and State Bar Court decisions acknowledge these differences. The Standards should also recognize the obvious differences as well, and treat the three types of errors differently.

Standard 2.2 should be modified to allow for discipline as low as a private reproval for minor trust account violations that result in no client harm.

7. Proposed California Standard 2.3.1 – sexual relations with clients.

In practice, very few cases have been successfully prosecuted under Rule 3-120. OCTC offers no empirical data or other convincing evidence for the proposition that a violation of the sex with clients rule requires mandatory suspension or disbarment. There is no reason why an arbitrary requirement of mandatory suspension should be established as the minimum punishment, where there is no history of insufficient sanctions having been rendered under the current standards.

E. Conclusion

Due to the press of client obligations and the limited time afforded for comment on the substantial and varied proposed modifications to the Standards as well as other pending proposals, we cannot adequately address all of our concerns in this letter. We urge the Board of Governors to vacate action on the current proposal and appoint a committee comprised of State Bar Court judges, members of OCTC and members of the respondents' defense bar, to engage in a thorough, thoughtful and well considered evaluation of appropriate changes to be made to the Standards.

Respectfully Submitted,

JAMES L. HAM

for

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cc: State Bar of California Board of Governors (via email and mail)

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June 30, 2010

VIA EMAIL AND U.S. MAIL

William Hebert
Calvo & Clark LLP
1 Lombard Street, 2nd Floor
San Francisco, CA 94111

Re: Comments on OCTC Agenda Item re Standards for Attorney Sanctions

Dear Bill:

The purpose of this letter is to express my views on OCTC's agenda item regarding revisions to the Standards for Attorney Sanctions for Professional Misconduct. Even though I do not commence my new role until July 12, I appreciate this opportunity to express my personal viewpoint. This is particularly true because I will be unable to attend the July DOC committee meeting due to previous commitments to my granddaughters.

I have reviewed the agenda item itself, the public comment from James Ham on behalf of ADDC and others, and OCTC's responsive memorandum. Although I appreciate Mr. Ham's consideration of me in his request that this issue be delayed until I am on board and have had time to study the issue, I do not think such a delay is necessary. I believe the proposed changes to the Standards are generally reasonable and constructive, and will serve the purpose of making the disciplinary process more efficient and fair. My goal, consistent with what I believe is OCTC policy and the direction from the Supreme Court, is to have Standards that are realistic and helpful in achieving a more consistent disposition of cases. I believe that these amendments largely serve that purpose.

In response to Mr. Ham's letter, I offer two additional comments. First, I view these Standards as a work in progress. Even though the Standards have not been revised for over two decades, I view this step as only a first step in making the Standards more relevant and helpful. If these revisions have any of the adverse consequences that Mr. Ham predicts, OCTC will certainly revisit those issues. I am aware of the joint NOBC/APRL task force revising the ABA standards, and I look forward to receiving their work product so we can examine whether California should move further in the direction of the ABA Standards.

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Second, I want to stress again my intent as Chief Trial Counsel to work collaboratively with all of the stakeholders in the disciplinary process. Those stakeholders include the Board of Governors, the Discipline Oversight Committee, and ADDC.

Very truly yours,

HOGE, FENTON, JONES & APPEL, INC.

James E. Towery

JET: slq

EXHIBIT C

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **PATRICK EARL MARSHALL,** **Member No. 64359,** A Member of the State Bar.	Case No. **01-O-01459-LMA** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. INTRODUCTION

In this original disciplinary proceeding, respondent **Patrick Earl Marshall** is charged with committing acts of moral turpitude and having inappropriate sexual relations with two incarcerated, indigent female clients during his representation as their public defender. The Hearing Department of the State Bar Court initially recommended that respondent be disciplined with a one-year stayed suspension after he had successfully completed the Alternative Discipline Program[1] (ADP). The State Bar appealed. The Supreme Court then remanded the matter to the State Bar Court; the Hearing Department's original disciplinary recommendation was rejected.

[1] It is the intent of the Legislature that the State Bar seek ways and means to identify and rehabilitate attorneys with impairment due to abuse of drugs or alcohol, or due to mental illness, affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety. (Bus. & Prof. Code, § 6230.) Consistent with the intent of the Legislature, the State Bar Court's Alternative Discipline Program was created. (Rules Proc. of State Bar, rule 800 et seq.)

After a three-day trial, this court finds that respondent is culpable on all four counts of the charged misconduct by clear and convincing evidence. Based upon the serious nature of culpability, as well as the applicable mitigating and aggravating circumstances, the court now recommends that respondent be disbarred from the practice of law.

II. PERTINENT PROCEDURAL HISTORY

On May 11, 2004, the Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a notice of disciplinary charges (NDC) against respondent. Respondent filed his response to the NDC on August 3, 2004.

Respondent was admitted to the court's ADP on July 25, 2005, over the opposition of the State Bar. (Rules Proc. of State Bar, rule 800 et seq.)

After participating in the ADP for 22 months, respondent successfully completed the program on May 17, 2007.

On July 17, 2007, the Hearing Department issued its Decision and Order Sealing Documents, recommending a one-year stayed suspension and a two-year probation.

On November 19, 2007, the State Bar filed a petition for writ of review with the Supreme Court. On February 13, 2008, the Supreme Court granted the State Bar's petition for writ of review. On February 11, 2009, the Supreme Court dismissed the petition for writ of review and remanded this case "to the State Bar Court to conduct such further proceedings as may be appropriate pursuant to the amended State Bar Rules of Procedure governing the Alternative Discipline Program. (Rules Proc. State Bar, rule 800 et seq.)"

On April 30, 2009, the Review Department rejected the July 2007 hearing decision and referred the matter to this court for further proceedings pursuant to the Supreme Court's February 2009 order.

Trial was held on February 8, 9 and 10, 2010. Deputy Trial Counsel Sherrie B. McLetchie represented the State Bar. Respondent represented himself.

Following the filing of post-trial briefs, the court took this case under submission for decision on March 29, 2010.[2]

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court's findings of fact are based on the documentary evidence and testimony presented at trial. A number of the court's findings of fact are based in large part on credibility determinations, which determinations the court carefully made after considering multiple relevant factors (e.g., Evid. Code, § 780). Except as otherwise noted, the court finds the testimony of the witnesses to be credible.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 27, 1975, and has been a member of the State Bar of California since that time.

B. The Natalie D. Matter[3]

The facts are not in dispute. Respondent served as the contract public defender for San Benito County from July 1, 1993 through February 7, 2001.

In 1995, respondent represented Natalie D. (Natalie) in a criminal case. She was a convicted felon facing possible life imprisonment. Respondent visited Natalie in the San Benito County jail on several occasions.

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[2] The court hereby denies both parties' motions to strike portions of opposing sides' closing briefs. The court recognizes that the State Bar's brief exceeded the 15-page limit and respondent's brief referred to statements not on record. Indeed, only evidence on the record and relevant arguments will be considered.

[3] To prevent the publication of damaging disclosures concerning living victims of respondent's sexual misconduct, the names of these persons are omitted from this decision whenever their best interests would be served by anonymity.

In 1995, respondent had sexual relations with his client in the county jail on at least three of those occasions.[4] On at least one occasion, the sexual relations included respondent's kissing and fondling Natalie. On at least two of these occasions, the sexual relations included respondent's having oral sex with his client, as well as his kissing and fondling her. The sexual relations also included mutual genital rubbing with hands, fellatio and oral-vaginal contact. Respondent also digitally penetrated Natalie's vagina.

Count Two – Sexual Relations with Client (Rules Prof. Conduct, Rule 3-120(B)(2))[5]

The State Bar charges that respondent willfully employed coercion, intimidation, or undue influence in entering into sexual relations with a client by having sexual relations with Natalie D. in jail.

Respondent argues that the sexual relations were consensual, mutual and voluntary.

Rule 3-120(B)(2) of the Rules of Professional Conduct[6] prohibits an attorney from employing coercion, intimidation, or undue influence in entering into sexual relations with a client.

The term "sexual relations" is defined as sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse. (Rules Prof. Conduct, rule 3-120(A).)

Business and Professions Code section 6106.8, subdivision (a), provides 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

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[4] Descriptions of respondent's sexual relations are graphic but necessary to demonstrate respondent's egregious misconduct.

[5] Count two (Rules Prof. Conduct, rule 3-120(B)(2)) is discussed before count one ((Bus. & Prof. Code, § 6106).

[6] References to rules are to the Rules of Professional Conduct, unless otherwise stated.

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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, rule 3-120 governing sexual relations between attorneys and their clients was adopted.

Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (*Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903.)

The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (*Giovanazzi v. State* Bar (1980) 28 Cal.3d 465, 472.) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. In all client matters, attorneys are advised to keep clients' interests paramount in the course of the attorneys' representation.

Accordingly, the court rejects respondent's argument that the sexual relations were consensual, mutual and voluntary. Natalie was unable to exercise free choice – respondent was her appointed counsel and she had no other support. Respondent knew that she was facing life imprisonment, that she was a drug addict and that she had essentially been abandoned by all of her family because of her addiction. She was clearly in a vulnerable position, completely dependent on his legal assistance. Because Natalie felt that respondent had the power to fight for her or dump her, she was afraid to refuse his sexual advances.

Natalie stated: "I didn't want to get dumped on....I wanted to go home....I believed that [respondent] had my life in his hands. I believed that he had the power whether I ever got a date to go home or stayed forever. He was my only hope."

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Because of the inherent power that appointed public defenders have on indigent clients and the very nature of their attorney-client relationship, there was no balance of power and the sexual relations could not have been consensual. Nobody really supervised respondent. In light of Natalie's predicament, respondent, who was clearly in a dominant position, took unfair advantage of her and sexually exploited her in the course of his professional representation. Respondent's conduct is particularly egregious because he was an experienced criminal attorney, who knew or should have known that criminal defendants like Natalie trusted him and that he represented their only hope.

Respondent further contends, among other things, whether intimidation and coercion should be under an objective or subjective standard in determining that he should reasonably know his conduct would cause the client to be intimidated or be coerced into conduct which she did not want to participate in. He asserts that she did not stop him. Claiming that there was no clear notice as to when his conduct was offensive to his client, he also questions the uncertainty of what constitutes undue influence.

These are dismal arguments, particularly in light of respondent's many years of therapy with the Lawyer Assistance Program (LAP), the ADP, Keystone Center Extended Care Unit, personal psychotherapy, and Sexaholics Anonymous Twelve Step program. His lack of comprehension of his misconduct is disturbing. Rather than acknowledging his bad acts, respondent still attempts to justify his behavior as mutual, consensual sex.

"The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

Here, respondent was the public defender and was appointed to represent Natalie, an indigent criminal defendant facing life imprisonment. As discussed above, based upon the very

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nature of the underlying representation, Natalie exhibited great emotional vulnerability and dependence upon his advice and guidance. "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." (*Beery v. State* Bar (1987) 43 Cal.3d 802, 813.) Respondent owed the high duty of honesty and obedience to fiduciary duty as her attorney. Instead, he took unfair advantage of and manipulated her vulnerability for his own pleasure.

Therefore, respondent, by clear and convincing evidence, exerted undue influence, coercion and intimidation in entering into sexual relations with Natalie, an incarcerated client, in willful violation of rule 3-120(B)(2).

Count One – Moral Turpitude (Bus. & Prof. Code, § 6106)[7]

The State Bar alleges that respondent willfully committed acts involving moral turpitude by having sexual relations with Natalie in jail.

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

Moral turpitude has been described as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97.) It has been described as any crime or misconduct without excuse (*In re Hallinan* (1954) 43 Cal.2d 243, 251) or any dishonest or immoral act. Crimes which necessarily involve an intent to defraud, or dishonesty for personal gain, such as perjury (*In re Kristovich* (1976) 18 Cal.3d 468, 472); grand theft (*In re Basinger* (1988) 45 Cal.3d 1348, 1358); and embezzlement (*In re Ford* (1988) 44 Cal.3d 810) may establish moral turpitude. Although an

[7] References to sections are to the provisions of the Business and Professions Code.

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evil intent is not necessary for moral turpitude, at least gross negligence of some level of guilty knowledge is required. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363.)

As discussed in count one, respondent's claim that the sexual conduct was consensual, mutual and voluntary is without merit. Respondent knew or should have known that his misconduct for personal gain was depraved and violated his private and social duties owed to his client and to society in general.

Therefore, by having sexual relations with an incarcerated client, Natalie, respondent committed an act of moral turpitude, dishonesty and/or corruption in willful violation of section 6106.

C. The Cynthia M. Matter

On January 5, 2001, as the contract public defender for San Benito County, respondent represented Cynthia M. (Cynthia) in a criminal case. He visited Cynthia at the San Benito County Jail on that day for the first time. During the visit, respondent hugged Cynthia and patted her buttocks without her consent.

Count Three – Moral Turpitude (Bus. & Prof. Code, § 6106)

The State Bar charges that respondent committed acts involving moral turpitude by having sexual relations with Cynthia on January 5, 2001.

Respondent admitted his touching of Cynthia was abrupt, impulsive and done without her consent. Thus, he took deliberate advantage of her for purposes of his own sexual gratification. In doing so, he violated his fiduciary obligations to Cynthia as her attorney.

By having sexual relations with his incarcerated client, including the touching of an intimate part of Cynthia for the purpose of sexual arousal, gratification, or abuse, respondent

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committed an act of moral turpitude, dishonesty and/or corruption in willful violation of section 6106.

Count Four –Sexual Relations with Client (Rules Prof. Conduct, Rule 3-120(B)(2))

The State Bar charges that respondent willfully employed coercion, intimidation, or undue influence in entering into sexual relations with a client by having sexual contacts with Cynthia in jail on January 5, 2001.

As Cynthia's public defender, respondent owed the utmost duty to his incarcerated client. Their relationship was unequal in that Cynthia was emotionally fragile and had to place a great deal trust in him and rely heavily on his agreement to provide legal assistance. His position of trust provided him an opportunity to manipulate her for his sexual benefit. Impulsive conduct is no excuse. Thus, by clear and convincing evidence, respondent exerted undue influence and intimidation in entering into sexual relations with an incarcerated client in willful violation of rule 3-120(B)(2).

IV. LEVEL OF DISCIPLINE

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b) and (e).)[8]

A. Mitigation

Respondent was admitted to the practice of law in 1975 and has no prior record of discipline. Respondent's 20 years of discipline-free practice at the time of his misconduct in 1995 is a mitigating factor. (Std. 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

[8]All further references to standards are to this source.

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At the time of his misconduct, respondent reasons that his tough case load contributed to the misconduct. However, office workload does not generally serve to substantially mitigate misconduct. (See *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366.) (Std. 1.2(e)(iv).) Therefore, the court does not find respondent's workload as mitigation.

However, significant mitigating weight is given to respondent's participation in and completion of the LAP. (Std. 1.2(e)(iv).) The parties stipulated to the following:

1. Respondent commenced his participation in the LAP on May 17, 2004.

2. Respondent signed a LAP Participation Agreement with LAP on September 24, 2004.

3. Under the terms of said agreement respondent was to:
   a. Attend group therapy sessions led by a group leader once a week (excepting legal holidays) for the entire period of respondent's LAP participation.
   b. Be professionally evaluated for the underlying psychological causes leading to his misconduct, and to follow all recommendations made by the evaluating authority for treatment of said causes in order to continue to practice law.
   c. Successfully complete his LAP commitment in order to obtain the lower level of discipline as outlined by the Hearing Department in its July 17, 2007 order. (Superseded and rendered "null" by order of the Supreme Court.)

4. Respondent completed the following components of this LAP commitment:
   a. Average of 44 weeks of group LAP meetings per year for a total of 220 weekly group LAP meetings. During the course of these meetings respondent was required to prepare, present to group, and send on to his case manager a semi-annual report on his recovery program and progress.
   b. Professional evaluation, October, 2004, at the Sexual Recovery Institute, 821 So. Robertson Blvd., Ste. 303, Los Angeles, CA, over a period of five days.
   c. Thirty-day in-patient treatment at the Keystone Center Extended Care Unit, 2000 Providence Ave., Chester, PA from December 29, 2004 through January 28, 2005 specializing in the treatment of sexual compulsion and addiction.
   d. Personal psychotherapy with Dr. Elizabeth Lee, Psy. D., 455 San Benito St., Hollister, CA from February 24, 2005 through January 24, 2008, a period of 2 years 11 months. These one-hour sessions occurred once a week for approximately two years, and then once every two weeks.
   e. Sexaholics Anonymous Twelve Step program (SA) meetings commencing on March 14, 2005 at the rate of two meetings per week, reduced to one meeting per week starting in March 2007 until SA requirement met on May 18, 2009. Total meetings attended over four years two months period was 244.
   f. Oversight by "work-site wellness monitor" who filed quarterly reports with respondent's LAP case manager as to respondent's mental fitness starting March 2007 through the end of respondent's LAP commitment in May 2009.

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Respondent's "wellness monitor" was Kevin P. Courtney, Esq., 17415 South Monterey Rd., Morgan Hill, CA. Respondent and Mr. Courtney were in telephonic contact with one another from one to three times per week, and had meetings with one another approximately 15-20 times during the time period noted.

g. Completed ten hours' requirement of independent participation in attending seminars suited to respondent's psychological development, and independent reading of "self-help" literature to assist respondent in reordering and revitalizing his life and relationships.

5. On July 11, 2007, LAP case manager Anna Gray, MFT, certified that respondent had "complied with requirements set forth in the LAP Participation Agreement/Plan for one year prior to the date of this certificate. During this time period, Mr. Marshall has maintained mental health and stability and participated successfully in the LAP."

6. On May 20, 2009, respondent completed his total LAP commitment.

Compelling mitigation is given to respondent's completed LAP participation even though there was no evidence of recovery or that treatment had been successful.

Moreover, the court gives significant weight in mitigation to respondent's successful completion of the ADP which he participated from July 25, 2005, through May 17, 2007.

Respondent also claims that he took objective steps demonstrating remorse and recognition of the wrongdoing found by seeking in-patient treatment at the Keystone Center Extended Care Unit and other treatments. (Std. 1.2(e)(vii).) While it was commendable that respondent admitted himself into Keystone Center Extended Care Unit, respondent's claimed remorsefulness is given no weight in mitigation because he still insists that the sexual relations were consensual and mutually initiated and that his clients were felons. As noted above, respondent has not fully accepted responsibility for his acts and come to grips with his culpability. Here, respondent keeps bringing up the prior felony convictions of the victims even after admitting the sexual relations. He lacks recognition of his wrongdoing, of the harm he had caused his clients and of their vulnerability as incarcerated, indigent inmates.

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B. Aggravation

There are several aggravating factors.

Respondent committed multiple acts of wrongdoing, including committing acts of moral turpitude and having sexual relations with two incarcerated, indigent female clients. (Std. 1.2(b)(ii).)

Respondent significantly harmed the clients, the public and the administration of justice by failing to uphold his fiduciary duties as a public defender. (Std.1.2(b)(iv).) The clients believed that respondent would not adequately represent them if they had refused to have sexual relations with him. Respondent's abuse of power has negatively impacted the reputation of the public defender's office and the public trust in the justice system.

V. DISCUSSION

The purpose of disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Respondent's misconduct involved two client matters that occurred in 1995 and 2001. The standards provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the client. The applicable standards in this matter are standards 1.6, 2.3 and 2.10. The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.) While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

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Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person must result in actual suspension or disbarment. As discussed above, respondent's sexual relations with two incarcerated inmates were acts of moral turpitude.

Standard 2.10 provides that culpability of a violation of any provision of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproval or suspension, depending on the gravity of the offense or the harm to the client.

Also, Business and Professions Code section 6106.8, subdivision (d), provides that intentional violation of rule 3-120 must constitute a cause for suspension or disbarment.

This case is one of first impression. The State Bar urges disbarment while respondent maintains that a stayed suspension would be proper. There are apparently no California disciplinary cases construing rule 3-120. The State Bar and respondent thus propounded cases from other jurisdictions to support their recommended level of discipline.

Respondent cited several cases involving sexual relations with a client in which the level of discipline ranges from a public reprimand to a one-year actual suspension, including *In the Matter of James V. Tsoutsouris* (Ind. 2001) 748 N.E.2d 856 [30-day actual suspension for engaging in a sexual relationship with a client in a marital dissolution matter]; *In the Matter of Disciplinary Proceedings Against Donald J. Kraemer* (Wis. 1996) 547 N.W.2d 186 [six months' actual suspension for sexual relations with a client in a civil matter]; and *Iowa Supreme Court Board of Professional Ethics and Conduct v. Ralph William Hill* (Iowa 1995) 540 N.W.2d 43 [one-year actual suspension for unwelcome sexual advances toward an incarcerated female client].

The State Bar also cited cases regarding sex with clients from other states in which the attorneys were disbarred, including *In re David J. Hassenstab* (1997) 325 Ore. 166 [disbarment

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for sexual relations with indigent clients who feared their legal matters would be jeopardized if they refused to engage in sex with the attorney]; *People of the State of Colorado v. John J. Gibbons* (Colo. 1984) 685 P.2d 168 [disbarment for conflict of interest in representing multiple co-defendants, for inappropriate sexual relationship with one of the female co-defendants who was unduly dependent on the attorney and unable to exercise free choice and for false and misleading information]; and *In the Matter of Jerry L. Berg* (1998) 264 Kan. 254 [disbarment for engaging in sexual conduct with three vulnerable clients who had mental and substance abuse problems and who allowed the attorney's advances as a necessity to protect their representation].

These cases from other jurisdictions provide some guidance in analyzing the facts and circumstances of respondent's inappropriate sexual relations with indigent, criminal defendants/clients and in determining the recommended level of discipline.

"The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment.... this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client." (*In the Matter of James V. Tsoutsouris, supra,* 748 N.E.2d 856, 859 [citing Comment 17 to Proposed ABA Model Rule 1.8].)

In respondent's closing argument in this proceeding, he still held fast to the position that his sexual relations were consensual and mutual. Although he cursorily admitted

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remorsefulness, he has not genuinely expressed contriteness. He has not fully accepted responsibility for his misconduct. As a public defender, he knew or should have known that emotional detachment was essential to his ability to render competent legal services and that any sexual relations with an incarcerated client would be considered an abuse of power and a byproduct of undue influence.

"Because the lawyer stands in a fiduciary relationship with the client, an unsolicited sexual advance by the lawyer debases the essence of the lawyer-client relationship. [Citation.] Often the lawyer-client relationship is characterized by the dependence of the client on the lawyer's professional judgment, and a sexual relationship may well result from the lawyer's exploitation of the lawyer's dominant position." (*People v. Good* (Colo. 1995), 893 P.2d 101, 103.)

Despite respondent's successful completion of the ADP and LAP and years of therapy, respondent still has not fully grasped the egregiousness of his offenses and the extreme harm he had caused the administration of justice and the integrity of the legal profession. In his closing brief, he audaciously put forth this claim: "Frankly, in total time re the misconduct as between the two victims would probably not exceed an hour's total duration. But for these incidents I have been free of any conduct warranting discipline by the Bar. ... I have been practicing law on an unlimited basis, now, for a period of 9 years, 2 months since the January, 2001 incident."

Violation of one's professional and ethical duties is not measured by the length of time. Having improper sexual relations with a client breaches the basic notions of trust and integrity and endangers public confidence in the legal profession, irrespective of its duration. If an attorney misappropriated client funds to pay for personal expenses for a brief moment, taking the money is still theft, regardless of the intent to repay the funds at some future date. Moreover, respondent's misconduct was not an isolated incident; he had repeatedly violated that trust. The

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fact that respondent has been practicing law on an unrestricted basis is fortuitous. Although an absence of similar misconduct in the past nine years speaks somewhat positively of respondent's progress towards rehabilitation, his moral deficiency is still profound.

Indeed, respondent's failure to understand the gravity of his misconduct and the severity he had harmed the administration of justice and the integrity of the legal profession concerns this court. Other than his lack of a prior record of discipline and his participation in the LAP and ADP, respondent did not present any other compelling mitigation. The court understands that this disciplinary matter must have been like an albatross around respondent's neck during the years participating in the LAP and ADP. Unfortunately, those years of therapy had not really rehabilitated respondent. His persistent claims that the sexual relations were consensual and that Natalie never told him to stop are indeed troubling and adversely reflect on his fitness to practice law. As the Iowa Supreme Court stated: "the professional relationship renders it impossible for the vulnerable layperson to be considered 'consenting." (*Iowa Supreme Court Board of Professional Ethics and Conduct v. Ralph William Hill, supra,* 540 N.W.2d 43, 44.)

"[Natalie and Cynthia] felt compelled to engage in sexual activity with [respondent], for fear that refusal would affect their legal matters adversely or leave them without legal assistance. [Respondent] abused his power over his clients and destroyed the trust that all clients should have in their lawyers." (*In re David J. Hassenstab* (1997) 325 Ore. 166, 181.)

For the foregoing reasons, the case law and the standards and after balancing all relevant factors, including the underlying misconduct and the mitigating and aggravating circumstances, the court concludes that disbarment is necessary to protect the public, to preserve public confidence in the profession, to maintain the highest possible professional standards for attorneys and to deter other attorneys from engaging in similar, reprehensible misconduct. Because of the

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high ethical standard demanded of a public defender, respondent's misconduct, and betrayal of trust and abuse of power in not *one* but *two* client matters warrant disbarment.

VI. RECOMMENDATIONS

A. Discipline

Accordingly, the court recommends that respondent **Patrick Earl Marshall** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

B. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.[9]

C. Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. It is further recommended that respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct found in this matter results in the payment of funds and that such payment be enforceable as provided for under Business and Professions Code section 6140.5.

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[9]Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

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VII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: June 15, 2010

LUCY ARMENDARIZ
Judge of the State Bar Court

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CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on June 15, 2010, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

PATRICK EARL MARSHALL
330 TRES PINOS RD #B2-7
HOLLISTER, CA 95023

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

SHERRIE MCLETCHIE, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on June 15, 2010.

Laine Silber
Case Administrator
State Bar Court

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STATE BAR COURT OF CALIFORNIA
180 HOWARD STREET, 6th FLOOR, SAN FRANCISCO, CALIFORNIA 94105-1639

LAINE SILBER
Case Administrator
(415) 538-2081
laine.silber@calbar.ca.gov

June 15, 2010

Frederick K. Ohlrich
Clerk of the Supreme Court
Earl Warren Building
350 McAllister St.
San Francisco, CA 94102-3600

In re: Case No. 01-O-01459-LMA, In the Matter of the Inactive Enrollment of PATRICK EARL MARSHALL

Dear Mr. Ohlrich:

Pursuant to the provisions of section 6081, Business and Professions Code, this is to advise you that effective June 18, 2010, PATRICK EARL MARSHALL, membership number 64359, a member of the State Bar of California, has been enrolled by the State Bar Court as an inactive member under section 6007(c), Business and Professions Code.

Very truly yours,

Laine Silber
Case Administrator
State Bar Court

cc: PATRICK EARL MARSHALL, Respondent
SHERRIE MCLETCHIE, Deputy Trial Counsel

6007_Inactive_Enrollment_Ltr

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