

# ADDENDUM TO AGENDA ITEM

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

**DATE:** July 19, 2010

**TO:** Members of the Board Committee on Discipline Oversight

**FROM:** Russell G. Weiner, Interim Chief Trial Counsel

**SUBJECT:** Addendum to Agenda Item regarding Proposed Amendments to the Standards for Attorney Sanctions for Professional Misconduct – Additional Public Comments

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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 DOC Committee released the proposed revisions for a 60-day public comment meaning public comments were due by July 15, 2010. As of the date of the original agenda item (July 2, 2010), the Office of the Chief Trial Counsel had only received one set of public comments, which were attached to the agenda item as Exhibit B. The Office of the Chief Trial Counsel has since received three additional public comments, which are attached as exhibits to this addendum.

### PUBLIC COMMENT

**Exhibit A:** Comments of complainant Keith Hardesty dated July 1, 2010. These comments have been redacted so as to keep confidential the identity of the subject of Mr. Hardesty’s complaint. An unredacted version of these comments is available upon request.

**Exhibit B:** Comments of HALT (Help Abolish Legal Tyranny) dated July 12, 2010. In its comments, HALT commends the Office of the Chief Trial Counsel’s proposal and (1) expresses particular support for the recommended amendments to Standards 1.2(b) [Aggravating Circumstances] and 1.8 [Effect of Default]; (2) encourages the State Bar to go a step beyond the Office of the Chief Trial Counsel’s recommendation with respect to client notification of discipline; and (3) urges the State Bar to consider further amending its Standards to include some of the criteria presented in HALT’s recent Lawyer Discipline Best Practices report.

**Exhibit C:** Comments of the State Bar Court dated July 14, 2010. In its comments, the State Bar Court states its concern that some of the proposals are inconsistent with current law

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and could cause confusion in the cases rather than the proposal's indicated goal of uniformity. The State Bar Court is also concerned that several proposals would improperly restrict judicial discretion. In sum, the State Bar Court states that it believes that the proposed modifications as currently drafted may have several undesired consequences.

Attachments

To, Itzel Berrio

July 1, 2010

I, Keith Hardesty are writing you to voice my comments on the proposed revisions of the STATE BAR attorney sanctions. I and my wife hired an attorney Bar # [REDACTED] back on February 19, 2008 who promised to save my home from foreclosure and to file chapter (13) or (7), At the time I was a mailman for the UNITED STATES POSTAL SERVICE for 15 years, after 10 months from the date of hire, the attorney [REDACTED] did absolutely nothing and I lost my home and career due to economical differences with my employer, my wife and I have been homeless ever since, However we are still awaiting our case with the (CHIEF TRIAL COUNSEL) case # [REDACTED]. I'm pleased to know that the STATE BAR has shown some compassion to victims such as my wife and I. To this day the attorney [REDACTED] doesn't acknowledge me nor the fact that I have ever hired him. My wife and I left Northern California, our jobs and families to Los Angeles to present our case to the BAR ASSOCIATION. Finally, I commend you and the STATE BAR for protecting: 1: The Public, 2: The Courts and 3: The Judicial process.

Thanks and may God Bless you  
and the Bar

Sincerely,  
Keith Hardesty

(Case # [REDACTED])



*Simple · Affordable · Accountable · Justice for All*

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July 12, 2010

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

Dear Mr. Berrio:

We commend the Office of Chief Trial Counsel for proposing critical improvements to the State Bar's Standards for Attorney Sanctions for Professional Misconduct. Since 1978, our nonprofit public interest organization, HALT, has been dedicated to increasing accountability in the civil justice system. In the area of lawyer discipline, we have often pointed to California as a model for the rest of the country and we are pleased to see that the state is once again poised to adopt responsible benchmarks.

While we agree that the Office's 10 proposals all represent essential advancements, we want to express particular support for the recommended amendments to Standards 1.2(b) [Aggravating Circumstances] and 1.8 [Effect of Default]. We also wish to encourage the State Bar to go a step beyond the Office's recommendation with respect to client notification of discipline. Finally, we urge the State Bar to consider further amending its Standards to include some of the criteria presented in HALT's recent Lawyer Discipline Best Practices report.

The Office's proposed amendment to Standard 1.2(b) [Aggravating Circumstances] correctly expands the State Bar's application of factors that would increase penalties against grossly negligent, incompetent and fraudulent lawyers. In addition to existing aggravating circumstances, the proposal would allow the bar to amplify sanctions when an attorney refuses to acknowledge wrongdoing, has substantial legal experience or has engaged in illegal conduct, among other things. These aggravating factors not only comply with recent California case law, but also reinforce the need for strict adherence to the principles underlying the Rules of Professional Conduct. A lawyer who shows no contrition or even acknowledgment that he or she has betrayed a client's confidences, wasted vital resources, committed serious harm and violated the public's trust in our system of law should be penalized more rigorously than one who recognizes his or her transgression and demonstrates how he or she will prevent this problem in the future. Additionally, attorneys who have practiced law for many years should simply know better than to take advantage of a client's trust and should be disciplined more severely for violating ethical rules in which they should be very

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**EXHIBIT B**

conversant. And certainly a lawyer should face a much stricter sanction if his or her ethical breach also violates state or federal law as a lawyer's first responsibility is to uphold the law under all circumstances. We strongly concur with the Office's recommendation to take these additional aggravating factors into consideration when determining the appropriate penalty.

In addition, we advise the State Bar to adopt the proposed new Standard 1.8 [Effect of Default]. The addition of this rule would ensure disbarment of attorneys who default in a disciplinary proceeding, unless the underlying offense is minimal. Defaults comprise a sizeable portion of the Court's caseload. We frequently hear from consumers who report their frustrations with their local disciplinary body's powerlessness to compel disreputable attorneys to face charges. Many victims of attorney abuses report that they do not believe that their complaint was ever acknowledged by the offending lawyer and that, in many cases, the attorney refused to file an answer, show up at proceedings or hear evidence against them. By giving the State Bar Court the authority to disbar in cases of default, the bar makes it far more difficult for attorneys to disregard hearings and delivers a fitting penalty to those who evade court orders.

The Office recommends that the Standards require attorneys to inform clients if they are currently suspended for a period of more than 60 days. While we agree with the need for client notification, we believe that the State Bar should go a step further and require lawyers to report to clients *all* previous and current disciplinary sanctions. When our organization interviewed consumers in preparation for our last Lawyer Discipline Report Card, many told us that they did not realize that their lawyer had a history of misconduct before they retained his or her representation. Requiring lawyers to include this information in an attorney's fee contract would help clients make better-informed decisions about whether to hire a particular lawyer and more important, whether to trust that lawyer with their most valued resources. At a minimum, the State Bar should certainly adopt the Office's recommendation of requiring client notification of current suspensions. Suspended lawyers should be expected to return files and any unearned fees to clients.

HALT will soon release our Lawyer Discipline Best Practices report, which details 10 model procedures applied by disciplinary agencies across the country. Last year, we circulated a draft report to every agency, including the State Bar of California, and encouraged administrators to provide feedback and additional recommendations. Based in part on the input of officials in about a dozen states, our organization finalized a report that encourages courts and bars to adopt the following disciplinary standards:

1. Disclose a lawyer's complete disciplinary history so that consumers can make informed decisions about whether to hire an attorney;

2. Host a user-friendly Web site that is easy to find and provides helpful information about the discipline process;
3. Abolish closed-door sanctions and replace private admonitions with formal and public censures, fines, suspensions and disbarments;
4. Permanently disbar lawyers who commit abusive practices against clients;
5. Abolish gag rules that prevent people from speaking publicly about the complaints they've filed;
6. Publicize the availability of lawyer discipline programs through required client notification and local advertising;
7. Open lawyer discipline hearings to everyone to increase the public's trust;
8. Provide ordinary citizens with a majority voice on the panels that decide attorney misconduct cases;
9. Grant clients and witnesses immunity from civil liability for any information given to the agency during a disciplinary investigation; and
10. Allow citizens the right to appeal initial complaint dismissals and hearing panel decisions.

Our Best Practices report applauds the California State Bar's candidness in publicizing attorney transgressions, recent improvements to its disciplinary Web site and the bar's commitment to permanently disbarring the state's worst offenders. As the State Bar conducts this current overhaul of its Standards of Attorney Sanctions, we hope that it will consider implementing at least three additional rules and procedures detailed in our report.

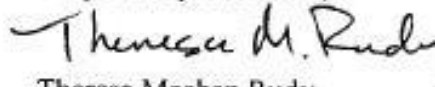
To increase transparency and confidence in its system for holding attorneys accountable, we recommend that California follow the example set by numerous jurisdictions, including neighboring states Arizona and Washington, and abolish closed-door sanctions. Disclosure of discipline deters misconduct by others in the profession, enhances the public perception of the self-regulated system and enables prospective clients to make better-informed decisions about hiring a particular lawyer. Addressing *all* incompetent and abusive actions with real consequences—public censures, fines, suspensions and in the most egregious cases, permanent disbarment—effectively filters the pool of qualified lawyers available to the public.

In addition, we encourage the State Bar to publicize more widely proceedings before the State Bar Court. While most proceedings before the Court are open to the public, the bar's Web site does not contain a schedule of upcoming hearings and little information is provided in local venues—making the already insular system nearly invisible to most Californians. The State Bar should follow the example set by Massachusetts, which not only allows the general public and press to attend every hearing and prehearing conference, but also makes a concerted effort to provide the public with ample notice of the proceedings. The agency's Web site provides a clear link on its home page to a list of dates, times and locations for hearings scheduled that quarter and the same directory is posted in a variety of public venues throughout the state, including courthouses and government agencies.

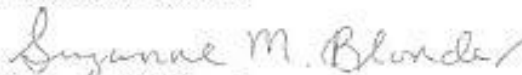
Finally, we urge the State Bar to consider inviting ordinary citizens to participate in the disciplinary decision-making process. California is one of the only states in the country to exclude laypersons from its disciplinary adjudication procedures. Instead, the state solely relies on judges (in most cases, former lawyers) to rule on matters involving abuses within the profession. The self-regulated nature of the system creates, at a minimum, the appearance of bias. The inherent unfairness in the system suggests that even some of the most abusive lawyers may be given a free pass, as long as they are generally well-liked or maintain power within the profession. If a jury of ordinary Americans can be trusted to decide complex, multimillion dollar civil cases and life-or-death capital cases at the criminal level, certainly we can trust laypersons to help decide ethics cases against lawyers. Lawyers and judges can serve as expert witnesses to instruct panels on the appropriate standard of care, but laypersons should have a much stronger voice in the disciplinary decision-making process.

We appreciate the opportunity to offer our comments and recommendations in response to the Office of Chief Trial Counsel's proposals. Should you need further assistance from our organization as the State Bar considers these critical issues, please feel free to contact us at (202) 887-8255. Thank you for your consideration.

Respectfully submitted,



Theresa Meehan Rudy  
Executive Director



Suzanne M. Blonder  
Of Counsel  
(CA Bar. No. 217873)



# STATE BAR COURT OF CALIFORNIA

180 HOWARD STREET, 6th FLOOR, SAN FRANCISCO, CA 94105

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

July 14, 2010

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

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

Dear Ms. Berrio:

The State Bar Court appreciates the opportunity to respond to the proposed amendments to the Standards for Attorney Sanctions for Professional Misconduct. The court is concerned that some of the proposals are inconsistent with current law and would cause confusion in the cases rather than the indicated goal of uniformity. In addition, several proposals would improperly restrict judicial discretion. In sum, we believe the proposed modifications as currently drafted may have several undesired consequences.

For example, the amendments propose to modify Standard 9.2(c) by adding as an aggravating factor, "Illegal conduct, including that involving the use of controlled substances." (Agenda Item, p. 4.) However, making this an aggravating factor would be inconsistent with the statute that created the Lawyers Assistance Program, as well as Supreme Court precedent. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 658, 663 [recovery from substance abuse is proper mitigating factor].) Specifically, Business and Professions Code section 6230 provides that:

"It is the intent of the Legislature that the State Bar of California 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."

Section 6232 further provides, in part, that:

"(b) An attorney currently under investigation by the State Bar may enter the program in the following ways: . . . (3) Voluntarily, and in accordance with

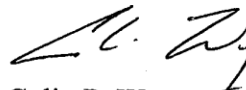
terms and conditions agreed upon by the attorney participant with the Office of the Chief Trial Counsel or upon approval by the State Bar Court, as long as the investigation is based primarily on the self-administration of drugs or alcohol or the illegal possession, prescription, or nonviolent procurement of drugs for self-administration, or on mental illness, and does not involve actual harm to the public or his or her clients.”

Finally, section 6233 provides that successful completion of the assistance program “shall” result in “a dismissal of the underlying allegations [of misconduct] or a reduction in the recommended discipline.” The plain meaning of these provisions is that attorneys who establish sufficient recovery from alcohol or drug dependency problems are entitled to mitigating credit in their cases. Thus, the inclusion of such “illegal conduct” as a basis for aggravation in disciplinary proceedings would conflict with the statutory purpose and prior Supreme Court precedent.

As for an example of the potential restriction on judicial discretion, the proposed amendments also seek to amend the Actual Suspension standards to require specific periods of actual suspension (i.e., 30 days, 60 days, 90 days, 180 days, one year, 18 months, two years, three years, and four years). As the OCTC acknowledges, both the Supreme Court and State Bar Court have specified periods of suspension that do not fall within the proposed specified periods. These variations recognize the need to formulate recommendations based on the facts unique to each case, and in addition, allow for more flexibility during settlement negotiations. Accordingly, the proposed amendments would be inconsistent with current case law, and would limit judicial discretion by mandating specific periods of suspension without any clear explanation.

While the foregoing are only examples of our concerns, we believe as currently drafted the modifications would have a negative impact on consistency in discipline cases and judicial independence.

Respectfully submitted,

  
Colin P. Wong