



The State Bar of California

OPEN SESSION AGENDA ITEM 5.9 JULY 2024 BOARD OF TRUSTEES

DATE: July 18, 2024

TO: Members, Board of Trustees
Sitting as the Regulation and Discipline Committee

FROM: Michelle Cramton, Clerk of the State Bar Court
Kathy Sher, Projects Attorney, State Bar Court

SUBJECT: Proposed Amendments to Rules of the State Bar Relating to Progressive Discipline (Standard 1.8): Return from Public Comment and Request for Adoption

EXECUTIVE SUMMARY

At its March 21, 2024, meeting, the Board authorized circulation for public comment of proposed amendments to Standard 1.8 of the Standards for Attorney Sanctions for Professional Misconduct to permit the greater exercise of judicial discretion with regard to progressive discipline. After a 45-day public comment period, eight comments have been received, five agreeing with the proposed changes and three disagreeing. This item seeks adoption of the proposed amendments.

RECOMMENDED ACTION

This agenda item seeks adoption of the proposed amendments to Standard 1.8 of the Standards for Attorney Sanctions for Professional Misconduct, as shown in Attachment A (clean text) and Attachment B (redline showing changes from the current Standard).

DISCUSSION

The State Bar Standards for Attorney Sanctions for Professional Misconduct apply a policy of progressive discipline, generally requiring that each successive disciplinary proceeding in which culpability is found should result in more severe sanctions than the last. In accordance with this policy, Standard 1.8 (a) states, "If a lawyer has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote

in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust.”

As discussed in more detail in Attachment C, the proposed amendments to Standard 1.8 are intended to give the judges of the State Bar Court more discretion in imposing progressive discipline. The proposal comes out of the work of the Ad Hoc Commission on the Discipline System, which explored modifications to the discipline standards as a means of preventing the perpetuation of historical disparities in attorney discipline. Because prior discipline may reflect disparities in treatment, inflexible requirements to apply more severe sanctions to those with prior disciplinary histories can exacerbate those patterns.

The proposed amendments to Standard 1.8 are attached in clean text (Attachment A) and in redline showing the changes from current Standard 1.8 (Attachment B). The proposed amendments to Standard 1.8:

- Change the language from stating that the sanction for successive discipline “must” be greater than the previously imposed sanction to instead state that it “should” be greater than the previously imposed sanction, unless specified factors apply;
- Allow consideration of the severity of the current misconduct in determining whether to apply progressive discipline;
- Allow consideration of other circumstances that would make imposition of greater discipline unjust;
- Give the court discretion not to impose greater discipline when any of the specified factors apply; and
- Require the court to state its reasons for not imposing a greater sanction when the lawyer has a record of prior discipline.

The request for public comment on these proposed changes was posted on the State Bar’s social media channels, sent to those who signed up to receive notice of public comment opportunities and posted on the State Bar’s website. The State Bar received eight comments on the proposed amendments, five agreeing with the proposal and three disagreeing. The full text of the comments received is provided in Attachment D.

The comments agreeing with the proposal included one brief comment thanking the State Bar for addressing past inequities by granting judges more discretion. Two of the comments in favor of the proposal included comments on matters not relevant to the proposal; two had no comment beyond stating agreement. Of those agreeing with the proposal, two individuals identified themselves as attorneys, one as a nonattorney, and one declined to state.

The comments disagreeing with the proposal all expressed concern that greater judicial discretion would weaken the disciplinary system and lead to failure to protect the public from those attorneys who repeatedly engage in misconduct. One comment noted that allowing greater discretion in the imposition of progressive discipline will lead to failures similar to those seen in the Tom Girardi case. Another notes that changing the Standard so that progressive discipline “should” be imposed, rather than “must” be imposed, will lead to greater subjectivity in determining the sanctions to be imposed, potentially allowing improper factors to influence

judge's decisions. That comment further notes that an objective rule requiring progressive discipline is needed to address the behaviors of repeat offenders. Of those disagreeing, two individuals identified as nonattorneys and one as an attorney.

Staff believes that the proposed amendments to the language of Standard 1.8 strike the right balance, maintaining the requirement that progressive discipline generally be applied while giving judges flexibility to determine whether there is a reason not to do so in a particular case. Accordingly, staff now recommends adoption of the proposed amendments to Standard 1.8, with an effective date of January 1, 2025.

PREVIOUS ACTION

[Proposed Amendments to the Standards for Attorney Sanctions for Professional Misconduct Relating to the Effect of Prior Discipline \(Standard 1.8\): Request to Circulate for Public Comment](#)

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

Title IV, Part A, Standard 1.8

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- d. 1. Align and implement recommendations of the Special Discipline Case Audit Committee and the Ad Hoc Commission on the Discipline System.

RESOLUTIONS

Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur, it is:

RESOLVED, that the Board of Trustees, sitting as the Regulation and Discipline Committee, hereby approves and adopts amendments to Standard 1.8 of the Standards for Attorney Sanctions for Professional Misconduct as set forth in Attachments A and B; and it is

FURTHER RESOLVED, that the effective date of the adopted amendments to Standard 1.8 of the Standards for Attorney Sanctions for Professional Misconduct shall be January 1, 2025.

ATTACHMENTS LIST

- A.** Proposed Amendments to Standard 1.8 – Clean Version
- B.** Proposed Amendments to Standard 1.8 – Redline to Current Standard 1.8
- C.** Board Agenda Item 60-4, March 2024 Meeting (without attachments)
- D.** Public Comment Received Regarding Proposed Amendments to Standard 1.8 of the Standards for Attorney Sanctions for Professional Misconduct