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June 19, 2014

Chair, Karen Goodman
Discipline Standards Task Force
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: ADDC Memorandum re: Discipline Standards

Dear Ms. Nelson:

This memorandum sets out the position of the Association of Discipline Defense Counsel (ADDC) on issues to be addressed by the Discipline Standards Task Force. We appreciate the invitation to provide our perspective to the Task Force and thank you for the opportunity.

Association of Discipline Defense Counsel (ADDC)

We are the bar association for lawyers who represent lawyers and applicants in disciplinary, admissions and regulatory proceedings before the State Bar of California and the California Supreme Court. Our members include former State Bar discipline prosecutors, former State Bar Court judges, and former members of the State Bar's Standing Committee on Professional Responsibility and Conduct. Collectively our members have hundreds of years of experience with the discipline system and the bar admission process. Many of our members also practice in other areas of law, including legal malpractice civil litigation, defense of other professionals in administrative proceedings, attorney/law firm risk management and criminal defense. ADDC members routinely advise attorneys on ethics and testify as experts.

The Role of the Standards is Circumscribed and Should Remain So

At its initial meeting on May 12, 2014, the Task Force heard a comprehensive presentation of background information from Bob Hawley, Assistant Executive Director.

3. ***The Focus of Disciplinary Sanctions Should Be the Individual Lawyer's Fitness to Practice Law***

The current emphasis on discipline as an inquiry into the fitness of the invidiual practitioner should remain in place.

4. ***The Standards Could Be Made More Useful By Better Discussion on the Degree of Culpability***

The current version of the Standards has been strengthened by its recent editing. It could be improved by expanded discussion of degrees of culpability as modeled by the ABA Discipline Standards.

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1. The Role of the Standards is Circumscribed and Should Remain So

At its initial meeting on May 12, 2014, the Task Force heard a comprehensive presentation of background information from Bob Hawley, Assistant Executive Director. This presentation presented a number of various alternatives that the Task Force could examine, from recommending no Standards at all to enacting a comprehensive set of Standards specifying highly defined sanctions for every possible disciplinary violations.

We believe that the Standards currently serve a valuable role as an analytical tool for practitioners and adjudicators in State Bar Court and that they can be improved to be more valuable.

We disagree that the Standards should be freighted with greater significance. The current Standards adequately describe the "primary purposes of discipline" which include:

(a) protection of the public, the courts and the legal profession;
(b) maintenance of the highest professional standards; and
(c) preservation of public confidence in the legal profession.

Rehabilitation can also be an objective in determining the appropriate sanction in a particular case, so long as it is consistent with the primary purposes of discipline."

Standard 1.1(a). This Standard goes on to explain that the Standards are "based on the State Bar Act and the longstanding decisions of the California Supreme Court, which maintains inherent and plenary authority over the practice of law in California."

The Standards are not substantive law; the California Supreme Court still has the ultimate say on the appropriate discipline in any particular case. Only the California Supreme Court, the State Legislature, and the Review Dept. of the State Bar Court (Rule of Procedure 5.159) can make substantive law on appropriate levels of discipline for various types of misconduct.

The Supreme Court has said that " In arriving at an appropriate discipline, we balance all relevant factors, including mitigating circumstances, on a case-by-case basis. The discipline ultimately imposed must be consistent with its purpose, that of protecting the public, the courts, and the legal profession from unfit practitioners. *Read v. State Bar* (1991) 53 Cal.3d 394, 422-423.

The nature of this inquiry, the required balancing of all relevant factors, cannot be reduced to a formula, as Mr. Hawley acknowledged at the first meeting of the Task Force. Nor is a formula needed. The Standards, to the extent that they purported to phrased as formula before their most recent revision, were written in 1985 for a volunteer referee system consisting of several hundred adjudicators, not a small cadre of professional judges (5 in the Hearing Dept. and 3 in the Review Dept.)

Re-writing the Standards as something like the Federal Sentencing Guidelines was another option discussed at the first meeting of the Task Force. This would require a Legislative enactment or an incorporation into the California Rules of Court. There is no demonstrated need to do this. The consequences of taking discretion away from the adjudicators in State Bar Court should be carefully considered.

2. *Retribution Should Not Be a Goal of the Discipline System*

It has been axiomatic that the purpose of attorney discipline is not punishment or retribution for bad behavior, which is the domain of the criminal justice system. *In re Brown* (1995) 12 Cal.4th 205, 217.

Defense counsel recognize that the imposition of discipline may play a role in deterring other misconduct. Based on our experience, that deterrent effect is small; most attorneys who commit ethical misconduct do not intentionally violate the rules but do so under conditions that mitigate the violations to some degree. At the other extreme, very serious forms of misconduct such a large misappropriations are probably undeterred by the knowledge that disbarment is possible; the criminal consequences of theft are well known even to lay people.

The suggestion that discipline standards should ascribe great weight to deterrence with heavy actions that do not reflect the true culpability of the individual practitioner is offensive to due process[1].

3. *The Focus of Disciplinary Sanctions Should Be the Individual Lawyer's Fitness to Practice law*

As stated by the Supreme Court in *Read*, *supra*, and many other cases, the purpose of discipline is to protect the public from unfit practitioners. "As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense *and the offender*." *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-22; see also *In re Kelley* (1990) 52 Cal.3d 487, 497: lawyer's repeated failure to conform her conduct to the requirements of the criminal law and court orders calls into question "their integrity as officers of the court and their fitness to represent clients." The best way to protect the public is to make sure that he individual practitioner is fit to practice law.

Bright line rules that purport to limit the factors that the adjudicator might consider in formulating the appropriate discipline or that purport to limit the mitigating effect in terms of sanctions do not protect the public. What protects the public is appropriate decisions in individual discipline cases. This end isn't served if rigid rules limit the discretion of the adjudicator to fashion the appropriate discipline.

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[1] Zacharias, The Purposes of Lawyer Discipline, at 711.

4. The Standards Could Be Made More Useful By Better Discussion on the Degree of Culpability

The most universal complaint about the Standards has been their lack of specificity. "In light of the lack of specificity in the applicable standards, we must use as our lodestar the purposes of discipline..." *In re Morse* (1995) 11 Cal.4th 184, 206. The Standards could be a more useful and accurate tool for analyzing likely outcomes in State Bar Court if the question of degree of culpability for given violation is addressed.

Currently our Standards only touch on the degree of culpability. The most robust example is current Standard 2.1 which governs misappropriation:

> 2.1. MISAPPROPRIATION
>
> (a) Disbarment is appropriate for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate.
>
> (b) Disbarment or actual suspension is appropriate for misappropriation involving gross negligence.
>
> (c) Suspension or reproval is appropriate for misappropriation that does not involve intentional misconduct or gross negligence

Differing ranges of discipline based on the degree of culpability involved in the misappropriation of client funds, intentional conduct, gross negligence or "simple" negligence, roughly approximating the ranges of discipline discussed in Supreme Court precedent (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38: "willful misappropriation" covers a broad range of conduct varying significantly in the *degree of culpability*." Emphasis added.)

A limitation of the current Standards is that they usually prescribe a wide range of conduct based on the violation of a specific rule or statute. In turn, a wide range of conduct can violate the same rule or statute.

For instance, an act of moral turpitude can be committed either through intentional dishonesty or gross negligence, yet Standard 2.7, while suggesting a broad range of discipline, doesn't even make the modest effort reflected in Standard 2.1 to clarify how to calibrate the sanction to the factors bearing on degree of culpability.

Standard 2.7.

> Disbarment or actual suspension is appropriate for an act of moral turpitude, dishonesty, fraud, corruption or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member's practice of law.

The reference to the magnitude of the misconduct appear to refer to the degree of culpability, yet it is not at all clear how to apply this "magnitude" concept.

The ABA Standards for Imposing Lawyer Sanctions discuss a more detailed methodology for analyzing lawyer misconduct than the California Standards (ABA Standards at pages 5-6.) It asks adjudicators to look at four key questions:

> (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)
>
> (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
>
> (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and
>
> (4) Are there any aggravating or mitigating circumstances?

The ABA Standards use degree of culpability (i.e. the mental state of the lawyer: did the lawyer act intentionally, knowingly or negligently when violating the rule) as one of the factors in determining the appropriate discipline.

The ABA's approach makes sense because it is the actors who act with the greatest degree of culpability, e.g. intentionally, who present the greatest threat of harm to the public. Conversely, actors who are merely negligent present the best candidates to learn from discipline and avoid further involvement with the discipline system.

The ABA Standards use ranges of discipline are keyed to general descriptions of the duties lawyers owe rather than specific rules or statutes. The reason is that a wide range of conduct can violate a specific rule or statute.

The ABA Standards approach is very close to the methodology employed by the California Supreme Court in the *Morse* case.[2] The Supreme Court found that the broad ranges provided by former Standard 2.6 ("disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim[s]...") and former Standard 2.10 ("... reproval or suspension according to the gravity of the offense or the harm, if any, to the victim[s]...." were not helpful. It certainly cannot have found the vague factor of "gravity of the misconduct" to have been much help. It also found that the case law was not comparable and of little guidance. The Court returned to two key questions:

> our determination of the appropriate discipline ultimately depends on the answers to two key questions. First, what did Morse do wrong? Second, what is the discipline most likely to protect the public, the courts, and the profession, or stated conversely, to deter Morse from future wrongdoing?

Answering the first question, the California Supreme Court found that Mr Morse violated his duty to the public to uphold the statutory law in California and violated his duty to the public to not to publish misleading advertising.

In assessing the answer to the second question, the Supreme Court went beyond the simple fact of Mr. Morse's 4 million misleading advertisements and discussed Mr. Morses's journey from "tenacity to truculence"

> He 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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[2] When published, *Morse* was regarded by the Office of Chief Trial Counsel as the best authority to date on determining appropriate discipline.

Based on Mr. Morse's extremely culpable state of mind, the Supreme Court imposed a three year actual suspension with a the requirement that Mr. Morse prove his rehabilitation before resuming active practice.

> Such a period should demonstrate to Morse that we take seriously his misconduct. This period of forced respite from practice may also allow him time for introspection so that he will come to appreciate that law is more than a mere business. It is still a profession in which concerns for ethics matter. We have observed that an errant attorney's "... assertion that *no* discipline should be imposed shows that he does not recognize his problems and that he may not correct them.

Morse, at pages 208-210.

The original State Bar Court recommendation was 60 days of actual suspension, based on the Review Dept.'s finding that Mr. Morse was "grossly negligent" and examination of case law.[3]

The Supreme Court's methodology in Morse is very similar to the four questions asked by the ABA Discipline Standards. An increasingly culpable state of mind carries with it increasing discipline. The "gravity" of misconduct relates to both its extent and the state of mind with which it is execute. Significantly, there is no discussion in Morse regarding the need to deter the misconduct of other lawyers, only the need to deter him, and, in fact, rehabilitate him by giving him an extended time out to consider what it means to be a lawyer.

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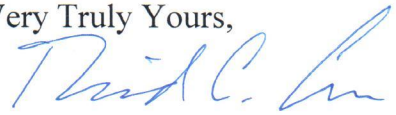
[3] In Matter of Morse (Review Dept. , 1994) 3 Cal. State Bar Ct. Rptr. 24 subsequently rev'd in part sub nom. In re Morse (1995) 11 Cal.4th 184; 1994 WL 266118]

Conclusion

Our current Standards have been improved by the revisions in language last year and can be improved to fulfill the role that they should fill: an analytical tool for the State Bar Court and practitioners. They can be improved further by expanding their discussion of the degree of culpability based on factors such the mental states of the offending lawyer.

The Standards need not and should not be revised to reflect a change in underlying discipline philosophy at odds with California Supreme Court precedent. Adopting a formulaic approach to the Standards that seeks to limit the current discretion that individual State Bar Court judges have under Supreme Court precedent to consider all relevant factors, would seem to accomplish that result.

Very Truly Yours,



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