

BUREAU OF AUTOMOTIVE REPAIR
FINAL STATEMENT OF REASONS

HEARING DATE: January 8, 2016

SUBJECT MATTER OF: Smog Check Licensing; Disciplinary Guidelines;
Probationary Registration/License

SECTIONS AFFECTED: §§ 3340.1, 3340.10, and 3340.28 of Title 16,
Division 33, Chapter 1, Article 5.5, California Code
of Regulations

§§ 3395.4 and 3395.5 of Title 16, Division 33,
Chapter 1, Article 12, California Code of
Regulations

UPDATED INFORMATION

The Initial Statement of Reasons and revised Initial Statement of Reasons are included in the file. On January 28, 2016, the Bureau of Automotive Repair sent a 15-day Notice of Availability of Modified Text and Document Added to the File to the Bureau's interested parties' mailing list. The notice informed interested parties of changes to the Guidelines for Disciplinary Orders and Terms of Probation (Disciplinary Guidelines) and to the Initial Statement of Reasons.

Changes subject to the 15-day notice were made in response to a written comment received during the public comment period and feedback received from the Office of Administrative Law (OAL). OAL conducted a courtesy review of the Initial Statement of Reasons prior to publication of the Notice of Proposed Regulatory Action; a subsequent internal review resulted in further changes to the Disciplinary Guidelines.

The notice period ran from January 29, 2016 to February 12, 2016. During this period the Bureau received two written comments. These comments demonstrated a potential need to enhance general awareness in the regulated industry of the administrative disciplinary process and the purpose of the Disciplinary Guidelines within that process.

Below, Part I briefly summarizes the administrative disciplinary process and discusses the use of the Disciplinary Guidelines. Part II summarizes changes included in the modified Disciplinary Guidelines and revised Initial Statement of Reasons and made available for the 15-day notice period. Part III summarizes non-substantive changes made to the regulatory text, including the Disciplinary Guidelines, following the 15-day notice period.

Part I. Administrative Disciplinary Process

Upon determination of the need to investigate the business practices of a licensee, the Bureau will conduct an investigation to gather evidence in support of a potential disciplinary action. If the evidence gathered supports the filing of an accusation against a license, the investigative materials are forwarded to the Office of the Attorney General for preparation and filing of an accusation against the respondent. Once the accusation is served on the respondent, the matter proceeds pursuant to the Administrative Procedure Act, Government Code sections §11500 to §11529.

The Disciplinary Guidelines are intended to guide the Administrative Law Judges in preparation of consistent proposed decisions and disciplinary orders. Bureau licensees, their counsel, and other parties to an administrative action will likely refer to the Guidelines as well.

Part II. Summary of Changes Included in Modified Disciplinary Guidelines and Revised Initial Statement of Reasons

The modified Disciplinary Guidelines, which are incorporated by reference in Title 16, California Code of Regulations (CCR) section 3395.4, contains the following changes to the originally proposed Disciplinary Guidelines:

1. Where cost recovery is described in the Disciplinary Guidelines, replace the term “prosecution” with the term “enforcement.” That is, the Bureau requests that the disciplinary orders contained in the Proposed Decisions issued by administrative law judges (ALJs) include a provision allowing for recovery of its investigative and enforcement costs. This change occurs in the “Proposed Decisions” section and in the “Cost Recovery” subsections of the Model Disciplinary Orders section.

The alternate wording more closely aligns with Business and Professions Code section 125.3(c), which provides “costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.”

2. Where a “minimum” level or order of discipline is discussed, change wording to clarify any level of discipline may be ordered by an ALJ, up to the maximum level of license revocation, and the probation terms provided by the Bureau are simply recommended (rather than minimum) terms.

The Bureau determined this clarification was needed following receipt of a written comment which indicated there was a potential for confusion regarding the range of discipline applicable to licensees. This clarification was made in the “Factors in Aggravation and in Mitigation” section and the “Disciplinary Order Guidelines” section, including in the disciplinary order guidelines tables.

3. In the Factors in Aggravation and in Mitigation section, add “Evidence of” before certain factors in aggravation and amending one of the factors in mitigation to state “Evidence that the violation was not part of a pattern of practice,” rather than “No evidence that the violation was part of a pattern or practice.”

These changes clarify that when applicable factors are argued, evidence of these factors must be presented. These changes were recommended in a written comment received during the public comment period.

4. In the Factors in Mitigation section, add a factor which states, “Evidence of any other conduct which would constitute a factor in mitigation.”

This factor parallels a similar provision under the factors in aggravation allowing for additional circumstances which may reasonably constitute aggravating factors. This change was recommended in a written comment received during the public comment period.

5. In Table A, Business and Professions Code Disciplinary Guidelines:
 - a. Increase probation term for violation of Business and Professions Code section 9884.7(a)(9), Subletting Repair Work without Customer’s Knowledge/Consent, from two years to three years.

This change to the probation term corrects an error by ensuring this term is consistent with those of other similar offenses, such as violation of Title 16, CCR section 3359. The rationale for the three year probation is provided in the revised Initial Statement of Reasons.

- b. Decrease probation term for violation of Business and Professions Code section 9889.3(c), Violation of Director’s Regulations, from five years to two years.

This change to the probation term corrects an error by stating the proper term. The term in the Disciplinary Guidelines for this violation now matches the term in the original and revised Initial Statement of Reasons for this offense.

- c. Increase probation term for violation of Business and Professions Code section 9889.3(f), Aids or Abets an Unlicensed Person, from three years to five years.

This change to the probation term corrects an error by stating the proper term. The term in the Disciplinary Guidelines for this violation now matches the term in the original and revised Initial Statement of Reasons for this offense.

6. In Table B, Health and Safety Code Disciplinary Guidelines:
 - a. Increase probation term for violation of Health and Safety Code section 44033(e), Failure to Post Station and Technician Licenses, from two years to three years.

This change to the probation term corrects an error by ensuring this term is consistent with those of other similar offenses, such as violations of Title 16, CCR sections 3340.15(c) and 3340.50(g). The rationale for the three year probation is provided in the revised Initial Statement of Reasons.

- b. Increase probation term for violation of Health and Safety Code section 44035 from two years to three years.

This change to the probation term corrects an error by ensuring this term is consistent with those of other similar offenses, such as violation of Title 16, CCR section 3340.15(g). The rationale for the three year probation is provided in the revised Initial Statement of Reasons.

- c. Delete Health and Safety Code section 44036.5(b) from the Disciplinary Guidelines.

This deletion corrects the error of including this offense in the originally proposed Disciplinary Guidelines. This code violation has been removed because gas blenders are not licensed by BAR and therefore cannot be put on probation.

- d. Decrease probation term for violation of Health and Safety Code section 44072.2(c) from three years to two years.

This change to the probation term corrects an error by ensuring this term is consistent with those of other similar offenses, such as violations of Business and Professions Code section 9884.7(a)(6) and Health and Safety Code sections 44072.2(a), 44072.2(c), and 44072.2(h). The rationale for the two year probation is provided in the revised Initial Statement of Reasons.

7. In Table C, California Code of Regulations Disciplinary Order Guidelines:

- a. Increase probation term for violation of Title 16, CCR section 3307(d), Failure to Post List of Prices, from two years to three years.

This change to the probation term corrects an error by ensuring this term is consistent with those of other similar offenses, such as violation of Title 16, CCR section 3340.15(d). The rationale for the three year probation term is provided in the revised Initial Statement of Reasons.

- b. Add Title 16, CCR section 3340.15(h), Subletting Inspections or Repairs Requires as part of the Smog Check Program, and provide a three year probation term is recommended for violation of this section.

This addition corrects the error of omitting this offense from the originally proposed Disciplinary Guidelines. As explained in the revised Initial Statement of Reasons, addition of this code section puts licensees on notice they may be disciplined for these offenses and a three year probation term is appropriate.

- c. Decrease probation term for violation of Title 16, CCR section 3340.17 from five years to three years.

The Bureau determined a three year probation term was more appropriate for this offense, as it does not involve a threat to public safety. The probation term is justified in the revised Initial Statement of Reasons.

- d. Add Title 16, CCR sections 3340.50(a)-(c) and (h). Recommend a three year

probation term for violations of these sections.

This addition corrects the error of omitting these offenses from the originally proposed Disciplinary Guidelines. As explained in the revised Initial Statement of Reasons, addition of these code sections puts licensees on notice they may be disciplined for these offenses and a three year probation term is appropriate.

- e. Increase probation term for violation of Title 16, CCR section 3340.50(d), Failure to comply with work area requirements, from two years to three years.

This change to the probation term corrects an error by ensuring this term is consistent with those of other similar offenses, such as violation of Title 16, CCR section 3340.15(a). The rationale for the three year probation is provided in the revised Initial Statement of Reasons.

8. In subsection (c) of the section Training Course, under Optional Terms and Conditions of Probation, add “brake and lamp station and adjuster” so that the paragraph heading reads, “Applicable to registrants and *brake and lamp station and adjuster* licensees.”

This added language clarifies this subsection, which encompasses all manner of non-technical training, applies only to registrants and brake and lamp station and adjuster licensees, and not to Smog Check inspectors and repair technicians. Because Health and Safety Code section 44045.6 establishes specific training requirements applicable to the latter, the Bureau has more limited authority to prescribe non-technical training to these licensees.

The revised Initial Statement of Reasons includes the following changes:

- Revise the Proposed Decisions section to describe the corresponding section of the currently proposed Disciplinary Guidelines. This section of the previously proposed Initial Statement of Reasons referred to an incorrect draft of the Disciplinary Guidelines.
- Provide justifications for code violations added to the Disciplinary Guidelines and remove justification for code violation removed from the Disciplinary Guidelines.
- Provide additional explanations for proposed probation terms throughout, including code sections for which probation terms were adjusted.
- Provide additional explanation of two-, three-, and five-year probation terms generally.
- Minor editorial changes throughout to improve the clarity and conciseness of this document.

Part III. Non-substantive Change to Disciplinary Guidelines after 15-Day Notice

The following non-substantive change was made to the regulatory text and modified Disciplinary Guidelines following the 15-day re-notice period:

1. In the regulation text (proposed CCR section 3395.4 and the Disciplinary Guidelines), amend revision date from May 2014 to March 2016.

This update provides a more current date for the Disciplinary Guidelines.

LOCAL MANDATE

A mandate is not imposed on local agencies or school districts.

SMALL BUSINESS IMPACT

This regulation will not have a significant adverse economic impact on small businesses.

CONSIDERATION OF ALTERNATIVES

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Bureau would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

BAR considered the alternative of taking no action. However, this option was deemed unacceptable for several reasons. First, BAR would not be acting in compliance with Government Code section 11425.50 (e), which essentially provides a penalty may not imposed if based on a guideline that is not adopted in regulation. Second, taking no action would engender confusion regarding the Bureau's jurisdiction over redesignated licenses. Third, taking no action would leave no alternative to a formal administrative hearing process when an application for a registration or license is denied, but a probationary registration or license may be warranted.

RESPONSES TO COMMENTS SUBMITTED DURING 45 DAY PUBLIC COMMENT PERIOD

The Bureau received one comment from a representative of the Automotive Service Councils of California and the California Auto Body Association, who made the following recommendations and/or objections regarding the proposed action:

Factors in Aggravation

1. **Recommendation:** The words "Evidence of" should be added at the beginning of certain Factors of Aggravation listed in the Disciplinary Guidelines to clarify that evidence of those factors should be provided if it is argued those factors apply. Specifically, the recommended wording should be added to Factors 5, 6, 7, 8, 10, and 15.

Response: This recommendation is accepted in part and rejected in part.

The Bureau added "Evidence of" to Factors 6, 7, 8, and 15 for clarification purposes. The Bureau did not amend Factors 5 or 10. Factors 5, 10, 12, and 13 involve "failure to" have completed certain actions. Amending only Factors 5 and 10 would potentially create confusion for readers because these factors would be inconsistent with Factors 12 and 13, and it is not always possible to produce evidence of the absence of certain behavior.

2. Recommendation: Add the word “reasonable” to Factor in Aggravation 5 such that it states, “Failure to permit BAR *reasonable* inspection of records.” This change is recommended for the following reason:

“There have been instances where a BAR representative will write a ‘failure to inspect’ violation on a Station Report. The circumstances arise when the shop could not turn over records immediately because of a pending civil case and all records were with attorney. The shop indicated that records were not restricted but were with his attorney, nevertheless, BAR wrote up as a violation. BAR violations listed on Station Reports are subjective and based on the opinion of a BAR field representative, and issued without any due process. If such a violation (indicated on Station Report) is used for a factor of aggravation, then the Administrative Law Judge should hear all the evidence (both sides) of the failure to permit BAR inspection of records before it is automatically considered a factor of aggravation.”

Response: This recommendation is rejected because it is unnecessary in promoting the goal of due process. As the comment notes, alleged violations of BAR laws and regulations are listed in Station Reports. These reports are included in the case presented to an ALJ as part of the administrative appeal process. During that process, a shop contesting the fairness of the report is given an opportunity to present its version of the facts pertaining to alleged violations before an ALJ. The ALJ hears evidence from both sides and considers only the evidence presented to him or her at the time of adjudication before determining the appropriate form of discipline.

What is more, cases that do make it to an ALJ often involve a number of serious offenses. The nature of these cases is often such that they cannot be resolved through settlement or with a lower probation period.

3. Recommendation: Amend Factor in Aggravation 10 such that it states “Failure to comply with BAR request for corrective action/*training*,” instead of “Failure to comply with BAR request for corrective action/*retraining*.” (Emphases added).

Response: This recommendation is rejected because the term “corrective action” is broad enough to encompass training.

Factors in Mitigation

1. Recommendation: The comment recommends Factor in Mitigation 1, which states a “respondent implemented BAR’s suggested resolution to a consumer complaint,” be clarified

“...to also provide mitigation where a shop in good faith offered to resolve the situation but wasn’t exactly as ‘suggested’ by BAR. For example, where the BAR suggested resolution was to refund a customer one amount (i.e \$500.00) but the shop based on the facts and circumstances and in good faith refunded another amount (i.e. \$250.00). This resolution should also be considered as a factor of mitigation even though it was not exactly as ‘suggested’ by BAR.”

Response: This recommendation could not be incorporated in the currently proposed

regulation. However, BAR will consider amending the Disciplinary Guidelines in a future regulatory proposal to replace the word “suggested” with “mediated.” The complaint resolution process involves a Bureau representative mediating a resolution between the two parties.

2. **Recommendation:** The comment recommends a new factor in mitigation for “[e]vidence of any other conduct which would constitute a factor in mitigation” in case there is a mitigating factor that has not been thought of at this time.

Response: This recommendation is accepted.

The language as stated above has been added to capture additional circumstances that may reasonably constitute a mitigating factor.

Disciplinary Order Guidelines

1. **Recommendation:** The comment recommends the Bureau clarify what “reasonable costs of investigation and enforcement” include. That is, “[t]he first two paragraphs [of this section] state that the BAR will recover reasonable costs of investigation and enforcement. Does cost of “enforcement” include other costs such as prior BAR field visits based on complaints? Costs of enforcing prior Citations? issuing of Station Reports? or pro-active or office conference? What is the definition of enforcement costs? This should be clarified.” [sic]

Response: This comment is rejected because, as described below, such clarification is unnecessary.

The Proposed Decisions section of the originally proposed and modified Disciplinary Guidelines outlines the information BAR requests to be included in disciplinary orders. This includes reasonable costs of investigation and enforcement “as determined by the ALJ hearing the matter, pursuant to Section 125.3 of the Business and Professions Code.” Section 125.3(c) of the Business and Professions Code provides these costs “shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General. Section 125.3(h) further provides “[a]ll costs recovered under this section shall be considered a reimbursement for costs incurred...”

The statute makes clear the costs are those directly related to the case at hand; that is, those costs incurred investigating a case and preparing it for hearing, as well as costs billed to the Bureau by the Attorney General for prosecution efforts. The amount of costs a respondent is ultimately ordered to pay is determined by the ALJ based upon the evidence presented at hearing. When ordering cost recovery, the ALJ can consider the licensee’s ability to pay and other factors. Pursuant to Business and Professions Code section 125.3(d), the Bureau can never increase the amount of cost recovery beyond what the ALJ has ordered, nor can the costs exceed the reasonable costs of the case being adjudicated.

2. **Objection:** The comment objects to the proposed five-year and two-year probation terms for certain offenses, as follows:

“The new Tables List Business and Profession Code Disciplinary Order

Guidelines (Table A); Health and Safety Code Disciplinary Orders Guidelines (Table B); California Code of Regulations Disciplinary Order Guidelines (Table C). These new tables would extend the current probationary maximum period from three (3) years to five (5) years. We believe this is unnecessary and the current policy of (3) three year maximum probation has proven effective and should continue be the standard

The list of Tables also contain minimum probationary periods of 2 years for all violations. However, a minimum 2 year probationary period for certain violations may not reasonable. In other words, the ‘punishment does not fit the crime.’ For example, failure to display identifying signs under H&S Code section 44033 (a) or CCR 3307 (c); or CCR 3309; or CCR 3340.22; or CCR 3340.22.1; CCR 3351.3; would be subject to a 2 year minimum probation under the proposal. If the shop remodeled or the sign fell or wasn't displayed in a manner deemed conspicuous to the public by BAR, that shop would be subject to a 2 year minimum probation. That seems very harsh. Also if an ARD fails to correct or update the mailing address on file with BAR, that would be also be a 2 year minimum probation.” [sic]

Response: This comment is rejected for several reasons listed below, but a clarification has been made in response to the comment.

First, to clarify, the proposed Disciplinary Guidelines retains the maximum penalty and lowest probation term provided in the currently incorporated Disciplinary Guidelines. The current maximum penalty is revocation of the registration or license. The two-year probation term is currently the lowest recommended probation term.

Second, past experience has led the Bureau to determine five-year and two-year probation terms for certain violations are appropriate to gain compliance. Explanations for all proposed probation terms, including instances in which recommended probation terms have increased to five years, are found in the Initial Statement of Reasons and revised Initial Statement of Reasons. The revised Initial Statement of Reasons also explains generally the reasons for which a two-, three-, or five-year term is assigned.

Third, within the administrative disciplinary process, licensees have opportunities to challenge evidence presented in support of alleged violations. At an administrative hearing, an ALJ hears both sides of a case and proposes a level of discipline they determine is appropriate depending on the facts and circumstances.

Nonetheless, the Bureau has clarified throughout the modified Disciplinary Guidelines that the probation terms listed in the tables are “recommended” rather than “minimum” terms.

3. Recommendation: The comment recommends a range of probation terms be provided for each violation. That is, “[t]he BAR should consider amending the minimum probationary periods to provide a reasonable range, depending on the facts and circumstances of the specific case. For example, the minimum probation period may range from no probation up to 3 years maximum. Health Safety Code section 44050 provides a range of fines for ARD citations. Why couldn't the same rational apply to minimum probationary periods?”

Response: This recommendation is rejected for two reasons.

First, the proposed and modified Disciplinary Guidelines already provide for a range of probation terms for each offense. An ALJ may assign any probation term, be it the recommended term, no term, or any other term, up to the maximum order of revocation depending on the facts and circumstances of the case. Second, as noted above, the current Disciplinary Guidelines, adopted in 1997, provide a two-year probation term as the lowest recommended term. The Disciplinary Guidelines provide recommended probationary terms for repair facilities found to have violated sections of the Automotive Repair Act and Health and Safety Code. It is consistent with the goal of consumer protection to require a repair facility to demonstrate compliance with these laws through a minimum term of probation. Two years is an appropriate minimum term to demonstrate said compliance.

RESPONSES TO COMMENTS SUBMITTED DURING 15 DAY NOTICE AND COMMENT PERIOD

The Bureau received two written comments during the additional 15 Day Notice and Comment Period. Neither comment was within the scope of the modifications subject to the additional notice period. For this reason and the reasons outlined below, these comments are rejected.

Comment #1

Commenter: California Emissions Testing Industries Association (CETIA)

Comment:

First, the proposed regulations grant BAR too much authority to impose restrictions and penalties upon licensees. BAR has proposed unreasonable probation requirements in regards to the standard and optional terms and conditions of probation in the Disciplinary Guidelines, as well as in subjecting probationary registration to supervision and compliance requirements (see CCR section 3395.5(e)(1)-(2)). BAR has exceeded its statutory authority because it has not demonstrated substantial evidence for these restrictions.

Second, the proposed regulation does not adequately address changes in license types; specifically, it does not allow stations to carry over station history and STAR certification status when changing license types.

Response:

This comment is rejected because it is not germane to the modifications that are the subject of the 15-day notice, as well as for the reasons below.

Regarding the first part, the Bureau is authorized to adopt regulations, including those imposing conditions on probation and probationary registration, that it determines are reasonably necessary to enforce the Automotive Repair Act and the Smog Check Program (e.g., Business and Professions Code sections 9882, 9884.2, 9889.5, and 9884.21; and Health and Safety Code section 44072.4). These regulations are subject to the Administrative Procedure Act, and thus are made available for review and comment by the public and regulated industry prior to adoption. Justifications for the proposed terms and conditions of probation, as well as the new probationary registration process, are included in the Initial Statement of Reasons and Revised Initial Statement

of Reasons.

The Bureau is proposing to add a process for probationary registration to allow eligible businesses that have had their registration denied to accept the timely issuance of a probationary registration and begin operating as an Automotive Repair Dealer. The business would otherwise have wait for the completion of an administrative proceeding likely to take several months to conclude.

Regarding the second part, it fails to recognize: 1) a change in license type from Test Only to Test and Repair and vice versa does not require the loss of a station's history of inspection data since that change does not require a change in the station's ARD registration number; and 2) a station that has been subject to disciplinary action would not be eligible for STAR certification pursuant to regulation.

Comment #2

Commenter: California Automotive Business Coalition (CalABC)

Comment:

The various items in this comment are summarized below. This comment is rejected because it is not germane to the modifications that are the subject of the 15-day notice, as well as for the reasons that follow.

Standard Terms and Conditions of Probation

- Page 27, #3 – Quarterly Reporting
 - Comment: This section is too vague and needs to be better defined. CalABC recommends the Bureau develop a form for businesses to follow that ties in with this section so businesses understand what information they must track and report on during the probationary period.
 - Response: The Proposed Decision issued by an ALJ after adjudication contains the list of specific requirements a respondent must meet. After the decision is adopted by the Department, Bureau staff enforces the decision in part by meeting periodically with respondents during the probationary period. At these meetings, the respondent is asked to explain what actions have been taken to comply with the requirements stated in the decision. For example, if a Smog Check station owner was disciplined because an employee fraudulently certified vehicles, the respondent station owner could be asked during their probation what he or she has done to ensure the employee did not continue to engage in that conduct.
- Page 27, #5 – Access to Examine Vehicles and Records
 - Comment: CalABC suggests the Bureau revise the regulation to address how and what an ARD will need to provide if their business records have been converted to electronic files.
 - Response: The Bureau is currently developing a separate regulation that addresses the use of electronic systems of customer authorization and recordkeeping in the automotive repair industry. The Bureau held two public workshops on that regulation in 2015.

Optional Terms and Conditions of Probation

- Page 29, #1 – Actual Suspension
 - Recommendation: Remove the word “consecutive,” such that the provision would no longer require a suspension to be served over a period of consecutive days. If a station is prohibited from a certain activity for a block of time, it creates a financial hardship on station employees who forego income from that activity during that time. Allow businesses to be shut down periodically over the suspension period.
 - Response: It would be infeasible for the Bureau to allow for a non-consecutive period of suspension; that is, to allow stations to shut down on a periodic basis and accumulate such time as will complete their suspension. Such practice would render the regulation ineffective as a disciplinary tool.
- Page 32, #7 – Supervision Requirements
 - Recommendation: Instead of prohibiting a respondent from delegating supervisory duties related to activities subject to probation, allow the respondent to designate an alternate supervisor. This change is recommended because it may not be feasible to have the respondent be the only one allowed to perform supervisory duties.
 - Response: First, the direct supervision requirement applies only to the activity leading to probationary status. Second, the recommendation seeks to have the Bureau allow the respondent to transfer his or her supervisory duties to someone who is not subject to the terms of probation. That is, someone who has not entered into and is not bound by an agreement with the Department which sets forth specific terms of probation. Making this change would essentially allow a respondent to circumvent responsibilities which he or she is contractually obligated to uphold.

Factors in Aggravation

- Failure to pay court judgments to the victim.
 - Comment: This factor in aggravation unfairly prejudices shops that, at the time of the administrative hearing, may have appealed the judgment and prevailed or had the judgment reduced.
 - Response: For purposes of the Bureau’s regulations, a “judgment” means a civil judgment in which the licensee has been found liable, after any and all appeals have been exhausted.
- Commits any act of dishonesty.
 - Comment: While acknowledging this provision has been eliminated in the latest version of the Disciplinary Guidelines, CalABC notes this provision is too subjective to enforce with any fairness and thus should be eliminated.
 - Response: There is no action required by the Bureau to respond to this comment.

“Minimum” and “Maximum” Penalties

- Recommendations:
 - The sentence “No single factor or combination of the above factors is required to

justify either the minimum or maximum penalty as opposed to an intermediate one” should be revised because it leaves respondents open to arbitrary penalties based on mitigating or aggravating factors.

- There should be guidelines for what merits a minimum versus maximum sentence and what one can expect based on the balance of factors in aggravation and mitigation. The Bureau ought to disclose the maximum possible penalty, or “worst case scenario,” for each code violation. Failure to do so constitutes a violation of due process. The Bureau has not been transparent regarding these potential penalties. How did the Bureau establish the penalties?
- Response:
 - The provision referenced in the first bullet is intended to promote, rather than discourage, sound disciplinary decisions. It allows an ALJ the flexibility to determine the outcome of each case depending on the facts and circumstances involved.
 - In response to a comment received during the 45-day comment period, the Bureau has done away with terminology conveying “minimum” and “maximum” probation terms to the extent it creates a misleading impression the recommended probation terms are a floor, rather than simply recommendations. As stated in the Disciplinary Guidelines, the maximum penalty in each case is license revocation. The revised ISOR contains a general description of what merits a two-, three-, or five-year probation term. It also provides justification for the recommended probation term for each code violation. It is not possible for the Bureau to provide a general description of how the balance of aggravating and mitigating factors will turn out in a given case, because this is dependent on an ALJ’s discretion in each case.