

# AGENDA ITEM

## Modification of Board Policy Regarding Posting of Consumer Alerts: Return from Public Comment

**DATE:** October 25, 2013

**TO:** Members, Regulation, Admissions and Discipline Oversight

**FROM:** Jayne Kim, Chief Trial Counsel

**SUBJECT:** Acceptance of Public Comment Re Modification of Board Policy Regarding Posting of Consumer Alerts

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### EXECUTIVE SUMMARY

At its July 2013 meeting, the Committee on Regulation, Admissions and Discipline Oversight ("RAD") approved circulation of the proposed modification of Board Policy Regarding Posting of Consumer Alerts, for a 60-day period of public comment. The Office of Chief Trial Counsel ("OCTC") received one public comment during the 60-day public comment period and recommends that RAD accept public comment and take no further action at this time.

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### BACKGROUND

In July 2008, upon recommendation of RAD, the Board of Trustees of the State Bar of California, formerly the Board of Governors ("Board") first approved and adopted a State Bar policy of posting public Notice of Disciplinary Charges ("NDCs") on the attorney profile page of the State Bar's website.

In May 2011, upon recommendation of RAD, the Board approved the State Bar's existing policy authorizing the posting of a Consumer Alert where the State Bar filed formal charges alleging misappropriation of client funds in the amount of \$25,000 or more.

In July 2011, upon recommendation of RAD, the Board approved expanding the use of Consumer Alerts by authorizing the posting of a Consumer Alert where the State Bar filed 15 or more cases involving allegations of loan modification misconduct. In both instances, the Board determined that public allegations of major misappropriation and filing of multiple loan modification cases warranted stronger public protection measures than provided by the mere posting of NDCs.

Under the existing Consumer Alert policies, the State Bar removes the Consumer Alert, informational text and disclaimer from the attorney profile page immediately upon the filing of a decision or order of the State Bar Court adjudicating the disciplinary proceeding. The State Bar Court decision or order is posted online and the NDC and responsive pleading are removed.

In May 2013, consistent with the State Bar's primary mission to protect the public from unethical attorneys, the Office of Chief Trial Counsel ("OCTC") sought Board approval to expand the State Bar's Consumer Alert policy and allow the posting of a Consumer Alert after any public filing of formal charges in State Bar Court alleging professional misconduct by an attorney. OCTC also sought expansion and approval to post a Consumer Alert after public filing of an application for assumption of an attorney's law practice in superior court. Pursuant to RAD discussion, which included consideration of public comment, the agenda item was continued for further consideration.

In July 2013, RAD authorized the release, for public comment, of a proposed modification of Board policy to authorize the posting of a Consumer Alert: (1) where the NDC or petition for involuntary enrollment alleges any misappropriation of \$25,000 or more (i.e. not limited to theft of client funds); (2) where the NDC or petition for involuntary enrollment alleges 15 or more cases of professional misconduct (i.e. not limited to loan modification misconduct); and (3) where the State Bar has filed an application seeking superior court assumption of an attorney's law practice, pursuant to Business and Professions Code section 6180 *et. seq.* or 6190 *et. seq.* The proposed modification also sought authorization to keep the Consumer Alert on the member's State Bar online profile page where the State Bar Court finds the member culpable of professional misconduct or grants the State Bar's petition for involuntary inactive enrollment or where the superior court grants the State Bar's application for court assumption of the member's law practice.

The Committee's discussion during the July meeting suggested that the State Bar, in addition to completing the public comment period, further contemplate the proposed modification, including clarification of the Consumer Alert language where the State Bar has filed an application regarding the assumption of an attorney's law practice due to death, pursuant to Business and Professions Code section 6180 *et. seq.*, and to consider whether to remove Consumer Alerts upon completion of probation, return to active status or an otherwise defined period of time.

## **PUBLIC COMMENT**

The only public comment received during the 60-day public comment period was from Michael Wine, President of the Association of Discipline Defense Counsel, in opposition to the proposed modification. A copy of the text of this comment is hereto attached as Attachment A.

In sum, Mr. Wine argues the following:

- The Consumer Alert policy destroys an attorney's practice without having to prove disciplinary charges and references a case recently dismissed by the Hearing Department after trial, which OCTC has appealed.
- The term "Consumer Alert" means that the attorney is a threat to the public and, therefore, should apply solely where the factual basis demonstrates a threat to the public.
- Clarification is needed regarding whether 15 counts or 15 complaints/cases would trigger a Consumer Alert.
- Consumer Alerts should be removed upon completion of reprobation conditions, probation or upon return to active status.

## **RESPONSE TO PUBLIC COMMENT**

Although only one public comment was received during this public comment period, the State Bar recommends that RAD accept public comment and take no action at this time.

OCTC and the State Bar Court are currently in the process of moving towards new case management systems. Selection and configuration of the State Bar Court's new case management, in particular, may significantly change what public information will be readily accessible through the State Bar website. This, in turn, may impact the scope and design of the State Bar's Consumer Alert policy. Both the proposed change to post a Consumer Alert after culpability finding by the State Bar Court and the proposed suggestion to remove Consumer Alerts upon completion of probation, return to active status or other defined time triggered by court order, for example, would require State Bar Court action. Under a new case management system, such court action could become more readily available to the public and change the State Bar's needed scope for a Consumer Alert.

OCTC also provides the following information in response to Mr. Wine's public comment:

- As of September 2013, the percentage of filed cases that resulted in dismissal this year was 1%. In other words, 99% of the Hearing Department decisions and orders filed this year have resulted in culpability or other favorable findings for OCTC.<sup>1</sup> OCTC notes that this calculation does not take into account the last quarter of 2013, so the percentage may change by year's end.

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<sup>1</sup> To avoid concerns of self-reporting, OCTC asked the State Bar Court to provide data regarding court dismissal of cases. According to that data, from January 1 through September 24, 2013, there were eight (8) dismissals out of 821 filed Hearing Department decisions and orders (266 decisions and 555 other dispositions).

- OCTC submits that the public has an important interest in knowing whether the State Bar has filed formal disciplinary charges against an attorney. A Consumer Alert is utilized only upon public filing of formal charges and does not replace the posting of a NDC and responsive pleading. Any inquiring member of the public may review the filed allegations and the attorney's response to weigh the seriousness of the allegations or to make other informed decisions. A Consumer Alert notifies the public that formal charges have been filed and the public is entitled to that information.
- The current Consumer Alert policy authorizes the posting of a Consumer Alert when the State Bar files loan modification charges involving 15 or more cases (not merely 15 or more counts/allegations). The proposed modification to expand the 15-case threshold was based upon the same requirement – a requisite filing of 15 or more consolidated cases.

In sum, OCTC recommends that RAD accept public comment and take no further action at this time to allow completion of the OCTC and State Bar Court case management system initiatives. Both OCTC and State Bar Court provide regular reports to RAD, which shall include updates on the respective case management systems. When the State Bar is ready to re-propose changes to the Consumer Alert policy, it will bring the agenda item back before RAD and seek another public comment period for any proposed recommendation.

#### **FISCAL / PERSONNEL IMPACT:**

None.

#### **RULE AMENDMENTS:**

None.

#### **BOARD BOOK IMPACT:**

None.

#### **RECOMMENDATION**

OCTC recommends that the RAD accept public comment and take no further action at this time.

#### **PROPOSED BOARD COMMITTEE RESOLUTION:**

Should the Regulation, Admissions and Discipline Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

**RESOLVED**, that the Regulation, Admissions and Discipline Oversight Committee accepts public comment in response to the proposed Modification to Board Policy Regarding Posting of Consumer Alerts.