

AGENDA ITEM

II.B. March 6, 2014

DATE: February 28, 2014

TO: Members, Regulation, Admissions and Discipline Oversight

FROM: Lawrence C. Yee, Acting General Counsel
Dina E. Goldman, Supervising Sr. Asst. General Counsel

SUBJECT: Proposed Resolution re: Matters To Be Included In The Annual Discipline Report and Reports To RAD

EXECUTIVE SUMMARY

Since the mid-1980's, the Legislature has set as a benchmark for the performance of the State Bar's discipline system the goal of six months from the receipt of complaints against attorneys to the time of dismissal, admonishment of the attorney involved, or the filing of formal disciplinary charges. Since then, the Legislature has also required the State Bar to report annually on the number of complaints as of December 31 of the preceding year, which were pending beyond six months after receipt without dismissal, admonition, or the filing of a notice to show cause. This "backlog" report is now included each year as part of the State Bar's Annual Discipline Report, which is the document filed each year to inform the Supreme Court, the Governor, the Legislature, and other stakeholders on the performance of the discipline system.

Starting with the 2010 Annual Discipline Report filed in 2011, the State Bar expanded the types of matters counted and included in the backlog report.

This item seeks approval of further expanding the matters—in addition to complaints received and processed up to the filing of disciplinary charges in six months—for inclusion in the Annual Discipline Report and to be incorporated into regular reports during the year to the Regulation, Admissions and Discipline Oversight Committee (RAD). The metrics reports provided to RAD would include executive summaries in tables concisely covering the salient measures to enable the Board to assess at any time during the year the performance of the discipline system. The expanded metrics reporting in both the Annual Discipline Report and the RAD reports would cover the processing of disciplinary complaints and other matters not only in the Office of the Chief Trial Counsel, but also after a filing in the State Bar Court until a final disposition of the complaint or matter.

BACKGROUND

A. The Annual Discipline Report

The State Bar's Annual Discipline Report informs the Supreme Court, the Governor, and the Legislature on the performance and condition of the discipline system. The Annual Discipline Report contains detailed statistical and other information about the State Bar's attorney discipline system. It presents data and tables on the numbers of complaints made against California lawyers and the average times for processing complaints through the discipline system for the preceding year. Statistical information is also presented for the three previous years to enable a year-to-year comparison and an overview of the workload and performance of the State Bar's attorney discipline system.

Section 6086.15 of the California Business and Professions Code requires the State Bar to file by April 30 of each year with the Chief Justice of California, the Governor, the Speaker of the Assembly, the President pro Tempore of the Senate, and the Assembly and Senate Judiciary Committees an Annual Discipline Report describing the performance of the State Bar's discipline system up to December 31 of the preceding year. The Annual Discipline Report must contain "statistical information presented in a consistent manner for year-to-year comparison" of the performance of the discipline system with the three previous years. Where feasible, the statistical information must be presented in data tables consistent with previous reports. Cal. Bus. & Prof. Code § 6086.15(b). The categories of information specified in the Annual Discipline Report which require the presentation of statistical data include: (1) existing backlog of cases within the discipline system; (2) number of inquiries and complaints and their disposition; (3) number and types of matters self-reported by members pursuant to statutory requirements; (4) number and type of matters reported by other sources (courts, insurers) pursuant to statutory requirements; (5) speed of complaint handling and dispositions by type; (6) number and types of filed notices to show cause and formal disciplinary outcomes; and (7) number and types of informal discipline outcomes. Cal. Bus. & Prof. Code § 6086.15(a)(1)-(7).¹

Historically, in assessing performance of the discipline system, the focus has generally been on the "backlog" of cases.

B. History of the Backlog Definition

The statutory requirements for reporting on the backlog began in 1986, after a six-part series entitled, "The Brotherhood," that was published in the *San Francisco Examiner*, criticizing the State Bar's discipline system as slow and ineffective in its handling of complaints against California lawyers. In response, the Legislature imposed

¹ The statute also requires the following information to be included in the Annual Discipline Report: a description of the programs of the State Bar directed at assuring honesty and competence by attorneys; a description of the programs of the State Bar directed at preventing acts warranting discipline; a description of the condition of the Client Security Fund, including an accounting of payouts; and an accounting of the cost of the discipline system by function. Cal. Bus. & Prof. Code § 6086.15(a)(8)-(11).

requirements for the State Bar to reduce its backlog of complaints. The definition of “backlog” in Section 6086.15(a)(1) today is derived from practically identical language enacted in 1986 in Sections 6140.2 (as added Cal. Stats. 1986, ch. 2, § 3, eff. Feb. 4, 1986) and 6094.5 (as added by Cal. Stats. 1986, ch. 475, § 4).

As originally enacted in February 1986, Section 6140.2 was urgency legislation that required the State Bar to meet certain goals and to provide two immediate reports on its progress in reducing the backlog. The language stated:

(a) On or before April 1, 1986, and June 1, 1986, the State Bar shall submit reports to the Judiciary Committees of the California State Senate and Assembly on the procedural changes and improvements which have been made in the State Bar disciplinary system and what effect these changes have had on the number of complaints pending, the time required to process these complaints, and *the progress made in reducing the backlog of complaints*.

(b) On or before December 31, 1987, *the State Bar shall reduce by 80 percent the complaints within its inventory as of March 31, 1985, which have been received but have not resulted in dismissal, admonishment of the attorney involved, or filing of formal charges* by State Bar Office of Trial Counsel. This reduction shall be accomplished by dismissal, admonishment of the attorney involved, or recommendation by the State Bar for disposition by the Supreme Court.

(c) The State Bar shall set as a *goal* by December 31, 1987, the improvement of its disciplinary system *so that no more than six months will elapse from the receipt of complaints to the time of dismissal, admonishment of the attorney involved, or the filing of formal charges* by the State Bar Office of Trial Counsel.

(Italics added.)²

Later in 1986, the Legislature adopted Section 6094.5, which imposed an annual report on the backlog by the State Bar. As enacted, Section 6094.5(a) stated:

It shall be the goal and policy of the disciplinary agency to dismiss a complaint, admonish the attorney, or file a written notice to show cause, with respect to the matter within six months after receipt of a written complaint. A notice to show cause is a public record when filed. This goal and policy is not jurisdictional and shall not serve as a bar or defense to, any disciplinary investigation or proceeding. The disciplinary agency shall provide a written report annually by March 31 to the Supreme Court and the Assembly and Senate Judiciary Committees on *the number of complaints as of December 31 of the preceding year, which were pending beyond six months after receipt*

² Section 6140.2, as amended by Cal. Stats. 2004, ch. 193, § 6, deleted outdated requirements and today states: “The State Bar shall set as a goal the improvement of its disciplinary system so that no more than six months will elapse from the receipt of complaints to the time of dismissal, admonishment of the attorney involved, or the filing of formal charges by the State Bar Office of Trial Counsel.”

without dismissal, admonition, or the filing of a notice to show cause, plus tables showing time periods beyond six months and the number in each category on a discussion of the reason for the extended periods.

Cal. Stats. 1986, ch. 475, § 4 (Italics added). This report was commonly referred to as the backlog report.

The reference to an “investigative backlog” began after 1988, when the Legislature amended Section 6094.5(a) to add goals for the State Bar to complete the investigation of a complaint within six months after its receipt or within 12 months for a complaint designated as a complicated matter. Cal. Stats. 1988, ch. 1159, § 24. This amendment did not alter the language of what would be reported in the backlog report. Read together, complaints in which investigations were not completed within six months of receipt—including those designated as “complicated matters”—would be included in the number of reported backlog complaints. Designations as “complicated matters” could explain “the reason for the extended periods” beyond six months, but the complaints would still be considered backlog.

In 1992, the Legislature enacted former Section 6086.13 to require the issuance of the Annual Discipline Report. Among other things, this section required the State Bar to include “the backlog of cases” in an Annual Discipline Report. Former § 6086.13, added by Cal. Stats. 1992, ch. 1265, § 2. As enacted, there was no definition of “backlog” in the statute.³ Section 6086.13 was later amended and renumbered as § 6086.15 by Stats. 1994, ch. 146, § 6.

Under former Section 6086.13(a)(1) and later in the renumbered Section 6086.15(a)(1), the Annual Discipline Report is due by April 30 each year, while the backlog report in Section 6094.5 was due by March 31 each year. In 2001, the duplicate reporting requirement was removed.⁴

At the same time, the language defining “backlog” in Section 6094.5 was deleted and moved to Section 6086.15(a)(1) with one significant change; it was preceded with the addition of the phrase, “including, but not limited to.”⁵ Cal. Stats. 2001, ch. 745, § 3 (eff.

³ In relevant parts, the statute read:

6086.13. (a) The State Bar shall issue an Annual Discipline Report by April 30 of each year describing the performance and condition of the State Bar discipline system. The report shall cover the previous calendar year and shall include accurate and complete descriptions of:

(1) The existing backlog of cases within the discipline system.

* * * *

⁴ Section 6094.5(a) was amended to delete the sentence, “The disciplinary agency shall provide a written report annually by March 31 to the Supreme Court and the Assembly and Senate Judiciary Committees on the number of complaints as of December 31 of the preceding year, which were pending beyond six months after receipt without dismissal, admonition, or the filing of a notice to show cause, plus tables showing time periods beyond six months and the number in each category on a discussion of the reason for the extended periods.” Cal. Stats. 2001, ch. 745, § 4 (eff. Oct. 12, 2001).

⁵ Under the general rule of statutory construction the use of the language “including, but not limited to” in a statutory definition is a phrase of enlargement rather than limitation. *People v. Arias*, 45 Cal. 4th 169, 176 (2008). The phrase “connotes an illustrative listing, one purposefully capable of enlargement,” but it

Oct. 12, 2001). As amended, the current definition of the term “backlog” in Section 6086.15(a)(1) states:

The existing backlog of cases within the discipline system, including, but not limited to, the number of complaints as of December 31 of the preceding year that were pending beyond six months after receipt without dismissal, admonition, or the filing of a notice to show cause, and tables showing time periods beyond six months and the number in each category and a discussion of the reason for the extended periods.

(Italics added.)

C. The Limiting Interpretation of Backlog

Although the Legislative addition of the phrase “including, but not limited to” in the definition of the term backlog signaled an intent that more information should be included in the backlog report to advise stakeholders on the performance of the discipline system, this was not reflected in the matters included in the report. Instead, the State Bar continued its practice of limiting the interpretation of what “cases” and “complaints” are counted in its report of the backlog together with the separate goals of six and 12 months for completing investigations, and focused its reporting on the “investigative” backlog.

This under-reporting was criticized by the California State Auditor in 2009. (California State Auditor, Report No. 2009-040, at pp. 39-40.)

[T]he State Bar has interpreted this law in such a way that it reports less than what the law permits and does not report consistently to allow for year-to-year comparisons. The State Bar was able to provide us with the types of cases that it does not include when it reports its backlog as well as its rationale for not including them. We believe that the State Bar’s stakeholders, including the Legislature, would benefit from having this same information, as it would provide more complete and clear measures of the number of complaints and cases that were pending over six months during the preceding year.

California State Auditor, Report No. 2009-040, at p. 36.

D. The Changes in Reporting of the Backlog in the Annual Discipline Report for 2010.

With changes in State Bar leadership in 2011, beginning with the *Annual Discipline Report* for 2010, the State Bar broadened and expanded the matters counted and included in the backlog report. The changes were prompted in large part by

must be applied in a manner consistent with the general list of examples listed by the Legislature. *Id.*, at 181.

recommendations in the 2009 audit report of the California State Auditor. As a result, the matters added in the expanded count for the backlog report included:

- Each complaint opened against a lawyer, counted separately, instead of only once when consolidated in a “case”;
- Complaints designated as “complicated” or “complex” where charges have not been filed six months after their receipt;
- Abated and held complaints;
- Complaints reopened after Audit and Review; and
- Complaints assigned to outside examiners.

In the transmittal letter that accompanied the 2010 report, the then new CEO Joseph Dunn stated:

This year, the State Bar has made major changes in both the format and the content of the Annual Discipline Report. Our goal has been to sharpen its focus on the areas of greatest interest to the State Bar’s stakeholders and to improve the overall transparency of the attorney discipline system. We have also incorporated recommendations from the Bureau of State Audits regarding the information presented. At the same time, we have taken care to conform to the requirements of the statute which directs us to submit this report.

* * * *

The principal focus of this report is on the efficiency and speed with which the discipline system is able to address allegations of professional misconduct against attorneys. Handling these complaints fairly and expeditiously is a cornerstone of the State Bar’s mission. Moreover, state law establishes specific benchmarks for the speed of complaint resolution. Business and Professions Code section 6094.5 sets one benchmark for closing or completing the investigations of complaints within six months after receipt and within 12 months for cases designated as complex. Business and Professions Code section 6140.2 sets another goal of filing disciplinary charges in the State Bar Court within six months of the receipt of the complaints. The extent to which the State Bar meets or falls short of these benchmarks is one of the major purposes of this report. Complaints that do not meet these statutory goals at the end of each year are included in the “existing backlog of cases” that must be described in this and in previous years’ reports.

* * * *

The Annual Discipline Report for 2010 is a transitional document. *We expect to refine and expand this format in coming years*, and we look forward to feedback on how we might improve upon this year’s effort.

(Emphasis added.)

E. Proposal for Expanded Reporting

In addition to the yearly Annual Discipline Report, OCTC reports discipline statistics to the Board and to RAD. Since late 2011, OCTC has provided “backlog” information to RAD on a monthly basis. Pursuant to the counting methodology of the State Bar’s Annual Discipline Report, backlog figures have been based upon OCTC’s inventory of “complaint” cases, which are initiated when Intake receives a written complaint form. In addition to complaints, however, OCTC handles other types of cases that may result in disciplinary proceedings. For example, entities are required to report certain activities to the State Bar – such as financial institutions reporting insufficient funds in a client trust account –which OCTC refers to as “reportable action” cases. In addition, OCTC may initiate its own investigation, which we refer to as “State Bar Investigations” or “SBIs.”⁶ Related to OCTC’s month-end reports, recent events have revealed internal inconsistency in the State Bar’s use of the term “complaints” and the need to refine definitions and the scope of reporting in the Annual Discipline Report.⁷

In an effort to standardize this reporting, the Chair and Vice-Chair of RAD have worked with staff over the past few months to clarify and/or develop metrics for reporting discipline cases. The metrics include reporting for active cases in OCTC as well as Supreme Court activity regarding discipline recommendations and “Walker” petitions.⁸ The metrics also include reporting for the Audit and Review inventory. The proposed metrics include reporting on all categories of disciplinary complaints, with the goal of

⁶Over the last five years (2009-13), OCTC has opened an average of 293 SBIs per year, accounting for about 5% of all cases opened.

⁷ The Annual Discipline Report uses the statutory definition of backlog, pursuant to Business and Professions Code section 6086.15, to mean “the number of complaints as of December 31 of the preceding year that were pending beyond six months after receipt without dismissal, admonition, or the filing of a notice [of disciplinary charges].” A recent re-examination of the Annual Discipline Report revealed, however, that its “complaint” count included a subset of SBIs. During the last quarter of 2013, as OCTC prepared for year-end backlog numbers, OCTC calculated and predicted its year-end backlog numbers based solely upon its complaint inventory, with the exclusion of non-complaint cases (such as SBIs, reportable actions, etc.). This has resulted in discrepancies regarding OCTC’s month-end reports starting with the report distributed in September 2013. For example, in September, OCTC reported ending the previous month with 71 complaints in investigations backlog. Using the Annual Discipline Report’s backlog formula (of complaints plus a subset of SBIs), the number would have been 75. Likewise, in October, OCTC reported ending the previous month with 50 complaints in investigations backlog when the number would have been 61 using the Annual Discipline Report’s counting formula. Having re-calculated all months in 2013, the two different “complaint” calculations resulted in a variance of 2 to 12 investigations backlog cases depending on the month. Notably, the Office of General Counsel prepares the Annual Discipline Report each year so OCTC’s internal count would not have affected the official State Bar of California Attorney Discipline Report For The Year Ending December 31, 2013.

⁸ A “Walker” petition is a petition for review filed in the California Supreme Court under California Rules of Court, rule 9.13(d), by a complaining witness after the State Bar’s Office of Chief Trial Counsel has dismissed a complaint against an attorney for professional misconduct. “Walker” refers to the Supreme Court’s decision, *In Re Walker*, 32 Cal.2d 488 (1948), establishing “as a matter of policy this court should not exercise [its] powers [to hear disciplinary matters] unless and until the accuser has followed the normal procedure by first invoking the disciplinary powers of The State Bar.”

having the Board aware of the number of complaints pending at the end of each month that are older than 6 months.

Under the proposed metrics, OCTC would report data to the Board for all disciplinary complaints, whether initiated by a member of the public or otherwise. In addition, the State Bar Court will provide key information from its Court Performance Standards and Assessment report, including caseload clearance rates, number and timeliness of trials and oral arguments, and number of cases completed within the established timelines.

For consistency, much of data in the proposed metrics would be used to prepare the Annual Discipline Report.

ISSUE

Should the Board approve the expanded metrics for reporting of discipline cases in the Annual Discipline Report and the regular reports provided to RAD?

CONCLUSION

Staff recommends that the Board adopt the proposed expanded metrics for reporting of discipline cases in the Annual Discipline Report and the regular reports provided to RAD.

DISCUSSION

The proposal is to clarify and/or expand the categories of discipline metrics reported by the Bar in the Annual Discipline Report to include, but not be limited to, all of the following:

OCTC Inventory of Open Discipline Complaints that are 6 Months or Older with Comparison to the Three Preceding Calendar Years

The inventory will report the following types of complaints:

- All complaints received from the public (measured from date received);
- State Bar initiated complaints (measured from investigation open date);
- Reportable Actions (Bus. & Prof. Code §§ 6086.7, 6086.8.) (measured from investigation open date); and
- Complaints reopened following Audit and Review (measured from date complaint was originally received).

The inventory will be broken into 2 categories:

- Investigations that are 6 months or older (i.e., open complaints where the investigation has not been completed within the time goals in Business and Professions Code section 6094.5(a)); and

- “Notice Open” Cases (i.e., those complaints where the investigation has been completed, but disciplinary charges have not been filed) that are 6 months or older.

OCTC Inventory of Discipline Complaints Pending Audit and Review

The inventory will report the following:

- All complaints submitted to Audit and Review that are still being reviewed;
- The age of complaints pending in Audit and Review;
- The average duration (days) complaints are in Audit and Review.

Supreme Court Activity

- The number of *Walker* petitions filed and granted .
- The number of OCTC petitions for review filed and number granted by the Supreme Court.

State Bar Court Activity

State Bar Court will report the following matters:

- Number of disciplinary and regulatory cases filed versus number closed;
- Number of cases in which trial commenced in the hearing department and whether within established timeline;
- Number of cases in which oral argument commenced in the review department and whether within established timeline;
- Number of closed cases processed on time in hearing and review departments; and
- Number of cases the Supreme Court remanded or granted writ of review.

Finally, in addition to the Annual Discipline Report, all of the above additional metrics will also be incorporated into the regular reports to RAD that are now currently provided. For the metrics that report a snapshot in time, they will include prior month's data and calendar year to date. RAD will continue to monitor these reports to determine whether additional information will be added to the reports.

FISCAL / PERSONNEL IMPACT:

N/A

RULE AMENDMENTS:

N/A

BOARD BOOK IMPACT:

N/A

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 recommends that the Board adopt expanded categories of discipline metrics, as summarized above and detailed in Attachment A, for reporting in the Annual Discipline Report and in regular reports to RAD.