

AGENDA ITEM

RAD ITEM 3H - JULY 2016

DATE: July 15, 2016

TO: Members, Regulation and Discipline Committee

FROM: Office of General Counsel

SUBJECT: Whether the State Bar May Alter Records of Public Attorney Discipline History on the State Bar Website

EXECUTIVE SUMMARY

The Board of Trustees inquired of the Office of General Counsel whether the State Bar may alter the information provided on the State Bar website regarding public discipline history of current or former members. Currently, to remove a record of prior public discipline, including from the State Bar website, a member or former member must request expungement from the California Supreme Court. State law provides what information the State Bar must maintain in its records related to discipline, and the expungement of such records is within the purview of the California Supreme Court. It is therefore not within the authority of the Board of Trustees to alter attorney discipline records.

BACKGROUND

At the March 2016 State Bar Board of Trustees meeting, a former State Bar member spoke about his public discipline history available on the State Bar website. He later submitted a letter proposing a policy change regarding older disciplinary information. This former member was disbarred in 2003 following two felony convictions and is now a licensed real estate broker. He contends that an individual's right to have "very old disciplinary" information removed from the website outweighs retaining the information on the State Bar's website to increase public protection. He would like all of his information, including that he was a State Bar member and was subsequently disbarred, removed from the State Bar website. The former member does not intend to apply for reinstatement. Based on his proposal, if the public were to search for him on the State Bar website, there would be no result.

A similar argument was recently made in a communication from a current State Bar member to State Bar President David Pasternak. This member resigned with charges pending in 2003 and was reinstated in 2008. He contends that the record of his prior misconduct impairs his ability to represent his clients effectively. He requests a process to seal the record of prior misconduct.

Based on these two inquiries, the Board requested the Office of General Counsel look into the State Bar's policy of maintaining all public discipline history on the State Bar website.

As discussed below, there is currently an avenue available for the expungement of such records by the California Supreme Court. An order granting expungement would presumably state what, if any, information related to the expunged discipline record(s) could be provided to the public, including on our website. Moreover, the content of the State Bar's records is governed by statute.

DISCUSSION

1. AVAILABILITY OF PUBLIC ATTORNEY DISCIPLINE HISTORY

The information available to the public regarding attorneys and attorney discipline is governed by the California Rules of Court and the Business and Professions Code. Rule 9.6 of the California Rules of Court states that "the State Bar must maintain, as part of the official membership records of the State Bar, the Roll of Attorneys of all persons admitted to practice in this state. Such records must include the information specified in Business and Professions Code section 6002.1 and 6064 and other information as directed by the Supreme Court." Business and Professions Code section 6002.1 requires members to provide specific information for the official membership records of the State Bar including current contact information, certified legal specialties, admission in any other jurisdictions, discipline imposed by another jurisdiction, and any other information that is required to by an agreement with the Office of Chief Trial Counsel. Section 6064 pertains to certifications of admission to the practice of law in California.

Business and Professions Code section 6094.5, subdivision (b) further requires that "The disciplinary agency . . . shall respond within a reasonable time to inquiries . . . as to public discipline that has been imposed upon an attorney in California." Disciplinary proceedings against attorneys are required to be public and there is a strong public policy favoring the disclosure of public records. (Bus. & Prof. Code, §§ 6086.1, 6094.5; *Mack v. State Bar of California* (2001) 92 Cal.App.4th 957, 962-964.) Similarly, the State Bar Act requires the State Bar to keep a permanent record of all disciplinary proceedings where discipline is imposed and respond to inquiries related to such discipline. (Bus. & Prof. Code §§ 6080; 6092.5, subd. (d); 6094.5, subd. (b).) Protection of the public is the highest priority for the State Bar of California and whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Bus. & Prof. Code § 6001.1)

The State Bar website is one of several forums that makes the Roll of Attorneys and other State Bar member information available, including records of public discipline and information regarding former members who were disbarred or resigned with charges pending. The State Bar has linked all *California Bar Journal* discipline summaries issued since 1996 to the State Bar website and has subsequently included those summaries in the Attorney Profile. More recently, the State Bar has included direct links to the actual Supreme Court and State Bar Court disciplinary decisions, orders, and stipulations.

The State Bar is not specifically required by statute to post public discipline online, although it tends to promote transparency and facilitates the public's right of access to State Bar disciplinary records. The State Bar's use of its website to provide public access to discipline information was challenged in 2001 in *Mack v. State Bar of California, supra*, 92 Cal.App.4th 957. The California Court of Appeal stated that there is a powerful public right of access to State Bar disciplinary records and found that the use of the internet to search out a lawyer's membership records and examine his public record of discipline is fundamentally no different than calling and asking for the same records. (*Id.* at p. 964.) Based on the determination that

there is no material difference between providing public discipline history via a telephone request or via the State Bar's website, there would need to be justification for removing already posted discipline history from the website or for providing less information online that is otherwise available to the public. Moreover, as described above, the Business and Professions Code and Rules of Court address what information regarding public discipline is to be made available to the public. None of those sections or rules provide any temporal limitations with respect to the information to be made publically available. The State Bar may need to seek changes to those Rules of Court and statutes in order to be authorized to alter or limit that information online. Although we are not required by any statute or rule to provide access to such information online, once we have undertaken to provide such information online, we should proceed carefully before providing less than all available information. Doing so could be confusing or misleading to the public.

2. CURRENT METHOD FOR EXPUNGEMENT OR SEALING OF STATE BAR DISCIPLINE HISTORY

The only avenue currently available to remove a record of prior public discipline, including from the State Bar website, is by requesting expungement from the California Supreme Court. Business and Professions Code section 6092.5, subdivision (e) provides that the State Bar of California shall expunge its records "as directed by the California Supreme Court."¹ Business and Professions Code section 6092.5, subdivision (e), also provides that the State Bar shall expunge records as the Supreme Court directs. A member who seeks to have their discipline history removed from the State Bar website may petition the Supreme Court and request expungement. However, our research into this issue shows that expungement of prior attorney discipline by the California Supreme Court is rare at best; we located only two petitions for expungement and both were denied.

Expungement does not necessarily mean destruction of the record to be expunged, and the public may retain access to expunged records. (See, e.g., *People v. Field* (1995) 31 Cal.App.4th 1778, 1787 ["expungement under [Penal Code] section 1203.4, of course, does not obliterate the conviction for all purposes . . . records of a conviction expunged under section 1203.4 are accessible to the public"].) Therefore, even if the Supreme Court granted a petition for expungement, whether discipline history would still be publicly available in certain instances would depend on the Supreme Court's order. If the Supreme Court's order states that the records are no longer available to the public, then they would have to be removed from the website. A member could also specifically ask for such an order as part of a petition for

¹ That a Rule of Court would be required is supported by Rule of Court 9.6 which provides that administrative suspensions for non-payment of membership fees may be expunged from a member's record. The rule limits the circumstances under which expungement may occur, including when (1) the member has not on any previous occasion obtain an expungement under the terms of Rule 9.6; (2) the suspension was for less than 90 days; (3) the suspension ended at least seven years before the date of the request for expungement; and (4) the member has no other record of suspension or involuntary inactive enrollment for discipline or otherwise. (Rule 9.6, Cal. Rules of Ct.) Even when this record is expunged, the State Bar must maintain internal records to report to the Commission on Judicial Nominees Evaluation or other governmental entities involved in judicial elections and the member retains a duty to disclose the suspension for purpose of determine the member's eligibility for judgeship. (*Id.*) Rule 9.6 (f) provides that "[n]othing in this rule may be construed as affecting the power of the Supreme Court to exercise its inherent power to direct the State Bar to expunge its records."

expungement. Thus, the relief requested appears to be within the inherent power of the California Supreme Court.

3. HOW OTHER LICENSING BODIES IN CALIFORNIA PROVIDE PUBLIC DISCIPLINE

Most other licensing bodies in California publish information on suspensions and the revocations of licenses online. Business and Professions Code section 27 requires nineteen agencies² within the Department of Consumer Affairs to provide “information on suspensions and revocations of licenses issued by the entity and other related enforcement action, including accusations filed pursuant to the Administrative Procedure Act . . . taken by the entity relative to persons, businesses, or facilities subject to licensure or regulation by the entity” online. Public information regarding suspensions and revocations of individuals and businesses subject to licensure, registration or regulation by the Bureau of Real Estate or the Bureau of Real Estate Appraisals is also published online. (See Bus. & Prof. Code §§ 10083.2, 11317.2.) Physician discipline history is also published online as required by statute, including the discipline history of former physicians. (See Bus. & Prof. Code § 2027.) In contrast, there is no such statutory requirement that applies to the State Bar. Although the State Bar is not statutorily required to post discipline history online, it may wish to continue to do so to promote transparency and in furtherance of our mission of public protection. Moreover, if the State Bar decides to remove or limit such information from its website, the legislature could decide to enact legislation specifically requiring the information to be provided online as it has done with other professions.

4. HOW OTHER STATES PROVIDE PUBLIC ATTORNEY DISCIPLINE HISTORY

Including California, thirty-nine states and Washington DC make public discipline history available online.³ In eleven states, an individual seeking public discipline history must call or write for such information; however, the information is not generally limited by a specific timeframe, e.g., the past ten years.⁴ Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Washington DC provide public discipline history online. Only two states, Texas and Florida, limit

² These agencies include (1) The Board for Professional Engineers, Land Surveyors, and Geologists; (2) The Bureau of Automotive Repair; (3) The Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation; (4) The Cemetery and Funeral Bureau; (5) The Professional Fiduciaries Bureau; (6) The Contractors’ State License Board; (7) The Bureau for Private Postsecondary Education; (8) The California Board of Accountancy; (9) The California Architects Board; (10) The State Athletic Commission; (11) The State Board of Barbering and Cosmetology; (12) The State Board of Guide Dogs for the Blind; (13) The Acupuncture Board; (14) The Board of Behavioral Sciences; (15) The Dental Board of California; (16) The State Board of Optometry; (17) The Board of Psychology; (18) The State Board of Chiropractic Examiners shall disclose information on its licensees; and (19) The Structural Pest Control Board.

³ A table that provides additional detail regarding other states’ treatment of public attorney discipline history is attached to this memorandum.

⁴ Currently an individual seeking public discipline information must call or write for such information in Alabama, Alaska, Hawaii, Idaho, Kentucky, Louisiana, Mississippi, New Mexico, Oklahoma, South Dakota, and Utah. New Mexico is in the process of adding public discipline history to its website.

the timeframe that public discipline history is included online. Florida and Texas provide discipline history for the past ten years online, but also provide prior public discipline history by contacting them directly, the Florida Bar via email and the State Bar of Texas by phone. Several states have limited public discipline history that is available online as a consequence when the websites were created. Regardless, the majority of states have public discipline history available for twenty years or more.

ATTACHMENT(S) LIST

A. Treatment of Public Records of Discipline by State