

AGENDA ITEM

705 DECEMBER 2016

DATE: December 7, 2016

TO: Members, Board of Trustees

FROM: Suzanne Grandt, Attorney, Office of the General Counsel
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SUBJECT: Closed Inquiries

EXECUTIVE SUMMARY

The Workforce Planning Report (Report) delivered to the State Bar in May, 2016, included recommendations related to the handling of Complaint Check Certificates of Standing.¹ Specifically, the Report recommended that Member Records and Compliance (MRC) discontinue the practice of sending requests for Complaint Checks to the Office of the Chief Trial Counsel (OCTC) and, instead, assume full responsibility for processing these documents.

Related to this recommendation, the Report also noted the confusion that has been created when a licensed attorney requests a Complaint Check and learns, for the first time, about allegations of misconduct that never proceeded beyond the Intake phase of case processing. Evaluations of these allegations of misconduct are defined by State Bar Rules as “inquiries.” The Report recommends the implementation of a policy to notify attorneys of inquiries that are closed in Intake and to purge these records from OCTC files. However, these recommendations raise a prior question: when does an allegation of misconduct have sufficient merit to warrant inclusion in a Complaint Check?

The Office of the General Counsel (OGC) has evaluated the question regarding attorney notification of closed inquiries, as well as what information should properly be included in Complaint Checks. The Committee on Regulation and Discipline brings this topic to the Board for discussion.

¹ Under current State Bar policy, all members of the State Bar may request a list of “confidential complaint information that may have been filed against [that person].” See State Bar Website at <http://www.calbar.ca.gov/Attorneys/MemberServices/CertificateofStanding.aspx#4>. This document is referred to as a “Complaint Check.” The State Bar’s website also refers to this document as a “grievance” or “discipline history” letter. Currently, the Complaint Check indicates when an initial report of misconduct was received, the file number, the name of the complainant, a brief statement of the allegation, and the disposition.

WORKFORCE PLANNING OBSERVATIONS AND RECOMMENDATIONS

In the Workforce Planning Report (Report) delivered to the Legislature in May, 2016, the National Center for State Courts (NCSC) noted a number of challenges related to the processing of Complaint Check Certificates of Standing. Previously, staff in Member Records and Compliance (MRC) received requests for these documents and initiated the response, processing the Certificate of Standing, which includes the following basic information: the member's full name, bar number, date of admission, name or status changes, administrative actions, reportable actions and *public* disciplinary history. MRC staff, however, lacked access to the data needed to produce the Complaint Check which includes confidential complaint information that may have been filed against a member of the bar. Instead, that data was previously accessible only to staff in the Office of the Chief Trial Counsel (OCTC). As a result, MRC staff would process the Certificate of Standing and then send the remaining portion – the Complaint Check – to OCTC staff in Los Angeles to be completed.

With the intent of streamlining this process, the NCSC recommended that MRC staff be given access to the systems that OCTC uses when it produces the Complaint Checks and be trained to read the data in the system so that Complaint Check Certificates of Standing could be processed entirely by MRC staff. While this recommendation has now been fully implemented, a related issue identified by NCSC remains outstanding.

Prior to about four years ago, Complaint Checks did not include information related to allegations of misconduct that had insufficient merit to proceed beyond the Intake phase in OCTC. While such filings are submitted on a "Complaint Form" and are colloquially referred to as "complaints," technically they are considered *inquiries*, not complaints. State Bar Rules define a Complaint as "a communication alleging misconduct by a State Bar member **sufficient to warrant an [I]nvestigation**² that may result in discipline of the member if the allegations are proved." Allegations of misconduct that are closed at intake are, by definition, insufficient to warrant an investigation.

For reasons that are not well documented, about four years ago, State Bar staff were directed to include *inquiries* in the information provided in Complaint Checks. This practice has proven problematic. Attorneys who request Complaint Checks may be entirely unaware that inquiries were submitted to OCTC, because the inquiry was closed prior to any investigation being undertaken by OCTC; in some instances they have stated under oath that they have not been the subject of any misconduct complaints based on their lack of knowledge of the more precise, technical definition of "complaint." Moreover, MRC's disclosure of this information may be in violation of State Bar Rules and Business and Professions Code sections mandating the confidentiality of non-public investigatory information.

In response to the first concern regarding attorney's lack of knowledge of inquiries, and the overall need for clearer guidelines in this area, the NCSC recommended that a policy be implemented to notify attorneys of inquiries closed at intake and that a rule be promulgated outlining timelines for purging such information from OCTC records.

² An Investigation is defined as "the process of obtaining, evaluating, and reviewing evidence and information." State Bar Rule 5.4(33).

DISCUSSION

Staff at the State Bar believe that the recommendation regarding notification to attorneys of inquiries that are closed in Intake is problematic. As an initial matter, this policy raises significant confidentiality concerns relating to communications between complainants and the State Bar. Business and Professions Code section 6094 states that “communications to the disciplinary agency relating to lawyer misconduct or disability or competence, or any communication related to an investigation or proceeding and testimony given in the proceeding are privileged.” Although State Bar rules permit OCTC, in its discretion, to notify attorneys they have received an allegation of misconduct against him or her, this is presumably in order to obtain information to determine whether to move forward with an investigation. Disclosure for any other reason by any other part of the State Bar serves no public protection purpose, and is arguably not permissible under State Bar Rules and Business and Professions Code section 6094. Moreover, this type of notification to the subject member may create a disincentive to individuals from filing grievances, since they may fear the risk of a potential libel, or other civil action against them.

In Chronicle Pub. Co. v. Superior Court (1960) 54 Cal.2d 548, the California Supreme Court stated “The State Bar will accept a complaint from any member of the public who feels, whether rightly or wrongly, that he has been aggrieved by the action of the attorney, or feels interested in complaining about an attorney, no matter how informally made the complaint may be.... These complaints are confidential unless they result in disciplinary action taken against the attorney. Many such complaints found to be unfounded are never brought to the attention of the attorney involved. ***This procedure acts as a safety valve for the public. It thereby is made to feel that the law profession is not a closed body which protects its members no matter how unfaithful to their trusts any might be, and which would punish a member of the public who makes an unfounded charge by disclosure of his name and his charge.*** . .” Id., at 567-568 (emphasis added).

Even setting aside these confidentiality issues, in 2016, on average, almost 900 inquiries were closed in Intake each month. Notification to each respondent attorney would create a huge burden on OCTC staff with no clear benefit to public protection. Moreover, OCTC and/or MRC may become inundated with calls, e-mails or other forms of communication from members demanding to know additional information regarding the closed matters.

Instead, staff recommends that the State Bar modify its current practice and cease including inquiries closed in Intake in Complaint Checks. The Board is asked to discuss this recommendation, as well as the following:

- Although it does not appear that the Board was consulted when the decision was made to begin including inquiries closed in Intake in Complaint Checks, is it appropriate to ask the Board to decide whether to reverse or continue with the current practice?;
- Should the Bar evaluate its policies for record destruction and develop a policy for purging inquiries that are closed in Intake after a certain time period (ex. after 5-10 years)?
 - The State Bar Record Retention Schedule mandates permanent retention of “Discipline Case Files.” Under the heading of “Discipline Case Files” there are a number of specific items including “non-disciplinary action (Incl. Investigation).”

See State Bar of California Record Retention Schedule, Rev. 9/1/16. Not included in the list of items are inquiries. However, arguably the term “non-disciplinary action” could be interpreted to encompass records of grievances.

- 28 state bars have rules regarding the expungement or destruction of records relating to closed or dismissed complaints or grievances from anywhere from one to ten years.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None.

BOARD GOALS & OBJECTIVES

Finalization of the policy on including allegations of misconduct that are closed in Intake will clarify the work of Bar staff and contribute to the completion of implementing Workforce Planning recommendations.