

AGENDA ITEM

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**TO: Members, Regulation and Discipline Committee
Members, Board of Trustees**

**FROM: Suzanne Grandt, Attorney, Office of the General Counsel Dag
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**SUBJECT: State Bar's Policy Regarding Notification to Members of Closed
Inquiries- Proposed Resolution**

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 (Complaint Checks).¹ 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. The Report recommends 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. These recommendations led the Committee on Regulation and Discipline (RAD) to consider why these inquiries were being included in Complaint Checks at all. The State Bar Office of the General Counsel (OGC) was asked to evaluate the need for member notification of these inquiries generally.

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" and is provided along with the member's Certificate of Standing, if requested. The State Bar's website also refers to this document as a "grievance" or "discipline history" letter.

During its investigation, OGC discovered that approximately four years ago Complaint Checks only included allegations of misconduct if OCTC had determined that the allegation contained sufficient evidence to warrant an investigation (defined by State Bar Rules as a “Complaint”). Thus, inquiries closed at the intake stage were not included. Although it is not clear why the policy was changed to include *all* allegations of misconduct, there is no record of any official policy change or board ruling on this issue.

After careful consideration of the Report’s recommendations, the Committee on Regulation and Discipline recommends **not** adopting the Report’s recommendation to notify proactively attorneys of inquiries closed in Intake and recommends that MRC return to its prior policy of not including such inquiries in Complaint Checks. The Report’s recommendation pertaining to purging State Bar records of these inquiries is not part of RAD’s recommendation, as it is still being evaluated by OGC.

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 is in technical 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 in intake and that a rule be promulgated outlining timelines for purging such information from OCTC records. Currently, fourteen State Bars have rules regarding mandatory notification to a subject attorney of dismissed or closed grievances or complaints.³

DISCUSSION

Staff at the State Bar believe that the recommendation regarding notification to attorneys of inquiries that are closed in Intake (“Closed Inquiries”) are problematic for five reasons: (1) notification serves little to no public protection purpose; 2) notification is prohibited under the current statutory scheme; 3) notification would inhibit the free flow of communication between complainants and the State Bar; 4) there may be significant burdens on member attorneys once they become aware of Closed Inquiries; and 5) State Bar staff will be substantially burdened. While these concerns were raised in the course of evaluating the Report’s recommendations, they apply with equal force to the State Bar’s current policy of including Closed Inquiries in Complaint Checks.

As an initial matter, notification to attorneys of Closed Inquiries, at any point in time, serves little to no public protection purpose. Currently, all members necessarily become aware of any allegations against them prior to any OCTC action being taken pursuant to

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

³ These State Bars are Alaska, Connecticut, Florida, Hawaii, Indiana, Maine, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New York, Oklahoma, and West Virginia.

Rule 2409(a). There is no practical reason to disclose initial reports of misconduct if OCTC determines not to take action. Moreover, Closed Inquiries are exempt from disclosure under the California Public Records Act, so there is no concern that a member's information is being disseminated without his or her knowledge.

Second, MRC's disclosure of Closed Inquiries is arguably prohibited under State Bar Rules and the Business and Professions Code. Business and Professions Code⁴ 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." Section 6086.1 also states that disciplinary investigations are confidential, but that the member whose conduct being investigated may waive confidentiality. 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.

Third, 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, (*Chronicle*), the California Supreme Court concluded that complaints confidentially made to the State Bar regarding an attorney's professional conduct, and the investigations of those complaints that do not result in public or private discipline, are confidential and not subject to disclosure to a third party. The court stressed that this confidentiality is in the public interest because it protects the proper functioning of the Bar's disciplinary system by ensuring people may file complaints without risk of creating a publicly accessible record and being subject to a libel action. *Id.* at 566-568.

That fact that Closed Inquiries consist of allegations that do not, by definition, even warrant an investigation arguably means they deserve even greater protections from disclosure than ongoing investigations and/or Complaints closed after investigation. The *Chronicle* court specified:

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. . .***

⁴ All section references are to the Business and Professions Code, unless otherwise specified.

Id., at 567-568 (emphasis added). While the Chronicle case dealt with *public* disclosure, the same policy arguments apply to disclosure to the subject member.

Fourth, notification of Closed Inquiries may trigger certain reporting obligations on the part of the member, such as disclosure to insurers, law partners, employers, or other State Bars.⁵ While this burden may be justified if there would be a substantial benefit to the public, it does not appear to be the case in this instance for the reasons discussed herein. Moreover, individuals may be maliciously incentivized to file frivolous reports of misconduct in order to intentionally burden a member attorney.

Fifth, State Bar Staff will be significantly burdened. 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. This will degrade Staff's ability to address justified complaints. Further, 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. Eliminating Closed Inquiries from Complaint Checks should reduce staff workload for this same reason.

In sum, for the reasons discussed herein, RAD recommends: 1) not implementing the Report's recommendation that attorneys should be notified of inquiries upon their closure and 2) inquiries closed in intake should not be included in Complaint Checks. Because the first recommendation is not a change in State Bar policy or procedure, only a resolution adopting the second recommendation is necessary.

BOARD COMMITTEE RECOMMENDATIONS

The Regulation and Discipline Committee recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees approve Should the Board of Trustees concur with the recommendation of the Board committee on Regulation, Admissions and Discipline, adoption of the following resolution should be appropriate:and it is

FURTHER RESOLVED, that the Board of Trustees approve the policy of Member Records and Compliance to exclude from Complaint Check Certificates of Standing any and all allegations of misconduct against a member closed as an inquiry in the Intake phase, prior to investigation.⁶

⁵ Disclosure of Closed Inquiries is not required by the Judicial Nominees Evaluation (JNE).

⁶ Intake is before investigation and not a stage of investigation.