

# **OPEN SESSION AGENDA ITEM**

## **REGULATION AND DISCIPLINE COMMITTEE III.D.**

**DATE:** March 8, 2018

**TO:** **Members, Regulation and Discipline Committee**

**FROM:** Steven Moawad, Chief Trial Counsel, Office of Chief Trial Counsel

**SUBJECT:** Request to Circulate for Public Comment Changes in Rules, Procedures and Policies to Enhance the State Bar's Public Protection Mission

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### **EXECUTIVE SUMMARY**

The Office of Chief Trial Counsel (OCTC) proposes amending several Rules of Procedure of the State Bar to enhance the public protection mission of the State Bar.

First, OCTC proposes amending the Rules of Procedure of the State Bar to expressly authorize OCTC to transmit letters of inquiry to lawyers through the internet. The letters of inquiry would be confidentially posted on the lawyer's "My State Bar Profile" portion of the State Bar's website. Attorneys would receive notification via the private e-mail addresses that they have provided to the State Bar pursuant to California Rule of Court rule 9.9 (formerly rule 9.7).

Second, OCTC proposes clarifying amendments to Rules of Procedure of the State Bar, rule 2302, governing confidentiality of investigations. OCTC proposes that rule 2302 be amended in several locations to clarify confidentiality obligations. Specifically, the rule should be amended to eliminate references to a waiver of confidentiality. This is consistent with the fact that information may be disclosed to specified individuals and entities, but the material remains confidential for all other purposes. OCTC also proposes that rule 2302 be amended to eliminate all references to the "President of the State Bar." Pursuant to rule 2101, OCTC has exclusive jurisdiction over State Bar discipline, and that rule 2302(e) be amended to expressly allow disclosure to a tenth category of persons, i.e., employees of a language interpretation or language translation company under contract with the State Bar to provide language translation or language interpretation services. The interpreter service would be contractually bound by a confidentiality clause.

Third, OCTC proposes an amendment to Board policy that authorizes State Bar staff to post an online consumer alert when disciplinary proceedings are initiated against an attorney, when OCTC files a petition alleging that the attorney should be placed on inactive status because he or she poses a substantial threat of harm to the public or clients, when an attorney is charged with a felony, when the superior court assumes jurisdiction over an attorney's law practice, or when an attorney is involuntarily placed on inactive status. OCTC further proposes that upon a decision finding culpability or an order following a stipulation to culpability, a consumer alert directing the consumer to the "Disciplinary and Related Actions" section at the bottom of a licensee's State Bar Profile page would be posted. Under this proposal, this consumer alert

would remain on the licensee's State Bar Profile page until completion of the reapproval conditions, the term of probation, or upon a return to active status, whichever is later.

This item requests that the Board circulate, for a 45-day public comment period, proposed rule amendments to State Bar Rules of Procedure 5.140(G) and 2409(b) [Electronic Notification of Letters of Inquiry], Rule 2302 [Confidentiality], and the Board policy regarding consumer alerts.

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## **BACKGROUND**

### Proposed Revisions to State Bar Rules of Procedure 2409(b) and 5.104(G) – Electronic Notification of Letters of Inquiry

Before filing disciplinary charges, OCTC is required to notify the attorney in writing about the nature of the charges, and provide the attorney an opportunity to provide an explanation or defense to the allegations. (Rule 2409(a), Rules Proc. of the State Bar.) This notification is referred to as a letter of inquiry.<sup>1</sup> Rule 2409 does not specify any particular method of service of this letter. Business and Professions Code section 6085 provides any person complained against to have a right to "fair, adequate and reasonable notice," but does not define the format of such notice.

Attorneys are required to cooperate in a State Bar investigation and may be subject to discipline if he or she does not do so. (Bus. & Prof. Code, § 6068(i).)

Currently, the State Bar sends letters of inquiry by U.S. Mail to the licensee's membership record address and any other address of which we are aware. If the licensee does not respond, we send a second letter. This results in a delay in completing our investigations. Despite these multiple letters, licensees frequently claim, rightly or wrongly, that they have not received the letter of inquiry. Members of the attorney's defense bar have similarly complained that OCTC use of the US Mail causes undue delay, which impacts their ability to provide a response by the deadline set in the letter of inquiry.

OCTC proposes to mitigate these problems through the use of electronic communication as has been done in other areas of the law. In the federal courts, for example, pleadings are routinely filed and served electronically.<sup>2</sup>

On February 1, 2010, the Supreme Court adopted California Rule of Court rule 9.9 (formerly rule 9.7) to facilitate online communications between the State Bar and licensees. As contemplated by the rule, the State Bar provides its licensees with a secure online account, called "My State Bar Profile," by which information the State Bar can confidentially transmit information to licensees. Rule 9.9(a) requires licensees to provide the State Bar with a confidential e-mail address "to facilitate communications by the State Bar with its members..."

### Proposed Revision to State Bar Rules of Procedure 2302 – Confidentiality of Investigations

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<sup>1</sup> "Inquiry" means an evaluation to decide whether any action is warranted by the State Bar based on information relating to the conduct of a State Bar member and received by the Office of the Chief Trial Counsel. See State Bar Rule 5.4(32).

<sup>2</sup> On May 10, 2016, the National Center for State Courts issued its Workforce Planning report in response to a request by the State Bar. One of the Workforce Planning recommendations was: "A secure complaint electronic portal should be developed to enable complaints and supporting documents to be filed electronically and to provide secure ecommunications between OCTC staff and involved complaint case participants."

The rule pertaining to confidentiality of State Bar investigations states that the Chief Trial Counsel “may waive confidentiality” of the investigation. This phrase misrepresents the effect of disclosure of information pursuant to Rule 2302(d)(1). For example, even after disclosure of information to another regulatory agency or to a law enforcement agency, OCTC would still consider the investigation confidential. Amendments to the rule clarifying that information can be provided without changing the confidential nature of the material are appropriate.

Additionally, OCTC is proposing general clean-up of the rule to reflect that OCTC has exclusive jurisdiction over State Bar disciplinary matters pursuant to rule 2101 and to explicitly allow the use of outside interpreters and translators without violating the confidentiality of the investigation.

#### Proposed Revision to Board Policy Regarding Consumer Alerts

Since approximately July 2005, the State Bar has posted disciplinary decisions and orders on stipulated dispositions on the licensee’s State Bar Profile page. Since 2008, the State Bar has also posted a copy of any Notices of Disciplinary Charges (NDC), and the licensee’s response to the charges, if any, in the “Disciplinary and Related Actions” section at the bottom of a licensee’s State Bar Profile page. In May and July 2011, the Board determined that some matters warrant more conspicuous notices about disciplinary actions.

On May 13, 2011, the Board approved posting a high-visibility consumer alert that contained general information about the allegations, and a disclaimer at the top of the State Bar Profile page of any attorney against whom a NDC or a petition for involuntary inactive enrollment pursuant to Business and Professions Code section 6007(c) is filed wherein a major misappropriation of client funds is alleged.

On July 22, 2011, the Board approved posting a high-visibility consumer alert that contained general information about the allegations, and disclaimer at the top of the State Bar Profile page of any attorney against whom a NDC or a petition for involuntary inactive enrollment pursuant to Business and Professions Code section 6007(c) is filed alleging 15 or more cases of misconduct related to loan modification.

Under current Board policy, the consumer alert and disclaimer is removed from the licensee’s profile page upon the filing of a decision or order of the State Bar Court adjudicating the disciplinary proceeding. The decision or order is posted in the “Disciplinary and Related Actions” section of a licensee’s State Bar Profile page.

In 2013, OCTC made a proposal to expand consumer alerts to include cases wherein: (1) 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. (See attachment G.)

OCTC withdrew the proposal after receiving public comment to the effect that the proposed consumer alerts would be unfair to the affected attorneys. (See attachment H.) In its response to the public comment, OCTC noted that the State Bar’s planned case management system would impact the scope and design of future consumer alerts because the public would be provided with more accessible and complete information in the case management system. (Ibid.)

## DISCUSSION

### Proposed Revisions to State Bar Rules of Procedure 2409(b) and 5.104(G) – Electronic Notification of Letters of Inquiry

This proposal, if adopted, would specifically authorize OCTC to use a licensee's "My State Bar Profile" page to transmit letters of inquiry to licensees who are the subject of misconduct allegations. OCTC would provide the licensee with substantially contemporaneous notification of the posting of the written notice of the nature of the charges by sending an e-mail to the licensee's confidential e-mail address. Once a licensee has opened the letter of inquiry, the State Bar's computer system would provide a notification to OCTC.

As under the current rules, evidence that a licensee has failed to respond to the e-mail or letter of inquiry could be used to prove that the licensee has failed to cooperate in the investigation.

Some licensees are exempt from providing an e-mail address because they do not have online access or an e-mail address. (Cal. Rule of Ct. 9.9(d).) In such cases, OCTC would continue to transmit letters of inquiry by regular mail.

To initiate a disciplinary proceeding, OCTC would still need to use certified mail. (See Bus. & Prof. Code, § 6002.1(c)).

OCTC believes that the proposed process will be beneficial for all concerned. Licensees will receive the letters of inquiry more expeditiously, and OCTC will know for certain whether the licensees have received the letters of inquiry.

To implement the proposed process, OCTC recommends that two rules be amended:

1. The following language should be added to Rule of Procedure 2409(a) to explicitly authorize OCTC to transmit letters of inquiry electronically:

The Office of Chief Trial Counsel may transmit the letter of inquiry by: (1) posting the letter of inquiry to the member's "My State Bar Profile" on the State Bar's website and (2) sending an e-mail notification to the confidential address the member maintains pursuant to rule 9.9(a)(2) of the California Rules of Court. The e-mail notification must state that a letter of inquiry from the Office of Chief Trial Counsel has been posted on the member's "My State Bar Profile" and remind the member of his or her duty to cooperate and participate in the State Bar's disciplinary investigation. If the member has not provided the State Bar with an e-mail address pursuant to rule 9.9(a)(2), the Office Chief Trial Counsel shall transmit the letter of inquiry by personal delivery or by regular mail.

2. The following language should be added to Rule of Procedure 5.104 to create a rebuttable presumption that, if not returned as undeliverable, a properly addressed e-mail to the licensee was received by the licensee. This would be an electronic equivalent of the mailbox rule.

(G) Letters of Inquiry.

(i) Proof that the Office of Chief Trial Counsel sent an e-mail notification to a member in compliance with rule 2409(a), Rules of Procedure of the State Bar, coupled with proof that the e-mail was not returned as undeliverable, creates a presumption affecting the burden of producing evidence that the member viewed the e-mail on or about the date it was sent.

(ii) Proof that a letter of inquiry was remotely accessed on a member's "My State Bar Profile" on a given date creates a presumption affecting the burden of producing evidence that the member received the letter of inquiry on that date.

(iii) The Office of Chief Trial Counsel may establish the proof necessary under paragraphs (i) and (ii) by submitting copies of State Bar records, supported by declaration(s) of State Bar staff attesting to the authenticity and nature of the records.

For consistency with the current version of other rules, the term "member" has been used instead of "licensee" in these proposed rule revisions. However, OCTC supports a future amendment of all the rules to replace the term "member" with "licensee." These proposed rules should be similarly amended at that time.

#### Proposed Revision to State Bar Rules of Procedure 2302 – Confidentiality of Investigations

OCTC proposes the following amendments to rule 2302.

1. **Rule 2302(d)(1).** Rule 2302(d)(1) currently provides, in part:

(d) (1) The Chief Trial Counsel or designee or the President of the State Bar, after private notice to the member, may waive confidentiality concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:...

OCTC believes the phrase "may waive confidentiality" misrepresents the effect of disclosure of information pursuant to Rule 2302(d)(1). For example, even after disclosure of information to another regulatory agency or to a law enforcement agency, OCTC would not deem confidentiality to be waived for all purposes. Instead, the language was intended to mean that the information could be provided without otherwise changing the confidential nature of the material.

Further, OCTC also believes the "President of the State Bar" (now called the "Chair") should not have authority over the disclosure of information concerning complaints or investigations because OCTC has exclusive jurisdiction over State Bar disciplinary matters pursuant to rule 2101 ("The Board of Trustees of the State Bar delegates to the Office of the Chief Trial Counsel exclusive jurisdiction to review inquiries and complaints, conduct investigations and determine whether to file notices of disciplinary charges in the State Bar Court, except as provided in Title III, rules 2201 and 2502, and Title II, rules 150-157.")

OCTC suggests the following clarification:

(d) (1) Notwithstanding paragraph (a) and without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel or designee, after private notice to the member, may disclose documents and information concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:...

2. **Rule 2302(d)(3).** Rule 2302(d)(3) currently provides, in part:

(3) After a waiver of confidentiality pursuant to paragraph (d)(1)(A) above, the Chief Trial Counsel or designee, may define the scope of information disseminated and may limit the disclosure of information to specified individuals or entities.

Again, OCTC believes the phrase “waiver of confidentiality” misrepresents the effect of disclosure of information pursuant to Rule 2302(d)(1)(A). OCTC proposes the following language:

(3) The Chief Trial Counsel or designee, may define the scope of information disclosed and may limit the dissemination of information pursuant to paragraph (d)(1)(A), above, to specified individuals or entities.

3. **Rule 2302(d)(4).** Rule 2302(d)(4) currently provides, in part:

(4) Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee or the President waives confidentiality pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel, the President or designee may issue...

OCTC believes the phrase “waives confidentiality” misrepresents the effect of disclosure of information. OCTC suggests changing the language of the rule as follows:

(4) Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee discloses documents or information pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel or designee may issue...

4. **Rule 2302(e).** Rule 2302(e) currently provides:

(e) Notwithstanding the provisions of paragraph (d), and without waiving confidentiality, the Chief Trial Counsel, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:...

OCTC believes the phrase “and without waiving confidentiality” is ambiguous and poorly drafted. The language was intended to mean that the information could be provided confidentially to the nine listed categories of persons or entities without otherwise changing the confidential nature of the material. OCTC suggests the following clarification:

(e) Notwithstanding paragraph (a), without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:...

5. **Interpreters.** OCTC investigates many cases in which the complainants or witnesses do not speak English, and/or documents are received in a foreign language. Therefore, OCTC frequently requires the services of language interpreters to translate interviews or documents. Some OCTC employees are qualified to do these translations in some languages, but we often need to employ outside interpretation services. While we believe that this practice does not violate the rule of confidentiality, OCTC requests that rule 2302 be amended to expressly authorize OCTC to use these outside services violating confidentiality. Under our proposal, OCTC would contractually require the translation service provider to maintain confidentiality.

6. **Any additional references to the State Bar President in rule 2302.** As discussed above, the Chair of the Board of Trustees does not have jurisdiction over State Bar disciplinary matters,

and therefore should not have authority to determine whether confidential materials are disclosed or whether confidentiality should otherwise be waived.

For consistency with the current version of other rules, the term “member” has been used instead of “licensee” in these proposed rule revisions. However, OCTC supports a future amendment of all the rules to replace the term “member” with “licensee.” These proposed rules should be similarly amended at that time.

OCTC is simultaneously seeking authorization to request that the Legislature make corresponding amendments to Business and Professions Code section 6086.1.

#### Proposed Revision to Board Policy Regarding Consumer Alerts

Consumer alerts contain information that is a matter of public record and is of current concern to clients and potential clients, opposing parties, and the courts. OCTC believes that consumer alerts are an effective way to provide clients and potential clients notice of important actions regarding a licensee. As such, consumer alerts have become a significant part of the State Bar’s public protection efforts. However, the circumstances under which a consumer alert are posted are limited. Therefore, the posting of a consumer alert is somewhat rare. OCTC believes that the consumer alert program should be expanded in order to better protect the public.

This proposal would expand current policy and authorize posting consumer alerts in the following situations:

1. Filing of a Notice of Disciplinary Charges (NDC) and Substantial Threat-of-Harm Proceedings.

This proposal would authorize posting consumer alerts whenever: (1) disciplinary charges are filed against an attorney, or (2) OCTC files a petition alleging that the attorney should be placed on inactive status because he or she poses a substantial threat of harm to the public or clients (Bus. & Prof. Code, § 6007(c)(1)-(3).) In order to make an informed and intelligent decision, clients and prospective clients need to know that their attorney or their prospective attorney is facing disciplinary charges. Similarly, opposing counsel and the courts need this information because a suspension or disbarment order may have a significant effect upon pending litigation.

This consumer alert will be removed from the licensee’s State Bar profile page: (1) if the charges are dismissed, or (2) upon the filing of a decision or order of the State Bar Court adjudicating the disciplinary proceeding based upon the NDC.

2. Imposition of Discipline

If, after a decision finding culpability or an order adjudicating the disciplinary proceeding is issued, the attorney is placed on probation or is issued a public reproof with conditions, a consumer alert stating that the attorney has been placed on probation or issued a reproof with conditions, and informing the consumer that the order or decision is available in the “Disciplinary and Related Actions” section at the bottom of a licensee’s State Bar Profile page would be posted to the licensee’s State Bar Profile page.

This consumer alert would remain on the licensee’s State Bar Profile page until completion of the reproof conditions or the end of the term of probation.

3. Felony Charges Pending in Court.

This proposal would authorize posting consumer alerts whenever felony charges are filed against an attorney in court. To make an informed and intelligent decision about their representation, clients and prospective clients need to know that their attorney or their prospective attorney is facing felony charges. Similarly, opposing counsel and the courts need this information because incarceration, or an order suspending or disbaring a licensee, might have a significant impact upon pending litigation.

Consumer alerts concerning pending criminal charges would only be posted if felony charges are filed in court. Prosecutors are required by law to disclose to the State Bar the pendency of an action against an attorney charging a felony or misdemeanor. (Bus. & Prof. Code § 6101(b)). Prosecutors are similarly required to notify the State Bar of the filing of an Information or Indictment charging an attorney with a felony. (Bus. & Prof. Code § 6068(o)(4)).

The State Bar is required by law to disclose to any member of the public so inquiring any information reasonably available to the State Bar pursuant to the above sections. (Bus. & Prof. Code, § 6086.1(c)). A member of the public navigating to a licensee's State Bar profile page should be deemed to be an inquiry as to the licensee's status and potential disciplinary actions. Therefore, consumer alerts for felony charges would assist the State Bar in complying with both statutorily mandated duties: disclosing information regarding pending felony charges and protecting the public.

This consumer alert would be removed from the licensee's State Bar profile page: (1) upon verification of notice to the State Bar that the charges have been dismissed, or reduced from a felony to a misdemeanor, or (2) upon the filing of a decision or order of the State Bar Court adjudicating a disciplinary proceeding based upon the facts underlying the felony prosecution.

#### 4. Superior Court Assumption of Jurisdiction Over Attorney's Caseload.

This proposal would authorize consumer alerts whenever the superior court assumes jurisdiction over an attorney's caseload. A superior court order assuming jurisdiction requires a finding that: (1) the attorney has one or more active cases and (2) the attorney is unable to practice law because of death, incapacity, suspension from practice, or disbarment. (See Bus. & Prof. Code, §§ 6180, et seq. 6190 et seq.)<sup>3</sup> When an assumption order is issued, it is particularly important that the public, active clients, courts, and opposing counsel be informed.

This consumer alert would be removed from the licensee's State Bar profile page after the superior court order is rescinded or ended.

#### 5. Inactive Enrollments, Suspensions, Disbarments, and Resignations with Charges Pending.

This proposal would protect the public by authorizing consumer alerts whenever an attorney is placed on involuntary inactive enrollment, suspended, disbarred, or resigned for one of the following reasons:

- The State Bar Court has recommended that the attorney be disbarred (Bus. & Prof. Code, § 6007(c)(4));

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<sup>3</sup> Unlike the 2013 OCTC proposal to modify the consumer alert policy (attachment B), under this proposal, a consumer alert would not be posted merely because the State Bar has filed a petition with the superior court to assume jurisdiction over an attorney's caseload. Rather, the alert would be posted after the petition is granted by the superior court.



- The State Bar Court has found that the attorney violated his or her disciplinary probation (Bus. & Prof. Code, § 6007(d));
- The attorney has defaulted in a disciplinary proceeding (Bus. & Prof. Code, § 6007(e));
- The attorney is delinquent in his or her child support obligations (Fam. Code, §17520);
- The attorney has failed to pay a fee arbitration award (Bus. & Prof. Code, § 6203);
- The attorney has failed to comply with his or her MCLE obligations (Cal. Rule of Court 9.31);
- The attorney has been enrolled inactive because he or she has committed a disciplinary violation and has been enrolled inactive pursuant to the Alternative Discipline Program (Bus. & Prof. Code, § 6233); or
- The attorney has been placed on interim suspension pending finality of a conviction for a felony or misdemeanor involving moral turpitude (Bus. & Prof. Code, § 6102), resigns with disciplinary charges pending, or is suspended or disbarred by the Supreme Court.

Attorneys who are enrolled inactive, suspended, disbarred, or resign with disciplinary charges pending lose their right to practice law. (Bus. & Prof. Code, § 6125 et seq.) Therefore, it is imperative that clients, prospective clients, opposing counsel, and the courts receive clear notice that the licensee can no longer practice and cannot accept new cases.

When an attorney is enrolled inactive involuntarily for one of these reasons, suspended, disbarred, or resigned with disciplinary charges pending, a consumer alert will be posted stating that the attorney is not entitled to practice law and informing the consumer that the order or decision is available in the “Disciplinary and Related Actions” section at the bottom of a licensee’s State Bar Profile page would be posted. This consumer alert would remain on the licensee’s State Bar Profile page until a return to active status with the State Bar.

These consumer alerts will remain posted until such time as the attorney is reinstated to the practice of law, if ever. All consumer alerts must be removed upon the death of an attorney or former attorney.

Generally, a consumer alert would not apply to cases in which the attorney is enrolled inactive based on mental illness, mental disability, or substance dependency. (Bus. & Prof. Code, §§ 6007(a) & (b)(1) & (b)(3).) In these circumstances, a consumer alert is unnecessary because, in the experience of OCTC, attorneys who assert claims of being mentally incompetent, or have been determined to be unable to practice law due to a mental infirmity or substance dependency, commonly do not engage in the unauthorized practice of law.

A consumer alert would be authorized, however, when the superior court has been required to take over the law practice of a disabled attorney. (Bus. & Prof. Code, §§ 6190, 6007(b)(2).) In such situations, the consumer alert will assist the State Bar in notifying clients, courts, and opposing counsel that the State Bar is in the process of winding down the attorney’s law practice.

## **FISCAL/PERSONNEL IMPACT**

No negative fiscal or personnel impact is anticipated.

## **RULE AMENDMENTS**

This agenda item requests authorization for a 45-day public comment period on proposed amendments to:

Proposed Revisions to State Bar Rules of Procedure 2409(b) and 5.104(G) – Electronic Notification of Letters of Inquiry

Title 3, Division 2, Chapter 4, Rule 2409, Rules of Procedure of the State Bar  
Title 5, Division 2, Chapter 5, Rule 5.104, Rules of Procedure of the State Bar

Proposed Revision to State Bar Rules of Procedure 2302 – Confidentiality of Investigations

Title 3, Division 2, Chapter 4, Rule 2302, Rules of Procedure of the State Bar

Proposed Revision to Board Policy Regarding Consumer Alerts

Board policy regarding Consumer Alerts

Board action to adopt the amendments to the Rules of Procedure and Board policy would occur only after the public comment process.

## **BOARD BOOK AMENDMENTS**

None.

## **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

## **RECOMMENDATION**

**It is recommended that the Regulation and Discipline Committee approve the following resolution:**

**RESOLVED**, that staff is authorized to make available, for public comment for a period of 45-days, proposed amendments to:

Title 3, Division 2, Chapter 4, Rule 2409, Rules of Procedure of the State Bar; and  
Title 5, Division 2, Chapter 5, Rules 5.104, Rules of Procedure of the State Bar; as set forth in Attachment A

Title 3, Division 2, Chapter 4, Rule 2302, Rules of Procedure of the State Bar, as set forth in Attachment C;

Board policy statements, as set forth in Attachment E; and it is

**FURTHER RESOLVED**, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed amended Rules of Procedure or Board policy.

**ATTACHMENT(S) LIST**

- A.** Clean draft of proposed amended rules 2409 and 5.104.
- B.** Redline version of proposed rules 2409 and 5.104.
- C.** Clean draft of proposed amended rule 2302.
- D.** Redline version of proposed rule 2302.
- E.** Proposed Board policy re Posting of Consumer Alerts.
- F.** Example of Consumer Alert Placement and Format.
- G.** July 2013 Proposal for Modification of Consumer Alert policy.
- H.** November 2013 Withdrawal of Proposal for Modification of Consumer Alert policy.

## **ATTACHMENT A (Clean Version of New Rules 2409 and 5.104)**

### **Rule 2409, Rules of Procedure of the State Bar (Office of Chief Trial Counsel Rules).**

- (a) Prior to the filing of a Notice of Disciplinary Charges, the Office of the Chief Trial Counsel shall notify the member in writing of the allegations forming the basis for the complaint or investigation and shall provide the member with a period of not less than two weeks within which to submit a written explanation. The Office of Chief Trial Counsel may transmit the letter of inquiry by: (1) posting the letter of inquiry to the member's "My State Bar Profile" on the State Bar's website and (2) sending an e-mail notification to the address the member maintains pursuant to California Rule of Court 9.9(a)(2). The e-mail notification must state that a letter of inquiry from the Office of Chief Trial Counsel has been posted on the member's "My State Bar Profile" and remind the member of his or her duty to cooperate and participate in the State Bar's disciplinary investigation. If the member has not provided the State Bar with an e-mail address pursuant to rule 9.9(a)(2), the Office Chief Trial Counsel shall transmit the letter of inquiry by personal delivery or by regular mail.

An extension of time for submission of the member's written explanation shall be granted only upon written request to the Office of the Chief Trial Counsel and for good cause shown as to the specific constraints on the member's practice which are claimed to necessitate the additional time. This rule does not prohibit the Office of the Chief Trial Counsel from contacting a member by telephone for purposes of resolution of minor matters or investigation.

- (b) In response to the Office of the Chief Trial Counsel's written notification pursuant to paragraph (a), the member may provide a written response claiming any applicable constitutional or statutory privilege; however, the availability of an applicable constitutional or statutory privilege shall not excuse the member from submitting a written response to the Office of the Chief Trial Counsel to the extent necessary to identify and exercise the claimed privilege.

### **Rule 5.104 Evidence (Rules of Procedure of the State Bar)**

- (A) Oral Evidence. Oral evidence must be taken only on oath or affirmation.
- (B) Rights of Parties. Each party will have these rights:
- (1) to call and examine witnesses;
  - (2) to introduce exhibits;
  - (3) to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination;
  - (4) to impeach any witness regardless of which party first called him or her to testify;
  - (5) to rebut the evidence against him or her; and,
  - (6) if the member does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination.
- (C) Relevant and Reliable Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(D) Hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(E) Privileges. The rules of privilege will be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(F) Judicial Discretion. The hearing judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

(G) Letters of Inquiry.

(1) Proof that the Office of Chief Trial Counsel sent an e-mail notification to a member in compliance with rule 2409(a), Rules of Procedure of the State Bar, coupled with proof that the e-mail was not returned as undeliverable, creates a presumption affecting the burden of producing evidence that the member viewed the e-mail on or about the date it was sent.

(2) Proof that a letter of inquiry was remotely accessed on a member's "My State Bar Profile" on a given date creates a presumption affecting the burden of producing evidence that the member received the letter of inquiry on that date.

(3) The Office of Chief Trial Counsel may establish the proof necessary under paragraphs (i) and (ii) by submitting copies of State Bar records, supported by declaration(s) of State Bar staff attesting to the authenticity and nature of the records.

**ATTACHMENT B (Proposed Amendments to Rules 2409 and 5.104 – Redline Version)**

Rule 2409, Rules of Procedure of the State Bar (Office of Chief Trial Counsel Rules).

- (a) Prior to the filing of a Notice of Disciplinary Charges, the Office of the Chief Trial Counsel shall notify the member in writing of the allegations forming the basis for the complaint or investigation and shall provide the member with a period of not less than two weeks within which to submit a written explanation. The Office of Chief Trial Counsel may transmit the letter of inquiry by: (1) posting the letter of inquiry to the member's "My State Bar Profile" on the State Bar's website and (2) sending an e-mail notification to the address the member maintains pursuant to California Rule of Court rule 9.9(a)(2). The e-mail notification must state that a letter of inquiry from the Office of Chief Trial Counsel has been posted on the member's "My State Bar Profile" and remind the member of his or her duty to cooperate and participate in the State Bar's disciplinary investigation. If the member has not provided the State Bar with an e-mail address pursuant to rule 9.9(a)(2), the Office Chief Trial Counsel shall transmit the letter of inquiry by personal delivery or by regular mail.

An extension of time for submission of the member's written explanation shall be granted only upon written request to the Office of the Chief Trial Counsel and for good cause shown as to the specific constraints on the member's practice which are claimed to necessitate the additional time. This rule does not prohibit the Office of the Chief Trial Counsel from contacting a member by telephone for purposes of resolution of minor matters or investigation.

- (b) In response to the Office of the Chief Trial Counsel's written notification pursuant to paragraph (a), the member may provide a written response claiming any applicable constitutional or statutory privilege; however, the availability of an applicable constitutional or statutory privilege shall not excuse the member from submitting a written response to the Office of the Chief Trial Counsel to the extent necessary to identify and exercise the claimed privilege.

Rule 5.104 Evidence (Rules of Procedure of the State Bar)

- (A) Oral Evidence. Oral evidence must be taken only on oath or affirmation.
- (B) Rights of Parties. Each party will have these rights:
- (1) to call and examine witnesses;
  - (2) to introduce exhibits;
  - (3) to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination;
  - (4) to impeach any witness regardless of which party first called him or her to testify;
  - (5) to rebut the evidence against him or her; and,
  - (6) if the member does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination.

(C) Relevant and Reliable Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(D) Hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(E) Privileges. The rules of privilege will be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(F) Judicial Discretion. The hearing judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

**(G) Letters of Inquiry.**

**(1) Proof that the Office of Chief Trial Counsel sent an e-mail notification to a member in compliance with rule 2409(a), Rules of Procedure of the State Bar, coupled with proof that the e-mail was not returned as undeliverable, creates a presumption affecting the burden of producing evidence that the member viewed the e-mail on or about the date it was sent.**

**(2) Proof that a letter of inquiry was remotely accessed on a member's "My State Bar Profile" on a given date creates a presumption affecting the burden of producing evidence that the member received the letter of inquiry on that date.**

**(3) The Office of Chief Trial Counsel may establish the proof necessary under paragraphs (i) and (ii) by submitting copies of State Bar records, supported by declaration(s) of State Bar staff attesting to the authenticity and nature of the records.**

## **ATTACHMENT C (Clean Version of New Rule 2302)**

### **Rule 2302. DISCLOSURE OF INFORMATION**

(a) Except as otherwise provided by law or these rules, information concerning inquiries, complaints or investigations is confidential. There is no duty of confidentiality with respect to non-members; however, the Chief Trial Counsel or designees may assert confidentiality with respect to inquiries, complaints, or investigations regarding non-members, if, in the discretion of the Chief Trial Counsel or designees, that is necessary to protect members of the public.

(b) A member whose conduct is the subject of an inquiry, complaint or investigation may waive confidentiality.

(c) Notwithstanding the provisions of paragraph (b), the Chief Trial Counsel or designee may decline to waive confidentiality regarding an inquiry, complaint or investigation, if it is determined that an ongoing investigation may be substantially prejudiced by a public disclosure before the filing of a notice of disciplinary charges.

(d) (1) Notwithstanding paragraph (a), without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel or designee, after private notice to the member, may disclose documents or information concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:

(A) A member has caused, or is likely to cause, harm to client(s), the public, or to the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. The following additional factors shall be considered in making this determination:

(i) The maintenance of public confidence in the discipline system's exercise of self-regulation;

(ii) The member's current membership status;

(iii) The record of prior discipline of the member;

(iv) The potential for the imposition of a substantial disciplinary sanction;

(v) The existence of any other public matters;

(vi) The status of the complaint or investigation;

(vii) The waiver of confidentiality by the member;

(viii) The gravity of the underlying allegations; and

(ix) The member's cooperation with the State Bar.

(B) A member has committed criminal acts or is under investigation by law enforcement authorities;

(C) A member is under investigation by a regulatory or licensing agency, or has committed acts or made omissions which may reasonably result in investigation by a regulatory or licensing agency;

(D) The member is the subject of multiple complaints and the Office of the Chief Trial Counsel has determined not to pursue all of the complaints. The Office of the Chief Trial Counsel may inform complainants whose allegations have not been pursued of the status of the other investigations or the manner in which the other complaint(s) against the member have been resolved, e. g., by directional letter, warning letter, admonition, agreement in lieu of discipline, or private reproof; or

(2) If the Chief Trial Counsel, for any reason, declines to exercise the authority provided by paragraph (d)(1), or disqualifies himself or herself from acting under paragraph (d)(1), he or she shall appoint a designee to act in his or her place.



(3) The Chief Trial Counsel or designee, may define the scope of information disclosed and may limit the information disclosed pursuant to paragraph (d)(1)(A), above, to specified individuals or entities.

(4) Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee discloses documents or information pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a member(s), which includes a statement of the status or disposition of the complaint(s) or investigation(s); clarifying the procedures involved; and defending the right of the member(s) to a fair hearing on the allegations of misconduct.

(5) The Chief Trial Counsel or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a non-member(s) when such disclosure would serve to protect the public, including, but not limited to, protecting the public from an individual(s) who has engaged in the unauthorized practice of law.

(e) Notwithstanding paragraph (a), without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:

(1) To employees of the State Bar Office of the Chief Trial Counsel, the State Bar Office of General Counsel or any Special Deputy Trial Counsel;

(2) To members of the Judicial Nominees Evaluation Commission or Review Committee as to matters concerning nominees in any jurisdiction;

(3) To witnesses or potential witnesses in conjunction with an inquiry, complaint, investigation, or proceeding;

(4) To other governmental agencies responsible for the enforcement of civil or criminal laws, including but not limited to information within the definitions set forth in Business and Professions Code sections 6043.5 and 6044.5;

(5) To agencies and other jurisdictions responsible for professional licensing;

(6) To the complainant or lawful designee;

(7) To the member(s) who is (are) the subject of the inquiry, complaint or investigation or their counsel of record, if any;

(8) To judges of the State Bar Court; or

(9) To any other person or entity to the extent that such disclosure is authorized by Business and Professions Code sections 6094.5(b), 6086.14 or other statutory provision or any other law.

(10) To employees of a language interpretation or language translation company under contract with the State Bar to provide language translation or language interpretation services. Any contract between the State Bar and a language interpretation or language translation company shall include a confidentiality clause or non-disclosure agreement.

## ATTACHMENT D (Proposed Amendments to Rule 2302 – Redline Version)

### Rule 2302. DISCLOSURE OF INFORMATION

(a) Except as otherwise provided by law or these rules, information concerning inquiries, complaints or investigations is confidential. There is no duty of confidentiality with respect to non-members; however, the Chief Trial Counsel or designees may assert confidentiality with respect to inquiries, complaints, or investigations regarding non-members, if, in the discretion of the Chief Trial Counsel or designees, that is necessary to protect members of the public.

(b) A member whose conduct is the subject of an inquiry, complaint or investigation may waive confidentiality.

(c) Notwithstanding the provisions of paragraph (b), the Chief Trial Counsel or designee ~~or the President~~, may decline to waive confidentiality regarding an inquiry, complaint or investigation, if it is determined that an ongoing investigation may be substantially prejudiced by a public disclosure before the filing of a notice of disciplinary charges.

(d) (1) Notwithstanding paragraph (a) and without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel or designee ~~or the President of the State Bar~~, after private notice to the member, may disclose documents or information concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:

(A) A member has caused, or is likely to cause, harm to client(s), the public, or to the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. The following additional factors shall be considered in making this determination:

- (i) The maintenance of public confidence in the discipline system's exercise of self-regulation;
- (ii) The member's current membership status;
- (iii) The record of prior discipline of the member;
- (iv) The potential for the imposition of a substantial disciplinary sanction;
- (v) The existence of any other public matters;
- (vi) The status of the complaint or investigation;
- (vii) The waiver of confidentiality by the member;
- (viii) The gravity of the underlying allegations; and
- (ix) The member's cooperation with the State Bar.

(B) A member has committed criminal acts or is under investigation by law enforcement authorities;

(C) A member is under investigation by a regulatory or licensing agency, or has committed acts or made omissions which may reasonably result in investigation by a regulatory or licensing agency;

(D) The member is the subject of multiple complaints and the Office of the Chief Trial Counsel has determined not to pursue all of the complaints. The Office of the Chief Trial Counsel may inform complainants whose allegations have not been pursued of the status of the other investigations or the manner in which the other complaint(s) against the member have been resolved, e. g., by directional letter, warning letter, admonition, agreement in lieu of discipline, or private reproof; or

(2) If the Chief Trial Counsel, for any reason, declines to exercise the authority provided by paragraph (d)(1), or disqualifies himself or herself from acting under paragraph (d)(1), he or she shall appoint a designee to act in his or her place.

(3) ~~After a waiver of confidentiality pursuant to paragraph (d)(1)(A) above, the~~ The Chief Trial Counsel or designee, may define the scope of information ~~disseminated~~ disclosed and may limit the ~~disclosure dissemination~~ of information pursuant to paragraph (d)(1)(A), above, to specified individuals or entities.

(4) Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee ~~or the President waives confidentiality~~ discloses documents or information pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel, ~~the President~~ or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a member(s), which includes a statement of the status or disposition of the complaint(s) or investigation(s); clarifying the procedures involved; and defending the right of the member(s) to a fair hearing on the allegations of misconduct.

(5) The Chief Trial Counsel, ~~the President~~ or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a non-member(s) when such disclosure would serve to protect the public, including, but not limited to, protecting the public from an individual(s) who has engaged in the unauthorized practice of law.

(e) Notwithstanding the provisions of paragraph (d), and without ~~waiving~~ violating the duty of confidentiality, confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:

(1) To employees of the State Bar Office of the Chief Trial Counsel, the State Bar Office of General Counsel or any Special Deputy Trial Counsel;

(2) To members of the Judicial Nominees Evaluation Commission or Review Committee as to matters concerning nominees in any jurisdiction;

(3) To witnesses or potential witnesses in conjunction with an inquiry, complaint, investigation, or proceeding;

(4) To other governmental agencies responsible for the enforcement of civil or criminal laws, including but not limited to information within the definitions set forth in Business and Professions Code sections 6043.5 and 6044.5;

(5) To agencies and other jurisdictions responsible for professional licensing;

(6) To the complainant or lawful designee;

(7) To the member(s) who is (are) the subject of the inquiry, complaint or investigation or their counsel of record, if any;

(8) To judges of the State Bar Court; or

(9) To any other person or entity to the extent that such disclosure is authorized by Business and Professions Code sections 6094.5(b), 6086.14 or other statutory provision or any other law.

(10) To employees of a language interpretation or language translation company under contract with the State Bar to provide language translation or language interpretation services. Any contract between the State Bar and a language interpretation or language translation company shall include a confidentiality clause or non-disclosure agreement.

## **ATTACHMENT E (Proposed Board Policy re Posting of Consumer Alerts)**

### **1. Filing of a Notice of Disciplinary Charges (NDC) and Substantial Threat-of-Harm Proceedings.**

When disciplinary proceedings are commenced in State Bar Court or when OCTC files a petition alleging that the attorney should be placed on inactive status because he or she poses a substantial threat of harm to the public or clients, the State Bar will post one or both of the following Consumer Alerts above the attorney's name on the licensee's State Bar profile page:

"CONSUMER ALERT: Formal disciplinary proceedings are pending against this attorney. Pursuant to State Bar policy, a copy of the State Bar's initiating document and the attorney's response, if filed, will remain posted in the Disciplinary and Related Actions section below until the proceedings have been adjudicated. Upon the filing of a court decision or order adjudicating the proceedings, that court decision or order will be posted in place of the initiating and responsive pleadings.

and/or:

"CONSUMER ALERT: A petition for inactive enrollment is pending alleging that this attorney represents a substantial threat of harm to the interests of the attorney's clients or the public. Upon the filing of a court decision or order adjudicating the proceedings, that court decision or order will be posted in the Disciplinary and Related Actions section below. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar."

and:

"DISCLAIMER: Petitions for inactive enrollment contain only allegations of professional misconduct. The attorney is presumed to be innocent of the allegations unless the State Bar Court finds the attorney culpable by clear and convincing evidence."

### **2. Imposition of Discipline.**

If, after a decision finding culpability or an order adjudicating the disciplinary proceeding is issued, the attorney is placed on probation or is issued a public reproof with conditions, the State Bar will post the following Consumer Alert above the attorney's name on the licensee's State Bar profile page:

"CONSUMER ALERT: This attorney has been placed on probation or been issued a reproof and ordered to comply with certain conditions. The decision(s) or order(s) are posted in the "Disciplinary and Related Actions" section towards the bottom of this page. The State Bar posts consumer alerts online whenever attorneys are placed on probation or issued a reproof with conditions. This alert will remain online until the attorney has completed any conditions of reproof or until the end of the term of probation. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar."

The consumer alert will be removed from the licensee's profile page posting when the period of probation is over or the conditions of reprobation have been met.

### **3. Felony Charges**

When the State Bar learns that an attorney has been charged in court with a felony, the State Bar will post the following Consumer Alert above the attorney's name on the licensee's State Bar profile page:

"CONSUMER ALERT: This attorney has been charged with a felony. For more information, contact the State Bar. The State Bar posts consumer alerts online when lawyers are charged in court with felonies. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar.

"DISCLAIMER: The filing of criminal charges does not constitute a finding of guilt or professional misconduct. Criminal defendants are presumed to be innocent until proven guilty in a court of law."

This consumer alert will be removed from the licensee's State Bar profile page: (1) upon verification of notice to the State Bar that the charges have been dismissed or reduction from a felony to a misdemeanor, or (2) upon the filing of a decision or order of the State Bar Court adjudicating a disciplinary proceeding based upon the facts underlying the felony prosecution.

### **4. Superior Court Assumptions of Law Practices.**

When the superior court issues an order assuming jurisdiction over a law practice of lawyer or former lawyer (Bus. & Prof. Code, §§ 6180 et seq., 6190, et seq.), the State Bar will post the following Consumer Alert above the attorney's name on the licensee's State Bar profile page:

"CONSUMER ALERT: The superior court has assumed jurisdiction over this attorney's former law practice and has appointed the State Bar to counsel, and courts, and to arrange for the return of client files. Please contact the Office of Chief Trial Counsel if you have questions or concerns about this attorney's former law practice. The State Bar posts consumer alerts online when the superior court assumes jurisdiction over an attorney's or former attorney's caseload. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar."

This consumer alert text will be removed from the licensee's State Bar profile page immediately after the superior court order is rescinded or ended.

### **5. Involuntary Inactive Enrollments.**

When the State Bar places an attorney on inactive enrollment pursuant to Business and Professions Code sections 6007(c)(4), 6007(d), 6007(e), 6203, or 6233, Family Code section 17520, or rule 9.31, California Rules of Court, is placed on interim suspension pending the finality of a conviction for a felony or misdemeanor involving moral turpitude (Bus. & Prof. Code, § 6102), is suspended, disbarred, or resigned from the practice of

law by the Supreme Court, the State Bar will post the following Consumer Alert above the attorney's name on the licensee's State Bar profile page:

"CONSUMER ALERT: The State Bar has placed this attorney on involuntary inactive status. As a result, the attorney is ineligible to practice law. The State Bar posts consumer alerts online in most instances when attorneys are placed on involuntary inactive status. The decision(s) or order(s) are posted in the "Disciplinary and Related Actions" section towards the bottom of this page. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar."

or

"CONSUMER ALERT: This attorney is suspended from the practice of law. As a result, the attorney is ineligible to practice law. The State Bar posts consumer alerts online when attorneys are suspended from practice. The decision(s) or order(s) are posted in the "Disciplinary and Related Actions" section towards the bottom of this page. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar."

or

"CONSUMER ALERT: This attorney is disbarred from the practice of law. As a result, the attorney is ineligible to practice law. The State Bar posts consumer alerts online when attorneys are disbarred. The decision(s) or order(s) are posted in the "Disciplinary and Related Actions" section towards the bottom of this page. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar."

or

"CONSUMER ALERT: This attorney has resigned from the practice of law with disciplinary charges pending. As a result, the attorney is ineligible to practice law. The State Bar posts consumer alerts online when attorneys resign with disciplinary charges pending. The decision(s) or order(s) are posted in the "Disciplinary and Related Actions" section towards the bottom of this page. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar."

These consumer alerts will remain posted until such time as the attorney is reinstated to the practice of law, if ever. All consumer alerts must be removed upon the death of an attorney or former attorney.



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## Attorney Search

### CONSUMER ALERT

The State Bar of California has filed disciplinary charges against this attorney alleging that the attorney engaged in a major misappropriation of client funds. You may read the Notice of **Disciplinary Charges** filed by the State Bar against the attorney, and any **reply** filed by the attorney. You may also learn more about the general nature of **misappropriation** of client funds.

**DISCLAIMER:** Any Notice of Disciplinary Charges filed by the State Bar contains only allegations of professional misconduct. The attorney is presumed to be innocent of any misconduct warranting discipline until the charges have been proven.

### Current Status: Active

This attorney is active and may practice law in California.

See below for more details.

### Profile Information

*The following information is from the official records of The State Bar of California.*

Bar Number:

[REDACTED]

Address:

[REDACTED]  
[REDACTED]  
[REDACTED]

Phone Number:

[REDACTED]

Fax Number:

[REDACTED]



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#### Status History

Effective Date	Status Change
Present	Active
	Admitted to The State Bar of California

#### Explanation of licensee status

#### Actions Affecting Eligibility to Practice Law in California

##### Disciplinary and Related Actions

Effective Date	Description	Case Number	Resulting Status
12/28/2011	Notice of Disc Charges Filed in SBOt	11-O-1111	

Overview of the attorney discipline system.

##### Administrative Actions

This member has no public record of administrative actions.

Copies of official attorney discipline records are [available upon request](#).

#### Explanation of common actions

#### State Bar Court Cases

*NOTE: The State Bar Court began posting public discipline documents online in 2005. The format and pagination of documents posted on this site may vary from the originals in the case file as a result of their translation from the original format into Word and PDF. Copies of additional related documents in a case are [available upon request](#). Only opinions designated for publication in the State Bar Court Reporter may be cited or relied on as precedent in State Bar Court proceedings. For further information about a case that is displayed here, please refer to the State Bar Court's online docket, which can be found at: <http://apps.statebarcourt.ca.gov/dockets.aspx>*

*DISCLAIMER: Any posted Notice of Disciplinary Charges, Conviction Transmittal or other initiating document, contains only allegations of professional misconduct. The attorney is presumed to be innocent of any misconduct warranting discipline until the charges have been proven.*

Effective Date	Case Number	Description
Pending	11-O-1111	Initiating Document <a href="#">[PDF]</a>
Pending	11-O-1111	Response <a href="#">[PDF]</a>

## AGENDA ITEM

**DATE:** July 5, 2013

**TO:** Members, Regulation, Admissions and Discipline Oversight  
Members, Board of Trustees

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

**SUBJECT:** Modification of Board Policy Regarding Posting of Consumer Alerts – Request for Release for Public Comment

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### EXECUTIVE SUMMARY

The State Bar's existing policy authorizes the posting of a Consumer Alert on a member's State Bar online profile page under two circumstances: (1) where the State Bar has filed a notice of disciplinary charges ("NDC") or petition for involuntary inactive enrollment, pursuant to Business and Professions Code section 6007(c), alleging either a misappropriation of \$25,000 or more of client funds and (2) where the State Bar has filed a NDC or petition for involuntary inactive enrollment, pursuant to Business and Professions Code section 6007(c), alleging 15 or more cases of loan modification misconduct. Under the existing policy, the Consumer Alert, informational text and disclaimer is removed from the member's profile page immediately upon the filing of a decision or order of the State Bar Court adjudicating the disciplinary proceeding, which is subsequently posted on the member's State Bar online profile page.

This agenda item seeks modification of the State Bar's existing 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 agenda item further seeks 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.

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## **BACKGROUND**

In July 2008, upon recommendation by the Board Committee on Regulation, Admissions and Discipline Oversight (“RAD”), the Board of Trustees of the State Bar of California, formerly the Board of Governors (“Board”) first approved and adopted the State Bar’s policy of posting public NDCs on the attorney profile page of the State Bar’s website. In March 2013, the Board of Trustees approved modification authorizing the more immediate posting of NDCs upon public filing of the NDC in State Bar Court.

Pursuant to existing policy, the State Bar posts both the NDC and responsive pleading (if filed) on an attorney’s profile page where they remain until the State Bar Court files and posts a decision or order adjudicating the proceedings. Where the State Bar Court’s decision or order includes a finding of professional misconduct, the initial and responsive pleadings are removed from the profile page and replaced with the State Bar Court’s decision or order. Where the State Bar Court dismisses the proceedings without any finding of professional misconduct, its decision or order is posted and remains on the profile page for a period of 60 days, along with the initial and responsive pleadings, unless the attorney requests earlier removal of those documents. Whenever the State Bar posts a NDC, it also provides notice to the public that the attorney is presumed innocent of the allegations in a NDC unless and until State Bar Court files a decision or order approving a stipulated disposition, finding that one or more charges of misconduct have been established by clear and convincing evidence.

In May 2011, upon recommendation by 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 by 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 as described above.

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.

## **ISSUE**

Whether RAD should authorize circulation of the proposed modification to the State Bar's Policy Re Posting of Consumer Alerts, hereto attached as Attachment A, for a 60-day period of public comment.

## **CONCLUSION**

RAD should authorize staff to circulate the proposed Modification to the State Bar's Policy Re Posting of Consumer Alerts, hereto attached as Attachment A, for a 60-day period of public comment.

## **DISCUSSION**

Consistent with its mission to protect the public, in 2008 and 2011, the Board authorized the posting of NDCs and certain Consumer Alerts on the State Bar's online attorney profile pages. In addition, in 2011, the California Legislature statutorily mandated renewed focus on public protection by enacting Business and Professions Code section 6001.1, which states as follows:

Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

Although prior Board action has allowed greater and more immediate public access to the State Bar's public records and proceedings, OCTC has identified certain gaps in the existing Consumer Alert policy, as follows:

- The existing policy limits Consumer Alerts to misappropriation allegations involving only client funds. The policy does not contemplate misappropriation allegations involving other types of entrusted funds.
- The existing policy limits Consumer Alerts to allegations involving multiple cases (15 cases or more) only if the attorney's practice area involved loan modification misconduct. The policy does not contemplate multiple case allegations involving other practice areas.
- The existing policy provides no notification to the public where the State Bar has initiated proceedings before the superior court to assume jurisdiction over an attorney's law practice.
- The existing policy requires the State Bar to remove the Consumer Alerts after the State Bar Court has found the attorney culpable of professional misconduct.

For these reasons, OCTC requests authorization to release for public comment the proposed modification of the State Bar's Consumer Alert policy, as provided in Attachment A. The proposed modification is not only harmonious with prior Board action but will further the State Bar's primary mission to protect the public.

### Current Policy for Major Misappropriation Cases

The existing policy limits the use of Consumer Alerts to formal charges involving the misappropriation of client funds, requiring that the attorney's misconduct occur during the practice of law. The California Supreme Court and State Bar Court, however, have long recognized that a licensed California attorney must adhere to his fiduciary duties regardless of whether he is performing during the practice of law. "An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity of an attorney. (*Worth v. State Bar* (1976) 17 Cal.3d 337, 341; see also *Ridge v. State Bar* (1989) 47 Cal.3d 952, 961.)

California attorneys may be disciplined for misappropriating entrusted funds, not limited to funds held in trust for a client. The existing limitation of the State Bar's Consumer Alert policy, therefore, should be modified to authorize the posting of a Consumer Alert where the State Bar has filed allegations involving the misappropriation of \$25,000 or more of entrusted funds.

The existing policy – limited to cases involving the misappropriation of client funds – is as follows:

1. Contemporaneously with posting online a notice of disciplinary charges which includes a charge of misappropriation involving \$25,000 or more of client funds, whether as a single charge or an aggregate of charges, the State Bar posts a Consumer Alert above the respondent member's name, including informational text and disclaimer, on the member's profile page.
2. Upon the filing of a decision or order of the State Bar Court adjudicating the disciplinary proceeding, the Consumer Alert, informational text and disclaimer is removed from the member's profile page immediately.
3. The State Bar Court posts a true and correct copy of a petition filed pursuant to Business & Professions Code section 6007(c)[threat of harm] to enroll a member involuntarily inactive on the respondent member's profile page when the verified application upon which the petition is based relies on, in whole or part, misappropriation of client funds involving \$25,000 or more, whether as a single charge or an aggregate of charges, and a true and correct copy of any response.
4. Contemporaneously with the posting of a filed petition under Business and Professions Code section 6007(c), which meets the criteria set forth in paragraph number 3 above, the State Bar posts a Consumer Alert above the member's name, including informational text and disclaimer. That text is modified to relate to the filing of

a petition rather than a notice of disciplinary charges on the respondent's member profile page.

5. Upon the filing of a decision or order of the State Bar Court adjudicating the Business & Professions Code section 6007(c) petition, the Consumer Alert, informational text and disclaimer is removed from the member's profile page immediately.

### Current Policy for Loan Modification Cases

The existing policy limits the use of Consumer Alerts to formal charges involving 15 or more cases alleging loan modification misconduct. The Board approved this policy in 2011, after the State Bar experienced an increase of complaints against attorneys suspected of engaging in loan modification misconduct. In adopting the existing policy, the Board recognized that lawyers engaged in multiple cases of professional misconduct are not only a danger to the public but also put significant strain on the discipline system and the Client Security Fund.

As detailed in the July 122 Agenda Item to RAD, State Bar investigations revealed a variety of schemes involving attorneys engaged in loan modification misconduct and demonstrated that attorneys involved in fraudulent schemes often accumulate a multitude of complaints involving similar acts of misconduct. In developing the criteria for this Consumer Alert policy, the Board considered that a monetary threshold was less meaningful than the volume of complaints. Loan modification outfits often charged nominal fees or fees under \$5,000 and used a business model involving mass scale advertisement and call center solicitation.

Fraudulent schemes, however, continue to morph and develop over time and the same public protection concerns exist where the State Bar has filed formal charges against an attorney in multiple cases regardless of whether that attorney performed loan modification, immigration, criminal defense, bankruptcy, debt consolidation, or other legal services. The existing limitation of the State Bar's Consumer Alert policy, therefore, should be modified to authorize the posting of a Consumer Alert where the State Bar has filed allegations involving 15 or more cases of professional misconduct against an attorney.

The existing policy – limited to cases involving the loan modification misconduct – is as follows:

1. Contemporaneously with posting online a notice of disciplinary charges that includes 15 or more cases of loan modification misconduct, the State Bar posts a Consumer Alert above the respondent member's name, including informational text and disclaimer, on the member's profile page.

2. Upon the filing of a decision or order of the State Bar Court adjudicating the disciplinary proceeding, the Consumer Alert, informational text and disclaimer is removed from the member's profile page immediately.

3. The State Bar Court posts a true and correct copy of a petition filed pursuant to Business and Professions Code section 6007(c)[threat of harm] to enroll a member involuntarily inactive on the member's profile page when the verified application upon which the petition is based relies on, in whole or part, loan modification misconduct, and a true and correct copy of any response.

4. Upon the posting of a State Bar Court decision or order adjudicating the petition, assuming that the petition is granted, the petition and response are removed from the website. In the event of denial of petition or dismissal of the proceeding, the decision or order is posted but the petition and response also remain posted for a period of 60 days, after which all three items relating to the proceeding (petition, response if any, and decision or order) are removed from the member's page.

5. Contemporaneously with the posting of a filed petition under Business & Professions Code section 6007(c), which meets the criteria set forth in paragraph number 3 above, the State Bar posts a Consumer Alert above the member's name, including informational text and disclaimer. That text is modified to relate to the filing of a petition rather than a notice of disciplinary charges on the member's profile page.

6. Upon the filing of a decision or order of the State Bar Court adjudicating the Business & Professions Code section 6007(c) petition, the Consumer Alert, informational text and disclaimer is removed from the member's profile page immediately.

#### Current Lack of Policy Re Assumption of a Law Practice

The current policy fails to contemplate public proceedings initiated by the State Bar in superior court, pursuant to Business and Professions Code sections 6180 and 6190, wherein the State Bar has made an application to the superior court for assumption by the court of jurisdiction over the law practice of a license California attorney. Although section 6180 and 6190 proceedings do not always involve related disciplinary proceedings, alerting consumers of these public proceedings serves an important public protection purpose.

Pursuant to Business and Professions Code section 6180 *et seq.*, the State Bar will file an application seeking court assumption of a law practice where an attorney has died, resigned, become inactive, been disbarred or suspended and has either left an unfinished client matter for which no other active member has agreed to assume with consent of the client or there is a belief that the interests of one of more clients or interested persons will be prejudiced if the proceeding is not maintained.

Pursuant to Business and Professions Code section 6190 *et seq.*, the State Bar will file an application seeking court assumption of a law practice where an attorney has, for any reason, become incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice which is necessary to protect the interest of a client if there is an unfinished matter for which no other active member has agreed to assume responsibility with the consent of the client.

The current policy should be modified to authorize the posting of a Consumer Alert where the State Bar has initiated public proceedings in superior court, whether pursuant to Business and Professions Code sections 6180 *et seq.* or 6190 *et seq.* Currently, there is no public notice available on the State Bar's website where the State Bar has initiated such proceedings seeking superior court assumption of the attorney's law practice.

#### Current Policy Re Removal of Consumer Alert

The existing policy requires the State Bar to remove the Consumer Alert, informational text and disclaimer from the attorney's profile page upon the filing of a decision or order of the State Bar Court adjudicating the proceedings – even if the State Bar Court has found the attorney culpable of professional conduct or grants the State Bar's petition, pursuant to Business and Professions Code section 6007c. In such cases, the State Bar posts the State Bar Court decision or order on the attorney's profile page when it removes the Consumer Alert.

Given the purpose of a Consumer Alert – to provide heightened public protection measures based upon the seriousness of the alleged misconduct – the State Bar should maintain a Consumer Alert on the attorney's profile page where the State Bar Court files a decision or order finding the attorney culpable of professional conduct or grants the State Bar's petition, pursuant to Business and Professions Code section 6007c.

Consistent with the purpose of providing Consumer Alerts to the public, the existing policy should be further modified to allow posting of a Consumer Alert in any disciplinary proceeding where the State Bar Court has found the attorney culpable of professional misconduct, grants the State Bar's petition, pursuant to Business and Professions Code section 6007c, not limited to those cases involving major misappropriation or consolidated matters of 15 or more cases, or when the superior court grants the State Bar's application under Business and Professions Code sections 6180 or 6190 to assume jurisdiction of a law practice.

#### Current Consumer Alert Language

The Consumer Alert language for both major misappropriation and loan modification cases is similar and, generally, as follows:

CONSUMER ALERT: The State Bar of California has filed disciplinary charges against this attorney alleging 15 or more cases of loan



modification misconduct. Loan modification misconduct is a serious disciplinary offense prosecuted by the State Bar.

DISCLAIMER: Any Notice of Disciplinary Charges filed by the State Bar contains only allegations of professional misconduct. The attorney is presumed to be innocent of any misconduct warranting discipline until the charges have been proven.

The first hyperlink (shown as underlined text above) would link to the Disciplinary and Related Actions section of a member's profile page. The second hyperlink would open a "pop up" to provide a brief explanation of loan modification misconduct by attorneys generally. Consumer Alerts for major misappropriation cases would contain a hyperlink "pop up" regarding misappropriation misconduct.

#### Proposed Consumer Alert Language

For consistency and efficiency, the proposed modification to the State Bar's Consumer Alert policy provides for a more uniform approach to the posting of Consumer Alerts. The hyperlinks (shown as underlined text below) would link to the posted documents in the Disciplinary and Related Actions section of a member's profile page.

#### **Disciplinary Proceedings**

Contemporaneously with the posting of a NDC or petition pursuant to Business and Professions Code section 6007, involving the alleged misappropriation of \$25,000 or more or involving 15 or more disciplinary proceedings, the Consumer Alert should state as follows:

CONSUMER ALERT: The State Bar of California has filed formal proceedings against this attorney. Pursuant to State Bar policy, a copy of the State Bar's initiating document and the attorney's response, if filed, will remain posted in the Disciplinary and Related Actions section below until the proceedings have been adjudicated. Upon the filing of a court order or decision adjudicating the proceedings, that court order or decision will be posted in place of the initiating and responsive pleadings.

DISCLAIMER: Any Notice of Disciplinary Charges or petition, pursuant to Business and Professions Code section 6007c, filed by the State Bar contains only allegations of professional misconduct. The attorney is presumed to be innocent of the allegations unless the State Bar Court finds the attorney culpable or grants the State Bar's petition.

Contemporaneously with the posting of a public order or decision by the State Bar Court finding an attorney culpable of any professional misconduct or granting a petition, pursuant to Business and Professions Code section 6007c, a Consumer Alert should be posted to state as follows:

CONSUMER ALERT: The State Bar Court has filed an order or decision finding the attorney culpable of professional misconduct or granting the State Bar's petition, pursuant Business and Professions Code section 6007c.

This Consumer Alert based upon public court order or decision is not limited to misappropriation or consolidated cases and would replace any earlier Consumer Alert posted based upon the filing of such allegations.

### **Superior Court Proceedings**

Contemporaneously with the posting of an application for assumption of an attorney's law practice, pursuant to Business and Professions Code section 6180 *et. seq.*, the Consumer Alert should state as follows:

CONSUMER ALERT: The State Bar of California has initiated formal proceedings in superior court alleging that this attorney has died, resigned, become inactive, been disbarred or suspended and has either left an unfinished client matter for which no other active member has agreed to assume responsibility with consent of the client or there is a belief that the interests of one of more clients or interested persons will be prejudiced if the proceeding is not maintained.

Any application filed by the State Bar, pursuant to Business and Professions Code section 6180 *et. seq.*, contains only allegations that superior court assumption of the attorney's law practice is warranted. Pursuant to State Bar policy, a copy of the State Bar's initiating document and the attorney's response, if filed, will remain posted in the Disciplinary and Related Actions section below until the proceedings have been adjudicated. Upon the filing of a court order or decision adjudicating the proceedings, that court order or decision will be posted in place of the initiating and responsive pleadings.

Contemporaneously with the posting of an order or decision by the Superior Court granting the State Bar's application to assume jurisdiction of an attorney's law practice, the Consumer Alert should be replaced with language as follows:

CONSUMER ALERT: The Superior Court has filed an order or decision assuming jurisdiction of the attorney's law practice, pursuant to Business and Professions Code section 6180 *et. seq.* If you have questions related to this law practice, please contact the State Bar's Complaint Hotline 1-800-842-9053.

Contemporaneously with the posting of an application for assumption of an attorney's law practice, pursuant to Business and Professions Code section 6190 *et. seq.*, the Consumer Alert should state as follows:

CONSUMER ALERT: The State Bar of California has initiated formal proceedings in superior court alleging that this attorney has become incapable of devoting the time and attention to, and providing the quality of service for, the attorney's law practice which is necessary to protect the interest of a client if there is an unfinished matter for which no other active member has agreed to assume responsibility with the consent of the client.

Any application filed by the State Bar, pursuant to Business and Professions Code section 6190 *et. seq.*, contains only allegations that superior court assumption of the attorney's law practice is warranted. Pursuant to State Bar policy, a copy of the State Bar's initiating document and the attorney's response, if filed, will remain posted in the Disciplinary and Related Actions section below until the proceedings have been adjudicated. Upon the filing of a court order or decision adjudicating the proceedings, that court order or decision will be posted in place of the initiating and responsive pleadings.

Contemporaneously with the posting of an order or decision by the Superior Court granting the State Bar's application to assume jurisdiction of an attorney's law practice, the Consumer Alert should be replaced with language as follows:

CONSUMER ALERT: The Superior Court has filed an order or decision assuming jurisdiction of the attorney's law practice, pursuant to Business and Professions Code section 6190 *et. seq.* If you have questions related to this law practice, please contact the State Bar's Complaint Hotline 1-800-842-9053.

**FISCAL / PERSONNEL IMPACT:**

None.

**RULE AMENDMENTS:**

None.

**BOARD BOOK IMPACT:**

None.

## **RECOMMENDATION**

OCTC recommends that RAD authorize staff to circulate, for a 60-day period of public comment, the proposed modification to the State Bar's policy regarding the posting of consumer alerts on the State Bar's website, as set forth herein in Attachment 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 authorize staff to make available, for public comment period of 60 days, the proposed modification to the State Bar's policy regarding the posting of consumer alerts on the State Bar's website, as set forth herein in Attachment A.

**FURTHER RESOLVED**, that this authorization for release from public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed item.

## ATTACHMENT A

### [PROPOSED] STATE BAR POLICY REGARDING POSTING OF CONSUMER ALERTS

The State Bar shall post a Consumer Alert on an attorney's online State Bar profile page where the State Bar has initiated proceedings in superior court seeking the assumption of an attorney's law practice or where the State Bar has initiated proceedings in State Bar Court involving either allegations of misappropriation in the amount of \$25,000 or more – whether as a single charge or an aggregate of charges – or allegations of professional misconduct in 15 or more cases.

Where the State Bar has initiated proceedings in State Bar Court, as described above, the State Bar shall post a Consumer Alert as follows:

1. Contemporaneously with the online posting of a filed Notice of Disciplinary Charges (“NDC”) or filed petition under Business and Professions Code section 6007(c), the State Bar will post a Consumer Alert above the respondent member's name, which shall include the following informational text and disclaimer language:

CONSUMER ALERT: The State Bar of California has filed formal proceedings against this attorney. Pursuant to State Bar policy, a copy of the State Bar's initiating document and the attorney's response, if filed, will remain posted in the Disciplinary and Related Actions section below until the proceedings have been adjudicated. Upon the filing of a court decision or order adjudicating the proceedings, that court decision or order will be posted in place of the initiating and responsive pleadings.

DISCLAIMER: Any Notice of Disciplinary Charges or petition, pursuant to Business and Professions Code section 6007c, filed by the State Bar contains only allegations of professional misconduct. The attorney is presumed to be innocent of the allegations unless the State Bar Court finds the attorney culpable or grants the State Bar's petition.

2. Contemporaneously with the online posting of any filed court decision or order finding the attorney culpable of one or more acts of professional misconduct as alleged or granting the State Bar's petition under Business and Professions Code section 6007(c), the State Bar will post a Consumer Alert above the respondent member's name, which shall include the following informational text and disclaimer language and, if applicable, replace the pre-existing Consumer Alert notifying the public about the filing of allegations against the attorney:

CONSUMER ALERT: The State Bar Court has filed an order or decision finding the attorney culpable of professional misconduct or granting the State Bar's petition, pursuant Business and Professions Code section 6007c.

3. Contemporaneously with the online posting of a filed court decision or order dismissing the proceedings in its entirety, the State Bar shall immediately remove any posted Consumer Alert, informational text and disclaimer from the member's profile page.

Where the State Bar has initiated proceedings in Superior Court, pursuant to Business and Professions Code section 6180 *et. seq.* , the State Bar shall post a Consumer Alert as follows:

4. Contemporaneously with the online posting of a filed application under Business and Professions Code section 6180 *et. seq.*, the State Bar will post a Consumer Alert above the respondent member's name, which shall include the following informational text and disclaimer language:

CONSUMER ALERT: The State Bar of California has initiated formal proceedings in superior court alleging that this attorney has died, resigned, become inactive, been disbarred or suspended and has either left an unfinished client matter for which no other active member has agreed to assume responsibility with consent of the client or there is a belief that the interests of one of more clients or interested persons will be prejudiced if the proceeding is not maintained.

Any application filed by the State Bar, pursuant to Business and Professions Code section 6180 *et. seq.*, contains only allegations that superior court assumption of the attorney's law practice is warranted. Pursuant to State Bar policy, a copy of the State Bar's initiating document and the attorney's response, if filed, will remain posted in the Disciplinary and Related Actions section below until the proceedings have been adjudicated. Upon the filing of a court order or decision adjudicating the proceedings, that court order or decision will be posted in place of the initiating and responsive pleadings.

5. Contemporaneously with the online posting of a filed superior court decision or order granting the State Bar's application under Business and Professions Code section 6180 *et. seq.*, the State Bar will remove the online posting of the initiating document and any response filed by the attorney and shall replace the Consumer Alert language with the following: .

CONSUMER ALERT: The Superior Court has filed an order or decision assuming jurisdiction of the attorney's law practice, pursuant to Business and Professions Code section 6180 *et. seq.* If you have questions related to this law practice, please contact the State Bar's Complaint Hotline 1-800-842-9053.

6. Contemporaneously with the posting of an application for assumption of an attorney's law practice, pursuant to Business and Professions Code section 6190 *et. seq.*, the Consumer Alert should state as follows:

CONSUMER ALERT: The State Bar of California has initiated formal proceedings in superior court alleging that this attorney has become incapable of devoting the time and attention to, and providing the quality of service for, the attorney's law practice which is necessary to protect the interest of a client if there is an unfinished matter for which no other active member has agreed to assume responsibility with the consent of the client.

Any application filed by the State Bar, pursuant to Business and Professions Code section 6190 *et. seq.*, contains only allegations that superior court assumption of the attorney's law practice is warranted. Pursuant to State Bar policy, a copy of the State Bar's initiating document and the attorney's response, if filed, will remain posted in the Disciplinary and Related Actions section below until the proceedings have been adjudicated. Upon the filing of a court order or decision adjudicating the proceedings, that court order or decision will be posted in place of the initiating and responsive pleadings.

7. Contemporaneously with the posting of an order or decision by the Superior Court granting the State Bar's application to assume jurisdiction of an attorney's law practice, the Consumer Alert should be replaced with language as follows:

CONSUMER ALERT: The Superior Court has filed an order or decision assuming jurisdiction of the attorney's law practice, pursuant to Business and Professions Code section 6190 *et. seq.* If you have questions related to this law practice, please contact the State Bar's Complaint Hotline 1-800-842-9053.

8. Contemporaneously with the online posting of a filed court order terminating section 6180 *et seq.* or 6190 *et. seq.* proceedings, the State Bar shall immediately remove the Consumer Alert, informational text and disclaimer from the member's profile page.

9. This policy is intended to replace any previous policy regarding the posting of consumer alerts on the State Bar's website and is consistent with the State Bar's policy regarding the online posting of NDCs and other initiating documents.

# 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.