

OPEN SESSION AGENDA ITEM

SEPTEMBER 2018 REGULATION AND DISCIPLINE COMMITTEE ITEM III.C.

DATE: September 13, 2018

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

FROM: Suzanne Grandt, Office of General Counsel; Carolina Almarante, Office of Research and Institutional Accountability; Dag MacLeod, Chief, Mission Advancement & Accountability

SUBJECT: Process for Handling Criminal Information received by the DOJ Pursuant to Recent Attorney Fingerprinting Requirements.

EXECUTIVE SUMMARY

Pursuant to the recent California Rule of Court, rule 9.9.5, requiring all active attorneys to be fingerprinted for the purpose of subsequent arrest notification by December 1, 2019, the State Bar is now receiving arrest, conviction, and sentencing data from the California Department of Justice (DOJ). Unlike charges and convictions, arrests are not required to be reported to the State Bar for disciplinary purposes, and an arrest does not constitute a disciplinable offense.

This agenda item provides a summary of program operations since the implementation of the new fingerprinting rule, considers the policy implications of pursuing disciplinary investigations based on arrests that do not result in charges or convictions, and provides recommendations to the Regulation and Discipline Committee (RAD) on the State Bar's handling of arrest data.

Staff specifically recommends that no arrest data be sent to the Office of the Chief Trial Counsel (OCTC). Instead, the Office of Research and Institutional Accountability (ORIA) will monitor arrests to determine if charges are filed. ORIA will transmit criminal record information to OCTC upon the filing of charges. Staff's recommendation is designed to ensure that OCTC is provided with information that it is required to receive under various reporting statutes while also ensuring that the Bar's discipline system does not unnecessarily import racial biases that may inform the arrest data now transmitted by the DOJ.

BACKGROUND

As previously reported to RAD and the Board of Trustees, in 2017, the State Bar entered into Subsequent Arrest Notification (SAN) contracts with the California Department of Justice (DOJ) for State Bar applicants and licensees. This means that when State Bar applicants are fingerprinted as part of their moral character application, the Office of Admissions will receive an initial report

containing the licensee's criminal offender record information (CORI)¹, commonly referred to as a "rap sheet," if one exists.

Once the applicant has been admitted to the State Bar, the State Bar will receive notification when the individual is arrested in the State of California, and the disposition of that arrest (such as dismissal or conviction), as well as sentencing and incarceration information. Penal Code (PC) Section 11075(a). The State Bar will *not* receive notification at the time charges are filed. However, the State Bar will be affirmatively notified of the disposition of the arrest, which will include information as to whether or not the individual was convicted or acquitted of any charges, or if any charges were dismissed or reduced, and details on these charges. This ongoing receipt of criminal information is referred to as "subsequent arrest notification."

The distinction between CORI and SAN data is an important one; CORI information is retrospective review of an individual's criminal history whereas SAN information is prospective.

On May 23, 2018, the Supreme Court issued California Rule of Court, rule 9.9.5 (Rule 9.9.5 or Rule) requiring the re-fingerprinting of most active attorneys licensed in California by December 1, 2019. Rule 9.9.5 became effective June 1, 2018. Attorneys impacted by the Rule of Court were notified of the Fingerprinting Rule requirements. Non-compliant attorneys will continue to receive regular reminders to comply with the rule prior to the penalty deadline (April 30, 2019). As of September 7, 2018, a total of 25,947 attorneys, approximately 13 percent, have complied with the Rule; the State Bar has received 1,178 CORI reports and 15 SANs.

Staff has been working to develop procedures for the effective handling of CORI data from the DOJ. In the course of implementing these procedures questions have arisen with respect to how arrest information received from the DOJ should be handled. Specifically, the question of whether arrest information should be made available to OCTC has been raised. The arrest information in question includes arrests that occurred prior to admission to the State Bar, arrests that were previously dismissed or resulted in acquittal, and arrests with no corresponding charges.

DISCUSSION

The legislature's recent amendment to Business and Profession Code (BPC) Section 6054, authorizing the State Bar to re-fingerprint attorneys for the purpose of subsequent arrest notification, and the promulgation of Rule 9.9.5, requiring such re-fingerprinting by December 1, 2019, highlight the importance to lawmakers that the State Bar receive up-to-date criminal information for purposes of attorney regulation. This is consistent with state law requiring summary disbarment and interim suspension if an attorney is convicted of certain specified crimes. BPC Sections 6101 and 6102. State law also requires the reporting of specified charges and convictions to the State Bar, and an attorney's failure to report certain information is itself a disciplinable offense. BPC Code Section 6068(o)(10).²

Reportable criminal information is summarized as follows:³⁴

¹ CORI is defined as "records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release." Penal Code Section 11075(a).

² As previously discussed with this Committee and the Board, under-reporting of criminal information is thought to be extensive.

³ See BPC Section 6068(o)(4)-(5) (listing criminal actions reportable by the licensee); BPC Section 6101(b) (listing criminal actions reportable by the court) and BPC Section 6101(c) (listing criminal actions reportable by prosecuting agency).

- felony charges (reportable by the licensee and the prosecuting agency);
- felony convictions (reportable by the licensee and the court);
- misdemeanor charges (reportable by the prosecuting agency)
- misdemeanor convictions for a crime committed in the practice of law or in which a client was the victim (reportable by the licensee);
- misdemeanor convictions for a crime that “necessarily involves dishonesty or moral turpitude, or an attempt, conspiracy or solicitation to commit such a crime” (reportable by the licensee)

While arrests are not reportable actions under State law, nor does an arrest constitute a disciplinable offense, OCTC has the authority to determine whether the facts underlying an arrest warrant an independent disciplinary investigation. See *Emslie v. State Bar* (1974) 11 Cal. 3d 210, 224, 520 P.2d 991, 998 [dismissal of criminal charges does not preclude the State Bar of California from investigating or from basing its disciplinary proceedings upon the same acts charged in the criminal action; the State Bar has a duty to investigate any charge of serious misconduct against an attorney]. Some violations might be provable in disciplinary proceedings even though they would not be provable in criminal court for reasons such as different standards of proof, different elements of offenses, and different evidentiary rules. Further, criminal prosecutors sometimes have different priorities than OCTC. When the conduct involves the practice of law, OCTC might decide to pursue matters that have been closed by criminal prosecutors. Also, OCTC would not be bound by immunity or cooperation agreements that a criminal prosecutor might make with the attorney.

While there may be situations in which OCTC may have good cause to independently investigate conduct underlying an arrest, there are important practical and policy considerations weighing against providing arrest notification to OCTC. These concerns involve cases where the arrest has not yet resulted in a charge or conviction, or when the arrest has been dismissed.

First, in practice, OCTC does not typically evaluate criminal information it receives from outside sources. Rather, OCTC utilizes a “criminal conviction monitoring” system. Specifically, when OCTC receives information pertaining to a criminal case, OCTC staff orders police reports and court records and monitors the criminal proceedings manually. In these cases, staff will wait until there is a final conviction before taking disciplinary action. Disciplinary action includes transmittal of the conviction to State Bar Court for purposes of interim suspension in cases of felony convictions and certain misdemeanor convictions. See State Bar Rule, rules 5.341- 5.343; BPC Section 6102(a). For more serious convictions, OCTC will also make a motion for summary disbarment pursuant to BPC Section 6102(c). For other types of crimes, OCTC will evaluate whether the conviction should be transmitted to the State Bar Court Review Department, where it is referred to the Hearing Department to determine whether the crime involves moral turpitude or other misconduct warranting discipline. BPC Section 6102(f), State Bar Rule, rule 5.344. This means that, practically, there is little reason to provide arrest information to OCTC prior to disposition because, in most cases, no action will be taken until final conviction.

Second, statistics from the community and national levels indicate that racial disparity is rampant in all aspects of the criminal justice system, beginning with arrests. A recent study, *San Francisco's Drug Arrest Drop 90% through 2016: Disproportionate Arrests of African Americans Persist*, illustrates this point. The study notes that although there was sharp decline in overall drug arrests between 2015 and 2016 African Americans in San Francisco were arrested for felony drug offenses at a rate 10 times greater than that of other racial/ethnic groups. Decisions to utilize arrest data for disciplinary purposes must be assessed in this context.

⁴ Note that Bar applicants are required to report arrest information. However, given that the Office of Admissions does not retain moral character application files for more than three years, it is not possible to systematically review CORI data against what was reported in any given attorneys moral character application. As a result, pre-admissions arrest data received as part of CORI information cannot be acted upon by the Bar.

Third, an arrest is not a reliable indication that a licensee has committed an unlawful act. *Schware v. Board of Bar Examiners*, (1957) 353 U.S. 232, 241 (1957) (“[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in misconduct”). The potential disparate impact on decision making based on potentially unreliable information is consistent with recent California legislation limiting the use of arrest information for employment decisions, as well as proposed legislation prohibiting use of certain criminal information in licensing decisions directed to various Boards within the Department of Consumer Affairs (e.g., Board of Accountancy, Acupuncture Board, Bureau of Barbering and Cosmetology, etc.)⁵.

RECOMMENDATION

1. CORI Information.

Staff recommends that ORIA review CORI reports (retrospective criminal record information) and transmit only conviction information to OCTC.

2. SAN Information

Staff recommends that ORIA monitor SANs and transmit arrest information to OCTC only once charges are filed.

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.

Objective: (Click here to enter an Objective (a-i) and corresponding text, i.e., a. Support increased funding and enhanced outcome measures for Legal Services.)

(List as many goals and objectives as apply. If none apply, delete text and select a None option from the drop-down box. If more than one goal apply, copy and paste “Goal” and “Objective” content boxes for each additional goal. Objectives must be listed manually.)

RECOMMENDATION

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

RESOLVED, that the Office of Research and Institutional Accountability will review all CORI information received from the DOJ and will only transmit conviction data to the Office of the Chief Trial Counsel; and it is

FURTHER RESOLVED, that the Office of Research and Institutional Accountability will monitor all SAN arrest information it receives from the California Department of Justice and will transmit the information to the Office of Chief Trial Counsel only after charges are filed.

⁵ The State Bar is not one of the entities that would be impacted by this proposed legislation.

(If no recommendation, i.e., item is informational only, delete text and state "None" here.)