



The State Bar of California

OPEN SESSION AGENDA ITEM 704 NOVEMBER 2019

DATE: November 14, 2019

TO: Members, Board of Trustees

FROM: Dag MacLeod, Chief of Mission Advancement & Accountability Division
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SUBJECT: Fingerprinting Update

EXECUTIVE SUMMARY

This agenda item updates the Board of Trustees (Board) on the implementation of California Rule of Court rule 9.9.5 requiring active attorneys, with limited exception, to be re-fingerprinted by December 1, 2019. Specifically, this item provides an overview regarding two major components of this implementation: the verification of compliance by attorneys, and the evaluation and transfer of the criminal history information from the Office of Research & Institutional Accountability (ORIA) to the Office of Chief Trial Counsel (OCTC). To date, less than two percent of the active attorney population are out of compliance with the fingerprinting rule and information from over 1,500 Records of Arrest and Prosecution (RAP Sheets) were transferred to OCTC. This agenda item further recommends that the Board approve a new annual fingerprinting schedule of penalties and deadlines for licensees who were not subject to the 2019 final deadline.

BACKGROUND

On June 1, 2018, the Supreme Court of California adopted Rule of Court 9.9.5 requiring the re-fingerprinting of most active attorneys in California. The Rule of Court directed the State Bar to “enter into a contract with the California Department of Justice for subsequent arrest notification services for attorneys whose license is on active status with the State Bar” (CRC

9.9.5(a)(1). This contract mandates that the Department of Justice (DOJ) provide notification to the State Bar when an attorney is arrested, and of the disposition of that arrest (i.e., conviction, guilty plea, dismissal) , referred to as subsequent arrest notification (SAN) service. The Rule of Court further direct the State Bar to “develop a schedule for implementation that requires all attorneys subject to fingerprinting ... be fingerprinted by December 1, 2019” (CRC 9.9.5(f)(1)). The rule further provides that failure to be fingerprinted if required by the rule may result in involuntary inactive enrollment pursuant to Business & Professions Code section 6054, subdivision (d).

In anticipation of the new Rule of Court, the Board approved a new State Bar Rule in March 2018 granting the State Bar the authority to enroll an attorney as inactive for noncompliance with rule 9.9.5. Noncompliance is defined as “failure to submit proof that fingerprints have been taken in accordance with State law and State Bar procedures.” State Bar Rule 2.46. The Board, as part of the March 2018 meeting, also adopted a schedule of penalties to ensure full compliance by December 1, 2019.

In addition to working to ensure attorneys comply with CRC 9.9.5, designated State Bar staff have been evaluating RAP Sheets that are sent to the State Bar by DOJ when an attorney who is re-fingerprinted has a criminal history. The State Bar also receives updated RAP sheets through SAN service administered by the DOJ. In September 2018, the Board adopted a resolution regarding what information ORIA is authorized to transfer to OCTC. Accordingly, staff developed protocols for the handling of RAP Sheets, including data security protocols, and routines for determining whether the information should be forwarded to OCTC pursuant to the Board’s resolution.

Due to the fact there will be a subset of newly admitted attorneys who the State Bar does not have a SAN contract for, attorneys transferring to active status from inactive and/or not eligible status, and/or attorneys who fail to comply with the fingerprinting requirements prior to December 1, 2019, rule 9.9.5 specifies that the State Bar has “ongoing authority” to require submission of fingerprints after December 1, 2019. However, there is no current penalty and noncompliance schedule in place for these attorneys.

DISCUSSION

Compliance Verification

Beginning in June 2018, notification was sent to all active and inactive attorneys alerting them of the fingerprinting requirement, along with detailed instructions on how to comply with the fingerprinting rule. The initial notification was followed by a series of monthly email reminders to those attorneys who failed to submit proof of fingerprint submission pursuant the State Bar’s instructions. Staff sent an average of 40,000 email reminders weekly during the early phases of implementation. The email reminders included notification of specific penalty deadlines, and how to address DOJ/FBI fingerprint rejections. Attorneys were also notified as to whether, despite proof of submission of fingerprints, their fingerprints were not received by the DOJ

In accordance with the schedule of penalties adopted by the Board, attorneys who were not compliant by May 1, 2019, were fined \$75, and those who were still out of compliance on August 1, 2019, were fined an additional \$100.

Figure 1 details the number of attorneys whose fingerprints were transferred to DOJ each month from July, 2017, through October, 2019.

Figure 1 – Attorney Fingerprinting by Month

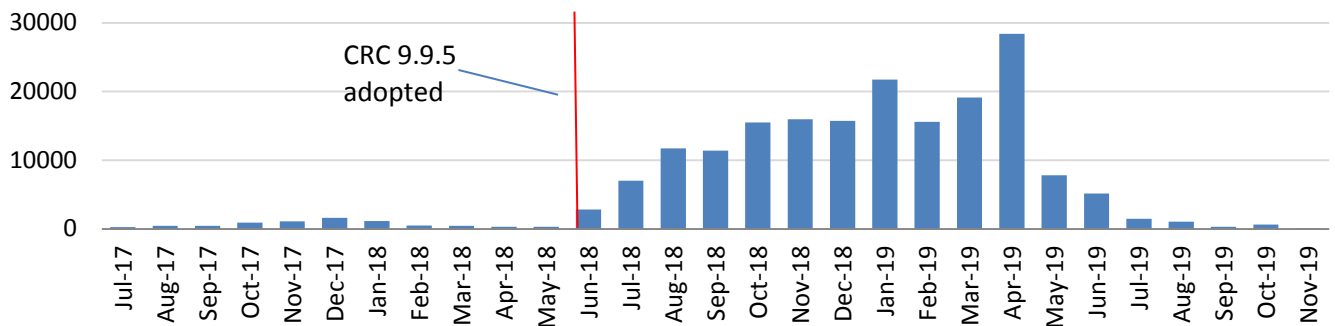


Figure 2 shows the cumulative effect of the fingerprinting over the course of the last two years. As of November 7, slightly more than 190,500 attorneys in California were registered as active. Of these, 98.1 percent had been fingerprinted in compliance with CRC 9.9.5 (Figure 2). Further, Table 1 identifies the different categories of attorneys that are represented in the remaining 1.9 percent of attorneys who due to a variety of circumstances did not successfully submit their fingerprints to the DOJ.

Figure 2 – Compliance with CRC 9.9.5 as of November 7, 2019

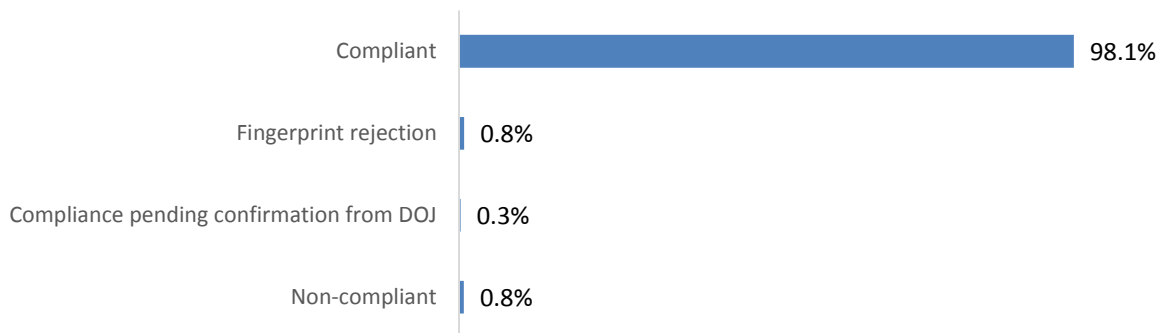


Table 1 – Active Attorneys Out of Compliance with CRC 9.9.5

Group 1	Newly admitted to the State Bar and passed moral character before July 2017 subsequent arrest notification contract when into effect.
Group 2	Newly transferred from not eligible to practice to active status.
Group 3	Newly transferred from judge to active status.
Group 4	Pending confirmation from the DOJ after the State Bar received proof of re-fingerprinting.
Group 5	Not newly transferred to active status and no record of any action taken to comply with the rule.

Groups 1 through 3 in Table 1 are either recently admitted to the State Bar or have recently reactivated their license after June 1, 2019 and had less than six months to comply with the rule. For this reason, State Bar staff is not recommending that these attorneys be enrolled involuntarily inactive. Instead, State Bar staff is recommending that these attorneys be placed on a new compliance schedule that begins in February 2020. Attorneys in Group 4 have taken action and the State Bar has proof of fingerprinting but due to unresolved fingerprint rejection or pending confirmation from the DOJ, staff proposes this population is also not subject to the December deadline.

Group 5 represents the active attorneys that the State Bar is recommending be enrolled as involuntarily inactive in Board Agenda Item 50-8, Fingerprinting Noncompliance Item. These attorneys have received multiple communications regarding the need to come into compliance with CRC 9.9.5 and they have been fined according to the schedule for imposing penalties for noncompliance and in compliance with the notice requirements imposed pursuant to Rule 2.46. The State Bar has no record of these attorneys taking any action to comply with the rule. The number of attorneys in group 5 as of November 1, 2019 is 1,575 and will decrease as the deadline approaches.

Proposed Notification and Penalty Schedule for Post December 1 Deadlines

State Bar staff recommends that the attorneys in Groups 1 through 4 *not* be subject to the December 2019 deadline. Instead, staff recommends that the State Bar continue tracking these attorneys following the current schedule and place them on a new schedule for on-going monitoring of attorneys not compliant with the fingerprinting rule.

The timeline for the new schedule would follow the same cycle as the annual fee cycle schedule. Below is a proposed penalty schedule for the on-going tracking of noncompliant attorneys.

Table 2 – Proposed Notification and Penalty Schedule for Active Attorneys

Post December 2019 Fingerprinting Notification and Penalty Schedule		
Penalty Deadline	\$75 Penalty	First business day in February
Reminders	On-going Email Reminders	December to June
Final Notice	Mailed Notification	60 days prior to final deadline
Final Deadline	Involuntary Inactive	Last business day in June

Attorneys impacted by the rule in 2020 and after will continue to receive weekly reminders regarding requirements to comply with the rule. As shown in Table 2, staff proposes a \$75 penalty by first business day in February, consistent with the annual fee cycle, and be enrolled involuntary inactive on last business day in June, if the attorney fails to comply with the rule.

RAP Sheet Data Transfer

During the last year, State Bar staff developed guidelines for the evaluation and transfer of criminal history information from RAP Sheets to OCTC. A January 2018 report to the Board of Trustees showed the decision matrix established in collaboration with OCTC to guide the management of this process. Information from RAP Sheets that is *not* transferred to OCTC includes:

- information on arrests that do not result in any subsequent charges;
- information on charges and convictions of infractions;
- criminal history information that was already known to the Bar including:
 - information from prior to admission to the State Bar;
 - charges and convictions post-admission that were already reported to the State Bar.

The remaining information that is transferred to OCTC includes misdemeanor and felony charges and convictions.

One of the most significant challenges of following these guidelines has been determining whether or not charges and convictions found on RAP Sheets had already been reported to OCTC. Cases in OCTC that originate as criminal matters reported to the State Bar are known as Criminal Complaint monitoring cases, or “C-Cases.” There is no clear, unique identifier that

allows State Bar staff to readily determine whether a case found on a RAP Sheet is the same case that is already in the OCTC case management system.

The first cases to be entered into the system are those where there is no record of any kind of the attorney in OCTC's case management system, Odyssey. This first phase of data entry of cases into Odyssey included the transfer of felony level offenses followed by misdemeanor offenses. As part of the second phase of data entry, staff will follow the same prioritization when manually reviewing RAP Sheet data against cases in Odyssey to identify new C-cases when there is a history of prior discipline in Odyssey but no C-Cases and when the attorney already has a C-Case in Odyssey. The goal of the manual review is to determine whether case in Odyssey is the same as the information contained on the RAP Sheet and create a new C-Case when it is determined that the C-Case already in the system is distinct from the information contained on the RAP Sheet.

Table 3 shows the proportion of RAP Sheets that fall into these different categories. The vast majority of attorneys who became compliant with CRC 9.9.5 had no criminal history and, therefore, no RAP sheet. The remaining attorneys whose fingerprints returned a criminal history are almost equally divided among those with no prior OCTC record in Odyssey, those who have a prior record in Odyssey, and those who have a prior C-Case in Odyssey.

Table 3 – Results of Fingerprinting under CRC 9.9.5

	N	%
No RAP Sheet	184,694	96.9
No Record in Odyssey	1,962	1.0
Odyssey Record But No C-Case	2,124	1.1
C-Case in Odyssey	1,885	1.0
Total	190,665	100

To date, State Bar staff entered almost 84 percent of the cases where there is no prior record in Odyssey – 1,642 of the 1,962 cases – and expect to finish data entry on these cases within the next week. At that point, staff will begin the more labor intensive phase of manual case review and work closely with OCTC staff to determine how best to evaluate records in Odyssey and verify whether the cases match information from RAP Sheets.

Staff has not yet conducted a detailed analysis of the RAP Sheet data. Staff has, however, looked at charges and charge level and found that just over half of all cases found on the RAP Sheets are related to Driving under the Influence. Looking at the charge level, just over 80 percent of the cases are misdemeanors, 6.5 percent of the cases are Felonies, and for the remaining 13 percent of cases a charge level has not yet been determined.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD OF TRUSTEES POLICY MANUAL AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None - core business operations

RECOMMENDATIONS

It is recommended that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees approve the annual fingerprinting schedule of penalties and deadline shown in Table 2 of this report for attorneys in Groups 1-4; and it is

FURTHER RESOLVED, that the Board of Trustees approve the same schedule of penalties and deadline for enrolment of attorneys as involuntarily inactive for future years when active licensee fail to comply with CRC 9.9.5.

ATTACHMENT(S) LIST

None