



Date: October 29, 2020

To: California Paraprofessional Program Working Group

From: Kimberly Kirchmeyer and Ira Spiro

Subject: Status Report on Discipline System for a Paraprofessional Program

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### **Executive Summary**

The California Paraprofessional Program Working Group (CPPWG or Working Group) is charged with developing recommendations for consideration by the Board of Trustees for the creation of a paraprofessional licensure/certification program to increase access to legal services in California. The CPPWG's charter is informed by the [California Justice Gap Study](#) and the [Task Force on Access Through Innovation of Legal Services](#). In carrying out its charge, the CPPWG must balance the dual goals of ensuring public protection and increasing access to legal services. The CPPWG's recommendations to the Board will include, among other topics, the discipline system for paraprofessionals.

### **Discussion**

The initial project plan for the CPPWG provided for the selection of practice areas and tasks that would be authorized for licensed paraprofessionals, to be followed by development of recommendations for the licensing requirements, regulatory structure, and disciplinary system for the program.

At its August 25, 2020, meeting, however, members of the CPPWG expressed reservations with regard to endorsing paraprofessional practice areas and tasks in the absence of an understanding of the requirements for licensing, regulation, and discipline for this newly created license. The Working Group decided to pivot to consideration of these topics, after which it would return to the subject of practice areas and tasks. Three subcommittees were formed subsequent to the August meeting in response to this pivot: Licensing, Discipline, and Regulation.

The Discipline Subcommittee, which comprises the authors of this memorandum, was tasked with the development of a recommended paraprofessional discipline system. In doing so, they considered the following information:

- California's attorney discipline system;
- Discipline system for licensing boards under the jurisdiction of the California Department of Consumer Affairs (DCA); and
- Current and proposed discipline system for licensees of the Washington State Bar Association (WSBA).

This memo provides a report on the status of the subcommittee's discussions, and preliminary recommendations regarding a discipline system for paraprofessionals.

### **California Attorney Discipline System**

The subcommittee reviewed the discipline system for California attorneys, which comprises the Office of Chief Trial Counsel (OCTC), the State Bar Court (SBC) and the California Supreme Court. Complaints against attorneys are reviewed in OCTC's Intake Unit, which may close the complaint or refer it to investigation. If the investigation finds potential misconduct, OCTC may pursue action against the attorney respondent, up to and including filing a notice of disciplinary charges (NDC). If an NDC is filed, an OCTC attorney prosecutes the case before a judge in the SBC Hearing Department. The SBC Hearing Judge's decision can be appealed to the SBC Review Department, either by the respondent or OCTC. SBC final rulings are filed as recommendations to the Supreme Court, which considers the case de novo and rules on discipline. Either party may request a rehearing before the Supreme Court, after which final discipline may be imposed. A detailed description of the California attorney discipline system is provided as Attachment A.

### **Discipline System for DCA Licensing Boards**

The subcommittee reviewed the discipline system for the California Medical Board, which is similar to that of other DCA licensing boards. Complaints against licensees are reviewed in the Central Complaint Unit (CCU), which may close the complaint or refer it to a District Office (DO) for investigation. The DO may close the case or refer it to the Attorney General (AG), which determines whether to initiate disciplinary action. Both the CCU and the DO have the option to refer the matter to the Citation and Fine Program, if it is determined that a minor violation has occurred. Imposition of a citation, which may include a fine, does not constitute disciplinary action.

In cases where it determines that discipline is warranted, the AG drafts formal charges, which are filed by the Board's Executive Director. The AG prosecutes the licensee before an Administrative Law Judge (ALJ), who writes a proposed decision. The proposed decision is reviewed by a panel of the Medical Board, which may adopt the decision as proposed, reduce the penalty and adopt the decision, or increase the penalty and adopt the decision, after written and oral argument. Decisions may be appealed by the licensee to the Medical Board panel; final decisions may be appealed to the Superior Court, the District Court of Appeal, and the Supreme Court. A detailed description of the Medical Board's enforcement process is provided as Attachment B.

### **Current and Proposed Discipline System for Washington Licensees**

The subcommittee met with Mr. Bobby Henry, Associate Director of Regulatory Services with the WSBA. Mr. Henry explained that, when the Limited License Legal Technician (LLLT) program was

implemented in Washington, a new discipline system was developed for LLLTs, which resulted in three separate disciplinary systems for WSBA licensees: (1) one for attorneys, (2) one for Limited Practice Officers (LPOs),<sup>1</sup> and (3) one for LLLTs. Complaints against attorneys are reviewed in the Office of Disciplinary Counsel (ODC), while complaints against LLLTs and LPOs are reviewed in the Regulatory Services Department, which may dismiss a complaint or refer it for investigation by ODC. Complaints warranting prosecution are heard before either a Disciplinary Board Committee, a LLLT Disciplinary Committee, or an LPO Discipline Committee. Appeals from committee decisions are heard by the licensing board of each licensee designation.

Mr. Henry reported that this system has proven inefficient, and that a new system has been proposed to streamline this process. In the newly proposed structure, which is currently out for public comment, all complaints would be reviewed and investigated by ODC, which could recommend dismissal, diversion, or a hearing. Cases referred for a hearing would go before an Office of the Regulatory Adjudicator (ORA) Authorization Panel, a three-person panel consisting of a staff adjudicator and two volunteers, which would authorize a statement of charges. Cases would be heard by an ORA staff adjudicator, while appeals would be brought before an ORA Appeal Panel, a five-person panel consisting of a staff adjudicator and four volunteers. Flow charts showing the current and proposed WSBA discipline systems are provided as Attachment C.

### **Preliminary Recommendations**

In the subcommittee's discussion of a disciplinary system for a paraprofessional program, they have been mindful of potentially conflicting policy considerations. Considerations of economies of scale suggest incorporating paraprofessionals into the attorney discipline system to allow for an efficient use of an existing structure. A new system, on the other hand, could allow for the inclusion of nonlicensed public members in the discipline process, and has the potential for the creation of a system that could move cases more quickly from receipt of complaint to final resolution. Such a system could also prove to be less expensive than the attorney discipline system.

The paraprofessional discipline system the subcommittee recommends is a hybrid of these options; it takes advantage of the existing structure in OCTC to conduct initial review and investigation, but provides for adjudication and appeal in a venue other than the State Bar Court, which is quite costly for the State Bar and would be quite costly for an appealing paraprofessional represented by an attorney in the State Bar Court. Initial disciplinary decisions would require adoption by the paraprofessional licensing board.<sup>2</sup> This model also introduces the ability to impose citations and fines in lieu of discipline, to be used in cases of minor violations that do not require discipline but where some form of penalty is deemed appropriate.

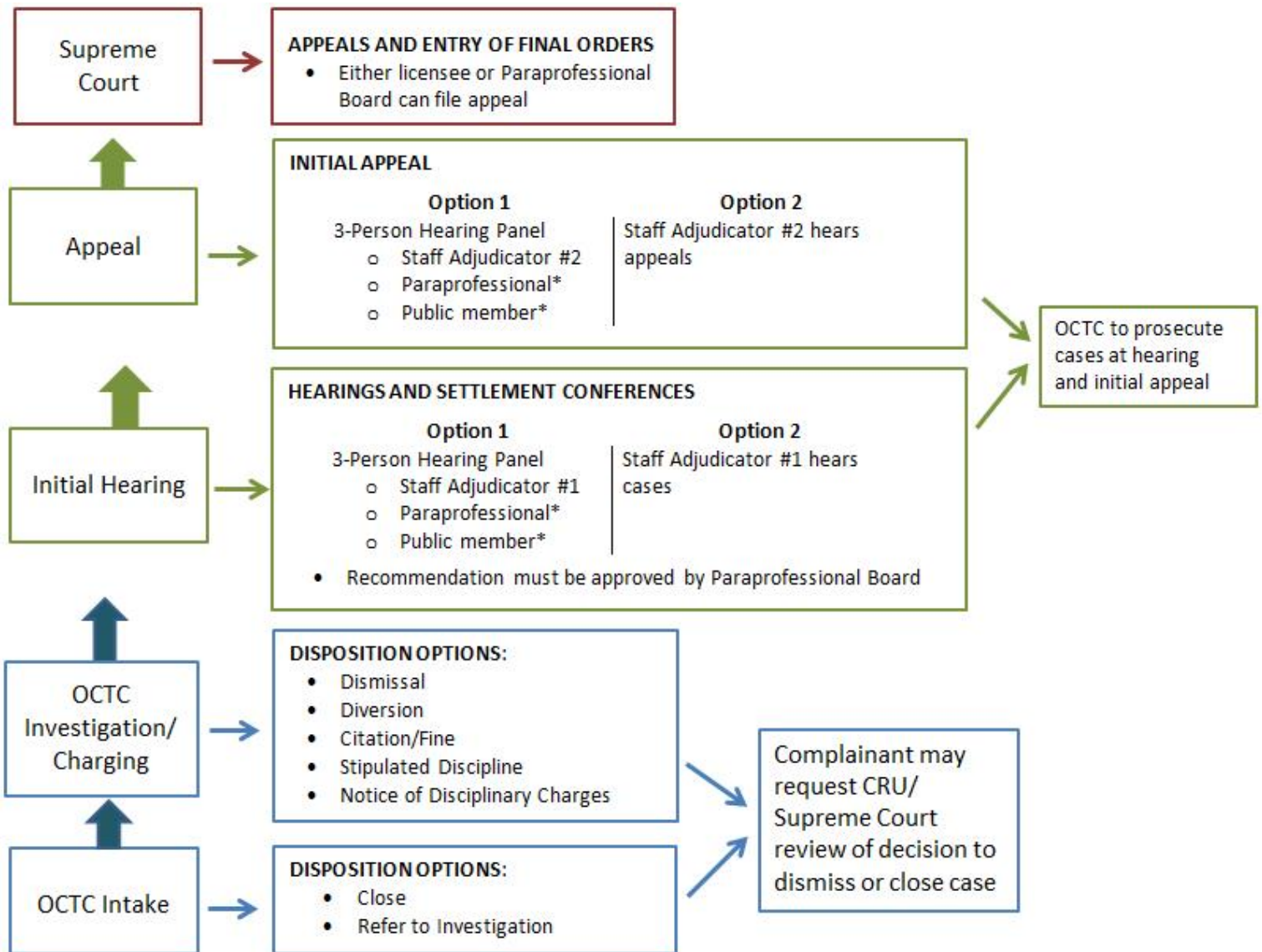
The chart on the following page presents two options for the paraprofessional hearing and appeals processes for consideration by the CPPWG. In the first option, the initial hearing and the appeal

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<sup>1</sup> LPOs are authorized to select, prepare and complete legal documents incident to the closing of real estate and personal property transactions, pursuant to Rule 12 of the Washington Supreme Court's Admission and Practice Rules.

<sup>2</sup> The Working Group has not yet discussed the overarching regulatory structure for the paraprofessional program, but our model contemplates that the structure would include a board distinct from the State Bar Board of Trustees.

would be heard by a three-person panel, comprising a staff adjudicator (an attorney employed by the State Bar), a public member,<sup>3</sup> and a licensee. The panel members would be appointed for a limited term, and would be paid for participating in hearings. This option would provide broader participation in disciplinary decisions compared with a single adjudicator. In the second option, hearings and appeals would be heard solely by a staff adjudicator, which would provide for a more efficient process.



\*Panels will be appointed for a limited term, and will hear all cases during their term. The panel members will receive extensive training, and be paid on a per diem basis for hearing cases.

## Next Steps

<sup>3</sup> Public members could not be current or former attorney or paraprofessional licensees.

After deciding which of the disciplinary model options to implement, the Working Group will need to draft disciplinary rules that outline the disciplinary consequences for specific violations, including options for citations and fines that would not be considered discipline, as well as diversion. These rules will be developed during a subsequent phase of the Working Group.

## California's Attorney Discipline System

In California, an attorney is licensed when admitted to the State Bar; only attorneys with active status may practice law. The State Bar is a constitutional agency established in the judicial branch. In administering the requirements for admission and discipline of California lawyers, the State Bar is an administrative arm of the California Supreme Court. Under its inherent judicial power to regulate admission and discipline, it is the Supreme Court that admits, disbars, or suspends a lawyer from the practice of law.

In California's attorney discipline system, communication and information concerning alleged misconduct of California lawyers is handled by the State Bar's Office of Chief Trial Counsel (OCTC). OCTC investigates those complaints involving allegations of professional misconduct and may initiate and prosecute disciplinary proceedings in State Bar Court (Court). The Hearing Department of the Court conducts evidentiary hearings and renders a decision with findings and recommendations of discipline that are reviewable by the Court's Review Department. In each case, the Court's final decision and accompanying record are then transmitted to the Supreme Court. In cases where the Court recommends the suspension or disbarment of a lawyer, the Supreme Court undertakes an independent determination of the discipline to be imposed. Discipline occurs with a final decision and order of the Supreme Court.<sup>1</sup> Following is a more detailed description of the attorney discipline process.

### INQUIRY

The disciplinary process typically begins with receipt of a written complaint in OCTC. Staff in OCTC receive and review complaints that allege ethical misconduct by an attorney or the unauthorized practice of law by a nonattorney. OCTC conducts the initial review of a complaint to determine whether to close it or forward it for investigation. If a complaint sufficiently alleges misconduct, OCTC assigns it for investigation. If it does not, OCTC closes the complaint.

Some complaints lack sufficient detail to allow OCTC to make an informed decision at the outset as to whether or not to assign a case for investigation. In these cases, OCTC will seek additional information to determine the next steps. This information gathering may involve contacting the complainant, reviewing court records, searching the internet, or conducting legal research. For example, in evaluating an allegation of failing to perform competently, if it is unclear whether an attorney-client relationship exists, OCTC will contact the complainant to try to secure a fee agreement or other evidence of such a relationship. If a complaint involves a violation of a court order, OCTC will attempt to obtain a copy of the order if it is not included with the complaint. If a complaint alleges failure to return an unearned fee, OCTC may request billing statements or an accounting to determine if there is a plausible claim of misconduct, and may assist the complainant in recovering fees from the respondent.

### INVESTIGATION

Investigations are carried out by investigators in OCTC, under the guidance and supervision of OCTC attorneys. Investigators may interview witnesses and respondents, subpoena and analyze bank records, obtain court documents, and otherwise evaluate and analyze the case to

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<sup>1</sup> Public and private reprovals are also considered formal discipline; issuance of a reproof by the Court does not require Supreme Court action.

determine whether there is clear and convincing evidence of attorney misconduct that would allow OCTC to bring disciplinary proceedings in Court. After a determination to proceed with disciplinary proceedings, the complaint advances to the pre-filing stage.

When multiple complaints are made against the same attorney, OCTC may focus its resources and prosecutorial efforts on those complaints most likely to result in disbarment. In such an event, the investigation of the other complaints may be suspended or “held.” If the Supreme Court orders the attorney's disbarment, prosecution of the suspended cases will no longer be necessary and the remaining complaints will not be investigated further.<sup>2</sup> If the attorney is not disbarred, however, OCTC may re-activate any suspended investigations. If an attorney is the subject of a criminal prosecution or party to civil action for the same misconduct, OCTC may suspend its investigation until the criminal or civil proceedings have concluded.

## **PRE-FILING**

Before finalizing formal charges, OCTC evaluates the evidence gathered during the investigation and any subsequent information received from the respondent or other source. Where OCTC has determined there is sufficient evidence to file a Notice of Disciplinary Charges, OCTC will notify the respondent in writing of the intent to file such charges and the attorney's right to request a confidential Early Neutral Evaluation (ENE) conference. Either party may request an ENE before a State Bar Court judge who will orally evaluate the facts, charges, and potential for discipline. Prior to the ENE, OCTC must provide the ENE judge with a draft or summary of the charges and OCTC's settlement position. Regardless of whether either party requests an ENE, OCTC also provides the respondent an opportunity to request informal discovery and to discuss potential settlement. If the parties are unable to reach a resolution or the respondent does not respond to OCTC's written notice, OCTC will proceed to file charges.

After the filing of formal charges, the parties may explore the appropriateness of participation in the Alternative Discipline Program (Program) for respondents with substance abuse and/or mental health concerns. Participation is contingent upon the following: (1) the Court's approval of a stipulation of facts and conclusions of law signed by the parties; (2) evidence that the respondent's substance abuse or mental health issue causally contributed to the misconduct; and (3) respondent's acceptance into the State Bar's Lawyer Assistance Program (LAP). The extent and severity of the respondent's stipulated misconduct, including the degree of harm suffered by their clients, if any, are factors in determining eligibility for the Program. The stipulation includes the level of discipline that will be imposed if the program is completed successfully, and a higher level of discipline that will be imposed if the attorney does not complete the program. If the respondent successfully completes the Program, the disposition may be dismissal of the charges or proceeding or some other level of discipline less than disbarment; if the respondent does not complete the Program, the higher level of discipline will be imposed.

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<sup>2</sup> Complainants in cases dismissed under these circumstances are eligible for reimbursement through the Client Security Fund.

## **HEARING AND REVIEW**

After the filing of disciplinary charges, OCTC prosecutes the case in the Hearing Department, which is the trial level of the Court. Five full-time judges hear and decide cases, and make recommendations to the Supreme Court in cases where proposed discipline includes suspension or disbarment. If the discipline is limited to reproof, it is imposed by the Court without review by the Supreme Court.

The Review Department is the appellate level of the State Bar Court, consisting of the presiding judge and two other review judges. The three-judge panel acts on a statewide basis to conduct de novo reviews of Hearing Department decisions and orders in cases in which at least one of the parties has sought review. Review judges review and decide cases, and make recommendations to the Supreme Court in cases in which one or both of the parties have sought review of a Hearing judge's decision, exercise temporary suspension and other powers delegated to it by the Supreme Court according to rule 9.10, California Rules of Court; and conduct discretionary interlocutory review on issues materially affecting the outcome of the Hearing Department cases.

## **SUPREME COURT**

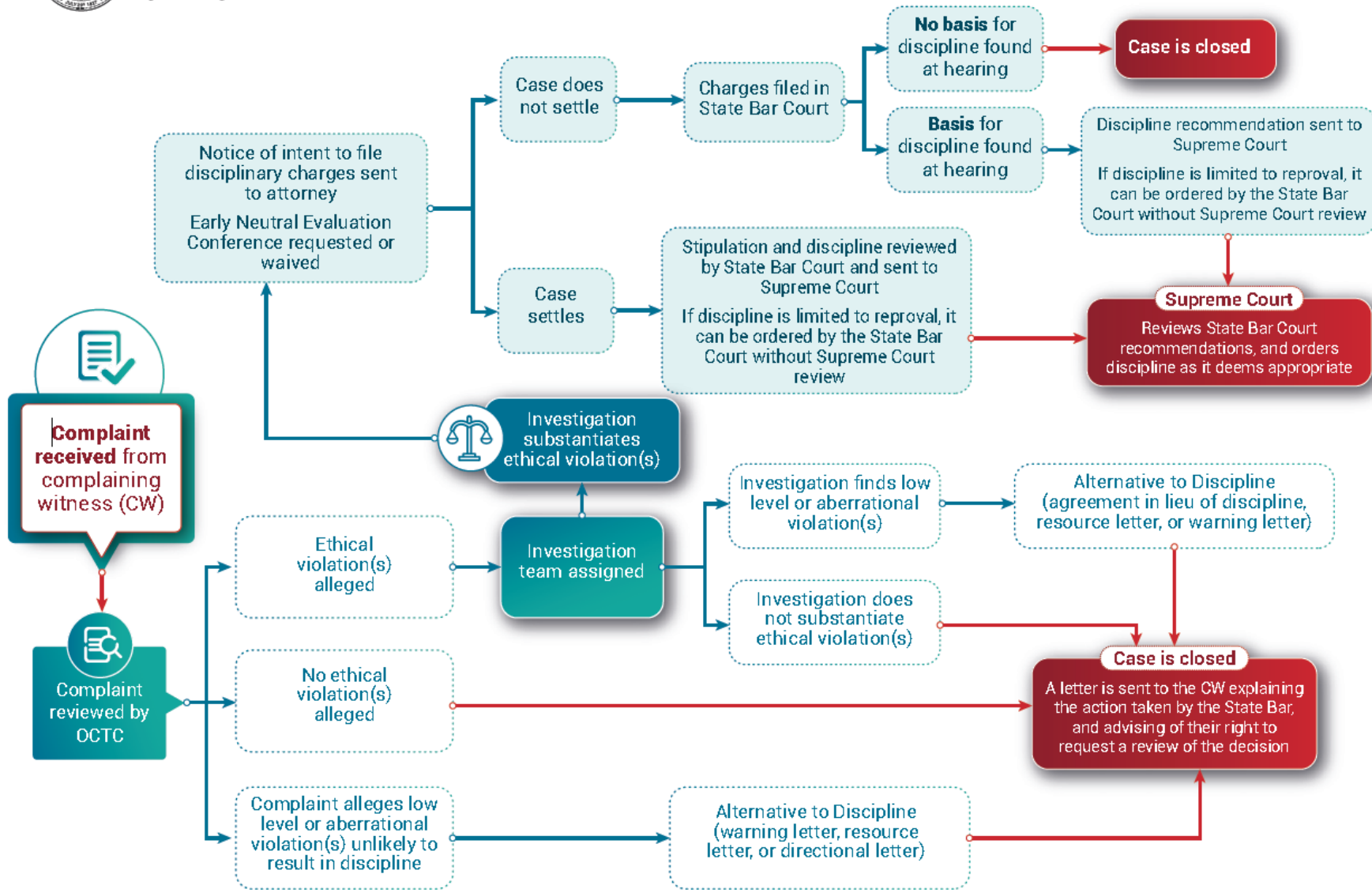
Upon the filing of the Court's decision and the record, the Supreme Court conducts its own independent determination and action. Discipline is not imposed until the Supreme Court issues its final order or decision.





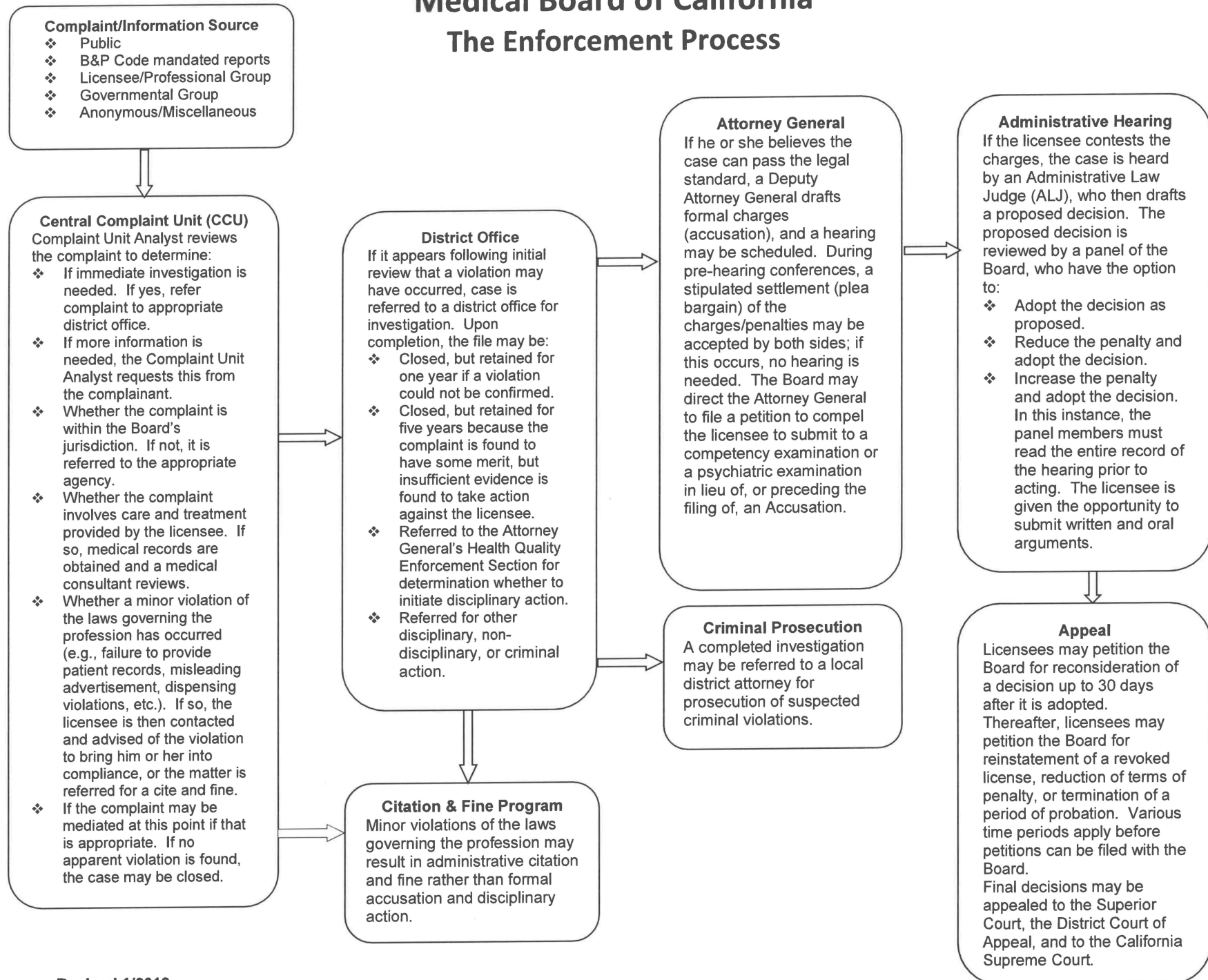
The State Bar  
of California

## Client Complaint Process



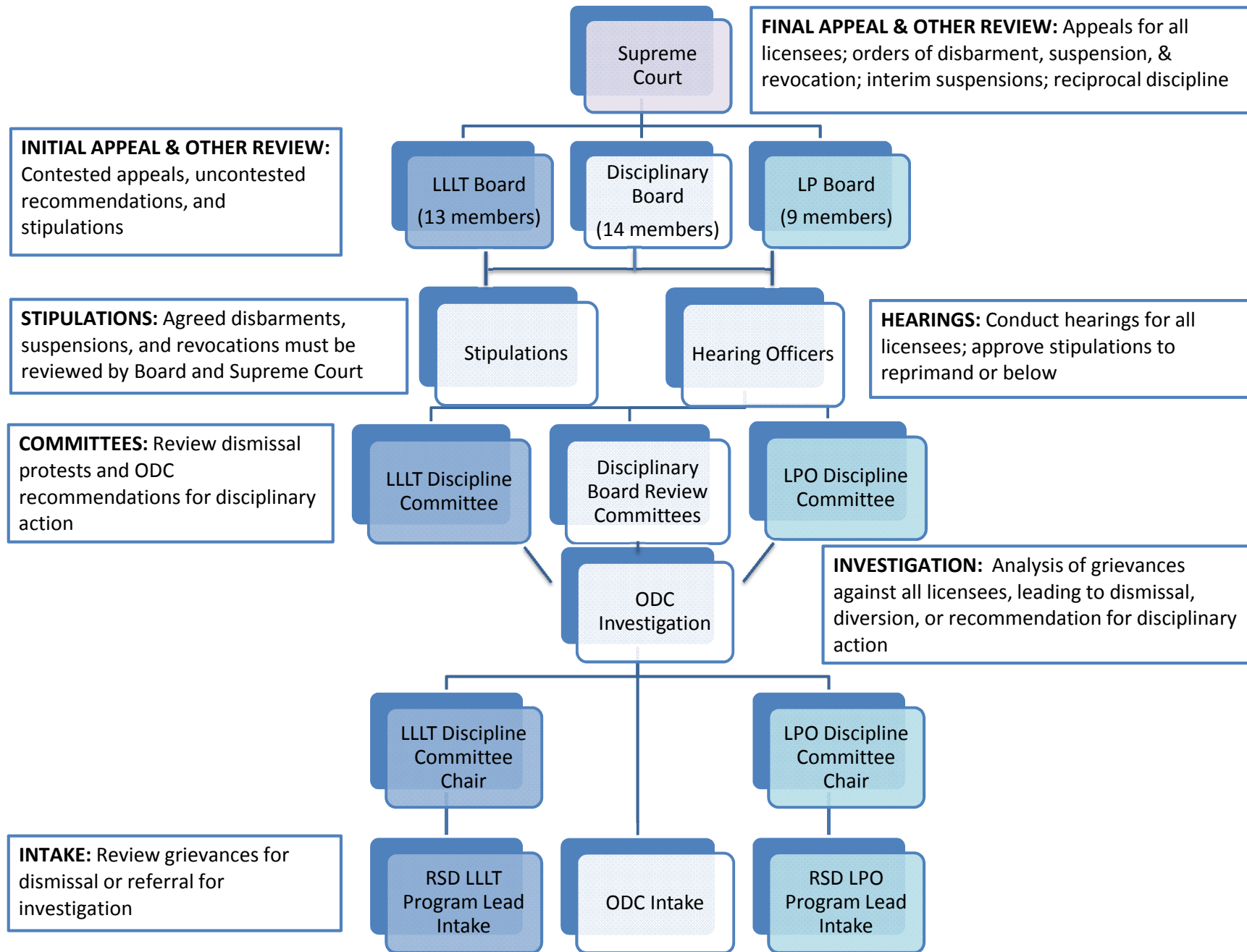
# Medical Board of California

## The Enforcement Process

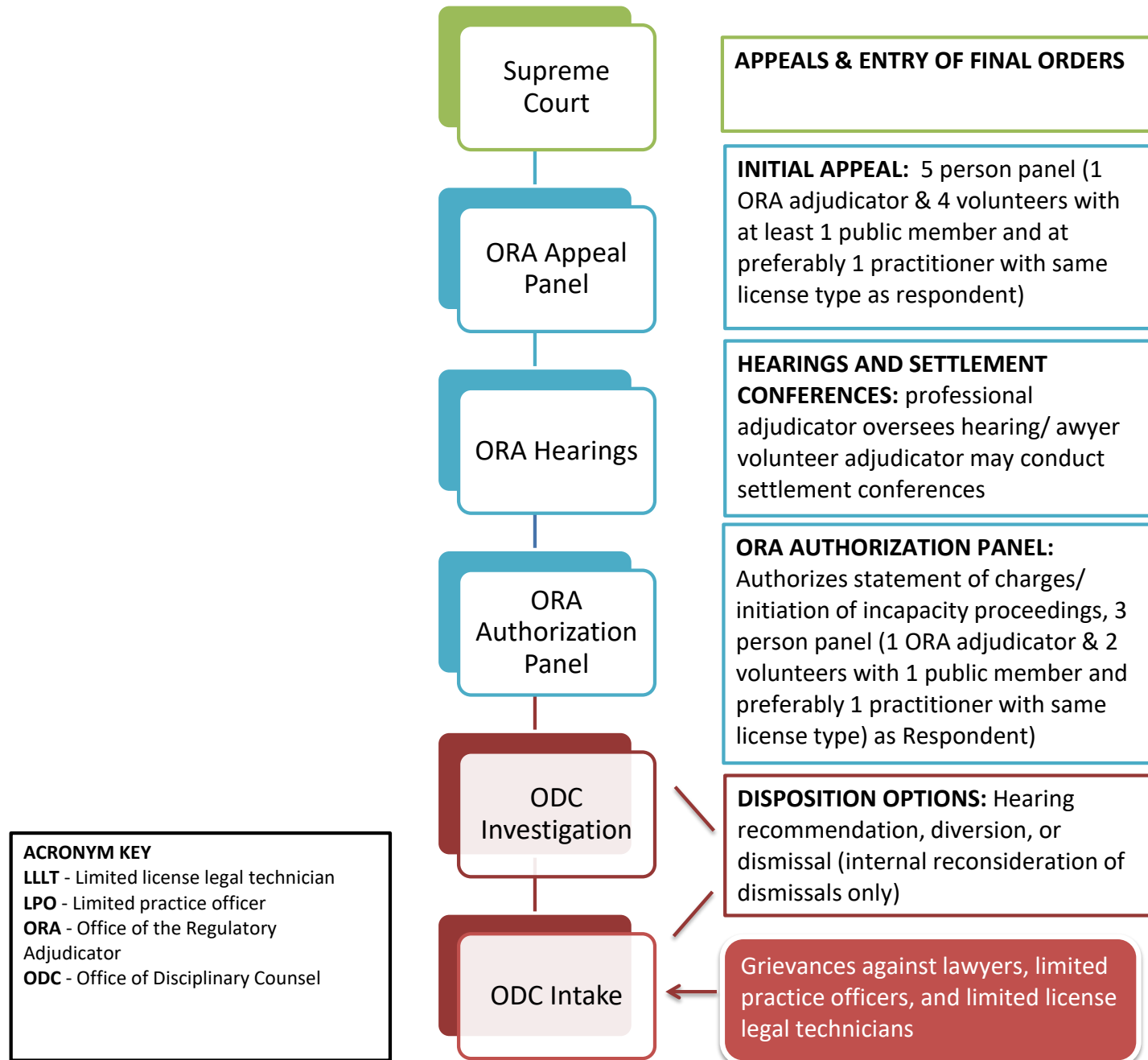


# CURRENT STRUCTURE OF THE THREE DISCIPLINE SYSTEMS

ATTACHMENT C



## PROPOSED STRUCTURE OF DISCIPLINE AND INCAPACITY SYSTEM



## VOLUNTEER POOL FOR SPECIFIC ADJUDICATIVE PROCEEDINGS

