



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM 702 NOVEMBER 2020**

**DATE:** November 19, 2020

**TO:** Members, Board of Trustees

**FROM:** Lisa Chavez, Director, Office of Research & Institutional Accountability

**SUBJECT:** Ad Hoc Commission on the Discipline System: Recommendations for Composition and Charter

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### **EXECUTIVE SUMMARY**

This agenda item follows up on the September 2020 Board of Trustees meeting at which the Board directed State Bar staff to develop plans to establish an ad hoc commission on the State Bar discipline system in consultation with leadership of the Regulation and Discipline Committee. This item includes recommendations on the commission charge, size, and composition.

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### **BACKGROUND**

Following receipt of a report on disparities in the discipline system, the Board directed staff to develop an action plan to address the factors that contribute to the disproportionate discipline of Black, male attorneys. At the July 2020 Board meeting, staff presented Trustees with 12 potential reforms developed by Professor Christopher Robertson to address disparate discipline imposed on Black attorneys. The Board directed staff to implement and evaluate a number of these reforms, including exploring ways to improve respondent representation, archiving complaints closed without discipline that are more than five years old, pursuing risk-based regulation options to prevent RA-Bank Matters, and studying complaints dismissed without discipline. Progress on this work is outlined in Board of Trustees Agenda Item 703.

The work described above will build on the dozens of initiatives, policies, and procedures the State Bar has implemented over the last several years to improve access and protection of the public served by the State Bar. OCTC in particular has also undergone numerous, major organizational changes designed to process cases more efficiently and effectively, as well as to focus resources on protecting the most vulnerable victims of attorney misconduct and the

misconduct of those who hold themselves out to be attorneys, thereby defrauding the public in the process. Among the changes introduced in the past five years are initiatives to:

- Improve access to the complaint process;
- Improve the treatment of complaining witnesses;
- Enhance operational efficiency;
- Improve the use of technology; and
- Identify and prioritize cases posing the most significant public protection risk.

Finally, the State Bar has developed a research agenda to be carried out over the next 12 months, addressing topics such as risk-based regulation, efficiency, procedural justice, and disparities in the discipline system. This research agenda will largely rely on routinely collected data available in administrative databases, but will be supplemented with data gleaned from in-depth reviews of narratives available in case files where applicable.

In addition to these efforts, the discipline system could nonetheless benefit from a comprehensive re-examination of its policies and procedures. OCTC's efforts to prioritize cases have led to important improvements that demonstrate significantly upgraded mechanisms for protecting the public than those that previously existed. Nonetheless, in many cases, the time to disposition remains lengthier than optimal, and the sheer number of older cases awaiting resolution still needs to be addressed. Additionally, the immense work that has been done is ripe for review to evaluate fairness and equity, ensures a keen focus on the State Bar's public protection mission, and continues to review outcomes to understand and address disparities that may exist based on race or gender. The Board of Trustees therefore directed staff to develop plans for an Ad Hoc Commission on the Discipline System. The commission would review work that has already been done (as well as work currently in progress), build upon initiatives that have been implemented, evaluate such initiatives, and integrate the many initiatives into a coherent whole to develop additional insight on how to improve the discipline system overall.

## **DISCUSSION**

Staff worked with Regulation and Discipline Committee leadership to outline the Ad Hoc Commission's charter, size, and stakeholder composition.

### **Charter**

The Ad Hoc Commission on the Discipline System will take inventory of the changes that have been proposed and implemented in the Office of Chief Trial Counsel since 2016 and evaluate their impact on public protection. The evaluation will focus on the impact of these reforms on a number of key aspects of the discipline system, including:

- Procedural justice and the experiences and perceptions of the system by complaining witnesses and respondents;
- Workload and operational efficiency of case processing;

- Case prioritization and differentiated case-flow management; and
- The efficacy of the system for preventing future attorney misconduct.

In particular, this body will:

- Review the full catalogue of reforms OCTC has implemented and identify one or more sets of processes, policies, and procedures to focus on;
- Evaluate if these processes, policies and procedures had their intended effect; and
- Based on this evaluation, recommend additional or revised reforms.

In so doing, the commission will review research studies that have been completed and determine whether additional research is needed. It will also review research studies in progress and generate policy recommendations as results become available.

Another key element of the State Bar's discipline system is the State Bar Court, which on its own initiative, also continually evaluates its processes to improve the adjudication of cases. With the participation of the State Bar Court, the commission may examine the structure of the court, principally issues involving its independence and autonomy.

As a guiding principle, the commission will focus on the dual goals of ensuring public protection and fairness in the discipline system.

### **Composition**

The Ad Hoc Commission will consist of 19 members appointed by the Board of Trustees. Members will represent key institutional entities that focus on public protection and reflect the state's diversity, both demographic and geographic. As a guideline, below are areas from which commission members will be sought and the recommended number of members from each:

- Council on Access and Fairness (2)
- California Medical Board (1)
- Department of Consumer Affairs (1)
- California Lawyers Association (1)
- Association of Discipline Defense Counsel (2)
- National Organization of Bar Counsel (1)
- California criminal justice system (prosecutor, defense counsel, judge) (3)
- State Bar Board of Trustees (2)
- Office of Chief Trial Counsel (2)
- State Bar Court (2)
- Affinity Bar Associations (2)

The commission will be staffed by the State Bar. It will begin its work in early 2021 and present a final report on its findings and recommendations no later than June 30, 2022, with periodic status updates to be provided to the Board of Trustees.

### **FISCAL/PERSONNEL IMPACT**

In addition to personnel costs for staffing this committee and expenses for meetings, it is anticipated that expenses will be incurred to hire a consultant to conduct research as needed.

## **AMENDMENTS TO RULES OF THE STATE BAR**

None

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

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.

Objective: b. Develop and implement transparent and accurate reporting and tracking of the health and efficacy of the discipline system, and measures to improve the fairness and efficacy of the discipline system to include: (a) an updated workload study for OCTC; (b) identification of staffing and resource needs based on the results of that study; (c) evaluating the different points of contact between the State Bar and Complaining Witnesses/Respondents to identify areas where modifications to the form or content of communication could improve the sense of procedural fairness; and (d) pilot changes in the form or content of communication w/ Complaining Witnesses and Respondents to identify measures that will improve the sense of procedural fairness by complaining witnesses or Respondent Attorneys.

## **RECOMMENDATIONS**

**Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the following charter will guide the work of the Ad Hoc Commission on the Discipline System:

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**FURTHER RESOLVED**, that the Board of Trustees directs State Bar staff to solicit membership for the Ad Hoc Commission and it is

**FURTHER RESOLVED**, that the Ad Hoc Commission on the Discipline System will begin its work in early 2021 and present a final report on its findings and recommendations no later than June 30, 2022, with periodic status updates provided to the Board of Trustees.

#### **ATTACHMENT(S) LIST**

**A.** None