



The State Bar *of California*

OPEN SESSION AGENDA ITEM REGULATION AND DISCIPLINE COMMITTEE III.E

DATE: September 23, 2021

TO: Members, Regulation and Discipline Committee

FROM: Dag MacLeod, Chief of Mission Advancement & Accountability
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SUBJECT: Update on Plans to Address the Requirements Contained in Senate Bill 211

EXECUTIVE SUMMARY

Senate Bill 211 (SB 211) directs the State Bar to propose case processing standards for competently, accurately, and timely resolving cases within the Office of Chief Trial Counsel (OCTC). The Bill also provides an opportunity to revise the criteria used for designating cases as complex, which allows more time for those cases to be processed. This agenda item provides an overview of efforts undertaken to date toward these goals and seeks input from members of Regulation and Discipline Committee on the standards that the State Bar should propose including factors that may be used to designate a case as complex.

BACKGROUND

Business and Professions Code section 6086.15(a) requires that the State Bar publish an Annual Discipline Report (ADR) by April 30 of each year “describing the performance and condition of the State Bar discipline system, including all matters that affect public protection.” Subsequent sections of the Business and Professions Code provide detailed requirements for reporting in the ADR.

In 2016 the State Bar completely reorganized the ADR to ensure strict compliance with the requirements of the statute. Within that newly adopted organizational framework for the ADR, however, staff also sought to supplement the statutory reporting requirements with additional

information on the key issue about which the ADR is supposed to report: the State Bar's protection of the public.

The fundamental challenge presented by the ADR has been to align the broad mandate on reporting with the specific requirements contained in the statute. Indeed, in the case of the 180-day backlog target, State Bar staff believe that the narrow focus on backlog undermines efforts in the OCTC to protect the public by focusing attention and resources on closing the oldest cases rather than on the cases that pose the greatest potential harm to the public.

In recent years staff have used the narrative introduction of the ADR to report on critical aspects of OCTC's work to protect the public that are not covered under the statute. Since the development of the case prioritization system in 2017, State Bar staff have focused the ADR narrative on case prioritization and have begun reporting a standard set of measures on Priority 1 cases: showing differences in case handling between the highest priority cases and lower priority cases and illustrating the importance of tracking counts of active attorneys as key measures of public protection.

The 2021 fee bill, Senate Bill 211 (SB 211) presents the State Bar with a unique opportunity to bring into alignment the broad mandate to report on public protection and the specific reporting requirements of the statute by directing the State Bar to "propose case processing standards for competently, accurately, and timely resolving cases within the Office of Chief Trial Counsel." SB 211 goes on to specify:

The case processing standards shall take into account all relevant factors, including, but not limited to, the mechanics of the discipline process, the risk to public protection, including multiple complaints against the same attorney, reasonable expectations of the public for resolution of complaints, and the complexity of cases (B&P § 6094.5(b)(1)).

The remainder of this agenda item is designed to guide a conversation among members of the Regulation and Discipline Committee and State Bar staff regarding the best approach for developing new case processing standards and for establishing criteria to designate cases as complex as directed by SB 211.

DISCUSSION

DEVELOPING A CONCEPTUAL FRAMEWORK FOR PUBLIC PROTECTION

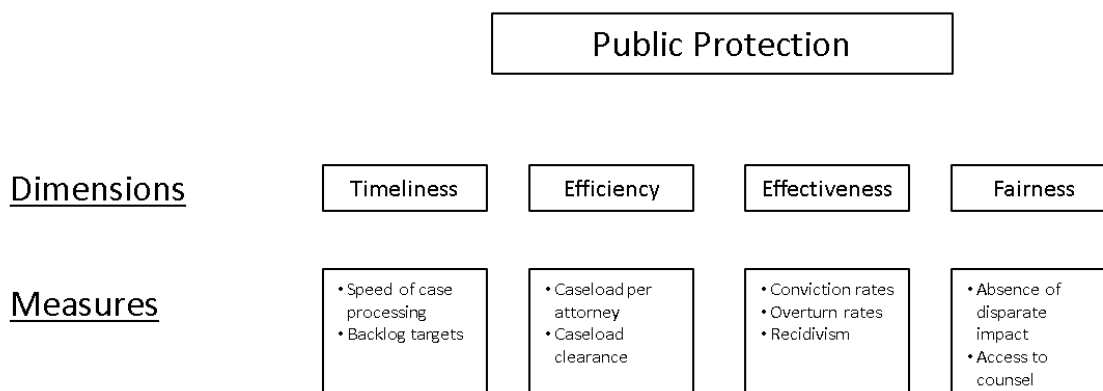
Despite the centrality of public protection to the State Bar's mission, this term lacks conceptual clarity. A broad range of specific functions is understood to fall within the State Bar's public protection mission: imposing discipline on attorneys for misconduct, establishing rules of professional conduct, and reimbursing clients for attorney theft, for example. But there is no generally accepted framework for organizing these functions or determining what fits and what does not under the public protection umbrella.

To address this, before looking at specific indicators of public protection that may be used to develop case processing standards, this agenda item proposes to categorize the work of the attorney discipline system along the lines of four distinct dimensions that contribute to public protection. The first three of these dimensions are drawn directly from the statute which directs the State Bar to propose case processing standards “that reflect the goal of resolving attorney discipline cases in a timely, effective, and efficient manner.” State Bar staff propose adding fairness as a fourth dimension of public protection:

1. Timeliness
2. Effectiveness
3. Efficiency
4. Fairness

The relationship between public protection, these four dimensions, and examples of measures that relate to each dimension is illustrated in Figure 1.

Figure 1. Dimensions and Measure Related to Public Protection



PREVIOUS WORK THAT CAN BE USED TO DEVELOP CASE PROCESSING STANDARDS

The State Bar has already done a considerable amount of work to capture data on the discipline system and has created a wide range of statistical reports and metrics that touch on these dimensions of public protection. Although not all of this information can be readily converted into standards, the research, analysis, and data already produced by the State Bar should be the starting point for seeking to address the SB 211 mandate. Members of the Regulation and Discipline Committee should also consider whether to add or modify these dimensions and or the corresponding measures.

Below, organized by each of the four dimensions listed above, is an inventory of data that the State Bar could use to begin developing standards. A final fifth section lists factors that contribute to case complexity. Although the Business and Professions Code had already allowed

for different case processing standards based on case complexity, for a variety of reasons OCTC has not designated cases as complex.¹ SB 211 has clarified the language in the Business and Professions Code, requiring that the ADR report on complex cases separately which provides the State Bar with an opportunity to revisit the factors that contribute to case complexity. This opportunity will present itself with the submission of the 2021 ADR. With this in mind, staff has presented a preliminary set of complex designation factors which will be used to flag cases as complex for the fourth quarter of 2021. A more rigorous and comprehensive approach to defining complex matters will take place as part of the overall case process standards development effort.

Timeliness

Timeliness in the discipline system is a necessarily vague term that captures the tension inherent in two competing ideas. On the one hand, the idea that speed of case processing is integral to justice is captured in the widely accepted notion that “justice delayed is justice denied.” On the other hand, due process and protection of the rights of the accused prevent the application of rigid time standards to case processing.² Moreover, a swift investigation of misconduct may not be sufficiently thorough and could jeopardize the ability of victims of attorney misconduct to vindicate their rights.

The need to balance these two competing ideas may actually be useful when we evaluate the system as a whole because the speedy resolution of relatively straightforward cases may be critical to ensuring that resources are available to process more complicated cases. It also points to the importance of establishing case processing standards that clearly distinguish between cases of different levels of complexity.

An analysis of case processing times in OCTC presented to the Board of Trustees in July of 2021 proposed time standards similar to those used in the Superior Courts of California but did not carve out distinct standards based on case complexity. Another potential limitation of the standards presented in July is that they were not aspirational. Instead, they were calculated to reflect what can be accomplished at current staffing levels. Those standards proposed the following targets for the resolution of cases in OCTC:

- 50 percent of cases within 3 months;
- 75 percent of cases within 7 months;
- 90 percent of cases within one year; and
- 100 percent of cases within two years.

¹ Previously the statute that complex cases be reported in the backlog in the same manner as noncomplex cases. In addition, the Business and Professions Code was inconsistent in its application of the complex designation. Section 6094.5 stated that it is the goal of the State Bar to process complaints within six months after receipt but goes on to say that if the chief trial counsel designates the matter as “complex” the goal is 12 months. Business and Professions Code 6140.2, however, stated that the goal shall be six months and did not provide for a complex designation.

² This tension between ensuring that cases are processed efficiently and allowing the time necessary for individual cases to be assessed and handled on their unique merits is articulated throughout the literature on court management, see for example National Center for State Courts, [Timely Justice in Criminal Cases: What the Data Tell Us](#), p. 4.

Although the Legislature rejected the proposal to adopt these timelines as case processing standards, the State Bar collects and reports on other measures that could be used to develop new case processing standards including:

- Decreasing the number of P1 cases in backlog for respondents with active licenses (Metric OCTC-1);
- Resolving 100 percent of P2 cases within 100 days (Metric OCTC-2);
- Case disposition times—currently reported descriptively with no target—(Metrics OCTC-4a and 4b); and
- Backlog within the existing 180-day backlog target.

Effectiveness

The adversarial nature of the discipline system provides checks on the work of OCTC that can serve as measures of effectiveness of the discipline system. For example, decisions to pursue discipline against attorneys may be challenged by the respondents and scrutinized by the State Bar Court. Decisions *not* to pursue discipline may also be challenged by complaining witnesses and frequently are. The Complaint Review Unit in the Office of General Counsel reviews about a thousand requests to reconsider the decision to close a case every year; the Supreme Court reviews an additional 70 to 120 requests for review of a decision by the Complaint Review Unit not to recommend reopening the case.

The State Bar already reports a number of metrics that fit under the heading of effectiveness including:

- Percent of Complaint Review Unit (CRU) reopens for reasons other than new evidence (Metric OCTC 5-A);
- Percent of Supreme Court appeals of CRU decisions (known as Walker Petitions) denied (Metric OCTC 5-B);
- Percent of Random Audit reopens for substantive reasons (Metric OCTC 5-C);
- Recidivism: Currently framed as “post-disposition outcomes,” this measure looks at new complaints, new investigations, and new discipline against attorneys who have already been subject to discipline by the State Bar;
- Counts of Priority 1 cases in backlog (ADR supplemental reporting); and
- Counts of the number of attorneys in Priority 1 cases who are still eligible to practice law (ADR supplemental reporting).

Efficiency

Among the four dimensions of public protection, efficiency—strictly understood as a measure of output per unit of input—appears to have the smallest number of existing measures on which to draw. A looser definition of efficiency—one that looks only at output without reference to input—might allow for some of the measures of timeliness to be categorized under this heading. Using the strict definition of efficiency, the State Bar could calculate a measure of efficiency based on case dispositions per attorney or per investigator.

Using a looser definition of efficiency, State Bar metrics and Discipline System Statistical Report measures that address issues of efficiency include:

- Maintaining annual caseload clearance rates of at least 100 percent (Metric OCTC-3); and
- Resolving 100 percent of P2 cases within 100 days (Metric OCTC-2).

Fairness

Since 2019, two important initiatives at the State Bar have begun addressing questions of fairness in the discipline system. First, the study of disproportionate discipline against Black attorneys has motivated a number of operational reforms to make the system fairer and has also pointed to data that are correlated with disproportionate discipline. The second initiative, emerging from the Governance in the Public Task Force report on risk-based regulation, also involves efforts to make the system fairer by identifying practice types that are at the highest risk for complaints and directing resources to attorneys in these practice areas to prevent misconduct.

Although measures of fairness may not appear at first glance to relate directly to case processing standards, surveys of complaining witnesses indicate that there is a relationship between the amount of time that OCTC devotes to processing cases and perceptions of procedural justice or the fairness of the system. Specifically, complaining witnesses in cases that are closed relatively quickly, in intake, view the attorney discipline system less favorably than complaining witnesses whose cases are closed later in the process, during the investigation stage.

This relationship between the amount of time devoted to processing a case and perceptions of fairness points, once again, to the way in which timeliness and fairness are interrelated. In this case, however, contrary to the notion that swifter decisions are better decisions, all other things being equal, complaining witnesses appear to perceive the system as being *more* fair when decisions are made *later* in the process.

Specific measures that have been developed or are in process related to the State Bar's work on disproportionate discipline and risk-based regulation include:

- Proportion of respondent attorneys who are represented by counsel;
- Discipline rates and sanction levels by race;
- Number of attorneys with Reportable Action Bank matters who are provided with resources to improve their client trust accounting practices; and
- Procedural fairness ratings.

Factors Contributing to Case Complexity

As noted above, the Business and Professions Code already provides for the designation of certain cases as complex. Because of inconsistent language in the statute, however, OCTC has

not chosen to use the complex case designation (see footnote 1, above). In its 2021 report on the State Bar discipline system, the California State Auditor acknowledged the contradictory language in statute but also recommended that the State Bar request that the Legislature modify the statute. By making such a request, the State Auditor argued, the State Bar “would provide a backlog measure that more appropriately assesses the State Bar’s performance in processing those cases with timelines over which it has limited control.”

With the enrollment and expected final passage of SB 211, the State Bar will be required to report on complex cases for all of calendar year 2021 in the ADR that will be submitted by October 31, 2022. Capturing information for this report on 2021 cases will require that cases are flagged as complex for the final quarter of 2021 (October–December). In addition, efforts will be made to retroactively identify cases as complex for the January–October period. This initial work to develop a complex case definition should be viewed as a necessary interim step, one that will ensure that the State Bar appropriately takes advantage of the benefit of the legislative change; the new chief trial counsel will play a role in finalizing the long-term approach to complex designation as part of the broader effort to develop new case processing standards.

A starting point for establishing the complex case designation is a 2016 State Bar report on backlog which, among other things, identified factors to use in designating a case “complex” and estimated the associated case processing timeframes for these cases. It should be noted that because a complex designation equates to a longer allotted case processing time, “case complexity” at this juncture should be interpreted to refer to cases that take longer to process. Ultimately, the factors used to designate cases as complex should include cases that are in fact complex as well as those that have characteristics that lead to delay.

Preliminary Complex Designation Factors (Presence of One or More):

- Requesting Bank Records;
- Requesting Court Records;
- Requesting Federal Records (usually related to immigration matters);
- Scheduling of Early Neutral Evaluation Conferences;
- Consulting with an expert, including a forensic accountant, etc.;
- Respondent retaining counsel after OCTC issues a Notice of Intent to File an NDC; and
- Respondents with multiple complaints against them.

State Bar staff will determine whether they can begin flagging cases with one or more of these factors effective October 1.

Additional factors that cause delay but may be more difficult to quantify include:

- Resolutions requiring coordination with local, state, federal, or international law enforcement agencies;
- Resolutions requiring coordination with related actions pending in one or more California Superior courts, courts in other states or countries, or in a federal court;

- Cases with large numbers of witnesses;
- Cases that involve substantial amounts of documentary evidence that requires evaluation, summarization, or review;
- Cases that involve unusual or complicated facts and/or novel or difficult legal issues that are time consuming to resolve; and
- Cases in which respondents make misrepresentations to the State Bar during the investigation.

Members of the Regulation and Discipline Committee are asked to provide input on the dimensions and measures of public protection presented here and to discuss the interim complex factors that have been identified by staff.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

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.

RECOMMENDATIONS

None

ATTACHMENT LIST

None