



The State Bar of California

OPEN SESSION AGENDA ITEM REGULATION AND DISCIPLINE COMMITTEE III.D

DATE: March 24, 2022

TO: Members, Regulation and Discipline Committee

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Discussion of Application of Consumer Alert Policy to Criminal Complaints
Alleging Felony Charges

EXECUTIVE SUMMARY

At its meeting on November 18, 2021, the Board of Trustees adopted proposed amendments to the Board policy regarding posting of a consumer alert upon the filing of felony charges against an attorney that: (1) clarified that the pending felony consumer alert applies to felonies pending in California, the United States Federal Courts, or any state or territory of the United States; and (2) authorized revision of the alert language to refer the public directly to the jurisdiction in which the felony case is pending. At the meeting, a request was made to the Office of Chief Trial Counsel (OCTC) to return with additional information to clarify, for purposes of the consumer alert, what it means for an attorney to be “charged in court with a felony” and how the consumer alert is currently applied in this regard.

This item provides the requested information, which is that under both California and federal law, an attorney is considered charged with a felony upon the filing with the court of an accusatory pleading that initiates criminal proceedings on such a charge, which may include a criminal complaint, information, or indictment. Accordingly, the consumer alert is currently posted when OCTC learns of any such filing. This approach is consistent with Business and Professions Code section 6101(b), which requires a district attorney, city attorney, or other prosecuting agency to report to the State Bar the pendency of any “action against an attorney charging a felony or misdemeanor immediately upon obtaining information that the defendant is an attorney,” and Business and Professions Code section 6086.1(c), which, “notwithstanding the confidentiality of investigations,” requires the State Bar to “disclose to any member of the public so inquiring, any information reasonably available to it pursuant to subdivision (o) of

section 6068, and to sections 6086.7, 6086.8, and 6101, concerning a licensee of the State Bar which is otherwise a matter of public record, including civil or criminal filings and dispositions.”

BACKGROUND

In May 2011, the Board determined that some disciplinary matters warrant conspicuous notices about pending disciplinary actions. On May 13, 2011, the Board approved posting a high-visibility consumer alert that contained general information about the allegations, and a disclaimer, at the top of the State Bar Profile page of any attorney against whom a notice of disciplinary charges (NDC) or a petition for involuntary inactive enrollment pursuant to Business and Professions Code section 6007(c) is filed in which a major misappropriation of client funds is alleged.

On July 22, 2011, the Board approved posting a high-visibility consumer alert that contained general information about the allegations, and a disclaimer, at the top of the State Bar Profile page of any attorney against whom an NDC or a petition for involuntary inactive enrollment pursuant to Business and Professions Code section 6007(c) is filed in which 15 or more cases of misconduct related to loan modification are alleged.

In November 2018, the Board, following a 60-day public comment period, approved the addition of several more consumer alerts and two notifications to the attorney’s State Bar Profile page. In particular, the Board approved a change to the Board policy on consumer alerts to add a consumer alert when “the State Bar learns that an attorney has been charged in court with a felony.”

In November 2021, the Board authorized amendments to the consumer alert for felony charges to: (1) clarify that it applies to felonies pending in California, the United States Federal Courts, or any state or territory of the United States; and (2) authorize revision of the alert language to refer the public directly to the jurisdiction in which the felony case is pending. The current Board policy resulting from this action is attached as Attachment A. As set forth in that policy, the current consumer alert for felony charges reads as follows:

CONSUMER ALERT: The State Bar has been informed that this attorney has been charged with a felony. The felony matter is [jurisdiction] [case number]. For more information, contact the court in the jurisdiction where the case is pending. The State Bar posts consumer alerts online when lawyers are charged in court with felonies. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar.

DISCLAIMER: The filing of criminal charges does not constitute a finding of guilt or professional misconduct. Criminal defendants are presumed to be innocent until proven guilty in a court of law.

At its November 2021 meeting, noting that the consumer alert refers only to the State Bar learning that an attorney “has been charged in court with a felony,” the Regulation and

Discipline Committee asked the OCTC to return with clarification of what it means for an attorney to be charged in court with a felony, in particular, whether this is limited to the filing of an information or indictment, or also includes a criminal complaint. OCTC's current practice is to post the alert once it learns that an attorney has been charged with a felony in any form, whether that felony charge is set out in a criminal complaint, information or indictment. As set out in the discussion below, consistent with Business and Professions Code section 6101(b) and 6086.1(c), the OCTC recommends that this practice be maintained.

DISCUSSION

Under Business and Professions Code section 6068(o)(4), an attorney has an obligation to self-report a felony charge against the attorney if it is brought in "an indictment or information." Under Business and Professions Code section 6101(b), the obligation of a district attorney, city attorney, or other prosecuting agency to report criminal charges to the State Bar is not limited to charges contained in an indictment or information. Rather, criminal prosecutors are obligated to report the pendency of any "action against an attorney charging a felony or misdemeanor immediately upon obtaining information that the defendant is an attorney." Under Business and Professions Code section 6086.1(c), the State Bar is required to "disclose to any member of the public so inquiring" any "information reasonably available to it" pursuant to sections 6068(o) or 6101 "concerning a matter of public record" including "criminal filings."

In California, felony charges can be, and frequently are, initiated by a criminal complaint. While the filing of a criminal complaint does not generally commence the prosecution of a felony for statute of limitation purposes (see Penal Code section 804(c)), a criminal complaint is an accusatory pleading, the filing of which "starts the criminal proceeding." *People v. Reese* (1981) 121 Cal.App.3d 606, 611; *see also People v. Viray* (2005) 134 Cal.App.4th 1186, 1197 ["[t]he complaint unconditionally commences an adversarial criminal process for purposes of" the Sixth Amendment]; *People v. Case* (1980) 105 Cal.App.3d 826, 833 ["The only method of initiating a criminal proceeding in California is the filing of an accusatory pleading in the court having trial jurisdiction over the charged offense."]; Penal Code section 691(c) ["The words 'accusatory pleading' include an indictment, an information, an accusation, and a complaint."]

Moreover, a criminal complaint can support the issuance of an arrest warrant, following review and a finding by a magistrate that the "offense complained of has been committed and that there is a reasonable ground to believe that the defendant has committed it." Penal Code section 813. The issuance of an arrest warrant based on a criminal complaint can commence the prosecution of an offense for purposes of the statute of limitations. See Penal Code section 804(d).

And, if a defendant is arrested without a warrant, a criminal complaint "stating the charge" against the defendant must promptly be sworn out before the magistrate. See Penal Code section 849 ("the person arrested, if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before the magistrate"). Charging a defendant with the commission of a felony by a criminal complaint triggers specific rights. See Penal Code section 859 ("When the defendant is charged with the

commission of a felony by a written complaint subscribed under oath,” defendant shall “without unnecessary delay, be taken before a magistrate of the court in which the complaint is on file,” that magistrate “shall immediately deliver to the defendant a copy of the complaint, inform the defendant that he or she has the right to have the assistance of counsel,” allow the defendant “reasonable time to send for counsel,” and if “the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him or her”) (emphasis added). Under *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, the magistrate must make a probable cause determination for the warrantless arrest in conjunction with this initial appearance.

A criminal complaint also triggers the right to a preliminary hearing, which, absent a waiver of time by the defendant, must be held within 10 court days. See Penal Code section 859b. And a defendant may enter a guilty plea to “the offense charged” in a criminal complaint, if “the public offense charged is a felony not punishable with death.” Penal Code section 859a (“While the charge remains pending before the magistrate and when the defendant’s counsel is present, the defendant may plead guilty to the offense charged”).

California law thus treats a criminal complaint as setting out a criminal charge. The filing in a California court of a criminal complaint alleging a felony charge against an attorney, therefore, would result in the “pendency of an action against an attorney charging a felony” that would trigger a prosecutor’s duty to report it to the State Bar under Business and Professions Code section 6101(b).

Similar procedures apply in federal court, in which a criminal complaint also constitutes a criminal charge that initiates criminal proceedings. There, a criminal complaint is “a written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 3. It must be made under oath before a magistrate judge, who may issue an arrest warrant or summons only if the complaint establishes “probable cause to believe that an offense has been committed and that the defendant committed it.” Fed. R. Crim. P. 3, 4(a). If a defendant is arrested without a warrant, “a complaint meeting Rule 4(a)’s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.” Fed. R. Crim. P. 5(b). On arrest, absent a statutory exception, a defendant must be taken “without unnecessary delay before a magistrate judge.” Fed. R. Crim. P. 5(a)(1)(A). At the initial appearance on the complaint, “if the defendant is charged with a felony,” the magistrate judge must inform the defendant of, among other things, “the complaint against the defendant, and any affidavit filed with it,” “the defendant’s right to retain counsel or to request that counsel be appointed,” and “any right to a preliminary hearing.” Fed. R. Crim. P. 5(d)(1) (emphasis added). In addition, if a defendant is “charged with an offense other than a petty offense,” the magistrate must, absent a waiver by the defendant, hold a preliminary hearing “within a reasonable time, but no later than 14 days after the initial appearance if the defendant is in custody and no later than 21 days if not in custody.” Fed. R. Crim. P. 5.1 (emphasis added). In federal court, however, the normal practice is to pursue felony charges through indictment, in which case the scheduled preliminary hearing no longer needs to be held. See Fed. R. Crim. P. 5.1(a)(2).

Under Business and Professions Code section 6086.1(c), the State Bar is required to “disclose to any member of the public so inquiring” any “information reasonably available to it” pursuant to section 6068(o) (attorney obligated to self-report an “information or indictment charging a

felony against the attorney) or 6101 (criminal prosecutor obligated to report “the pendency of an action against an attorney charging a felony”) “concerning a matter of public record” including “criminal filings.” Thus, the State Bar’s awareness of a publicly filed indictment, information, or criminal complaint would trigger the State Bar’s disclosure obligations under section 6086.1(c) upon inquiry by any member of the public. The State Bar treats a member of the public’s accessing of an attorney page on the State Bar’s website as constituting a public inquiry. As a result, OCTC’s current practice is, upon learning of an indictment, information, or criminal complaint charging an attorney with a felony, to post the consumer alert because the attorney is, as the result of any of these filings, “charged with a felony.”

Given the above, in accordance with the disclosure obligations of Business and Professions Code section 6086.1(c), OCTC recommends that, as is the current practice, a consumer alert continue to be posted whenever OCTC becomes aware that an attorney is the subject of a felony charge set out in a publicly filed criminal complaint, information, or indictment.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

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

Information only – no recommended action.

ATTACHMENT LIST

- A. Current Board Policy Regarding Posting of Consumer Alerts When Felony Charges Are Pending

Board Policy Regarding Posting of Consumer Alerts When Felony Charges Are Pending

Pending Felony Charges

When the State Bar learns that an attorney has been charged in court with a felony, the State Bar will post the following Consumer Alert above the attorney's name on the licensee's State Bar Profile page:

"CONSUMER ALERT: The State Bar has been informed that this attorney has been charged with a felony. The felony matter is [jurisdiction] [case number]. For more information, contact the court in the jurisdiction where the case is pending. The State Bar posts consumer alerts online when lawyers are charged in court with felonies. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar.

"DISCLAIMER: The filing of criminal charges does not constitute a finding of guilt or professional misconduct. Criminal defendants are presumed to be innocent until proven guilty in a court of law."

This consumer alert will be removed from the licensee's State Bar profile page: (1) upon verification of notice to the State Bar that the charges have been dismissed or reduced from a felony to a misdemeanor, or (2) upon the filing of a decision or order of the State Bar Court adjudicating a disciplinary proceeding based upon the facts underlying the felony prosecution.