



The State Bar of California

OPEN SESSION AGENDA ITEM 705 MAY 2022

DATE: May 19, 2022

TO: Members, Board of Trustees

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Proposed Adoption of Consumer Alert for Disciplinary Actions in Other Jurisdictions

EXECUTIVE SUMMARY

The State Bar currently posts on an attorney's profile page on the State Bar website notations indicating various State Bar disciplinary actions, including the filing of notices of disciplinary charges and interim limitations on an attorney's ability to practice pending the completion of disciplinary proceedings. In contrast, currently, notification to the public regarding disciplinary action in another jurisdiction occurs only when the State Bar files a notice of disciplinary charges based on a final order for discipline in the other jurisdiction. California State Auditor Report 2022-030 (issued April 14, 2022) recommends: "The State Bar should notify the public on its website when other jurisdictions have determined that an attorney who is also licensed in California presents a substantial threat of harm to the public." In accordance with this recommendation, and to make notice regarding disciplinary actions in other jurisdictions similar to notice of State Bar disciplinary actions, the Office of Chief Trial Counsel (OCTC) proposes that the Board authorize the posting of a consumer notice on a California attorney's profile page on the State Bar website when the attorney has been the subject in another jurisdiction of: (1) an interim suspension or other interim disciplinary action pending that jurisdiction's final determination regarding discipline; (2) a finding that discipline should be imposed, even if that finding remains subject to review or appeal; or (3) a final order of discipline, even if the State Bar has not yet filed a notice of disciplinary charges based on that final order. The proposed consumer notice would identify the other jurisdiction and the action taken in that jurisdiction (whether interim, pending review, or final), advise that any additional information should be sought from the other jurisdiction, and for interim actions or nonfinal discipline findings include a disclaimer that an attorney is presumed innocent until an order for discipline becomes final.

BACKGROUND

Under Business and Professions Code section 6049.1(a), a “final order” made by “any court or record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys” that determines that a California licensed attorney committed professional misconduct in that other jurisdiction “shall be conclusive evidence that the licensee is culpable of professional misconduct in this state,” subject to two limited exceptions. The two exceptions, which the respondent bears the burden of establishing, are: (1) whether, as a matter of law, the lawyer’s culpability determined in the proceeding in the other jurisdiction would not warrant the imposition of discipline in California under the applicable California laws or rules in place at the time of the misconduct in the other jurisdiction; and (2) whether the other jurisdiction’s proceedings lacked fundamental constitutional protection. See Business and Professions Code section 6049.1(b).

In accordance with Business and Professions Code section 6049.1(b), the Board has adopted rules providing for the conduct of expedited disciplinary proceedings where there is a final order of discipline in another jurisdiction. See Rules of Procedure of the State Bar of California, Rules 5.350–5.354. Under these rules, the disciplinary proceeding is initiated by a notice of disciplinary charges to which must be attached: (1) “a certified copy of the foreign jurisdiction’s findings and final order” and (2) “a copy of the statutes, rules, or court orders of the foreign jurisdiction found to have been violated by the attorney.” Rule 5.351(B).

Under Business and Professions Code section 6068(o)(6), an attorney has the obligation to report to the State Bar, in writing, within 30 days of the time the attorney has knowledge, of the “imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.” Under Business and Professions Code section 6086(o)(8), this disclosure obligation extends to discipline against any law firm in which the attorney was a partner and any law corporation in which the attorney was a shareholder at the time of the misconduct. The failure to comply with this disclosure obligation may independently subject the attorney to discipline.

In addition to receiving notice from an attorney pursuant to section 6068(o)(6), the State Bar may learn of disciplinary actions in other jurisdictions through communications from those jurisdictions; reports from those jurisdictions to the American Bar Association, which maintains a database of such reports to which the State Bar has access; media reports; or submissions by complainants. None of these provides a mechanism by which the State Bar can be ensured that it will learn of all disciplinary actions taken by other jurisdictions against California licensed attorneys.

Under Business and Professions Code section 6086.1(b) “all disciplinary investigations” are confidential “until the time that formal charges are filed” and all investigations relating to a filing for involuntary inactive enrollment or restriction under section 6007(a), (c), (d), or (e), are confidential until the public filing is made. See also State Bar Rule of Procedure 2302(a). Under Business and Professions Code section 6086.1(b)(2), the “Chief Trial Counsel or the Chair of the State Bar may waive confidentiality, but only when warranted for protection of the public.” If there is such a waiver of confidentiality, the Chief Trial Counsel or the Chair of the State Bar may, after private notice to the affected attorney, make public certain limited information regarding the

investigation, namely, information “confirming the fact of an investigation or proceeding, clarifying the procedural aspects and current status, and defending the right of the licensee to a fair hearing.” Business and Professions Code section 6086.1(b)(2); see also State Bar Rule of Procedure 2302(d).

DISCUSSION

California State Auditor Report 2022-30 discusses the disclosure of temporary suspensions imposed in other jurisdictions to protect the public from further misconduct while the other jurisdiction’s disciplinary case is being decided. Based on this discussion, the State Auditor recommends that the “State Bar should notify the public on its website when other jurisdictions have determined that an attorney who is also licensed in California presents a substantial threat of harm to the public.”

When the OCTC files a notice of disciplinary charges pursuant to Business and Professions Code section 6049.1 based on discipline in another jurisdiction, the notice of disciplinary charges is public and a notice is placed on the “License Status, Disciplinary and Administrative History” section of the attorney’s State Bar profile page on the State Bar’s website. Such a notice of disciplinary charges, however, can be filed only after the discipline in the other jurisdiction has become final and the State Bar has obtained “a certified copy of the foreign jurisdiction’s findings and final order” as required by Rule 5.351(b). As a result, there are three circumstances where, despite the other jurisdiction having taken disciplinary action, either interim, pending review, or final, a notice of disciplinary charges pursuant to section 6049.1 cannot yet be filed: (1) the other jurisdiction has imposed a temporary suspension or taken other interim disciplinary action pending completion of its disciplinary proceedings; (2) the other jurisdiction has recommended or ordered discipline, but the recommendation or order for discipline is not final because it remains subject to review or appeal; or (3) the other jurisdiction’s disciplinary action is final, but the State Bar has not yet obtained “a certified copy of the foreign jurisdiction’s findings and final order” as required by Rule 5.351(b).

The OCTC recommends authorization of the posting on the attorney’s State Bar profile page of a consumer alert in any of these three situations, with language as proposed in Attachment A. This would bring public notice of disciplinary actions in other jurisdictions into line with public notice of State Bar disciplinary actions, with respect to which the State Bar posts in the “License Status, Disciplinary and Administrative History” section of the attorney’s profile page on the State Bar website a notation indicating any of the following: the filing of a notice of disciplinary charges, any interim action that limits an attorney’s ability to practice pending final disciplinary action (such as an interim suspension or involuntary ineligible status), and the hearing department’s decision imposing discipline (which remains subject to review by the review department and Supreme Court). This would also ensure compliance with the recommendation of the State Auditor, and further public protection by ensuring that members of the public are aware of disciplinary actions not only in California but in other jurisdictions as well.

As indicated, the proposed alerts would include disclaimers that, for non-final disciplinary actions the attorney is presumed innocent until final disciplinary action is taken in the other jurisdiction, and that based on disciplinary actions in another jurisdiction an attorney is not subject to discipline in California until the completion of proceedings in accordance with Business and

Professions Code section 6049.1. The consumer alert would be removed if an interim disciplinary action in another jurisdiction is terminated, if the disciplinary proceedings in the other jurisdiction do not result in a final order for discipline, or if after review of the final order the OCTC determines that it will not pursue a notice of disciplinary charges pursuant to section 6049.1(b)(2), (3).

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal 1: Protect the Public by Strengthening the Attorney Discipline System: Administer an attorney discipline system that is efficient, accountable, and transparent.

Strategy a: Effectiveness: Adopt new case processing standards and improved operational practices to focus resources on cases posing the most significant risks of harm and reduce the backlog of unresolved disciplinary cases.

Strategy d: Policy and Systems Change: Respond to emerging issues regarding attorney misconduct and promote solutions to increase public protection.

RECOMMENDATIONS

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

RESOLVED, that the Board of Trustees adopts the proposed amendments regarding posting of a consumer alert for interim, nonfinal, and final disciplinary actions in other jurisdictions as set forth in Attachment A; and it is

FURTHER RESOLVED, that the proposed amendments to the Board Consumer Alerts policy become effective immediately.

ATTACHMENT LIST

- A.** Proposed Board Policy Regarding Posting of Consumer Alerts for Interim, Non-Final, and Final Disciplinary Actions in Other Jurisdictions

**Board Policy Regarding Posting of Consumer Alerts for Interim, Non-Final, and Final
Disciplinary Actions in Other Jurisdictions**

(1) When the State Bar learns that an attorney has been the subject in another jurisdiction of an interim disciplinary action such as temporary suspension or ineligibility to practice pending completion of disciplinary proceedings in that other jurisdiction, 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 the subject of an interim action pending completion of a disciplinary proceeding in another jurisdiction. The interim action is [nature of interim action] imposed in [jurisdiction] in [case number]. For more information, contact the disciplinary authorities in the jurisdiction where the disciplinary proceeding is pending. The State Bar posts consumer alerts online when lawyers are the subject of disciplinary actions in other jurisdictions. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar.

"DISCLAIMER: Neither the pendency of disciplinary proceedings nor the taking of an interim action in such proceedings in another jurisdiction constitutes a finding of professional misconduct. An attorney charged with professional misconduct in another jurisdiction is presumed innocent in that other jurisdiction until the other jurisdiction enters a final order for discipline. Even after another jurisdiction enters a final order for discipline, an attorney may be subject to discipline in California based on that final order for discipline only after the filing in State Bar Court of a notice of disciplinary charges and the completion of proceedings pursuant to Business and Professions Code section 6049.1."

(2) When the State Bar learns that an attorney has been the subject in another jurisdiction of a recommendation or order for discipline that is not yet final because it is pending review or appeal, 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 the subject of a recommendation or order for discipline in another jurisdiction that is not yet final because it is pending review or appeal. The disciplinary action recommended or ordered is [nature of disciplinary action] imposed in [jurisdiction] in [case number]. For more information, contact the disciplinary authorities in the jurisdiction where the disciplinary action has been recommended or ordered. The State Bar posts consumer alerts online when lawyers are the subject of disciplinary actions in other jurisdictions. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar.

“DISCLAIMER: An attorney charged with professional misconduct in another jurisdiction is presumed innocent in that other jurisdiction until the other jurisdiction enters a final order for discipline. Even after another jurisdiction enters a final order for discipline, an attorney may be subject to discipline in California based on that final order for discipline only after the filing in State Bar Court of a notice of disciplinary charges and the completion of proceedings pursuant to Business and Professions Code section 6049.1.”

(3) When the State Bar learns that an attorney has been the subject in another jurisdiction of a disciplinary order that has become final, 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 the subject of a final disciplinary order in another jurisdiction. The disciplinary action ordered is [nature of disciplinary action] imposed in [jurisdiction] in [case number]. For more information, contact the disciplinary authorities in the jurisdiction where the disciplinary action has been recommended or ordered. The State Bar posts consumer alerts online when lawyers are the subject of disciplinary actions in other jurisdictions. Anyone who believes they have been the victim of attorney misconduct is urged to file a complaint with the State Bar.

“DISCLAIMER: Even after another jurisdiction enters a final order for discipline, an attorney may be subject to discipline in California based on that final order for discipline only after the filing in State Bar Court of a notice of disciplinary charges and the completion of proceedings pursuant to Business and Professions Code section 6049.1.”

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The consumer alert will be removed from the licensee’s State Bar profile page: (1) upon verification of notice to the State Bar that an interim action has been rescinded, even if disciplinary proceedings in the other jurisdiction remain pending; (2) upon verification of notice to the State Bar that disciplinary charges in the other jurisdiction have been dismissed; (3) upon the filing in State Bar Court of a notice of disciplinary charges based on a final disciplinary order in the other jurisdiction; or (4) upon a determination by the OCTC that the disciplinary action in the other jurisdiction would not support discipline in California pursuant to Business and Professions Code section 6049.1(b)(2), (3).