



The State Bar *of California*

AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

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To: Members, Ad Hoc Commission on the Discipline System

From: Justin Ewert, Principal Program Analyst
Lisa Chavez, Director

Subject: Adoption of Expungement Recommendations

EXECUTIVE SUMMARY

The Ad Hoc Commission on the Discipline System (AHCDS) was created to review 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 26 member AHCDS focused 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.

The AHCDS divided into two subcommittees, fairness and effectiveness, and then further into working groups to review specific areas of focus and develop recommendations to be reviewed by the full commission. The six-member expungement working group addressed two issues: (1) removal of discipline information from the attorney profile page on the State Bar website, and (2) expungement of the discipline record. The working group developed recommendations that addressed both issues although the recommendations did not receive unanimous support. At the AHCDS' April 28, 2022, meeting, one member of the working group volunteered to work with staff to develop alternative recommendations for consideration.

BACKGROUND

Prior to the formation of the expungement working group, the fairness subcommittee reviewed the findings of the [State Bar study on racial disparities](#) in the discipline system. The goals of the study were to determine if there were disparities in discipline and identify the factors that contribute to those disparities. The study analyzed attorneys that were admitted to practice from 1990 to 2009 and found that without controlling for other factors, there was disproportionate discipline against black male attorneys. Black male attorneys were three times as likely to be placed on probation, and almost four times as likely to be disbarred as compared to their white male counterparts.

The study identified several factors that contributed to disparities. Prior complaints had a large impact on future discipline. Counsel representation, firm size, and rates of complaints all contributed to the disparities in the system.¹

The study findings motivated an interest in exploring expungement of attorney discipline records as a remedy to historical disparities in discipline. Following recent trends in criminal justice, the working group first explored expungement of the discipline record and, in the process, took up the issue of removal of discipline history from the attorney profile page.

RECOMMENDATIONS

The narrative below summarizes each issue considered by the working group, the working group's recommendations, and the alternate recommendations developed after the Ad Hoc Commission's April 28, 2022, meeting.

REMOVAL OF DISCIPLINE HISTORY FROM ATTORNEY PROFILE PAGE

Each licensed attorney in California has a profile page which can be found on the State Bar website; profile pages include an attorney's public discipline history, where applicable. [Business and Professions Code section 6094.5\(f\)](#) states, "The State Bar... shall respond within a reasonable time to inquiries... as to public discipline that has been imposed upon an attorney in California". Although the statute does not specifically require the State Bar to post public discipline on its website, the State Bar has chosen to facilitate the public's right of access to attorney disciplinary records as prescribed by statute through posting public disciplinary history on the State Bar website. Examples of public discipline posted include public reprovals,

¹ The State Bar followed up this study by contracting with Professor Christopher Robertson of the University of Boston to come up with potential reforms to address disparities in the discipline system. The follow-up [report](#) identified 12 potential reforms to the discipline system. The fairness subcommittee received a presentation on the report's findings and reform implementation.

probation, suspension, and disbarment. Private reprovations and non-disciplinary actions such as agreements in lieu of discipline and warning letters, are not published on the attorney profile page.

There is currently no time delimitation on the website posting meaning that once public discipline is published on an attorney's profile page it remains in perpetuity.

The working group reviewed parallel practices in other state. Most other states had discipline information available on their websites. Only two states, Mississippi and South Dakota, do not make any attorney discipline history available online. Two of the larger states, Texas and Florida, limit public information on the website to 10 years. In addition to other state attorney regulatory agencies, the working group reviewed the practices of other professional regulatory agencies within California, with a significant focus on the Medical Board of California and the California Board of Registered Nursing. Table 1 outlines the current website publishing practices for the State Bar of California, the Medical Board of California, and the California Board of Registered Nursing.

Table 1. Length of Time Discipline History Remains on Website: California Professions

Intervention or Type of Discipline	Attorneys (State Bar of California)	Doctors (Medical Board of California)	Nurses (California Board of Registered Nursing)
Private Reproval	Private	N/A	N/A
Public Reproval	Public indefinitely	10 years from the effective date	3 years from the effective date
Alternative Discipline Program Participation	Public indefinitely (De Facto)	N/A	Private
Probation	Public indefinitely	Public indefinitely	10 years from the effective date
Suspension	Public indefinitely	Public indefinitely (if this suspension is part of an interim suspension order or similar type order, public indefinitely but only posted on the website while in place)	10 years from the effective date
Disbarment/Revocation	Public indefinitely	Public indefinitely	Public indefinitely

In addition to reviewing information from other jurisdictions and entities, the working group considered public comment received. The AHCDs received public comment from an attorney who had a public reproof that impacted his ability to get a job sixteen years after the infraction.

In light of the findings of the study on racial disparities in the discipline system and the information gleaned from other states and California licensing agencies, and public comment received, the working group adopted a recommendation to establish timeframes for attorney discipline history website posting as described in Table 2.

Table 2. Working Group's Recommendations for Attorney Discipline History Website Posting Timeframes

Type of Discipline	Proposed Timeframes
Private Reproof	1 year or when conditions are met
Public Reproof	3 years
Probation with Stayed Suspension	3 years of conclusion of probation
Probation with Actual Suspension	5 years from reinstatement
Disbarment	Public indefinitely (no change)

Proponents of the working group's time standards argue that the proposed standards would:

- Begin to redress the findings in the racial disparities study;
- Align the approach with current criminal justice trends in California;
- Align the approach with other states and other California regulatory agencies; and
- Balance the public's right to know with the attorney's ability to move past already fulfilled discipline.

Although discipline would be removed from the website, it would continue to be available upon request.

As noted above, the working group's adoption of these recommended timeframes was not unanimous. Opponents argued that:

- The time periods proposed were too short; and
- Two different standards for the reporting of discipline history (one available on the website and the other available up verbal or written request) may potentially be confusing to the public.

In consideration of these concerns, one member of the working group recommended alternative timeframes, as outlined below.

**Table 3. Alternative Recommendation for Attorney Discipline History
Website Posting Timeframes**

Type of Discipline	Proposed Timeframes
Private Reprimand	1 year after conditions are met
Public Reprimand	6 years after conditions are met
Probation with Stayed Suspension	10 years from the conclusion of probation
Probation with Actual Suspension	10 years from the conclusion of probation
Disbarment	Public indefinitely (no change)

Proponents of the alternative timeframes argue that they better align with other California regulatory boards, falling midway between what is in place for nurses and doctors, and practices in Texas and Florida.

Both proposals recommend that eligibility for removal of discipline history from the State Bar website be conditioned upon no re-offenses during the time period, no active investigations, and full payment of restitution.

The Ad Hoc Commission will be presented with two alternative recommendations for consideration and action at its June 1, 2022, meeting. One will reflect the working group's recommended timeframes and the other will reflect the alternative recommended set of timelines.

EXPUNGEMENT OF THE DISCIPLINE RECORD

[Business and Professions Code section 6092.5\(e\)](#) states the State Bar shall "Expunge the records of the State Bar as directed by the California Supreme Court." There is no formal process to petition the Supreme Court for expungement and only two petitions have been filed in recent years, neither successful. Staff was unable to identify any other state attorney regulatory boards that expunge discipline records. Three states do not consider very low levels of discipline—informal admonitions or private reprimands being two examples—for subsequent discipline after certain time periods.

Currently, there is an avenue for attorneys to have administrative discipline expunged if certain conditions are met. The administrative expungement is for short term Minimum Continuing Legal Education (MCLE) non-compliance or failure to pay fees. Administrative suspension can be expunged from the attorney discipline record if the following conditions are met:

- The licensee has not on any previous occasion obtained an expungement;
- The suspension was for 90 days or fewer; and
- The suspension ended at least seven years prior to the date the expungement is sought
- The licensee has no other record of suspension or involuntary inactive enrollment for discipline or otherwise.

The Bar must continue to maintain internal records and report administrative suspensions to the Commission on Judicial Nominees Evaluation upon request.

[Rule 5.12](#) of the State Bar Rules of Procedure allows for the sealing of portions of the record. The motion must be supported by specific facts showing that a statutory privilege or constitutionally protected interest exists that outweighs the public interest in the proceeding. This requirement severely limits record sealing in practice.

The working group reviewed California’s criminal expungement laws. [Penal Code section 1203.4](#) allows for the expungement of a criminal record for certain misdemeanors and felonies and eligibility requires satisfaction of several conditions and eligibility criteria. There are several exemptions to the reach of criminal expungement, including when applying to be a peace officer, running for public office, or applying for a licensing agency. Advocates for criminal record expungement argue this removes barriers to securing employment and housing.

The working group also reviewed AB 1076 – the Clean Slate Act. This act automatically authorizes relief in the form of set aside and/or sealing of convictions and arrest on or after January 1, 1973. This change supplements the current petition-based system. In July 2022, the Department of Justice will be required to conduct a monthly review of the statewide criminal justice database to identify persons with arrest records that are eligible for relief, and “shall grant relief” if such information is present in the records.

Based on the foregoing the working group developed recommended timelines for expungement of attorney discipline records as outlined in Table 4.

Table 4. Working Group's Recommendations for Expungement of Attorney Discipline Record Timeframes

Type of Discipline	Proposed Timeframes
Private Reprimand	1 year or when conditions are met
Public Reprimand	3 years
Probation with Stayed Suspension	3 years of conclusion of probation
Probation with Actual Suspension	5 years from reinstatement
Disbarment	Public indefinitely (no change)

Proponents of the working group's time standards for expunging the discipline record state that doing so would:

- Meaningfully address the findings of the study on racial disparities in the discipline system; and
- Eliminate confusion that could result from only removing discipline from the website by aligning these timeframes with those proposed for discipline removal from website (see Table 2).

Opposition to the working group's recommendations is summarized as follows:

- Removing the discipline record completely is not aligned with the State Bar's mission to protect the public; and
- The recommended timelines for low levels of discipline are too short and not in the public's interest.

One working group member developed an alternative set of expungement timelines as outlined in Table 5.

**Table 5. Alternative Recommendations for Expungement of Attorney
Discipline Record Timeframes**

Type of Discipline	Proposed Timeframes
Private Reprimand	5 years
Public Reprimand	6 years after conditions are met
Probation with Stayed Suspension	Public indefinitely (no change)
Probation with Actual Suspension	Public indefinitely (no change)
Disbarment	Public indefinitely (no change)

Both proposals recommend that eligibility for expungement of the attorney record be based on no re-offenses during the time period, no active investigations, and all restitution being paid.

The Ad Hoc Commission will be presented with two alternative recommendations for consideration and action at its June 1, 2022, meeting. One will reflect the working group's recommended timeframes and the other will reflect the alternative recommended set of timelines.