



# The State Bar *of California*

## AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

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Date: June 1, 2022

To: Members, Ad Hoc Commission on the Discipline System

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Subject: Discussion and Adoption of Attorney Representation Recommendations

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### EXECUTIVE SUMMARY

The Ad Hoc Commission on the Discipline System (AHCDS or Commission) 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 come up with recommendations to be reviewed by the full commission. The fairness subcommittee reviewed the issue of respondent representation in attorney discipline proceedings and the impact of representation, or lack thereof, on discipline outcomes. The AHCDS requested staff update the full commission on the State Bar's efforts to increase respondent representation. The following narrative describes two options for providing attorney representation for licensees undergoing the attorney discipline process for the AHCDS to consider.

Both options contemplate the use of State Bar resources to provide representation to low-income respondents. The funding used to provide this representation would come from the

State Bar's General Fund, which supports the attorney discipline system overall. In light of structural underfunding in the General Fund, widespread concern about the attorney discipline system being too "lax" (see recently issued report by the California State Auditor), and, related, the optics of the State Bar funding respondent's counsel, the AHCDs may decide that neither of the recommendations outlined in this memorandum are viable. In that case staff would draft a pro bono-based model for the Commission's consideration.

## BACKGROUND

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

The State Bar followed up this study by commissioning Professor Christopher Robertson of the University of Boston to draft recommendations designed to address the specific causal factors identified in the racial disparities study. Professor Robertson's [report](#) identified 12 potential reforms to the discipline system, five of which were related to attorney representation. The five reforms were as follows:

1. Track and report the proportion of discipline cases with attorney representation;
2. Inform attorneys facing discipline about the increased statistical likelihood of discipline without counsel;
3. Develop a roster of attorneys who agree to provide low cost and pro bono consultations;
4. Facilitate sliding-scale fee representation by members of the Association of Discipline Defense Counsel; and
5. Create a Discipline Equity Office to minimize disparities and support unrepresented attorneys.

The State Bar implemented the first two reforms and deferred the creation of a Discipline Equity Office for lack of resources. With respect to the third and fourth reforms, two options have been developed and will be presented to the AHCDs for consideration, as described below.

### **OPTION 1: STATE BAR APPOINTED COUNSEL PROGRAM, HOURLY RATE**

This \$250,000 pilot program would provide representation for low-income licensees undergoing the attorney discipline process. Eligible participants (i.e., respondents) of the program would include attorneys who are licensed in the state of California, qualify for reduced license fees, and are undergoing a formal discipline investigation by the Office of Chief Trial Counsel (OCTC).<sup>1</sup>

To implement the program the State Bar would contract with two respondents' counsel firms for outside counsel to provide representation to low-income attorneys facing discipline. The selected would be compensated at a rate of \$300 per hour which equates to approximately 833 billable hours. The hourly rate is the same rate the State Bar pays attorneys appointed to represent mentally infirm respondents in State Bar Court proceedings.

The program would remain active until \$250,000 in funds is exhausted. Approximately 200 low-income attorneys undergo a formal investigation each year and the number of attorneys served will depend on case closure stage. Members of the Association of Discipline Defense Counsel estimate, on average, 10 billable hours are required for cases closed in investigation, 35 hours for cases closed in prefiling, 60 hours for cases closed in postfiling. The State Bar estimates that approximately 83 attorneys would be served under this program annually.<sup>2</sup>

Licensees would not be eligible to participate in the program if (1) the complaint filed against them is based on conviction monitoring for a felony where summary disbarment is appropriate; or (2) the case is deemed a highly sensitive or high-profile case that is unlikely to be resolved with limited funds.

### **OPTION 2: STATE BAR APPOINTED COUNSEL PROGRAM, FLAT FEE**

Under this model the State Bar would appoint a panel of defense counsel who apply to participate and who are willing to work under specified terms of the program. Eligibility and exclusion criteria would be the same as the program described in option one above.

Under this program defense counsel would offer a free one-hour consultation to eligible respondents. If a mutual agreement for representation is reached, the defense counsel would be paid by the State Bar a flat fee of \$3,500 for full services (e.g., research, letters, calls, appearance) within the limited scope of (a) eliminating jeopardy for suspension and disbarment, and (b) only up to and including the Early Neutral Evaluation Conference. The program would remain active until \$250,000 in funds is exhausted. The State Bar estimates that approximately 71 attorneys would be served under this program.

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<sup>1</sup> The 2022 threshold for reduced fees is \$60,478.35 in gross annual individual income from all sources for 2021.

<sup>2</sup> This estimate was generated by assuming similar patterns of case closure stage among low-income respondents based on data from 2019, 2020, and 2021. On average, 90 percent of their cases across these three years closed in investigation, three percent closed in prefiling, and seven percent closed in postfiling.

## **RECOMMENDATIONS**

The AHCDS will be asked to adopt one of the following recommendations:

**The Ad Hoc Commission on the Discipline System recommends the Board of Trustees implement the State Bar Attorney Representation Program.**

**The Ad Hoc Commission on the Discipline System recommends the Board of Trustees implement the State Bar Appointed Counsel Program.**