



The State Bar of California

AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

Date: August 24, 2022

To: Members, Ad Hoc Commission on the Discipline System

From: Lisa Chavez, Director, Office of Research and Institutional Accountability

Subject: Adoption of Moral Turpitude Recommendations

EXECUTIVE SUMMARY

The Ad Hoc Commission on the Discipline System (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 commission 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 commission 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 three-member Moral Turpitude Working Group reviewed issues related to discipline cases involving moral turpitude. The working group also held a joint meeting with the Early Neutral Evaluation Conference Working Group to discuss topics of mutual interest and form recommendations. Members of these two working groups proposed recommendations related to the following issues: (1) creating a process so that respondents may present a response to moral turpitude allegations before OCTC transmits misdemeanor criminal conviction matters to the State Bar Court, (2) clarifying ambiguities in rules governing participation in the Alternative Discipline Program, and (3) rule revisions to promote the use of Early Neutral Evaluation Conferences as a mechanism for arriving at pre-filing settlements of disciplinary proceedings. Members did not reach a consensus regarding these recommendations, which are presented to the full commission for review, discussion, and potential adoption.

BACKGROUND

The Moral Turpitude Working Group (working group) was formed to explore the experiences of respondents who are charged with moral turpitude. [Business and Professions Code section 6016](#) aims to protect the public against unsuitable practitioners. It states: “The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”

Staff from the Office of Chief Trial Counsel (OCTC) gave an overview of moral turpitude to the Effectiveness Subcommittee, which, in turn, formed the working group. OCTC charges attorneys with moral turpitude due to a wide range of behavior deemed contrary to the rules of morality and the duties owed between people or society in general, and such standards are continuously evolving. Staff shared that case law has established that moral turpitude cannot be defined with precision but that the most common allegations involving moral turpitude are misrepresentation, misappropriation, and intentional culpability through gross negligence. Under State Bar Rules of Procedure, rule 5.382(c), attorneys disciplined for acts of moral turpitude, dishonesty, or corruption that have resulted in significant harm to a client or the administration of justice are ineligible for participation in the Alternative Discipline Program (ADP). OCTC staff explained that cases involving moral turpitude are some of the more challenging and contested cases the State Bar deals with.

Attorneys can be charged with moral turpitude as an original matter.¹ An analysis of 442 original matters that reached disposition in State Bar Court’s Hearing Department between March 1, 2019, and May 31, 2021, found that 37 percent had at least one moral turpitude charge during the matter’s pendency.

Attorneys can also be charged with moral turpitude when OCTC seeks discipline for a criminal conviction. [Business and Professions Code section 6101\(c\)](#) states the following: “Within 30 days of receipt, the Office of Chief Trial Counsel shall transmit the record of any conviction which involves or may involve moral turpitude to the Supreme Court with such other records and information as may be appropriate to establish the Supreme Court’s Jurisdiction.”² OCTC receives notices of criminal conviction matters from attorneys ([Business and Professions Code sections 6068\(o\)\(4\), \(5\)](#)), prosecutors ([Business and Professions Code section 6101\(b\)](#)), and

¹ An “original matter” is a case that stems from one or more complaints from various sources (complaining witness, court, bank, media, or other source, or a State Bar initiated investigation).

² If the conviction is not final at the time of the original transmission (because it remains subject to appeal or a petition for certiorari in the United States Supreme Court, see California Rule of Court 9.10(a)), OCTC “must file a supplemental record of conviction containing sufficient proof that the conviction is final” as directed by State Bar rule 5.341.

courts ([Business and Professions Code section 6101\(c\)](#)). OCTC also learns of criminal convictions through Criminal Offender Record Information (CORI).³

OCTC's initial transmission of the certified conviction record is to the State Bar Court's Review Department.⁴ In some misdemeanor cases, if sufficient information regarding particular facts and circumstances is available to OCTC within the 30-days within which it must make its initial transmittal determination, OCTC may determine that the facts and circumstances underlying the conviction neither involved moral turpitude nor other misconduct warranting discipline. When OCTC so concludes, it has the discretion to refrain from transmitting the record of the misdemeanor conviction for further proceedings. Records of misdemeanor convictions are public, as are OCTC's transmittals of the records of misdemeanor convictions to the Review Department. The State Bar Court Review Department, on its own motion or the motion of any party, may direct the Hearing Department to conduct a hearing to resolve whether the case involves moral turpitude.

ISSUES DISCUSSED

The Moral Turpitude working group was formed to address issues and concerns raised by commission members who represent respondents in State Bar discipline matters. Examples of these concerns include:

- The perception that OCTC overcharges moral turpitude;
- Respondents experience moral turpitude allegations akin to a "scarlet letter" and are hesitant to settle original matters during an Early Neutral Evaluation Conference (ENEC) without having an opportunity to defend themselves thoroughly;⁵
- The perception that OCTC is inconsistent in its willingness to settle cases involving moral turpitude;
- Concern that OCTC does not sufficiently utilize its discretion when evaluating criminal conviction cases to transmit to the State Bar Court;

³ These cases, referred to as "CORI cases" are the result of Rule of Court, rule 9.9.5, requiring all licensed attorneys to be re-fingerprinted by December 2019. The State Bar now regularly receives Subsequent Arrest Notification and Records of Arrest and Prosecution (RAP) sheets from the Department of Justice. State Bar staff evaluate these RAP sheets to ensure that OCTC is made aware of any criminal charges and convictions against attorneys that had not been previously reported.

⁴ California Rule of Court 9.10(a) authorizes the State Bar Court to exercise "statutory powers under Business and Professions Code sections 6101 and 6102 with respect to the discipline of attorneys convicted of crimes." As a result, pursuant to State Bar Rule of Procedure 5.341, OCTC's initial transmission of the certified record of conviction (whether or not final) is to the Review Department of the State Bar Court.

⁵ The ENEC is a settlement conference held prior the OCTC filing of Notice of Disciplinary Charges (NDC). State Bar rule 5.30(B) states that "At the conference, the judge must give the parties an oral evaluation of the facts and charges and the potential for imposing discipline." Prior to filing an NDC, OCTC notifies a respondent of their right to request an ENEC and the respondent must respond to the notice within 10 days with a request to exercise this right. The conference is to take place within 15 days of the request. Judges may order multiple ENECs. More information on ENECs can be found [here](#).

- The perception that the State Bar Court dismisses many criminal conviction matters based on misdemeanors, particularly old cases OCTC receives through CORI, thus wasting resources and subjecting respondents to unfair treatment because criminal conviction matters become public once transmitted to State Bar Court; and
- The perception of ambiguity within the State Bar rules involving referrals to ADP.

The following narrative describes the empirical research the working group reviewed and the discussions that resulted from this review.

MORAL TURPITUDE IN ORIGINAL MATTERS

Staff analyzed 442 original matters that reached disposition in the State Bar Court's Hearing Department between March 1, 2019, and May 31, 2021.⁶ To explore whether OCTC overcharges moral turpitude, staff examined outcomes among matters with at least one moral turpitude charge. As noted above, 37 percent had at least one moral turpitude charge during the matter's pendency. Key findings include the following:

- The vast majority (93 percent) of matters that involved moral turpitude resulted in the respondent being found culpable of moral turpitude.
- Nearly half of matters analyzed were disposed of by stipulation, one-third by trial, and one in five by default. This pattern is the same for matters with and without moral turpitude charges.
- Respondents charged with moral turpitude had similar attorney representation rates in State Bar Court compared with respondents who were not charged with moral turpitude (45 percent versus 42 percent).
- Among matters with at least one moral turpitude charge, attorney representation during proceedings was not significantly related to whether the moral turpitude charge was dismissed or disposition outcome (disbarment, probation/suspension, or reproof).

Two out of the three Moral Turpitude Working Group members agreed the results showing a high conviction rate among matters that involved moral turpitude disproved the claim that OCTC overcharged moral turpitude.⁷ However, one working group member expressed concern that the analysis excluded criminal convictions. Staff conducted an analysis focused on criminal conviction matters in response to this concern, described below.

MORAL TURPITUDE IN CRIMINAL CONVICTION MATTERS

Staff analyzed 397 criminal conviction cases that reached disposition in State Bar Court between March 3, 2019, and February 28, 2022. Issues explored include the relationship between disposition outcomes and case characteristics such as case origin (CORI vs. non-CORI),

⁶ These 442 matters represent 429 individual respondents and 670 complaints.

⁷ The rationale was that if OCTC "overcharged" moral turpitude, the State Bar Court would have dismissed matters involving moral turpitude at a much higher rate than seven percent.

type of criminal conviction (misdemeanor vs. felony), and length of time since conviction. Key findings include the following:

- Most cases transmitted during the time analyzed were CORI cases, and nearly all of these cases were based on misdemeanor convictions;
- Among all cases where the underlying charge was a misdemeanor, 43 percent resulted in non-disciplinary action, and nearly all of those cases were dismissed pretrial. Of those dismissed pretrial, more than half were dismissed by OCTC.⁸
- Over two-thirds (76 percent) of cases based on misdemeanor convictions more than 10 years old were disposed of with no disciplinary action.

All three working group members agreed the results addressed concerns raised by the member who requested analyses on criminal convictions. However, there was no consensus on the results' implications. One member argued that the high rates of non-disciplinary action in misdemeanor cases show and the high share that is dismissed by OCTC pretrial suggests that both respondents and the system would be better served if a determination of whether a criminal conviction matter involves moral turpitude can be conducted before transmittal to State Bar Court in a venue like the ENEC. In response, one member asserted that the system works as it should. Statute does not require OCTC to determine whether a criminal conviction matter involves moral turpitude, only to transmit the case if it "may" involve moral turpitude. In turn, the State Bar Court's Review Department directs the Hearing Department to conduct a hearing to resolve whether misdemeanor cases involve moral turpitude.

RECOMMENDATIONS

The Moral Turpitude Working Group met several times. In addition, it held a joint meeting with the Early Neutral Evaluation Conference Working Group on July 8, 2022, to discuss topics of interest to both working groups and formulate recommendations.⁹ As a result, the recommendations described below were developed and considered by members of both working groups.

The recommendations focused on three topics: (1) creating a process so that respondents may present a response to moral turpitude allegations before OCTC transmits misdemeanor criminal conviction matters to the State Bar Court, (2) clarifying ambiguities in rules governing participation in the Alternative Discipline Program, and (3) rule revisions to promote the use of Early Neutral Evaluation Conferences as a mechanism for arriving at pre-filing settlements of State Bar disciplinary proceedings. Working group members did not reach a consensus regarding these recommendations, which are presented to the full commission for review, discussion, and potential adoption.

⁸ In contrast, only 5 percent of cases where the underlying charge was a felony resulted in non-disciplinary action.

⁹ At this meeting, members agreed to submit their proposed recommendations to staff who, in turn, circulated them to members of both working groups to solicit agreement/disagreement and alternative recommendations.

PRE-TRANSMITTAL MEETING FOR MISDEMEANOR CRIMINAL CONVICTION CASES

Members who represent respondents in State Bar discipline matters argued that respondents and the system would be better served if determining whether a criminal conviction matter based on a misdemeanor involves moral turpitude was conducted before OCTC's transmittal of the case to State Bar Court. Currently, there is no rule which authorizes either an ENEC or other pre-transmittal meeting in a misdemeanor criminal conviction proceeding, at which respondents or the State Bar Court could weigh in on whether a respondent's misdemeanor criminal conviction involves moral turpitude or other misconduct warranting discipline.

One member proposed the following recommendation:

The Ad Hoc Commission on Discipline System recommends that the Board direct staff to work with stakeholders to study possible revisions to all applicable rules to determine the feasibility of conducting a pre-transmittal meeting similar to an Early Neutral Evaluation Conference in misdemeanor conviction matters subject to Rule 5.340 – 5.347 that would determine whether or not the facts and circumstances underlying the misdemeanor conviction involve moral turpitude or other misconduct warranting discipline, and if appropriate, evaluate a potential disposition of the matter.

Arguments in favor of this recommendation include:

- State Bar research that showed high rates of non-disciplinary action in misdemeanor cases and high rates of pretrial case dismissal initiated by OCTC suggests that both respondents and the system would be better served if a determination of whether a criminal conviction matter involves moral turpitude was conducted before transmittal to State Bar Court;
- The absence of pre-transmittal determination causes serious hardship to respondents where the ultimate disposition is dismissal because the disciplinary filing remains on the State Bar Court's public docket unless a motion to seal the record is made and granted;
- In matters where the appropriate disposition is a non-disciplinary one, such as an Agreement In Lieu of Discipline (ALD) or an admonition, or where a confidential private reproof is appropriate, the filing of the public proceeding requires the disposition of a criminal referral matter to be public. In contrast, non-public dispositions are possible in an original matters;
- Once OCTC transmits a misdemeanor conviction to the Review Department, the mandatory costs borne by respondents in State Bar proceedings increase. The Ad Hoc Commission has identified the current cost structure as a subject for reform. In addition, respondents represented by counsel typically incur much higher legal fees when formal disciplinary proceedings are filed in the State Bar Court; and
- The transmittal of a conviction to the Review Department also causes the court to incur the burdens associated with filing an action with the State Bar Court.

Opponents of the recommendation argue:

- Business and Professions Code section 6101(c) directs OCTC to transmit “the record of any conviction that involves or may involve moral turpitude.” The discretion to make this determination and transmit is thus vested in and directed to OCTC. OCTC attorneys have prosecutorial discretion based on ethics and following the law to make appropriate decisions on whether to transmit criminal convictions;
- Adding a pre-transmittal meeting to the criminal conviction transmittal process is impractical given the relatively short statutory deadline (30 days from receipt of the certified record of conviction) for OCTC to transmit convictions to the Review Department;¹⁰
- A pre-transmittal process delays filing a notice of disciplinary action, thereby denying the public knowledge about the disciplinary action. Public protection (as evidenced by the statutory requirements imposed on OCTC, district attorneys, and courts) is served by public transmittal of convictions that are already a matter of public record whenever there is a possibility that they “may” involve moral turpitude, with subsequent resolution of that issue in a public forum. Processes that favor already convicted respondents over early public disclosure are inconsistent with the mission of the Bar to protect the public; and
- Attorneys convicted of felonies and certain misdemeanors are required to self-report these convictions to the State Bar. Nothing would prevent an attorney, or their counsel, from reporting a misdemeanor conviction and, at the same time, outlining the facts and circumstances that they believe demonstrate that the conviction should not be transmitted.

One member disagreed with the recommendation to create a pre-transmittal meeting to determine whether a misdemeanor conviction involves moral turpitude or other misconduct warranting discipline. However, she agreed that the State Bar should study possible changes to the disciplinary system for cases based on criminal convictions, but only if this focus is limited to the following:

- Exploration of whether notice of disciplinary filings should be removed from the State Bar Court’s public docket when disciplinary actions are dismissed or result in an admonition or private reproof; and
- Exploration of policy changes where respondents would not be obligated to pay costs in matters where disciplinary actions are dismissed.¹¹

Another member who disagreed with the recommendation noted she would be amenable to a recommendation consistent with criminal statutes that allow an attorney to expunge the public notice of criminal misconduct at an appropriate time.

¹⁰ At its June 1, 2022, meeting, the Ad Hoc Commission adopted a recommendation to pursue statutory change to extend the criminal conviction transmittal timeline would require a legislative change. The timeline was extended from 5 to 30 days in 2019 and members believe that the legislature is unlikely to extend this timeline further.

¹¹ This member notes that these changes should be explored for all matters, not just criminal conviction matters.

ALTERNATIVE DISCIPLINE PROGRAM (ADP)

Attorneys accepted into ADP are required to participate in treatment with the Lawyers Assistance Program (LAP) for three years (which may be reduced to 18 months depending on incentives and performance). Upon successful completion, respondents earn a lower level of discipline than would otherwise be imposed.

Members of the two working groups discussed State Bar rules associated with ADP. Under rule 5.382(C)(3), an attorney is ineligible to participate in ADP if the attorney's misconduct involves acts of moral turpitude, dishonesty, or corruption that have resulted in significant harm to one or more clients or the administration of justice. Participation in ADP is also contingent upon the court's approval of a stipulation of facts and conclusions of the law signed by the parties (rule 5.382(A)(2)). However, when the parties dispute whether there was moral turpitude committed resulting in significant harm or to the administration of justice—by virtue of the impasse, a stipulation cannot be reached.

Some members contend that rule 5.382(A)(2), in effect, disallows participation without the opportunity to litigate the issue. They asserted that the State Bar should amend rules to provide for an evidentiary hearing and judicial determination on the issues of moral turpitude/dishonesty/corruption and harm before an attorney is precluded from the program. They proposed the following recommendation:

The Ad Hoc Commission on the Discipline System recommends that the rule involving referrals to the Alternative Discipline Program (ADP) be clarified to allow for judicial determination of eligibility following an evidentiary hearing.

Proponents of this recommendation argue that it would expand opportunities for rehabilitation under [Business and Professions Code section 6230](#), which states, "It is the intent of the Legislature that the State Bar of California seek ways and means to identify and rehabilitate attorneys with impairment due to substance use or a mental health disorder affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety."

The main counterview is that an evidentiary hearing would create a burden for OCTC. A mandatory evidentiary hearing on moral turpitude issues may result in duplicated efforts and the need to potentially call witnesses again if the respondent does not enter the ADP and a trial in regular proceedings ensues. One member proposed an alternative recommendation that stresses an evidentiary hearing would not be needed in every instance and is provided below:

The Ad Hoc Commission on the Discipline System recommends that the rule involving referrals to the Alternative Discipline Program (ADP) be modified to make clear that eligibility is subject to judicial determination following, if necessary, an evidentiary hearing.

A third alternative recommendation makes explicit that an evidentiary hearing would be part of the disciplinary hearing.

The Ad Hoc Commission on the Discipline System recommends that the rules involving referrals to the Alternative Discipline Program (ADP) be amended to allow for judicial determination of eligibility and suitability of a respondent attorney as part of the disciplinary hearing on the merits in cases where the parties are unable to agree.

Staff propose the following recommendation. It states that staff will work with stakeholders, removes the reference to an evidentiary hearing to widen the scope of possible solutions, and narrows the focus on moral turpitude issues.

The Ad Hoc Commission on the Discipline System recommends that the Board direct staff to work with stakeholders to study and clarify all applicable rules involving referrals to the Alternative Discipline Program (ADP), specifically concerning whether or not moral turpitude has resulted in significant harm to a client(s) or the administration of justice.

EARLY NEUTRAL EVALUATION CONFERENCE

Members who represent respondents shared how respondents they have represented experienced the ENEC process when faced with a moral turpitude charge. Although the full Ad Hoc Commission adopted a recommendation on June 1, 2022, calling for expanding the deadline for transmittal of criminal conviction matters in misdemeanor cases to allow for an ENEC, these members asserted that ENEC process needs to be revised for this recommendation to be effective. Examples of concerns they raised include: (1) OCTC is not bound to follow judges' judicial evaluations, even those that raise concerns regarding a lack of evidence to support moral turpitude charges, and (2) OCTC attorneys are inconsistent in their response to judicial evaluations, with some willing to negotiate and others stating they have no authority to negotiate.

The State Bar's Chief Trial Counsel, George Cardona, participated in the July 8, 2022, joint meeting of the two working groups as a staff panelist and expressed interest in learning more about the concerns raised. Ellen Pansky discussed her concerns with Mr. Cardona after the meeting and offered the following recommendation with Mr. Cardona's support:

The Ad Hoc Commission on Discipline System recommends that the Board direct staff to work with stakeholders to propose revisions to all applicable rules to promote the use of Early Neutral Evaluation Conferences as a mechanism for arriving at pre-filing settlements of State Bar disciplinary proceedings.

Proponents of this recommendation note the following benefits:

- Adoption of this recommendation would result in an increase in pre-filing settlements, which would conserve OCTC and State Bar Court resources;

- An increase in pre-filing settlements will lead to more expeditious and less expensive resolutions for respondents whose cost obligations increase by going to trial; and
- Allowing respondents an opportunity to present a response to the allegation that a misdemeanor conviction involves moral turpitude before the case becoming public would increase the system's fairness.

One opponent of this recommendation argues the following:

- No other regulatory agency in California provides for an ENEC similar to what the State Bar offers. The ENEC process is ultimately a detriment to public protection because it results in delays public notification of alleged misconduct violations; as a result, the public cannot consider these misconduct allegations when making decisions about which attorney to hire or not hire;
- The ENEC process also delays the filing of a notice of disciplinary action and in many cases, delays the ultimate resolution of the complaint; and
- The expansion of the ENEC process would shift the balance between a respondent's due process rights and public protection. As a result, the rights of respondent attorneys would be increased, and public protection decreased.

Another member asserted that there is no way to know that revisions made to the rules associated with the ENEC will result in significant conservation of OCTC and State Bar Court resources. This member also expressed concern that respondents are incentivized to delay the discipline process to ensure they continue to practice. Prolonging the discipline process does not make sense when the misconduct will be a matter of public record under any scenario. Finally, this member requested that the State Bar publish metrics on the number of ENECs currently held outside of the time outlined in State Bar rules (15 days), the number of ENECs held per case, and the average amount of time from request for an ENEC to resolution.