



The State Bar of California

Ad Hoc Commission on the Discipline System Report and Recommendations

August 12, 2022

DRAFT

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EXECUTIVE SUMMARY

The State Bar of California (State Bar) has implemented several initiatives, policies, and procedures to improve the effectiveness and fairness of the attorney discipline system. Examples of reforms that address effectiveness include implementing a case prioritization system, modernizing the online complaint portal and the Office of Chief Trial Counsel's (OCTC) case management system, and reorganizing OCTC teams. Reforms addressing fairness include creating the Complaint Review Unit, expanding multilingual communication, and increasing targeted services and outreach to vulnerable populations. In addition, the Board of Trustees (Board) has taken a proactive approach to research and addressing disproportionate discipline. As a result of these efforts, State Bar has begun work on several reforms, including archiving complaints older than five years old, proactively educating attorneys who experience low-level reportable action bank matters, and advising respondents of the importance of securing counsel as they engage in disciplinary investigation and proceedings.

Given these wide-ranging and ambitious efforts, the Board directed a systematic review of discipline system improvement efforts and established an Ad Hoc Commission on the Discipline System (commission). At its November 19, 2020, meeting, the Board approved the commission charter (Appendix A), which tasked the commission with evaluating:

- 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.

To begin, the commission would review the entire catalog of reforms implemented by the OCTCT. From that review, the commission would: (1) identify one or more sets of processes, policies, and procedures to focus on; (2) evaluate whether these processes, policies, and procedures had their intended effect; and (3) based on this evaluation, recommend additional or revised reforms.

The 26-member commission began its work in April 2021 and formed two subcommittees to review the OCTC catalog of reforms. One, the Effectiveness Subcommittee, focused on reforms intended to improve effectiveness, and the other, the Fairness Subcommittee, focused on reforms intended to improve fairness. The two subcommittees were further divided into seven working groups:

- Closed complaints;
- Discipline costs;
- Diversion;
- Early Neutral Evaluation Conference;
- Expungement;
- Moral turpitude; and
- Progressive discipline.

Each working group was tasked with developing recommendations for consideration by the full commission. No working group was formed to study attorney representation; instead, the full commission reviewed two options for a counsel representation pilot program developed by staff and adopted a recommendation accordingly.

RECOMMENDATIONS ADOPTED

At its June 1, 2022, and August 24, 2022, meetings, the commission adopted the following recommendations:

Costs and Sanctions Assessment

The commission explored discipline costs and monetary sanctions imposed on attorneys by the State Bar.

[Business and Professions Code section 6086.10](#) instructs the State Bar to collect costs associated with disciplinary investigation and court proceedings. The State Bar, however, determines the exact costs imposed. Attorneys who do not pay discipline costs have their license to practice suspended until payment is made. The statute allows for relief of costs in very narrow circumstances, with most of the relief resulting in an extension of time to pay, rather than a reduction in, costs. Current discipline costs range from \$3,693, for original matters that settle before filing disciplinary charges, to \$24,695, for original matters that proceed to the review department after trial. The commission also reviewed [Business and Professions Code section 6086.13](#), which requires the State Bar to adopt rules set for the imposition of monetary sanctions on disciplined attorneys. The collected monetary sanctions go directly to the Client Security Fund (CSF), a fund that reimburses clients who have lost money or property due to attorney misconduct. State Bar rules implement Section 6086.13 sanctions in the following amounts: (1) \$5,000 for disbarment; (2) \$2,500 for actual suspension; and (3) \$1,000 for resignation with charges pending. Based on projected revenue of \$100,000 from sanctions, the amount received through sanctions will be equivalent to 1.1 percent of the 2022 CSF budget.

In general, commission members expressed widespread support for lowering discipline cost assessments and eliminating sanctions for several reasons, including:

- State Bar discipline costs are much higher than those assessed by other state bars, comparable California regulatory boards, and other state attorney regulatory agencies;
- Among 16 jurisdictions surveyed, none report imposing monetary sanctions in addition to disciplinary costs, and the punitive nature of sanctions is contrary to long-standing precedent that discipline exists to protect the public, not to impose punishment;
- High costs can impact the ability of an attorney to return to practice, impeding rehabilitation; and
- The current cost structure unfairly penalizes respondents for contesting charges, resulting in unfair outcomes. For instance, costs for matters that proceed to a multi-day

trial are more than two times higher than costs for matters that end with a one-day trial.

The commission adopted the following recommendations:

The Ad Hoc Commission on the Discipline System recommends the Board of Trustees reevaluate its current discipline cost model with a focus on reducing costs. This includes, but is not limited to, restructuring the costs structure so that attorneys are not penalized for going to trial or review and scaling fees when charges are dismissed.

The Ad Hoc Commission on the Discipline System recommends that the State Bar seek a statutory amendment to eliminate disciplinary sanctions.

Early Neutral Evaluation Conference

The commission explored the Early Neutral Evaluation Conference (ENEC) phase of the discipline process. The ENEC is a settlement conference held before filing a Notice of Disciplinary Charges (NDC). The purpose of the NDC is for all parties to obtain a judicial evaluation of the case. Before filing an NDC, OCTC notifies a respondent of their right to request an ENEC; the respondent must respond to the notice within ten days to exercise this right. The conference is to take place within 15 days of a respondent's request for an ENEC.

[Business and Professions Code section 6101](#) requires OCTC to transmit criminal conviction cases to the State Bar Court Review Department within 30 days of receipt if it determines that the case may or does involve moral turpitude. Commission members expressed interest in affording respondents in conviction matters an ENEC because State Bar research showed that nearly half of all criminal conviction cases where the underlying charge was a misdemeanor resulted in non-disciplinary action and nearly all were dismissed pre-trial. Allowing respondents an opportunity to present a response to the allegation that a misdemeanor conviction involves moral turpitude prior to the case becoming public would increase fairness in the system and benefit both respondents who would avoid costs associated with trial should they settle their cases in an ENEC and costs associated with State Bar Court. Because the current statutory timeline does not allow the sufficient time needed for an ENEC to be offered, scheduled, and conducted, modifying the criminal conviction transmittal timeline would require a legislative change.

The commission adopted the following recommendation:

The Ad Hoc Commission on the Discipline System recommends seeking a statutory amendment to extend the deadline for the transmission of criminal conviction matters in misdemeanor cases to allow for an Early Neutral Evaluation Conference.

Attorney Discipline on State Bar Website and Expungement of Attorney Discipline Records

The commission explored policy issues relating to public access to attorney discipline history in two ways. First, it explored options for attorneys to expunge their discipline records. Second, the commission examined the State Bar's practice of displaying public discipline history on the licensee's attorney profile page on the State Bar's website.

Despite the existence of [Business and Professions Code section 6092.5\(e\)](#), which states the State Bar shall "Expunge the records of the State Bar as directed by the California Supreme Court" there is no formal process for attorneys to petition the Supreme Court for expungement. Indeed, only two petitions have been filed in recent years, neither successful. The commission also explored the State Bar's practice of displaying public discipline history on the licensee's attorney profile page on the State Bar's website. There is currently no time limit on how long such information is posted, contrary to the practice of other similarly situated state agencies, such as the Medical Board. Although there is no statutory or rule requirement that the State Bar 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 [Business and Professions Code section 6094.5\(f\)](#) through posting public disciplinary history on the State Bar website.

There was widespread consensus on adopting timeframes to remove discipline history from attorneys' profiles and expunge discipline records. Proponents in favor of adopting shorter timelines argued that the proposed timeframes would begin to redress historical racial disparities in discipline and align the State Bar with California's current criminal justice trends and the practices of other regulatory agencies. Expungement of attorney discipline records would require California Rules of Court rule changes.

The commission adopted the following recommendation:

The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for removal of the attorney discipline from the website attorney profile page and for expungement of attorney discipline records:

- **Private reproval: 1 year of when conditions are met**
- **Public reproval: 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)**

Moral Turpitude

[This section will be written after the August 24 meeting should recommendations be adopted.]

Progressive Discipline

The commission explored discipline standards adopted by the Board of Trustees to establish the means to determine the level of discipline to ensure consistency in disciplinary proceedings. The State Bar currently follows a policy of "progressive discipline," which means each successive incident of discipline should generally be more severe than the last. The rationale for what is commonly referred to as "progressive discipline" is that a prior record of discipline is a significant aggravating factor in determining the appropriate level of discipline.

The commission specifically reviewed Standard 1.8 which states that "If a lawyer has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust." The commission also reviewed Standard 1.6, which details mitigating circumstances.

The commission will vote on the following recommendations at its August 24, 2022, meeting:¹

The Ad Hoc Commission recommends to the State Bar Board of Trustees analyze and modify Standards 1.6 and 1.8 to permit the greater exercise of judicial discretion with regards to progressive discipline.

Attorney Representation

The commission examined the impact lack of respondent representation has on discipline outcomes, as empirically demonstrated by the State Bar's research on racial disparities in discipline. Staff developed two options for an attorney representation pilot program. Eligible participants (i.e., respondents) for both options include attorneys licensed in California who qualify for reduced license fees and undergo a formal discipline investigation by OCTC.² Both options proposed the use of \$250,000 in State Bar resources to provide representation to low-income respondents as a pilot program that would remain active until funds are exhausted.

The options varied by compensation structure: 1) an hourly rate at \$300 per hour, an approach estimated to result in 83 attorneys per year being served; or 2) a flat fee of \$3,500 for complete services only up to and including the Early Neutral Evaluation Conference (ENEC), estimated to benefit 71 attorneys annually. The funding to provide this representation would come from the State Bar's General Fund, which supports the attorney discipline system overall. The commission debated both options and adopted the following recommendation:

¹ The commission voted on and approved this recommendation at its June 1, 2022, meeting. However, a review of the circumstances surrounding this vote indicated that the commission did not have a quorum. The vote has been invalidated and the commission will vote on this recommendation at its final meeting.

² The 2022 reduced license fees threshold is approximately \$60,500 in gross annual individual income from all sources). Approximately 200 attorneys annually satisfy these criteria.

The Ad Hoc Commission on the Discipline System recommends the Board of Trustees implement a State Bar Appointed Counsel Program based on an hourly rate structure similar to the 6007 Court Appointed Counsel Program.³

³ This is a State Bar Court program that appoints counsel to two case types: 1) when a licensee asserts a claim of insanity or mental incompetence (Business and Professions Code 6007, subdivision (b)(1) and (2) when the State Bar Court finds the licensee unable to perform competently due to mental infirmity or illness (Business and Professions Code 6007, subdivision (b)(3)).

BACKGROUND, PURPOSE, AND COMPOSITION OF THE COMMISSION

The State Bar of California (State Bar) has implemented several initiatives, policies, and procedures to improve the effectiveness and fairness of the attorney discipline system. Examples of reforms that address effectiveness include implementing a case prioritization system, modernizing the online complaint portal and the Office of Chief Trial Counsel's (OCTC) case management system, and reorganizing OCTC teams. Reforms addressing fairness include creating the Complaint Review Unit, expanding multilingual communication, and increasing targeted services and outreach to vulnerable populations. In addition, the Board of Trustees (Board) has taken a proactive approach to research and addressing disproportionate discipline. As a result of these efforts, State Bar has begun work on several reforms, including archiving complaints older than five years old, proactively educating attorneys who experience low-level reportable action bank matters, and advising respondents of the importance of securing counsel as they engage in disciplinary investigation and proceedings.

The Board established the Ad Hoc Commission on the Discipline System (commission) to assess the reforms that have been implemented and to identify any additional improvements needed to further the efficiency, effectiveness, or fairness of the discipline system. At its November 19, 2020, meeting, the Board approved the commission charter, which tasked members with evaluating:

- 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.

In so doing, the commission would review the entire catalog of reforms OCTC has implemented and identify one or more sets of processes, policies, and procedures to focus on; evaluate whether these processes, policies, and procedures had their intended effect; and based on this evaluation, recommend additional or revised reforms. The charter identified the key institutional entities focused on public protection from which to select commission members. The commission charter is provided as Appendix A.

Commission Members

The State Bar solicited applications for the commission in several ways, including conducting targeted outreach to affinity bar organizations throughout the state, sending an announcement in an all-licensee email, posting on social media, and providing links to application materials on the State Bar website homepage during the application period. The application period began on December 9, 2020, and ended on January 5, 2021, with 33 applications received.

At its meeting on January 21, 2021, the Board appointed members to the commission, Trustee Ruben Duran as chair, and Trustee Sean SeLegue as vice-chair. Appointments included

members with a broad array of backgrounds and expertise in trial courts, regulatory agencies, and practicing attorneys. The Board also authorized the chair to fill additional vacant slots. Under this authorization, Chair Duran appointed four additional members to increase the commission's racial/ethnic diversity and add a direct consumer voice, thus adding breadth and diversity to its discussions. In addition, commission members served in their capacity rather than as representatives of any organization or employer. Due to his promotion to Chair of the Board of Trustees in September 2021, Mr. Duran was unable to continue as commission chair, and he appointed Brandon Stallings as his replacement. The commission roster is provided in Table 1.

Table 1. Commission Roster and Stakeholder Group

Members	Stakeholder Group
Brandon Stallings, Chair [L]	Board of Trustees
Sean SeLegue, Vice-Chair [L]	Board of Trustees
Michele Anderson [L]	Prosecutor
Karen Bell [L]	California Lawyers Association
Ray Buenaventura [L]	Defense Counsel
Shanae Buffington [L]	Affinity Bar Association
Hailyn Chen [L]	Board of Trustees
Ruben Duran [L]	Board of Trustees
Shirin Ershadi [P]	Public Member
Gary Farwell [L]	Affinity Bar Association
Sarah Good [L]	Committee on Access and Fairness
Jenna Jones [P]	Medical Board of California
Shelan Joseph [L]	Prosecutor
Janet King [P]	Public Member
Jerry Larkin [L]	National Organization of Bar Counsel
Melanie Lawrence [L]	Office of Chief Trial Counsel
Edward Lear [L]	Association of Discipline Defense Counsel
Alexia Mayorga [L]	Defense Counsel
Hon. W. Kearse McGill [J]	State Bar Court
Steven Moawad [L]	Office of Chief Trial Counsel
Cynthia Nakao [L]	Prosecutor
Ellen Pansky [L]	Association of Discipline Defense Counsel
Eloise Rosenblatt [L]	California Lawyers Association
Linda Schneider [L]	Department of Consumer Affairs
Hon. Phong Wang [J]	State Bar Court
Martin Winfield [L]	Affinity Bar Association

[J] = Judge [L] = Lawyer [P] = Public Member

This report describes how the commission carried out its charge and outlines its recommendations to the State Bar Board of Trustees.

SUBCOMMITTEES

The commission held its inaugural meeting on April 30, 2021. Members discussed the commission charter, received a comprehensive overview of the attorney discipline system, and reviewed key components of an inventory of discipline system initiatives, policies, and procedures the State Bar has developed and implemented over the last several years. The inventory (provided as Appendix B), provided to members in advance of the April 30, 2021, meeting, was organized into two categories:

- **Effectiveness:** These initiatives, policies, and procedures address workload and operational efficiency; and
- **Fairness:** These initiatives, policies, and procedures promote procedural justice, reduce disparate impact, prevent future attorney misconduct, and improve the experiences and perceptions of complaining witnesses and respondents.

Significant time during the kickoff meeting was spent reviewing a section of the inventory's fairness category that addresses racial disparities in attorney discipline. In addition, staff gave an in-depth presentation on [a 2019 State Bar initiated study](#) of complaints and discipline against attorneys admitted to the State Bar between 1990 and 2009. Conducted by Professor George Farkas, Distinguished Professor in the School of Education at the University of California, Irvine, the analysis sought to determine whether nonwhite attorneys experience disproportionate discipline. Key findings included:

- Without controlling for any other factors, there was disproportionate discipline against Black male attorneys, who were three times as likely to be placed on probation, and almost four times as likely to be disbarred as compared with their white male counterparts.
- Using multiple regression analysis to introduce control variables into the evaluation, the study found that the factors correlated with race and were statistically significant predictors of discipline included:
 - Number of prior complaints. Discipline disparities between Black and white male attorneys are explained in part by a higher number of complaints against Black attorneys.
 - Rates of counsel representation. Black, male attorneys have a lower likelihood of being represented by defense counsel during the investigation stage and during State Bar Court discipline proceedings.

Staff also provided an overview of how the State Bar engaged in corrective action in response to this study. To understand the origins of these findings, the State Bar invited Professor Christopher Robertson, N. Neal Pike Scholar, and Professor at the School of Law of Boston

University to explore possible remedies.⁴ His [July 2020 report](#) presented to the Board focused on 13 potential reforms across three broad areas: (1) client trust fund accounting, (2) the treatment of prior complaints and discipline history, and (3) securing legal representation for those facing discipline. The commission received an overview of Professor Robertson's report and the State Bar's implementation of several of his recommendations.⁵

The commission concluded its first meeting by forming two subcommittees reflecting the above categories, "Effectiveness" and "Fairness" to continue reviewing the inventory and to identify a subset of the inventory to explore further and develop recommendations. Members submitted their subcommittee preferences, and Chair Duran assigned members and appointed chairs to each subcommittee. Six members (Chair Duran, Vice-Chair SeLegue, Ellen Pansky, Edward Lear, Melanie Lawrence, and Steve Moawad) served on both subcommittees to ensure that commission leadership were kept apprised of subcommittee work and that both subcommittees benefited from the expertise and perspective of OCTC and Association of Discipline and Defense Counsel (ADDC) members. Subcommittee rosters and meetings are provided in table 2.⁶

Each subcommittee reviewed the remaining inventory pertaining to its respective focus and identified a subset of topics to explore more thoroughly. Upon concluding their reviews of each subject, the subcommittees formed working groups to develop recommendations specific to a particular subject area.

⁴ Professor Robertson met with OCTC staff and leadership, conducted focus group interviews, and reviewed documents related to OCTC process and policy.

⁵ Details about the State Bar's implementation of Professor Robertson's recommendations are described in the section "Fairness Subcommittee" below.

⁶ Shirin Ershadi and Janet King were appointed to the commission after the subcommittees' work was nearly complete; they were not appointed to any subcommittees as a result.

Table 2. Subcommittee Rosters and Meeting Dates

Subcommittee	Subcommittee Members	Meeting Dates
Effectiveness	Edward Lear[C] Karen Bell Ruben Duran Gary Farwell Jenna Jones Melanie Lawrence Alexia Mayorga Steve Moawad Cynthia Nakao Ellen Pansky Eloise Rosenblatt Linda Schneider Sean SeLeague Brandon Stallings Hon. Phong Wang	May 24, 2021 June 25, 2021 July 16, 2021 August 18, 2021
Fairness	Shanae Buffington[C] Michele Anderson Ray Buenaventura Ruben Duran Sarah Good Shelan Joseph Jerry Larkin Melanie Lawrence Edward Lear Hon. W. Kearse McGill Steve Moawad Ellen Pansky Sean SeLeague Martin Winfield	May 24, 2021 June 22, 2021 July 19, 2021 August 24, 2021

[C] = Chair

EFFECTIVENESS SUBCOMMITTEE

At its kickoff meeting on May 24, 2021, the Effectiveness Subcommittee reviewed the inventory of initiatives, policies, and procedures meant to improve effectiveness. Upon conclusion of this meeting, the subcommittee chose to focus its work on five areas of the inventory:

- Case processing: standardization and consistency;
- Factors impacting case settlement;
- Prevention efforts and attorney support;
- Metrics; and
- Diversion.

The narrative below describes the information the subcommittee reviewed in these five areas and whether the subcommittee decided to form a working group to explore the topics more deeply to develop recommendations.

Case Processing: Standardization and Consistency

Some of the most significant changes OCTC has made in recent years to streamline operations and ensure that the State Bar fulfilled its public protection mandate has addressed the need for standardization and consistency in case processing. In 2017 OCTC established a training and calibration team to formalize and improve training for all levels of staff. The subcommittee received a comprehensive overview of the methods OCTC uses to calibrate case handling between teams and offices, including stipulation calibration meetings and trial team meetings. Throughout the year, knowledge and expertise are reinforced through training, policy directives, and staff review of the results of random audits of open and closed cases. Open investigation audits are conducted by supervising attorneys within OCTC whereas an independent external auditor conducts an audit of closed cases.

Subcommittee members also discussed how the State Bar follows a policy of "progressive discipline," which means each successive incident of discipline should generally be more severe than the last. The rationale is that a prior record of discipline is a significant aggravating factor in determining the appropriate level of discipline. Members reviewed Standard 1.8 of the State Bar California Rules of Procedure which states that "If a lawyer has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust."

Subcommittee members expressed concern that Standard 1.8 does not provide for judicial discretion. Noting racial/ethnic disparities in discipline, some members questioned whether or not the progressive discipline policy exacerbates these disparities.

The subcommittee concluded its review of OCTC's efforts to ensure standardization and consistency in case processing with the decision to form a working group to further explore the concept of progressive discipline.

Factors Impacting Case Settlement

The Effectiveness Subcommittee explored factors that impact discipline case settlement, particularly during the Early Neutral Evaluation Conference (ENEC) phase of the discipline process. The ENEC is a settlement conference held before filing a Notice of Disciplinary Charges (NDC). The purpose of the NDC is for all parties to obtain a judicial evaluation of the case. State Bar Rules of Procedure rule 5.30(B) states: "At the conference, the judge must give the parties an oral evaluation of the facts and charges and the potential for imposing discipline." Before filing an NDC, OCTC notifies a respondent of their right to request an ENEC; the respondent

must respond to the notice within ten days to exercise this right. The conference is to take place within 15 days of the respondents' request for an ENEC.

Subcommittee members shared their opinions on the aspects of the ENEC process that impacted both case settlements and contributed to overall case delays. Some pointed out that judges can order multiple ENECs. Others expressed concern that OCTC "overcharges" moral turpitude, which impedes respondents' willingness to settle, given the seriousness of this allegation. Finally, others noted that the State Bar does not resolve criminal conviction matters with an ENEC due to statutory requirements that direct OCTC to transmit criminal conviction cases to the State Bar Court Review Department if it determines the case may involve moral turpitude. The transmittal to the Review Department renders the case public, obviating the possibility of a private resolution—when appropriate—through an ENEC. In response to the repeated theme of the impact of moral turpitude charges on case settlement, OCTC staff gave a comprehensive presentation on this topic, including a summary of the most common disciplinary charges involving moral turpitude and sanctions associated with this allegation.

The subcommittee concluded its review of factors that impact case settlement with the decision to form two working groups: one that would focus on the ENEC process and one that would focus on moral turpitude.

Prevention Efforts and Attorney Support

The Effectiveness Subcommittee reviewed the State Bar's efforts to prevent misconduct before it occurs. The Office of Professional Competence (OPC) gave a comprehensive overview of resources available to attorneys, such as the Ethics hotline (including data on its usage and customer satisfaction results), and a myriad of educational opportunities, including a new attorney training program; Minimum Continuing Legal Education self-study articles; e-learning courses; ethics school; client trust accounting school; an annual ethics symposium; and forthcoming self-assessment modules. In response to questions about support for solo practitioners, subcommittee members learned about the now-defunct Law Office Management Assistance program that the State Bar established in 1995 for attorneys needing law office management advice. A contractor provided the program at an annual cost of \$160,000. Services included management audits and educational seminars, and attorneys had access to information on accounting and billing programs and new product/software reviews. The Board terminated the program in 2008 due to underutilization.

Subcommittee members also learned about the State Bar's Lawyer Assistance Program (LAP). This confidential program provides a supportive structure for building a personal recovery program concerning mental health issues and/or problematic substance use. Law students, State Bar applicants, and attorneys (both current and former) are eligible for the LAP.

The subcommittee concluded that it was satisfied with the State Bar's efforts in this area and decided against pursuing these topics further.

Metrics

The subcommittee reviewed metrics used by the State Bar to assess OCTC's effectiveness. In 2019 the State Bar adopted performance metrics for all functional areas of the organization. OCTC's metrics measure cycle time (for example, caseload clearance rates) and quality (for example, the number of closed cases the Complaint Review Unit (CRU) recommended for reopening, and the number of Walker petitions granted by the California Supreme Court).⁷ Staff prepares OCTC metric reports for the Board throughout the year. Staff also prepares a Discipline System Statistical Report to supplement the metrics. This report includes additional measures of the system's impact, including recidivism rates and access and fairness ratings given by complaining witnesses in surveys administered upon case closure. The subcommittee also reviewed statutorily mandated reporting of case backlog and the State Bar's efforts to propose an alternative to the backlog standard.

The subcommittee concluded that it would be appropriate for staff to develop new metrics that align with the recommendations ultimately adopted by the commission but that no additional focus on metrics was needed at this time.

Diversion

The subcommittee approached the topic of diversion in two ways. First, it reviewed the State Bar's options for non-disciplinary actions. Next, it examined the post-trial Alternative Discipline Program (ADP).

OCTC has several options for non-disciplinary actions, including issuing directional letters, resource letters, warning letters, or entering into an Agreement in Lieu of Discipline (ALD). The ALD is the most severe non-disciplinary action, and OCTC uses it for instances when minor misconduct occurs with a lack of harm. Respondents must stipulate to the underlying facts, including acknowledgment of violating rules, and agree to a series of remedial activities, including attending State Bar Ethics School. ALDs are confidential.

OCTC issued 59 ALDs between 2016 and 2020; subcommittee members expressed concern about how infrequently OCTC used this non-disciplinary action. OCTC described the extensive resources required to administer ALDs, including negotiating and drafting the agreement and monitoring compliance over the agreement (typically at least one year).

The Alternative Discipline Program (ADP) supports attorneys whose misconduct stems from mental health and/or substance abuse issues. Respondents must request participation in the ADP at least 45 days before trial, provide evidence that mental health and/or substance abuse contributed to the misconduct, and be accepted into the ADP, which conducts check-ins and reports on attorney compliance. The benefit of ADP for participating attorneys is that State Bar

⁷ Should CRU decline to recommend reopening a case, it will notify the complainant and inform them of their right to request the California Supreme Court review the complaint pursuant to *In re Walker* (1948) 32 Cal.2d 488 to determine if it should be reopened.

Court imposes a lower level of discipline upon successful ADP completion. Attorneys are not eligible to participate if disbarment is recommended for discipline, misconduct involves moral turpitude impacting a client or the administration of justice, or if the respondent has previously participated in ADP. A State Bar Court judge, other than the trial judge, handles the ADP process.

Members reviewed data on outcomes among attorneys who entered an ALD or participated in ADP. Within three years, nearly one in four ALD recipients and almost half of ADP participants were the subjects of a new OCTC investigation. In comparison, 60 percent of respondents who were disciplined by probation are the subject of a new investigation within three years.

The subcommittee concluded its review of the State Bar's diversion efforts and formed a working group to explore this topic more extensively.

FAIRNESS SUBCOMMITTEE

At its kickoff meeting on May 24, 2021, the Fairness Subcommittee continued its review of the discipline system inventory. Upon the conclusion of this meeting, the subcommittee chose to focus its discussions on six areas of the discipline system:

- Bias in complaint process;
- Communication with complaining witnesses during intake;
- Costs associated with discipline process;
- Expungement;
- Perception of State Bar Court independence; and
- Prior complaints

The narrative below describes the information the subcommittee reviewed for these five areas and whether the subcommittee decided to form a working group to explore the topics more deeply to develop recommendations. Professor Farkas' research and Professor Robertson's subsequent recommendations addressed three of the six areas. The subcommittee reviewed the research, recommendations, and the Board's corresponding action when discussing these three areas.

Bias in Complaint Process

The Fairness subcommittee was motivated to explore the possibility of bias in the complaint process for two reasons. First, Professor Farkas' research on racial disparities in attorney discipline found that the number of prior investigations opened against an attorney is one of the factors most strongly associated with attorney disbarment. Over one in ten (12 percent) Black male attorneys were the subject of 10 or more complaints compared with 4 percent of white men. Among attorneys with 10 or more complaints, Black male attorneys had, on average, 6.8 reportable action bank cases, while white male attorneys had 3.7. Reportable action bank matters arise from a bank's notification to the State Bar that a client trust account (CTA) check was presented with insufficient funds (see [Business and Professions Code section 6091.1](#)). As a result, the subcommittee sought to understand the reportable action bank matter

process thoroughly. Second, the subcommittee was interested in exploring the general sense that solo practitioners and attorneys who practice specific areas of law are at higher risk of being the subject of a complaint, given the nature of their work.

Bank Reportable Actions

Reportable action bank matters are insufficient fund activity on client trust accounts that banks must report to the State Bar per [Business and Professions Code section 6091.1](#). Upon receiving a notice of insufficient fund activity, OCTC staff review them to determine if they merit an investigation, often reaching out to attorneys for an explanation. If the insufficient funds activity is less than \$50 (referred to as the *de minimis* threshold), OCTC closes the matter.⁸ If there are no facts to show misconduct (or minimal misconduct), OCTC sends the attorney a closing letter alerting them to the matter. In other cases, OCTC will send resource or warning letters. Finally, should attorneys fail to respond, or there is an indication of commingling or misappropriation, OCTC will forward the matter to investigation. In 2020, OCTC disposed of over 1,100 reportable bank matters. The majority (700) were disposed of with a closing letter, over 150 were disposed of because the amount involved was less than the *de minimis* threshold, less than 50 received a resource or warning letter, and 175 were forwarded to investigation.

The subcommittee received an in-depth presentation on Professor Robertson's recommendations regarding reportable bank matters. As noted above, among attorneys with 10 or more complaints, Black male attorneys had, on average, 6.8 reportable action bank cases while white male attorneys had 3.7. Professor Robertson recommended two reforms to address these disparities:

- Revise the policy for handling *de minimis* bank overdrafts (currently defined as overdrafts of less than \$50); and
- Explore options to allow attorneys to create a "cushion" with their funds in a client trust account (similar to how attorneys may deposit a reasonable amount of their funds to cover bank fees).

The subcommittee received a thorough overview of how the State Bar addressed these recommendations. The Board directed staff to analyze the potential impact of raising the *de minimis* amount, and the results suggested that doing so would compromise public protection. Staff also examined the option of creating a "cushion" and concluded that existing ethics rules prohibit such commingling. In place of implementing reforms recommended by Professor Robertson to address disparities in reportable bank matters, the Board directed the OCTC to explore proactive, preventative options instead. Accordingly, OCTC modified all four form letters it sends to attorneys in response to notices from banks of insufficient funds in a client trust account. The new letters provide a comprehensive list of resources and warning language regarding the risk of discipline. Over 800 attorneys now receive this letter annually.

⁸ The subcommittee reviewed how other jurisdictions approach client trust accounting rules and learned that out of 19 states surveyed, none reported having a *de minimis* threshold.

Other Complaint Considerations

The subcommittee also reviewed the State Bar's research on the relationship between the area of law practiced and complaint risk. An analysis of attorneys whose licenses were active between 2018 and 2020 found that 15 percent received a complaint during this period. Practice areas with the highest risk for complaints are family law (35 percent), criminal law (28 percent), elder abuse (27 percent), personal injury (26 percent), bankruptcy (24 percent), and trusts and estates (23 percent).

Finally, the subcommittee reviewed the State Bar's research on solo practitioners. Approximately one in four active attorneys are solo practitioners; solo practitioners are more likely to practice in trusts and estates, personal injury, and criminal and family law than non-solo practitioners. An analysis of solo practitioners with active licenses between 2018 and 2020 found that 29 percent of solo practitioners received at least one complaint compared with 15 percent of all attorneys during the same period.

The subcommittee learned about State Bar current efforts to address complaint risk among solo practitioners. An example includes requiring attorneys to report their employment sector in their profiles at the State Bar attorney portal. When attorneys change their employment sector to a solo practitioner or a law firm with 10 attorneys or less, the State Bar sends a letter alerting them to requirements under the Rules of Professional Conduct and the State Bar Act (Business and Professions Code sections 6000 et seq) that apply to operating a law firm. The letter also describes resources such as Client Trust Accounting School, Ethics School, and publications made available by the California Lawyer's Association.

The subcommittee concluded that it was satisfied with the State Bar's efforts to curtail multiple reportable bank matters and complaint risk among solo practitioners and decided against pursuing these topics further.

Communication with Complaining Witnesses During Intake

A "complaining witness" is a person who files a complaint. OCTC communicates with complaining witnesses to obtain information necessary to substantiate their complaints and, in some cases, to explain reasons for closing complaints with no action. OCTC always sends a "closing letter" to complaining witnesses when closing a case without action. The closing letter explains the reasons for case closure and provides information regarding fee arbitration and/or lawyer referral services. In addition, the closing letter invites the complaining witness to provide more details on the matter and directs them to the State Bar's Complaint Review Unit, should they wish to have OCTC's decision to close their case reviewed.

The subcommittee concluded that it was satisfied with the State Bar's efforts in this area and decided against pursuing this topic further.

Costs Associated with Discipline

The subcommittee explored discipline costs and sanctions imposed on attorneys by the State Bar and other costs respondents incur, including those associated with defense counsel representation.

The subcommittee first explored costs related to attorney representation. Professor Farkas' research found that lack of attorney representation during investigation and State Bar Court discipline proceedings was a substantial factor contributing to racial disparities in discipline and that Black, male attorneys are less likely to be represented by defense counsel. Professor Robertson, in turn, identified five potential reforms to address the attorney representation gap: (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 consultation; (4) facilitate sliding-scale fee representation by members of the Association of Discipline Defense Counsel; and (5) create a Discipline Equity Office to monitor disparities and support unrepresented attorneys.

Staff shared that the State Bar implemented the first two reforms, deferred the creation of a Discipline Equity Office for lack of resources, and was developing options to address the third and fourth reforms for the commission to consider.

The subcommittee also learned about costs the State Bar imposes on disciplined attorneys. [Business and Professions Code section 6086.10](#) instructs the State Bar to collect costs associated with disciplinary investigation and court proceedings. The State Bar, however, determines the exact costs imposed. Current discipline costs range from \$3,693, for original matters that settle before filing disciplinary charges, to \$24,695, for original matters that proceed to the review department after trial. Attorneys who do not pay their discipline costs have their license to practice suspended until payment is made. The statute allows for relief from costs in very narrow circumstances, with most of the relief resulting in an extension of time to pay, rather than a reduction in, costs. The subcommittee reviewed the practices of 16 other states and learned that most assessed minimal costs, \$3,000 or less, with two states imposing no costs at all.

Finally, the subcommittee reviewed [Business and Professions Code section 6086.13](#), which requires the State Bar to adopt rules for imposing monetary sanctions on disciplined attorneys. The collected monetary sanctions go directly to the Client Security Fund (CSF), a fund that reimburses clients who have lost money or property due to attorney misconduct. State Bar rules implement Section 6086.13 sanctions in the following amounts: (1) \$5,000 for disbarment; (2) \$2,500 for actual suspension; and (3) \$1,000 for resignation with charges pending. Based on projected revenue of \$100,000 from sanctions, the amount received through sanctions will be equivalent to 1.1 percent of the 2022 CSF budget.

The subcommittee concluded it would not form a working group to study attorney representation further and, instead, review the State Bar's proposal to increase attorney representation. In addition, the subcommittee formed a working group to study further the issue of State Bar imposed costs and sanctions.

Expungement

The Fairness Subcommittee explored the topic of discipline record expungement from multiple angles. It began its work by reviewing California's criminal expungement laws. [Penal Code section 1203.4](#) allows for expunging a criminal record for certain misdemeanors and felonies. However, eligibility requires satisfying several conditions and considering specific criteria. In addition, 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 that it removes barriers to securing employment and housing.

The State Bar's Office of General Counsel (OGC) provided the subcommittee with an overview of [Business and Professions Code section 6092.5\(e\)](#), which states the State Bar shall "Expunge the records of the State Bar as directed by the California Supreme Court." There is no formal process for attorneys to petition the Supreme Court for record expungement, and only two petitions have been filed in recent years, neither successful. There are avenues for attorneys to have administrative suspensions related to short-term Minimum Continuing Legal Education (MCLE) non-compliance ([California Rules of Court 9.31\(f\)](#)) or failure to pay fees expunged if they meet certain conditions ([California Rules of Court 9.8\(b\)](#)).

The subcommittee considered the practices of other jurisdictions concerning record expungement. Based on a survey of 19 jurisdictions, none reported expunging discipline records. However, three of these states reported that while records are not expunged, certain low-level discipline is not taken into account in subsequent discipline consideration after a specified period of time has passed.

In addition to record expungement, the subcommittee reviewed the State Bar's practice of posting license status and disciplinary and administrative history on attorney profile pages of the State Bar website and determined that the current practice can have adverse effects on impacted attorneys in perpetuity. For instance, one California attorney licensee delivered a public comment to the commission describing his struggle securing employment sixteen years after he was disciplined by public reproof because this history appeared when prospective employers searched his name on the internet.⁹

⁹ Examples of public discipline posted include public reprovals, probation, suspension, and disbarment. Private reprovals and non-disciplinary actions such as agreements in lieu of discipline and warning letters, are not published on the attorney profile page.

The State Bar's OGC provided an overview of the statutory and California rules of court that govern how the State Bar publicizes attorney discipline history. [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." However, there is no statutory or rule requirement that the State Bar 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 by posting public disciplinary history on the State Bar website. There is currently no time limit on how long such information is posted.

The subcommittee reviewed the website posting 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 3 outlines the current website publishing practices for the State Bar of California compared to these two boards.

**Table 3. Length of Time Discipline History Remains on Public Website:
California Attorneys, Doctors, and Nurses**

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

N/A= not applicable (this intervention or type of discipline not an option for this Board)

The subcommittee also reviewed parallel practices in other states. Most other states make discipline history available on their websites. Only two states, Mississippi and South Dakota do

not make any attorney discipline history available online. Two larger states, Texas and Florida, limit the website display of discipline to 10 years.

The subcommittee concluded its review by forming a working group to explore: (1) the State Bar's practice of posting discipline history on attorney profile pages; and (2) the expungement of discipline records.

Perception of State Bar Court Independence

State Bar Court Judge Kearse McGill gave an overview of the history of the State Bar Court, describing how proceedings were handled before 1989 when the State Bar Court was established. Subcommittee members learned about the composition and functions of the Hearing and Review Departments. Judge McGill stressed that the State Bar Court, in most cases, makes recommendations to the California Supreme Court, which exercises sole authority over most disciplinary matters. The State Bar Court can only order dismissal of formal charges or issue admonitions and both public and private reprovals.

Subcommittee members discussed respondent and public perceptions about the State Bar Court's independence and impartiality, specifically the origin of the concern that the court lacks both. State Bar Court proceedings' physical space and location play a big role, as the court shares the same buildings as the OCTC, and the State Bar logo is in courtrooms. Additionally, State Bar Court judges are paid by the State Bar. Finally, the OGC provides counsel to the State Bar Court in litigation while representing OCTC in various types of litigation.

After consideration of Judge McGill's presentation, the Fairness Subcommittee concluded that the Board best addresses these issues. Since then, the following changes have been implemented: (1) the State Bar Court has a new seal, and (2) all Court staff have a new email domain (statebarcourt.ca.gov) that is aligned with the Court's website that has always been independent of the State Bar.

Prior Complaints

An analysis of over 51,000 original matters received by OCTC between 2017 and 2020 showed that 58 percent were closed in intake. Generally, these complaints do not state a basis for attorney discipline, even if all the facts stated by the complaining witness are assumed to be true. Most attorneys who were the subject of these complaints never learned that a complaint was filed against them.

The Fairness Subcommittee explored how OCTC considers complaints closed without discipline when evaluating new complaints. This focus was motivated by Professor Farkas' finding that the number of prior complaints filed against an attorney is one of the variables most strongly associated with attorney disbarment. Nearly half (46 percent) of Black male attorneys had a least one complaint filed against them, and 12 percent had ten or more complaints. In contrast, 32 percent of white male attorneys had at least one complaint filed against them, and 4 percent had 10 or more complaints.

Professor Robertson's research found that while prior complaints that are closed without discipline have no probative value in State Bar Court, OCTC uses closed complaints to evaluate whether a new complaint establishes a pattern of misconduct. He recommended shielding decision-makers from information that is potentially prejudicial and offered two potential reforms:

- (1) expunge complaints closed without discipline after five years; and
- (2) archive all closed complaints but establish conditions for gaining rare access to them.

The subcommittee learned that, in response to these recommendations, the Board passed a resolution representing a hybrid of both reforms. This resolution directed OCTC not to consider closed complaints more than five years old when evaluating a new complaint with limited exceptions. In late 2020, the State Bar archived nearly 400,000 cases of all types and origins over five years old and were closed without discipline (excluding the issuance of warning, directional, or resource letters). Archiving complaints removes them from the view of Intake staff when they assess the merits of a new complaint.

The subcommittee also reviewed other states' practices in this area. Among 19 states that responded to a State Bar inquiry regarding attorney discipline system policies and procedures, six reported having rules that called for the expungement of cases closed without discipline, and three reported limiting line staff from viewing such closed complaints. Of the states that responded, 13 indicated that they notified respondents of closed complaints, and two shared their motivation for doing so, which was to prevent potential future misconduct. This is contrary to OCTC's practice, which is not to alert attorneys to complaints filed against them with no action. Some subcommittee members questioned the fairness of OCTC's practice of not alerting attorneys of closed complaints, given that it can still consider complaints less than five years old when evaluating new complaints.

The subcommittee concluded its review of how OCTC handled complaints closed without discipline, with the decision to form a working group to examine further the issues raised during its initial consideration of the topic.

RECOMMENDATIONS

As a result of the meetings of both the Effectiveness and Fairness Subcommittees, seven working groups were formed:

- Closed complaints;
- Discipline costs;
- Diversion;
- Early Neutral Evaluation Conference;
- Expungement;
- Moral turpitude; and
- Progressive discipline.

The working groups held 14 meetings, as detailed in table 4. Working groups requested and reviewed additional information, research, and analyses to facilitate their work. When scheduling meetings of the working groups proved challenging, staff facilitated discussions of identified topics at meetings of the full commission.

This section discusses the commission's recommendations based on the working groups' deliberations. The Closed Complaints and Diversion Working Groups did not develop recommendations; their deliberations are discussed at the end of the section.

Table 4. Working Group Rosters and Meeting Dates

Working Group	Working Group Members	Meeting Dates
Closed Complaints	Shanae Buffington Sarah Good Jerry Larkin Edward Lear Steven Moawad	October 26, 2021
Discipline Costs	Ruben Duran Hon. W. Kearse McGill Ellen Pansky Sean SeLegue	November 22, 2021
Diversion	Michelle Anderson Karen Bell Shanae Buffington Alexia Mayorga Steven Moawad Ellen Pansky	November 1, 2021
Early Neutral Evaluation Conference	Edward Lear Melanie Lawrence Linda Schneider	August 23, 2021 September 29, 2021 December 8, 2021 January 19, 2022 July 8, 2022
Expungement	Michele Anderson Ray Buenaventura Sarah Good Shelan Joseph Steven Moawad Martin Winfield	August 12, 2021 October 19, 2021 January 18, 2022
Moral Turpitude	Ellen Pansky Sean SeLegue Melanie Lawrence	August 26, 2021 May 16, 2022 July 8, 2022

Working Group	Working Group Members	Meeting Dates
Progressive Discipline	Ray Buenaventura Sarah Good Shelan Joseph Steven Moawad Eloise Rosenblatt Hon. Phong Wang Martin Winfield	October 25, 2021

Note: The Early Neutral Evaluation Conference and Moral Turpitude Working Groups held a joint meeting on July 8, 2022.

DISCIPLINE COSTS

At its kickoff meeting on November 22, 2021, the Discipline Costs Working Group confirmed it would focus on costs the State Bar imposes on attorneys who go through the discipline process. In so doing, members reviewed discipline costs and monetary sanctions currently collected by the State Bar and discussed their fairness and impact on respondents. The working group met once, and the full commission addressed this topic on April 28, 2022.

Working group members questioned the fairness of the existing discipline cost structure, reflecting significant increases in costs between one-day and multi-day trials. One member noted that [Business and Professions Code section 125.3](#) allows boards within the Department of Consumer Affairs to recoup costs for investigation and minimal prefiling charges but not for costs related to going to trial. The purpose of excluding trial costs is to avoid discouraging licensees from pursuing their right to a hearing, a point that resonated with many working group members. Staff shared an analysis of 870 attorneys suspended or who received public or private reprimands between 2014 and 2016. The research showed that 11 percent failed to pay fees and/or filed a petition for relief within the original disciplinary period. The median disciplinary cost assessment for this group of attorneys was \$12,800.

The working group also reviewed [Business and Professions Code Section 6086.13](#), which requires the State Bar to adopt rules for the imposition of monetary sanctions on disciplined attorneys and the current sanction amounts. Staff confirmed that no other jurisdiction assessed sanctions in addition to disciplinary costs on its attorneys and that eliminating sanctions would require the State Bar to pursue a statutory change.

In general, members of the working group expressed widespread support for lowering discipline cost assessments and eliminating sanctions for the following reasons:

- State Bar discipline costs are much higher than those assessed by other state bars, comparable California regulatory boards, and other state attorney regulatory agencies;
- Among 16 jurisdictions surveyed, none report imposing monetary sanctions in addition to disciplinary costs, and the punitive nature of sanctions is contrary to long-standing precedent that discipline exists to protect the public, not to impose punishment;

- High costs can impact the ability of an attorney to return to practice, impeding rehabilitation;
- The current cost structure unfairly penalizes respondents for contesting charges, resulting in unfair outcomes. For instance, costs for matters that proceed to a multi-day trial are more than two times higher than costs for matters that end with a one-day trial;
- Respondents are subject to a cost assessment with no regard for proportionality. For example, if a respondent gets multiple serious charges dismissed but is convicted of one minor charge, there is no corresponding reduction in the fees assessed; State Bar Court judges do not have the discretion to lower discipline costs in matters where the respondent is successful in getting the most serious charges dismissed; and
- Costs associated with matters that proceed to the Review Department are the highest among all proceedings (\$24,695 for original matters and \$22,136 for criminal referrals in 2022). Respondents must pay total costs even if they successfully reduce the final level of discipline during the review process.

Recommendations

The full commission discussed this topic at its June 1, 2022, meeting. A staff memo with proposed recommendations and detailed discussions regarding the basis for these recommendations was distributed in advance of this meeting and is provided in Appendix C. There was widespread support among members to lower discipline costs. The commission adopted the following recommendations.

The Ad Hoc Commission on the Discipline System recommends the Board of Trustees reevaluate its current discipline cost model with a focus on reducing costs. This includes, but is not limited to, restructuring the costs structure so that attorneys are not penalized for going to trial or review and scaling fees when charges are dismissed.

The vote was as follows.

Yes: 12

No: 4

Abstain: 0

Absent: 2

The Ad Hoc Commission on the Discipline System recommends that the State Bar seek a statutory amendment to eliminate disciplinary sanctions.

The vote was as follows:

Yes: 12

No: 0

Absent: 13

EXPUNGEMENT

The Expungement Working Group met three times. At its August 12, 2021, kickoff meeting, the working group confirmed it would explore two areas: (1) the removal of discipline history from the attorney profile page; and (2) the expungement of attorney discipline records.

Removal of Discipline History from Attorney Profile Page

Working group members received a comprehensive primer on the policies and procedures surrounding discipline history on attorneys' State Bar profile page. In addition, they delved deeply into the rationale behind the State Bar's decision to post public discipline online despite not being specifically required. They also reviewed practices of other professional regulatory agencies within California and parallel practices in other states.

Based on the findings of the study on racial disparities in the discipline system, information gleaned from other states and California licensing agencies, and public comment submitted on this topic, the working group adopted a recommendation to establish the following timeframes for the automatic removal of discipline history from attorney profile pages on the State Bar website. The vote was not unanimous, and a dissenter offered an alternative set of timeframes that called for longer lengths of time. Both sets of timeframes are presented in table 5.

Table 5. Working Group and Alternative Recommendations for Attorney Discipline History Website Posting Timeframes

Type of Discipline	Working Group Proposed Timeframes	Alternative Proposed Timeframes
Private Reprimand	1 year or when conditions are met	1 year after conditions are met
Public Reprimand	3 years	6 years after conditions are met
Probation with Stayed Suspension	3 years of conclusion of probation	10 years from the conclusion of probation
Probation with Actual Suspension	5 years from reinstatement	10 years from the conclusion of probation
Disbarment	Public indefinitely (no change)	Public indefinitely (no change)

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

The full commission discussed the topic at its meetings on January 25, 2022, and April 28, 2022.

Proponents in favor of the working group's proposal argued that the proposed timeframes would:

- Begin to redress historical racial disparities in discipline;
- 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 attorneys' ability to move past already fulfilled discipline.

Proponents of the alternative set of timeframes argued that:

- The proposed timeframes offered were too short;
- The alternative timeframes better align with other California regulatory boards, falling midway between what is in place for nurses and doctors; and
- The alternative timeframes better align with large states such as Texas and Florida that limit their websites' display of discipline to 10 years.

The full commission considered these two sets of timeframes at its June 1, 2022, meeting, as summarized in the section "Recommendations Adopted" below. A staff memo with all recommended timeframes and detailed discussions regarding the basis for these recommendations was submitted to the commission in preparation for this meeting and is provided in Appendix C.

Discipline Record Expungement

The working group reviewed [Business and Professions Code section 6092.5\(e\)](#), which states the State Bar shall "Expunge the records of the State Bar as directed by the California Supreme Court." Staff confirmed there is no formal process for attorneys to petition the Supreme Court for expungement. Working group members also reviewed State Bar Rules of Procedure, rule 5.12, which allows for sealing portions of discipline records. Respondents' motions must be supported by specific facts showing that a statutory privilege or constitutionally protected interest outweighs the public interest in the proceeding. This requirement severely limits record sealing in practice. The working group also reviewed other professional regulatory agencies within California and parallel practices in other states. Staff confirmed that a recommendation to expunge attorney discipline records according to specified time frames would require rule changes.

The working group developed recommended timeframes for expungement of attorney discipline records, aligning the timeframes with those proposed for removing attorney discipline from the attorney profile page. The vote was not unanimous, and a dissenter offered

an alternative set of timeframes using the same framework. Both sets of timeframes are presented in table 6. Both proposals recommend that eligibility for expungement of the attorney record be based on no re-offenses during the period, no active investigations, and all restitution having been paid.

Table 6. Working Group and Alternative Recommendations for Expungement of Attorney Discipline Record Timeframes

Type of Discipline	Working Group Proposed Timeframes	Alternative Proposed Timeframes
Private Reprimand	1 year or when conditions are met	1 year after conditions are met
Public Reprimand	3 years	6 years after conditions are met
Probation with Stayed Suspension	3 years of conclusion of probation	10 years from the conclusion of probation
Probation with Actual Suspension	5 years from reinstatement	10 years from the conclusion of probation
Disbarment	Public indefinitely (no change)	Public indefinitely (no change)

The full commission discussed the topic at its meetings on January 25, 2022, and April 28, 2022.

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

- Address disproportionate involvement of black male attorneys 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 the website.

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

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

Recommendations

On June 1, 2022, commission members engaged in rigorous discussion about both topics, and staff provided clarity in response to questions regarding what expungement of discipline

records meant in practice. Records are not "destroyed" when expunged; however, attorneys would no longer be required to report discipline, nor would the State Bar report on expunged discipline in response to inquiries. OCTC would continue to access expunged records as they apply to the imposition of progressive discipline. Nevertheless, one member expressed concern about the impact the proposal would have on public protection, particularly in situations where attorneys have been convicted of domestic violence.

One member moved that rather than voting on each topic separately, members would vote on the two sets of timeframes, understanding that their vote would apply to both removals of discipline records from attorney website profiles and expungement of discipline records. The full commission adopted this motion.

The commission adopted the timeframes recommended by the working group. The recommendation is as follows:

The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for removal of the attorney discipline from the website attorney profile page and for expungement of attorney discipline records:

- **Private reproof: 1 year of 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)**

The votes were as follows:

Yes: 9

No: 0

Abstain: 3

Absent: 13

EARLY NEUTRAL EVALUATION CONFERENCE

The ENEC Working Group met several times to explore the ENEC process. Their discussions settled on two topics: (1) extending the deadline to transmit criminal conviction matters to allow for an ENEC; and (2) establishing timelines between subsequent ENECs. No consensus was reached among working group members regarding these issues.

Criminal Conviction Matters

Working group members reviewed [Business and Professions Code Section 6101](#), which requires OCTC to transmit criminal conviction cases to the State Bar Court Review Department within 30 days of receipt if it determines that the case may or does involve moral turpitude. This statutory timeline does not allow the sufficient time needed for an ENEC to be offered,

scheduled, and conducted before transmittal to the Review Department makes the matter public.

Working group members also reviewed data on the criminal conviction cases that OCTC learns of through Criminal Offender Record Information (CORI). These cases (referred to as "CORI cases") result from Rule of Court, rule 9.9.5, requiring all licensed attorneys to be re-fingerprinted by December 2019. In addition, the State Bar now regularly receives Subsequent Arrest Notification and Records of Arrest and Prosecution sheets from the Department of Justice. State Bar staff evaluate these RAP sheets to ensure that OCTC is aware of any criminal charges and convictions against attorneys that had not been previously reported. Before 2019, criminal conviction cases fluctuated at around 250 per year. This number increased to over 2,000 cases in 2019 and 2020 but is now on a downward trend as processing of the remaining CORI cases generated from the re-fingerprinting requirement continues with approximately 750 criminal conviction cases in 2021.

Proponents of offering an ENEC to respondents in criminal conviction cases assert that doing so would have many benefits for the respondent and the State Bar, including:

- Nearly half of all criminal conviction cases where the underlying charge was a misdemeanor resulted in non-disciplinary action, and nearly all were dismissed pre-trial.
- Allowing respondents an opportunity to present a response before the case becomes public would increase fairness in the system and save resources associated with State Bar Court trials; and
- The ENEC process provides the respondent with an early assessment of the matter and can alert them to its seriousness.

The counterview was based on the following arguments:

- CORI cases comprise the majority of criminal conviction matters transmitted to the State Bar Court in recent years but will soon become a small minority as OCTC works through the influx of cases the State Bar received in 2019 and 2020 as a result of the re-fingerprinting requirement and automated reporting of criminal convictions;
- Criminal convictions are already a matter of public record, and there are opportunities to settle cases during pretrial and even the trial phase;
- Offering ENECs in criminal conviction cases would overburden an already strained resource; and
- Modifying the criminal conviction transmittal timeline would require a legislative change. Given that the legislature extended the time to transmit criminal conviction cases from 5 to 30 days in 2019, the legislature is unlikely to extend this timeline further.¹⁰

¹⁰ [SB 176](#), Jackson (2019) extended the amount of time OCTC must transmit criminal conviction cases that involve or may involve moral turpitude from 5 days to 30 days. OCTC requested a longer timeline than 30 days.

Time Standards for ENECs

Judges may order multiple ENECs. The working group explored the possibility of establishing time standards between the first and subsequent ENECs by examining data and analyses provided by the State Bar and reviewing the various rules that govern the ENEC process.

An analysis of 442 cases filed in State Bar Court between March 2019 and October 2021 found that cases with ENECs took, on average, 659 days to file compared with 485 days for cases that did not have an ENEC. In addition, around one-third of cases with an ENEC required two sessions, and 24 percent required three or more.¹¹ The working group also reviewed an analysis of settlement rates which showed that 26 percent of all ENECs result in settlement. This settlement rate does not vary significantly by the number of ENECs held.

Proponents for establishing timelines between the initial and subsequent ENECs asserted:

- The lack of time constraints between ENECs delays the public notification of the pending charges against respondents;
- Rule 5.30 calls for the first ENEC to be held within 25 days of the notice to the respondent. This shows the intent of the Board to conduct the process quickly; and
- Multiple ENECs do not increase the likelihood of settlement.

The counter view was that multiple ENECs occur when the judge believes the settlement is possible and is in the best interests of all parties. Therefore, the State Bar should maintain judicial discretion in the ENEC process.

Recommendations

Working group members disagreed on whether or not to extend the deadline to transmit criminal conviction matters to allow for an ENEC or establishing timelines between subsequent ENECs. A staff memo with proposed recommendations and detailed discussions regarding the basis for these recommendations was distributed to the commission in preparation for its June 1, 2022, meeting and is provided in Appendix C. This memo contained additional research staff generated for the Moral Turpitude Working Group on outcomes for criminal conviction cases transmitted to the Review Department within 30 days per statutory requirements. The analysis found that 45 percent of criminal conviction cases where the underlying charge was a misdemeanor resulted in non-disciplinary action, and nearly all those cases were dismissed pretrial. Of those dismissed pretrial, more than half were dismissed by OCTC.

At its June 1, 2022, meeting, commission members engaged in a rigorous discussion regarding the recommendation to seek a statutory change that would allow time for criminal conviction matters to be resolved with an ENEC. Some members expressed concern about consumer notice delays that the ENEC process would cause, particularly concerning criminal conviction cases based on domestic violence. In addition, one member argued that criminal conviction

¹¹ Data limitations prevented an analysis of the impact of multiple ENECs on case age.

cases are not regular discipline cases and, therefore, should not be given the option to "settle" because the convicted person's guilt is not in question.

The commission adopted the following recommendation regarding criminal conviction cases on June 1, 2022:

The Ad Hoc Commission on the Discipline System recommends seeking a statutory amendment to extend the deadline for the transmission of criminal conviction matters in misdemeanor cases to allow for an Early Neutral Evaluation Conference.

The vote was as follows:

Yes: 12

No: 1

Absent: 12

Commission members engaged in an equally rigorous discussion regarding the recommendation to impose timelines on subsequent ENECs, essentially repeating the pros and cons described above. George Cardona, Chief Trial Counsel, was a meeting panelist who provided information in responses to questions about OCTC policies, practices, and procedures. He noted that all parties must agree to subsequent ENECs and shared that he felt no changes were needed. The commission voted on and ultimately did not approve the following recommendation.

The Ad Hoc Commission on the Discipline System recommends that the State Bar conduct subsequent ENECs only in cases in which the hearing judge determines that a private reproof is a likely outcome.

The vote was as follows:

Yes: 1

No: 11

Absent: 13

MORAL TURPITUDE

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](#) protects 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.¹² 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." 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 courts ([Business and Professions Code section 6101\(c\)](#)). OCTC also learns of criminal convictions through CORI as described in the section on ENECs above.

The working group also received a thorough overview of how OCTC responds to criminal convictions. OCTC's initial transmission of the certified conviction record is to the State Bar Court's Review Department.¹³ 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 on the motion of any party, may direct the Hearing Department to conduct a hearing to resolve whether the case involves moral turpitude.

¹² 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).

¹³ 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.

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:

- 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 ENEC without having an opportunity to defend themselves thoroughly;
- 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;
- 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
- Ambiguity within the State Bar rules involving referrals to ADP.

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.¹⁴ The recommendations described below were developed and considered by members of both working groups. Working group members did not reach consensus on any of these recommendations. A staff memo with proposed recommendations and detailed discussions regarding the basis for these recommendations was distributed to the commission in preparation for its August 24, 2022, meeting and is provided in Appendix C.

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.

[Will be completed after August 24, 2022, meeting. See staff memo on Moral Turpitude posted at the online meeting agenda for recommendations the commission will consider.]

¹⁴ 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.

PROGRESSIVE DISCIPLINE

At its first meeting, the Progressive Discipline Working Group confirmed that, out of concern for historical disparities in attorney discipline and lack of judicial discretion, its goal was to explore modifications to the State Bar's Rules of Procedure that outline discipline standards.

The working group reviewed Standard 1.8 which states: "If a lawyer has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust." The working group also reviewed Standard 1.5, which details aggravating circumstances, including a prior record of discipline, multiple acts of wrongdoing, a pattern of misconduct, concealment, and significant harm to the client. Finally, they reviewed Standard 1.6, which details mitigating circumstances, which include the absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to reoccur, lack of harm to a client, extreme emotional difficulties, extraordinary good character, remoteness in time of the misconduct and subsequent rehabilitation, and restitution was made without the threat of force or administrative action.

The working group discussed several modifications. One option was to modify the following clause in Standard 1.8: "[...] the sanction must be greater than the previously imposed sanction." Specifically, working group members suggested changing "must" to "may," which would allow for greater discretion when considering prior discipline. The working group also discussed additions to the mitigating factors in Standard 1.6.

Arguments in favor of amendments to Standards 1.8 and 1.6 include:

- Prior discipline may be the result of disparities in the discipline system, and changes to the standards could help reduce the impact of previous discipline disparities on current outcomes¹⁵; and
- Changes to the standards will allow for greater judicial discretion and increase fairness in the system.

Arguments against modification include:

- The Supreme Court has consistently expressed support for the standards and progressive discipline; and
- Increasing discretion may have the unintended impact of increasing discipline disparities due to implicit bias.

The working group met twice, and the full commission also discussed the topic at its January 25, 2022, meeting. Some commission members supported modifying standards, but the discussion

¹⁵ The working group reviewed an analysis of attorneys who were disbarred between 2015 and 2021. Half had no prior formal discipline and 40 percent were previously on probation. Small sample sizes and lack of racial-ethnic data on disciplined attorneys prevented drawing conclusions about any racial disparities in previous discipline among disbarred attorneys.

did not lead to specific recommendations. Similarly, the working group did not generate recommendations due to the standards' complexity and the many issues involved.

Recommendations

The full commission discussed progressive discipline at its June 1, 2022, meeting. A staff memo with detailed discussions about the standards and the working group's deliberations was distributed ahead of this meeting and is provided in Appendix C. There was widespread interest in modifying standards to allow for greater judicial discretion. However, there was also consensus that specific changes to the standards would require extensive and in-depth legal analyses beyond the commission's scope.

The commission [TBD] the following recommendation at its August 24, 2022, meeting:¹⁶

The Ad Hoc Commission recommends the State Bar Board of Trustees analyze and modify Standards 1.6 and 1.8 to permit the greater exercise of judicial discretion with regards to progressive discipline.

The vote was as follows:

Yes: ____

No: ____

Absent: ____

ATTORNEY REPRESENTATION

The Fairness Subcommittee discussed the impact lack of respondent representation has on discipline outcomes, as empirically demonstrated by the State Bar's research on racial disparities in discipline. The subcommittee requested that instead of a working group, staff update the full commission on the State Bar's efforts to increase respondent representation as recommended by Professor Robertson.

Staff developed two options for a counsel representation pilot program. Eligible participants (i.e., respondents) for both options include attorneys licensed in California who qualify for reduced license fees and undergo a formal discipline investigation by OCTC.¹⁷ Approximately 200 attorneys annually satisfy these criteria. Both options propose the use of \$250,000 in State Bar resources to provide representation to low-income respondents as a pilot program that would remain active until funds are exhausted. The funding to provide this representation would come from the State Bar's General Fund, which supports the attorney discipline system overall.

¹⁶ The commission voted on and approved this recommendation at its June 1, 2022, meeting. However, a review of the circumstances surrounding this vote indicated that the commission did not have a quorum. The vote has been invalidated and the commission will vote on this recommendation at its final meeting.

¹⁷ The 2022 threshold for reduced fees is \$60,478.35 in gross annual individual income from all sources for 2021.

Option 1: State Bar Appointed Counsel Program, Hourly Rate

Under this option, the State Bar would appoint a panel of defense counsel and compensate them at \$300 per hour, equating 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 under the State Bar Court Appointed Counsel Program.¹⁸ Members of the Association of Discipline Defense Counsel estimate, on average, ten billable hours are required for cases closed in an investigation, 35 hours for cases closed in prefiling, and 60 hours for cases closed in post-filing. The State Bar estimated that this option would serve approximately 83 attorneys annually.¹⁹

Option 2: State Bar Appointed Counsel Program, Flat Fee

Under this option, the State Bar would appoint a defense counsel panel. Participating defense counsel would offer a free one-hour consultation to eligible respondents. If a mutual agreement for representation is reached after that consultation, the State Bar would pay defense counsel a flat fee of \$3,500 per matter for full services only up to and including the ENEC. The State Bar estimated that this option would serve approximately 71 attorneys.²⁰

Recommendations

The full commission discussed the two options for attorney representation at its June 1, 2022, meeting. A staff memo with detailed descriptions of each option was distributed ahead of this meeting and is provided in Appendix C. There was widespread interest among members in adopting one of the two options. However, one member dissented and noted that no other California regulatory agency maintains an appointed counsel program of this type. In addition, members discussed the State Bar Court Appointed Counsel Program (also referred to as "6007 Court Appointed Counsel Program") that pays attorneys to represent mentally infirm respondents in proceedings and the pros and cons of hourly rates versus flat fee arrangements. As a result of these discussions, the commission generated and adopted the following recommendation:

¹⁸ In 2020 the program, whose panel is appointed and maintained by the State Bar Court, provided counsel to 12 respondents. Appointments are limited to two case types: 1) when a licensee asserts a claim of insanity or mental incompetence (Business and Professions Code 6007, subdivision (b)(1)) and, 2) when the State Bar Court finds the licensee unable to perform competently due to mental infirmity or illness (Business and Professions Code 6007, subdivision (b)(3)).

¹⁹ 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.

²⁰ The estimate of attorneys served (71) is lower than option #1 because cases closed in investigation would require approximately 10 billable hours, yet counsel would receive a flat fee of \$3,500. The majority of investigations are closed in the investigation stage.

The Ad Hoc Commission on the Discipline System recommends the Board of Trustees implement a State Bar Appointed Counsel Program based on an hourly rate structure similar to the 6007 Court Appointed Counsel Program.

The vote was as follows:

Yes: 13

No: 1

Absent: 11

CLOSED COMPLAINTS

At its kickoff meeting on October 26, 2021, the Closed Complaints Working Group confirmed its focus on OCTC's practice of not notifying attorneys of complaints it closed without discipline.

Some members questioned the fairness of this practice, given that OCTC staff may consider closed complaints that are less than five years old when evaluating new complaints. Members also noted that 13 other states notified attorneys of closed complaints. OCTC members of the working group argued that the State Bar receives over 16,000 complaints per year and expressed concern about any proposed recommendation to mandate OCTC notify attorneys of complaints received. No other state has a similar complaint volume, and significant resources would be required to inform attorneys and respond to the inevitable follow-up questions they may have. Some members expressed concern about the impact of such notifications on the attorney/client relationship. Finally, others expressed concern that attorneys would be required to report knowledge of closed complaints when applying for jobs or malpractice insurance. The meeting ended with a request for data on the complaint history of disciplined attorneys.

Due to scheduling conflicts, the working group was unable to meet again. Instead, staff presented the research requested to the entire commission at its January 25, 2022, meeting. A complaint history analysis of 373 respondents who received their first discipline for an original matter between 2018 and 2020 showed that 91 percent had at least one prior complaint closed without discipline, and 28 percent had more than 10. The vast majority (83 percent) were convicted of an offense much like one alleged in a previously dismissed complaint. For example, among all attorneys disciplined for misconduct related to client neglect/abandonment, 87 percent had received a prior complaint related to client neglect/abandonment that OCTC closed without discipline. For seven categories of misconduct analyzed, more than 50 percent of respondents had a previously closed complaint for the same misconduct for which they were disciplined.

In response to this analysis, some working group members expressed interest in exploring a recommendation for OCTC to develop a pilot program to send letters to respondents who received complaints about one of the seven misconduct categories. However, there was no consensus on the issue.

At the April 28, 2022, meeting of the full commission, Executive Director, Leah Wilson, and Chief Trial Counsel, George Cardona, updated members on a recently published [state audit report](#). They noted one recommendation called for the State Bar to send a letter with client account trust accounting resources upon closing all reportable bank matters and that OCTC had initiated work to implement this recommendation. Commission members agreed with Ms. Wilson's suggestion that the working group does not pursue recommendations related to closed complaints given that the State Bar will be reaching out to a significant portion of all attorneys subject to complaints pursuant to the recommendations of the California State Auditor.

DIVERSION

At its kickoff meeting on November 1, 2021, the Diversion Working Group confirmed its focus on understanding non-disciplinary actions. Concerned about equal access to these nonpublic measures, members requested data on participation and how this varies by race/ethnicity and gender. Unfortunately, due to scheduling conflicts, the Diversion Working Group did not meet a second time.

At the April 28, 2022, meeting of the full commission, Executive Director, Leah Wilson, and Chief Trial Counsel, George Cardona, updated members on the recently published state audit report referenced above. They noted that the audit called for the State Bar to revise policies and procedures related to nonpublic alternatives to discipline, including developing specific eligibility criteria and guidance for staff discretion. OCTC had initiated work on implementing this recommendation. Commission members agreed with Ms. Wilson's suggestion that the working group not pursue recommendations related to diversion as the State Audit addressed this issue and recommended restricting the use of nonpublic measures.

DISSENTING OPINIONS AND ALTERNATIVE RECOMMENDATIONS

APPENDIX A. AD HOC COMMISSION ON THE DISCIPLINE SYSTEM CHARTER

The Ad Hoc Commission on the Discipline System will take inventory of 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 evaluation will focus 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.

In particular, this body will:

- Review the full catalogue of reforms OCTC has implemented and identify one or more sets of processes, policies, and procedures to focus on;
- Evaluate if these processes, policies and procedures had their intended effect; and
- Based on this evaluation, recommend additional or revised reforms.

In so doing, the commission will review research studies that have been completed and determine whether additional research is needed. It will also review research studies in progress and generate policy recommendations as results become available.

Another key element of the State Bar's discipline system is the State Bar Court, which on its own initiative, also continually evaluates its processes to improve the adjudication of cases. With the participation of the State Bar Court, the commission may examine the structure of the court, principally issues involving its independence and autonomy.

As a guiding principle, the commission will focus on the dual goals of ensuring public protection and fairness in the discipline system.

Composition

The Ad Hoc Commission will consist of 19 members appointed by the Board of Trustees. Members will represent key institutional entities that focus on public protection and reflect the state's diversity, both demographic and geographic. As a guideline, below are areas from which commission members will be sought and the recommended number of members from each:

- Council on Access and Fairness (2)
- California Medical Board (1)
- Department of Consumer Affairs (1)
- California Lawyers Association (1)
- Association of Discipline Defense Counsel (2)
- National Organization of Bar Counsel (1)

- California criminal justice system (prosecutor, defense counsel, judge) (3)
- State Bar Board of Trustees (2)
- Office of Chief Trial Counsel (2)
- State Bar Court (2)
- Affinity Bar Associations (2)

The commission will be staffed by the State Bar. It will begin its work in early 2021 and present a final report on its findings and recommendations no later than June 30, 2022, with periodic status updates to be provided to the Board of Trustees.

APPENDIX B. INVENTORY OF DISCIPLINE SYSTEM INITIATIVES



The State Bar of *California*

Inventory of Discipline System Initiatives

**Prepared for the
Ad Hoc Commission on the Discipline System**

April 30, 2021

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INTRODUCTION

The following inventory lists the dozens of discipline system initiatives, policies, and procedures the State Bar has implemented over the last several years. It is organized in the following categories:

- **Fairness:** This includes initiatives that promote procedural justice, reduce disparate impact, prevent future attorney misconduct, and improve the experiences and perceptions of complaining witnesses and respondents.
- **Effectiveness:** This includes initiatives that address workload and operational efficiency.

The majority of the initiatives outlined are focused on the Office of Chief Trial Counsel (OCTC). It is the single largest division in the State Bar, comprising about half of all State Bar employees. OCTC is also the lynchpin of the discipline system. OCTC processes approximately 16,000 complaints of misconduct each year and another roughly 4,000 notifications of potential ethical violations related to criminal cases, client trust accounting, and the unauthorized practice of law. Because of its centrality to the State Bar's mission of public protection, OCTC is also the most closely scrutinized of the State Bar's divisions.

Partially as a result of this scrutiny, in recent years, OCTC has undergone numerous and significant organizational changes. Approximately half of the recommendations contained in a 2015 Bureau of State Audit report focused directly on OCTC; and 17 recommendations contained in the legislatively mandated workforce planning report of 2016 were also directed toward OCTC.¹ A 2018 discipline system workload study estimated the amount of staff resources needed to process cases through different stages of the attorney discipline process. This provided support for the State Bar's proposed licensing fee increase of 2020 to fund, in part, additional staff level for OCTC. As of this writing, a 2020 Bureau of State Audit report focused on OCTC is scheduled to be published in late April 2021. Finally, it should be noted that some of the most significant changes in OCTC in recent years were initiated by OCTC leadership in their ongoing efforts to streamline operations and ensure that the State Bar fulfills its public protection mandate.

FAIRNESS

Improved Access to the Complaint Process

Online Complaint Portal. OCTC launched an online complaint portal, allowing complaining witnesses to file complaints electronically, rather than on paper via mail in both English and Spanish. For approximately 10 months afterwards, OCTC saw a significant increase in the number of complaints received overall. Four additional languages (Vietnamese, Korean,

¹ See California State Auditor Report, 2015-030, "State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability," <https://www.bsa.ca.gov/pdfs/reports/2015-030.pdf>; also see "State Bar of California Workforce Planning: Report to the Office of the Executive Director," May 10, 2016, http://www.calbar.ca.gov/Portals/0/documents/reports/2016_Workforce_Planning_Report_May_15.pdf

Russian, and Chinese) were added to the system in 2019 to further expand access to complaining witnesses in their preferred language. (2018)

Multilingual Communication. To increase access to the attorney discipline system and to avoid undue delay of cases involving people who would prefer to communicate in a language other than English, OCTC had the Complaint Acknowledgement Letter and several informational letters translated into the 10 most common languages spoken in California (English, Arabic, Chinese, Farsi, Hindi, Korean, Russian, Spanish, Tagalog, and Vietnamese). This change has eliminated a 10-day delay in each case requiring translation. OCTC translated several informational letters sent at the initial stage of the investigation and whenever a case is reassigned. OCTC also developed new procedures to ensure that complaining witnesses are communicated with in their preferred language. (2019-2020)

Complaining Witnesses in Custody. OCTC engaged with a third-party communications company to facilitate collect calls from complaining witnesses who are in custody. Doing so eliminates the need to interview complaining witnesses via written format, a process that caused delay because of the need to mail questions and responses. Interviews are now completed in a more expeditious manner. (2018)

Complaint Review Unit. In 2016, Rule 2603 of the Rules of Procedure of the State Bar of California was amended to delegate to Office of General Counsel the “second look” function that had previously been completed by OCTC staff. This amendment was sought upon the recommendation of the State Auditor in 2015. Complainants are entitled to request that the State Bar Office of General Counsel’s (OGC) Complaint Review Unit (CRU) review OCTC’s decisions to close a case. If CRU finds that the case was not closed properly, or if it the complaining witness presents new evidence, it will refer the complaint back to OCTC with a recommendation that it be reopened for investigation. While the recommendation to transfer this function to OGC was made in order to make the review process more independent, it also had the practical effect of freeing up OCTC resources to dedicate to case processing.

Targeted Services and Outreach to Vulnerable Populations

Unauthorized Practice of Law by Non Attorneys. A nonattorney could be someone who has never been a licensed attorney, was formerly a California licensed attorney, or an attorney licensed in another state, but not in California. OCTC formed a specialized team dedicated to the investigation of complaints related to the unauthorized practice of law by nonattorneys (NA/UPL), a problem that often impacts vulnerable communities, including immigrants. OCTC did so in response to concerns from stakeholders who expressed concern that the Office was not adequately addressing the issue. Since then, the team has streamlined its work and processes, including referring matters to law enforcement for criminal action early and prioritizing cases that pose the most significant public protection concerns. NA/UPL cases do not impact the count of statutory backlog; as such, additional resources to support the NA/UPL team were not included in the recent State Bar licensing fee increase. (2016)

Immigration Law Cases. OCTC established a team on a pilot basis to primarily handle cases implicating the practice of Immigration Law. Because Immigration Law is particularly complicated, OCTC hopes that dedicating staff with expertise in the area will improve efficiency in handling these cases. The pilot team consists of two attorneys whose caseloads comprise cases wherein the alleged misconduct in the context of an Immigration case or where the misconduct implicates the immigration status of a client. These attorneys will oversee the investigations of those complaints, prepare cases for filing and present cases at trial. (2020)

To speed up the process of obtaining the privacy waivers required to receive immigration records, in 2020 OCTC created an immigration-specific assignment letter, available in many languages, which requests that complainants provide the waiver as soon as their case is assigned. Getting the privacy waivers out at the earliest opportunity reduces the time spent waiting for files from U.S. Citizenship and Immigration Services and the Executive Office for Immigration Review, a period which can sometimes be as long as six months or more.

Complaining Witness and Respondent Feedback

Complaining Witness Survey. The State Bar offers complaining witnesses (CW) the opportunity to share information about their experience filing a complaint via an online survey. The purpose of this survey is to assess CW's views of the State Bar's discipline system's accessibility and fairness. Complaining witnesses are invited to participate in a survey via a letter they receive that describes the outcome of their complaint. Those with email addresses are invited to participate via email. CW are asked, "Please tell us about your experience with how the State Bar handled your complaint, by indicating how strongly you agree or disagree with each of the following statements" using a five point scale where 1=strongly disagree and 5 = strongly agree. Examples of questions pertaining to access include, (1) It was easy to find the complaint form on the State Bar's website, (2) The instructions and information on the website about filing a complaint were clear and easy to understand. Examples of questions pertaining to access include, (1) The communication from the State Bar addressed the issues raised in my complaint, even if I did not agree with the decision to close my case, (2) The communication from the State Bar addressed the issues raised in my complaint, even if I did not agree with the decision to close my case. In 2020, over 1,200 CWs responded to the survey.

Closing Calls to Complaining Witnesses. Prior to mid-2020, OCTC required that staff call a complaining witness upon closure of any investigation. That call was in addition to a required detailed closing letter staff draft and send to the complaining witness. Seeking to reduce a redundancy in order to more efficiently resolve cases, OCTC participated in an experiment in order to determine what, if any effect, eliminating the closing call had on a complaining witness' perception that OCTC was accessible and fair. At the conclusion of the experiment, results indicated that the perception was impacted, but not in a statistically significant manner such that the impact did not militate against adoption of a new policy. Thus, staff is no longer required to place calls in all cases. OCTC still requires calls in some cases, including those in which the complaining witness is in a vulnerable category and detailed closing letters are still required in all cases.

Respondent Survey. In late 2019, the State Bar distributed a short survey to respondents who were recently disciplined by reproof or probation. The purpose of this survey is to assess respondents' views of the State Bar's discipline system's accessibility and fairness. Respondents were asked, "Please tell us about your experience with how the State Bar handled your case, with respect to the Office of Chief Trial Counsel and the State Bar Court separately, by indicating how strongly you agree or disagree with each of the following statements" using a five point scale where 1=strongly disagree and 5 = strongly agree. Examples of survey items include, (1) I was given the opportunity to provide or present the necessary information before decisions were made about the matter, (2) I was treated with courtesy and respect, (3) Communications about the process and outcome of the case were clear to me. (4) My case was resolved in a reasonable amount of time, (5) I understand the outcome of the case.

Following the advice from the Office of General Counsel, distribution of the survey was divided into two groups according to whether the respondents had been represented by counsel in their discipline proceedings. The survey was emailed directly to those without counsel; for those represented by counsel, the survey was emailed to their counsel, with the request that they forward the survey to their clients. A total of 46 surveys were distributed to respondents without counsel, and 11 responses were received, with a response rate of 24 percent. For those represented by counsel, 50 surveys were distributed and 3 responses were received, at a rate of 6 percent. Due to the small number of response cases, especially for those represented by counsel, this project was put on hold. The State Bar is currently exploring alternative ways to receive feedback from respondents including interviews and focus groups.

Addressing Racial Disparities in Attorney Discipline

In 2019, the State Bar initiated a statistical analysis of complaints and discipline against attorneys admitted to the Bar between 1990 and 2009. Conducted by Professor George Farkas, Distinguished Professor in the School of Education at the University of California, Irvine, the analysis sought to determine whether there is disproportionate representation of nonwhite attorneys in the attorney discipline system and, if so, to understand its origins, and take corrective action. The findings, documented in a report to the Board of Trustees in November 2019, included the following

- Without controlling for any other factors, there was disproportionate discipline against Black, male attorneys, who 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.²
- Using multiple regression analysis to introduce control variables into the evaluation, the study found that the factors that were correlated with race and were statistically significant predictors of discipline included:
 - Number of prior complaints. Discipline disparities between Black and white male attorneys are explained in part by a higher number of complaints against Black attorneys.
 - Rates of counsel representation. Black, male attorneys have a lower likelihood of being represented by defense counsel during the investigation stage and during State Bar Court discipline proceedings.

The State Bar invited Professor Christopher Robertson, N. Neal Pike Scholar and Professor at the School of Law of Boston University, and Visiting Scholar and Special Advisor at the James E. Rogers College of Law of the University of Arizona, to explore possible remedies to address these findings. Professor Robertson met with OCTC staff and leadership, conducted focus group interviews, and reviewed documents related to OCTC process and policy. In July 2020, Professor Robertson presented an interim report which focused on thirteen potential reforms across three broad areas: (1) client trust fund accounting, (2) the treatment of prior complaints and discipline history, and (3) securing legal representation for those facing discipline. Since then, the State Bar has implemented several of these reforms, summarized in table 1.

² The study also identified disparities between Hispanic and white and between Black and Hispanic females and their white counterparts, but the State Bar focused on the disparity between Black and white males as it was the largest.

Table 1. Racial Disparities Study: Results, Recommendation, and Implementation

Study Finding	Recommendation	Implementation
The number of prior complaints is a strong predictor of discipline. Almost half (46 percent) of all Black male attorneys had at least one complaint filed against them and 12 percent had 10 or more complaints. In contrast, 32 percent of white male attorneys had at least one complaint filed against them and 4 percent had 10 or more complaints.	Shield decision-makers from complaints more than five years old that were closed without discipline by expunging complaints or, alternatively, archiving complaints closed without discipline after five years.	In late 2020, the State Bar archived nearly 400,000 cases of all types and origins that were more than five years old and were closed without discipline (excluding the issuance of warning, directional, or resource letters). Archiving complaints removes them from the view of Intake staff when they assess the merits of a new complaint.
Among attorneys with a large number of complaints against them, Black male attorneys had, on average, 6.8 Reportable Action Bank cases while white male attorneys had 3.7. ³	Explore proactive, preventive options for attorneys who experience low-level Reportable Action Bank matters that also ensure public protection is not compromised.	OCTC modified the four letters it sends attorneys in response to notices from banks of insufficient funds in a client trust account. The new letters provide a comprehensive list of resources and warning language regarding the risk of discipline. Approximately 800 attorneys will receive this letter annually.

³ Reportable Action Bank cases are initiated when a bank reports insufficient funds activity in an attorney's client trust account as required under Business and Professions Code section 6091.1.

Table 1. Racial Disparities Study: Results, Recommendation, and Implementation (continued)

Study Finding	Recommendation	Implementation
The proportion of investigations in which attorneys were not represented by counsel is a strong predictor of discipline. Black respondents were less likely to be represented by counsel when facing a disciplinary investigation by the State Bar compared with white attorneys.	(1) Track and report rates of representation in the discipline system as a key performance indicator. (2) Inform attorneys facing discipline about the statistical likelihood of probation or disbarment if they fail to secure counsel.	<p>Staff operationalized a metric “Percent of Respondents that Retain Representation” that will be based on closed cases of all types that reached the investigation stage or a later stage. Staff will report this metric quarterly, beginning in March 2021 with the 2019 value (14 percent) serving as its baseline.</p> <p>Staff developed a one-page flyer for respondents that includes a link to the membership directory of the Association of Discipline Defense Counsel Association (ADDC) and advises them of the importance of securing counsel. To test whether receiving this flyer has an impact on respondents securing counsel, respondents have been randomly assigned to two groups and only one receives the flyer when they are notified that OCTC has opened an investigation. Staff will evaluate the impact of the flyer on counsel retention approximately three to five months following the program’s launch, depending on the sample size available; the flyer may be adjusted accordingly, based on the findings, and distributed to all respondents.</p>

EFFECTIVENESS

Case Processing

Case Prioritization System. In 2018 OCTC implemented a case prioritization system with Board of Trustees approval. Instead of just working the oldest cases first, regardless of the public protection risk, OCTC now prioritizes the cases posing the most significant public protection risks first, regardless of age. In addition, OCTC identifies cases that likely, with a little work, can resolve quickly. Those cases are assigned to expeditor teams, who work only those cases. In these “expedited” cases, OCTC has eliminated a number of processes required in other cases (for example, no investigation plan is necessary), to expedite case processing. The practical effect of expediting teams is the movement of some cases faster, and the reduction of caseloads for others working higher priority cases.

Modernized Case Management System and Online Complaint Portal. In 2019 OCTC converted from a years-old DOS based case record system to a new case management system, “Odyssey.” Odyssey has allowed OCTC to move from maintaining paper files to maintaining and utilizing files electronically. Doing so has increased efficiencies in that multiple staff members can work files at the same time and tasks are “moved” electronically to staff without the added need to wait for the receipt of a paper file. Some efficiency has been lost, however, in that moving within the electronic file is slowed because doing so requires multiple “clicks.” In addition, OCTC is capturing significantly more data per file, requiring more staff resources for data input. In August 2020, OCTC integrated the online complaint portal with the case management system so that, after verification, complaints submitted, including attachments, are automatically uploaded to the case management system and a new case is opened. This eliminates the need for staff to manually enter data for complaints submitted on-line.

Changes in OCTC Supervisors, Teams, and Administrative Functions

- In 2016 OCTC moved the “worker-team” from Intake to Enforcement. That team, which had been assigned to Intake for years, was comprised of attorneys and complaint analysts (a classification no longer used), who would “work” lower-level complaints with the goal of resolving them before having to send them to Enforcement. While a number of those complaints were able to be resolved without moving them to Enforcement, in some instances, the cases were not resolved and were then forwarded to Enforcement. However, by the time the cases were moved to Enforcement, they were already aged—some so much so they were already nearing backlog. The change meant that cases were not held and “worked” in Intake but rather, assigned like all other cases, to the team in Enforcement. In implementing Workforce Planning recommendations, OCTC dissolved the specialized “worker-team” entirely and deployed the staff among the Enforcement teams. Doing so did slow the movement of lower-level cases in Intake because they became subject to many of the same processes as other cases that moved to investigations. The adoption of the case prioritization system in 2018 eliminated many of those processes in lower-level cases and has brought greater efficiency to handling those cases. (2016)

- OCTC re-organized into a vertical team structure with supervising attorneys, a newly created classification, responsible for a team of attorneys, investigators, and support staff, de-centralizing previously centralized investigative and administrative functions. Supervising attorneys were empowered to approve charging and resolution decisions. While making this change improved efficiencies in some respects, the change necessarily required OCTC to move senior staff into supervisor positions and away from carrying full-caseloads thereby reducing resources for case processing. The downside to this change was the need to divert staff that otherwise would be processing cases to new supervisory roles. (2017)
- In 2017 OCTC fully staffed a training and calibration team in order to formalize and improve training for all levels of staff. By doing so, OCTC was able to streamline the onboarding of new staff and improve the quality and consistency of the work of existing staff. (2017)

Policies and Procedures that Improve Efficiency

- OCTC began requesting that financial records be provided in an electronic format when subpoenaed during an investigation, and in 2018, purchased software to scan paper and electronic financial records to pull out transactions and expedite fund tracing exercises involving voluminous records. Prior to this, financial records were catalogued by staff manually. (2017-2018)
- OCTC sought approval from the Board of Trustees to update the Rules of Procedure of the State Bar to permit electronic service, the use of electronic signatures, and the exchange and lodging of electronic trial exhibits. This proposed rule was approved in September 2020.
- OCTC sought amendments to Rule 2409 of the Rules of Procedure of the State Bar of California to eliminate delays caused by mailing letters to respondents which describe allegations and requests a response, to allow posting of those letters to the My State Bar Profile page of the respondent attorney. This reduces the amount of time OCTC staff would otherwise wait, due to communication via the U.S. Postal service. (2018)
- OCTC sought a change to Rule 5.140 of the Rules of Procedure of the State Bar of California allowing the court to take judicial notice of noncertified court records. Prior to the rule change, OCTC secured certified court records to ensure admissibility at trial. OCTC was charged for doing so and at times, the cost would be significant. In addition, cases could be delayed from moving forward, while staff waited for receipt of those records. The rule now expressly authorizes the court to take judicial notice of noncertified records, which are often times, easily accessible online. (2018)
- In 2018 OCTC sought amendments to Rule 5.21 of the Rules of Procedure of the State Bar of California to toll the rule of limitations when an attorney is on inactive status

pursuant to Business and Professions Code section 6007(a) or (b). Many of these attorneys are unlikely to return to practice, but prior to the amendment, OCTC policy required quarterly written status reports on each case in the inventory that was suspended due to the attorney's incapacity. Similarly, State Bar Court conducted periodic status conferences on filed cases that were suspended due to the attorney's incapacity. The practical effect of the amendment is to allow OCTC to move to dismiss filed matters and to close suspended matters, where attorneys are enrolled under one of these subsections, and where it is more likely than not that the attorney will never return to practice. At the same time, if the attorney does return to practice, OCTC is not limited by the rule of limitations, to re-file charges. Many of the cases that were in OCTC's inventory because of the inactive enrollments, were in backlog. (2018)

- OCTC eliminated an office policy prohibiting nolo contendere pleas—often cited by members of the defense bar as a barrier to the efficient resolution of cases. (2018)

Discipline System Metrics. The Board of Trustees adopted discipline system metrics in September 2018. These metrics were developed, in part, in response to the State Auditor's recommendation in its 2017 report that the State Bar "identify key goals and metrics to measure how well its attorney discipline system is meeting the State Bar's core mission to protect the public from attorney misconduct."⁴ In support of this recommendation, the State Bar's initial five-year strategic plan for 2017-2022 included the following goal: "Develop and implement transparent and accurate reporting and tracking of the health and efficacy of the discipline system," which specifically includes the "development of new metrics for measuring the effectiveness of the discipline system including any needed revisions to the statutory backlog metric." Specific metrics were developed for each operational area of the discipline system, which include:

- Office of Chief Trial Counsel;
- State Bar Court;
- Office of Probation;
- Alternative Discipline Program (ADP) of the Lawyer Assistance Program (LAP); and
- Client Security Fund (CSF).

Most metrics include targets for accountability purposes. All metrics are tracked regularly; depending on the metric, reporting frequency varies between monthly, quarterly, semiannually, or annually. Metric results are reported to the Board of Trustees at each of their bimonthly meetings.

Recivism. The State Bar regularly analyzes post-disposition recivism among respondents who receive one of four types of dispositions: resource letter, warning letter, reproof (both public or private), and probation. Four outcomes are analyzed: (1) new complaint received, (2) new complaint investigated, (3) new case filed with State Bar Court, and, (4) discipline imposed.

⁴ California State Auditor. *Report 2017-30, The State Bar of California: It Needs Additional Revisions to its Expense Policies to Ensure That it Uses Funds Prudently*. June 2017. <https://www.bsa.ca.gov/pdfs/reports/2017-030.pdf>

Disciplines include: participation in the Alternative Discipline Program, reproof, probation, or disbarment. All complaint types are considered, including probation violations. Finally, recidivism is analyzed at 6, 12, 24, and 36 months post-disposition.

APPENDIX C. STAFF MEMOS TO THE AD HOC COMMISSION



The State Bar *of California*

AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

Date: June 1, 2022

To: Members, Ad Hoc Commission on the Discipline System

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

Subject: Adoption of Discipline Costs and Sanctions 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 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 four-member Discipline Costs Working Group reviewed discipline costs and sanctions currently collected by the State Bar and examined their fairness and impact on respondents. Due to scheduling conflicts, the working group did not develop recommendations. Instead, the full AHCDS discussed the topic on April 28, 2022. At that time members expressed concern about the high discipline costs respondents incur. The recommendations that follow are reflective of that discussion.

RECOMMENDATIONS

The working group and AHCDs discussed two types of costs imposed on respondents: discipline costs and monetary sanctions. The narrative below provides background on each and proposed recommendations for the Ad Hoc Commission's consideration.

COSTS ASSOCIATED WITH DISCIPLINE

In 1986, the Legislature authorized the State Bar to collect costs associated with disciplinary investigation and proceedings. [Business and Professions Code Section 6086.10](#) requires the State Bar to impose costs on disciplined attorneys for various expenses including the "reasonable costs" of investigation, hearing, and review. The Board of Trustees has the authority to define "reasonable costs"; it is not defined in statute. The State Bar's current cost structure is based on a discipline costs study conducted in 2010 by consulting firm Hilton, Farnkopf & Hobson. Costs are updated annually to increase with inflation as recommended by this study.

The current disciplinary cost structure can be found on the [State Bar Court's website](#). Discipline costs range from \$3,693 for original matters that settle prior to the filing of disciplinary charges to \$24,695 for original matters that proceed to the review department after trial. Costs recovered reimburse the general fund to offset the cost of discipline and the 2022 budget for discipline costs to be collected was \$1.5 million. 2022 budgeted expenses for the Office of Chief Trial Counsel and State Bar Court totaled \$75.8 million; discipline costs recovered comprise 1.9 percent of budgeted expenses.

Attorneys who do not pay their discipline costs have their license to practice suspended until the outstanding costs are paid. Statute allows for relief of costs in very narrow circumstances, with most of the relief resulting in an extension of time to pay rather than a reduction in costs. An analysis of 870 attorneys who were suspended or received a public or private reproof between 2014 and 2016 found that 11 percent failed to pay fees and/or filed a petition for relief within the original disciplinary period. The median disciplinary cost associated with this group of attorneys was \$12,800.

A survey of 16 other states found that most states assessed minimal costs, \$3,000 or less, and two states collected no costs at all. [Business and Professions Code section 125.3](#) allows boards within the Department of Consumer Affairs to recoup costs for investigation and minimal pre-filing charges but not for costs related to going to trial. The purpose of excluding trial costs is to avoid discouraging licensees from pursuing their right to a hearing.

The AHCDs expressed support for lowering discipline costs at its April 28, 2022, meeting, based on the following:

- State Bar discipline costs are much higher than those assessed by other state bars, comparable California regulatory boards, and other state attorney regulatory agencies;
- High costs can impact the ability of an attorney to return to practice;
- Costs for matters that proceed to a multi-day trial are more than two times higher than costs for matters that end with a one-day trial;
- Respondents are subject to all costs regardless of outcome. For example, if a respondent gets multiple serious charges dismissed but is convicted of one minor charge, there is no corresponding reduction in the fees assessed; State Bar Court judges do not have the discretion to lower discipline costs in matters where the respondent is successful in getting most charges dismissed; and
- Costs associated with matters that proceed to the Review Department are the highest among all proceedings (\$24,695 for original matters and \$22,136 for criminal referrals in 2022). Respondents must pay full costs even if they are successful at reducing the final level discipline during the review process.

With the foregoing in mind, the Ad Hoc Commission is asked to consider the following recommendation:

The Ad Hoc Commission on the Discipline System recommends the Board of Trustees reevaluate its current discipline cost model with a focus on reducing costs. This includes, but is not limited to, restructuring the costs structure so that attorneys are not penalized for going to trial and scaling fees when charges are dismissed.

MONETARY SANCTIONS

Business and Professions Code section 6086.13 requires the State Bar to adopt rules setting for the guidelines for the imposition of monetary sanctions on disciplined attorneys. These rules were adopted and enacted in April 2020. Monetary sanctions collected go directly to the Client Security Fund (CSF), a fund that reimburses clients who have lost money or property due to attorney misconduct. CSF received \$17,000 in sanctions related revenue in 2021 and \$25,000 through the first quarter of 2022; the 2022 CSF budget totals \$8.5 million. Based on projected revenue of \$100,000, the amount received through sanctions will be equivalent to 1.1 percent of the 2022 CSF budget.

The rules provide for sanction recommendations in the follow amounts:

- \$5,000 sanction for disbarment;
- \$2,500 for actual suspension; and
- \$1,000 for resignation with charges pending.

The State Bar Court can increase these recommended amounts up to the statutory limit of \$5,000 per violation and \$50,000 per disciplinary order based on the facts and circumstances of

each discipline case. Eliminating sanctions altogether would require a statutory change. No other state bar appears to assess sanctions in addition to disciplinary costs.

Given that discipline costs alone are high relative to those imposed by comparable agencies, the imposition of sanctions may compound an already overly burdensome set of financial penalties levied on respondents. As such the Ad Hoc Commission is asked to consider the following recommendation:

The Ad Hoc Commission on the Discipline System recommends that the State Bar seek a statutory amendment to eliminate disciplinary sanctions.



The State Bar *of California*

AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

Date: June 1, 2022

To: Members, Ad Hoc Commission on the Discipline System

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

Subject: Adoption of Early Neutral Evaluation Conference 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 come up with recommendations to be reviewed by the full commission. The four-member Early Neutral Evaluation Conference (ENEC) Working Group was tasked with reviewing the ENEC process and determining whether changes in that process could be made to improve fairness or efficiency. With respect to fairness, the working group looked at whether changes could be made to allow for an ENEC in criminal conviction cases. With respect to efficiency, the working group examined whether there should be time standards established between the first and subsequent ENECs. No consensus was reached among working group members regarding these issues.

BACKGROUND

The narrative below gives background information on topics explored by the working group.

EARLY NEUTRAL EVALUATION CONFERENCE

The Early Neutral Evaluation Conference (ENEC) is a settlement conference held prior to the Office of Chief Trial's (OCTC) filing of Notice of Disciplinary Charges (NDC). [State Bar Rule of Procedure 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.

An analysis of 442 cases filed in State Bar Court between March 2019 through October 2021 found that cases that had an ENECs took, on average, 659 days to file compared with 485 days for cases that did not have an ENEC. Around one third of cases that had an ENEC required two sessions and 24 percent required three or more.¹

More information on ENECs can be found [here](#).

CRIMINAL CONVICTION MATTERS

OCTC receives notices of criminal conviction matters from attorneys ([Business and Professions code 6068\(o\)\(4\), \(5\)](#)), prosecutors ([Business and Professions code 6101\(b\)](#)), and courts ([Business and Professions code 6101\(c\)](#)).² OCTC also learns of criminal conviction through Criminal Offender Record Information (CORI). 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 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.

OCTC has 30 days to transmit criminal conviction cases to the State Bar Court Review Department if it determines that the case may or does involve moral turpitude.³ Transmittal to the Review Department makes the case public. In criminal conviction cases with a misdemeanor conviction involving moral turpitude the Review Department, on its own motion or on the motion of any party, may direct the Hearing Department to conduct a hearing to resolve whether the case involves moral turpitude.

¹ Data limitations prevented an analysis of the impact of multiple ENECs on case age.

² For example, [Business and Professions code 6101\(c\)](#) instructs clerks of courts in which an attorney is convicted of a crime to send the conviction to OCTC within 48 hours of the conviction.

³ [SB 176](#), Jackson (2019) extended the amount of time OCTC has to transmit criminal conviction cases that involve or may involve moral turpitude from 5 days to 30 days.

An analysis of criminal conviction cases transmitted to State Bar Court between March 3, 2019, and February 28, 2022, found that the majority of cases transmitted were CORI cases and nearly all of these cases were based on misdemeanor convictions. In contrast, 29 percent of non-CORI criminal conviction cases were based on felony convictions. The analysis also found that 45 percent of cases where the underlying charge was a misdemeanor resulted in non-disciplinary action and nearly all of those cases were dismissed pre-trial. Of those dismissed pretrial, more than half were dismissed by OCTC.⁴

RECOMMENDATIONS

The working group met several times to explore the ENEC process. Their discussions settled on two topics: 1) extending the deadline to transmit criminal conviction matters in misdemeanor case to allow for an ENEC and, 2) establishing timelines between subsequent ENECS. No consensus was reached among working group members regarding the following recommendations.

The Ad Hoc Commission on the Discipline System recommends seeking a statutory amendment to extend the deadline for the transmission of criminal conviction matters in misdemeanor cases to allow for an Early Neutral Evaluation Conference.

Proponents of offering an ENEC to respondents in criminal conviction cases state that doing so would have many benefits for the respondent and the State Bar including:

- The current process does not allow for criminal conviction cases to be resolved prior to the notification of the public, even in cases where the case ultimately results in non-disciplinary action or the ultimate discipline is a private reproof. Allowing respondents an opportunity to present a response to the allegation that a misdemeanor conviction involves moral turpitude prior to the case becoming public would increase fairness in the system and save resources;
- The ENEC process provides the respondent with an early assessment of the matter and can alert them to its seriousness; and
- Research found that nearly half of all criminal conviction cases where the underlying charge was a misdemeanor resulted in non-disciplinary action and nearly all were dismissed pre-trial.

The counter view is based on the following arguments:

- CORI cases comprise the majority of criminal conviction matters transmitted to the State Bar Court in recent years and will soon become a small minority as OCTC works through the influx of cases the State Bar received in 2019 and 2020 as a result of the re-fingerprinting requirement and automated reporting of criminal convictions;

⁴ In contrast, only 5 percent of cases where the underlying charge was a felony resulted in non-disciplinary action.

- The analysis described above found that 80 percent of non-CORI cases result in public discipline. Allowing respondents to resolve criminal conviction cases with an ENEC would delay public notification of attorney criminal convictions, thus compromising public protection;
- Criminal convictions are already a matter of public record and there are opportunities to settle cases during pre-trial and even the trial phase;
- Offering ENECs in criminal conviction cases would overburden an already strained resource; and
- Modifying the criminal conviction transmittal timeline would require a legislative change. Given the 2019 extension of time to transmit criminal conviction cases from 5 to 30 days, the legislature is unlikely to extend this timeline further.

The Ad Hoc Commission on the Discipline System recommends that the State Bar establish timelines for subsequent Early Neutral Evaluation Conferences.

Proponents for establishing timelines between the initial and subsequent ENEC's seek to address the lack of time constraints between multiple conferences. They assert:

- The lack of time constraints delays the public notification of the pending charges against respondents;
- Rule 5.30 calls for the first ENEC to be held within 25 days of the notice to the respondent. This shows Board intent to conduct the process quickly; and
- Multiple ENECs do not increase the likelihood of settlement. Overall, 26 percent of all ENECs result in settlement; this does not vary much by the number of conferences held.

The counterview is that multiple ENECs occur when the judge believes settlement is possible and is in the best interests of all parties. Therefore, judicial discretion in the ENEC process must be maintained.



The State Bar *of California*

AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

Date: June 1, 2022

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 reprovals 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.



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.



The State Bar *of California*

AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

Date: June 1, 2022

To: Members, Ad Hoc Commission on the Discipline System

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

Subject: Adoption of Progressive Discipline 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 come up with recommendations to be reviewed by the full commission. The fairness subcommittee reviewed the **Standards for Attorney Sanctions** (“progressive discipline”) and recommended the formation of the progressive discipline working group to review discipline standards and the impact of prior discipline. The six-member working group did not develop any recommendations.

BACKGROUND

Prior to the progressive discipline working group’s formation, 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. Counsel representation, firm size, and rates of complaints all contributed to the disparities in the system.¹

This research motivated the interest in exploring modification of the Standards for Attorney Sanctions (referred to as “progressive discipline” informally) as a remedy to historical disparities in attorney discipline.

PROGRESSIVE DISCIPLINE

[Standard 1.8](#) of the State Bar California Rules of Procedure states that “If a lawyer has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust.” The rationale for progressive discipline is that a prior record of discipline is a significant aggravating factor in determining the appropriate level of discipline. The Supreme Court has held that the degree of discipline imposed must be sufficient to deter future wrongdoing by the respondent.² These standards were adopted by the Board of Trustees to establish the means to determine the level of discipline and ensure consistency in discipline proceedings.³

The working group reviewed standard 1.5 which details aggravating circumstances; these circumstances include a prior record of discipline, multiple acts of wrongdoing, a pattern of misconduct, concealment, and significant harm to the client. Standard 1.6 details mitigating circumstances, which include absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to reoccur, lack of harm to a client, extreme emotional difficulties, extraordinary good character, remoteness in time of the misconduct and subsequent rehabilitation, and restitution was made without threat of force or administrative action.

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.

² *In re Morse* (1995) 11 Cal.4th 184, 210

³ Standard 1.1 states “The Standards are based on the State Bar Act, the published opinions of the Review Department of the State Bar Court, and the longstanding decisions of the California Supreme Court, which maintains inherent and plenary authority over the practice of law in California.”

RECOMMENDATIONS

The working group discussed modifying the standards. One suggestion was to change the language in standard 1.8 in the following clause: “must be greater than the previously imposed sanction”. Specifically, working group members suggested changing “must” to “may” to allow for discretion when considering prior discipline. The working group also discussed additions to standard 1.6 mitigating factors.

Arguments in favor of amendments to standards 1.8 and 1.6 include:

- Prior discipline may be the result of disparities in the discipline system and changes to the standards could help reduce the impact of prior disparities on current outcomes⁴; and
- Changes to the standards will allow for greater judicial discretion and increase fairness in the system.

Arguments against modification include:

- The Supreme Court has consistently expressed support for the standards and progressive discipline; and
- Increasing discretion as to whether or not to consider prior discipline may have the unintended impact of increasing disparities in the system due to implicit bias.

The working group met twice, and the full AHCDs also discussed the topic at its January 25, 2022, meeting. Some members of the full commission supported modifying standards, but the discussion did not lead to specific recommendations. Due to the standards’ complexity and the multitude of issues involved, the working group did not generate recommendations.

⁴ The working group reviewed an analysis of attorneys who were disbarred between 2015 and 2021. Half had no prior formal discipline and 40 percent were previously on probation. Small sample sizes and lack of racial-ethnic data on disciplined attorneys prevented drawing conclusions about any racial disparities in previous discipline among disbarred attorneys.



The State Bar *of California*

AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

Date: June 1, 2022

To: Members, Ad Hoc Commission on the Discipline System

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

Subject: Discussion and Adoption of Attorney Representation Recommendations

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).¹

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.²

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.

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

² 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.