



*The State Bar of California*

# **Ad Hoc Commission on the Discipline System: Final Report and Recommendations**

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Board of Trustees, September 22, 2022



# Commission's Charge



**Take Inventory of Discipline System Reforms**



**Evaluate Impact**

- Have these policies had their intended impact?
- What has been the impact on public protection?
- Review existing studies and commission new studies



**Recommend Additional or Revised Reforms**



# How the Commission did its work

## Received comprehensive presentations from State Bar staff

- Initiatives, policies, procedures
- State Bar implementation of reforms meant to address racial disparities
- State Bar plans to address recommendations of 2022 audit and Committee on Special Audit

## Commissioned new empirical analyses

## Reviewed practices of other California regulatory agencies

## Reviewed practices of other jurisdictions



# Recommendations Adopted





# Discipline Costs

## Background

Business and Professions Code section 6086.10 instructs the State Bar to recover costs associated with disciplinary investigation and court proceedings. The State Bar determines exact costs.

Business and Professions Code section 6086.13 requires the State Bar to adopt rules to impose monetary sanctions on disciplined attorneys.

## Issues Raised

- State Bar discipline costs are higher than those assessed by other state bars and comparable California regulatory boards
- No other jurisdiction reports imposing monetary sanctions in addition to disciplinary costs
- High costs can impact the ability of an attorney to return to practice, impeding rehabilitation
- Attorneys are unfairly penalized for contesting charges. For example, costs for one-day trials are more than two times higher than costs for matters that settle prior to filing of an NDC.



## Recommendation Adopted

- ✓ Reevaluate the 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.
- ✓ Seek a statutory amendment to eliminate disciplinary sanctions.





# Attorney Discipline on State Bar Website

## Background

Business and Professions Code section 6094.5(f) requires that the State Bar provides the public with attorney discipline records.

The State Bar has chosen to facilitate public access to attorney discipline records by posting attorney's public discipline history on licensee's profile pages of State Bar website.

## Issues Raised

- There is no statutory or rule requirement for posting on the State Bar website.
- There is no time limit for how long such information is posted, unlike the Medical Board of California. Information is posted in perpetuity.
- Lack of time limits can have adverse effects on attorneys for many years after satisfying discipline requirements.





# Expungement of Attorney Discipline Records

## Background

- 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”.

## Issues Raised

- No process in place for attorneys to petition the Supreme Court.
- The State Bar should be aligned with criminal justice trends in California which is to expunge certain records after a period of time.
- Record expungement would begin to address historical racial disparities in attorney discipline.





## Recommendation Adopted

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: One year or when conditions are met
- Public reproof: Three years
- Probation with stayed suspension: Three years of conclusion of probation
- Probation with actual suspension: Five years from reinstatement
- Disbarment: Public indefinitely (no change)

Note: discipline record expungement will require statutory change.





# Early Neutral Evaluation (ENEC)

## Background

- The ENEC is a settlement conference held before filing a Notice of Disciplinary Charges. The purpose of the ENEC is for all parties to obtain a judicial evaluation of the case.
- OCTC is not bound to follow judges' judicial evaluations.
- 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.

## Issues Raised

- Respondents should be allowed to settle cases involving misdemeanor criminal convictions. This can lead to cost savings for attorney and State Bar.
- Current statutory timeline does not allow sufficient time for an ENEC to be offered.



## Recommendations Adopted

- ✓ Seek a statutory amendment to extend the deadline for the transmission of criminal conviction matters in misdemeanor cases to allow for an ENEC.





# Moral Turpitude

## Background

- Business and Professions Code section 6016: *“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.”*
- Can be charged as part of original matter **or** when OCTC seeks discipline for a criminal convictions
- Attorneys disciplined for moral turpitude are ineligible for participation in the Alternative Discipline Program (ADP)

## Issues Raised

- System would benefit from a process to resolve misdemeanor criminal conviction cases **before** transmittal to State Bar Court. Currently there is no rule that allows for this.
- Ambiguity within State Bar rules involving referrals to ADP.
- OCTC not bound to follow judges’ evaluations during ENEC process, even those that raise concerns regarding lack of evidence to support moral turpitude charges. ENEC process needs to be reviewed.



## Recommendations Adopted

- ✔ 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 ENEC 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.
- ✔ Direct staff to work with stakeholders to study and clarify all applicable rules involving referrals to the Alternative Discipline Program, specifically concerning whether or not moral turpitude has resulted in significant harm to a client(s) or the administration of justice.
- ✔ Direct staff to work with stakeholders to propose revisions to all applicable rules to promote the use of ENECs as a mechanism for arriving at prefiling settlements of State Bar disciplinary proceedings.



# Progressive Discipline

**Background:** Standards in place promote consistency in discipline proceedings and “progressive discipline”.

**Standard 1.6:**

A lawyer must establish mitigating circumstances by clear and convincing evidence.

**Standard 1.8(a):**

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. (emphasis added)

**Issues Raised**

- Prior discipline may be the result of disparities in the discipline system.
- Lack of judicial discretion prevents judges from reducing the impact of prior discipline on current outcomes.





## Recommendation Adopted

Analyze and modify standards 1.6 and 1.8 to permit the greater exercise of judicial discretion regarding progressive discipline.



# Attorney Representation

**Background:** Research on racial disparities found that lack of representation was one factor that explained racial disparities in discipline outcomes.

## Issues Considered

Under Business and Professions Code 6007, the State Bar Court Appointed Counsel Program appoints counsel when:

- a licensee asserts a claim of insanity or mental incompetence
- the State Bar Court finds the licensee unable to perform competently due to mental infirmity or illness.

Considered hourly versus flat fee approaches to providing representation to attorneys who qualify for reduced licensing fees (\$60,500 gross income)



## Recommendation Adopted

Implement a State Bar-Appointed Counsel Program based on an hourly rate structure similar to the 6007 Court-Appointed Counsel Program.



# Roadmap Forward

## Board of Trustees

Receive report and recommendations  
Issue for public comment

## Board of Trustees

Receive updated recommendations (if any)  
Receive public comment  
Take action as determined by Board

## Ad Hoc Commission

Review public comment received  
Modify recommendations as needed

September  
2022

December  
2022

January  
2023

