



The State Bar *of California*

AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

Date: December 2, 2022

To: Members, Ad Hoc Commission on the Discipline System

From: Lisa Chavez, Director

Subject: Potential New Recommendations and Modification to Existing Recommendations
Based on Public Comment Received

This memo contains information for agenda items Business II.A and Business II.B of Ad Hoc Commission on the Discipline System meeting scheduled for December 5, 2022.

On September 22, 2022, the State Bar Board of Trustees formally received the final report of the Ad Hoc Commission on the Discipline System and directed staff to issue the report recommendations for a 60-day public comment period.

The State Bar engaged in several strategies to encourage public comment. A [public-friendly miniwebsite](#) was launched in English on September 28 and a [Spanish miniwebsite](#) launched October 6. Social media posts and paid ads in English and Spanish were regularly placed on Facebook, Instagram, LinkedIn, and Twitter. Finally, staff emailed approximately 80 community-based organizations to encourage their review and comment.

The public comment period closed on November 28, 2022, and 78 public comments were received. Respondents were allowed to submit comments anonymously or provide their names and email addresses and to submit comments on behalf of an organization. The majority (54) of respondents were attorneys who self-identified as such. In addition, a small number of respondents who included their names and email addresses were determined to be California attorneys and considered attorneys for analyses conducted on the results presented in table 1 below.

All recommendations received a majority vote for "Agree with proposed recommendation." In general, attorneys were more likely to agree with the proposed recommendations than the total set of respondents.

Public commenters are also allowed to submit a written comment for each recommendation and submit a single attachment. All written comments and attachments received are provided in the report "Ad Hoc Commission on the Discipline System: Public Comments Received."

Written comments yielded five potential new recommendations for the Ad Hoc Commission on the Discipline System (commission) to consider given previously adopted recommendations. Two written comments revealed the need to modify eligibility rules surrounding the recommendation to remove attorney discipline history from the website and expunge discipline records.

SUMMARY OF RESULTS

Respondents were asked to select one of three options for each recommendation:

1. Agree only if modified;
2. Agree with proposed recommendation; or
3. Disagree with the proposed recommendation.

Table 1 sets out the results for each recommendation disaggregated by total and attorney respondents. The recommendation regarding the adoption of timelines for removal of discipline history from the State Bar website and expungement of discipline records was presented to the public in the form of two distinct recommendations. Recommendation 4A focused on removing discipline history and recommendation 4B focused on the expungement of discipline records.

Table 1: Public Comment Results

	Agree only if modified	Agree with the proposed recommendations	Disagree with the proposed recommendations
Recommendation 1: 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.			
Total Respondents	12%	76%	13%
Attorneys	9%	85%	6%
Recommendation 2: The Ad Hoc Commission on the Discipline System recommends that the State Bar seek a statutory amendment to eliminate disciplinary sanctions.			
Total Respondents	10%	69%	21%
Attorneys	9%	81%	9%
Recommendation 3: 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.			
Total Respondents	9%	73%	18%

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	Agree only if modified	Agree with the proposed recommendations	Disagree with the proposed recommendations
Attorneys	6%	83%	11%
Recommendation 4A. 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: <ul style="list-style-type: none"> • 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) 			
Total Respondents	27%	61%	12%
Attorneys	26%	67%	7%
Recommendation 4B. The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for expungement of attorney discipline records: <ul style="list-style-type: none"> • 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) 			
Total Respondents	25%	64%	12%
Attorneys	24%	69%	7%
Recommendation 5. 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.			
Total Respondents	9%	79%	12%
Attorneys	6%	87%	7%
Recommendation 6. 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.			
Total Respondents	12%	79%	9%
Attorneys	7%	87%	6%

	Agree only if modified	Agree with the proposed recommendations	Disagree with the proposed recommendations
Recommendation 7. 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.			
Total Respondents	14%	76%	10%
Attorneys	7%	85%	7%
Recommendation 8. 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.			
Total Respondents	9%	77%	14%
Attorneys	7%	83%	9%
Recommendation 9. 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			
Total Respondents	9%	81%	10%
Attorneys	4%	89%	7%

POTENTIAL NEW RECOMMENDATIONS BASED ON PUBLIC COMMENT RECEIVED

Respondents were offered the opportunity to submit written comments in response to each recommendation. Staff reviewed all comments and identified five for the commission to consider for new recommendations. Options for new recommendations are also provided. In cases where written comments were lengthy and addressed several topics, only relevant text are provided for the purpose of brevity. For all comments, see the report, "Ad Hoc Commission on the Discipline System: Public Comments Received."

1. Allow attorneys to resign without charges pending after satisfying discipline requirements and remove discipline history from website and expunge discipline records

In response to recommendations 4A ("The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for removal of discipline history from the website attorney profile page") and 4B ("The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for expungement of attorney discipline records"), a respondent submitted the following comment:

It may be worth allowing disciplined attorneys to resign without charges pending after they satisfy all of their discipline requirements on the condition that their State Bar

website profile is expunged. This would accomplish OCTC's goal of preventing disciplined attorneys from ever practicing again and the disciplined attorneys' privacy interests and their ability to succeed in a different career

Options for recommendations include:

Option 1. Allow attorneys to resign without charges after satisfying discipline requirements and remove discipline history from the website attorney profile page and expunge attorney discipline records upon resignation;

Option 2. Direct staff to explore the implications of allowing attorneys to resign without charges after satisfying discipline requirements, removing discipline history from website attorney profile page, and expunging attorney discipline records upon resignation.

2. Modify State Bar website so that internet browsers cannot index attorney profile pages

In response to recommendations 4A and 4B ("The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for expungement of attorney discipline records"), a respondent submitted the following comment:

It may be worth considering a change to the State Bar website whereby Google cannot index attorney profile pages. This is consistent with every other licensed profession in California. This provides at least some measure of privacy for respondents.

The Medical Board of California's (MBC) webpage ["License Verification"](#) allows the public to search for physician profiles and other health care providers licensed/registered in the state. Staff explored whether a physician's profile appeared when using Google to search for a known California medical licensee. The licensee's physician profile did not appear in the Google search.

The MBC Licensee Profile search page is managed by the Department of Consumer Affairs (DCA). DCA staff shared that the "DCA search has been actively configured and designed for performance, security, and status integrity. These configuration choices may preclude search engines from indexing the platform."

An option for a new recommendation is:

Option 1. Configure the State Bar attorney profile search function to preclude internet search engines from indexing attorney profiles.

3. Create timelines for removal of discipline history from website and expungement of discipline records for attorneys who voluntarily resign with charges pending and are reinstated

In response to recommendation 4A ("The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for removal of discipline history from the website attorney profile page") a respondent submitted the following comment:

There need be a similar timeline for removal of the attorney discipline from the website attorney profile page of "attorneys who submitted a voluntary resignation with charges pending," who have subsequently been reinstated on the active roster of the California State Bar. Note: I am such an attorney who resigned in 1994 "while charges were pending," and though my petition for reinstatement was granted in 2003, and though I've been practicing since without any discipline, my State Bar website profile, on many occasions has caused many hardships. Despite not having been disciplined, many who have viewed my profile on the bar's website, have incorrectly surmised that I was disciplined and consequently disbarred. For context, you may view my profile (Cal. Bar #152790). Thank you.

In response to recommendation 4B ("The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for expungement of attorney discipline records"), a respondent submitted the following comment:

There need be a category for "voluntary resignation with charges pending," who have subsequently been reinstated on the active roster of the California, and attorneys who have maintained a discipline free law practice of five (5) or more years after reinstatement should be eligible to have their "attorney discipline record" expunged.

An option for a recommendation is:

Option 1. Direct staff to propose timelines for removal of discipline history from attorney profile pages and expungement of discipline history for licensees who resigned voluntarily with charges pending and were subsequently reinstated as active licensees.

4. Create timelines for removal of administrative suspension history from website and expungement of administrative suspensions

In response to recommendation 4A ("The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for removal of discipline history from the website attorney profile page") a respondent submitted the following comment:

I believe they may be inadequate. I have been practicing for over 40 years. My first year my dues were late due to mailing address change from LA County to Orange County; thereafter from death in family due another move. Extreme upsets in my personal life. For the subsequent 39 or so years my Dues have been timely. I have committed no further wrongs in the sight of the State Bar. Although these Rule changes state they are intended to address

"disciplinary" matters, There no discipline, no reproof, no probation, no disbarment, only briefly suspended until my dues were received. The Rules should address "suspensions for failure to pay dues in timely manner" in the same manner, but with a lesser consequence. And, last but not least, I hereby request my "suspensions" be expunged in full. I believe a 38-year penalty is sufficient, even if consecutive. Thank you.

An option for a recommendation is:

Option 1. Direct staff to propose timelines for the removal of administrative suspensions from attorney profile pages and the expungement of administrative suspensions from attorney records.

5. Require attorneys to provide notice of regulation by the State Bar of California, similar to the California Code of Regulations, section 1355.4 that addresses medical doctors.

In response to recommendation 4A ("The Ad Hoc Commission on the Discipline System recommends the Board of Trustees adopt the following timelines for removal of discipline history from the website attorney profile page"), a respondent submitted the following comment:

We would encourage the State Bar to find ways to inform more people of their abilities to file complaints. For example, the State Bar could look to the Medical Board's policy that requires all Medical Board licensees to have a physical notice in the office that provides information about how to file a complaint with the Medical Board. Something similar could be implemented for CA attorneys so that both clients and other staff who observe malpractice or other action that warrants discipline have information about and can feel empowered to make a complaint. This is of particular importance for complainants who are not traditionally empowered to speak up against people with more social and financial leverage, as attorneys often are.

As [noted](#) on the MBC website, California Code of Regulations, section 1355.4 requires that all medical licensees "shall provide notice to each patient of the fact that the licensee is licensed and regulated by the Board." Other requirements include:

"The notice shall be provided either by posting the notice in an area on the premises that is visible to the patient, a written statement that is signed by the patient, or including the statement on letterhead. The notice shall include the following:

NOTICE

Medical doctors are licensed and regulated by the Medical Board of California

(800) 633-2322

www.mbc.ca.gov"

Options for recommendations include:

Option 1. Require attorneys to provide notice of regulation by the State Bar of California similar to what is required of California medical licensees.

Option 2. Direct staff to explore implications of requiring attorneys to provide notice of regulation by the State Bar of California similar to what is required of medical licensees and explore additional options for notification (including notice on professional websites) given the legal profession's modes of service.

POTENTIAL MODIFICATIONS TO EXISTING RECOMMENDATIONS BASED ON PUBLIC COMMENT RECEIVED

1. Clarify Eligibility for Recommendation Regarding Adopting Timelines for Removal of Attorney Discipline from Website and Expungement of Attorney Discipline Recommendations

In response to recommendations 4A and 4B, a respondent submitted the following comment:

With respect to ATTORNEY DISCIPLINE ON STATE BAR WEBSITE/ EXPUNGEMENT, I am unclear as to the meaning of the statement "Both proposals recommend that eligibility for removal of discipline history from the website be conditioned upon no new discipline or active investigations during this period, and payment of all restitution." I am unclear as to what is meant by the phrase "during this period". What is the period? Also, I am unclear what the meaning of "Active" investigations means. What period of time? Would those include complaints that were investigated and closed by the Ca State Bar with no action?

In response to recommendations 4A, a respondent submitted the following comment:

What does active investigation mean? I think it should be clear only complaints that lead to filing of bar violation charges should stop eligibility.

The comments pertain to text surrounding eligibility, not the recommendations. Staff recommends clarifying the report text as follows:

Eligibility for removal of discipline history and expungement of the attorney record would be based on no new discipline imposed during the relevant timeframe, or no current active investigations, and payment of all restitution.