



The State Bar *of California*

State Bar's Use of Nonpublic Discipline

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Categories of Resolutions

Nonpublic	<ul style="list-style-type: none">• Resource letter• Directional letter• Warning letter• Admonition letter• Agreement in lieu of discipline• Private reproof prior to filing of NDC	Not Discipline
Public	<ul style="list-style-type: none">• Private reproof after filing of NDC• Public reproof• Probation w/ stayed suspension• Probation w/ actual suspension• Disbarment	Discipline





Reported in ADR

Table SR-6B: Formal Disciplinary Outcomes

- Disbarments
- Probation with Actual Suspension
- Probation with Stayed Suspension
- Public Reproval
- Private Reproval

Table SR-7B: Specified Dispositions

- Admonitions
- Agreements in Lieu of Discipline
- Warning Letters
- Directional Letters
- Private Reprovals



Nonpublic Measures (State Audit 2022-030, Figure 2)

RESOURCE LETTER



Describes resources, such as ethics training or client trust account training, along with a summary of the conduct of concern and ways to rectify it.

DIRECTIONAL LETTER



Directs action on the part of an attorney. This can include direction to return a client file or to communicate with a client.

WARNING LETTER



Informs an attorney of his or her ethical obligations when there is substantial evidence that he or she committed a violation that may be misconduct.

AGREEMENT IN LIEU OF DISCIPLINE



A written agreement that may involve conditions of practice or further legal education or rehabilitation.

PRIVATE REPROVAL



A censure or reprimand that may include conditions. Private reproof is the only nonpublic measure that the State Bar considers to be discipline.



Case Example 1

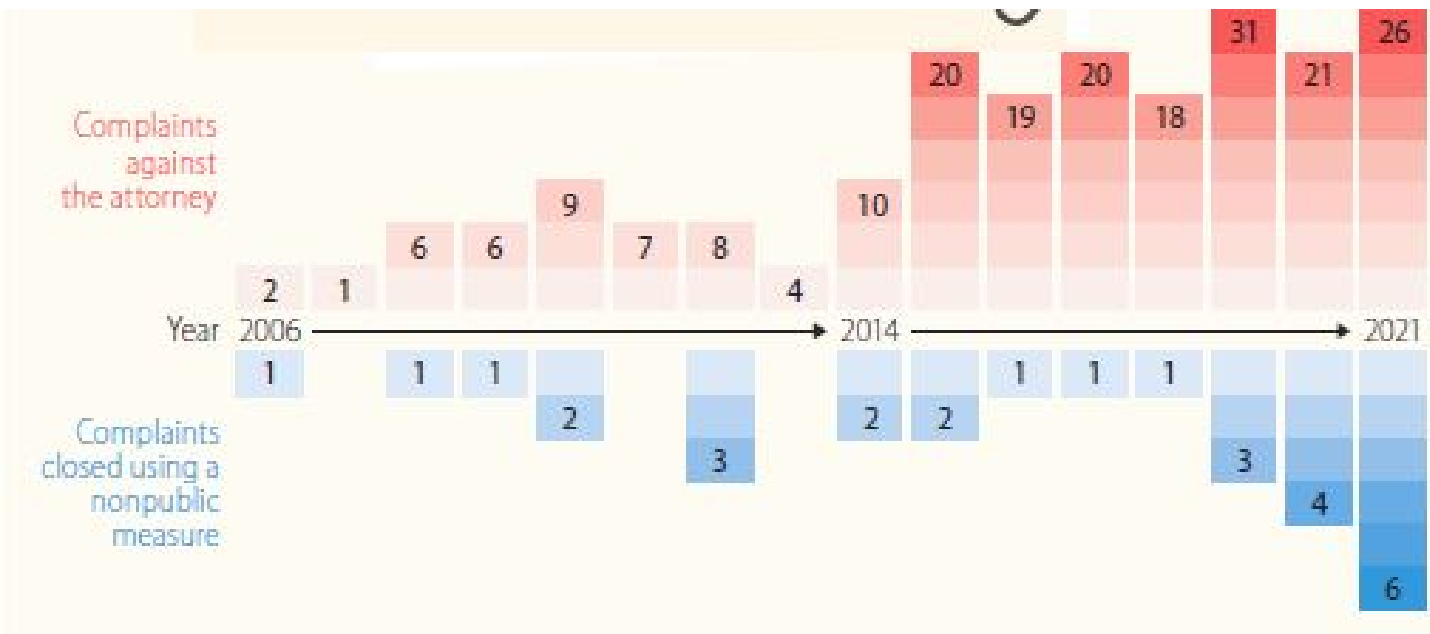
An attorney exhibited a pattern of failing to provide settlement payments or to provide files to clients until the client complained. The State Bar closed cases against this attorney 28 times over 16 years using nonpublic measures and all of the other closed cases were closed outright. However, complaints against the attorney continued to increase. From 2014 to 2021, the attorney was the subject of 165 complaints. Despite the high number of complaints, many for similar matters, the State Bar has imposed no discipline, and the attorney still maintains an active license.

In one early case, the State Bar issued a warning letter to the attorney for failing to release a client’s case file for nearly a year. However, the attorney has continued to generate complaints from other clients for this same issue. In the 11 years since the State Bar issued that warning letter, complaints have led the State Bar to issue 11 directional letters requiring the attorney to return client files.



Case Example 1

“patterns of attorney misconduct suggest that the State Bar is overusing nonpublic measures”



State Audit 2022-030 (April 2022)

Findings:

- “the State Bar closed many cases through nonpublic measures, such as warning letters, but it lacks clear policies on when it is appropriate for staff to use these nonpublic measures”
- “although the State Bar’s policies provide general guidelines for deciding when to use nonpublic measures, the policies lack the details necessary to ensure that they are implemented consistently”.patterns of attorney misconduct suggest that the State Bar is overusing nonpublic measures”

Recommendation:

- “To ensure that it uses nonpublic measures to close complaints only when such use is consistent and appropriate, the State Bar should revise its policies by October 2022 to define specific criteria that describe which cases are eligible to be closed using nonpublic measures and which are not eligible.”



Resource Letters

- Preventative measure issued in lieu of straight closing letter where determination has been made that facts are insufficient to move the case forward
- Includes information on resources available to assist in complying with lawyer's obligations
- Must be used for closing: (a) all bank reportable actions and (b) all complaints alleging client-trust account violations in which the respondent has been notified of the investigation prior to closing
- Other situations discretionary based on whether based on all the circumstances, including respondent's prior history, there is cause for concern that, absent guidance, future misconduct may occur



Directional Letters

- May issue where facts establish only certain violations amenable to remediation based on action that can be taken by lawyer in response to direction (e.g., return file) and violations have not resulted in significant harm to client, public, or administration of justice that cannot be remedied by the directed action.
- Discretionary evaluation of all circumstances, including respondent's prior history, to determine whether likely to comply with direction provided or whether more serious response is warranted
- Provides summary of basis for violation, clear directions for action within specified time, and caution that failure to comply may result in matter being reopened for more serious action



Warning Letters

- May be issued where:
 - (a) facts sufficient to establish by clear and convincing evidence only minor violations that did not cause significant harm to client, public, or administration of justice and are unlikely to result in imposition of discipline by State Bar Court; or
 - (b) facts constitute substantial evidence of non-minor violations but there remain serious questions whether evidence available for presentation at trial would be sufficient to establish the violations by clear and convincing evidence.
 - Violations are not considered minor if:
 - (a) they involve dishonesty, moral turpitude, or corruption; or
 - (b) the presumed sanction under the Standards is no lower than disbarment or actual suspension
- Discretionary evaluation of all circumstances, including respondent's prior history, to determine whether warning letter is sufficient to deter future misconduct by the attorney, or whether a more serious response is warranted
- Other requirements:
 - May issue only after respondent has opportunity to respond to allegations
 - Must provide summary of basis for violation
 - May be contingent on completion of specified conditions
 - Respondent may request OCTC administrative review of issuance
 - OCTC may rescind warning letter and reopen based on new evidence or other good cause



Admonitions

- Alternative to warning letter where facts sufficient to establish by clear and convincing evidence only minor violations that did not cause significant harm to client, public, or administration of justice and are unlikely to result in imposition of discipline by State Bar Court
- If “within two years after the date of the admonition letter, a State Bar Court proceeding is filed against the attorney based upon other alleged misconduct, the matter terminated by admonition may be reopened. All Policy Directive 2022-07 October 31, 2022 Page 13 applicable time limitations shall be tolled during the period between the issuance of the admonition and the filing of the notice of disciplinary charges.” Rule 2602(b).
- Other requirements:
 - May issue only after respondent has opportunity to respond to allegations
 - Must provide summary of basis for violation
 - May be contingent on completion of specified conditions
 - Must advise respondent that, upon written request of the attorney, mailed within fifteen days after service of the admonition letter, the admonition shall be set aside and the investigation may be resumed. Rule 2602(c).



Agreements in Lieu of Discipline

- Another alternative to warning letter where facts sufficient to establish by clear and convincing evidence only minor violations that did not cause significant harm to client, public, or administration of justice and are unlikely to result in imposition of discipline by State Bar Court
- Differs from warning or admonition letter in that attorney is required to agree that misconduct has occurred and agreement typically includes formal periodic reporting on compliance with conditions
 - Monitoring by OCTC
 - If respondent fulfills conditions, OCTC cannot reopen the matter or bring a new one based on the same misconduct. Rule 5.124(H).



Nonpublic Private Reprovals

- Private reproof agreed to by parties and approved by State Bar Court prior to filing of Notice of Disciplinary Charges that initiates public disciplinary proceeding.
- Submitted as a stipulation for approval by the State Bar Court – constitutes discipline.
- OCTC may agree to this where facts sufficient to establish by clear and convincing evidence only minor violations that did not cause significant harm to client, public, or administration of justice and are unlikely to result in imposition of discipline by State Bar Court at the level of a public reproof or higher.
- Discretionary evaluation of all circumstances, including respondent's prior history, to determine whether sufficient to deter future misconduct by the attorney, or whether public discipline is warranted
- "A private reproof imposed before a State Bar Court proceeding begins is part of the attorney's official State Bar attorney records, but is not disclosed in response to public inquiries and is not reported on the State Bar's web page. The record of the proceeding is not available to the public unless it becomes part of the record of any later proceeding in which it is introduced as evidence of a prior record of discipline." Rule 5.127(C).



Questions?

