



The State Bar of California

OPEN SESSION AGENDA ITEM 60-8 MAY 2023

DATE: May 18, 2023

TO: Members, Board of Trustees
Sitting as the Regulation and Discipline Committee

FROM: George S. Cardona, Chief Trial Counsel

SUBJECT: Initial Discussion of Potential Policy/Rule Changes Regarding: (1) Notice to Respondents of All Closed Complaints; and (2) Elimination of Private Reprovals

EXECUTIVE SUMMARY

This discussion item seeks guidance from the Board whether staff should develop recommendations on two issues: (1) should the Office of Chief Trial Counsel (OCTC) notify respondents of all complaints received against them, including complaints that are closed without moving to investigation—this would be a change from OCTC’s current practice under which it does not notify respondents of most such complaints; and (2) should all disciplinary reprovals should be public—this would require a change to the current rules under which private reprovals agreed to and issued prior to the public filing of a Notice of Disciplinary Charges are nonpublic. If the Board’s guidance is that it wishes to further consider these potential changes, staff would do the necessary research, solicit input from stakeholders, and return in September with a proposal for Board consideration, with any necessary rule changes then presented to the Board in November.

BACKGROUND

NOTICE TO ATTORNEYS WHO ARE THE SUBJECT OF A DISCIPLINARY COMPLAINT

As explained in the State Bar’s Senate Bill 211 Case Processing Standards Proposal (SB 211 Proposal), and as revised November 4, 2022, disciplinary complaints received by the State Bar move through three distinct case processing stages: intake, investigation, and charging.

Intake

Per the SB 211 Proposal:

The intake stage of case processing involves the initial screening of a complaint, an evaluation of the complaint's merits, and follow-up with the complaining witness if necessary to collect additional information needed to support the complaint. In some instances, additional information may be gathered from publicly available sources such as court dockets or opinions. Complaints are forwarded to investigation if they set out plausible, nonconclusory factual allegations that: (a) if true, would constitute a violation of the State Bar Act or Rules of Professional Conduct; or (b) suggest reasonable avenues of investigation that, if pursued, would be likely to develop facts constituting such a violation. If a case is not forwarded to investigation, a closing letter explaining the reasons for closure is drafted and sent to the complaining witness. Approximately 63 percent of complaints received by the State Bar are closed in the intake stage. (8-9)

Under OCTC's current practices, typically, attorneys are not notified of complaints against them that are closed in intake. Limited exceptions are for complaints that are closed with intake direction to the attorney to take certain action (e.g., return a file or communicate with the complainant). In addition, all attorneys who are the subject of bank reportable actions for insufficient funds transactions in client trust accounts, even if those reportable actions close in intake without forwarding to investigation, receive a closing letter providing educational resources relating to the management of client trust accounts.

Investigation

If a case is not closed at the intake stage and is forwarded for investigation:

[the] investigation stage involves preparing an investigation plan, additional contact with complaining witnesses, notice to respondents that they are under investigation along with a request for a response to the allegations, and follow-up investigation to speak with additional witnesses and gather supplemental information as needed...If a decision is made to close a case without disciplinary action, closing letters explaining the reasons for closure are drafted and sent to the complaining witness and respondent. (SB 211 Proposal, 9)

Thus, under OCTC's current practices, if a case moves forward to investigation, the attorney who is the subject of the complaint typically will receive notice of the complaint through a request to the attorney to respond to the complaint's allegations and, if the complaint is ultimately closed in investigation, a closing letter explaining the reasons for closure, which may include OCTC's decision to close using one of the nonpublic measures discussed below.

NONPUBLIC PRIVATE REPROVALS

The State Bar's use of nonpublic discipline was discussed at the Board's January 2023 meeting. A copy of the presentation is provided as Attachment A. As discussed, to resolve disciplinary complaints, OCTC has available a number of alternatives, some of which constitute discipline

(which must be imposed by the State Bar Court or Supreme Court), and some of which do not (which may be imposed by OCTC itself):

Nondisciplinary Resolutions	Disciplinary Resolution
Closure	Private reproof prior to filing of NDC
Closure with resource letter	Public reproof after filing of NDC
Closure with directional letter	Probation with stayed suspension
Closure with warning letter	Probation with actual suspension
Closure with admonition letter	Disbarment
Agreement in lieu of discipline	

Generally, the nondisciplinary resolutions that can be issued by OCTC are nonpublic.¹ With one exception, the disciplinary resolutions are all public. That one exception is a private approval agreed to and issued by the State Bar Court prior to the public filing of a Notice of Disciplinary Charges, which remains a form of discipline but is not publicly disclosed:

Private Reproof Before Notice of Disciplinary Charges. 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. The attorney is not obligated to pay discipline costs. (State Bar Rule of Procedure 5.127(A))

DISCUSSION

Notice to respondents of all complaints against them, even those closed in intake based on a determination that there is no basis for moving them forward to investigation, poses pros and cons for discussion, including the following:

Pros	Cons
Keeps attorneys advised of possible nondisciplinary issues, enabling correction before they give rise to disciplinary issues	If complainant is an ongoing client, may detrimentally affect ongoing attorney-client relationship
If notice is coupled with a resource letter, may encourage use of available resources to assist in preventing more serious disciplinary issues	May deter complainants from submitting complaints

¹ Following the public filing of a Notice of Disciplinary Charges, if OCTC and the attorney make an agreement in lieu of discipline, the public disciplinary proceeding may be voluntarily dismissed without prejudice (State Bar Rule of Procedure 5.124(H)). Under these circumstances, the agreement in lieu of discipline could be public. The State Bar Court also has authority to resolve a public disciplinary proceeding "by an admonition to the attorney if the subject matter of a pending disciplinary proceeding does not involve a Client Security Fund matter or a serious offense, and the Court concludes that the violation(s) were not intentional or occurred under mitigating circumstances, and no significant harm resulted" (State Bar Rule of Procedure Rule 5.126(A)). Under these circumstances, though the admonition is not discipline (Rule 5.126(D)), it would be public.

Pros	Cons
Puts attorneys on notice of clients or others who are dissatisfied with their performance, enabling corrective measures that may avoid subsequent complaints	If reporting to malpractice carriers is required, potential detrimental impact on ability to maintain malpractice insurance (research needed)
Potential reduction in number of future incoming complaints if attorneys take steps to address performance issues	Additional resources dedicated to drafting of notices to attorneys or reconfiguring Odyssey to generate automatic notices

Eliminating nonpublic private reprovls as a disciplinary action also poses pros and cons for discussion, including the following:

Pros	Cons
Clear distinction between discipline (public) and nondiscipline (generally private)	Eliminates a form of discipline that may provide a mechanism for settling some matters that otherwise would not settle
Eliminates confusion among both public and attorneys over private reprovls often not being private	Change from long-standing status quo
Ensures that all discipline serves both specific and general deterrence (because public)	Inconsistent with other jurisdictions (research needed)
Consistent with other jurisdictions (research needed)	
Aligns with Department of Consumer Affairs disciplinary boards (research needed)	

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- a.1. Support accountability in the attorney discipline system through the development and implementation of new case processing standards.

Goal 3. Protect the Public by Regulating the Legal Profession

RECOMMENDATIONS

None

ATTACHMENT LIST

- A. Agenda Item 60-6 January 2023, State Bar's Use of Nonpublic Discipline



The State Bar *of California*

ATTACHMENT A

State Bar's Use of Nonpublic Discipline

George Cardona, Chief Trial Counsel

Regulation and Discipline Committee, January 19, 2023

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

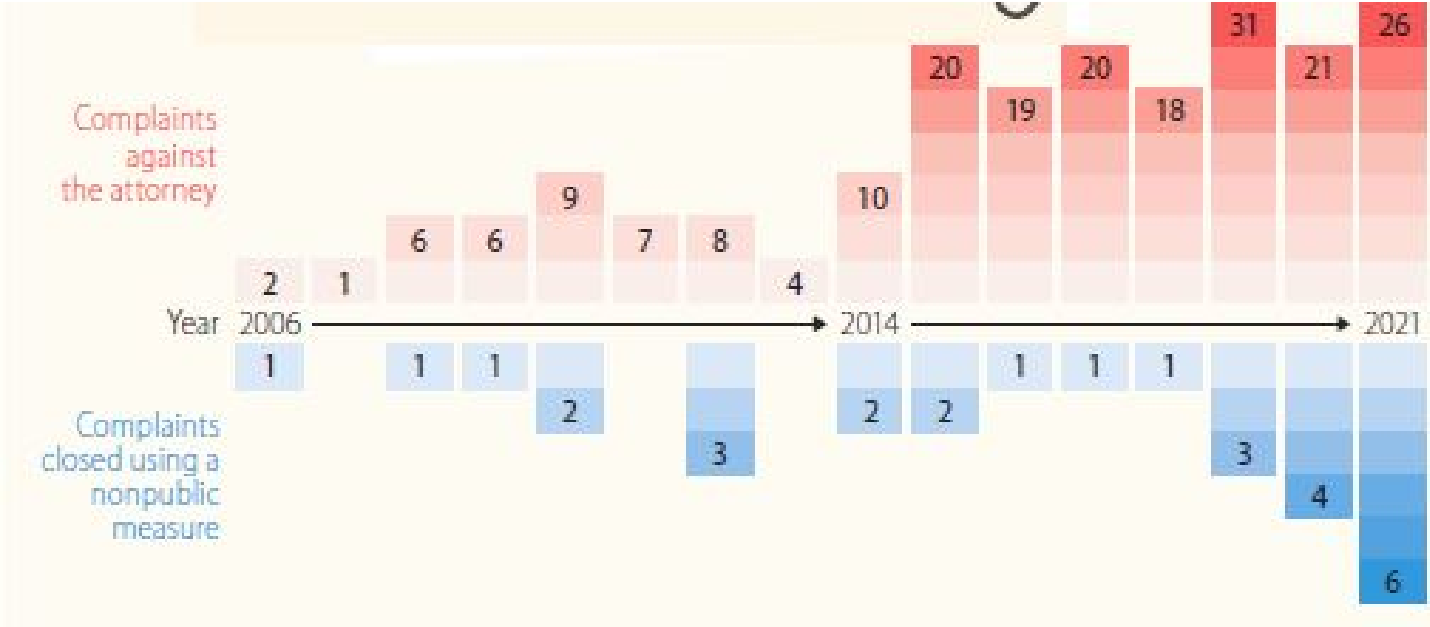
An attorney exhibited a pattern of failing to provide settlement payments or to provide files to clients until the client complained. The State Bar closed cases against this attorney 28 times over 16 years using nonpublic measures and all of the other closed cases were closed outright. However, complaints 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?

