The State Bar of California

OFFICE OF GENERAL COUNSEL

180 Howard Street, San Francisco, CA 94105 Tel: (415) 538-2000

April 10, 2019

ANTITRUST DETERMINATION 2019-0001

A. Authority

This determination is made pursuant to California Supreme Court Administrative Order 2017-09-20 ("State Bar Antitrust Policy"), which mandates that the State Bar Office of General Counsel provide a determination on issues submitted to it for resolution of potential antitrust concerns.

B. Issues Presented

On January 20, 2019 the State Bar received a Request for Antitrust Determination from an individual wishing to remain anonymous ("Requestor"). Requestor's submission is attached hereto as Appendix 1. Requestor states that the discipline history of California attorneys is presented differently in the public Attorney Licensee Profiles maintained on the State Bar's website, depending on the year discipline was imposed. Requestor asserts that sometime after 2005, the State Bar started to include significantly greater detail about an attorney's discipline record, in particular by including links to State Bar Court documents. Requestor also states that as of October 26, 2018, the State Bar replaced longer, narrative California Bar Journal discipline summaries with short, explanatory phrases.

Requestor alleges that changes to the information provided on public Attorney Licensee Profiles over time means that it is easier for the public to access and understand the nature of some attorneys' discipline history, based solely on when an attorney was disciplined. Requestor argues that this disparity makes it easier for attorneys disciplined prior to 2005 to lie about or explain away their discipline history to potential clients, resulting in an anticompetitive advantage for attorneys disciplined prior to 2005, and a disadvantage for consumers of legal services who are searching for or vetting attorneys online.

C. Analysis

1. The Dissemination of Discipline Information by the State Bar Does Not Impact Commerce so as to Raise Antitrust Concerns.

The Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C., § 1 *et seq.,* serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. (See *FTC v. Ticor Title Ins. Co.* (1992) 504 U.S. 621, 632 [112 S.Ct. 2169, 119 L.Ed.2d 410] ["Continued enforcement of the

national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls."].) In order to raise antitrust concerns, the actions or policies at issue must have some impact on competition, *i.e.*, the market for legal services. If the action or proposed action does not affect competition or has only a de minimis impact, the antitrust laws are not implicated. (See *Marsh v. Anesthesia Servs. Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 495 [132 Cal.Rptr.3d 660] [antitrust complaint must allege substantially adverse effect on competition in the relevant market]; see also *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1681 [60 Cal.Rptr.2d 195, 201], as modified on denial of reh'g (Feb. 13, 1997) [under Sherman Antitrust Act and Cartwright Act, Bus. & Prof. Code, § 16700 *et seq.*, plaintiff must show substantially adverse impact on competition in the relevant market].)

Courts have held that individualized decisions on admissions or discipline do not impact overall competition in the market to sufficiently raise antitrust concerns. (State Bar Antitrust Policy, p. 4.)[1] An action may raise antitrust concerns when, for example, that action raises prices, reduces output, diminishes quality, limited choices, or creates, maintains, or enhances market power. (See *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma* (1984) 468 U.S. 85, 106–114 [104 S.Ct. 2948, 2963, 82 L.Ed.2d 70] [plan to limit the total amount of televised intercollegiate football games in a manner that raises prices, reduces output, eliminates competitors, and is unresponsive to consumer preference is anticompetitive conduct in violation of antitrust laws].)

Requestor's allegations of antitrust violations stemming from the changes over time to the State Bar's publication of information on Attorney Licensee Profiles fail to raise antitrust concerns because there is no discernable impact to the market for legal services. Although Requestor labels the State Bar's actions as "anticompetitive," Requestor fails to articulate what market impacts allegedly occur as a result. The State Bar actions Requestor takes issue with follow directly from the types of individualized decisions on discipline or regulatory matters that the Supreme Court's State Bar Antitrust Policy specifically identifies as not raising antitrust concerns due to a lack of market impact. That is, the publication of information related to an attorney's discipline history only occurs because of the individualized decisions on discipline made about that attorney. As such, regardless of any change over time of the format of the information published, the fact of publishing any information at all cannot be said to impact overall competition in the market for legal services.

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[1] (See also 98 Ops. Cal. Atty. Gen. 12, at *5 (Sept. 10, 2015) ["[S]uspending the license of an individual license-holder for violating the standards of the profession is a reasonable restraint and has virtually no effect on a large market, and therefore would not violate antitrust laws." [citing *Oksanen v. Page Memorial Hospital* (4th Cir. 1999) 945 F.2d 696]; *Petri v. Virginia Bd. of Medicine* (E.D. Va., Oct. 23, 2014, No. 1:13-CV-01486) 2014 WL 5421238, at *5 [Virginia Medical Board's discipline of an individual chiropractor did not impact overall competition]; *Robb v. Conn. Bd. of Veterinary Med.* (D. Conn. 2016) 157 F. Supp. 3d 130.)

Consistent with this view, data published by the State Bar strongly suggest that the number of attorneys affected by the challenged State Bar actions is too small to impact overall competition in the market for legal services. According to information provided in the State Bar's Annual Attorney Discipline Reports,[2] in any given year from 2003 through 2017 the number of attorneys subjected to regulatory or disciplinary action that would have resulted in information being published on their Attorney Licensee Profiles represents 1% or fewer of all the active attorneys licensed to practice in California. Even this small percentage exaggerates the potential for any market impact because it ignores the highly individualized process by which clients might identify, research, and choose to hire attorneys. Requestor's analysis requires one to assume many variable factors regarding the manner in which attorneys and potential clients will act—assumptions which may not be borne out in many instances. First of all, attorneys do not necessarily compete with each other—criminal defense attorneys are not in the same market as attorneys who practice family law, for example. Thus, a criminal defense attorney with a more detailed summary is not in competition with a family law attorney with an abbreviated summary. Moreover, Requestor's theory assumes that disciplined attorneys will try to mislead potential clients about their discipline history. Additionally, some potential clients will find and read the public orders of discipline regardless of whether summaries are included on an Attorney Licensee Profile. These are only three examples of ways in which Requestor's assumptions are based on scenarios which will not be true in many instances; the number of potentially impacted attorneys will therefore be far less than even the 1% mentioned above.

Since the number of attorneys potentially affected by the State Bar actions challenged by Requestor is such a small fraction of the total number of market participants, any market impact would be de minimis at most, and therefore does not implicate antitrust concerns.

2. The Conduct in Question Must Be Unlawful to Raise Antitrust Concerns.

"Antitrust injury is made up of four elements: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." (*Glen Holly Entertainment, Inc. v. Tektronix Inc.* (9th Cir. 2003) 343 F.3d 1000, 1008, *opinion amended on denial of reh'g* (9th Cir. 2003) 352 F.3d 367.) "[T]he antitrust injury analysis must begin with the identification of the defendant's specific unlawful conduct." (*American Ad Management, Inc. v. General Telephone Co. of California* (9th Cir. 1999) 190 F.3d 1051, 1055.) As exemplified in sections 1 and 2 of the Sherman Antitrust Act, acts are unlawful under antitrust principles if they constitute a contract, combination or conspiracy that exerts an unreasonable restraint on trade or commerce (15 U.S.C. § 1), or the monopolization, or any agreement or conspiracy to monopolize any market for a particular product or service (15 U.S.C., § 2).

[2] (Available at http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Reports.)

Here, Requestor has not identified any conduct by the State Bar that is unlawful under antitrust principles. Requestor does not advance any arguments to suggest that the State Bar's publication of information on Attorney Licensee Profiles constitutes a monopoly or an attempt to monopolize.[3] Rather, Requestor argues that differing levels of detail about attorneys' discipline imposes an anticompetitive restraint on the attorneys whose discipline is more readily available to potential clients. To be unlawful, providing such public information must cause "an actual injury to competition, beyond the impact on [an individual] claimant." (*eMag Solutions, LLC v. Toda Kogyo Corp.* (N.D. Cal. 2006) 426 F.Supp.2d 1050, 1055.) Requestor has not advanced any theory of injury beyond what allegedly would be suffered by a very few individual attorneys. The actions of the State Bar Requestor identifies as anticompetitive are therefore not unlawful for antitrust purposes.

Hearings and records of original disciplinary proceedings are public following the filing of a Notice of Disciplinary Charges, as a matter of law. (Bus. & Prof. Code, §§ 6086, subd. (a)(1), 6086.1, subd. (a)(2)(A), 6086.1, subd. (b); rule 5.9, Rules Proc. of State Bar.) The State Bar publishes attorney discipline history information as a matter of policy, because doing so tends to promote transparency and facilitates the public's right of access to State Bar disciplinary records.[4] In other words, the actions of the State Bar that Requestor claims are anticompetitive merely represent the State Bar's compliance with its obligations to provide public information in an effort to protect the public.

Courts have recognized for over a century that providing information to market participants—in the instant case, informing potential clients about attorney discipline history—results in improved market conditions rather than restraints on trade. For example, in *Board of Trade of*

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[3] Requestor has not and cannot show that the acts alleged constitute price fixing or monopolization of the market for legal services, especially given the small number of attorneys allegedly affected. Even with monopolization, there must be some attempt to use an alleged monopoly to affect prices. The United States Supreme Court has defined monopoly power as "the power to control prices or exclude competition." (*United States v. E. I. du Pont de Nemours & Co. (Cellophane)* (1956) 351 U.S. 377, 391.) No such attempt is or can be alleged by Requestor, taking this issue outside the realm of antitrust laws.

[4] Requestor speculates that *Mack v. State Bar of California* (2001) 92 Cal.App.4th 957 [112 Cal.Rptr.2d 341], on which the State Bar often relies to support the publication of attorney discipline information on its website, is no longer valid in light of the vast changes to the online landscape since that case was decided. The Courts of Appeal consistently cite *Mack* for the proposition that public information may be posted the State Bar's website, including as recently as 2015. (See *Missud v. State Bar of California* (Cal. Ct. App., Mar. 30, 2015, No. A141459) 2015 WL 1477893, at *3 [nonpub. opn.] ["[A]n attorney's disciplinary history is a 'public record' which may lawfully be published on line. (*Mack v. State Bar* (2001) 92 Cal.App.4th 957, 961–964; [Citation]."].)

City of Chicago v. U.S. (1918) 246 U.S. 231 [38 S.Ct. 242, 244, 62 L.Ed. 683], the United States Supreme Court considered a rule imposed by the Chicago Board of Trade requiring grain traders to fix the price of grain "to arrive" (*i.e.*, in shipments bound for Chicago from other parts of the Midwest) by 2:00 p.m. each day, after which such "to arrive" grain orders could only be made at the fixed price until the market re-opened the next morning. The Court held that even though the rule fixed prices during a portion of each business day, it was not a restraint on trade in violation of the Sherman Antitrust Act because it improved market conditions in part by bringing buyers and sellers into "more direct relations" and allowed buyers and sellers to act with "adequate knowledge of market conditions." (*Id.*, at p. 240.) More recently, in *In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 154 [204 Cal.Rptr.3d 330, 353], plaintiffs alleged, among other things, that car manufacturers and dealer associations conspired to keep Canadian-produced cars out of California, thereby increasing domestic prices. The Court of Appeals found that antitrust conspiracy claims were insufficient when they were based on the sharing of industry information at conferences or trade association meetings, holding that "[g]athering and compiling industry information and disseminating it among members does not offend antitrust policy, even though to do so naturally 'tends to stabilize that trade or business and to produce uniformity of price and trade practice.' [Citations.]" (*Id.*, at pp. 153-54.) These cases show that sharing information about the market generally is considered to improve market conditions, and therefore should not be considered anticompetitive even if it affects prices.

Requestor has not identified a situation that plausibly leads to price fixing, making it even easier to conclude that providing information about attorney discipline history is not unlawful in the antitrust context. Indeed, such information is intended to protect the public and to help potential clients make informed decisions when hiring a lawyer. Therefore, Requestor has not identified an action by the State Bar that restrains trade at all, let alone unreasonably or unlawfully.

3. The Alleged Injury Must Be of the Type the Antitrust Laws Were Intended to Prevent.

In order to raise antitrust concerns, an alleged injury must be "of the type the antitrust laws were intended to prevent." (*Glen Holly Entertainment, Inc.*, *supra*, 343 F.3d at p. 1008.) "The purpose of federal and state antitrust laws is to protect and promote competition for the benefit of consumers. [Citations.]" (*Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1240 [60 Cal.Rptr.3d 631, 645].) Therefore, injury to an individual market participant is not the relevant inquiry. "[I]t is competition, not competitors, which the [Sherman Antitrust] Act protects." (*American Ad Management, Inc.*, *supra*, 190 F.3d at p. 1055 [quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 344, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)].)

While Requestor alleges that the State Bar's actions are anticompetitive, there is no specific allegation of harm to consumers based on those actions. As noted above, providing

information to the public about attorney discipline history does not injure consumers of legal services—it empowers them to make informed choices. Moreover, to the extent that differing levels of detail are immediately available on different Attorney Licensee Profiles, that does not injure the public either.

First, regardless of whether materials are posted to an Attorney Licensee Profile, those materials are available to the public if the State Bar possesses them. Contrary to Requestor's contention, consumers are not limited to paying for certified copies of State Bar Court records or traveling to the State Bar offices to inspect physical copies. The State Bar also provides copies of public records in accordance with the California Public Records Act. (See Bus. & Prof. Code, § 6026.11 ["The State Bar is subject to the California Public Records Act."].) As such, all public information in the State Bar's possession regarding an attorney's discipline history is available to any member of the public who requests that information.

Second, potential clients are entitled to complete and accurate information from attorneys themselves.[5] Therefore, there is no reason to suspect, let alone conclude, that differing levels of detail on the State Bar's Attorney Licensee Profiles meaningfully alters the information consumers of legal services are able to access. Requestor's conjecture about what potential clients are willing to do (and unwilling to do) to obtain such publically available information requires various assumptions that are not supported by any evidence. Therefore, there is no potential threat to consumers of legal services as to prices, output, quality, or choices.

As to attorneys with post-2005 discipline histories, Requestor alleges they are harmed because they "cannot lie or massage the facts" about their discipline history because of the information posted on their Attorney Licensee Profiles. Requestor does not explain what this alleged injury means, or how it may create, maintain, or enhance anyone's market power. As noted above, no attorney is entitled to lie to or mislead a client or potential client. In any event, Requestor's theory applies only among those attorneys with discipline histories, without regard to the vast majority of attorneys with no such history of discipline. There is no reason to suspect that differing levels of detail on the State Bar's Attorney Licensee Profiles has any impact on the market power of any group of attorneys. As such, even if individual attorneys with post-2005 discipline histories are placed at a competitive disadvantage because of the information available regarding their discipline, Requestor does not articulate how any injury to such an attorney harms competition as opposed to an individual competitor. (See *American Ad Management, Inc.*, *supra*, 190 F.3d at p. 1055 ["The antitrust laws do not provide a remedy to every party injured by unlawful economic conduct. It is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers."].) Requestor fails to

[5] "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading." (Rule 7.1(a), Rules of Professional Conduct.)

articulate how such an alleged injury would potentially raise prices, reduce output, diminish quality, limit choices, or create, maintain, or enhance market power.

In short, since publishing publicly available information serves rather than frustrates consumer interests, any alleged detrimental impact to one small group of attorneys—even if such impact exists—does not raise antitrust concerns because that is not an injury the antitrust laws are meant to prevent.

4. The Alleged Injury Must be the Direct Result of the Allegedly Anticompetitive Conduct.

In the antitrust context, a close chain of causation must exist between the allegedly anticompetitive conduct and the alleged injury. (*American Ad Management, Inc.*, *supra*, 190 F.3d at p. 1058; see also *Glen Holly Entertainment, Inc.*, *supra*, 343 F.3d at p. 1012 [customer alleging antitrust injury is required to show "that she was directly and economically hurt by the alleged violation"].)

Requestor asserts that the alleged antitrust injury flows from the fact that attorneys disciplined after 2005, "cannot lie or massage the facts" about their discipline history because of the information posted on their Attorney Licensee Profiles. The alleged injury identified by Requestor therefore flows not from the State Bar's publication of attorney discipline histories, but the communications between individual attorneys and clients or potential clients. Thus, even assuming an attorney disciplined after 2005 suffers economic injury because an attorney disciplined prior to 2005 successfully misled a client, the injury would result directly from the improper actions of a dishonest attorney, not from the information published (or not) by the State Bar.

The alleged injury does not directly result from the allegedly anticompetitive State Bar actions, and therefore does not raise antitrust concerns.

D. Conclusion

Based on the foregoing analysis, there is no antitrust violation related to the State Bar's publication of attorney discipline information.

E. Reviewability

The State Bar Office of General Counsel's determinations on reports of potential antitrust violations may be reviewed *de novo* by the California Supreme Court. Requestor is hereby advised of the right to request review by filing a petition with the Court, pursuant to rule 9.13, subsection (d) through (f), California Rules of Court, within **60 days of the date of this determination.**

Rule 9.13. Review of State Bar Court decisions

(a) Review of recommendation of disbarment or suspension

A petition to the Supreme Court by a member to review a decision of the State Bar Court recommending his or her disbarment or suspension from practice must be filed within 60 days after a certified copy of the decision complained of is filed with the Clerk of the Supreme Court. The State Bar may serve and file an answer to the petition within 15 days of service of the petition. Within 5 days after service of the answer, the petitioner may serve and file a reply. If review is ordered by the Supreme Court, the State Bar must serve and file a supplemental brief within 45 days after the order is filed. Within 15 days of service of the supplemental brief, the petitioner may serve and file a reply brief.

(Subd (a) amended effective January 1, 2007; previously relettered and amended effective October 1, 1973; previously amended effective July 1, 1968, and December 1, *1990.)*

(b) Review of State Bar recommendation to set aside stay of suspension or modify probation

A petition to the Supreme Court by a member to review a recommendation of the State Bar Court that a stay of an order of suspension be set aside or that the duration or conditions of probation be modified on account of a violation of probation must be filed within 15 days after a certified copy of the recommendation complained of is filed with the Clerk of the Supreme Court. Within 15 days after service of the petition, the State Bar may serve and file an answer. Within 5 days after service of the answer, the petitioner may serve and file a reply.

(Subd (b) amended effective January 1, 2007; adopted effective October 1, 1973; previously amended effective December 1, 1990.)

(c) Review of interim decisions

A petition to the Supreme Court by a member to review a decision of' the State Bar Court regarding interim suspension, the exercise of powers delegated by rule 9.10(b)-(e), or another interlocutory matter must be filed within 15 days after written notice of the adverse decision of the State Bar Court is mailed by the State Bar to the petitioner and to his or her counsel of record, if any, at their respective addresses under section 6002.1. Within 15 days after service of the petition, the State Bar may serve and file an answer. Within 5 days after service of the answer, the petitioner may serve and file a reply.

(Subd (c) amended effective .January 1, 2007; adopted effective December 1, 1990.)

(d) Review of other decisions

A petition to the Supreme Court to review any other decision of the State Bar Court or action of the Board of Governors of the State Bar, or of any board or committee appointed by it and authorized to make a determination under the provisions of the State Bar Act, or of the chief executive officer of the State Bar or the designee of the chief executive officer authorized to make a determination under article 10 of the State Bar Act or these rules of court, must be filed within 60 days after written notice of the action complained of is mailed to the petitioner and to his or her counsel of record, if any, at their respective addresses under section 6002.1. Within 15 days after service of the petition, the State Bar may serve and file an answer and brief. Within 5 days after service of the answer and brief, the petitioner may serve and file a reply. If review is ordered by the Supreme Court, the State Bar, within 45 days after filing of the order, may serve and file a supplemental brief. Within 15 days after service of the supplemental brief, the petitioner may file a reply brief,

(Subd (d) amended effective January 1, 2007, previously amended effective July 1, 1968, May 1, 1986, and April 2, 1987; previously *relettered and amended effective October 1, 1973, and December 1, 1990.)*

(e) Contents of petition

(1) A petition to the Supreme Court filed under (a) and (b) of this rule must be verified, must specify the grounds relied upon, must show that review within the State Bar Court has been exhausted, must address why review is appropriate under one or more of the grounds specified in rule 9.16, and must have attached a copy of the State Bar Court decision from which relief is sought.

(2) When review is sought under (c) and (d) of this rule, the petition must also be accompanied by a record adequate to permit review of the ruling, including:

(A) Legible copies of all documents and exhibits submitted to the State Bar Court supporting and opposing petitioner's position;

(B) Legible copies of all other documents submitted to the State Bar Court that are necessary for a complete understanding of the case and the ruling; and

(C) A transcript of the proceedings in the State Bar Court leading to the decision or, if a transcript is unavailable, a declaration by counsel explaining why a transcript is unavailable and fairly summarizing the proceedings, including arguments by counsel and the basis of the State Bar Court's decision, if stated; or a declaration by counsel stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date before any action is requested from the Supreme Court other than issuance of a stay supported by other parts of the record.

(3) A petitioner who requests an immediate stay must explain in the petition the reasons for the urgency and set forth all relevant time constraints.

(4) If a petitioner does not submit the required record, the court may summarily deny the stay request, the petition, or both.

(Subd (e) amended effective January 1, 2007; previously repealed and adopted by the Supreme Court effective December 1, 1990, and February 1, 1991; previously repealed and adopted effective March 15, 1991.)

(f) Service

All petitions, briefs, reply briefs, and other pleadings filed by a petitioner under this rule must be accompanied by proof of service of three copies on the General Counsel of the State Bar at the San Francisco office of the State Bar, and of one copy on the Clerk of the State Bar Court at the Los Angeles office of the State Bar Court. The State Bar must serve the member at his or her address under Business and Professions Code section 6002.1, and his or her counsel of record, if any.

(Subd (f) amended effective January 1, 2007; adopted by the Supreme Court *effective December 1, 1990; previously amended by the Supreme Court effective February 1, 1991; previously amended effective March 15, 1991.)*

Rule 9.13 amended and renumbered effective January 1, 2007; adopted as rule 59 by the Supreme Court effective April 20, 1943, and by the Judicial Council effective July 1, 1943; previously amended and renumbered as rule 952 effective October 1, 1973; previously amended effective July 1, 1976, May 1, 1986, April 2, 1987, December 1, 1990, February 1, 1991, and March 15, 1991.

The address to file your petition with the California Supreme Court is:

CALIFORNIA SUPREME COURT
CLERK'S OFFICE
350 McALLISTER STREET
SAN FRANCISCO, CA 94102

APPENDIX 1

The State Bar *of California*

REQUEST FOR ANTITRUST DETERMINATION

Pursuant to Supreme Court of California Admin. Order 2017-09-20

Requester Information

Date **January 20, 2019**

First Name withheld Last Name withheld

Organization withheld

Address withheld

City withheld State California Zip Code withheld

Email **antitrustdetermination@gmail.com** Phone withheld Fax withheld

It is the policy of the State Bar of California to comply with all laws. An important aspect of this policy is our commitment to obey the letter and the spirit of the antitrust laws. Pursuant to the Supreme Court of California's Administrative Order 2017-09-20, any member of the public may report a potential antitrust violation to the State Bar. When notifying the State Bar of your concerns, please include the following information:

- The nature of the potentially anticompetitive action;
- The department(s) or committee(s) of the State Bar undertaking the action;
- The specific type(s) of market impacts you believe may arise from that action; and
- Why you believe the State Bar does not enjoy immunity from antitrust laws for the action in question.

Request for Antitrust Determination

Please be as specific as possible. Attach additional sheets of paper as necessary.

Please see attachment

SUBMIT THIS FORM

1) *By E-mail*: AntitrustRequest@calbar.ca.gov

2) *By Mail*:
The State Bar of California
Office of General Counsel
Attn: Antitrust Request
180 Howard Street
San Francisco, California 94105

Attachment to Request for Antitrust Determination

A. Introduction

All personal identifying information is being withheld from this request because it appears that the State Bar publishes such information on its website, and I would prefer not to have my name published. This notwithstanding, the e-mail address I have provided is valid and will be monitored on a regular basis. You may feel free to communicate with me via e-mail. I have no problem with your publishing your determination of the present request on your website.

B. The Department(s) or Committee(s) of the State Bar Undertaking the Action

I believe this would include the Office of the Chief Trial Counsel, the State Bar Court, and the Office of Membership Records.

C. The Specific Type(s) of Market Impacts I Believe May Arise from the Complained of Action

As I will explain in this attachment, the complained of action has an anticompetitive impact on attorneys with a public record of discipline, which not only affects those attorneys, it also affects consumers of legal services searching online for an attorney or vetting an attorney by utilizing the internet.

D. The Nature of the Potentially Anticompetitive Action

As you are aware, the State Bar maintains a website with an attorney licensee profile for every member. When a member is disciplined, the State Bar publishes the level of the sanction for *all* members so disciplined.[1] However, *some* disciplined members have the dubious honor of having the reasons for their discipline laid out in great detail online while some do not. So far as I can tell, this is arbitrarily based on when the discipline occurred. Indeed, the State Bar even admits

[1] Excluding agreements in lieu of discipline and admonishments.

that, "The State Bar Court began posting public discipline documents online in 2005." In a further effort to add salt to a wound and a final nail to the professional and personal coffin, *some* attorney licensee profiles of disciplined attorneys contain a summary from the California Bar Journal. It is not clear to me when this practice began—presumably it was after 2005—although it is clear that this practice ended on October 26, 2018.[2] Beginning on that date, discipline summaries from the California Bar Journal, which can be as long as several paragraphs, will no longer be posted on a disciplined member's attorney licensee profile. Instead, an "attorney discipline listing" will be posted. These "attorney discipline listings" are not several paragraphs of humiliating detail—they are literally a "3-5 word summary of discipline reason."[3]

As far as I can tell, the State Bar can, at least for anticompetition law purposes, *probably* post online whatever they wish about disciplined attorneys, so long as the Legislature and/or the Supreme Court of California authorizes the same. I am unaware, however, that the Legislature and/or the Supreme Court of California authorized that *some* disciplined attorneys—for conduct of varying degrees of egregiousness—should merely have a few words posted on their attorney licensee profile—words like "public reproval with/duties" or "discipline w/actual suspension"—based *merely* on an arbitrary date. I will explain the anticompetitive effects of such terse descriptors later. Before I do so, I feel it is necessary to dispose of an issue you may be considering.

The issue is that consumers of legal services are free to request public records from the State Bar for attorneys disciplined pre-2005. I am skeptical that a federal court would find this argument persuasive. First, the State Bar Court's own website describes the process for doing this:

[2] Attached hereto is a State Bar document evincing this policy change.
[3] Id.

> Copies of Public Records of Discipline
>
> Before you place an order, check online Attorney Search for free copies. Public records of discipline, which explain why an attorney was disciplined, can be ordered by sending a written request to the State Bar Court with the following information:
>
> The full name of the attorney and if available, the membership number, case number(s) or any other information. The address where the documents are to be mailed and the telephone number of the requestor. The State Bar Court charges a $25 certification fee per case for all records requests. In the event the copying costs exceed $25, you will be notified. The records will be provided to you upon receipt of payment. Please make your check or money order for $25 payable to the State Bar of California.
>
> Please call 213-765-1400 if you have any questions.
>
> Mail written requests and your check/money order for $25 to:
>
> State Bar Court
> Discipline Copies
> 845 S. Figueroa St.
> Los Angeles, California 90017-2515

Realistically, no reasonable person would do this. It is, however, possible to avoid the copying fee by driving to the offices of the State Bar to inspect the records; however, at least at the Los Angeles office, one would still have to pay for parking, unless they eat at Denny's, in which case the parking fee would be waived (validation). Again, no reasonable person would do this. Finally, *Mack v. State Bar* (2001) 92 Cal. App. 4th 959 would, in my opinion, be unconvincing to a federal court in the context of anticompetition law. With all due respect to the Court of Appeal, *Mack* was decided nearly two decades ago and includes the following quote in its reasoning: "The Internet is a unique and wholly new medium of worldwide human communication." Moreover, the Office of

the Chief Trial Counsel has acknowledged the power of conspicuous and lengthy entries on the face of an attorney licensee profile.[4]

Lawyers disciplined post-2005 *cannot* conceal the nature of their past discipline, which if one believes that people are irredeemable, is a good thing. Lawyers disciplined pre-2005 *can*, which should be cause for concern to consumers of legal services, the State Bar, the courts and other attorneys. The fact of the matter is that the State Bar does not apply discipline equally from a public protection point of view (*i.e.*, two DUIs within a short period of time results in a public reproval, whereas making just one false statement about MCLE compliance results in a 30-day actual suspension). MCLE is a joke, and all attorneys know it. Attorneys merely put less than $100 on a credit card every 3 years and then watch a few videos at home. DUIs can kill people, they indicate a disregard for the law, and they suggest an alcohol problem which can spill over into an attorney's practice. The real danger here is that consumers of legal services have no clue how the State Bar's presumed discipline standards work—they only understand plain English descriptions of conduct.

By way of example, an attorney publicly reproved for multiple alcohol related offenses pre-2005 can tell a potential client anything he or she wishes in response to a question directed to that attorney about the discipline. Said attorney could literally say that the discipline was a result of advocating "too zealously" and sending too many subpoenas. This explanation could easily be accepted by a potential client, which both harms the client and attorneys disciplined post-2005. This is an anticompetitive action implemented by the State Bar. The reason it is anticompetitive, if not obvious, is because attorneys disciplined post-2005 cannot lie or massage the facts since the same are posted on those attorney's licensee profiles. To be certain, no attorney should lie or

[4] Attached hereto is a State Bar document wherein the OCTC argues for a consumer alert box on attorney licensee profiles under certain circumstances.

massage the facts—ever. That being said, if any sort of attorney were to do such a thing, it would be the multiple alcohol related offense attorney described above. That is why I propose that *all* disciplined attorneys should have their discipline publicized in a *uniform* manner. This seems to be a totally fair request and truly is the only way to avoid anticompetitive market impacts.

E. Why I Believe the State Bar Does Not Enjoy Immunity from Antitrust Laws for the Action in Question

The decision to treat disciplined attorneys differently based on whether they were disciplined pre or post-2005 or post October 26, 2018 appears to have been made, arbitrarily, by the State Bar alone without active state supervision, without direction from the Legislature or the Supreme Court of California. As far as I can tell, the State Bar should not enjoy immunity on this basis.

F. Concluding Remarks

I find nothing indicating that the Legislature or the Supreme Court of California authorized the State Bar to publish discipline information on attorney licensee profiles in *radically* inconsistent manners based solely on the date the member was disciplined. Any reliance on *Mack v. State Bar*, which I assume the State Bar will attempt, is inapposite here because you are treating disciplined members differently (*i.e.*, this has nothing to do with whether or not phone calls to the State Bar are equivalent to a quick Google search of a person's name. A member disciplined for reason "X" in 2004 should have the same attorney licensee profile as if he or she was disciplined in 2010 or in 2019. It's that simple.

The State Bar, through its policies, forces attorneys disciplined post-2005 to compete at a severe disadvantage against attorneys disciplined for the same conduct pre-2005. What's more, attorneys disciplined between 2005 and October 26, 2018 are at a disadvantage competing against

not only attorneys disciplined pre-2005 but also against attorneys disciplined post October 26, 2018. This would seem to negate any argument that this recent policy change is related to undue burden or technological limitations. Even if the State Bar completely disregards the fundamental unfairness to disciplined attorneys, the complained of policies harm consumers of legal services.

Consumers of legal services reasonably expect that discipline information provided by the State Bar is provided in a uniform manner. If it is not provided in a uniform manner, it *is* confusing. By way of example, an attorney disciplined in 2014 for certain conduct may have a three paragraph discipline summary on the face of his or her attorney licensee profile while an attorney disciplined in 2019 for literally identical conduct gets 3-5 words on his or her attorney licensee profile. Is it a stretch to say that the consumer will more likely give the latter attorney a shot at their business? It is not. What if, however, the 2019 conduct is far more egregious? How is the consumer to know that the Bar changed its policy effective October 26, 2018? Is it a stretch to think the consumer would choose the attorney with the less conspicuous discipline posting notwithstanding the more egregious conduct? It is not. Is it a stretch to say that the consumer wouldn't think to click on the .pdf link to a stipulation or decision? It is not.

Thank you in anticipation of your serious consideration of this request.

_____/s/_____
Anonymous

The State Bar *of California*

Attorney Discipline Listings New Process
As of October 26, 2018

Effective immediately we will stop creating attorney discipline summaries, and replace them with an attorney discipline *listing* that follows these steps.

Steps by State Bar Court staff

- Twice per month State Bar Court staff will send a list of disbarments and suspensions (of any length) to Communications staff
- The list will include a title (using the following format) and a link to the PDF of disposition. (State Bar Court staff already upload decision PDFs and should continue to do so. This will provide the link to be used in the listings, as noted below.)
- Example listing:
    - Andrew Mark Weitz of Studio City disbarred for loan modification operation and misdemeanor.
      Effective discipline date: [Day, month, year]
      http://members.calbar.ca.gov/courtDocs/14-O-5994-2.pdf [paste the link to the decision PDF]
    - FORMAT:
        - *Disbarment:* [Full attorney name] of [City / or City, State, if outside CA] disbarred for [brief 3-5 words summary of discipline reason]
        - *Suspension:* [Full attorney name] of [City / or City, State, if outside CA] suspended for [length of time] for [brief 3-5 words summary of discipline reason]

Steps by Communications staff

- Communications staff post the discipline listings as either a disbarment or suspension in this area of the website: http://www.calbar.ca.gov/About-Us/News-Events/California-Bar-Journal/Attorney-Discipline
- The County tag and discipline effective date should still be included
- Effective immediately the headline will link to the discipline decision PDF provided by State Bar Court instead of to a discipline summary.

Open question

- Should we include probation and public reprovals?

Footnote 2

OPEN SESSION
AGENDA ITEM

54-121.1 SEPTEMBER 2018
REGULATION AND DISCIPLINE COMMITTEE ITEM II.A.1

DATE: September 13, 2018

TO: **Members, Regulation and Discipline Committee**
Members, Board of Trustees

FROM: Melanie J. Lawrence, Interim Chief Trial Counsel, Office of Chief Trial Counsel

SUBJECT: Changes in Board Policy Regarding Consumer Alerts – Return From Public Comment and Request for Approval

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EXECUTIVE SUMMARY

The Office of Chief Trial Counsel (OCTC) proposes an amendment to Board policy that authorizes State Bar staff to post an online consumer alert when disciplinary proceedings are initiated against an attorney, when OCTC files a petition alleging that the attorney should be placed on inactive status because he or she poses a substantial threat of harm to the public or clients, when an attorney is charged with a felony, when the superior court assumes jurisdiction over an attorney's law practice, or when an attorney is involuntarily placed on inactive status. OCTC further proposes that upon a decision finding culpability or an order following a stipulation to culpability, a consumer alert directing the consumer to the "Disciplinary and Related Actions" section at the bottom of a licensee's State Bar Profile page would be posted. Under this proposal, this consumer alert would remain on the licensee's State Bar Profile page until completion of the reproval conditions, the term of probation, or upon a return to active status, whichever is later.

At the May 2018 meeting, in Item III.A.1., the Regulation and Discipline Committee resolved to send out for a 60-day public comment period the proposed amendments to the Board policy on consumer alerts. The close of public comment was July 31st. Five comments were received during the public comment period. Public comments were submitted by the Association of Discipline Defense Counsel (ADDC), the Los Angeles County Bar Association (LACBA), the Solo & Small Firm Section of the California Lawyers Association, the Orange County Bar Association (OCBA), and Ellen Pansky. The public comments are summarized in this agenda item and reproduced in their entirety in Attachment N.

BACKGROUND

Since approximately July 2005, the State Bar has posted disciplinary decisions and orders on stipulated dispositions on the licensee's State Bar Profile page. Since 2008, the State Bar has also posted a copy of any Notices of Disciplinary Charges (NDC), and the licensee's response to the charges, if any, in the "Disciplinary and Related Actions" section at the bottom of a licensee's State Bar Profile page. In May and July 2011, the Board determined that some matters warrant more conspicuous notices about disciplinary actions.

On May 13, 2011, the Board approved posting a high-visibility consumer alert that contained general information about the allegations, and a disclaimer at the top of the State Bar Profile page of any attorney against whom a NDC or a petition for involuntary inactive enrollment pursuant to Business and Professions Code section 6007(c) is filed wherein a major misappropriation of client funds is alleged.

On July 22, 2011, the Board approved posting a high-visibility consumer alert that contained general information about the allegations, and disclaimer at the top of the State Bar Profile page of any attorney against whom a NDC or a petition for involuntary inactive enrollment pursuant to Business and Professions Code section 6007(c) is filed alleging 15 or more cases of misconduct related to loan modification.

Under current Board policy, the consumer alert and disclaimer is removed from the licensee's profile page upon the filing of a decision or order of the State Bar Court adjudicating the disciplinary proceeding. The decision or order is posted in the State Bar Court Cases section of the licensee's State Bar Profile page. Actions affecting the status of the attorney's license to practice law is posted in the "Disciplinary and Related Actions" section of a licensee's State Bar Profile page.

In 2013, OCTC made a proposal to expand consumer alerts to include cases wherein: (1) the NDC or petition for involuntary enrollment alleges any misappropriation of $25,000 or more (i.e. not limited to theft of client funds); (2) where the NDC or petition for involuntary enrollment alleges 15 or more cases of professional misconduct (i.e. not limited to loan modification misconduct); and (3) where the State Bar has filed an application seeking superior court assumption of an attorney's law practice, pursuant to Business and Professions Code section 6180 et. seq. or 6190 et. seq.

OCTC withdrew the proposal after receiving public comment to the effect that the proposed consumer alerts would be unfair to the affected attorneys. In its response to the public comment, OCTC noted that the State Bar's planned case management system would impact the scope and design of future consumer alerts because the public would be provided with more accessible and complete information in the case management system.

The proposed policy amendments would include posting a consumer alert on a State Bar licensee's profile page in the following situations:

1. Upon the filing of a Notice of Disciplinary Charges (NDC) or a Substantial Threat-of-Harm Proceeding.
2. Upon the imposition of discipline.
3. Upon discovery that felony charges were pending in Superior Court.
4. Upon the assumption of jurisdiction over attorney's practice by a Superior Court.
5. Upon an Inactive Enrollment, Suspension, Disbarment, or Resignation with Charges Pending.

DISCUSSION

Consumer alerts contain information that is a matter of public record and is of current concern to clients and potential clients, opposing parties, and the courts. OCTC believes that consumer alerts are an effective way to provide clients and potential clients notice of important actions regarding a licensee. As such, consumer alerts have become a significant part of the State Bar's public protection efforts. However, the circumstances under which a consumer alert are

Footnote 4

posted are limited. Therefore, the posting of a consumer alert is somewhat rare. OCTC believes that the consumer alert program should be expanded in order to better protect the public.

This proposal would expand current policy and authorize posting consumer alerts in the following situations:

1. Filing of a Notice of Disciplinary Charges (NDC) and Substantial Threat-of-Harm Proceedings.

This proposal would authorize posting consumer alerts whenever: (1) disciplinary charges are filed against an attorney, or (2) OCTC files a petition alleging that the attorney should be placed on inactive status because he or she poses a substantial threat of harm to the public or clients (Bus. & Prof. Code, § 6007(c)(1)-(3).) In order to make an informed and intelligent decision, clients and prospective clients need to know that their attorney or their prospective attorney is facing disciplinary charges. Similarly, opposing counsel and the courts need this information because a suspension or disbarment order may have a significant effect upon pending litigation.

This consumer alert will be removed from the licensee's State Bar profile page: (1) if the charges are dismissed, or (2) upon the filing of a decision or order of the State Bar Court adjudicating the disciplinary proceeding based upon the NDC.

Unrelated to this proposal, recently, the State Bar redesigned the State Bar Profile page of licensees. An example of the new licensee profile page is included as Attachment B. While different screen resolutions and zooming will affect the area of a website visible on a screen, an example of the visible text on the current licensee profile page without scrolling is in Attachment C. While the modified licensee profile page reformats the identifying information of the licensee and moves the Disciplinary and Related Actions section of the page into view when the consumer navigates to the webpage, it does not highlight that an NDC was filed.

If an alert upon the filing of any NDC is deemed overbroad or unnecessary, alternatively, alerts could be posted when charges raising significant public protection concerns are filed (e.g., misappropriation, allegations of moral turpitude, etc.).

A second alternative to this proposal is to change the words "Consumer Alert" to simply, "Notice." This seemingly would reduce the concern about stigmatizing the attorney while balancing the need to inform the public of the fact that disciplinary charges were filed.

2. Imposition of Discipline

If, after a decision finding culpability or an order adjudicating the disciplinary proceeding is issued, the attorney is placed on probation or is issued a public reproval with conditions, a consumer alert stating that the attorney has been placed on probation or issued a reproval with conditions, and informing the consumer that the order or decision is available in the "Disciplinary and Related Actions" section at the bottom of a licensee's State Bar Profile page would be posted to the licensee's State Bar Profile page.

This consumer alert would remain on the licensee's State Bar Profile page until completion of the reproval conditions or the end of the term of probation.

Footnote 4

The attached modified licensee profile page brings the Disciplinary and Related Actions section of the page into view when the consumer navigates to the webpage. However, a consumer alert would proactively alert the consumer that discipline was imposed.

3. Felony Charges Pending in Court.

This proposal would authorize posting consumer alerts whenever felony charges are filed against an attorney in court. To make an informed and intelligent decision about their representation, clients and prospective clients need to know that their attorney or their prospective attorney is facing felony charges. Similarly, opposing counsel and the courts need this information because incarceration, or an order suspending or disbarring a licensee, might have a significant impact upon pending litigation.

Consumer alerts concerning pending criminal charges would only be posted if felony charges are filed in court. Prosecutors are required by law to disclose to the State Bar the pendency of an action against an attorney charging a felony or misdemeanor. (Bus. & Prof. Code § 6101(b)). Prosecutors are similarly required to notify the State Bar of the filing of an Information or Indictment charging an attorney with a felony. (Bus. & Prof. Code § 6068(o)(4)).

The State Bar is required by law to disclose to any member of the public so inquiring any information reasonably available to the State Bar pursuant to the above sections. (Bus. & Prof. Code, § 6086.1(c)). A member of the public navigating to a licensee's State Bar profile page should be deemed to be an inquiry as to the licensee's status and potential disciplinary actions. Therefore, consumer alerts for felony charges would assist the State Bar in complying with both statutorily mandated duties: disclosing information regarding pending felony charges and protecting the public.

This consumer alert would be removed from the licensee's State Bar profile page: (1) upon verification of notice to the State Bar that the charges have been dismissed, or reduced from a felony to a misdemeanor, or (2) upon the filing of a decision or order of the State Bar Court adjudicating a disciplinary proceeding based upon the facts underlying the felony prosecution.

In making this proposal, OCTC is mindful that information about felony charges would be posted prior to any conviction and recognizes that this is controversial. While OCTC believes that such a policy is required to comply with our statutory duty to disclose such information, we recognize that the current trend in handling criminal history information is to limit the circumstances under which people must release criminal history information, including "ban the box" initiatives. As a result, an alternative proposal could be that we post the alert only after any conviction in the matter. However, OCTC believes that statutory amendments may be required to permit more limited consumer alerts in this area.

4. Superior Court Assumption of Jurisdiction Over Attorney's Caseload.

This proposal would authorize consumer alerts whenever the superior court assumes jurisdiction over an attorney's caseload. A superior court order assuming jurisdiction requires a finding that: (1) the attorney has one or more active cases and (2) the attorney is unable to practice law because of death, incapacity, suspension from practice, or disbarment. (See Bus. & Prof. Code, §§ 6180, et seq. 6190 et seq.)[1] When an assumption order is issued, it is particularly important that the public, active clients, courts, and opposing counsel be informed.

[1] Unlike the 2013 OCTC proposal to modify the consumer alert policy, under this proposal, a consumer alert would not be posted merely because the State Bar has filed a petition with the superior court to

This consumer alert would be removed from the licensee's State Bar profile page after the superior court order is rescinded or ended.

5. Inactive Enrollments, Suspensions, Disbarments, and Resignations with Charges Pending.

This proposal would protect the public by authorizing consumer alerts whenever an attorney is placed on involuntary inactive enrollment, suspended, disbarred, or resigned for one of the following reasons:

- The State Bar Court has recommended that the attorney be disbarred (Bus. & Prof. Code, § 6007(c)(4));
- The State Bar Court has found that the attorney violated his or her disciplinary probation (Bus. & Prof. Code, § 6007(d));
- The attorney has defaulted in a disciplinary proceeding (Bus. & Prof. Code, § 6007(e));
- The attorney is delinquent in his or her child support obligations (Fam. Code, §17520);
- The attorney has failed to pay a fee arbitration award (Bus. & Prof. Code, § 6203));
- The attorney has failed to comply with his or her MCLE obligations (Cal. Rule of Court 9.31);
- The attorney has been enrolled inactive because he or she has committed a disciplinary violation and has been enrolled inactive pursuant to the Alternative Discipline Program (Bus. & Prof. Code, § 6233); or
- The attorney has been placed on interim suspension pending finality of a conviction for a felony or misdemeanor involving moral turpitude (Bus. & Prof. Code, § 6102), resigns with disciplinary charges pending, or is suspended or disbarred by the Supreme Court.

Attorneys who are enrolled inactive, suspended, disbarred, or resign with disciplinary charges pending lose their right to practice law. (Bus. & Prof. Code, § 6125 et seq.) Therefore, it is imperative that clients, prospective clients, opposing counsel, and the courts receive clear notice that the licensee can no longer practice and cannot accept new cases.

When an attorney is enrolled inactive involuntarily for one of these reasons, suspended, disbarred, or resigned with disciplinary charges pending, a consumer alert will be posted stating that the attorney is not entitled to practice law and informing the consumer that the order or decision is available in the "Disciplinary and Related Actions" section at the bottom of a licensee's State Bar Profile page would be posted. This consumer alert would remain on the licensee's State Bar Profile page until a return to active status with the State Bar.

These consumer alerts will remain posted until such time as the attorney is reinstated to the practice of law, if ever. All consumer alerts must be removed upon the death of an attorney or former attorney.

Generally, a consumer alert would not apply to cases in which the attorney is enrolled inactive based on mental illness, mental disability, or substance dependency. (Bus. & Prof. Code, §§ 6007(a) & (b)(1) & (b)(3).) In these circumstances, a consumer alert is unnecessary because, in the experience of OCTC, attorneys who assert claims of being mentally incompetent, or have been determined to be unable to practice law due to a mental infirmity or substance dependency, commonly do not engage in the unauthorized practice of law.

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assume jurisdiction over an attorney's caseload. Rather, the alert would be posted after the petition is granted by the superior court.

Footnote 4

A consumer alert would be authorized, however, when the superior court has been required to take over the law practice of a disabled attorney. (Bus. & Prof. Code, §§ 6190, 6007(b)(2).) In such situations, the consumer alert will assist the State Bar in notifying clients, courts, and opposing counsel that the State Bar is in the process of winding down the attorney's law practice.

Public Comment

Five comments were received during the public comment period. Public comments were submitted by the Association of Discipline Defense Counsel (ADDC), the Los Angeles County Bar Association (LACBA), the Solo & Small Firm Section of the California Lawyers Association (SSF-CLA), the Orange County Bar Association (OCBA), and Ellen Pansky. The public comments are reproduced in their entirety in Attachment N.

The five comments received can be characterized as follows:

ADDC – Opposed to posting a consumer alert upon filing of an NDC; Opposed to posting an alert for certain inactive enrollments; general objections.

LACBA – Opposed to posting a consumer alert upon filing of a NDC. LACBA does not oppose the remaining proposals.

SSF-CLA – Opposed to posting a consumer alert upon filing of an NDC, a petition initiating substantial threat-of-harm proceedings, the filing of felony charges against an attorney in a criminal court, and for certain inactive enrollments.

OCBA – Opposed to blanket posting of an alert at the time of filing of an NDC, but does not oppose a consumer alert upon the filing of an NDC for more serious, client-threatening conduct; does not oppose consumer alerts being posted in situations 2 through 5 or for a substantial threat-of-harm proceeding.

Ellen Pansky – Opposed to proposal number one to post a consumer alert in each case in which charges have been filed; no objection to the other proposals.

In summary, the arguments made against the proposal are:

1. Filing of a Notice of Disciplinary Charges
    a. Posting consumer alerts to the profile page of an attorney before the charges are proven is de facto discipline and attorneys have a due process right to defend themselves before discipline is imposed. (ADDC)
    b. Posting consumer alerts to the profile page of an attorney before the charges are proven may negatively impact attorneys whose cases are later dropped, dismissed, or subsequently exonerated. According to the 2017 Annual Discipline Report, a significant number of lawyers have their disciplinary proceedings dismissed or closed by the Court with non-disciplinary action. (ADDC, LACBA, Ellen Pansky)
    c. Public protection does not warrant posting a consumer alert for allegations of minor infractions which likely do not present a threat of harm to the public or involve a client's interests. (OCBA, Ellen Pansky)
    d. The proposed consumer alert strongly implies that a potential client should not hire an attorney with disciplinary charges filed against him or her. This would

Footnote 4

have a greater impact on solo and small firm practitioners who lack the resources to challenge disciplinary charges. (SSF-CLA)

e. There is no evidence to support OCTC's position that clients and prospective clients need to know that charges have been filed, as opposed to proven, against attorneys to make informed and intelligent decisions. (SSF-CLA)
f. A large percentage of disciplinary matters are resolved with a disposition less than an actual suspension. Attorneys that do not receive an actual suspension likely committed offenses that were relatively minor and therefore, public protection does not require warning the public about the matter prior to the resolution of the matter. (LACBA)
g. The threat of the placement of a consumer alert on the profile page of an attorney will provide an unfair advantage to OCTC. Attorneys facing the filing of an NDC will be more likely to admit to allegations that are not true in order to avoid the posting of a consumer alert. (ADDC)
h. Matters in which an NDC has been filed may be abated. Matters can remain abated for months or years without proceeding to resolution. Posting a consumer alert in these circumstances would undercut the purpose of the abatement. (ADDC)
i. Posting a consumer alert upon the filing of the NDC is unnecessary because the State Bar already posts a copy of the NDC on the member's State Bar Profile page. (ADDC, SSF-CLA, Ellen Pansky)
j. OCTC charges a moral turpitude violation in nearly all NDCs. If the filing of an NDC is highlighted by a banner on the attorney profile page, many clients or potential clients will terminate or decline to enter into an attorney-client relationship with the attorney. The interference with the attorney client relationship is unwarranted because moral turpitude allegations are frequently rejected by the State Bar Court and dismissed by OCTC in stipulated dispositions. (LACBA, Ellen Pansky)

2. Substantial Threat-of-Harm Proceedings
    a. There is no evidence to support OCTC's position that clients and prospective clients need to know that charges have been filed, as opposed to proven, against attorneys to make informed and intelligent decisions. (SSF-CLA)
3. Felony Charges are Filed in Criminal Court
    a. There is no evidence to support OCTC's position that clients and prospective clients need to know that charges have been filed, as opposed to proven, against attorneys to make informed and intelligent decisions. (SSF-CLA)
4. Inactive Enrollments
    a. Failure to pay child support, failure to pay a fee arbitration award, or failure to comply with MCLE requirements have little to do with public protection and consumer alerts should not be posted for these reasons. (ADDC, SSF-CLA)
5. General Objections
    a. The proposal does not include any proposed procedures, including time limits, for the removal of the consumer alert. (ADDC)

Other comments include urging the Board of Trustees to delay consideration of the posting of a consumer alert at the time of the filing of an NDC so research can be conducted in the following areas:

1. The number of cases filed with the State Bar Court that are dismissed outright by OCTC and those that are dismissed outright by the State Bar Court.
2. The average number of dismissals of individual counts included in the original NDC, whether the dismissals occurred either as a result of stipulation by the parties or by order of the court.

Footnote 4

3. The percentage of cases in which charges of moral turpitude are included in the NDC, together with the percentage of cases in which the moral turpitude charges are dismissed either by stipulation or by court order.

Response to Public Comment

OCTC submits the following comments in response to the public comments received:

1. Filing of a Notice of Disciplinary Charges

All five of the public comments received in response to the Consumer Alert agenda item expressed significant concern that the posting of alerts upon the filing of a Notice of Disciplinary Charges (NDC) would potentially prejudice attorneys who might later be exonerated or whose matters might later be dropped, dismissed, or subsequently reversed.

Two of the public comments received (LACBA and ADDC) cite to the State Bar's Annual Discipline Report for the proposition that large numbers of attorneys are charged with disciplinary offenses and subsequently exonerated. For example, "According to the draft 2017 State Bar Annual Discipline Report, **more than 200 lawyers had their disciplinary proceedings dismissed and 87 lawyers had their matters closed by the Court with non-disciplinary action in 2016 and 2017**." (ADDC Public Comment – Consumer Notices and Alerts, p. 1. Emphasis in original.) These statistics appear to refer to data reported as "Closed by SBC with No Action" and "Closed by SBC with Non-Disciplinary Action" on page 8 of the 2017 Annual Discipline Report of the State Bar of California (ADR) (p. 34 of 112). Similarly, the LACBA states:

> [O]ut of 334 total disciplinary proceedings filed in 2017, 117 were closed with no action or with no disciplinary action. This means that more than one-third of cases filed with the State Bar Court in 2017 were dismissed. The same report discloses that, in 2016, of 462 total cases filed in the State Bar Court, 86 were dismissed or closed with no discipline imposed, constituting over 18% of the cases filed in 2016. This means that, in just two years, **203 lawyers were publicly charged and the State Bar failed to prove that any disciplinary violation had occurred**. (LACBA, OCTC Public Comment – Consumer Notices and Alerts, p. 3. Emphasis Added.)[2]

The statistics cited above, "Closed with Non-Disciplinary Action" and "Closed with No Action" have specific definitions that are unrelated to the number of attorneys against whom OCTC has filed disciplinary charges and were later exonerated or had their matters dropped, dismissed, or subsequently reversed.

[2] When OCTC reached out to the LACBA to determine where in the Annual Discipline Report the cited statistics appear, Ellen Pansky, one of the drafters of the LACBA comment noted the following, in part, "These numbers were extrapolated from the Case Inventory and Disposition attachment, on page 8 of the April 2018 annual discipline report. You have to add up the individual numbers to get the totals. Looking back at my notes, I believe that I added up the numbers under the individual categories listed on page 8, but cannot reconstruct the numbers I used in July. Nonetheless, looking back at that document now, you can see that, under the first heading on page 8 "Table 2. Inquiries and Complaints," for 2017, the report reflects that 483 total cases were filed (see third line down on page 8), 98 were closed by SBC with no action (fifth line), 82 were closed by SBC with "non-disciplinary action (sixth line)," for a total of 180 closed with no disciplinary action. This equals 37% of the total cases filed in 2017. This percentage is higher than the percentage I originally calculated."

Footnote 4

For example, for purposes of the State Bar Court section of the ADR, the section from which both the ADDC and the LACBA take the cited statistics, "Closed with Non-Disciplinary Action" is defined as "Admonition or the granting of a petition pursuant to section 6007." (State Bar Annual Discipline Report, 2017, pg. A-2 [69 of 112]). If the State Bar Court grants, for example, an OCTC petition to place someone on inactive status due to mental illness pursuant to Business and Professions Code section 6007(b)(3), the matter is properly counted as a matter that is "Closed with Non-Disciplinary action." Such a disposition does not mean that OCTC filed an NDC and the attorney was later exonerated or had his or her matter dropped, dismissed, or subsequently reversed. While admonitions of attorneys are also counted in this statistic, of the 82 cases listed as having been "Closed with Non-Disciplinary Action," only one matter was an admonition.

Reviewing the data in response to the public comments has been useful insofar as it revealed a number of coding errors that the State Bar will work to correct. It is important to point out, though, that the coding errors that were found do not support the assertion that NDCs filed by OCTC are routinely dismissed. To the contrary, in reviewing the data, we determined that 47 of the attorneys listed as having their cases "Closed with Non-Disciplinary Action" were, in fact, disbarred, and 29 others received some sort of disciplinary action, e.g., stayed suspension, actual suspension, probation, etc.). A few additional cases involved 6007(b)(3) petitions that were granted. The definition of "Closed with Non-Disciplinary Action" is inapplicable to the number of cases where an attorney was exonerated.

Similarly, while also not defined in statute, for purposes of the State Bar Court section of the ADR, "Closed with No Action" is defined as "Closed by the Court with dismissal, termination or denial of petition." (Annual Discipline Report of the State Bar of California, 2017, pg. A-2 [69 of 112]). While OCTC files does file petitions, including, for example, substantial threat of harm proceedings (B&P 6007(c)) and petitions to place someone on inactive status due to mental illness, etc. (B&P 6007(b)(3)), among others, generally disciplinary cases are initiated with the filing of an NDC, not a petition. On the other hand, petitions are frequently filed in State Bar Court by disbarred attorneys seeking reinstatement and by suspended attorneys seeking relief from actual suspension under a disciplinary order that requires compliance with standard 1.2(c)(1). It is reasonable to believe that the vast majority of these dismissed or denied petitions do not represent failed prosecutions or exonerated attorneys, but rather petitions filed, in large part, by respondent attorneys themselves.

Further, while, as shown above, the cited statistics do not represent disciplinary cases that were either dismissed or closed without discipline, it is important to remember that the statistics cited measure the number of cases closed, not the number of attorneys who had cases closed. When OCTC files a Notice of Disciplinary Charges against an attorney in State Bar Court, we frequently file more than one case against the attorney in the same NDC. Despite being filed in the same NDC, these cases are counted separately. Therefore, even assuming the cited statistics meant disciplinary cases were, in fact, closed without disciplinary action, using statistics about the number of cases to say that 200 lawyers had disciplinary proceedings dismissed in 2016 and 2017 (i.e., substituting the number of attorneys for the number of cases) drastically overstates the number of attorneys who had cases closed or whose matters were later dropped, dismissed, or subsequently reversed.

Despite the fact that the cited statistics do not stand for the proposition that hundreds of attorneys were exonerated, undue prejudice to innocent practitioners is an understandable concern so, in response to the public comment, OCTC worked with the State Bar's Office of Institutional Research and Accountability (ORIA) to determine the number of attorneys in 2017

Footnote 4

who would have had a consumer alert posted to their profile page as a result of this proposal and were later exonerated or had their matters dropped, dismissed, or subsequently reversed.

To understand the impact of posting a consumer alert at the time of filing of an NDC, it is important to understand that OCTC only files an NDC in four types of cases:

1) J - Reciprocal discipline cases wherein the attorney was subjected to discipline in another jurisdiction,
2) O - Original matters,
3) H - Matters involving a violation of previously imposed terms of discipline, and
4) N - Rule 9.20 violations, which also arise from a failure to comply with the terms of a prior discipline.

In 2017, there were 17 cases dismissed after an NDC was filed in State Bar Court. Sixteen of those cases were O cases (Original matters) and one was an H case (involving a violation of previously imposed terms of discipline). In one of the O cases, while the Hearing Department initially dismissed the case, the Review Department reversed the decision and recommended that the attorney be disbarred. This disbarment recommendation was adopted by the Supreme Court. After eliminating that case, in order to determine the number of attorneys impacted, we also eliminated duplicates (i.e., attorneys who had two cases dismissed were counted only once). That brought the total number down to 13 unique respondents.

We then examined the outcome to see how many respondents received an "exoneration-type" dismissal. OCTC dismissed matters for five of the respondents for reasons unrelated to the culpability of the respondent. For example, four of the five respondents had their cases dismissed because the respondent had physical or mental health issues to such an extent that they could not be prosecuted. Several of those respondents died shortly after the dismissal.

Of the remaining respondents, four respondents had their cases dismissed on motion of OCTC after we discovered, post-filing, additional information that lead us to believe that the cases should be dismissed. For example, one respondent's "O" case was related to her failure to timely file a 9.20 declaration after she was placed on interim suspension by the Review Department following her criminal conviction. After filing, we discovered that she did not timely comply because she was transferred between multiple correctional facilities which made compliance difficult. After that, she complied. We deemed the failure to comply not to be willful and dismissed the case. While this was not a situation where OCTC tried the matter and failed to prove culpability, this is an instance where later discovered information resulted in a full dismissal of the charges after filing of an NDC. Therefore, for purposes of this discussion, this case, like the other three respondents whose cases were dismissed by OCTC following the post-filing discovery of additional information, have been counted as an "exoneration-type" dismissal. The remaining four respondents were found not culpable after a State Bar Court trial and should also be counted as "exoneration-type" dismissals. In total, eight attorneys had their matters completely dismissed by OCTC or by the State Bar Court after filing of an NDC in State Bar Court.[3]

[3] Some additional attorneys had C cases (Conviction referral matters) dismissed in 2017. These dismissals occurred, for example, as a result of a reversal of the criminal conviction which formed the basis of the C case. We did not include those attorneys in this discussion because OCTC does not file an NDC in C cases and therefore, the NDC consumer alert is inapplicable to a C case. Instead, a consumer alert would be posted, if approved by the Board, pursuant to Alert 3 in this agenda item, when OCTC discovers that felony charges are pending in superior court, not upon either the criminal conviction or the transmittal of the conviction to State Bar Court.

Footnote 4

In 2017, cases involving 256 unique respondents were closed by the State Bar Court in which OCTC filed an NDC.[4] This means that the 2017 NDC "exoneration rate" was slightly more than 3%.[5] Therefore, charges were admitted or proven true against slightly less than 97% of the attorneys charged by NDC in 2017.

The "culpability rate," above, is calculated by dividing the number of attorneys who were found culpable of a disciplinable offense by the total number of attorneys against whom the State Bar Court closed a case in which OCTC filed an NDC in 2017. While this culpability rate is calculated in a similar manner as the conviction rates published by the United States Department of Justice, local district attorney offices, and many other prosecution agencies (i.e., conviction of any charge counts as a conviction), it is important to recognize that the "culpability rate" does not mean that the respondent was found culpable of all charges, or even the most serious charge. While greater potential prejudice may inure to an attorney who had a consumer alert posted and is subsequently completely exonerated, an evaluation of consumer alerts being issued at the time of filing of the NDC should also include a discussion of the potential prejudice to attorneys who have serious charges filed against them, but are subsequently disciplined for less significant charges.

As a result, OCTC worked with ORIA to attempt to determine the disposition of individual allegations within cases in order to calculate the number of attorneys who were either:

1) Charged with moral turpitude allegations that were dismissed or were not proven, or
2) Charged with serious offenses but only disciplined for less serious offenses.

Unfortunately, the AS/400 mainframe case management system does not track the disposition of charges at an allegation level. Further, even if allegation-level dispositions were available, allegations may or may not be charged in order of significance, i.e., with the most serious count first, so an analysis cannot be based on the order of charges. Instead, a detailed ranking of the significance of charges would be required to properly analyze this issue.

In light of the inability to determine the number of attorneys against whom OCTC filed an NDC charging the attorney with serious misconduct, but the attorney was disciplined for less significant misconduct, we sought to find a surrogate method of analysis. Therefore, OCTC and ORIA looked to the outcomes of unique attorneys following the filing of an NDC in State Bar Court. Of the 256 unique attorneys against whom OCTC filed an NDC, 213 of them were either disbarred or received an actual or stayed suspension. To be clear, this does not show that these attorneys were found culpable of the most serious charges, but the fact that approximately 83% of the 256 attorneys charged by NDC were either disbarred or received an actual or stayed suspension tends to show that they were not found culpable of merely de minimis violations. Significantly, less than 20 attorneys against whom OCTC filed NDC received a public or private reproval.

Recommendation: In light of the small number of attorneys against whom OCTC filed an NDC when the attorney was later exonerated or had their matters dropped, dismissed, or subsequently reversed, and would thus be prejudiced by the NDC consumer alert, OCTC respectfully requests that the Board adopt the proposal as circulated for public comment.

Alternatively, the Board could sever the NDC portion of the proposal from the substantial threat of harm portion and the remainder of the agenda item. The Board could adopt the substantial

[4] The total number of unique respondents against whom OCTC filed either an NDC or a stipulation pre-NDC in 2017 was 315.

[5] The cases disposed by the State Bar Court in 2017 may not have been filed in 2017, so the "exoneration rate" is a generalization based on 2017 NDC filings and dispositions.

Footnote 4

threat of harm and the rest of the agenda item and direct OCTC to submit for Board review, at a future date, a plan to post consumer alerts at the time of filing of NDCs which will reduce the number of consumer alerts issued where the alleged conduct is minor or de minimis.

Further, if the Board is concerned about the number of attorneys who are charged with moral turpitude allegations that are later dismissed or not proven, the Board could direct OCTC, following implementation of the new case management system, to submit for Board review, at a future date, a plan to post consumer alerts at the time of filing of NDCs with additional statistics regarding the charging and disposition of moral turpitude allegations.

2. Substantial Threat of Harm Proceedings

OCTC respectfully disagrees with the public comment and believes that, consistent with public protection, members of the public have a right to know when a petition alleging that an attorney represents a substantial threat of harm has been filed.

3. Felony Charges are Filed in Criminal Court

OCTC respectfully disagrees with the public comment and believes that the State Bar is required by statute to provide this information to the public.

4. Inactive Enrollments

OCTC respectfully disagrees with the public comment and believes that a consumer alert is warranted because an attorney who has been enrolled inactive is ineligible to practice law.

FISCAL/PERSONNEL IMPACT

Additional staff effort will be required to initiate, update, and remove the consumer alerts. Depending on the number of alerts issued, this may be significant. The new case management system may automate some portions of these efforts.

RULE AMENDMENTS

Board policy regarding Consumer Alerts.

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

RECOMMENDATION

It is recommended that the Board of Trustees approve the following resolution:

> **RESOLVED**, that following a 60-day public comment period, the Board of Trustees hereby adopts the amendments the Board policy regarding consumer alerts as set forth

Footnote 4

in Attachment A; and it is

FURTHER RESOLVED, that the amendment to Board policy is effective immediately and will apply to all pending and future matters.

ATTACHMENT(S) LIST

A. Proposed Board policy re Posting of Consumer Alerts

B. Current Licensee Profile Page Example (Full)

C. Current Licensee Profile Page Example (Visible Text With No Scrolling)

D. Example of Current Consumer Alert Placement and Format

E. Example of Proposed NDC Consumer Alert Placement and Format

F. Example of Proposed Threat of Harm Consumer Alert Placement and Format

G. Example of Proposed Discipline Consumer Alert Placement and Format

H. Example of Proposed Felony Consumer Alert Placement and Format

I. Example of Proposed Assumption Consumer Alert Placement and Format

J. Example of Proposed Involuntary Enrollment Consumer Alert Placement and Format

K. Example of Proposed Suspended Consumer Alert Placement and Format

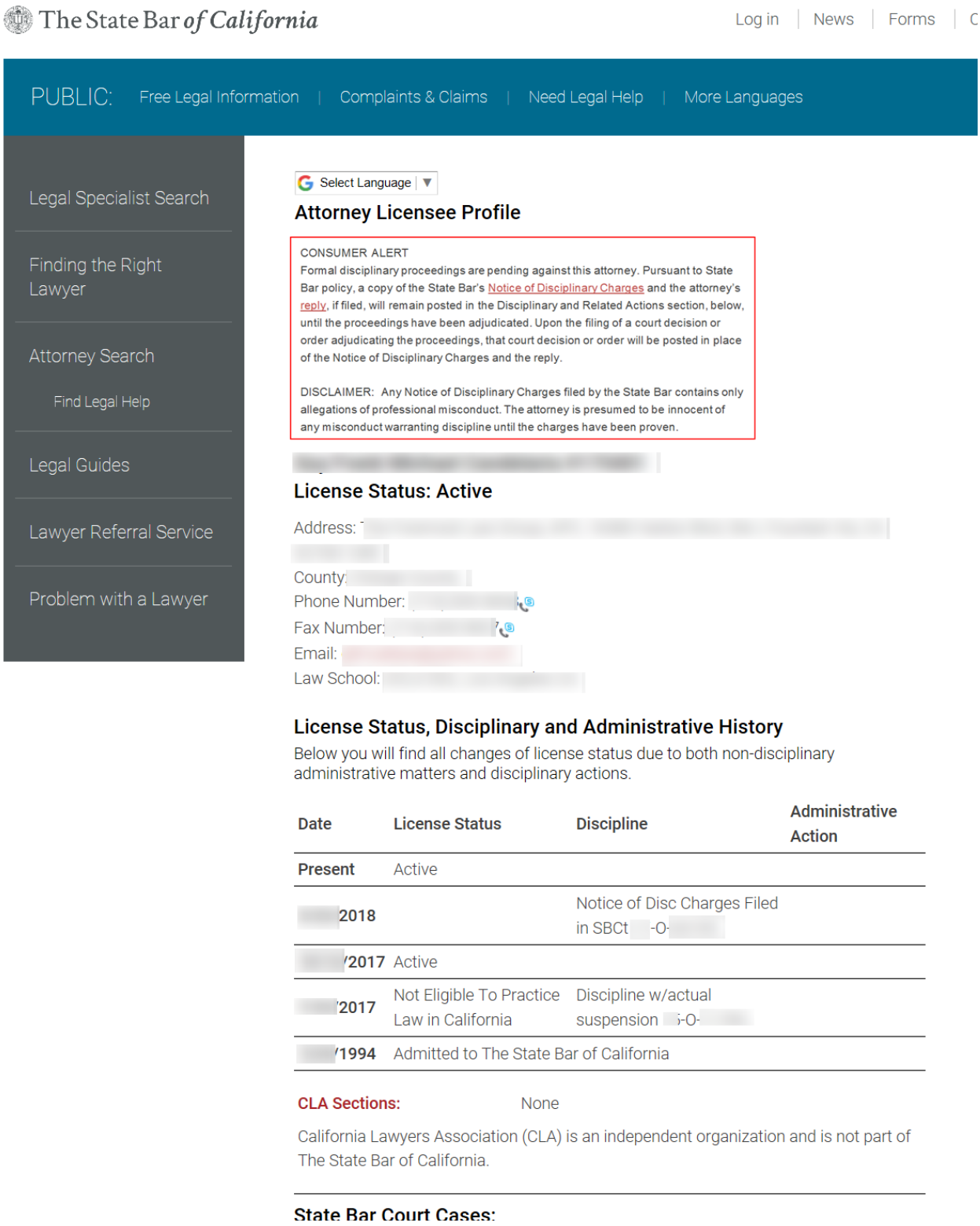
L. Example of Proposed Disbarred Consumer Alert Placement and Format

M. Example of Proposed Resigned with Charges Pending Consumer Alert Placement and Format

N. Public Comments

Footnote 4

ATTACHMENT E (Example of Proposed NDC Consumer Alert Placement and Format)



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CONSUMER ALERT
Formal disciplinary proceedings are pending against this attorney. Pursuant to State Bar policy, a copy of the State Bar's Notice of Disciplinary Charges and the attorney's reply, if filed, will remain posted in the Disciplinary and Related Actions section, below, until the proceedings have been adjudicated. Upon the filing of a court decision or order adjudicating the proceedings, that court decision or order will be posted in place of the Notice of Disciplinary Charges and the reply.

DISCLAIMER: Any Notice of Disciplinary Charges filed by the State Bar contains only allegations of professional misconduct. The attorney is presumed to be innocent of any misconduct warranting discipline until the charges have been proven.

License Status: Active

Address:
County:
Phone Number:
Fax Number:
Email:
Law School:

License Status, Disciplinary and Administrative History

Below you will find all changes of license status due to both non-disciplinary administrative matters and disciplinary actions.

Date	License Status	Discipline	Administrative Action
Present	Active		
2018		Notice of Disc Charges Filed in SBCt -O-	
/2017	Active		
/2017	Not Eligible To Practice Law in California	Discipline w/actual suspension -O-	
/1994	Admitted to The State Bar of California		

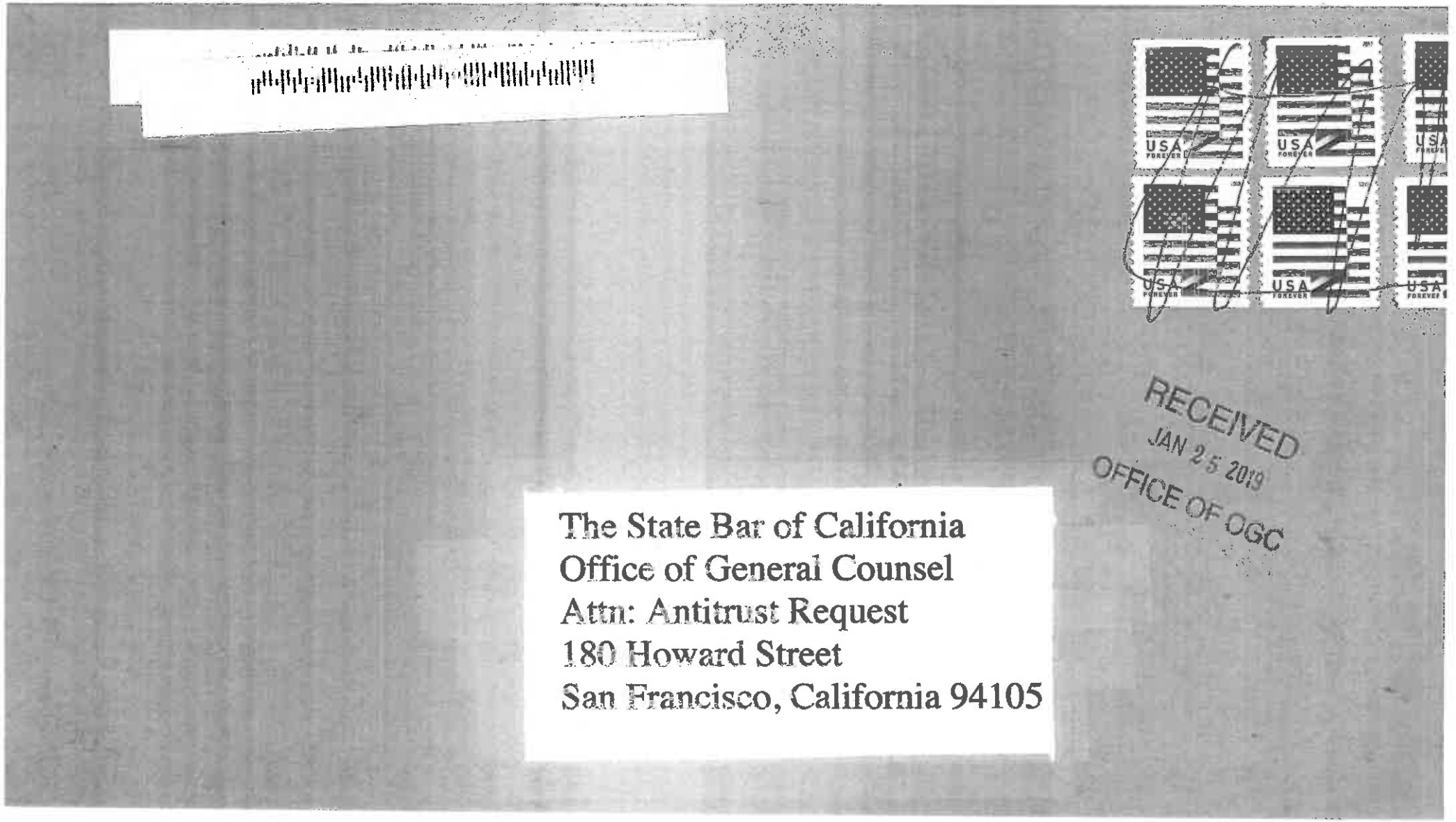
CLA Sections: None

California Lawyers Association (CLA) is an independent organization and is not part of The State Bar of California.

State Bar Court Cases:

Revised 02/08/18

Footnote 4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