

DATE: May 6, 2004

TO: Board Committee on Regulation, Admissions and Discipline

FROM: Working Group on the Record Destruction Policy

SUBJECT: Request for Public Comment of State Bar Record Destruction Policy

EXECUTIVE SUMMARY

Acting under the direction of the Board Committee on Regulation, Admissions and Discipline, a staff working group from the Office of the Chief Trial Counsel, Office of General Counsel, State Bar Court, Certification and Information Technology proposed a Record Destruction Policy (“Policy”) that would enable the State Bar to destroy, after a set period of time has expired, written disciplinary complaints, inquiries and related materials that did not lead to formal disciplinary proceedings. Those files subject to the Policy include: (1) complaints and inquiries opened in error based on a mistake in the member’s identity or in wrongfully categorizing the matter as an inquiry or complaint; (2) inquiries closed prior to being forwarded onto the investigation stage; (3) complaints closed prior to the filing of formal disciplinary charges; (4) reportable actions; and (4) alternate dispositions, such as agreements in lieu of discipline. Retention time periods of one year for files in category (1) and ten years for files in categories (2) through (4) were recommended. Not affected by the Policy would be all records and files related to formal disciplinary proceedings, files of historical/institutional significance and files related to litigation in which the State Bar is a party, which would be subject to permanent retention. At its March 2004 meeting, the Board Committee on Regulation, Admission and Discipline recommended adoption of the Policy in principle and requested that informed comment be sought from Supreme Court staff. Court staff having declined, the Working Group on the Record Destruction Policy now seeks approval for sending the Policy out for public comment. The public comment period would run for ninety days.

I. BACKGROUND

In December 1993, then State Bar President Margaret Morrow established the Discipline Evaluation Committee, a blue ribbon panel of attorney and public members whose charge was to evaluate the cost efficiency and effectiveness of the State Bar's discipline system. In response to one of the Committee's observations concerning the removal of non-public disciplinary complaints from the system, a staff task force was appointed to study the issue. The specific recommendation is stated as follows:

Currently, written complaints against lawyers are permanently resident on State Bar records, although they are not public information. The discipline system may want to consider having complaints removed from lawyers' files after the passage of a certain amount of time, say ten years, particularly if improvements in training, early intervention and alternatives to discipline reduce the current rate of recidivism.

(Discipline Evaluation Committee Report, p. 26.)

In May 1997, following the finalization of the task force study, the Board of Governors authorized dissemination of the report and recommendation for public comment. The proposed policy, which required the destruction of various records after a one, two, five and ten-year retention period, was approved by the Board, but for various reasons, including the 1998 State Bar shut-down and concerns expressed by the staff of the California Supreme Court, was withdrawn and never implemented. This year, at the request of the Board Committee on Regulation, Admissions and Discipline, the concept of the record retention/destruction policy was revisited, resulting in the current Policy. A copy of the Policy is attached at Appendix A.

II. POLICY CONSIDERATIONS

In fairness to members and without compromising public protection concerns, after passage of a set period of time, closed files of disciplinary proceedings that did not result in the initiation of formal proceedings in the State Bar Court should cease to exist. These files contain old and often outdated information that is not relevant or meaningful and serves no public protection purpose. Further, physical storage space and related costs have become significant for maintaining the growing amount of discipline related records.

This Policy reflects consideration of public protection concerns, and the State Bar's need to maintain information that is potentially useful in pattern detection. It is felt that a ten-year retention period is sufficient for such purposes. Moreover, all records relating to formal disciplinary proceedings, including records of discipline, will be retained permanently. The Policy also takes into consideration record maintenance and statistical compilation requirements

imposed on the State Bar by statute and would allow for the retention of general information for statistical purposes.

There is also an extremely narrow amount of information which is maintained and made available to inquiring parties. This information is derived from specific reportable actions, and to the extent formal proceedings are not initiated, information contained in those files quickly becomes outdated. After a period of time, dissemination of public information may be unfair to the members and provides no value to the public or the State Bar. Since the information does not lead to discipline, public confidence in the system would not be jeopardized by removing this limited information from the system after a period of time.

III. RECORD DESTRUCTION POLICY RECOMMENDATIONS

A. Proposed Policy Defined

The proposed Policy would result in the destruction of the files of all closed disciplinary proceedings that did not result in the initiation of formal proceedings in the State Bar Court. Written complaints, inquiries and related materials, including the electronic record, will no longer exist. Electronic records would include computer records, except to the extent that computer information is kept for statistical purposes as required by statute. (See Bus. & Prof. Code § 6095.1.)

B. Categories of Files Include in the Policy

Identified categories of files covered by the Policy are complaints and inquiries opened in error, purged inquiries, inquiries closed prior to forwarding for investigation, complaints closed prior to the filing of formal charges, complaints or inquiries closed by alternative disposition prior to the filing of formal charges, and reportable actions which did not lead to formal charges. Exceptions and exclusions from the Policy are set forth below

C. Exclusions and Exceptions From the Policy

The following shall be permanently retained: record of a formal disciplinary proceeding whether or not discipline was imposed; all files and documents relating to members who are disbarred or resigned with charges; and all files and documents maintained by the Office of the Chief Trial Counsel relating to a formal disciplinary proceeding. All files and documents of a disciplinary proceeding relating to civil litigation in which the State Bar is a party and files and documents of historical or institutional significance may be permanently retained.

D. Retention Time Periods

Under the Policy, one- and ten-year time periods are applicable:

One Year Retention After Closure. For all members, the following files may be destroyed by the State Bar one year after closure of the file:

- (1) Complaints and inquiries opened in error;
- (2) Inquiries Purged.

These pertain to situations where a member was erroneously identified or a matter was placed in an incorrect category [complaints/inquiries opened in error], or where there was an oral communication to the State Bar and no follow-up information was received [purged inquiry]. These matters have no meaningful substantive content and could be destroyed periodically. A time period of less than one year would be administratively onerous.

Ten Year Retention After Closure. For members who have not been disciplined, do not have any complaints designated for preparation of a Notice of Disciplinary Charges, and do not have any proceeding pending before the State Bar Court:

- (1) Reportable Actions;
- (2) Inquiries closed prior to forwarding for investigation;
- (3) Complaints closed prior to the filing of a Notice of Disciplinary Charges;
- (4) Alternative dispositions to discipline, including admonitions, warning letters, and agreements in lieu of discipline, if issued prior to the filing of a Notice of Disciplinary Charges.

These subject files provide meaningful information, but only for a limited time, and it was determined that a ten-year period allows sufficient time for pattern detection. Thereafter, the information becomes stale and of little value, other than for statistical purposes. Reportable actions are rarely supplemented with updated information, as the relevant statutory provisions only require that the initial incident be reported to the State Bar. Consequently, the State Bar records may be outdated and possibly misleading.

Permanent Retention. For disciplined members, disbarred members, and members who resign with disciplinary charges pending, all records of disciplinary proceedings, except for those matters opened in error or purged inquiries, are subject to permanent retention. In addition, files and documents of a disciplinary proceeding related to civil litigation in which the State Bar is a party or provide historical or institutional significance may be permanently retained.

It is important to retain the entire disciplinary history on disciplined members for public protection reasons and misconduct pattern detection purposes. In addition, once formal disciplinary proceedings are filed, the State Bar Court record becomes public by statute (Bus. & Prof. Code, § 6086.1). Disciplinary files related to civil litigation in which the State Bar is a party and records of historical or institutional significance may also be permanently retained as such records may have long-term value.

IV. RULE AND REGULATION CHANGES

As the Policy would erase any trace of the information contained in the subject files, it is anticipated that the implementation of the Policy may require a rule of court, as the files and records are technically files and records of the Supreme Court. A proposed rule of court, which would have to be approved by the California Supreme Court, is set forth in the Policy.

Approval of the Policy would also require significant revisions, if not a total modification, of Division 5, Article 5 of the State Bar Administrative Manual, which contains the existing five year destruction policy.

V. FISCAL AND PERSONNEL IMPACT

It is estimated that with the implementation of the destruction policy, there will be a file storage savings of at least \$60,000 per year. Computer costs and personnel for implementing the destruction are unknown at this time. Personnel and resource requirements to administer an ongoing destruction policy have not been fully developed but are not expected to be extensive.

PROPOSED RESOLUTION

Should the Board Committee on Regulation, Admissions and Discipline agree with the proposed recommendation, adoption of the following resolution would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline, authorizes staff to make available for public comment for a period of 90 days, the proposed Record Destruction Policy as a revision to Division 5, Article 5 of the State Bar Administrative Manual, in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of final approval of the proposed item.