

# AGENDA ITEM

**JULY 123**

Posting of Public Notices of  
Disciplinary Charges on State  
Bar Website

**DATE:** June 16, 2008

**TO:** Members of the Board Committee on Regulation,  
Admissions and Discipline Oversight  
Members of the Board of Governors

**FROM:** Scott J. Drexel, Chief Trial Counsel

**SUBJECT:** Posting of Public Notices of Disciplinary Charges on the  
State Bar's Website -- Request for Approval Following  
Public Comment

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## **EXECUTIVE SUMMARY**

The Commission on Judicial Performance does it. The Medical Board of California does it. Even some criminal justice courts do it. The issue presented by this agenda item is whether the State Bar should also do it. As used in this agenda item, "it" refers to making filed public disciplinary or criminal charges available to the public on the particular agency's website.

Business and Professions Code section 6086.1, subdivision (a) provides that the "hearings and records of original disciplinary proceedings in the State Bar Court shall be public, following a notice to show cause." The "record" that initiates a proceeding in State Bar Court is the "notice of disciplinary charges" a.k.a. "notice to show cause." Despite the public nature of these charges, the State Bar currently only makes that information available to the public upon receiving a specific written or telephonic request about the particular attorney from a judge, another attorney or a member of the public. Moreover, in order to obtain a mailed copy of the "public" disciplinary charges, the requestor must first send a check to the State Bar in the amount of \$.50 per page, a process that can often take two weeks.

If approved by the Board of Governors, this proposal would authorize public notices of disciplinary charges (NDCs) (along with the members' responses) to be posted on the member's profile page on the State Bar website, along with a notice warning viewers that the NDCs constitute only charges of misconduct and that the member is presumed to be innocent of the charges unless and until culpability is found by the State Bar Court.

Although the time for public comment on this proposal does not expire until June 30, 2008, there have been 26 comments submitted to date, 4 of which are in favor of the proposal and 22 of which oppose the proposal. Despite the opposition from a majority of those members who have submitted comments, the Office of the Chief Trial Counsel believes that making these public disciplinary charges accessible to the public is an important public protection measure that should be approved by the Board of Governors.

## DISCUSSION

### **A. Background**

This agenda item is *not* about whether disciplinary proceedings against attorneys should be public or whether notices of disciplinary charges (“NDCs”) filed in the State Bar Court should be public. That decision was made in August 1985, almost 23 years ago. The decision to make NDCs and disciplinary proceedings in general open to the public was made at least partially in response to a series of articles that had been published earlier that year in the *San Francisco Examiner* newspaper. In that series, entitled “The Brotherhood,” the State Bar discipline system was criticized as secretive, slow and lenient.

In announcing the adoption of rules opening the discipline system to the public, the October 1985 edition of the *California Lawyer* magazine stated as follows:

“With increasing public attention focused on the State Bar’s disciplinary system, the bar’s Board of Governors decided to relax rules restricting public access to pending disciplinary charges.

“After sharp debate at its August meeting, the board amended the bar’s Rules of Procedure. Under the amendments, which went into effect in September:

- The public has access to disciplinary information as soon as formal charges are filed by the State Bar’s Office of Trial Counsel. Under the old rules, proceedings remained confidential until a State Bar Court hearing panel recommended public disciplinary action.”

Thereafter, effective February 4, 1986, the Legislature enacted Business and Professions Code section 6086.1 which provided as follows: “Except as otherwise provided by law, hearings and records of original disciplinary proceedings in the State Bar Court shall be public, following a notice to show cause.”<sup>1</sup>

The purpose of this agenda item is simply to seek approval for the implementation of a proposal to make documents that are already public more readily accessible to those who already have a right to see them, i.e., judges, other attorneys and members of the general public.

It is extremely important to distinguish between “complaints” against State Bar members and the filing of public “notices of disciplinary charges” against members. Virtually anyone may file a complaint against a member of the State Bar. (Rule 2403, Rules Proc. of State Bar.) Even when the complaint is false or motivated by spite, the complaint is privileged and no lawsuit against the complainant predicated upon the complaint or the complainant’s subsequent communications with the State Bar may be maintained. (Bus. & Prof. Code, § 6094, subd. (a).) However, in order to protect the reputation

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<sup>1</sup> The document that initiates a formal disciplinary proceeding against an attorney in the State Bar Court was formerly known as a “notice to show cause.” It is now known, and will hereinafter be referred to, as a “notice of disciplinary charges.” (See rule 20, Rules Proc. of State Bar.)

of the respondent attorney, **all disciplinary investigations are confidential until the time that formal charges are filed.** (Bus. & Prof. Code, § 6086.1, subd. (b).)

The Office of the Chief Trial Counsel may only file a notice of disciplinary charges if it finds, in its discretion after investigation, that (1) there is reasonable cause to believe that a member has committed a violation of the State Bar Act or the Rules of Professional Conduct; and (2) the member has received a fair, adequate and reasonable opportunity to deny or explain the matters which are the subject of the notice of disciplinary charges. (Rule 2604, Rules Proc. of State Bar.) Moreover, before a notice of disciplinary charges is filed, the member has the right to have an early neutral evaluation conference before a State Bar Court hearing judge for the purpose of providing the parties with an oral neutral evaluation of the alleged facts and charges and the potential for the imposition of discipline. (See rule 75, Rules Proc. of State Bar.)

The NDCs filed by the Office of the Chief Trial Counsel have a high degree of reliability with 92% of the NDCs resulting in the imposition of public discipline in 2007 and approximately 91% of the NDCs resulting in public discipline in 2006.<sup>2</sup> The high percentage of NDCs resulting in the imposition of public discipline was also one of the reasons cited by former State Bar President Burke M. Critchfield in 1985 when he explained the Board of Governors' decision to make disciplinary proceedings more public. In that regard, President Critchfield stated as follows (*California Lawyer* (Dec. 1985), p. 72):

“In addition to sponsoring legislation to expedite and improve the disciplinary process, the bar last year took a series of positive actions in line with a two-year Board of Governors' evaluation of the system. One reform now permits public disclosure of disciplinary proceedings once an attorney has been formally charged with misconduct; previously, public scrutiny was withheld until a hearing panel recommended public disciplinary action. (More than 90 percent of formal charges do result in discipline.)”

Although the records and hearings relating to disciplinary proceedings pending against attorneys in the State Bar Court are public, members of the public, including judges and other attorneys, have extremely limited access to information about those proceedings.

There are currently only three methods by which a member of the public can learn about and obtain access to public information regarding a current disciplinary proceeding against a State Bar member: (1) telephoning the attorney complaint line, membership services office or State Bar Court; (2) writing a letter to the State Bar; or (3) making a personal visit to the State Bar's office in either San Francisco or Los Angeles.

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<sup>2</sup> In 2006 and 2007, there were no respondent attorneys who were exonerated of all misconduct following a trial on the merits, although one respondent received an admonition. (See rule 264, Rules Proc. of State Bar [a non-disciplinary disposition that may be imposed if the violation found was not a “serious offense”, was either unintentional or occurred under mitigating circumstances and no significant harm resulted from the offense].) The other cases that were dismissed without the imposition of discipline occurred prior to trial. In approximately one-half of those cases, the proceeding was resolved either as a dismissal in light of the respondent attorney's successful completion of the Alternative Discipline Program or because the Office of the Chief Trial Counsel and the respondent attorney entered into an agreement in lieu of discipline (“ALD”) pursuant to Business and Professions Code section 6092.5, subdivision (i). While an ALD does not constitute discipline, the respondent attorney must admit that he or she has committed one or more violations of the Rules of Professional Conduct and/or the State Bar Act and must agree to comply with specific conditions.

Upon making an inquiry about whether there is a current disciplinary proceeding pending against a specific California attorney, a member of the public who telephones or writes to the State Bar will be told whether there is a current proceeding pending against the attorney. Non-attorneys on the State Bar staff are not permitted to read or describe the nature and extent of the pending charges against an attorney over the telephone. However, if the member of the public wants to obtain a copy of the notice of disciplinary charges, he or she must send a check or money order to the State Bar in the amount of \$.50 per page for a copy of the NDC. Upon receipt of the check, the State Bar will mail a copy of the NDC to the member of the public.<sup>3</sup> Alternatively, the member of the public may make an appointment with the State Bar Court Clerk's Office in Los Angeles or San Francisco to come into the State Bar Court to review the file in person.

A member of the public who accesses the Attorney Search feature on the State Bar's website is currently unable to obtain **any** information about a pending disciplinary proceeding against an attorney unless the State Bar Court has filed a decision after trial or has approved a stipulation disposition between the respondent attorney and the Office of the Chief Trial Counsel. With the exception of those circumstances, the respondent attorney's profile page on the State Bar's website reflects only the attorney's current membership status (i.e., whether he or she is currently active, inactive or not entitled to practice) and whether the attorney has ever been previously disciplined, enrolled as an inactive member or administratively suspended.

Thus, despite the fact that an attorney is facing serious **public** disciplinary charges (e.g., the willful misappropriation of a large amount of entrusted funds or the abandonment of multiple clients), a member of the public who is considering retaining the attorney and who is accessing the attorney's profile page to determine whether the attorney has ever been disciplined, cannot learn that there is a pending disciplinary proceeding against the attorney. Moreover, if the attorney has never previously been disciplined, the profile page will inform the public that "[t]his member has no public record of discipline." While this statement is true, it gives the unsophisticated or casual inquirer the erroneous impression that the attorney has no past *or pending* disciplinary issues.

**B. The Proposal to Make Public Notices of Disciplinary Charges More Readily Accessible to the Public**

The State Bar is the administrative arm of the California Supreme Court in matters relating to attorney admissions and discipline. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 599-600.) The purpose of the attorney discipline system is to protect the public, the courts and the legal profession, to preserve the high ethical standards of the profession and to protect public confidence in the legal profession. (*Porter v. State Bar* (1992) 52 Cal.3d 518, 527.) Thus, at least insofar as it relates to attorney discipline and regulation, the State Bar is a public protection agency.

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<sup>3</sup> Obviously, this process is time-consuming and can be somewhat resource intensive. Only the State Bar Court and the Office of the Chief Trial Counsel have copies of the NDC. Generally, requests by the members of the public to obtain a copy of an NDC are processed by the State Bar Court. A State Bar Court clerk must retrieve the file, check the number of pages in the NDC, calculate the appropriate charge and advise the member of the public of the amount to be sent to the State Bar. Upon receipt of the check, the State Bar Court clerk makes a photocopy of the NDC and mails it to the member of the public. The check from the member of the public must be sent to the Office of Finance for processing and deposit into the State Bar's bank account. Depending upon the vagaries of the U.S. mail and the workload of the State Bar Court Clerk's Office, a turnaround time of approximately two weeks from initial public contact to the inquirer's receipt of the NDC is not uncommon.

Notices of Disciplinary Charges are public documents. The Office of the Chief Trial Counsel believes that the availability of these public documents to members of the general public is important to the protection of the public and to assisting them in making informed and knowledgeable decisions about the potential retention of, or consultations with, an attorney.

The Office of the Chief Trial Counsel strongly recommends that the RAD Committee and the Board of Governors approve the proposed statement of policy, in the form attached hereto as Appendix A, regarding the posting of **public** notices of disciplinary charges on the respondent attorney's member profile page on the State Bar's website as a means of making these important public documents more easily and readily accessible to the public, including potential clients of the respondent attorney.

The Office of the Chief Trial Counsel recognizes that the NDC contains only *allegations* of misconduct and that it does not constitute a judicial finding or conclusion that professional misconduct has, in fact, been committed. Therefore, the Office of the Chief Trial Counsel proposes to take two additional steps to ensure that the attorneys against whom NDCs have been filed are treated fairly. First, we propose to add a general notification to the public on the website that emphasizes that the filing of an NDC in the State Bar Court does not constitute a finding or conclusion of professional misconduct, that the attorney is presumed to be innocent until his or her culpability is proved in the State Bar Court and/or the Supreme Court and that culpability in disciplinary proceedings must be proved by clear and convincing evidence.

Secondly, we propose delaying the posting of the NDC on the member profile page until either (a) the respondent files his or her response to the NDC; or (b) the time for filing a response to the NDC (including any agreed-upon or court-approved extensions of time) has expired. If the respondent files a response to the NDC, we propose also posting that on the same page. Rule 103(c) of the Rules of Procedure requires the respondent attorney to file a response which contains either (a) a specific admission or specific denial of the allegations set forth in the NDC and such other facts by way of defense that may be relevant; or (b) a plea of *nolo contendere* to the NDC, subject to approval by the State Bar Court. By posting the attorney's response to the NDC, inquiring members of the public can quickly and easily determine, and take into appropriate account, whether the attorney is contesting some or all of the allegations of misconduct.

The Office of the Chief Trial Counsel is aware that respondents will be unhappy at the prospect of having their NDCs posted on the State Bar's website and having those NDCs readily available for viewing by current and prospective clients and others. However, in affirming the trial court's dismissal of a civil action brought by an attorney who alleged, among other things, that the State Bar's publication of reproof orders on the State Bar's website made those orders too readily available to the public, the court of appeal in *Mack v. State Bar* (2001) 92 Cal.App.4th 957, 963-964 emphasized that there is a strong public policy in favor of access to public records. In light of that public policy, the court of appeal held that the State Bar should be free to use modern technologies, such as the Internet, to make its public documents more readily available to the public.

Finally, the Office of the Chief Trial Counsel does not envision that the posting of the NDC and the response to the NDC on the attorney's profile page would be permanent. Rather, the NDC and response would only be posted until (1) a State Bar Court decision or order approving a stipulated disposition of the proceeding is filed; or (2) the disciplinary proceeding is dismissed without the imposition of discipline. In the latter case, we recommend that the order of dismissal or decision exonerating the respondent attorney from all culpability in the matter be posted on the attorney's

member profile page for a limited period of time (e.g., 60 days) and, following the expiration of that time period, all reference to the disciplinary proceeding would be deleted from the profile page.

**C. Accusations/Charges Are Posted By Other Agencies Too**

The State Bar of California would not be the only regulatory body to make their public disciplinary or criminal accusations or charges available to the public on their respective websites.

Currently, the Commission on Judicial Performance posts Notices of Formal Proceedings filed by the Commission against California judges on its website, along with the judge's answer to the notice.

Additionally, the Medical Board of California posts on its website the formal "accusations" filed by the California Attorney General's Office on behalf of the Executive Director of the Medical Board against physicians.

A number of county superior courts also make available to the public the charges that have been filed against criminal defendants, both prior to the defendants' entry of a plea and prior to any adjudication of the charges. (See, e.g., Ventura County Superior Court.)

**D. Public Comments**

The public comment period with respect to this proposal does not expire until June 30, 2008. To date, a significant number of public comments have been received, most of them opposed to the proposal.

Rather than summarizing only a portion of the public comments here, once the public comment period has expired, copies of all public comments, along with a memorandum summarizing those comments will be separately provided to the Board and made available to the public.

**RECOMMENDATION**

The Office of the Chief Trial Counsel strongly believes that public protection requires that members of the public who are interested in consulting with, and possibly retaining California attorneys, should have ready access to information about disciplinary proceedings pending against those attorneys. Posting the public notice of disciplinary charges against an attorney on the member's profile page on the State Bar's website will more fully inform the public about the attorney. At the same time, publication of a warning regarding the fact that the NDC contains only charges and not a finding of culpability, coupled with the posting of the attorney's response to the NDC, will provide adequate protection to the attorney's reputation and will allow the attorney to make clear that he or she is contesting the charges.

If you agree that the proposed policy regarding the posting of notices of disciplinary charges on the State Bar's website should be approved, your adoption of the following resolution would be appropriate:

**For the RAD Committee:**

**RESOLVED**, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends that the Board of Governors approve the proposed policy statement regarding the posting of public notices of disciplinary charges on the State Bar's website, in the form attached hereto as Appendix A, to become effective immediately upon adoption.

**FURTHER RESOLVED**, that the Board Committee on Regulation, Admissions and Discipline Oversight recommends to the Board of Governors that the aforementioned policy should be applicable to all disciplinary proceedings currently pending in the State Bar Court in which a State Bar Court hearing judge decision or order approving stipulation as to facts, conclusions of law and disposition has not been filed and to all notices of disciplinary charges or other initial pleading in an attorney disciplinary proceeding that is filed in the State Bar Court on or after the effective date of this policy.

**For the Board of Governors:**

**RESOLVED**, upon the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, the Board of Governors hereby approves and adopts the policy statement regarding the posting of public notices of disciplinary charges on the State Bar's website, in the form attached hereto as Appendix A, to become effective upon adoption.

**FURTHER RESOLVED**, that the aforementioned policy shall be applicable to all disciplinary proceedings currently pending in the State Bar Court in which a State Bar Court judge decision or order approving stipulation as to facts, conclusions of law and disposition has not been filed and to all notices of disciplinary charges or other initial pleading in an attorney disciplinary proceeding that is filed in the State Bar Court on or after the effective date of this policy.