

AGENDA ITEM

RE: JULY 123

Posting of Public Notices of
Disciplinary Charges on State
Bar Website

DATE: July 1, 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: Summary of Public Comments on Proposal to Post Filed
Notices of Disciplinary Charges on State Bar's Website

The 45-day public comment period on the Office of the Chief Trial Counsel's proposal to post public notices of disciplinary charges (NDCs) filed in the State Bar Court on the State Bar's website expired on June 30, 2008. A total of **51** public comments were received during the comment period. Thirteen (**13**) of the public comments received were in support of the proposal while **38** of the comments were opposed to the proposal. Five (5) of the comments in opposition to the proposal appeared to have erroneously concluded that all uninvestigated client complaints would be posted on the website and one commenter mistakenly believed that the issue was whether the proposal should be released for public comment. The latter commenter was in favor of publishing the proposal for a public comment period but did not express any view on the merits of the proposal itself.

A summary of the public comments on the proposal to post public NDCs on the State Bar's website is as follows:

Comments in Favor of Proposal (13 Comments)

Susan B. Harlow (member of the public): Ms. Harlow and her husband are strongly in favor of the proposal to post public NDCs on the State Bar's website and believe that, had the State Bar done so in the past, they could have avoided the problems they encountered with their attorney. Ms. Harlow states that she and her husband moved to California in 2003 after her husband had accepted a new job. Mr. Harlow was terminated shortly after they relocated and purchased a home. Because they believed his termination was wrongful, the Harlows retained an attorney to represent them in a wrongful termination action. When they checked the attorney on the State Bar's website, they found that she had no prior disciplinary record. Unbeknownst to them, however, there was a pending disciplinary proceeding against the attorney based upon multiple client complaints. The attorney failed to competently perform the legal services for she was retained, resulting in the dismissal of Mr. Harlow's wrongful termination action. The Harlows had paid the attorney more than \$35,000 in legal fees. The attorney subsequently entered the Alternative Discipline Program.

Kathleen Strong (State Bar member): Ms. Strong states that she applauds the proposal to post pending NDCs on the State Bar website because it will increase the public's ability to assess the merits of the attorneys they are about to hire. She states that it has always struck her as somewhat secretive and inappropriate for the State Bar to list an attorney as having "no public record of disciplinary action" when, in fact, an NDC is both public and a form of disciplinary action. Ms. Strong states that she went to the trouble to obtain an NDC from the State Bar Court and found that it was a "ridiculously time-consuming" process. She views the failure to publish public NDCs as misleading and as evidencing a desire by the State Bar to protect the accused lawyer at the expense of the public. She believes that all public information should be made easily accessible to the public.

Owen Smigelski (State Bar member): Mr. Smigelski states that there is an overriding public interest in providing public information to prospective and current clients of California attorneys. He believes that publishing this information will prompt attorneys to respond quickly to charges in order to ensure that their response is published with the charges. Mr. Smigelski states that he was personally harmed by the State Bar's failure to publish public NDCs on its website. He states that he left a position in San Diego several years ago to accept an offer with a firm in Los Angeles. The LA attorney's profile on the State Bar's website indicated that the attorney had no record of discipline. Mr. Smigelski later learned, however, that several weeks before he accepted the position, formal disciplinary charges were filed against the attorney in the State Bar Court. The attorney later stipulated to a 120-day period of actual suspension for multiple ethical violations. Mr. Smigelski only learned of the charges after he had accepted shares in the attorney's law corporation and had transferred his book of clients to the firm. Mr. Smigelski left the firm soon after learning of the attorney's disciplinary problems.

Craig A. Klein (State Bar member): Mr. Klein states that the posting of NDCs on the State Bar's website is a long overdue step in the right direction of protecting the public from unscrupulous and incompetent attorneys. Mr. Klein states that, given the high statistical rate of culpability, there is no reason why this information should not be made available to the public.

Center for Public Interest Law, Administrative Director Julianne D'Angelo Fellmeth (State Bar member): The Center for Public Interest Law (CPIL) strongly supports the Office of the Chief Trial Counsel's proposal to post NDCs on the State Bar's website. CPIL's Administrative Director, Julianne Fellmeth, notes that the NDC is public information that is already provided to an inquiring member of the public upon request. There is no reason this public information should not be made accessible to the public on the State Bar's website.

Ms. Fellmeth notes that the licensing agencies under the Department of Consumer Affairs, which are governed by the Administrative Procedures Act, regularly post the fact of the filing an "accusations" against licensees on the DCA agency's website. Moreover, Business and Professions Code section 2027(c)(4) requires the Medical Board of California to post current accusations against physicians on its website. Ms. Fellmeth further notes that the Contractors State License Board can disclose on its website "serious complaints" that have been investigated sufficiently to enable an enforcement supervisor to determinate a "probable violation" even though no formal accusation has yet been filed.

Ms. Fellmeth also notes that the California Public Records Act, although not applicable to the State Bar, expresses a strong public policy in favor of the disclosure of public records. Additionally, in 2004, the passage of Proposition 59 amended the California Constitution (art. I, § 3(b)(2)) to require statutes,

court rules and other authorities to be broadly construed if it furthers the public's right of access to information concerning the conduct of the public's business.

Ms. Fellmeth argues that the State Bar's current failure to post public NDCs on its website is affirmatively misleading to the public because it leads consumers to believe that an attorney may have no disciplinary problems when, in fact, there may be serious charges currently pending against the attorney. The Center for Public Interest Law believes that accurate and truthful information about the filing of formal disciplinary charges should be available to the public on the State Bar's website.

Professor Leslie C. Levin: Professor Levin is a law professor at the University of Connecticut School of Law and the author of an article in the *Georgetown Journal of Legal Ethics* (2007) entitled, "The Case for Less Secrecy in Lawyer Discipline." Professor Levin described the proposal to post NDCs on the State Bar's website as "a terrific initiative" and "a fair and measured response to a very real problem." Professor Levin states that NDCs are currently only "theoretically public" because laypersons cannot readily access the information. She asserts that disciplinary counsel in virtually every state can recount stories about lawyers who continued to harm clients while serious charges were pending against them. She argues that members of the public should be able to access information that might allow them to protect themselves in those situations. Finally, Professor Levin states that since disciplinary charges are only filed after the Office of the Chief Trial Counsel has found that there is reasonable cause to believe the attorney has committed a violation of law or professional ethics, the attorney is afforded more protection than a citizen receives when he or she is named as the defendant in a civil action since mere allegations in a civil complaint are public and typically remain public in perpetuity.

HALT (Americans for Legal Reform), Senior Counsel Suzanne M. Blonder (State Bar member): On behalf of HALT, Ms. Blonder states that adoption of the proposal to post NDCs on the State Bar's website is necessary because (1) it will fulfill the unambiguous legislative intent of Business and Professions Code section 6086.1; (2) it is in accord with established precedent; (3) it is required by the express public policy of the State of California; and (4) a movement towards transparency and accessibility in attorney discipline is a positive step for the clients and prospective clients of attorneys.

Ms. Blonder argues that the plain language of Business and Professions Code section 6086.1 reflects a legislative intent to have the records of pending disciplinary proceedings available to the public. In order to fulfill the legislature's intent, Ms. Blonder asserts that the State Bar should use all reasonable means of making pending disciplinary records available. Additionally, citing *Mack v. State Bar* (2001) 92 Cal.App.4th 957, Ms. Blonder states that the court of appeal has rejected a claim from a disciplined attorney who objected to the fact that his private reproof was published on the State Bar's website. Ms. Blonder noted that the court of appeal emphasized the strong public policy favoring the disclosure of public records.

Ms. Blonder also argues that requiring the use of the telephone or mail to order copies of NDCs is an outmoded method of making information available to the public. In order to satisfy its stated public policy goal of protecting the public, the State Bar should adapt to new, more efficient and less costly means of transmitting information. Finally, Ms. Blonder states that HALT strongly urges the Board of Governors to consider the example of Oregon, which allows public access to all *complaints* against lawyers, allowing consumer's to distinguish frivolous claims from meritorious ones.

Claudia Kirkland (State Bar member): Ms. Kirkland is a former Deputy District Attorney who had originally written to the State Bar to complain that the State Bar's website showed another deputy DA as being a "member in good standing" despite the fact that there is a proceeding pending against him in the State Bar Court. When notified that of the current proposal for posting NDCs on the website, Ms. Kirkland submitted a comment in which she stated that she is in favor of the proposal and that it informs the public, protects the attorney and deletes any record if the attorney is exonerated of the charges. Ms. Kirkland commented that it is very difficult for the public to get information about pending disciplinary proceedings. Ms. Kirkland stated that, although she is an attorney, she wasn't aware that the State Bar does not currently post information about pending disciplinary proceedings.

Bonnie Russell (member of the public): Ms. Russell states that she is in favor of the proposal to post NDCs on the State Bar's website. She characterizes the real question posed by the proposal as "[h]ow long will the State Bar aid, abet and protect bad actors instead of providing public access so the public might proactively act to protect themselves?" Ms. Russell points out that, by posting public information about filed NDCs on the website, the State Bar might save future payouts by the Client Security Fund to unwary clients of attorneys against whom charges were pending when they were hired.

Melvin Hirshman (Maryland Bar Discipline Counsel): Mr. Hirshman, a former President of the National Organization of Bar Counsel, states that he is in favor of the proposal. However, he appears to have misinterpreted the proposal as requiring the posting of all *complaints* against attorneys, and not simply those complaints that have been found by the Office of the Chief Trial Counsel to warrant the filing of formal disciplinary charges in the State Bar Court. He notes that it has always been a problem for his office when a prospective client calls asking about pending complaints against an attorney against whom a proceeding for suspension or disbarment is pending and his office cannot disclose that information to the prospective client.

David (member of the public from Manhattan Beach): David states that he believes it is imperative for the State Bar to protect the public by publishing pending charges that have been filed in the State Bar Court. He states that he was victimized by an attorney's fraud and misrepresentations and only learned, by accident, that the attorney had multiple disciplinary charges pending against him in the State Bar Court.

Mark A. Anderson (State Bar member): Mr. Anderson supports the online publication of NDCs. He comments that the proposal appears similar to the policies of the Better Business Bureau and of Angie's List and that it balances the public's right to notice with the due process rights of the accused.

TuleJim (member of the public): TuleJim writes that he is completely in favor of the proposed posting of NDCs on the State Bar's website and does not believe that it would be unfair to attorneys.

Comments in Opposition to Proposal (38 Comments)

Los Angeles County Bar Association: Writing on behalf of the Los Angeles County Bar Association (LACBA), President Gretchen Nelson states that LACBA strongly objects to the posting of public NDCs on the State Bar's website. LACBA is particularly concerned that the posting of mere allegations will cause a member of the public to conclude that the attorney has been marked by the State Bar as an "unsuitable practitioner." LACBA notes that as many as 9% of accused attorneys have had the charges

against them dismissed and that a charge of moral turpitude can damage an attorney's reputation even if the attorney is later found culpable of wrongdoing based upon gross negligence rather than moral turpitude. LACBA also notes that settlements are often reached with respondents on terms that are significantly different from the charges and that the posting of charges can be coercive and may compel false admissions of wrongdoing by attorneys who are simply interested in reaching pre-filing agreements.

LACBA further argues that the State Bar has existing authority to place attorneys on immediate involuntary inactive status if they present a danger to the public. While acknowledging that the key issue is protection of the public and that it is important to provide increased public access to information, those rights must be balanced against (a) protection of the innocent; (b) possible breaches of confidentiality and attorney-client privilege; and (c) the disadvantages of having a statement of attorney wrongdoing through the posting of unproved charges. Finally, LACBA claims that due process issues associated with publishing unproven charges have not been tested. LACBA claims that Colorado recently rejected a similar proposal and that Louisiana revoked a similar rule because of poor experience.¹

Association of Discipline Defense Counsel, President David C. Carr (State Bar member): Writing on behalf of the Association of Discipline Defense Counsel (ADDC), President David Cameron Carr states that the ADDC strongly opposes the proposal to post public NDCs on the State Bar's website. Mr. Carr states that there must be a weighing of whether the public's interest in being fully informed about counsel they might hire outweighs the damage an attorney suffers from the publication. Mr. Carr acknowledges that notices of disciplinary charges are public documents but argues that they are "somewhat less reliable" than the decisions of the State Bar Court regarding an attorney's misconduct.

Mr. Carr asserts that, in considering the reliability of the charges contained in NDCs, the most relevant question relates to the percentage of the actual counts charged in a contested disciplinary proceeding that is ultimately sustained by the State Bar Court. He claims that defaults result in all *charges* being admitted and should be excluded from consideration. He also claims that criminal convictions, agreements in lieu of discipline and rule 9.20 violations should also be excluded because they either require no OCTC investigation or are "strict liability" violations. He further asserts that unrepresented respondent attorneys sometimes stipulate to the violations of rules or statutes that they did not really violate simply to conclude the discipline process.

Mr. Carr additionally argues that the Office of the Chief Trial Counsel "overcharges" violations of Business and Professions Code section 6106 (i.e., allegations of the commission of acts of moral turpitude, dishonesty or corruption). Mr. Carr claims that there is a potential for tactical advantage by utilizing charges of moral turpitude to "put heft and leverage" into an NDC.

¹ The information regarding Colorado and Louisiana is apparently mistaken. Nancy L. Cohen, Colorado's Chief Deputy Disciplinary Regulation Counsel and a former President of the National Organization of Bar Counsel, reported to me that she is unaware of any alleged rejection of a proposal to post disciplinary charges on the Colorado State Bar or Colorado Supreme Court's websites. Similarly, Charles Plattsmier, Louisiana's Chief Disciplinary Counsel since 1996, reported to me that he is very much in favor of making filed formal disciplinary charges as available as possible to the public and the Louisiana has not revoked any rule similar to that proposed by the Office of the Chief Trial Counsel.

Mr. Carr asserts that posting information on the State Bar's website is the modern equivalent of the "town crier" because it is susceptible of being skimmed quickly without careful consideration. Mr. Carr cautions that, within days of being posted on the website, NDCs will be cut-and-pasted and portions of them will begin to appear in pleadings filed by opposing counsel. The intent will be to discredit the attorney and the attorney's clients. Mr. Carr asserts that the attorney's business will begin to decline as potential clients and referring attorneys check the website and see that disciplinary charges have been filed. If allegations are made, they will be treated as true. Mr. Carr asserts that viewing documents in a court file that the viewer had to travel to the State Bar Court to view will furnish "the appropriate context for understanding the picture" and will discourage the malicious or misinformed use of the information."

Beverly Hills Bar Association, President Marc L. Sallus (State Bar member): Writing on behalf of the Beverly Hills Bar Association (BHBA), President Marc L. Sallus states that the Board of Governors of BHBA voted unanimously to oppose to proposal to post public NDCs on the State Bar's website. In opposing the proposal, the Board of Governors of BHBA believes that posting of NDCs will undermine the presumption of innocence, that it will not be ameliorated by the publication of a disclaimer and that there will be resulting harm to the reputation of the attorney. Mr. Sallus asserts that some discipline cases take years to resolve and that, during that period, the attorney's practice will be destroyed. He asserts that disgruntled clients may use the pending disciplinary charges as an excuse to refuse to pay for the attorney's services and that overzealous or hyper-aggressive opposing counsel may use the allegations against the attorney in pending litigation. Mr. Sallus further argues that serious charges in an NDC may scar an attorney forever even though he or she is later found culpable or admits to a lesser violation.

Mr. Sallus points out that the Office of the Chief Trial Counsel already has authority to seek the involuntary inactive enrollment of attorneys who are engaged in serious misconduct. He asserts that at least 9% of respondents are found to be "completely innocent." If the proposal is approved, the Board of Governors will be authorizing the Office of the Chief Trial Counsel to abdicate their professional responsibilities as prosecutors to ensure "that justice will be done."

Mr. Sallus further argues that many cases are resolved by alternatives to discipline, including diversion or by an agreement in lieu of discipline. If the proposal is approved, lawyers will be less likely to accept these resolutions because they will have nothing to lose by full blown litigation of the charges. As a result, this proposal could result in increased litigation.

Finally, Mr. Sallus argues that there is a significant possibility that the NDC or the attorney's response to the NDC will include confidential or privileged information of a non-complaining client and that this would undermine the sanctity of the attorney-client relationship.

Ophir J. Bitton (State Bar member): Mr. Bitton is opposed to the proposal. He asserts that the posting of the NDC on the State Bar's website would violate the basic characteristic of our criminal justice system, i.e., that a person who is charged with an offense is presumed to be innocent until the facts show his or her guilt. He asserts that the posting of a disclaimer that the attorney is presumed innocent will be ineffective and that allowing the attorney to post his or her response to the NDC, "while noble in theory," will not be sufficient to "un-ring the bell" of the accusations made against him or her. Finally, Mr. Bitton notes that, if the proposal is adopted, State Bar prosecutors would be sacrificing an important tool when it comes to the disposition of a private reproof. Once disciplinary charges are filed, the attorney has no real incentive to stipulate to a private reproof.

Philip Feldman (State Bar member): Mr. Feldman asserts that the criminal justice system is restricted from publicizing mere charges of criminal activity while the news media is well equipped to bring major matters to the attention of the public. According to Mr. Feldman, the Office of the Chief Trial Counsel has not made clear why there is a greater need for public awareness in the attorney discipline system than there is in the criminal justice system. He asserts that prosecutors should protect the public by prosecuting offenders and offenses, not be publicizing charges and creating a presumption of “guilty under proven innocent”.

Alan Nopar (State Bar member): Mr. Nopar agrees that NDCs should be made available to the public but is concerned that the proposed warning language and the posting of the attorney’s response to the NDC will not adequately protect the attorney’s reputation. Mr. Nopar notes that there are 200,000 attorneys in California and that the vast majority of potential clients will avoid an attorney who has any negative information about him or her on the State Bar’s website. He further asserts that keeping the NDC and a decision exonerating the attorney on the website for 60 days after the attorney has been exonerated will further harm the attorney for that 60-day period. Finally, Mr. Nopar is concerned that, even after an NDC is removed from the State Bar’s website, it may remain on other search engines such as *Google* or *Yahoo Search* for years into the future.

Kurtiss Jacobs (State Bar member): Mr. Jacobs is opposed to the proposal noting that, even though 92% of the filed NDCs results in the imposition of public discipline, one of every 12 attorneys are apparently exonerated. He asks whether the State Bar will reimburse these innocent attorneys for the fees they have lost while being essentially libeled by the State Bar.

John Paladin (State Bar member): Mr. Paladin is opposed to the posting of NDCs on the State Bar’s website. Mr. Paladin argues that the seriousness of the charges and the attorney’s prior discipline history should be taken into consideration in determining whether the charges should be made public before an adjudication of the charges has been conducted.

Dean Jane L. O’Hara Gump, San Francisco Law School (State Bar member): Dean Jane O’Hara Gump of San Francisco Law School argues that the proposal to post public NDCs on the State Bar’s website, before there has been any adjudication of guilt, is misguided and feeds both public misconception and a public desire for sensationalism. Dean Gump asserts that publication of a disclaimer and of the attorney’s response would be ineffective and inappropriate. She asserts that the laudatory conviction rate of the Office of the Chief Trial Counsel is insufficient to justify the public dissemination of charges prior to a determination of guilt.

Samer Salhab (State Bar member): Mr. Salhab states that he is completely opposed to the proposal, which he characterizes as “overzealous.” Mr. Salhab, who is a criminal lawyer, states that in the court of public opinion, people are guilty until proven innocent instead of the other way around. The publication of unproven charges will cast an adverse reflection on the lawyer’s reputation. Allowing the attorney to post his or her response will not correct the situation and may even make it worse if the attorney cannot articulate his version of events in the most accurate way.

James Kosnett (State Bar member): Mr. Kosnett asks “what’s the rush” and states that most people will assume that the attorney is guilty. He asserts that nothing should be published until the attorney is found culpable.

Kevin Underhill (State Bar member): Mr. Underhill is opposed to the proposal to post NDCs on the State Bar's website. He states that charges mean nothing unless and until they are proven and that the public is likely to see the mere filing of charges as evidence of guilt. Providing a disclaimer will not protect the attorney's reputation. A 92% conviction rate does not justify the harm that will be suffered by the innocent 8%. Mr. Underhill believes the current system is onerous enough and that adoption of this proposal would result in the punishment of attorneys before any wrongdoing has been proven.

Paul Ready (State Bar member): Mr. Ready suggests that a more balanced approach would be to simply note on the website that an NDC has been filed without detailing the allegations. The attorney should be able to publish a response or ignore it at his/her option. Mr. Ready further suggests that, if the State Bar concludes that the attorney's response is misleading or materially false, the State Bar could print a comment or warning stating that the response was misleading or false. While this is more complicated, Mr. Ready believes that it would better protect the interests of all concerned.

David Vallerga (State Bar member): Mr. Vallerga essentially asserts that since some of the disciplinary charges filed against attorneys do not result in culpability, the State Bar is sanctioning the filing of a certain number of "false" charges. Charges that are proven to be true are already posted on the website.

Lauren LaPietra (State Bar member): Ms. LaPietra states that the publication of disciplinary charges can be very prejudicial, given the potential for the attorney to be exonerated. She believes that it also creates an incentive for the filing of questionable charges.

Ken Cady (State Bar member): Mr. Cady says that it is "anti-American and outright stupid" to put allegations of misconduct on the website before anything is proven. It is something that one would expect to see in a fascist country, not in California.

Alice Akawie (State Bar member): Ms. Akawie states that the general public does not understand the notion of "pending" and "presumed innocent" and that the public would unfairly conclude that the attorney is guilty in advance of a full and complete hearing. In Ms. Akawie's opinion, it is a denial of due process.

Kevin A. Taheny (State Bar member): Mr. Taheny states that, while hearings and records of disciplinary proceedings must be public after the NDC is filed, that doesn't mean the NDC has to be published on the State Bar's website. The potential damage to the attorney who is presumed innocent could be substantial, even though he or she is later exonerated.

Richard E. Quintilone, II (State Bar member): Mr. Quintilone strongly opposes the posting of NDCs on the State Bar's website. The fact that discipline has been imposed should be available online but Mr. Quintilone also opposes the publication of stipulated dispositions or decisions. While the public has the right to know about any warranted discipline, broadcasting a "complaint" online unnecessarily harms the attorney.

Mr. Quintilone states that he recently stipulated to discipline in a matter. If he had known that the stipulation would be posted online, he would have elected to have a trial instead. Mr. Quintilone states that he could not afford his attorney while concurrently fighting the bar prosecutor when he tried to bring up "old" charges. According to Mr. Quintilone, the Orange County District Attorney even charged him

with a criminal offense in order to force him to plead to the disciplinary matter. Mr. Quintilone has found that the stipulation in his matter has been used against him by clients in pleadings regarding fees and in law and motion pleadings in which his discipline has no relevance.

Joel F. Tamraz (State Bar member): Mr. Tamraz believes that the proposal to post NDCs on the State Bar's website is a bad idea. While the percentage of cases in which culpability is found is high, the posting of charges will be a black mark on a possible innocent attorney. Members of the public who see the charges posted online will assume the attorney is guilty. Mr. Tamraz argues that if charges are posted online, the State Bar should publish an apology to any attorney who is found not culpable. Finally, the publication of the charges on the website would encourage other attorneys to file complaints against a lawyer to damage his or her reputation and to attempt to obtain that attorney's clients.

Roger M. Lindmark (State Bar member): Mr. Lindmark is opposed to the proposal. He essentially asserts that the Office of the Chief Trial Counsel wants to publish charges on the website as a means of intimidating attorneys to accept the prosecutor's settlement offer. Mr. Lindmark extensively attacks the perceived misconduct of the State Bar prosecutor who brought charges against him in an earlier disciplinary proceeding. Mr. Lindmark claims that he was charged with four counts of misconduct in that proceeding but was only found culpable of one count. He claims that the other counts were included only for purposes of intimidation. According to Mr. Lindmark, he was compelled to prove his innocence at trial. He also asserts that the hearing judge's decision was "results oriented" and that the Review Department turned the law on its head. Mr. Lindmark asserts that accused attorneys are not afforded due process and there is no procedure for having bogus counts dismissed to shorten the trial.

Judge Darrel W. Lewis (Ret.) (State Bar member): Judge Lewis is opposed to the proposal. Although culpability is found in 92% of the cases, that means that 8% of the attorneys are not found culpable. Since the NDC would be posted on the website for six months or more, the attorney will be subject to embarrassment, humiliation and loss of business for no good reason. According to Judge Lewis, the only possible reason for this proposal is to embarrass those attorneys who have the temerity to force prosecutors to meet their burden of proof.

Barry Greenberg (State Bar member): Criminal defendants are considered innocent until proven guilty. Posting an NDC on the State Bar's website would constitute a "badge of guilt" even if that is not what is intended.

Jason L. Oliver (State Bar member): Mr. Oliver is opposed to the proposal. He asserts that the State Bar is not infallible and that an attorney is presumed innocent until proven guilty. No public benefit is achieved by the proposed policy that is not already served by the system that is in place. The casual web surfer is much more likely to assume that the attorney is culpable of the charged misconduct than is the person who goes to the time and trouble of requesting documents from the State Bar Court. A disclaimer would be ineffective. Potential clients will most likely hire an attorney without any "record" rather than take a chance on an unknown attorney with a question mark on his or her profile. Mr. Oliver asserts that written requests for documents is the norm rather than the exception.

Patrick A. Lanius (State Bar member): Mr. Lanius is opposed to the proposal to post public NDCs on the State Bar's website. Mr. Lanius asserts that publication of the NDC will be tantamount to a conviction for those who are not found culpable because, once the charges are published, the bell can't be unrung.

Ronald B. Funk (State Bar member): Mr. Funk is opposed to the proposal. He argues that the public is adequately protected when there is an adjudication on the merits. Under this proposal, even members who are ultimately exonerated will suffer harm in that current and potential clients will be turned away based upon the pending charges.

Erik Gunderson (State Bar member): Mr. Gunderson is opposed to the proposal. He asserts that disgruntled clients and adversaries are known to initiate disciplinary complaints against attorneys as part of an assault on an opposing party's camp. According to Mr. Gunderson, bar prosecutors have, in the past, decided to file charges based upon the gravity of the alleged conduct, not upon the evidence. Mr. Gunderson is concerned that the public often do not distinguish between accusations and convictions. Posting charges in a readily accessible format will create a substantial risk of impairment of professional opportunities and the diminishment of personal reputation.

Paul W. Smith (State Bar member): Mr. Smith is opposed to the proposal because it violates the spirit of one of the fundamental principles of our legal system: innocent until proven guilty. The effect of publishing the NDC will be to punish the attorney before he has been found guilty. The damage to the attorney's reputation outweighs any potential benefit to the public. Mr. Smith also questions the public benefit of the proposal, stating that the State Bar already has power to suspend attorneys who commit serious violations. Mr. Smith is concerned about the damage that will be caused to the 8% of attorneys who are not found culpable of misconduct.

Nicholas Damer (State Bar member): Mr. Damer is opposed to the proposal. He asserts that "[s]currilous charges can come from any maliciously motivated person" and that the State Bar does little to discourage or punish such conduct. Mr. Damer recounts his own experience with the discipline system in which he claims to have been victimized by the malicious conduct of other attorneys. Mr. Damer asserts that the State Bar acted to perpetuate and enforce a "cover-up." He asserts that what the State Bar currently publishes about attorneys is both unfair and defamatory but is shielded by Civil Code section 47.

Stephen G. Hammers (State Bar member): Mr. Hammers appears to have misinterpreted the proposal as calling for the posting of all *complaints* against an attorney on the State Bar's website. Mr. Hammers states that the State Bar will receive numerous additional, frivolous complaints against litigants by aggrieved parties or opposing attorneys so that a notice will be posted indicating that the attorney is under investigation. Mr. Hammers suggests that the Medical Board model is a good one, although he mistakenly believes that the Medical Board only posts information on its website when a physician is found guilty of misconduct.

David Hicks (State Bar member): Mr. Hicks asks whatever happened to the presumption of innocence and being able to distinguish between frivolous and serious breaches of fiduciary duty. Mr. Hicks also appears to have misinterpreted the proposal as calling for the posting of all client *complaints* on the State Bar website.

Robert Mills (State Bar member): Mr. Mills states that, having been the subject on several occasions of frivolous accusations which were ultimately withdrawn in their entirety, he is concerned that the publication of those complaints would be highly unfair and prejudicial to innocent attorneys. He views publicizing accusations as a denial of due process. Mr. Mills appears to have misinterpreted the proposal as calling for the posting of *complaints* rather than formal charges.

Ivan Trahan (State Bar member): Mr. Trahan states that he has had two complaints filed against him in his 31 years of practice. The first complaint was found to be unfounded. The second complaint is also unfounded but still pending. Posting a complaint before it is proven would create a system of guilty until proven innocent.

Philip E. Kay (State Bar member): Mr. Kay asserts that posting unproven NDC allegations will further encourage State Bar prosecutors to abuse the process through the threat of filing the NDC to force a settlement. He asserts that the publication of unproven charges will have a larger negative impact on smaller firms and sole practitioners, as compared to larger firms. Mr. Kay opposes such publication. If the proposal is adopted, Mr. Kay believes that the State Bar should also be required to make public all instances in which State Bar prosecutors are criticized or reprimanded in the performance of their duties in order to balance the process.

Thomas J. Milhaupt (State Bar member): Mr. Milhaupt believes that posting unproven allegations is unfair and will unavoidably lead to the improper, completely unjustified, wholesale public humiliation and smearing of many members. Mr. Milhaupt believes that the publication of the attorney's response is meaningless. Existing or potential clients are unlikely to be enticed to retain or hire an attorney with charges pending against him or her. He states that the State Bar can already act quickly in egregious cases where a significant threat to the public exists. In Mr. Milhaupt's view, the harm to attorneys outweighs any public benefit.

Claudia Brisson (State Bar member): Ms. Brisson believes that prejudice outweighs benefit. In her view, no publication should occur until an attorney is found culpable of misconduct.

Jodie Rosello (State Bar member): Ms. Rosello states that it should be innocent until proven guilty. The proposal is not fair to the 10% of attorneys who are ultimately exonerated.

Kevin Kwak (State Bar member): Mr. Kwak misinterpreted the issue as being whether the RAD Committee should authorize the release of the proposal for a period of public comment. Mr. Kwak states that the proposal should be released for public comment. He did not comment on the merits of the proposal itself.