

# DISCUSSION ITEM

**MAY 2011 Request for Rule of Court re: Expungement of Private Reproval**

**DATE:** April 15, 2011

**TO:** Members, Regulation, Admissions and Discipline Oversight

**FROM:** Staff

**SUBJECT:** Request from the Association Of Disciplinary Defense Counsel's For a Rule of Court re: Expungement of Private Reprorals

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## EXECUTIVE SUMMARY

As described on their website, the Association of Disciplinary Defense Counsel ("ADDC") is the bar association for lawyers who represent lawyers and others in disciplinary, admissions and regulatory proceedings before the State Bar of California and the California Supreme Court. According to their website, there are 26 members in the ADDC.

In 2010, the ADDC made a request of the Supreme Court for a Rule of Court which would allow for the expungement of private reprovals in State Bar disciplinary proceedings under certain conditions. The Supreme Court referred the matter to the State Bar. The request, which is attached, explains the scenarios in which it would be appropriate to expunge a member's disciplinary record. The question before this committee is whether to consider this proposal.

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## BACKGROUND

Private reprovals are the lowest form of discipline imposed in State Bar disciplinary proceedings. In 2010, the ADDC made a request of the Supreme Court to consider a Rule of Court that would expunge private reprovals from an attorney's disciplinary record under certain conditions. The Supreme Court referred the ADDC back to the State Bar of California. State Bar President Bill Hebert was contacted by Jerome Fishkin, President of the ADDC and President Hebert referred the matter to the Board Operations Committee ("Board Ops") for assignment. Board Ops referred the matter to this committee for consideration.

## ISSUE

The attached memorandum from the ADDC outlines the issue. The question is: does RAD wish to consider this matter?

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Enclosed please find a proposed Rule of Court regarding expungement of private reprovals. This proposal is sponsored by ADDC.

We have previously spoken to Supreme Court staff about the mechanics of making such a proposal. We were told that we should submit our proposal to the State Bar for its views before forwarding the proposal to the Supreme Court. We ask that the Board circulate our proposal for public comment before doing so.

The reasons for this proposal are as follows.

A private reproof is the least form of discipline. It is reserved for minor offenses. There should actually be a difference between a private reproof and a public reproof. This issue did not arise until a few years ago, when the State Bar began publishing on its website, private reprovals that were imposed after disciplinary cases were filed. This practice defeats the very concept of "private." This practice also rewards the prosecutors who pursue a minor case and are able to post the "private" reproof.

Bus & Prof 6078 permits the State Bar to impose public or private reprovals. Public reprovals are available to everyone. Private reprovals were only available when good cause was shown in discovery, in a proper case. *Chronicle Publishing Co v Superior Court* (1960) 54 Cal 2<sup>nd</sup> 548, 574-575. The State Bar now posts on its website, private reprovals that are administered after filing of disciplinary charges. The court of appeal has upheld the practice. *Mack v State Bar* (2001) 92 Cal.App.4th 957.

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In the context of a public reproof of a judge, this court stated that there is an "...the expectation that the judge will respond to the censure by ceasing to engage in the conduct that resulted in the disciplinary action." *Haworth v. Superior Court* (2010) 50 Cal 4th 372, 390-91. It is equally reasonable to conclude that an attorney will respond to a private reproof by ceasing to engage in the conduct. We propose a two step process. First, upon completion of the conditions of reproof, the reproof itself is removed from the member's listing on the State Bar's website. Second, if indeed the attorney responded appropriately, that is, ceased the conduct, then five years later, the record is expunged.

There is no known policy reason why a "private" reproof should be on the public record forever. An attorney who maintains a clean record should be able to expunge a private reproof. Under current practice, all disciplinary actions are on the attorney's web page listing forever.

Expunging records involves a trade-off between competing interests. The State Bar would like to know if a member has a prior record. Prospective clients and employers might also like to know. On the other hand, one who has committed only a minor transgression should not have the stigma in public records forever. Even prospective clients and employers may not be interested in ancient history. Expungement of a minor disciplinary record allows an attorney to practice law without carrying the stigma of an old mistake. Expungement provides a clean slate to somebody who has committed one, isolated, minor act.

Criminal records can be expunged. Judicial discipline is not expunged, but as noted in *Haworth*, there comes a time when past discipline is no longer the subject of mandatory disclosure. After passage of time and a

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clean record, the defendant is permitted to have a clean slate. A lawyer should be able to do so also, when the discipline is as minor as a private reproof. There is no known policy reason why a "private" reproof should be on the public record forever.

**Rule 8.xx Expungement of Private Reprovals**

(a) Private reprovals that are imposed by the State Bar Court or this Court shall be removed from the State Bar website when the member has complied with all condition of the reprovail.

(b) The State Bar shall promulgate rules for the annual expungement of private reprovals, where five years has passed since the member complied with all conditions of reprovail.

(c) The member shall not qualify for expungement if

(1) the member is presently the subject of disciplinary investigation or proceedings; or

(2) the member is under involuntary inactive enrollment; or

(3) the member is under an interim suspension

(d) The expungement shall require removal of all references to the member's private reprovail from the public records of the State Bar Court and the State Bar.

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(e) The reprovial expunged under this rule is deemed not to have occurred and the member may answer accordingly any question relating to his or her membership record.

(f) Notwithstanding any other provision of this rule, the State Bar must maintain such internal records as are necessary to apply the terms of (b) and (d) of this rule and to report to the Commission on Judicial Nominees Evaluation or appropriate governmental entities involved in judicial elections the member's eligibility for a judgeship under the California Constitution, article VI, section 15.