

AGENDA ITEM

JULY 2011 **Proposed Rule of Court re: Expungement of Private Reproval - Request for Release for Public Comment**

DATE: **June 29, 2011**

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

FROM: **Jill Sperber, Special Assistant to the Chief Trial Counsel
Office of the Chief Trial Counsel**

SUBJECT: **Proposed Rule of Court re: Removal from Website and Expungement of Private Reprorals - Request by the Association of Disciplinary Defense Counsel for Release for Public Comment**

EXECUTIVE SUMMARY

This item is before your committee to decide whether to release for public comment a new rule of court authorizing, upon certain conditions: 1) removal from the State Bar's member web page an attorney's public record of a private reproval and 2) expungement of a private reproval as requested by the Association of Disciplinary Defense Counsel ("ADDC").

As described on its website, the ADDC is the voluntary 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. Approximately 26 members belong to ADDC.

Currently, no authority exists to remove a private reproval from an attorney's official State Bar disciplinary record. In 2010, ADDC requested the California Supreme Court to consider a new Rule of Court which would 1) remove from the State Bar's website any private reproval reported on the State Bar member's web page and 2) expunge a private reproval after five years, upon compliance by the attorney with any conditions imposed with the reproval. The Supreme Court advised ADDC to present its proposal to the State Bar's Board of Governors initially for consideration.

ADDC's proposal was placed on RAD's May 2011 meeting agenda for discussion. The item was continued to RAD's July 2011 meeting to provide an opportunity for ADDC and the Office of the Chief Trial Counsel (OCTC) to potentially develop consensus language to address one of OCTC's primary concerns. Although the Chief Trial Counsel and ADDC's President Jerome Fishkin conferred, ADDC decided to stand by its original rule proposal.

For the reasons set forth below, OCTC believes that ADDC's rule proposal does not reflect sound policy or ensure protection of the public. Accordingly, OCTC recommends that RAD not release ADDC's rule of court proposal for public comment.

ADDCC's cover memorandum regarding its proposal dated October 31, 2010 and draft rule of court are set forth as Attachments A and B, respectively. For any questions about this agenda item, please contact Jill Sperber, Special Assistant to the Chief Trial Counsel at jill.sperber@calbar.ca.gov or (415) 538-2023.

BACKGROUND

Private reprovais are the minimum level of discipline imposed in State Bar disciplinary proceedings. (Bus. & Prof. Code §6077.) A private reprovail may result from either an order approving a stipulation or an adjudicated decision issued by the State Bar Court. Typically, attorneys who receive reprovais are required to comply with probation –type conditions. (Rule 9.19, Rules of Court; Rule 5.128, Rules of Proc. of State Bar.)

Some private reprovais are a matter of public record; others are not. A private reprovail imposed before a notice of disciplinary charges is filed is part of the attorney's official membership records but is not disclosed or reported publicly. (Rule 5.127(C), Rules Proc. of State Bar.) A private reprovail may be introduced as evidence of a prior record of discipline.

By statute, hearings and records of original proceedings are public following the filing of a notice of disciplinary charges. (Bus. & Prof. Code §§6086.1(a)(1), 6086.1(b); Rule 5.9, Rules Proc. of State Bar.) As such, a private reprovail imposed after a notice is filed is a publicly disclosed record, and is reported on the member's profile page on the Bar's website. (Rule 5.127(D), Rules Proc. of State Bar.) For purposes of this discussion, this category of reprovais will be referred to as "public/private reprovais."

In 2010, the State Bar imposed 37 private reprovais. An estimated seven private reprovais were public/private reprovais, that is, imposed post-notice filing. The majority of private reprovais were imposed as the result of stipulations reached before the filing of disciplinary charges. Currently, there is no authority for expungement of an attorney's disciplinary record, including a private reprovail.¹

In 2010, the Association of Disciplinary Defense Counsel (ADDCC) submitted to the California Supreme Court a new draft rule of court that has two elements. First, the rule would require that public/private reprovais be removed from the State Bar's member profile page once the attorney has complied with the conditions of the reprovail. Second, the ADDCC draft rule would require expungement of all private reprovais (regardless of whether they are publicly disclosed) after the passage of five years, as long as the

¹ The State Bar has a general duty to "[e]xpunge records of the agency as directed by the California Supreme Court." (Bus. & Prof. Code §6092.5(e).)

attorney complied with the conditions of the reproof. The Supreme Court advised ADDC to present its rule proposal to the State Bar of California.

ADDC President Jerome Fishkin obtained State Bar authorization to present the matter for discussion at RAD's May 2011 meeting. RAD continued the matter to its July 2011 meeting to provide the Office of the Chief Trial Counsel (OCTC) with an opportunity to meet and confer with Mr. Fishkin to potentially develop a consensus rule proposal. Notwithstanding OCTC's concern that the rule did not provide for use of an expunged reproof as a prior discipline, ADDC stands by its original rule proposal (Attachment B), and requests that the rule be released for public comment.

ISSUE

Whether to authorize release of the ADDC's proposed new rule of court as set forth in Attachment B for a 45-day public comment period.

DISCUSSION

1. Removal of a private reproof from the State Bar's website based merely on compliance with reproof conditions does not protect the public.

In or about July 2005, the State Bar began posting disciplinary decisions and orders on stipulated dispositions on the member's profile page on the State Bar's website. Because a private reproof imposed after a notice of disciplinary charges is filed is public discipline, it is reported as a record of public discipline on the member's State Bar web page. (Rule 5.127(D), Rules of Proc. of State Bar.)

The first aspect of the ADDC proposal consists of requiring the removal of public/private reprovals from the member's web page upon completion of the conditions of the reproof. OCTC has several fundamental disagreements with this approach.

First, as a threshold matter, ADDC's proposal to remove private reprovals from its website upon completion of reproof conditions is not an appropriate subject for a rule of court. Website content is a matter of State Bar website policy within the purview of the Board of Governors. The information posted about a member on his or her profile page is ultimately a matter of website policy established by the Board.

More importantly, the proposal negatively impacts the public protection considerations underlying disclosure of attorneys' public disciplinary records on the State Bar's website. Often, public/private reprovals are imposed as part of negotiated settlements. Consistent with the rules of procedure (Rule 5.127(D), Rules of Proc.), the stipulation form adopted by the State Bar Court expressly advises respondents that a post-notice private reproof (public/private reproof) is part of the respondent's official State Bar membership records, disclosed in response to public inquiries, and reported as a record of public discipline on the State Bar's member web page. OCTC and the State Bar Court agree to these settlements based on the express understanding that the disposition, although labeled "private reproof," will be matters of public record and disclosed publicly in response to inquiries and on the website. The respondents receive

significant benefits from these agreements. They receive the lowest possible disciplinary sanction and are not required to pay discipline costs. (See Bus. & Prof. Code §6086.10.) The ADDC proposal would deprive the State Bar of the benefits of these negotiated dispositions to the detriment of public protection.

Removal of a public/private reproval from the member's web page would also create an irrational hybrid result where public discipline would be removed from public view on the website despite its inclusion in the attorney's public record and disclosures made in response to public inquiries.

In addition, the ADDC rule assumes that the public/private reproval would be removed from the Bar's website as a ministerial function performed by State Bar staff upon mere compliance by the member with "all condition [sic] of the reproval."² (See Attachment B, rule 8, subd.(a).) The proposal does not specify, however, how compliance will be conveyed to staff, who carries the burden of establishing compliance, and what occurs procedurally when a dispute exists regarding the member's compliance with conditions. The draft rule does not provide for any disqualifications for removal-such as filed disciplinary charges-or the passage of any required period of time.

In sum, ADDC's justification for removal of a public/private reproval-that a private reproval should not be on the attorney's public record forever-fails to provide a satisfactory basis to withhold this material, public information from website users.

2. An expunged private reproval would not constitute "prior discipline."

OCTC does not support ADDC's proposed rule of court requiring expungement of private reprovals for a number of reasons. After this matter was continued by RAD in April 2011, the Chief Trial Counsel discussed with ADDC's President, Jerome Fishkin, one of OCTC's primary concerns: that absent an express statement in the rule providing for the contrary, expungement of a private reproval would prohibit OCTC and the State Bar Court from relying on the expunged private reproval as "prior" discipline in subsequent disciplinary proceedings. Currently, a private reproval may used as part of the record of a later disciplinary proceeding to show that the respondent has a prior discipline. (Rule 5.127(C), Rules of Proc. of State Bar.)

In contrast, expunged criminal convictions may be pleaded and proved in any subsequent prosecution of the defendant. This is expressly provided for in the expungement statute. (Penal Code §1203.4(a).) Notwithstanding this expressed concern, ADDC stands by its original rule proposal.

² Rule 9.19(a), Rules of Court, authorizes the State Bar to attach conditions to a public or private reproval designed to protect the public and serve the interests of the member. Failure to comply with conditions may subject the member to additional discipline. (Rule 9.19(b), Rules of Court.)

3. The proposal for self-executing expungement after the passage of five years based merely upon compliance with reproof conditions does not provide sound policy or protect the public.

ADDC's proposal provides for automatic annual expungements of private reprovals after the passage of five years based merely on the member's self-proclaimed compliance with the conditions of the reproof. Consistent with this concept, subdivision (b) of ADDC's draft rule 8 provides that 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 reproof." (See Rule 8, subd.(b).) As with the first aspect of its proposal, ADDC's rule is self-executing and fails to set forth how an attorney's compliance with conditions would be conveyed to the State Bar, who would convey compliance, or how disputes regarding compliance would be resolved.

ADDC's proposal fails to meet even the minimal protections provided by statute concerning the requirements for expungements of criminal convictions. To expunge a conviction, a defendant who has fulfilled the conditions of his or her probation (with other exceptions) must apply to the court with a petition for a certificate of rehabilitation and pardon. Significantly, a defendant who is serving a sentence, on probation or charged with the commission of any offense does not qualify for expungement. (Penal Code §1203.4.) Also, the defendant is subject to an order reimbursing the court and county for costs (§1203.4(d)), must give notice to the prosecutor and an opportunity to object (§1203.4(e)), and carries the burden of proof that the criteria established for expungement have been met. *People v. Ignazio* (1955) 137 Cal.Appl.2d Supp. 881.)

Compared to the statutory requirements and procedure required of defendants to expunge a criminal conviction, ADDC's proposed expungement proposal, envisioned as a self-executing annual administratively performed expungement of all private reprovals, is too lax. The proposal's complete disregard of subsequent discipline complaints filed or discipline imposed in the intervening five years does not promote public protection. Unlike expungements of criminal convictions, expungements under this proposal would not be subject to notice to or opportunity to object by the State Bar, a written petition by the attorney, or any proof by the attorney that the criteria for expungement are met. The draft rule provides for no independent determination by a court that expungement is appropriate.

4. The few categories for disqualification of a private reproof for expungement are inadequate to protect the public.

Under the terms of ADDC's rule proposal, the presence of any of the three following conditions would disqualify a private reproof for expungement:

- (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 interim suspension. (Rule 8, subd. (c) of Attachment B.)

OCTC believes that, while these three disqualifying categories present a good start, they don't go far enough to ensure public protection. By disqualifying for expungement the private reproof of a member who is "presently" subject to disciplinary investigation or proceedings, a respondent would be entitled to expungement despite subsequent disciplinary charges investigated, filed and possibly resolved with discipline within the intervening five year period. Because ADDC's expungement rule is tied to a member's mere compliance with the conditions of reproof, rather than to the absence of any new disciplinary complaints, filed disciplinary charges, or the imposition of subsequent discipline, the public will not be adequately protected.

5. The rule proposal would allow serial expungements of private reprovals involving the same attorney.

An additional concern with ADDC's proposal is that expungement without limitations as to the number of expungements allowed per member would create another undesirable policy of requiring expungements of private reprovals imposed on the same respondent as long as they were issued at least five years apart. As such, an attorney would be entitled to show and rely upon a "clean record" despite serial disciplinary charges resulting in serial private reprovals. This does not constitute well-reasoned policy.

6. The proposal would relieve an attorney of the duty to disclose an expunged private reproof in response to questions relating to the member's disciplinary record.

Lastly, ADDC's draft rule of court expressly authorizes the member to not disclose the existence of the expunged reproof in response to any question, as the reproof is "deemed not to have occurred." (Rule 8, subd. (f) of Attachment B.) For criminal convictions, even a defendant must disclose the expunged conviction in response to any question "...contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State lottery." (Penal Code section 1203.4 (a).) In contrast, ADDC's rule provides for disclosure of the expunged reproof only for purposes of reports to the Commission on Judicial Nominees Evaluation or appropriate governmental entities involved in judicial elections concerning the member's eligibility for a judgeship. (See Rule of Court 8, subd. (f).) As such, ADDC's rule proposal authorizing attorneys to withhold disciplinary information in direct response to questions posed by public entities regarding qualifications for public office or licensure is overbroad and undermines the public interest.

Based on these reasons, OCTC does not support ADDC's proposal and respectfully recommends that the RAD Committee not release this proposal for public comment.

FISCAL / PERSONNEL IMPACT:

Some personnel impact is involved, to the extent that staff will be required to identify whether a private reproof meets the criteria to 1) remove from the website a post-notice private reproof and 2) expunge all private reprovals upon the passage of five years, subject to the disqualification limitations. Both activities require staff monitoring,

verification that the attorney has met reproof conditions, assessment of whether the objective criteria for expungement are met, checking the confidential and public disciplinary records of the attorney to ensure that the reproof qualifies for expungement under Rule 8(c), and website and official membership records maintenance to remove and expunge private reprovals, and removal of all references to the member's private reproof in public records of the State Bar Court and the State Bar.

To the extent that proposed Rule 8(d) provides that the State Bar remove "all references to the member's private reproof from the public records of the State Bar Court and the State Bar," some financial impact is expected.

RULE AMENDMENTS:

Not applicable.

BOARD BOOK IMPACT:

Not applicable.

RECOMMENDATION

The Association of Disciplinary Defense Counsel recommends that the RAD Committee release the proposed Rule of Court set forth in Attachment B for a 45-day public comment period.

For the reasons stated above, the Office of the Chief Trial Counsel recommends that the RAD Committee not release ADDC's proposed rule of court for public comment.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the RAD Committee agree with ADDC's recommendation, the following resolution would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions & Discipline Oversight hereby authorizes the release of the proposed Rule of Court attached as Attachment B for a 45-day public comment period;

and it is

FURTHER RESOLVED, that the release of the attached Rule of Court set forth in Attachment B for public comment does not constitute, and shall not be considered, as approval of the Board of Governors of the State Bar of the matters published.