THE STATE BAR OF CALIFORNIA

INTER-OFFICE COMMUNICATION

DATE: April 30, 2008

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

FROM: Scott J. Drexel, Chief Trial Counsel

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

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ISSUE

The issue presented by this agenda item is whether the Board Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") should authorize the public comment release, for a period of 45 days, of the attached proposed policy regarding the posting of notices of disciplinary charges ("NDCs") that have been filed by the Office of the Chief Trial Counsel in the State Bar Court on the respondent attorney's member profile page on the State Bar's website.

RECOMMENDATION

The Office of the Chief Trial Counsel believes that the public availability of information regarding discipline that has been previously imposed upon an attorney and about disciplinary proceedings that are currently pending against the attorney is important for the protection of the public and to assist them in making informed and knowledgeable decisions about the potential retention of or consultations with the attorney. For that reason, the Office of the Chief Trial Counsel strongly recommends that the RAD Committee authorize the release, for a 45-day public comment period, of the proposed statement of policy, in the form attached hereto as Appendix A, regarding the posting of notices of disciplinary charges ("NDCs") filed in the State Bar Court on the respondent attorney's member profile page on the State Bar's website as a means of maximizing the availability of this important information to potential clients.

DISCUSSION

Business and Professions Code section 6086.1, subdivision (a) provides, in relevant part, that "hearings and records of original disciplinary proceedings in the State Bar Court shall be public, following a notice to show cause." (See also, Bus. & Prof. Code, § 6086.1, subd. (b); rule 20, Rules Proc. of State Bar.)

Unfortunately, although the records and hearings relating to the disciplinary proceeding pending against an attorney in the State Bar Court are public, members of the public currently have extremely limited access to them.

There are three principal methods by which a member of the public can currently access public information regarding a member of the State Bar of California: (1) through the Attorney Search feature on the State Bar's website (www.calbar.ca.gov); (2) by telephoning the attorney complaint line or the State Bar's membership records office; or (3) by writing a letter to the State Bar.

Upon making an inquiry about a specific California attorney, a member of the public who telephones or writes to the State Bar will be told whether there is a pending disciplinary proceeding against that attorney. If such a proceeding is pending against the attorney and the member of the public wants to know the nature of the charges or to obtain a copy of the notice of disciplinary charges ("NDC")[1], the member of the public must agree to pay $.50 per page for the NDC and/or for any other related document that the individual wishes to receive. 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 stipulated disposition between the respondent attorney and the Office of the Chief Trial Counsel.[2] Except in the aforementioned circumstance, the profile page 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 may be facing charges of serious misconduct (e.g., the willful misappropriation of a large amount of entrusted funds or the abandonment of multiple clients), a member of the public who accesses the attorney's profile page on the State Bar's website is not currently notified of the pendency of that proceeding. 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 may be true, it gives the unsophisticated or casual inquirer the erroneous impression that the attorney has no past or pending disciplinary issues.

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[1] Pursuant to rule 101 of the Rules of Procedure, the NDC is required, among other things, to (a) cite the statutes, rules or court orders alleged to have been violated; (b) contain a statement of facts constituting the alleged violations in sufficient detail to permit the preparation of a defense; and (c) relate the alleged facts to the specific statutes, rules or court orders alleged to have been violated.

[2] In approximately July 2005, the State Bar Court began posting decisions and stipulated dispositions in attorney disciplinary proceedings on the member profile page of the State Bar's website, including in those cases in which the proceeding has not yet become final.

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. However, such charges are only filed if the Office of the Chief Trial Counsel finds 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, although the mere filing of an NDC does not amount to proof of misconduct, it should be emphasized that culpability was found in 91% of all cases filed by the Office of the Chief Trial Counsel in 2006 and in 92% of all cases filed in 2007. Therefore, even the mere filing of such charges has a high degree of reliability and legitimacy.

Nevertheless, 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, in addition to posting the notice of disciplinary proceedings on the member profile page, we propose to also post the attorney's response to the NDC 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 reproval 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.

In conclusion, the Office of the Chief Trial Counsel 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.

RECOMMENDATION

If you agree that the Office of the Chief Trial Counsel's proposal for the posting of the notice of disciplinary charges on the State Bar's website should be released for public comment, your adoption of the following resolutions would be appropriate:

> "**RESOLVED** that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of the proposed policy statement regarding the publication of notices of disciplinary charges on the State Bar's website, in the form attached hereto as Appendix A, for a 45-day public comment period; and it is
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> **FURTHER RESOLVED** that the release of the aforementioned policy statement for public comment does not constitute, and shall not be considered, as approval by the Board of Governors of the State Bar of the matters published."

SJD:dim
Attachment