

DATE: November 18, 2005

TO: Board Committee on Member Oversight
Board Committee on Regulation, Admissions and Discipline Oversight

FROM: Phyllis Culp, Office of Certification
Elyse Cotant, Member Services Center

SUBJECT: Members Records on State Bar Website – Proposed Policy for Optional
Expungement of Record of Suspension from Practice for Failing to Pay
Member Fees: Request for Public Comment

Executive Summary

Administrative suspension for failure to pay membership fees takes place by order of the California Supreme Court. Expungement of a suspension for nonpayment of membership fees from an attorney's membership record is not permitted unless there was staff error. The availability of a member's status history on the State Bar's public Web site has generated increased member sensitivity to the status history. From time to time a member complains that an administrative suspension for nonpayment annual fees that is remote in time and did not cause client harm unnecessarily blemishes the member's status history, or that any record of suspension may unfairly detract from a member's application for judicial appointment or other public service.

In June 2005, in response to a member's request to expunge a suspension for failing to pay annual dues from his membership record, your Board Committees considered a proposal to create an expungement exception for members whose suspension for nonpayment of annual dues arose in very limited circumstances. Staff was directed to return with proposed rules.

This memorandum proposes rule amendments to create a limited expungement exception in four very narrow circumstances: 1) the member has only the one suspension for nonpayment of the annual fee; 2) the suspension is at least ten years old; 3) the suspension was for 90 days or less; and 4) the suspension was beyond the member's control. Your authorization to publish the proposed rules for a 90-day public comment period is requested. Any rule permitting expungement of a suspension for nonpayment of dues will require Court review and approval.

Any questions or comments about this proposal may be directed to Phyllis Culp at phyllis.culp@calbar.ca.gov or at (415)538-2118, or may be directed to Elyse Cotant at elyse.cotant@calbar.ca.gov or at (415) 538-2326.

BACKGROUND

The California Supreme Court's expressly reserved power over the regulation of the practice of law, which includes admissions and discipline of attorneys, also includes the power to suspend members for nonpayment of membership fees. The State Bar's official membership records contain each member's entire history of administrative and disciplinary suspensions. All suspensions appear on the State Bar's web site. A "no exception" policy to the entire history being contained on the official membership records provides consistency and is in the interest of public protection as well as the public's right to know public information.

Currently, members may petition the Supreme Court for an order removing an administrative suspension from their membership records. However, the Court has been reluctant to alter the official membership records, or to remove information from it. A member's administrative suspension from the practice of law has been a consideration in some attorney disciplinary matters. The policy that support maintaining permanent records of member suspension is rooted in the California Constitution, statues, case law, and the California Rules of Court.

In June 2005, your Board Committees considered a member's request to expunge a single five-day suspension for failing to pay the annual dues in the 1980s. He was unaware of the suspension until he looked himself up at the State Bar's Web site. His suspension resulted from circumstances out of the member's control or knowledge, was inadvertent, and was not due to staff error. After considering a suggestion that expungement be limited to eligible members who meet three criteria, your Board Committees directed staff to return with draft rules for the very narrow circumstances. The member's request implied a fourth circumstance, which has been added. The criteria are

- the member has only the one annual fees suspension and no other administrative or disciplinary suspensions;
- the suspension is at least ten years old;
- the suspension was for 90 days or less; and
- the suspension was beyond the member's control.

The attached draft expungement rules would apply only to suspensions for nonpayment of the annual licensing fees, and not to other forms of administrative suspension, such as MCLE noncompliance, fee arbitration award noncompliance, or child support noncompliance. Nevertheless, there is some apprehension that once an exception is created, no matter how narrow and limited, its very existence will open the door to requests for expansion, such as to add other forms of administrative suspension or to shorten the number of years before expungement can take place.

This item requests authorization of a 90-day public comment period on the attached proposal, which would amend Rule 950.5 of the California Rules of Court and Section 10.1 of Article I of the Rules and Regulations of the State Bar of California to incorporate an expungement policy for this type of suspension.

LEGISLATION, CASE LAW, AND RULES PERTAINING TO THE PROPOSAL

Statutes and other law applicable to administrative suspensions resulting from a member's failure to pay the annual licensing fees are summarized below. Early cases (*Carpenter* and *Hill*) relating to Business and Professions Code section 6143 confirm that the Supreme Court must order a suspension for non-payment of dues. Moreover, suspension for nonpayment of dues can serve as the basis for discipline under Business and Professions Code section 6126 or 6103, perhaps others too.

1. California Constitution

The State Bar of California exists as a public corporation in the judicial branch of government, as specified in Article VI, Section 9 of the California Constitution. Section 9 states:

"The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record."

2. Statutes and Case Law

Bus. & Prof. Code, § 6143 [Suspension for nonpayment of membership fees]:

"Any member, active or inactive, failing to pay any fees, penalties, or costs after they become due, and after two months written notice of his or her delinquency, shall be suspended from membership in the State Bar. The member may be reinstated upon the payment of accrued fees or costs and such penalties as may be imposed by the board, not exceeding double the amount of delinquent dues, penalties, or costs."

Early case law based on Section 6143 established that the power to suspend members for failing to pay membership fees lies in the Supreme Court, not in the State Bar's Board of Governors (*Carpenter v. State Bar of Calif.* (1931) 211 Cal. 358. When a member fails to pay Bar dues, the Board's action in recommending the member's suspension from membership is treated as a finding of fact and recommendation that the Supreme Court make an order of suspension, and the suspension must be made by an order of the Supreme Court (*Hill v. State Bar* (1939) 14 Cal.2d 732 *Carpenter* and *Hill* are discussed further, below.

Bus. & Prof. Code, § 6125 [Active membership to practice law, unauthorized practice of law]:

"No person shall practice law in California unless the person is an active member of the State Bar."

Bus. & Prof. Code, § 6126 [Unauthorized practice law or advertising as a misdemeanor]

"(a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars (\$1,000), or by both that fine and imprisonment . . .

(b) Any person who has been involuntarily enrolled as an inactive member of the State Bar, or has been suspended from membership from the State Bar, or has been disbarred, or has resigned from the State Bar with charges pending, and thereafter practices or attempts to practice law, advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or county jail . . .

c) The willful failure of a member of the State Bar, or one who has resigned or been disbarred, to comply with an order of the Supreme Court to comply with Rule 955, constitutes a crime punishable by imprisonment in the state prison or county jail.

(d) The penalties provided in this section are cumulative to each other and to any other remedies or penalties provided by law.”

In *Carpenter* the Court cited sections 6125 and 6143 as basis for stating “It is clear ... that the sum total or aggregate effect of these provisions is to suspend the right of petitioner to practice law, which suspension will terminate only upon his compliance with the law.” In *Hill*, the member was disciplined under section 6126 for practicing law during his suspension for non-payment of dues.

Bus. & Prof. Code § 6103 [Sanctions for Violation of Oath or Attorney’s duties]:

“A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.”

This section 6103 can be another basis for disciplining attorneys who practice law while suspended for nonpayment of dues. (see *Herron v. State Bar* (1944) 24 Cal.2d 53.)

Bus. & Prof. Code § 6002.1 [Official Membership Records]:

“(a) A member of the State Bar shall maintain all of the following on the official membership records of the State Bar:

(5) Such other information as may be required by agreement with or by conditions of probation imposed by the agency charged with attorney discipline.”

Bus. & Prof. Code § 6092.5 [Duties of Disciplinary Agency]:

“In addition to any other duties specified by law, the disciplinary agency shall do all of the following:

(a) Promptly notify the complainant of the disposition of each matter.

(b) Notify all of the following of a lawyer’s involuntary enrollment as an inactive member and termination of that enrollment, or any suspension or disbarment, and the reinstatement to active membership of a suspended or disbarred attorney:

- (1) The presiding judge of the superior court in the county where the attorney most recently maintained an office for the practice of law, with a request that the judge notify the courts and the judges in the county.
- (2) The local bar association, if there is one, in the county or area where the attorney most recently maintained an office for the practice of law.
- (3) The appropriate disciplinary authority in any other jurisdiction where the attorney is admitted to practice.

(e) Expunge records of the agency as directed by the California Supreme Court."

3. California Rules of Court

California Rules of Court, Rule 950.5 (Roll of Attorneys of California):

"The State Bar shall maintain, as part of the official membership records of the State Bar, the Roll of Attorneys of all persons admitted to practice in this State. Such records shall include the information specified in sections 6002.1 and 6064 of the Business and Professions Code and other information as directed by the Court."

In re Attorney Discipline System (1998) 10 Cal.4th 582, discusses the development of Rule 950.5 in connection with options the Governor raised as alternatives to the Court's authorization of funding to reopen the State Bar disciplinary system. The Supreme Court observed:

"[Option 7, that the court could maintain the roll of those admitted to the practice of law.] . . . this court maintained the roll until the adoption of California Rules of Court, rule 950.5 in 1996. Although the court formerly maintained the physical roll of attorneys, keeping the roll up-to-date, taking changes of address, **entering information on the status of attorneys**, and the like, were functions performed by State Bar personnel even before 1996." (fn 23, emphasis added)

In re Attorney Discipline System discussed funding the Bar's Membership Records function from the special assessment for the discipline system. The Court noted that it transferred responsibility for maintaining membership records from itself to the Bar. The Court observed the Bar's membership records office bills and collects fees, costs, and penalties imposed on licensed attorneys, including reimbursements to CSF and disciplinary costs, and the office keeps track of all Bar members, including any record of discipline, and answers inquires from courts, governmental agencies, other states, and the public. The Court stated that accurate records are integral to a meaningful licensing and disciplinary system, and that the fees requested for this service were an appropriate disciplinary expenditure. The Supreme Court's funding of the membership records function shows that a member's record is an integral part of the disciplinary system. (*In re Attorney Discipline* at 862).

PROPOSED RULE AMENDMENTS FOR AN EXPUNGEMENT POLICY

In view of the foregoing authority, the proposed amendment to Rule 950.5 of the California Rules of Court provides for expungement of a suspension for nonpayment of membership fees from a

member's membership record. Rules of Court pertaining to the State Bar typically call for the Board to adopt rules to implement the policy contained in the Rule of Court, and may require the Court's approval of the adopted rules if appropriate. Because the State Bar maintains the roll of attorneys and the official membership records on behalf of the Supreme Court, the proposed amendment to Rule 950.5 provides for Supreme Court approval after the Board adopts a State Bar expungement rule.

Section 10.1 of Article I of the Rules and Regulations of the State Bar is a suitable place for the State Bar's expungement rule. Section 10.1 provides for nunc pro tunc amendment of a member's record to strike the name of a member from the Supreme Court's order of Suspension for Nonpayment of Fees. Proposed amended Section 10.1 would add a provision permitting the Board to recommend expungement of suspensions for failing to pay annual licensing fees, upon the written request of a member whose suspension comes within four circumstances:

- 1) the suspension was an isolated, one-time incident of 90 days or less duration;
- 2) the suspension ended at least 10 years before the date on which the member requests expungement;
- 3) the member's membership record is devoid of any other incident or form of suspension, whether for discipline or otherwise; and
- 4) the reason for the suspension was beyond the member's control.

The fourth criteria, which was added after your Board Committee reviewed this subject in June, is similar to a criteria the Board applies when reviewing requests for membership fees and penalty waivers under Section 7 of Article I. Since the implementation provision is written with permissive rather than mandatory language, the Board may consider additional relevant factors as appropriate.

This expungement process, which proposes individual request and consideration, weighs the desire to provide a one-time-only member benefit with the need to maximize assurance that the public, the profession, and the administration of justice will be protected. Since members must request expungement, members assume the burden of establishing that their requests warrant the Board's recommendation. Individual requests invite attention, which decreases the chances of providing the benefit to an unintended undeserving individual and increases the likelihood of screening out any member who meets the four criteria, but who may have other undisclosed circumstances that could be reason not to recommend the expungement. For example, it is possible that a member who meets the four criteria but is under disciplinary investigation and close to being charged with ethical violations, should not receive the benefit.

In furtherance of the need to protect the public, the profession, and the administration of justice, staff does not recommend an expungement process that would be automatic for all members who meet the first three criteria. As of June 2005, approximately 1,036 members would fall within this group. Absent individual scrutiny, it is not known whether expunging the suspension record of any specific member of this group raises a public protection issue. Also, an automatic approach would prevent consideration of the fourth criteria, which is that the suspension was inadvertent and out of the member's control, because that information is not part of the Bar's computer data base. An automatic approach would shift the burden to the State Bar and Board to identify individuals who should be further reviewed and to justify withholding of a recommendation, rather than place the burden on the member to establish his or her qualification. Thus, although an automatic approach that utilizes computer programming to identify members who meet the first three criteria offers the

advantage of being easier to administer and would be more appealing to members, on balance these factors are outweighed by other considerations.

FISCAL/STAFF IMPACT

It is expected that this proposal would have no fiscal impact. Initially there may be some impact on staff, but thereafter much less impact on staff is expected.

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

If the Board adopts the proposed amendments to Rule 950.5 and Section 10.1 of Article I, the proposal must be transmitted to the Supreme Court for approval. After approval by the Court, the Board Book would require modification in the section where the Rules of Court are located.

PROPOSED BOARD COMMITTEE ACTION

Should the Board Committee on Member Oversight and the Board Committee on Regulation, Admission, and Discipline Oversight wish to authorize public comment on draft amendments to Rule 950.5 of the California Rules of Court and Section 10.1 of Article I of the Rules and Regulations of the State Bar of California, it would be appropriate to adopt the following resolutions:

For the Board Committee on Member Oversight

RESOLVED that the Board Committee on Member Oversight hereby authorizes staff to make available for public comment for a 90-day period the proposed amendments to Rule 950.5 of the California Rules of Court and Section 10.1 of Article I of the Rules and Regulations of the State Bar, in the form attached; and it is

FURTHER RESOLVED that this authorization for release for public comment is not, and shall not be, construed as a statement or recommendation of approval of the proposed item.

For and the Board Committee on Regulation, Admission, and Discipline Oversight

RESOLVED that the Board Committee on Regulation, Admission, and Discipline Oversight hereby authorizes staff to make available for public comment for a 90-day period the proposed amendments to Rule 950.5 of the California Rules of Court and Section 10.1 of Article I of the Rules and Regulations of the State Bar, in the form attached; and it is

FURTHER RESOLVED that this authorization for release for public comment is not, and shall not be, construed as a statement or recommendation of approval of the proposed item.

ATTACHMENTS

CALIFORNIA RULES OF COURT
PROPOSED AMENDMENT OF RULE 950.5
(November 18, 2005, Deletions are in Strikeout, Addition are Underlined)

RULE 950.5 Roll of Attorneys of California

a) The State Bar will maintain, on the official membership records of the State Bar, the roll of attorneys of all persons admitted to practice in this State. The membership records must include the information specified in sections 6002.1 and 6064 of Business and Professions Code and other information as directed by the Court.

b) The State Bar may recommend expungement of a suspension for nonpayment of membership fees from an attorney's membership record in accordance with rules adopted by the State Bar and approved by the Court. The Court may make such order of expungement of the suspension for nonpayment of membership fees from the membership record as the Court deems appropriate.

RULES AND REGULATIONS OF THE STATE BAR OF CALIFORNIA

Article I, Classes of Membership (Additions are Underlined, November 18, 2005)

§ 10.1 Nunc Pro Tunc; Retroactive Reinstatement; Expungement

A. Provided that the member has complied with the member's duty to maintain on the member's registration records of the State Bar the member's current office or other address for State Bar purposes and that the correct fee and penalty, if any is applicable, has been paid, the secretary or designee shall seek an amendment nunc pro tunc to strike the name of a member from the Supreme Court's order of Suspension for Nonpayment of Fees in the following circumstances:

- (1) The member's name had been placed on the suspension list by the State Bar in error, including but not limited to such an error resulting from the State Bar's handling of the member's membership status;
- (2) An office of the State Bar received the member's correct fee and penalty, if any was applicable, prior to the suspension date, but Membership Services Operations received the fee and applicable penalty only after the suspension was effective;
- (3) The last address of the member appearing on the membership records of the State Bar was incorrect, having been erroneously recorded by the State Bar, and the notice required by section 6143 of the Business and Professions Code (hereafter "statutory delinquent notice") was sent to the incorrect address by the State Bar;
- (4) The last address of the member appearing on the membership records of the State Bar was correct, but the statutory delinquent notice was sent by the State Bar to an incorrect address;
- (5) The State Bar's remittance bank timely received the member's correct fee and penalty, if any was applicable, but failed to notify the State Bar so it could remove the member's name from the suspension list prior to the effective date of the order of suspension;
- (6) At the time of suspension, the member was deceased.

B. Upon the written request of a member, the Board may recommend that the Supreme Court order expungement of the member's record of suspension for nonpayment of membership fees, provided that all of the following apply:

- (1) The suspension was of 90 days or less duration;
- (2) The suspension ended at least 10 years prior to the date on which expungement is requested;
- (3) The member's membership record contains no other incident or form of suspension, whether for discipline or otherwise; and
- (4) The reason for the suspension was beyond the member's control.