The State Bar of California

OPEN SESSION
AGENDA ITEM
60-5 SEPTEMBER 2023

DATE: **September 22, 2023**

TO: **Members, Board of Trustees**
Sitting as the Regulation and Discipline Committee

FROM: **George Cardona, Chief Trial Counsel**
Melanie Lawrence, Program Director, Office of Professional Support & Client Protection
Enrique Zuniga, Public Trust Liaison

SUBJECT: **Discussion Regarding State Bar Diversion Program**

EXECUTIVE SUMMARY

This information item discusses three proposed programs that would divert more matters from the ordinary discipline process.

First, the Office of Professional Support & Client Protection (OPSCP) is in the early stages of exploring the possibility of adding a voluntary mediation component to the Mandatory Fee Arbitration Program. This would provide parties with an additional option for resolving fee disputes through a more quick and less formal mediation process, with the goal of decreasing the number of disciplinary complaints based on fee disputes.

Second, the Office of the Public Trust Liaison (PTL) has developed the design for a Complaint Diversion Program (CDP), modeled on similar programs operated by the State Bars of Texas and Georgia, that would provide an option for addressing communication and file return issues without initiating the formal complaint process. The CDP would address the needs of clients who may be reluctant or disinclined to file a disciplinary complaint but still require assistance in resolving matters with their attorneys. The CDP would provide clients with communication and file return issues with the option of submitting a service request to the CDP rather than a disciplinary complaint to the Office of Chief Trial Counsel (OCTC). One goal of the program would be to reduce the number of disciplinary complaints based on communication and file return issues. PTL needs staff to implement this program, and OCTC is considering a loan of one staff member to the PTL accordingly.

Finally, by November 1, 2023, OCTC plans to implement a formal diversion program under which specified criteria will be used to identify disciplinary complaints for which respondent attorneys will be offered the opportunity to enter into diversion agreements, with educational and other conditions selected to address the issues that gave rise to the complaints, in return for agreement not to proceed with investigation or prosecution of disciplinary charges. The criteria for participation in the diversion program will exclude repeat offenders and offenses that have resulted in significant harm to clients, the public, or the administration of justice. The goal is to divert up to 20 percent of disciplinary complaints into a speedier resolution path designed to provide preventative assistance to avoid future complaints. OCTC plans to use existing staff resources to implement this diversion program.

BACKGROUND

Diversion as a part of the attorney discipline system is not a new concept, either in California or throughout the country. Business and Professions Code section 6231 requires the Board to establish and administer an Attorney Diversion and Assistance Program as a means of implementing the Legislature's intent that the State Bar "identify and rehabilitate attorneys with impairment due to substance use or a mental health disorder affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety." Business and Professions Code section 6230. The Lawyer Assistance Program implements this program, providing resources to lawyers either on a voluntary basis or as required by the State Bar Court through its Alternative Discipline Program. State Bar Rules of Procedure rules 5.380 to 5.389.

OCTC currently implements nondisciplinary closures equivalent to diversion in several different ways. It issues directional letters conditioning closure on attorney compliance with directions to return files to or resume communication with clients. It also enters into agreements in lieu of discipline and issues warning letters closing cases contingent on an attorney's compliance with specified conditions within a specified time period.

A recent law review article states, "Today, in thirty-five U.S. jurisdictions, lawyer discipline complaints may result in diversion agreements that enable the respondent lawyer to avoid discipline sanctions even where some misconduct occurred." Leslie C. Levin and Susan Saab Fortney, *"They Don't Know What They Don't Know": A Study of Diversion in Lieu of Lawyer Discipline*, 36 Georgetown Journal of Legal Ethics 309, 313 (2023) [hereafter, "*Study of Diversion*"]. (The article includes in this number California, Michigan, and New York, which it describes elsewhere as limiting diversion "to lawyers suffering from mental health problems or an impairment such as substance abuse." *Id.*at 317.) After a lengthy discussion of the limited data available regarding diversion for attorney discipline complaints, the article concludes:

> Jurisdictions considering proactive initiatives should recognize the role that diversion alternatives can play in a comprehensive regulatory regime. Although diversion alternatives do not squarely qualify as proactive programs because some misconduct has already occurred, diversion conditions focus on dealing with the particular problem that precipitated the complaint. More generally, diversion can

provide an important intervention opportunity to work with lawyers to examine their mistakes and improve their procedures, practices, and fitness when practicing law. Through these efforts, regulators may be able to better focus diversion to meet lawyers' needs and protect the public.

In the long run, well-conceived diversion programs may also positively affect regulators' relationships with lawyers. Some solo and small firm lawyers view regulators with suspicion or even bitterness, fueled in part by the observation that regulators disproportionately discipline this cohort. By implementing effective alternatives to discipline—and communicating that they genuinely want to help respondent lawyers—regulators may seem less like adversaries. Respondents who feel like they are being treated fairly and with dignity may feel more commitment to educational and rehabilitation efforts.

It is important, however, to be clear-eyed about the limits and costs of diversion. Even with the most well-designed educational program, diversion may not be appropriate for some lawyers and may be especially inappropriate for those who reoffend. Moreover, diversion, as currently employed, has a hidden cost for the regulatory system. Because information about diverted matters is generally treated as confidential, diversion sends no signal to the public that minor misconduct is being addressed or to the larger lawyer community about the types of conduct that lead to a regulatory response. Every time diversion or a private sanction is used in lieu of public discipline, regulators potentially lose an opportunity to educate and deter other lawyers. Research shows that enforcement action must be communicated effectively to have deterrent effects. One alternative to keeping all information on diversion confidential would be to regularly publish, even if in an aggregated form, information about the types of misconduct that gave rise to diversion. (*Id*. at 350.)

The *ABA Model Rules for Lawyer Disciplinary Enforcement* outline model procedures for a diversion program (referred to as an "Alternatives to Discipline Program"). See Model Rule 11(G). The model rules suggest limiting diversion to matters involving "lesser misconduct," which the model rules define as "conduct that does not warrant a sanction restricting the respondent's license to practice law." Model Rule 9(B). The model rules further state that conduct shall not be considered lesser misconduct if any of the following apply:

1. the misconduct involves the misappropriation of funds;
2. the misconduct results in or is likely to result in substantial prejudice to a client or other person;
3. the respondent has been publicly disciplined in the last three years;
4. the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last five years;
5. the misconduct involves dishonesty, deceit, fraud, or misrepresentation by the respondent;
6. the misconduct constitutes a "serious crime' as defined in Rule 19(C); or

7. the misconduct is part of a pattern of similar misconduct

Id. Comments to the model rule state that the "existence of prior disciplinary offenses would not necessarily make a respondent ineligible for referral" to the program, and that instead "consideration should be given to whether the respondent's prior offenses are of the same or similar nature, whether the respondent has previously been placed in the [program] for similar conduct and whether it is reasonably foreseeable that the respondent's participation in the program will be successful." Model Rule 11(G), comments. Similarly, the comments state that "the existence of 'a pattern of misconduct' and/or 'multiple offenses' should not make a respondent ineligible for the program. A pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying problem." *Id.*

As noted in the recent law review article, "jurisdictions do not uniformly follow the [Model Rules] approach." *Study of Diversion* at 316. Many, however, apply similar eligibility criteria and procedures. Thus, for example, Illinois provides for eligibility for diversion as follows:

> The Administrator and respondent may agree to a diversion of the respondent to a program designed to afford the respondent an opportunity to address concerns identified in the investigation if the Administrator concludes that diversion would benefit and not harm the public, profession and the courts, and the conduct under investigation does not involve any of the following:
>
> (1) misappropriation of funds or property of a client or third party;
> (2) a criminal act that reflects adversely on the attorney's honesty;
> (3) actual loss to a client or other person, and the Court's rules or precedent would allow for a restitution order for that type of loss in a disciplinary case, reinstatement case or Client Protection Program award, unless restitution is made a condition of diversion; or
> (4) dishonesty, fraud, deceit, or misrepresentation.

Rules of the Attorney Registration and Disciplinary Commission, Rule 56, Diversion (Jan. 2023).

Similarly, the District of Columbia's rules provide that diversion shall not be available where:

> (1) the alleged misconduct resulted in prejudice to a client or another person;
> (2) discipline previously has been imposed or diversion previously has been offered and accepted, unless Disciplinary Counsel finds the presence of exceptional circumstances justifying a waiver of this limitation;
> (3) the alleged misconduct involves fraud, dishonesty, deceit, misappropriation or conversion of client funds or other things of value, or misrepresentation; or
> (4) the alleged misconduct constitutes a criminal offense under applicable law, except for the offenses of driving under the influence and operating a motor vehicle while impaired (or a similar conviction in another jurisdiction).

DC Bar Disciplinary Rules, Section 8.1, Diversion.

The most recent draft of SB 40 (as amended in the Assembly, September 7, 20232), the legislation that, among other things, sets attorney license fees for 2024, includes a provision adding new section 6086.20(b) to the Business and Professions Code to require the Board, in consultation with the Chief Trial Counsel, by April 1, 2024, to provide to the Assembly and Senate Judiciary Committees "recommendations for codifying a formal disciplinary program for attorneys accused of minor violations of the Rules of Professional Conduct." The development and exploration of the three diversion programs outlined below is intended to support compliance with this requirement.

DISCUSSION

A. OPSCP's Fee Dispute Program

OCTC sees significant numbers of disciplinary complaints that actually set out what are disputes over attorney fees rather than alleging conduct warranting discipline. Examples include complaints that allege agreements for excessive (but not unconscionable) fees, disputes over the effectiveness of attorney work that is being charged for, and attorney refusals to disburse from their client trust accounts settlement funds as to which the attorney asserts an entitlement for earned fees. If a review of such complaints or further investigation reveals no potential violation of the State Bar Act or the Rules of Professional Conduct warranting discipline, OCTC typically closes these complaints with a letter that advises the client of the opportunity to pursue relief through the State Bar's Mandatory Fee Arbitration Program. This process (review of the complaint and drafting and issuance of a closing letter with a referral to the fee arbitration program) takes resources that could otherwise be used to handle complaints more likely to result in discipline.

Early diversion of more of these types of complaints into the existing Mandatory Fee Arbitration Program could save significant OCTC resources and provide an alternative that may result in a more satisfactory outcome for the client.

The Mandatory Fee Arbitration Program is an informal, confidential, and lower-cost forum for resolving fee disputes between lawyers and their clients. Some local bar associations administer their own programs, and the State Bar provides fee arbitration only when there is no local bar program. Arbitration of a fee dispute is voluntary for a client but in most instances, mandatory for a lawyer if a client requests it. If an attorney claims a client owes an outstanding balance of fees or costs, they must provide the client with a notice of their right to arbitrate before or at the time of filing a lawsuit or other proceeding to collect the amount. The State Bar program can also enforce a final, binding arbitration award in favor of a client in State Bar Court by seeking administrative remedies, such as suspension, to enforce compliance with the award.

Arbitrators are volunteers. Depending on the amount in dispute, either a sole attorney arbitrator or panel of three arbitrators which includes one lay arbitrator, will hear the dispute. After a hearing where evidence and testimony are taken, a written decision is issued by the arbitrator. The findings may include a refund of fees or costs to the client, a determination that the client owes outstanding fees, or a determination that no money is owed by either party.

Parties can agree to be bound by the award; if they do not agree, the award will become binding 30-days after service unless a party requests a trial de novo.

While the program has historically offered arbitration only, the statute giving rise to the program allows the Board to include a voluntary, mediation component in the program. See Business and Professions Code section 6200(a), (c) (Board "may establish, maintain, and administer a system and procedure for mediation of disputes concerning fees, costs, or both, charged for professional services by licensees of the State Bar"; "[m]ediation under this article shall be voluntary for an attorney and a client"). OPSCP is in the early stages of exploring the possibility of adding a voluntary mediation component to the program that parties could elect prior to an arbitration. The availability of a mediation component would allow parties an opportunity to resolve fee disputes more quickly and less formally and potentially with more input into how the disputes resolve. To the extent a mediation component serves to attract more parties and resolve their fee disputes without them submitting disciplinary complaints, it would reduce the resources OCTC currently expends on reviewing disciplinary complaints that actually allege only fee disputes.

Fees for use of the program have not been adjusted in several years. Staff did not propose changes to the fees concurrently with other recent general fund program fee increases submitted to the Board earlier this year as a comprehensive review of the existing program is currently underway Through this process, staff is gathering stakeholder input and considering potential changes, including exploration of the fee structure and adding a mediation component, that would increase utilization and ensure access and use by a broader and likely more diverse population.

B. PTL's Complaint Diversion Program

The Complaint Diversion Program (CDP) reflects a new approach aimed at resolving allegations of violations of Rule of Professional Conduct 1.16(e)(1) (return of file issues) and Business and Professions Code section 6068(m) and Rule 1.14 (communication issues). The primary objective of the program would be to provide a proactive and non-confrontational channel for addressing communication and file return issues without the need for clients to initiate the formal disciplinary complaint process, addressing the needs of individuals who may be reluctant or disinclined to file a disciplinary complaint but still require assistance in resolving these types of matters with their attorneys. By providing an alternative to the formal State Bar complaint process, the program would foster a more harmonious attorney-client relationship while reducing the strain on the traditional disciplinary complaint process. It is estimated that there are 300-500 complaints annually that would be eligible for the CDP.

The PTL does not currently have the staff to implement the CDP. OCTC is considering the loan of a staff member to PTL to enable implementation.

C. OCTC's Diversion Program

The targets of OCTC's diversion program are respondents whose disciplinary and complaint histories demonstrate that (a) they do not pose a significant risk of harm to their clients or the public and (b) their alleged misconduct stems from issues subject to correction through education or other rehabilitative measures. As a result, generally, the diversion program will target respondents who have not been the subject of prior discipline, do not have a history including 15 or more complaints within the last five years, and have allegedly engaged in isolated, low risk to public protection, minimally aggravated misconduct. Based on a review of historical case data, the expectation is that approximately 10 percent to 20 percent of disciplinary complaints will involve respondents for whom diversion is a potentially appropriate resolution.

For eligible respondents, diversion will serve many of the purposes of discipline. It will further public protection by providing specific deterrence of similar misconduct by the same attorney, through education, direction, warning, or the imposition of conditions on the attorney's action for some period of time. In these same ways, it will assist in maintaining the professional standards of and rehabilitating the particular attorney receiving diversion.

To maximize the benefits of diversion, the goal will be to resolve cases at the earliest appropriate stage. Thus, subject to specified criteria, diversion will be available in intake (pre-investigation) or investigation. The applicable criteria will vary based on when diversion will begin. Universally disqualifying factors will preclude diversion at any time. Other factors will require that diversion not be available in intake and be deferred until the completion of further investigation of the conduct at issue. If no disqualifying factor is present, a discretionary determination will be made whether diversion will sufficiently serve the purposes of discipline and is appropriate based on consideration of all circumstances.

OCTC will provide to and discuss with the Discipline Liaisons the specific guidelines for diversion, which will define the criteria for eligibility based on both the nature of the current alleged misconduct and the respondent's prior history, provide guidance on the exercise of discretion in offering diversion to otherwise eligible respondents, and outline the procedures for entering into diversion agreements. The eligibility criteria are expected to limit diversion to cases posing only a low risk to public protection. Putting aside prior complaint and discipline histories that may render diversion unavailable, examples of conduct anticipated generally to be eligible for diversion absent significant harm to a client, the public, or the administration of justice are:

- Performance violations;
- Communication violations (including communication issues with clients and improper communications with represented parties);
- Failures to sufficiently disclose potential conflicts of interest (if the result is the development of an actual conflict or client harm, diversion would not be appropriate);
- Failures to obey court orders;
- Failures to return files after termination;

- Failure to report as required by BPC 6068(o);
- Failures to supervise;
- Threats of civil, disciplinary, or administrative charges to secure an advantage in a civil dispute.

Respondents determined to be eligible for diversion will be sent a letter specifying the conditions of diversion and explaining what will happen if the respondent (a) declines diversion, (b) accepts diversion and satisfies its conditions, or (c) accepts diversion and fails to satisfy its conditions. In general terms, diversion will result in a closing of the complaint conditioned on completion of the specified diversion conditions, with the understanding that failure to complete the conditions will result in the complaint being reopened to allow further investigation and charging of the alleged disciplinary violations. Diversion conditions will vary depending on the nature of the alleged misconduct, but generally will, as applicable, include requirements that the respondent address and resolve any duty breaches (e.g., restore performance or address any potential conflicts of interest), refund any acknowledged unearned fees, complete mandatory fee arbitration and satisfy any resulting order, complete an instructional course (such as a continuing legal education course) that will address issues underlying the alleged misconduct (e.g., a primer on conflicts and required informed consents), and complete a general instructional course on attorney ethical obligations to clients and courts (for example, Ethics School and/or Client Trust Accounting School). To accept diversion, the respondent attorney will be required to sign on to the diversion letter, creating an agreement to comply with the specified conditions of diversion within specified time frames.

Monitoring will be conducted to confirm that the respondent complies with the diversion conditions and reporting requirements within the time specified in the diversion letter. Initially, OCTC expects the monitoring team to consist of two paralegals assigned diversion monitoring as an adjunct to their paralegal duties. As the program develops, OCTC will determine additional staffing needs, including the feasibility of assigning other staff to perform monitoring duties.

OCTC will work with the Mission Advancement & Accountability Division to gather and report aggregate data on diversion matters, including data regarding the effect that diversion has on recidivism. A goal of early implementation of OCTC's diversion program will be to develop information and data to be used to support the 2024 diversion report due to the legislature, including information regarding numbers of diversion-eligible cases, numbers of cases resolved through diversion, and staffing needs and costs of the diversion program.

FISCAL/PERSONNEL IMPACT

Currently, none. OCTC plans to implement its diversion program on an initial basis using existing resources. OCTC is considering the loan of a staff member to PTL to enable initial implementation of its CDP. OPSCP is in the initial stages of exploring an expanded program to include mediation. Additional funding would be needed at a minimum as an upfront cost to support mediation services. Fee arbitration is a service for which the State Bar charges fees. Ultimately the program must be self-sustaining and thus any initial investment would not be construed as an ongoing expense, however the Board is not asked to approve any funding at

this time. Instead, the 2024 diversion report due to the legislature will include an overview of the costs associated with an enhanced fee arbitration program. Similarly, the 2024 diversion report due o the legislature will include an overview of ongoing staffing needs and costs associated with the CDP and OCTC's diversion program.

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

a. 3. Sustain a well-resourced, motivated, and accountable, prosecutorial workforce.
b.1. Assist members of the public needing assistance in submitting complaints and resolving problems by providing clear information about how the system works, outlining what constitutes a viable complaint.

Goal 3. Protect the Public by Regulating the Legal Profession

b. 3. Provide effective support for attorneys experiencing practice management and other challenges that affect competency.

RECOMMENDATIONS

None

ATTACHMENT LIST

None