



The State Bar of California

OPEN SESSION

AGENDA ITEM

6.1 NOVEMBER 2024

BOARD OF TRUSTEES

DATE: November 14, 2024

TO: Members, Board of Trustees

FROM: Mia Ellis, Deputy Special Counsel, Division of Regulation

SUBJECT: Proposed New Rule 9.33 Relating to Expungement of Attorney Discipline: Return from Public Comment, Request to Approve and Submit to the Supreme Court for Adoption; Deferral of Adoption of the State Bar Policy on Website Removal; and Direct Staff to Develop a Legislative Priorities Proposal Related to Confidentiality of Expunged Records Under the California Public Records Act

EXECUTIVE SUMMARY

Proposed new rule 9.33 of the California Rules of Court outlines criteria for expungement of nondisbarment discipline from the attorney profile page. The proposed State Bar Policy on Website Removal provides for the removal of nondisbarment discipline and administrative actions from the attorney's public profile. The rule and policy are returned to the Board following public comment. This item requests that the Board approve rule 9.33 and submit it to the Supreme Court, defer adoption on the State Bar policy on website removal, and direct staff to develop a legislative priorities proposal that ensures that expunged licensee and former licensee discipline records are exempt from the California Public Records Act.

RECOMMENDED ACTION

This item requests the Board approve proposed new rule 9.33 of the Rules of Court and submit it to the Supreme Court. It also recommends that the Board defer adoption of the State Bar policy on website removal until after the Supreme Court considers proposed new rule 9.33. The Board is also asked to direct staff to develop a legislative priorities proposal to amend the California Public Records Act.

DISCUSSION

The Board established the Ad Hoc Commission on the Discipline System in November 2020 to assess reforms implemented by the State Bar to further the efficiency, effectiveness, and fairness of the discipline system and to identify any additional improvements needed. On September 22, 2022, the Board received the commission's final report and recommendations ([701 September 2022](#)).

In alignment with the recommendations of the Ad Hoc Commission on the Discipline System, at its July 2024 Board of Trustees meeting ([5.1 July 2024](#)), the Board approved a 60-day public comment period for proposed new rule 9.33, to expunge nondisbarment discipline from the attorney profile page, and a State Bar policy governing removal of nondisbarment discipline and administrative inactive enrollments from the attorney profile page.

PUBLIC COMMENT

In addition to the standard circulation for public comment, the public comment opportunity for the proposed rule and policy were sent to complaining witnesses who filed complaints against licensees since the launch of the electronic complaint form in October 2018. All comments received can be accessed in the [compilation of all comments](#).

Proposed Rule 9.33 of the Rules of Court¹

In response to the public comment, 445 participants completed the survey and provided a position on proposed rule 9.33.

Please indicate whether you are an attorney	Total Responses: 445	Agree	Disagree	Agree If Modified
Attorney	81 (18%)	38 (47%)	25 (31%)	18 (22%)
Nonattorney	311 (70%)	36 (12%)	262(84%)	13 (4%)
Decline to State	53 (12%)	7 (13%)	41 (77%)	5 (9%)

¹ Staff made a minor, nonsubstantive edit to proposed new Rule 9.33 section (c), Records to be Maintained by State Bar. The second sentence referenced "and subdivision (e)," a vestige from an earlier version of the proposed rule. The rule as presented to the Board in July, which was circulated for public comment, did not include a subdivision (e). The change should not require the rule to undergo another public comment period as State Bar rule 1.10(B) states "Public comment is not required (1) to correct clerical errors; clarify grammar; improve organization; conform to specific changes in a law; update references or citations; or make similar editorial changes..."

Common Themes²

Most respondents were nonattorneys and the vast majority of nonattorney respondents opposed the proposed rule. Common themes that emerged from those who disagreed with the proposal rule include:

Attorney Bias:

- "This rule seems to favor legal professionals without considering the impact on the general public."

Negative Implications:

- "Implementing this rule as it stands might harm the integrity of the legal profession."

Lack of Transparency and Trust:

- "Transparency is crucial in maintaining public trust and ensuring that attorneys are held accountable for their actions. Clients must have the ability to conduct thorough research to make informed decisions when selecting legal representation. This transparency is especially important when an attorney's actions have caused harm to a client."
- "Attorney misconduct often causes lifelong harm to victims, and an eight-year expungement period fails to address this impact. Public trust and transparency are crucial; concealing past misconduct undermines both."
- "The public already does not trust the legal profession. This will further erode transparency and increase distrust."

A significant minority of attorney respondents agreed with the rule or agreed if modified, as did a small percentage of nonattorneys. Common themes reflected in these participants' public comment submissions include:

- "Expungement of discipline is necessary to give attorneys an incentive to keep their records clean and do the right thing. Forgiveness and rebirth are essential."
- "I think this is a reasonable proposal. If an attorney has discipline or a complaint that is 8 years old and has had no other issues, it should not continue to hinder their ability to do their job well."
- "As an attorney disciplined for alcohol-related misdemeanors, and with the expectation that I will successfully complete the ADP program, and having recovered from alcohol use disorder, the removal of this stigma from my online bar record would be a godsend."
- "Everyone makes mistakes, and the ability to work towards expungement gives incentive to continue work and to do it well. At which point, a person who has proven themselves should no longer have to suffer the consequences of past actions."

² The Common Themes section was compiled with the assistance of the generative AI Advisor in ThoughtExchange, the engagement and feedback tool used by the State Bar to receive public comment. The Advisor was asked to filter participants by position on the proposal, identify common themes within each group, and then provide example comments for the themes.

- “In fairness to victims, I believe the proposal should be modified from 8 years to 10 years.”
- “I like the concept, but I think it should be modified. Anything over 8 years is history. If there were more than one offense that did not warrant disbarment, they should all be removed from the public record. Why publicly stigmatize someone for acts that are history?”
- “This new rule should be modified to allow only individuals who meet a certain criteria, be allowed this action. It should be handled accordingly, and in my opinion should only be given if there was no victims in their case.”
- “Agree only if the discipline involved did not involve 'moral turpitude' or elder abuse.”

State Bar Policy Related to Removal of Administrative Suspensions and Public Discipline Record from the Attorney’s Public Profile

In response to the public comment, 857 participants completed the entire survey and provided a position on the proposed policy.

Please indicate whether you are an attorney	Total Responses 857	Agree	Disagree	Agree If Modified
Attorney	118 (14%)	51 (43%)	49 (42%)	18 (15%)
Nonattorney	663 (77%)	42 (6%)	577 (87%)	44 (6%)
Decline to State	76 (9%)	8 (11%)	65 (85%)	3 (4%)

Common Themes³

The majority of respondents were nonattorneys who disagreed with the proposed policy. A sample of comments submitted by those disagreeing with the proposal rule include:

- "I strongly disagree with the proposed policy; it hides important information from the public."
- "The recommendations are not in the best interest of transparency and accountability."
- "I oppose the changes because they reduce the public’s ability to make informed decisions."

A significant minority of attorney respondents agreed with the policy or agreed if modified, as did a small percentage of nonattorneys. A sample of comments submitted include:

- “It sounds like a fairly narrow exception that could allow an attorney that made a small mistake a long time ago to repair their public image.”

³ The Common Themes section was compiled with the assistance of the generative AI Advisor in ThoughtExchange, the engagement and feedback tool used by the State Bar to receive public comment. The Advisor was asked to filter participants by position on the proposal, identify common themes within each group, and then provide example comments for the themes.

- “This is long overdue. Keeping matters like public reprovals on members records it seems like forever is uncalled for and should have been done away with long time ago...Keeping this in the public harms reputations, livelihoods of hard working attorneys, especially those whose records have been clean for YEARS, and many African American attorneys have been affected in large part.”
- “Agreeable are the administrative violations and inactive enrollments removal. I would however disagree with the nondisbarment violation removal...The stringencies and limitations for elimination of nondisbarment violations would be sensible only when nondisbarment violations are clearly defined.”
- “I believe that this is a gracious policy. It helps attorneys to maintain dignity. However, it also keeps people in the dark about the attorney they may seek to hire or employ. The timeline should be at least 10 years.”
- “While I agree that an attorney should be given opportunity to have a nondisbarment discipline removed from display, I do not agree that the removal should be automatic as proposed. I believe the process should involve the attorney having to apply for the removal and have to undergo vetting before said discipline is no longer visible to the public.”

Organizational Comments

Below is a *summary* of comments submitted by organizational entities. [Compilation of comments](#).

Office of Chief Trial Counsel (OCTC)

OCTC proposes modifications of the timeframes set forth in proposed Rule of Court 9.33(d)(5) and section (b)(5) of the proposed rule regarding removal to be:

- (a) 8 years from the effective date of a public or private reproval;
- (b) 10 years from termination of probation for a term of probation with a stayed suspension where no actual suspension is imposed; and
- (c) 10 years from termination of probation or reinstatement following termination of the actual suspension, whichever is later, where an actual suspension is imposed.

According to OCTC, these changes will better align with the other states that allow removal of public records and/or expungement of attorney discipline, as well as with California’s approach to discipline imposed on doctors, nurses, and real estate appraisers.

OCTC agrees with defining the effects of expungement to allow the State Bar to continue to maintain confidential records of expunged discipline and to allow OCTC and the State Bar Court to rely on expunged discipline for internal OCTC investigative and charging decisions; for purposes of prosecuting an attorney for unauthorized practice of law during a period when the attorney was not eligible to practice law; and as an aggravating circumstance and prior discipline under Standards 1.5 and 1.8 of the Standards for Attorney Sanctions for Professional Misconduct. This ensures that prior discipline can be given appropriate consideration if an attorney is accused of or found culpable for new misconduct.

OCTC believes additional clarity is needed on what it means to remove information from a licensee's public record of discipline and administrative suspensions. Issues OCTC suggests addressing include:

- (a) does expungement apply to State Bar Court and Supreme Court dockets/records;
- (b) if it does, how are State Bar staff to reply to requests from the public for disciplinary information regarding a particular attorney; and
- (c) a California Public Records Act amendment may be needed to accomplish the intended definition of expungement.

California Black Lawyers Association (CABL)

CABL expressed support for some aspects of proposed rule 9.33 but also expressed significant concerns. CABL believes that the State Bar Court's ability "to use the expunged records as aggravating circumstances and prior discipline may have a disparate impact on attorneys of color. As evidenced by Dr. Farkas's 2019 Empirical Analysis, Black and Brown attorneys are disproportionately disciplined compared to their White counterparts. Allowing expunged records to still be used by the State Bar in prosecuting attorneys will continue this disparate practice and likely exacerbate it since aggravating circumstances by their very definition, warrant a greater sanction and higher level of discipline. (See Stds. 1.2(h); 1.5.) The provision of the law also undermines the purpose of expungement, which is to protect an individual's privacy and give the individual a fresh start by removing their record from public view."

Civil Justice Association of California (CJAC)

CJAC expressed opposition to the proposed eight-year expungement period as too lenient. The Association believes the Bar should align with the Medical Board of California by implementing a ten-year period before expungement; this would result in consistency with California's approach to other professions that serve the public. The Association further opined that public disciplinary records help consumers and businesses make informed decisions to assess an attorney's fitness for representation, just as they would when choosing a medical provider.

HOA Fightclub, nonprofit

HOA Fightclub expressed that the public depends on the records of discipline to help make decisions of who should represent them. All discipline matters should be made public for the lifespan of an attorney to add accountability and demand that lawyers are following the rules themselves. The public deserves to know if an attorney has a pattern of abuse.

InfraGard

According to InfraGard, the proposed policy is not fair and removes a critical layer of protection for laypersons who rely upon the fiduciary duty of an attorney. Potential clients should have all information available to make an informed decision.

East Bay Chiropractic Health Center

East Bay Chiropractic Health Center believes information should be available to the public. If an attorney has complaints, it should be the public's choice to decide to work with them. Hiding past complaints takes this away from the public.

STATE BAR STAFF COMMENTS AND RECOMMENDATIONS

The Ad Hoc Commission on the Discipline System, organized into subcommittees on fairness and effectiveness, reviewed reforms implemented by the State Bar to further the efficiency, effectiveness, and fairness of the discipline system. The fairness subcommittee examined the findings of the State Bar's study on racial disparities in the discipline system. The study aimed to determine if there were disparities in discipline and identify contributing factors. It revealed a disproportionate rate of discipline against black male attorneys and identified several factors contributing to the disparities, notably the significant impact of prior complaints on future discipline. To address these issues, the subcommittee considered potential remedies, including expunging certain disciplinary records and removing disciplinary history from attorney profile pages.

Although staff recommends advancing the rule and policy generally, issues impact the timing and approach to their future implementation.

1. Impact of the California Public Records Act (CPRA)

The website removal policy proposes to remove public discipline and administrative suspensions only from the attorney profile page but would still provide the information in response to a written or telephonic request. Under proposed rule 9.33, when information is expunged, the State Bar will delete it from the attorney's public discipline record – meaning the expunged information would not only be removed from the attorney profile page, but also, in theory, would not be provided in response to a written or telephonic request.

However, the State Bar lacks authority to withhold these records since the CPRA does not provide an exemption for expunged records. To obtain the benefit of expungement, the State Bar will need to seek legislative changes to ensure records removed from the website and expunged are exempt from disclosure under the CPRA. Therefore, State Bar staff recommend that the Board directs staff to develop a legislative proposal amending the CPRA to exempt expunged disciplinary records.

2. Implementation Challenges

The State Bar currently lacks the technology to automatically remove records from the licensee's public profile page as contemplated by the website removal policy; the development of a solution will take time and resources. In addition to this concern, implementation of the website removal policy may result in increased CPRA-related workload as members of the public and other interested parties try to get access to information previously accessible via the State Bar website.

Based on the considerations outlined above, staff recommends:

1. Defer adoption of the State Bar website removal policy until the Supreme Court acts on proposed rule 9.33. During the pendency of the court's consideration of the rule proposal staff can finalize the requirements for, and quantify the resource needs related to, implementation of the policy.

2. Pursue legislative amendments to exempt expunged licensee and former licensee discipline records from disclosure under the CPRA.

PREVIOUS ACTION

- [Proposed Amendments to Rule 9.8 and 9.31 of the Rules of Court and Proposed New Rule 9.33 Relating to Expungement of Attorney Discipline and Administrative Actions: Request to Circulate for Public Comment](#)
- [Ad Hoc Commission on the Discipline System: Approval of Recommendation for Website Removal and Expungement](#)
- [Ad Hoc Commission on the Discipline System Recommendations: Status Update Regarding Board-Directed Follow-up Work](#)
- [Discussion and Approval of the Ad Hoc Commission on the Discipline System Report and Recommendation](#)

AMENDMENTS TO RULES OF COURT

Title 9, Division 2, of the California Rules of Court

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

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

- d. 1. Align and implement recommendations of the Special Discipline Case Audit Committee and the Ad Hoc Commission on the Discipline System.

RESOLUTIONS

Should the Board of Trustees concur, it is:

RESOLVED, that the Board of Trustees approves the proposed new rule 9.33 of the California Rules of Court, as set forth in Attachment A, and authorizes staff to submit the proposed new rule 9.33 to the California Supreme Court with a request that the proposed new rule be approved, adopted, and included in a new Chapter 5 (Expungements) within Division 2 of Title 9 of the California Rules of Court; and it is

FURTHER RESOLVED, that staff is directed to develop a legislative priorities proposal that provides that expunged licensee and former licensee discipline records are exempt from disclosure under the California Public Records Act; and it is

FURTHER RESOLVED, that the Board of Trustees directs staff to return a proposed State Bar of California Policy on Removal of Public Discipline and Administrative Suspensions from the Attorney Profile Page to the Board of Trustees following the California Supreme Court's final action on the proposed new rule 9.33 of the California Rules of Court.

ATTACHMENTS LIST

- A.** Proposed New Rule 9.33 of the California Rules of Court – *Correction*
- B.** Proposed State Bar of California Policy on Removal of Public Discipline and Administrative Suspensions from the Attorney Profile Page