



The State Bar of California

OPEN SESSION AGENDA ITEM 5.1 JULY 2024 BOARD OF TRUSTEES

DATE: July 18, 2024

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

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

SUBJECT: Proposed Amendments to Rules 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

EXECUTIVE SUMMARY

Consistent with Board of Trustees direction provided at meetings in 2023 and in May 2024, this item seeks Board approval to circulate for public comment proposed new rule 9.33 of the Rules of Court related to expungement of discipline. This item also advances recommendations previously considered by the Board regarding nondisciplinary, administrative, suspensions.

When originally noticed for the present meeting of the Board this item was slated to include amendments to rules 9.8 and 9.31 of the Rules of Court to effectuate administrative suspension related proposals. In lieu of those amendments, staff now proposes to address the administrative suspension component of the recommendations through policy alone. In that vein, this item describes a policy covering website removal of both disciplinary and administrative suspension (and other discipline information) as well as staff's plan to issue that policy out for public comment.

RECOMMENDED ACTION

Staff recommends the Board circulate for public comment proposed new rule 9.33 of the Rules of Court related to expungement.

DISCUSSION

The Board established the Ad Hoc Commission on the Discipline System (commission) 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. The Board considered the Ad Hoc Commission's recommendations at its January 2023 and September 2023 meetings. Pursuant to those discussions staff recommended policies on removal of nondisbarment discipline from the attorney profile page, expungement, removal of criminal conviction transmittals from the attorney profile page, and removal of discipline history from the attorney profile page of licensees who resign without charges pending to the Board at its May 2024 meeting. After considering staff recommendations and the recidivism data presented, the Board directed staff to draft a proposed Rule of Court regarding expungement of nondisbarment discipline after 8 years. This item also discusses a policy on removal of nondisbarment discipline and administrative inactive enrollments from the attorney profile page, based on similar previous Board discussions stemming from the work of the commission.

Proposed New Rule of Court 9.33 Regarding Expungement of Nondisbarment Discipline After Eight Years

In response to the Board's directive to draft a proposed Rule of Court regarding expungement of nondisbarment discipline after 8 years, the State Bar staff proposes new Rule of Court 9.33. Subdivision (a) of rule 9.33 defines terms applicable to expungement. Subdivision (b) defines the effect of expungement. Consistent with the discussion at the May 2024 Board of Trustees meeting, expunged records would be removed from the attorney's public record of discipline, but the prior discipline could still be used as an aggravating circumstance and as prior discipline under Standards 1.5 and 1.8 of the Standards for Attorney Sanctions for Professional Misconduct, respectively. Subdivision (c) requires the State Bar to maintain internal records of expunged information. Subdivision (d) provides the requirements to be eligible for expungement of discipline:

- (1) Expungement is one-time relief
- (2) Only licensees with one discipline are eligible for expungement
- (3) The licensee must be active, voluntary inactive, or resigned (with or without charges pending)
- (4) The licensee must not have any disciplinary matters pending in State Bar Court or before the Supreme Court at the time their prior discipline is expunged – pending matters must be dismissed or resolved without discipline to be eligible for expungement
- (5) At least eight years have passed from the:
 - (A) Effective date of a public or private reproof
 - (B) Termination of a term of probation with a stayed suspension, when there is no actual suspension imposed
 - (C) Termination of probation or reinstatement following termination of the actual suspension, whichever is later

Proposed new Rule of Court 9.33 also includes a proposal that the Board has not formally adopted: expunging discipline from the profile page of attorneys who resign with charges pending. Attorneys may resign with no prior or pending discipline¹; with prior discipline but without charges pending; or with charges pending. All resignations are reviewed by the Supreme Court and upon acceptance of the request by the Supreme Court, the Supreme Court issues a resignation order.

Staff proposes that licensees who resign with charges pending, like all other licensees, be eligible to have one prior discipline expunged after eight years.

It is important to note that even if the proposed amendments to the Rules of Court are adopted by the Supreme Court, statutory amendments may be required to effectuate the expungement policy. For example, absent an exemption, the California Public Records Act may require disclosure of expunged discipline upon a request for those records.

Should the Supreme Court ultimately adopt proposed new rule 9.33, expungement relief would be realized by 3,680 licensees.

Removal of Discipline and Administrative Suspensions and Administrative Inactive Enrollments from the Licensee's Attorney Profile Pages

The Rules of Court, State Bar Act, and the Rules of the State Bar impose several obligations on State Bar licensees. If attorneys fail to comply with certain obligations, they may be involuntarily enrolled as inactive. This enrollment is administrative, and no hearing is required. Currently, Rule of Court [9.8\(b\)](#) (nonpayment of fees) and Rule of Court [9.31\(f\)](#) (MCLE) permit a one-time removal of a period of inactive enrollment from an attorney's public record. There are no similar provisions for other rules authorizing administrative inactive enrollment or administrative suspension (e.g., the Client Trust Account Protection Program (CTAPP), fingerprinting, Rule 2.2 reporting, etc.).²

In addition to a proposed new rule 9.33 of the Rules of Court effectuating discipline-related expungement, staff proposes a new State Bar policy to remove nondisbarment public discipline and administrative suspensions from the licensee's attorney profile page. Removal of nondisbarment public discipline and administrative suspensions from the attorney profile page would not constitute expungement and the information would still be available upon request.

¹ To voluntarily resign without charges pending, attorneys must submit a Voluntary Resignation form. The State Bar forwards the completed resignation form to State Bar Court, which, in turn, transmits these to the Supreme Court. Upon acceptance of the request by the Supreme Court, the Supreme Court issues a resignation order. This process is the same whether the licensee has prior discipline or not.

² Proposed new rule 9.33 provides one-time automatic expungement of nondisbarment discipline in specified circumstances. Existing Rules of Court 9.8 and 9.31 permit one-time expungement of administrative suspension for nonpayment and involuntary inactive enrollment for MCLE noncompliance. Staff did not include expungement of administrative suspensions/inactive enrollments in proposed new rule 9.33, or propose amendments to rules 9.8 or 9.31, to effectuate recommendations regarding administrative suspensions, but this remains an option in the future based on an assessment of implementation pursuant to policy alone.

Currently, there are 38,110 total number of licensees with at least one involuntarily inactive enrollment. Here is a breakdown of administrative inactive enrollment by type:

Description	% of All Administrative Inactive Enrollments
MCLE Noncompliance	22%
Fingerprint Noncompliance	1%
CTAPP Noncompliance	3%
Child & Family Support Noncompliance	1%
Failed to Pay Annual Fees	73%

In developing a proposal to remove administrative inactive enrollments and administrative suspensions from the website, staff considered the timeframe between administrative inactive enrollments/administrative suspensions and a licensee's first subsequent discipline.

Of the 38,110 licensees who have had at least one administrative inactive enrollment, 5,015 (13 percent) had subsequent discipline. On average, it took about 4 years (1,509 days) between the initial administrative inactive enrollment and the first subsequent discipline. The median time was about 2 years (718 days).

Discipline	Licensees	Percent
Private reproof, restricted	198	4%
Private reproof, public disclosure	90	2%
Public reproof	66	1%
Public reproof with/duties	211	4%
Discipline w/actual suspension	1,883	38%
Discipline, probation; no actual susp.	415	8%
Interim suspension after conviction	422	8%
Disbarment	1,218	23%
Resignation with charges pending	602	12%
Total	5,015	100%

There is a correlation between the number of administrative inactive enrollments and the probability of discipline. Licensees with five or more administrative suspensions are 31.9 percent more likely to be disciplined.

No. of Admin Inactive Enrollments	% Increase in Probability of Discipline
1 or more	5.2%
2 or more	9.9%
3 or more	14.6%
4 or more	20.4%
5 or more	31.9%

Based on the correlation between administrative actions and discipline, staff proposes the automatic removal of the first two administrative inactive enrollments/administrative suspensions when the administrative action ends. Beginning with the third administrative action, staff proposes the licensee is eligible to have each subsequent inactive enrollment expunged four years from the date the inactive enrollment period ends. All contemporaneously served administrative inactive enrollments or administrative suspensions that occurred within 60 days of each other count as one inactive enrollment.

Contemporaneous with whatever action the Board takes on proposed Rule 9.33 of the Rules of Court, staff will send out for public comment a policy on removal of nondisbarment public discipline and administrative suspensions from the licensee's attorney profile page.

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 sitting as the Regulation and Discipline Committee concur, it is:

RESOLVED, that the Board of Trustees, sitting as the Regulation and Discipline Committee, authorizes staff to make available for public comment, for a period of 60 days, new rule 9.33 of the Rules of Court, as set forth in Attachment A.

ATTACHMENTS LIST

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