



The State Bar of California

OPEN SESSION AGENDA ITEM 5.2 JULY 2024 BOARD OF TRUSTEES

DATE: July 18, 2024

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

FROM: Leah T. Wilson, Executive Director
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SUBJECT: Ad Hoc Commission on the Discipline System: Adoption of New Discipline Cost Model and Request to Circulate Monetary Sanction Rules for Public Comment

EXECUTIVE SUMMARY

The Ad Hoc Commission on the Discipline System recommended changes to discipline cost assessment and the imposition of monetary sanctions, viewing both as unduly punitive, out of line with other jurisdictions, and, because of historical racial disparities in the attorney discipline system, disproportionately impacting Black male attorneys in particular.

The Board considered the Ad Hoc Commission's recommendations on these topics in [January 2023](#) and in [September 2023](#). This item reflects the culmination of staff's work in response to direction received by the Board at these meetings. Specifically, the item includes a new structure for assessing discipline costs, an option for setting a cap on those costs, and proposed amendments to rules governing the imposition of sanctions.

RECOMMENDED ACTION

The Board is asked to approve the new discipline cost methodology, consider and approve a cap on total discipline costs to be assessed, and authorize the release for public comment of rules on sanctions.

DISCUSSION

MONETARY SANCTIONS

California Business and Professions Code, section 6086.13 provides that Supreme Court disbarment and suspension orders, or orders accepting a resignation with charges pending, may include monetary sanctions up to a statutory maximum. The code section requires the State Bar, “with the approval of the Supreme Court,” to create guidelines for the imposition of such sanctions. Monetary sanctions are deposited into the State Bar’s Client Security Fund (CSF).

The required guidelines, contained in State Bar Rules of Procedure, rule 5.137 (rule 5.137), were approved by the Supreme Court on March 23, 2020¹ and became effective on April 1, 2020. The rule provides that the State Bar Court shall consider all facts and circumstances of the discipline case and be guided by the following amounts as a total monetary sanction:

- up to \$5,000 for disbarment;
- up to \$2,500 for actual suspension; and
- up to \$1,000 for resignation with charges pending.

The State Bar Court can deviate from the recommended total sanctions up to the statutory maximum of \$5,000 per violation and \$50,000 per disciplinary order based on the facts and circumstances of each discipline case. The rule also provides the State Bar Court with discretion to recommend that monetary sanctions be waived, in whole or in part, based on several circumstances, including “for good cause, or in the interests of justice.”

The Ad Hoc Commission on the Discipline System recommended that the “State Bar seek[s] a statutory amendment to eliminate disciplinary sanctions.” They reasoned that the costs imposed by the State Bar are higher than other state bars, other jurisdictions do not impose sanctions in addition to costs, and high costs can negatively impact rehabilitation.

In response, State Bar staff addressed the Ad Hoc Commission’s concerns and recommendations at the September 2023 Board meeting. While staff determined that a statutory amendment would be required to completely eliminate sanctions, staff recommended amendments to rule 5.137 that would substantially achieve the Ad Hoc Commission’s objectives. Staff specifically discussed two options for amending rule 5.137. One would eliminate sanctions altogether for nondisbarment cases, and the other would permit State Bar Court to deviate from \$0 up to the statutory maximum in non-disbarment cases.

Subsequent to the September 2023 meeting, staff determined that, based on the language of Business and Professions Code section 6086.13, subdivision (a), the State Bar Court should have the discretion to impose sanctions in the cases of disbarment, suspension, and resignation with charges pending and therefore rule amendments limiting the application of sanctions to

¹ Pursuant to Business and Professions Code section 6086.13, subdivision (c), “rules setting forth guidelines for the imposition and collection of monetary sanctions” must be approved by the Supreme Court.

disbarment cases only would not be appropriate.² Thus, the amendments in Attachment A set the recommended sanctions at \$0 for suspension and resignation with charges pending but allow the State Bar Court to deviate from that recommendation up to the statutory maximum. These amendments further the recommendation of the Ad Hoc Commission while operating within the requirements of Business and Professions Code section 6086.13.

Additionally, amendments to subsection (H) clarify that any installment payments for monetary sanctions shall be added to the attorney's annual fees. While State Bar Rules of Procedure, rule 5.129 (F), mandates that discipline cost installment payments be added to the attorney's annual attorney fees,³ there is currently no authority to add sanctions to the attorney's annual attorney fees. This addition is necessary so that the State Bar has a means of enforcing the installment payments.

DISCIPLINE COSTS

The Ad Hoc Commission on the Discipline System found that the State Bar's discipline costs are higher than those of other attorney licensing agencies, and that its practice of assessing fees for trial and review proceedings is unusual as compared to attorney and other professional licensing entities. With these findings in mind, the commission [recommended eliminating all discipline costs associated with trial and review proceedings](#). The Board discussed these recommendations in [January](#) and [September 2023](#) and asked staff to evaluate the implications of adoption of the commission's recommendation. In response to concerns raised by the State Bar Court (SBC) and the Office of Chief Trial Counsel (OCTC)—that elimination of all court-related costs could result in more trials, impacting staffing and judicial resources—the Board asked staff to develop a proposal for an updated cost model that achieved the goal of scaling back, but not eliminating, costs assessed for trial and review proceedings.

The current discipline cost model assigns costs by case types and stages. Enhancement charges are assessed for cases comprised of multiple investigations; a resignation fee is also included in the current discipline cost model.

Costs are assigned to case stages and types pursuant to a 2010 time study. Specifically, the amount of time it takes to perform the tasks associated with a given stage/case type is multiplied by the hourly rate of the staff expected to perform that task.

² Business and Professions Code, section 6086.13, subd. (a) ("Any order of the Supreme Court imposing suspension or disbarment of a licensee of the State Bar, or accepting a resignation with a disciplinary matter pending *may include* an order that the licensee pay a monetary sanction not to exceed five thousand dollars (\$5,000) for each violation, subject to a total limit of fifty thousand dollars (\$50,000).") (emphasis added).

³ "(F) Payment in Annual Installments. If the Court's order imposing costs allows an attorney to pay in annual installments, the order must designate the amount of each installment, which will be added to and become a part of the attorney's annual attorney fees."

Table 1. Types and Stages of Cases, 2010 Model

Original Disciplinary Matters Case Type	Conviction Referral Proceedings Case Type	Rule 9.20 Case Type	Probation Revocation Case Type
Default cases	Default cases	Rule 9.20 Proceedings Case Type	Probation Revocation Proceedings Case Type
Stage One: Settlement prior to filing of a Notice of Disciplinary Charges	Stage One: Does not apply		
Stage Two: Settlement during first 120 days of proceeding	Stage Two: Settlement during first 120 days of proceeding		
Stage Three: Settlement Before Pretrial Statement is filed	Stage Three: Settlement Before Pretrial Statement is Filed		
Stage Four: Settlement before trial but after Pretrial Statement is filed or a one-day trial	Stage Four: Settlement before trial but after Pretrial Statement is filed or a one-day trial		
Stage Five: Multiday trial	Stage Five: Multiday trial		
Stage Six: Review Department proceedings	Stage Six: Review Department proceedings		
+ <i>Per Investigation</i>	+ <i>Per Investigation</i>		
+ <i>Per Resignation</i>	+ <i>Per Resignation</i>		

Discipline costs are adjusted annually using a formula that applies a combination of the Employment Cost and Consumer Price Index (ices).

Business and Professions Code section 6145.1(b) directed the State Bar to provide a progress report on OCTC’s case processing standards to the legislature by April 2023. To prepare that report, the State Bar’s Mission Advancement & Accountability Division (MAAD) conducted a time study to measure how much time OCTC staff spends on different stages of discipline case processing. Optimally, data collected for the 2024 report could have been used to update the time study portion of the 2010 discipline cost model. However, the stages and case types identified in 2010 were not used/inapplicable to the 2024 study.

For this reason, staff was not able to update the 2010 model. Instead, a new methodology, simpler to maintain in the long run, has been developed to calculate discipline costs.

A NEW METHODOLOGY FOR A DISCIPLINE COST MODEL

1. Redefining the Types and Stages of Discipline Costs

The updated methodology consolidates the current four case types into one, All Disciplinary Matters, and eliminates resignation costs. In addition, the methodology reflects modified

stages, one through six, clearly breaking out one-day and multiday trials and review department proceedings.

Table 2. Updated Types and Stages and Levels of Cases

All Disciplinary Matters		
Default: resolution via default	Rule 9.20 Proceedings	Probation Revocation Proceedings
Stage One: Settlement prior to filing of a Notice of Disciplinary Charges		
Stage Two: Settlement during first 120 days of proceeding		
Stage Two: Settlement Before Pretrial Statement is filed		
Stage Three: Settlement before trial but after Pretrial Statement is filed or a one-day trial		
Stage Four: One-day trial		
Stage Five: Multiday trial		
Stage Six: Review Department proceedings		
+ Per Investigation (Cost Per Case)		
+ Per Resignation		

2. Updating the Formula by Which Discipline Cost is Calculated

The updated methodology moves away from an approach tied to the amount of staff time spent on tasks/stages, primarily because current time data is not available and would be resource-intensive to generate on either one-time or ongoing bases. Instead, the new methodology derives costs from budgeted expenditures and workload as follows:

Inputs:

- A. Total OCTC and SBC prior year actual budget minus the cost of all attorney and judicial positions.⁴
- B. % of total cases closed by stage in the prior year.

Analysis:

- C. Multiply budget by case stage percentages to determine total cost per stage.
- D. Divide the total cost per stage by the number of attorneys associated with the cases closed in that stage to determine a per attorney cost by stage.
- E. Add a per investigation cost enhancement in instances where more than one OCTC matter is reflected in a single SBC case. This enhancement fee equates to the per case cost that is derived from the data outlined in A-C above.

⁴ The governing statute for discipline costs calculation section 6086.10(c)(3) does not allow for costs associated with attorney personnel to be included in cost recovery efforts.

Default and stage one costs are discrete meaning a respondent is assessed costs only for that particular stage. Costs for stages two through six are “stacked”, meaning that an attorney is charged for each stage that their matter passes through; for example, an attorney whose matter closes after a one-day trial would be assessed fees for Stages 1 through 4.

Table 3. 2024 Discipline Costs – New Methodology

	Cases Closed with Discipline	Total Closed Cases	2023 Budget Less Attorney Cost	Discipline Cost Per Stage	Cases Closed w/ Discipline by Attorney	Discipline Cost Per Attorney	Discipline Cost Per Attorney Stacked
Default	84	17,231	32,539,872	158,630	28	5,665	5,665
Stage 1: Before NDC	53	17,231	32,539,872	100,088	41	2,441	2,441
Stage 2: Before Pretrial	124	17,231	32,539,872	234,168	103	2,273	4,715
Stage 3: After Pretrial	59	17,231	32,539,872	111,419	42	2,653	7,367
Stage 4: One Day Trial	7	17,231	32,539,872	13,219	7	1,888	9,256
Stage 5: Multiday Trial	63	17,231	32,539,872	118,972	55	2,163	11,419
Stage 6: Review	2	17,231	32,539,872	3,777	2	1,888	13,307
Totals	327	17,231	32,539,872	740,272	278		
Total Cases Closed with Discipline	Total Closed Cases	Budget Less Attorney Cost	Total Discipline Cost	Total Cases Closed with Discipline	Discipline Cost Per Investigation/Case		
392	17,231	32,539,872	740,272	392	1,888		

Table 4. 2024 Discipline Costs – New Methodology Compared to 2010 Methodology

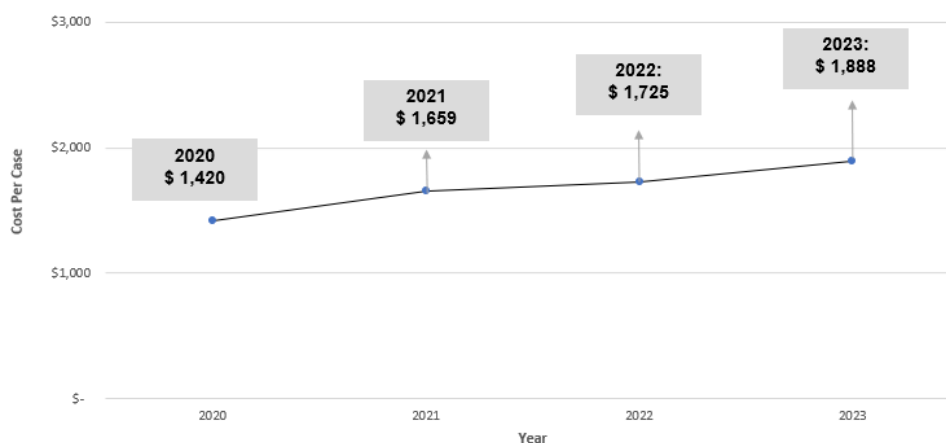
Stage	2023 Official Discipline Costs	2023 Discipline Cost by New Methodology	Difference
Default	\$5,609	\$5,665	\$(56)
Stage 1: Before NDC	\$3,864	\$2,441	\$1,423
Stage 2: Before Pretrial	\$5,837	\$4,715	\$1,122
Stage 3: After Pretrial	\$9,365	\$7,367	\$1,998
Stage 4: One Day Trial	\$9,365	\$9,256	\$109
Stage 5: Multiday Trial	\$21,119	\$11,419	\$9,700
Stage 6: Review	\$25,834	\$13,307	\$12,527
<i>Per Investigation/Case</i>	\$1,233	\$1,888	\$(655)

The updated methodology results in a 52 percent reduction in total costs potentially assessed, from \$27,067 to \$15,195. In addition, by clearly parsing out trial and review costs, the model allows for the SBC to readily exercise its discretion to waive all costs associated with trial unless, for example, a respondent is found to have pursued trial in bad faith. The combination of an overall reduction in the amount of total costs that can be assessed, and increased ability for the SBC to exercise its discretion to waive trial and/or review costs, advances the spirit of the commission’s recommendations while addressing concerns raised about their wholesale adoption.

The updated discipline cost methodology is described in full in Attachment B.

The new methodology relies heavily on two variable factors: the number of cases closed with discipline each year and the number of attorneys associated with those cases. Given the potential variability in these factors in any given year, staff may propose modifications to the straight application of the model in a given year to smooth the impact of unusual or outlier data.

Figure 5. Cost Per Case from 2019 to 2023 as Calculated by the New Methodology



CAPPING TOTAL FEES TO BE ASSESSED

In addition to updating the discipline cost model, the Board may consider establishing a cap on total fees assessed to ensure that the overall financial burden placed on a respondent aligns with parallel costs imposed by other state bars and comparable California regulatory boards. Out of the 20 attorney licensing agencies reviewed by the Ad Hoc Commission, 14 do not impose discipline fees beyond direct expenses such as transcript fees, postage fees, or photocopying fees. The remaining 6 states assess fees ranging from \$500–\$3,000. While the State Bar’s discipline costs would be significantly reduced from current levels should the Board adopt the proposed revised cost assessment methodology, the Board may wish to further address the high nature of California’s attorney discipline costs by imposing a cap on total fees to be assessed. If the Board chooses to go in this direction staff proposes implementing a cap on fees at Stage 3, after Pretrial, or \$7,367 (2024). The cap would not apply to the per investigation enhancement fee.

PREVIOUS ACTION

In [January 2023](#) the Board received the updated final report of the Ad Hoc Commission on the Discipline System and directed staff to reevaluate its current discipline cost model with a focus on reducing costs, including, but not limited to, restructuring the costs structure so that attorneys are not penalized for going to trial or review and scaling fees when charges are dismissed. Staff was also directed to assess the need for a statutory amendment to eliminate disciplinary sanctions given the commission’s concerns. Following discussion with stakeholders and assessment of statutory language, staff presented findings on both topics to the board in [September 2023](#).

FISCAL/PERSONNEL IMPACT

Because Business and Professions Code, section 6068.13 requires that the monetary sanctions collected are deposited into CSF, reducing monetary sanctions imposed on attorneys will likely reduce revenue for CSF. As reported in the September 2023 Board item on the Ad Hoc Commission's report, CSF received \$17,000 in sanctions-related revenue in 2021.

The new methodology will reduce the amount of discipline costs levied annually. In 2023, the State Bar assessed \$2.5 million in discipline costs. Under the new methodology proposed, the \$1.7 million would have been assessed. However, the State Bar does not collect the majority of these costs. For example, over a five-year period, between 2019 and 2023, \$4.8 million in discipline and sanctions costs were assessed to disbarred and resigned attorneys. Of that \$4.8 million, the State Bar has received 10 percent, or \$0.5 million, to date.

AMENDMENTS TO RULES OF PROCEDURE

Title 5, Division 2, Chapter 6, Rule 5.137

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

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

- c. 1. Implement reforms and recommendations to reduce inequities identified in the 2019 report: Discrepancies by Race and Gender in Attorney Discipline by The State Bar of California: An Empirical Analysis.

RECOMMENDATIONS

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 45 days, proposed amended rule 5.137 as outlined in Attachment A; and it is

FURTHER RESOLVED, that the Board of Trustees adopts the new discipline cost methodology as reflected in Attachment B.

ATTACHMENTS LIST

- A. Proposed Amendments to State Bar Rules of Procedure, Rule 5.137
- B. New Discipline Cost Model