



## Judicial Council of California · Administrative Office of the Courts

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 25, 2013

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**Title**

Judicial Branch Administration: Notification to State Bar of Attorney Misconduct

**Agenda Item Type**

Action Required

**Rules, Forms, Standards, or Statutes Affected**

Adopt Cal. Rules of Court, rules 10.609 and 10.1017

**Effective Date**

January 1, 2014

**Date of Report**

September 9, 2013

**Recommended by**

Administrative Presiding Justices Advisory Committee

Hon. Tani G. Cantil-Sakauye, Chair

Trial Court Presiding Judges Advisory Committee

Hon. Brian Walsh, Chair

**Contact**

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### Executive Summary

The Trial Court Presiding Judges Advisory Committee and the Administrative Presiding Justices Advisory Committee recommend that the Judicial Council adopt parallel rules of court, one for the trial courts (rule 10.609) and one for the appellate courts (rule 10.1017), to improve compliance with Business and Professions Code section 6086.7. That statute requires “a court” to notify the State Bar of certain instances of misconduct by and incompetence of attorneys. The rules would specify whose responsibility it is to notify the State Bar under the statute.

### Recommendation

The Trial Court Presiding Judges Advisory Committee recommends that the Judicial Council, effective January 1, 2014, adopt rule 10.609 to:

1. Clarify that the judge who issues the order that triggers the notification requirement under Business and Professions Code section 6086.7 is responsible for notifying the State Bar, but may direct court staff to do so;
2. Specify what must be included in the notice to the State Bar; and
3. Provide that the person who notifies the State Bar must also inform the attorney who is the subject of the notification that the matter has been referred to the State Bar.

The Administrative Presiding Justices Advisory Committee recommends that the Judicial Council, effective January 1, 2014, adopt rule 10.1017 to:

1. Clarify that the justice who issues the order or authors the opinion that triggers the notification requirement under Business and Professions Code section 6086.7 is responsible for notifying the State Bar, but may direct the Clerk to do so;
2. Specify what must be included in the notice to the State Bar; and
3. Provide that the person who notifies the State Bar must also inform the attorney who is the subject of the notification that the matter has been referred to the State Bar.

The text of the proposed rules is attached at pages 7–9.

### **Previous Council Action**

There has not been any previous council action related to this topic.

### **Rationale for Recommendation**

The California Commission on the Fair Administration of Justice (CCFAJ), appointed by the state Senate to study and recommend ways to reduce the rate of wrongful convictions in California, issued a report in late 2007 addressing court compliance with Business and Professions Code section 6086.7, which requires “[a] court” to notify the State Bar of any of the following:

- A final order of contempt imposed on an attorney;
- Modification or reversal of a judgment based on misconduct, incompetent representation, or willful misrepresentation by an attorney;
- Imposition of sanctions on an attorney of \$1,000 or more, except sanctions for failure to make discovery; or
- Imposition of any civil penalty on an attorney under Family Code section 8620.

Section 6086.7(b) adds that whenever a court notifies the State Bar under subdivision (a), the court “shall also notify the attorney involved that the matter has been referred to the State Bar.”

Based on a comparison of reported appellate decisions in California and actual notifications to the State Bar, the CCFAJ concluded that courts have been underreporting misconduct that is required to be reported by section 6086.7(a). The CCFAJ noted that because the statute assigns the notification responsibility to “[a] court,” the failure to comply may be attributable to confusion over who has the actual duty to report under the statute.

In an effort to improve compliance with section 6086.7, the CCFAJ recommended that the Judicial Council consider a rule of court that would clearly define which judge or justice has the duty to notify the State Bar. This proposal includes one such rule for superior court judges and one for appellate justices.

### **Proposed rule 10.609—Trial court judges**

As noted, section 6086.7 requires “[a] court” to report the attorney to the State Bar. Because the statute requires “[a] court” to notify the State Bar, whether it is the judge’s responsibility or whether the judge may delegate the task to someone else is unclear. Proposed rule 10.609 would specify that the judge who issues the order that triggers the notification requirement is responsible for notifying the State Bar, but that judge may direct court staff to do so.

The proposed rule would also clarify that the notice to the State Bar must include the attorney’s full name and State Bar number, if known, and a copy of the order that triggered the notification requirement.

Finally, subdivision (b) of the statute requires that the court notify the attorney involved that the matter has been referred to the State Bar. The proposed rule would clarify that the person who notifies the State Bar must, in addition, inform the attorney who is the subject of the notification that the matter has been referred to the State Bar.

The committee also recommends including an Advisory Committee Comment that would set forth the provisions of the statute and state that the rule is intended to clarify who has the responsibility of notifying the State Bar under section 6086.7. The comment would also note that judges are subject to canon 3D(2) of the Code of Judicial Ethics, which states:

Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.

The commentary to canon 3D(2), which would also be included in the advisory committee comment, contains a reference to section 6086.7. It states:

Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the

violation to the presiding judge, appropriate authority, or other agency or body. Judges should note that in addition to the action required by Canon 3D(2), California law imposes mandatory additional reporting requirements on judges regarding lawyer misconduct. See Business and Professions Code section 6086.7.

### **Proposed rule 10.1017—Appellate court justices**

There may be confusion about who must notify the State Bar when a judgment is reversed by the Court of Appeal for a reason that triggers the notification requirement. It could be the trial judge who rendered the judgment and to whom a case has been remanded, the appellate justice who authored the reversing opinion, or the presiding justice of the Court of Appeal that rendered the reversing judgment. To clarify who is responsible for notifying the State Bar when an appellate court reverses a judgment, the Administrative Presiding Justices Advisory Committee proposes adoption of rule 10.1017, which would specify that the justice issuing the order or authoring the opinion that triggers the notification requirement under section 6086.7 is responsible for notifying the State Bar. Under the rule, the justice may direct the Clerk to notify the State Bar. As used in this rule, “Clerk” is intended to refer to the Clerk of the Supreme Court and the clerk/administrators of the Courts of Appeal. The rule would also state that the notice to the State Bar must include the attorney’s name and the attorney’s State Bar number, if known, as well as a copy of the order that triggered the notification requirement.

As noted, section 6086.7(b) requires that the court also notify the attorney involved that the matter has been referred to the State Bar. To comply with that statutory requirement and to specify who must notify the attorney, the rule would state that the person, i.e., the justice or Clerk, who notified the State Bar must also inform the attorney who was the subject of the referral that the matter has been referred to the State Bar.

As in proposed rule 10.609, the advisory committee comment would state the provisions of section 6086.7 and explain that the rule is intended to clarify who is responsible for complying with the statutory requirement. It would also contain a cross-reference to canon 3D(2) and its commentary.

### **Comments, Alternatives Considered, and Policy Implications**

This proposal was circulated for comment as part of the spring 2013 invitation-to-comment cycle. Five individuals or organizations responded to the invitation to comment.<sup>1</sup> One comment, from litigant Ronald Pierce, did not address the provisions in the proposed rules. The Superior Court of San Diego County, without comment, indicated agreement with the proposed rules. The Orange County Bar Association disagreed with the proposal, stating only that the rules “[m]ight result in selective reporting.” It is unclear how the rule might result in selective reporting. In fact, each rule is intended to make it clear under what circumstances a court must report an attorney to the State Bar.

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<sup>1</sup> A chart providing the full text of the comments and the committee responses is attached at pages 10–13.

The State Bar commented that it agrees with the proposed rules if they are modified in two respects. First, the State Bar suggests that the new rules specifically provide that the notification include a copy of the order or opinion that triggered the notification. Acknowledging that courts in many instances include such a copy along with the notification, the State Bar notes that sometimes it receives only a letter referring to the action. Both committees agreed with this suggestion and recommend adding language to this effect.

Second, the State Bar recommends that the rules include reference to two other statutes: Business and Professions Code sections 6086.8(a) and 6101(c). Section 6086.8(a) provides:

Within 20 days after a judgment by a court of this state that a member of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity, the court which rendered the judgment shall report that fact in writing to the State Bar of California.

Section 6101(c) provides:

The clerk of the court in which an attorney is convicted of a crime shall, within 48 hours after the conviction, transmit a certified copy of the record of conviction to the Office of the State Bar. Within five days of receipt, the Office of the State Bar shall transmit the record of any conviction which involves or may involve moral turpitude to the Supreme Court with such other records and information as may be appropriate to establish the Supreme Court's jurisdiction. The State Bar of California may procure and transmit the record of conviction to the Supreme Court when the clerk has not done so or when the conviction was had in a court other than a court of this state.

Although these two statutes involve reporting requirements, they are unrelated to the original CCFAJ proposal, which concerned a lack of compliance specifically with section 6086.7; the CCFAJ studied and reported on misconduct and incompetence of prosecutors and criminal defense lawyers in California's criminal justice system. And, unlike sections 6086.7 and 6086.8, section 6101(c) is clear that it is the responsibility of the clerk of the court to transmit a copy of the record of conviction to the State Bar. However, the Administrative Presiding Justices Advisory Committee agreed that it would be beneficial to include a reference to section 6086.8 in the new rules because that statute, like section 6086.7, directs "the court" to report to the State Bar. Because section 6086.8 addresses a different reporting requirement and the invitation to comment did not include that statute, the committee concluded that it should not now recommend amendment of proposed rules 10.609 and 10.1017 to include section 6086.8, but the committee will consider this at a later date.

Finally, the Superior Court of Los Angeles County commented that section 6086.7 does not require reporting *all* attorney contempt citations. Rather, the statute refers to “a final order of contempt imposed against an attorney *that may involve grounds warranting discipline under this chapter.*” (Italics added.) The court suggested that the Advisory Committee Comment be modified to include this clarifying language from the statute so that the rule is consistent with the statute. The court notes that the language reinforces a judge’s discretion to determine whether the contempt involves conduct subject to discipline under the State Bar Act. Including this additional language would clarify that if a judge concludes that a contempt order does *not* involve a ground warranting discipline, the judge need not notify the State Bar. Both committees agreed and recommend modifying the Advisory Committee Comment to include this language.

In addition to reviewing the comments discussed above, the committee considered and rejected a suggestion by the CCFAJ that the rules include a provision requiring the courts, after reporting an attorney to the State Bar, to notify the attorney’s supervisor, if known.

### **Implementation Requirements, Costs, and Operational Impacts**

The proposal will result in no costs. Section 6086.7 reporting requirements are mandatory. The proposed rules simply clarify individual responsibility within a court for reporting. The operational impact should be minimal because reports to the State Bar required by section 6086.7 are rare.

### **Attachments**

1. Cal. Rules of Court, rules 10.609 and 10.1017, at pages 7–9
2. Chart of comments, at pages 10–13

Rules 10.609 and 10.1017 of the California Rules of Court would be adopted, effective January 1, 2014, to read:

1 **Title 10. Judicial Administration Rules**

2  
3 **Division 4. Trial Court Administration**

4  
5 **Chapter 1. General Rules on Trial Court Management**

6  
7 **Rule 10.609. Notification to State Bar of attorney misconduct**

8  
9 **(a) Notification by judge**

10  
11 When notification to the State Bar is required under Business and Professions Code  
12 section 6086.7, the judge issuing the order that triggers the notification requirement  
13 under section 6086.7 is responsible for notifying the State Bar. The judge may direct  
14 court staff to notify the State Bar.

15  
16 **(b) Contents of notice**

17  
18 The notice must include the State Bar member’s full name and State Bar number, if  
19 known, and a copy of the order that triggered the notification requirement.

20  
21 **(c) Notification to attorney**

22  
23 If notification to the State Bar is made under this rule, the person who notified the  
24 State Bar must also inform the attorney who is the subject of the notification that the  
25 matter has been referred to the State Bar.

26  
27 **Advisory Committee Comment**

28  
29 Business and Professions Code section 6086.7 requires a court to notify the State Bar of any of the  
30 following: (1) a final order of contempt imposed on an attorney that may involve grounds warranting  
31 discipline under the State Bar Act; (2) a modification or reversal of a judgment in a judicial proceeding  
32 based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of  
33 an attorney; (3) the imposition of any judicial sanctions on an attorney of \$1,000 or more, except  
34 sanctions for failure to make discovery; or (4) the imposition of any civil penalty on an attorney under  
35 Family Code section 8620. If the notification pertains to a final order of contempt, Business and  
36 Professions Code section 6086.7(a)(1) requires the court to transmit to the State Bar a copy of the relevant  
37 minutes, final order, and transcript, if one exists. This rule is intended to clarify who has the responsibility  
38 of notifying the State Bar under section 6086.7 and the required contents of the notice.

39  
40 In addition to the requirements stated in Business and Professions Code section 6086.7, judges are subject  
41 to canon 3D(2) of the California Code of Judicial Ethics, which states: “Whenever a judge has personal  
42 knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated

1 any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action,  
2 which may include reporting the violation to the appropriate authority.” The Advisory Committee  
3 Commentary states: “Appropriate corrective action could include direct communication with the judge or  
4 lawyer who has committed the violation, other direct action, such as a confidential referral to a judicial or  
5 lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or  
6 other agency or body. Judges should note that in addition to the action required by Canon 3D(2),  
7 California law imposes mandatory additional reporting requirements on judges regarding lawyer  
8 misconduct. See Business and Professions Code section 6086.7.”

## 11 **Division 5. Appellate Court Administration**

### 13 **Chapter 1. Rules Relating to the Supreme Court and Courts of Appeal**

#### 15 **Rule 10.1017. Notification to State Bar of attorney misconduct**

##### 17 **(a) Notification by justice**

19 When notification to the State Bar is required under Business and Professions Code  
20 section 6086.7, the senior justice issuing the order or the justice authoring the  
21 opinion that triggers the notification requirement under section 6086.7 is responsible  
22 for notifying the State Bar. The justice may direct the Clerk to notify the State Bar.

##### 24 **(b) Contents of notice**

26 The notice must include the State Bar member’s full name and State Bar number, if  
27 known, and a copy of the order or opinion that triggered the notification requirement.

##### 29 **(c) Notification to attorney**

31 If notification to the State Bar is made under this rule, the person who notified the  
32 State Bar must also inform the attorney who is the subject of the notification that the  
33 matter has been referred to the State Bar.

#### 35 **Advisory Committee Comment**

37 Business and Professions Code section 6086.7 requires a court to notify the State Bar of any of the  
38 following: (1) a final order of contempt imposed on an attorney that may involve grounds warranting  
39 discipline under the State Bar Act; (2) a modification or reversal of a judgment in a judicial proceeding  
40 based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of  
41 an attorney; (3) the imposition of any judicial sanctions on an attorney of \$1,000 or more, except  
42 sanctions for failure to make discovery; or (4) the imposition of any civil penalty on an attorney under  
43 Family Code section 8620. If the notification pertains to a final order of contempt, Business and

1 Professions Code section 6086.7(a)(1) requires the court to transmit to the State Bar a copy of the relevant  
2 minutes, final order, and transcript, if one exists. This rule is intended to clarify which justice has the  
3 responsibility of notifying the State Bar under section 6086.7 and the required contents of the notice.  
4 In addition to the requirements stated in Business and Professions Code section 6086.7, judges are subject  
5 to canon 3D(2) of the California Code of Judicial Ethics, which states: “Whenever a judge has personal  
6 knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated  
7 any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action,  
8 which may include reporting the violation to the appropriate authority.” The Advisory Committee  
9 Commentary states: “Appropriate corrective action could include direct communication with the judge or  
10 lawyer who has committed the violation, other direct action, such as a confidential referral to a judicial or  
11 lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or  
12 other agency or body. Judges should note that in addition to the action required by Canon 3D(2),  
13 California law imposes mandatory additional reporting requirements on judges regarding lawyer  
14 misconduct. See Business and Professions Code section 6068.7.”  
15

**SPR13-30**

**Attorney Misconduct: Notification to State Bar** Proposed Adoption of Cal. Rules of Court, rules 10.609 and 10.1017

All comments are verbatim unless indicated by an asterisk (\*).

<b>List of All Commentators, Overall Positions on the Proposal, and General Comments</b>				
	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Orange County Bar Association by Wayne R. Gross President Newport Beach, CA	N	Might result in selective reporting.	It is unclear from the comment how the proposed rule would result in selective reporting.
2.	State Bar of California, Office of the Chief Trial Counsel Los Angeles, CA	AM	<p>The State Bar of California, Office of the Chief Trial Counsel (OCTC) has reviewed the proposal to adopt a rule of court addressing court compliance with a statutory mandate to notify the State Bar of instances of attorney misconduct. OCTC supports the proposal, subject to the following comments.</p> <p>First, OCTC recommends that proposed new rules 10.609 and 10.1017 specifically provide that the required notification to the State Bar include a copy of the order or opinion that triggers the notification. Although the court in many instances currently provides such a copy along with the notification, OCTC sometimes receives only a letter referring to the action.</p> <p>Second, the proposed new rules cover notification to the State Bar when required under Business and Professions Code Section 6086.7. OCTC recommends that two other statutes with notification requirements also be covered by the Rules of Court in a similar way.</p> <p>The first statute is Business and Professions Code Section 6086.8(a), which provides as follows:</p>	<p>The committee agrees and has incorporated this suggestion into the proposed rule.</p> <p>The proposed rule is limited to the provisions in Business and Professions Code section 6086.7 because the California Commission on the Fair Administration of Justice identified lack of compliance with section 6086.7 as an issue in its study and report on misconduct and incompetence of prosecutors</p>

**SPR13-30**

**Attorney Misconduct: Notification to State Bar** Proposed Adoption of Cal. Rules of Court, rules 10.609 and 10.1017

All comments are verbatim unless indicated by an asterisk (\*).

<b>List of All Commentators, Overall Positions on the Proposal, and General Comments</b>				
	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>“Within 20 days after a judgment by a court of this state that a member of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity, the court which rendered the judgment shall report that fact in writing to the State Bar of California.”</p> <p>The second statute is Business and Professions Code Section 6101(c), which provides as follows:</p> <p>“The clerk of the court in which an attorney is convicted of a crime shall, within 48 hours after the conviction, transmit a certified copy of the record of conviction to the Office of the State Bar. Within five days of receipt, the Office of the State Bar shall transmit the record of any conviction which involves or may involve moral turpitude to the Supreme Court with such other records and information as may be appropriate to establish the Supreme Court’s jurisdiction. The State Bar of California may procure and transmit the record of conviction to the Supreme Court when the clerk has not done so or when the conviction was had in</p>	<p>and criminal defense lawyers in California’s criminal justice system. However, the Administrative Presiding Justices Advisory Committee agrees that if the proposed rules are adopted, they should be amended at a later date to include section 6086.8. Because section 6101(c) is clear that the responsibility to report under that statute belongs to the clerk of the court, there is no need to include that statute in these rules.</p>

**SPR13-30**

**Attorney Misconduct: Notification to State Bar** Proposed Adoption of Cal. Rules of Court, rules 10.609 and 10.1017

All comments are verbatim unless indicated by an asterisk (\*).

<b>List of All Commentators, Overall Positions on the Proposal, and General Comments</b>				
	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			a court other than a court of this state.”	
3.	Superior Court of Los Angeles County	AM	<p>The Advisory Committee Comment is inconsistent with Business and Professions Code section 6086.7 and the wording of proposed Rule 10.609.</p> <p>Business and Professions Code section 6086.7 does not require all attorney contempt to be referred to the State Bar, but only: "A final order of contempt imposed against an attorney that may involve grounds warranting discipline under this chapter."</p> <p>Such a qualified finding of contempt is incorporated into new proposed rule 10.609, by reference:                      “When notification to the State Bar is required under Business and Professions Code section 6086.7, the judge issuing the order . . . .”                      However, the Advisory Committee Comment creates confusion by not including the qualifying language as to whether a contempt should be reported by suggesting a duty to report any contempt, even a contempt that the judge may not believe involves a ground warranting discipline under this chapter. This is also inconsistent with the appropriate discretion placed in a judicial officer to determine whether a report of the particular contempt to the State Bar is “appropriate corrective action” under Code of Judicial Ethics canon 3D(2).</p>	The committee agrees with the commentator and has incorporated the suggested language into the proposed rule.

**SPR13-30****Attorney Misconduct: Notification to State Bar** Proposed Adoption of Cal. Rules of Court, rules 10.609 and 10.1017

All comments are verbatim unless indicated by an asterisk (\*).

<b>List of All Commentators, Overall Positions on the Proposal, and General Comments</b>				
	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			In general, trial court judges should be given a wide range of discretion as to what “appropriate corrective action” is required for attorney misconduct, and whether that action is a report to the State Bar. The Legislature has appropriately left the discretion as to the discretionary determination of the judicial officer the determination as to whether the contempt warrants discipline under the Business and Professions Code. The Rules of Court should not inappropriately limit that discretion.	
4.	Superior Court of San Diego County by Mike Roddy Executive Officer	A	No further comment.	No response necessary.