



The State Bar of California

OPEN SESSION AGENDA ITEM 704 MARCH 2020

DATE: March 12, 2020

TO: Members, Board of Trustees

FROM: Lori Meloch, Program Director, Professional Support & Client Protection
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Office of Probation

SUBJECT: Follow-up from Strategic Planning Session – Consideration of Options to
Improve Payment of Restitution

EXECUTIVE SUMMARY

At its Strategic Planning Session on January 23, 2020, as part of its goal to ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system, the Board of Trustees directed the State Bar to develop an action plan to improve the payment of restitution by those respondent attorneys ordered by the Supreme Court and State Bar Court to pay restitution. This agenda item recommends the adoption of a strategic plan objective that will guide the implementation of that action plan.

BACKGROUND

Restitution may be ordered by the State Bar Court in reprobation matters and recommended by the State Bar Court and ordered by the California Supreme Court in probation matters. Restitution serves both rehabilitative and public protection goals. In such orders, the respondent attorney is ordered to pay restitution directly to the named victim. Unfortunately, for many reasons, including reluctance to pay and inability to pay, respondent attorneys often do not pay the restitution as ordered. The State Bar is exploring a number of options that could assist those to whom restitution is ordered with the collection of restitution.

DISCUSSION

The Board of Trustees adopted Standards for Attorney Sanctions for Professional Misconduct (the Standards). The Standards set forth a means for determining the appropriate disciplinary sanction in a particular case and to ensure consistency. The Standards help fulfill the primary purposes of discipline, which include: (a) protection of the public, the courts and the legal profession; (b) maintenance of the highest professional standards; and (c) preservation of public confidence in the legal profession. Rehabilitation can also be an objective in determining the appropriate sanction. When restitution is ordered as an attorney sanction, it can serve all of the purposes of discipline as set forth in the Standards and can also serve to encourage rehabilitation.

Although a respondent attorney can be ordered to pay restitution and, if restitution is not paid, the respondent attorney can be further disciplined and even disbarred, the State Bar cannot otherwise compel a respondent to pay the restitution as ordered. Once an attorney is disbarred, there is no further sanction that can be imposed. While the Client Security Fund (CSF) is often an option for victims to whom restitution was ordered, not all losses fall within the CSF rules, or victims may suffer losses greater than the maximum amount of reimbursement that CSF can pay. Additionally, CSF only reimburses the principal amount wrongfully retained by the attorney. In some cases, when respondent attorneys have delayed making restitution, the interest that is owed to the victims can be substantial. Client victims would benefit if they or the State Bar possessed better tools to assist in the enforcement of restitution orders.

There are many issues that affect whether a respondent attorney can or will pay the restitution that is ordered, including whether the respondent attorney has the means to pay the ordered restitution.

Recognizing the challenges but desiring to increase the likelihood that a respondent attorney will pay restitution to a victim, the Board of Trustees directed the State Bar to develop proposals to improve the payment of restitution.

Staff recommends that the Board adopt a new strategic objective to capture the importance of this issue, and to frame the work to follow. Specifically, staff recommend the addition of an objective to Goal 2 of the Strategic Plan to read: The State Bar shall develop recommended statutory, rule, policy, or guideline changes to encourage the timely and complete payment of restitution.

In carrying out that objective, staff proposes the following operational plan:

- The Office of Professional Support and Client Protection will collaborate with the Office of Chief Trial Counsel (OCTC) to develop and employ effective language to be included in stipulations that will improve complete and timely payment of restitution.
 - The purpose of this objective is to address concerns that the stipulated orders in some instances do not incentivize regular payment of restitution and do not

contain sufficient language to hold a respondent accountable for nonpayment with additional discipline.

- The Office of Professional Support and Client Protection, in collaboration with State Bar Court, OCTC and the Supreme Court and other stakeholders, as needed, will explore options to allow a return to active status in certain circumstances, instead of continuing a suspension until restitution is fully paid.
 - Currently, restitution is typically ordered as an “and until” condition, meaning that the respondent attorney is ordered suspended for a set period of days, and until he or she pays the ordered restitution. This type of condition can be overwhelming in some circumstances, and interfere with the respondent’s ability to secure employment that will allow him or her to fully pay the restitution owed. One possible approach is to allow respondents who have made regular installment payments, and have paid a certain percentage of the total owing to return to the practice of law. This could provide incentive to respondents to keep them on track to pay the restitution, resulting in respondents’ rehabilitation and payment to victims.
- Pursue statutory authority to allow those to whom restitution is ordered to convert Supreme Court restitution orders into automatic judgments.
 - This will provide victims with an additional tool to try to collect the court-ordered restitution.
- Encourage use of already existing programs like the Lawyer Assistance Program career counseling services to assist Respondents with employment opportunities while disciplined or after disbarment.
 - This will give support to respondents willing and able to obtain employment, thus demonstrating rehabilitation, and possibly providing a source of income resulting in payment to victims.

While these are the areas that have been identified as promising, more details need to be developed, and these proposals need to be explored with stakeholders to determine their viability.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees adopts a new objective under Goal 2 of the State Bar Strategic Plan to read: The State Bar shall develop recommended statutory, rule, policy, or guideline changes to encourage the timely and complete payment of restitution; and it is

FURTHER RESOLVED, that the Board of Trustees directs staff to explore the activities to implement this objective described in this agenda item.