

AGENDA ITEM

III B. MARCH 6 2014

DATE: February 5, 2014

TO: Members, Board Committee on Operations

FROM: Craig Holden, Chair PPDB

SUBJECT: 2014 Board of Trustees Planning Meeting Action Items

EXECUTIVE SUMMARY

This item comes before the Board Operations Committee (BOps) in its role as the control point for all items that appear on the agendas of the other board committees and of the board. Part of BOp's charter is its responsibility to coordinate the work of the other Board committees and oversee the Secretariat function of the Board. [Tab 9 (Board Committees and Task Forces), Article 2 (Committee on Operations)]. BOps "refers" any issue that appears on a committee agenda to that committee for consideration. All issues must first be deemed worthy of committee by BOps before the issue may be agendized before a committee

At its January 10 & 11, 2014, Planning Meeting, Board of Trustees participated in three concurrent breakout sessions on the following topics and subtopics:

Topic I - Enhancing Public Protection : (A) Expansion of Malpractice Insurance Disclosure; (B) Random Audit of Lawyer Trust Accounts; and (C) Advance Fees.

Topic II - Access To Justice: (A) Legal Services Funding; (B) Unbundled Services; (C) Law School Indebtedness

Topic III - The Emerging and Unregulated Legal Services Sector: (A) Alternative Business Structures; (B) Limited Practice Rules: and (C) Ancillary Law-Related Services

This memorandum summarizes the breakout group discussions and the outcomes identified for referral to the appropriate Board Committee for action.

BACKGROUND

Issue: A. Expansion of Malpractice Insurance Disclosure

- 1. Should the State Bar revisit a rule that would require attorney certification to the State Bar followed by identification on the State Bar's Web site of those attorneys who certify that they do not have professional liability insurance?***

The breakout group expressed concerns regarding the benefit of insurance disclosure. The group's sense was that the State Bar could create a false sense of security amongst consumers of legal services by actively providing the wrong or insufficient information. The group felt that disclosure was likely to mislead clients and could induce them to feel protected when the reality could be that the policy would be used to defend the attorney first, potentially leaving nothing for the client.

As an alternative to disclosure, the group suggested that increased consumer education about malpractice insurance would be more valuable. The group recommended that the State Bar develop a consumer fact sheet on malpractice insurance and that a thorough review of the State Bar's consumer pamphlets be conducted to assure that they contain more meaningful and detailed information on uninsured attorneys and the nature of professional liability insurance.

Outcome

The Member Oversight Committee ("MOC") monitors the operational performance of programs and functions related to attorney members that are outside of the admission, regulation and discipline functions. MOC should oversee the development of a consumer fact sheet on malpractice insurance and a thorough review of the State Bar's consumer pamphlets to assure that they contain more meaningful and detailed information on uninsured attorneys and the nature of professional liability insurance.

Issue: B. Random Audit of Lawyer Trust Accounts

- 1. Should the Board adopt a rule providing that lawyer trust accounts selected at random may be audited without having grounds to believe misconduct has occurred and also providing appropriate procedural safeguards?***

The breakout group suggested that the prior to undertaking random audits of lawyer trust accounts, the State Bar should obtain more statistical data about the relationship between trust accounts violations and discipline and between trust account violations and Client Security Fund payouts.

However, the group did find value in the concept of random audits, stating that they would provide: (1) education; (2) deterrence; and (3) detection of misappropriation.

The group recognized that there could be an inherent public relations value and deterrent in announcing the State Bar's intention to pursue random trust account audits and those audits would also call for lawyers to affirmatively attest to compliance in trust fund administration.

The group also recommended that the random lawyer trust account audit model should not be time and resource intensive and should track and identify the causes for noncompliance on a preventative basis. Additionally, audits should be coupled with a vehicle to educate lawyers on trust fund compliance.

Outcome

Staff is developing protocols to establish a Random Audit Program similar to that established in 1981 by the New Jersey Supreme Court.

Staff will report regarding the random audit program to the Regulation, Admissions and Discipline Oversight Committee ("RAD"), which monitors the operational performance of the State Bar's regulatory and public protection functions and recommends to the full Board changes in rules, policies or procedures governing attorney regulation.

Issue: C. Advance Fees

1. Should the State Bar pursue rule changes that mandate that lawyers put their advance fees in trust accounts?

The breakout group felt that the State Bar should require lawyers to deposit advance fees in their trust accounts and that the Board should direct the Committee on Professional Responsibility and Conduct (COPRAC) to initiate the process to make the appropriate rule changes and submit them for approval to the Supreme Court.

Currently, the California Rules of Professional Conduct permit, rather than require, advance fees to be deposited in a trust account.

In 2010 the Board adopted proposed Rule 1.15 (re client trust accounts); and proposed Rule 1.5 (re fees in general), which deleted the Rule Revision Commission's proposed provisions for expressly regulating nonrefundable, earned on receipt, or similarly-denominated fee arrangements.

Rule 1.15 (re client trust accounts); and proposed Rule 1.5 (re fees in general), have not yet been filled with the Supreme Court but it is anticipated that many of the proposed rules will be submitted to the Court throughout this year.

Rule 1.15 would continue the California status quo of permitting lawyers to use discretion in deciding whether to hold advance fees in a trust account and it would add explicit requirements concerning a lawyer's duty to account for advance fees.

Rule 1.5 would continue the California status quo prohibition against illegal or unconscionable fees and it would add rule comments with guidance on the application of the rule to advance fees.

Outcome

COPRAC should be tasked with reviewing the issue of expressly regulating nonrefundable, earned on receipt, or similarly-denominated fee arrangements and report to the Regulation, Admissions and Discipline Oversight Committee (“RAD”). RAD monitors the operational performance of the State Bar’s regulatory and public protection functions and recommends to the full Board changes in rules, policies or procedures governing attorney regulation.

Topic II – Increasing Access to Justice

Issue: A. Legal Services Funding

- 1. Since additional funding is always key, what new structural funding sources for legal services should the Board consider (that go beyond the current funding practices)?***

The breakout group felt that the State Bar should not seek increases of court fees for funding legal services, as increasing fees would have a detrimental effect on access to justice for low and medium income individuals.

As an alternative the group recommended pursuing “agency funding” from existing funding such as the Veteran’s Administration that could, for example, fund veterans’ legal service needs. The group felt that a similar state government model could be developed to draw from existing resources to fund associated legal services.

Outcome

The State Bar led informal Legal Services Research and Development group should continue to look at ways to diversify funding for legal services.

Staff will continue to report on this issue to the Stakeholder Relations Committee (“SRC”) which has oversight for the State Bar’s activities that advance the administration of justice and the science of jurisprudence in conformity with Business and Professions Code Section 6031.

Issue: B. Unbundled Services

- 1. How can we encourage more attorneys to use unbundling and more judges to understand the role of unbundling? What specific ways can the State Bar and its Sections and Committees promote the understanding of and practice of limited scope legal assistance? For example, should the Bar encourage the Sections and Certified Specialists to participate***

in the design of trainings that expand the application of unbundling to a number of subject matter areas?

The breakout group felt that better education regarding limited scope assistance was necessary for judges, lawyers, law schools and the public. The group's view was that the framework for limited scope assistance was in place, but that all of the stakeholders need to align.

Suggestions included development of an unbundling tool kit that would assist lawyers in providing legal services to clients who otherwise could not afford or would not choose to hire a lawyer. The tool kit would address all aspects of limited scope representation, including the formation and termination of the relationship, the performance of discrete tasks, and the ethical issues and procedural rules involved in this service method.

The group also felt that there needed to be a collective effort to create a simplified limited scope system that (1) defines the scope of representation; (2) provides for clear communication between counsel, judges and parties; (3) creates parameters for the lawyer's role in document preparation, including disclosure of the lawyer's assistance; and (4) governs the entry of appearances and withdrawals for limited representation.

Outcome

State Bar staff will continue to report on limited scope assistance to the Stakeholder Relations Committee ("SRC") which has oversight for the State Bar's activities that advance the administration of justice and the science of jurisprudence in conformity with Business and Professions Code Section 6031.

Issue: C. Law School Indebtedness

It was the sense of the breakout group that law school indebtedness is an access to justice issue because: (1) small law firms face challenges hiring and retaining competent attorneys; (2) fewer lawyers are able to work in public interest positions; (3) new attorneys have too much debt to provide affordable legal services to poor and middle class families and individuals; (4) as fewer attorneys find sustainable jobs in the private sector, more attorneys enter solo practice; (5) debt burdened lawyers are less likely to engage in pro bono work (6); debt drives young attorneys away from rural areas; and (7) heavy debt burdens decrease the diversity of the legal profession.

The group felt that in order to better understand the effects of law school indebtedness the issue needed to be quantified through the collection of data.

Outcome

Law school indebtedness will be taken up by the State Bar Civil Justice Strategies Task Force, which will analyze the reasons for and potential solutions to the "justice gap" – the gap between the need for civil legal assistance by low- and moderate-income Californians and the resources available to meet that need.

Topic III – The Emerging and Unregulated Legal Sector

Issue: A. Alternative Business Structures

- 1. New regulatory structures for legal practice are being introduced in other legal cultures (e.g., in Australia, England and Wales, as well as the issuance of limited licensing in Washington State). Law firms in other jurisdictions may allow non-lawyer ownership and, in particular, allow public ownership of law firms. Should the State Bar examine alternative business structures for California?***

It was the view of the breakout group that alternative business structures could enhance the delivery of legal services to the middle class and help to close the justice gap. Additionally, the group felt that as a regulatory agency the State Bar and the Board of Trustees needed to keep their eyes on developments in the delivery of legal services.

Outcomes

In continuing the Board's governance reform, the breakout group felt that the Board should task the Planning, Program Development and Budget Committee (PPDB), within its governance purview, with continuing the discussion on the future of the delivery of legal services and impending innovations.

Issue: B. Limited Practice Rules

- 1. What steps should the Board consider in establishing a limited license practice of law?***

The breakout group recommended to the Board that the State Bar further study and develop a proposal for a limited license to practice law program, including possible governance models, for adoption and implementation in California.

Additionally, the group recommended that the State Bar monitor the progress of the Washington State Limited License Legal Technician program that went into effect on September 1, 2012.

Outcome

The breakout group recommended that the issue of limited licensing be referred to the State Bar Civil Justice Strategies Task Force, for development of further governance models for California, including testing, admission, and regulation of a limited licensing practice.

Issue: C. Ancillary law-related services

1. Should other “legal services” that are ancillary to the practice of law be regulated under the State Bar jurisdiction?

The breakout group acknowledged that under California law, non-lawyers are already allowed to perform some legal tasks that don’t constitute the practice of law, such as helping people fill out legal forms. The breakout group agreed that the State Bar should further study the delivery of “legal services” that are ancillary to the practice of law.

Outcome

The breakout group recommended referral of the issue of ancillary law-related services to the Task Force on Civil Justice Strategies for further consultation with nonlawyer ancillary law-related service providers regarding possible regulatory schemes.

FISCAL / PERSONNEL IMPACT:

TBD

RULE AMENDMENTS:

TBD

BOARD BOOK IMPACT:

TBD

RECOMMENDATION

The Board Planning, Program Development and Budget Committee (“PPDB”) recommends that the action items from the January 2014 Board of Trustees Planning Meeting be referred to the appropriate subject matter committees, as noted below, for discussion during the 2013-14 Board year and that their recommendations be considered and adopted by the Board as appropriate for implementation during the 2013-14 Board-year.

2014 Board Planning Meeting Action Items		
ACTION POINT	RESPONSIBLE COMMITTEE	COMMENTS
1. Malpractice Insurance Consumer Education – conduct a review of the State Bar’s consumer pamphlets to assure that more meaningful and detailed information on issues such as uninsured attorneys and the nature of professional liability insurance is available to consumers; develop a consumer fact sheet on malpractice insurance.	Member Oversight Committee	The Member Oversight Committee (“MOC”) monitors the operational performance of programs and functions related to attorney members that are outside of the admission, regulation and discipline functions.
2. Development of Random Audit of Lawyer Trust Accounts Program.	Regulation, Admissions and Discipline Oversight Committee (“RAD”)	Staff is developing protocols to establish a Random Audit Program similar to that established in 1981 by the New Jersey Supreme Court.
3. Seek a rule requiring that lawyers deposit advance fees in their trust accounts.	COPRAC would report to the Regulation, Admissions and Discipline Oversight Committee (“RAD”)	COPRAC should be tasked with reviewing the issue of expressly regulating nonrefundable, earned on receipt, or similarly-denominated fee arrangements.
4. The State Bar led informal Legal Services Research and Development group should continue to look at ways to diversify funding for legal services.	Legal Services R&D Group; Stakeholder Relations Committee (“SRC”)	Pursue “agency funding” from existing funding such as the Veteran’s Administration that could, for example, fund veterans’ legal service needs.
5. State Bar staff will continue to report on progress on limited scope assistance.	Stakeholder Relations Committee (“SRC”)	Provide greater education regarding limited scope assistance for judges, lawyers, law schools and the public.

2014 Board Planning Meeting Action Items		
ACTION POINT	RESPONSIBLE COMMITTEE	COMMENTS
6. Better understand the effects of law school indebtedness; quantify the issue through the collection of data.	State Bar Civil Justice Strategies Task Force	Law school indebtedness could be views as an access to justice issue because in limits recent graduates ability to work in public interest positions; affordable legal services to poor and middle class families and individuals; debt drives young attorneys away from rural areas; and decreases the diversity of the legal profession.
7. PPDB should continue the institutional discussion on the future of the delivery of legal services and impending innovations.	Planning, Program Development and Budget Committee ("PPDB")	The breakout group felt that as a regulatory agency the State Bar and the Board of Trustees needed to keep its eyes on developments in the delivery of legal services.
8. The State Bar should further study and develop a proposal for a limited license to practice law program.	State Bar Civil Justice Strategies Task Force	Further study a limited license to practice law and monitor the progress of the Washington State Limited License Legal Technician program.
9. The State Bar should further study the delivery of "legal services" that are ancillary to the practice of law.	State Bar Civil Justice Strategies Task Force	Consultation with nonlawyer ancillary law related service providers regarding possible regulatory schemes.