

AGENDA ITEM

DATE: February 24, 2015

TO: Members of the Regulation and Discipline Committee

FROM: Dennis Mangers, Chair, UPL Oversight Committee
Lawrence C. Yee, Acting General Counsel
Jayne Kim, Chief Trial Counsel

SUBJECT: Unauthorized Practice of Law Oversight Committee and
Unauthorized Practice of Law Enforcement

EXECUTIVE SUMMARY

This item requests that the Regulation and Discipline Committee recommend to the Board of Trustees that it continue its commitment to investigating and enforcing unauthorized practice of law violations through the Office of Chief Trial Counsel under the jurisdiction of the Regulation and Discipline Committee of the State Bar. In doing so, this item recommends that (1) the Board of Trustees retire the Standing Committee on Unauthorized Practice of Law Oversight (“UPL Oversight Committee”) and transfer its functions back to the Regulation and Discipline Committee, and (2) the Regulation and Discipline Committee approve the elimination of the small stand-alone Unauthorized Practice of Law (“UPL”) enforcement unit within the Office of General Counsel (“OGC”). The special unit and the UPL Oversight Committee were established in the fall of 2013 in anticipation of legislation granting enhanced enforcement authority to the State Bar over UPL. The special unit was composed of two attorneys, two investigators, and an administrative assistant. Because of the veto of AB 888 in 2013 and the withdrawal of AB 852 in 2014, the State Bar’s existing authority has remained in its Office of the Chief Trial Counsel (“OCTC”), which has continued to vigorously investigate and work with state and local law enforcement in the prosecution of UPL. OCTC, OGC, and other State Bar staff, together with the President and other members of the Board of Trustees, have continued to work collaboratively with stakeholders to educate and protect the public from UPL scammers.

BACKGROUND

In early 2013, the debate and consideration of comprehensive federal immigration reform legislation intensified and raised concerns about the possibility of fraud by unscrupulous immigration consultants who would take advantage of the reform legislation to prey upon the immigrant community. The California Legislature introduced AB 1159 and AB 888 that would have expanded the State Bar's enforcement authority in this area. To proactively prepare for this situation and in anticipation of enhanced statutory authority that would expand the State Bar's ability to file civil enforcement actions for UPL violations, the State Bar's Board of Trustees formed the UPL Oversight Committee, chaired and vice-chaired by public members Dennis Mangers and Gwen Moore. The Oversight Committee's primary charges were to develop policy for implementation of the Bar's UPL enforcement activities and to review the performance of a small stand-alone UPL unit within the Office of General Counsel ("OGC") in carrying out those policies. The composition of the Oversight Committee, with a majority of non-attorney members, was intended to address potential antitrust concerns implicated by *North Carolina State Board of Dental Examiners v. FTC*, the federal case just decided on February 25, 2015, by the United States Supreme Court, where a licensing board is composed of professionals of the regulated trade.

The Legislature passed both AB 1159 and AB 888. However, the Governor vetoed AB 888, leaving the State Bar with the more limited authority under AB 1159 to enforce the prohibition against non-attorneys from using the term "notario" or "notario publico" and the ban against advance fees for immigration reform act services before their enactment by Congress. Moreover, in spite of regular "town halls" sponsored by the State Bar and other efforts to educate the public about the dangers of UPL immigration scams, there was no significant spike in the number non-attorney UPL complaints filed with the State Bar. As a result, the State Bar has continued to investigate and process UPL complaints through OCTC, working up cases and referring them to law enforcement for prosecution.

ISSUE

Should the functions of the UPL Oversight Committee be moved under the jurisdiction of the Regulation and Discipline Committee, thereby resulting in the retiring of the UPL Oversight Committee?

Should the regulation of non-attorney UPL matters be handled by OCTC, thereby formally eliminating the planned implementation of regulating non-attorney UPL matters in a unit within OGC?

DISCUSSION

- A. There is No Legal Reason That Would Require Continued Oversight of the State Bar's Non-Attorney UPL Functions by a Separate Board Oversight Committee

The grant of additional jurisdiction through anticipated legislation – Assembly Bill 888 – underscored the need for a UPL Oversight Committee. If enacted, AB 888 would have substantially expanded the State Bar’s regulatory power by granting it the ability to levy civil fines against non-attorneys engaged in the unlawful practice of law and recover attorney fees. Although approved by the Legislature, on October 9, 2013, Governor Brown vetoed AB 888. Governor Brown formally explained his reasoning for the veto as follows: “We already have adequate enforcement mechanisms and remedies to stop the unlicensed practice of law through the existing powers of the State Bar or through the authority of the Attorney General and local prosecutors to bring civil and criminal actions.”

Following the veto of Assembly Bill 888, Assemblyman Dickinson introduced Assembly Bill 852 (“AB 852”), which was nearly identical to AB 888, but sought to cure the concerns expressed by the Governor, by including provisions allowing the Attorney General, district attorneys and city attorneys a right of first refusal to initiate legal proceedings, eliminating the award of attorney fees to the State Bar, and requiring that any matter brought by the State Bar involve injury or likelihood of imminent harm to clients or the public. However, in July 2014, the State Bar requested that the provisions of AB 852 providing for fines and penalties in civil enforcement actions brought by the State Bar against non-attorneys engaged in UPL be placed on hold for a year. Presently, there is no legislation being pursued that would warrant oversight by a separate board committee.

In addition, and perhaps most significantly, there has been no increase in the number of immigration-related complaints received by the State Bar. OCTC is not aware of any backlog or surge in non-attorney complaints or referrals from law enforcement or regulatory agencies since the immigration reform debate ignited in mid-2013.

Finally, the antitrust concerns do not appear to be an issue. The UPL Oversight Committee was charged with addressing anticipated antitrust concerns prompted by facts in the then-pending federal case entitled *North Carolina State Board of Dental Examiners v. FTC* 717 F.3d 359 (4th Circ., 2013) *petition for cert. granted*, 134 S.Ct. 1491, Mar. 03, 2014. In the North Carolina case, which was heard by the United States Supreme Court in October 2014 and decided today, February 25, 2015, the Supreme Court held that a specialized state licensing agency with a governing board comprised of market participants elected by other market participants is a “private” actor subject to federal antitrust scrutiny. The dental board, composed primarily of dentists, sent cease-and-desist letters to non-dentists teeth-whitening service providers and product manufacturers often warning that the unlicensed practice of dentistry is a crime. The effect of the letters was that this and other related board actions led non-dentists to cease offering teeth whitening services in North Carolina. The Federal Trade Commission filed a complaint against the board and alleged that its elimination of non-dentists from the teeth-whitening market constituted an unfair method of competition, which is a violation of the Federal Trade Commission Act, 15 U.S.C. section 45. The Board appealed to the Fourth Circuit, which affirmed the FTC’s determination.

In a six-to-three opinion written by Justice Anthony Kennedy, the Supreme Court affirmed the Fourth Circuit, holding that the dental board is not immune from the antitrust laws. The Court's opinion explains that even though the dental board is an agency of the state, its actions must still be supervised by the state in order to enjoy antitrust immunity. The formal designation given to an agency by the States does not itself create state-action immunity. The Supreme Court held that because a controlling number of the board's decision-makers are "active market participants in the occupation," the board regulates (i.e., dentists), the board could not invoke state-action antitrust immunity, unless it was subject to active supervision by the State, which was not met in the case of its cease-and-desist letters.

An entity may not invoke [state-action] immunity unless the actions in question are an exercise of the State's sovereign power. State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority.

But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor.... For purposes of *Parker*, a non-sovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.

Slip opn., at p. 7. Significantly, the Supreme Court, at *id.*, cited and quoted, for an example of a non-sovereign state agency, its decision in *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"); see also, *Keller v. State Bar of California*, 496 U.S. 1, 11 ("The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as 'governmental agencies'"); *In Re Attorney Discipline System*, 19 Cal.4th 582, 599 ("The Legislature also made clear that the State Bar is not in the same class as those state agencies that have been placed within the executive branch....").¹

Since North Carolina was not adequately supervising the board's activities, the board was not exempt from federal antitrust liability. Active supervision was deemed

¹ With respect to state bars, the SCOTUS blog states in its analysis of the *North Carolina* case: "Bar associations in particular have been a source of litigation over the doctrine of state action immunity. Today's opinion cites three important cases concerning regulation of lawyers by state bar associations. The Court's descriptions of the cases suggest that those cases should be interpreted to mean that only the specific actions of a bar that are actively supervised by the state (e.g., a state supreme court) get antitrust immunity. The rest of a bar association's activities likely have no such immunity." (<http://www.scotusblog.com/2015/02/opinion-analysis-no-antitrust-immunity-for-professional-licensing-boards/>)

necessary to address the danger that board members could act to further their private interests.

Here, those same concerns are no longer present. Antitrust concerns are avoided, not through oversight by the Committee, but as a result of existing procedures where action taken by the State Bar requires Court confirmation and would therefore meet the test under the more stringent “state action” doctrine. (Bus. & Prof. Code, §§ 6126.3, 6126.4, 6127; see also, *North Carolina Board of Dental Examiners*, Slip opn. at p. 9 [“The active supervision requirement demands, *inter alia*, ‘that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.’”].)² Moreover, the prosecution of non-attorneys is undertaken by other state and local law enforcement agencies, while OCTC works proactively and effectively in conjunction with its law enforcement partners to utilize OCTC’s more limited authority to assume jurisdiction over the files of the non-attorneys engaged in UPL or to prosecute those attorneys for their unethical behavior in aiding and abetting UPL.

The functions of the existing UPL Oversight Committee could be moved under the jurisdiction of the Regulation and Discipline Committee which has general oversight over the State Bar’s regulatory functions and directly oversees the actions of the Chief Trial Counsel. (Bus. & Prof. Code, § 6079.5(a).)

B. Regulation Over Non-Attorney UPL Should Remain in OCTC, Which Has the Experience and Expertise to Address Non-Attorney UPL Matters Within the Scope of Its Existing Authority and is Currently Handling All Non-Attorney UPL Matters

Due to the anticipation of increased workload in the area of UPL and enhanced regulatory authority, and a concern that law enforcement lacked the resources to prosecute these UPL matters, it was recommended by the State Bar’s former Executive Director that a separate unit within OGC be formed to enforce the anticipated jurisdiction by bringing civil lawsuits against those engaged in UPL matters. It was projected that at least five new positions would have to be created at an annual cost to the State Bar of approximately \$500,000 in salaries and administrative expenses for this start-up unit. However, increased non-attorney UPL complaints never materialized³, the proposed legislation that was expected to generate additional work was not effectuated, and law enforcement expressed a dedication and willingness to prosecute non-attorney UPL matters, particularly those

² Had AB 888 or AB 852 been enacted, the Supreme Court’s opinion suggests that any cease-and-desist letters issued by the State Bar would have met the “active supervision” requirement if the letters included, among other options, notice that recipients had a right to seek declaratory rulings in state court. Slip opn. at p. 4.

³ Recently, OCTC conducted a review of immigration related complaints from October 2013 through December 2014. Approximately 100 immigration-related complaints were identified, which is a small fraction of the total complaints received during that same period. 36 of those complaints were against non-attorneys involving immigration matters and none of those complaints alleged a violation of AB 1159, including the improper use “notario,” “notario publico,” or other prohibited language set forth in Business and Professions Code section 6126.7.

matters involving immigration services. Consequently, the planned implementation of this unit was never realized.

Moreover, OCTC has been handling all non-attorney UPL complaints as part of its regulatory function. With its resources and unique experience in investigating and addressing attorney misconduct and non-attorney UPL, OCTC has the expertise to handle the enforcement of UPL matters as well as the background and experience to work effectively and coordinate efforts with law enforcement and other agencies in matters involving the unauthorized practice of law.

For example, Business and Professions Code section 6126.3 authorizes the State Bar to petition the superior court for an order assuming jurisdiction over the practice of any person who advertises or holds themselves out as entitled to practice law without being an active member of the Bar. Since section 6126.3 was enacted in 2005, OCTC has exclusively tracked complaints against non-attorneys, including those relating to immigration practice, and routinely filed, successfully executed and administered section 6126.3 superior court petitions. OCTC, as a matter of course, involves law enforcement in the planning, timing, and execution of its formal section 6126.3 petitions to assume jurisdiction over unlicensed legal practices. It also actively partners and coordinates with law enforcement on some of these cases, such as where law enforcement will execute its own search warrant, or even make arrests, simultaneous with the execution of our order.

OCTC also has in place staff and a protocol for referring non-attorney UPL matters to the proper law enforcement agency and engages in a proactive relationship with law enforcement and other regulatory agencies regarding non-attorney immigration UPL activities.

OGC remains available to provide legal guidance and advice to OCTC, which has traditionally been the role of OGC.

FISCAL / PERSONNEL IMPACT:

The retiring of the UPL Oversight Committee will result in some fiscal impact, the exact amount which is unknown at the time, due to savings in administrative costs and expense reimbursements related to meetings. Anticipated savings to the State Bar by utilizing the resources of OCTC in the handling of non-attorney UPL matters and not creating a separate unit in OGC will result in an approximate savings of \$500,000 annually.

RULE AMENDMENTS:

None known.

BOARD BOOK IMPACT:

Tab 9, Article 10 [the charter of the UPL Oversight Committee will be removed]; Tab 9. Article 2 [reference to the chair as a member of the Executive Committee will be removed].⁴

RECOMMENDATION:

It is recommended that the Regulation and Discipline Committee (1) recommend that the Board of Trustees approve the transfer of the functions of the UPL Committee to the Regulation and Discipline Committee and that the UPL Committee be retired, and (2) formally end the planned implementation of a UPL unit within OGC.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Regulation and Discipline Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Regulation and Discipline Committee hereby recommends that the Board of Trustees approve the transfer of all functions of the UPL Oversight Committee to the Regulation and Discipline Committee and retire the UPL Oversight Committee; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee acknowledges that the handling of non-attorney UPL functions will remain in the OCTC without the implementation of a separate UPL unit in OGC.

⁴ Under the Board Book, tab 9, article 2, the chair of the UPL Oversight Committee is a member of the Executive Committee. (Board resolution, July 2014.) Because Mr. Mangers serves both as chair of RAD and UPL Oversight Committee and is one of the two current public members of the Board, the composition of the Executive Committee will be unaffected. The Board and the Executive Committee may take formal action to expressly amend the Executive Committee's composition in that committee's charter.