

AGENDA ITEM

111 JULY 2015

DATE: July 6, 2015

TO: Members, Board Executive Committee
Members, Board of Trustees

FROM: Lawrence C. Yee, Acting General Counsel
Dina E. Goldman, Acting Chief Assistant General Counsel

SUBJECT: Revision to State Bar Rules Title 6 re Access to State Bar Records—
Return From Public Comment

EXECUTIVE SUMMARY

The California Public Records Act generally requires state and local agencies to disclose records to the public, upon request, except for those specifically exempted. As a judicial branch agency, the State Bar is exempt from the California Public Records Act. In addition, the State Bar is not subject to the provisions of California Rule of Court 10.500, which governs public access to judicial administrative records. However, requests for State Bar records can be subject to the common law right of access, which requires a balancing test to be applied for each record requested to weigh the public's interest in disclosure versus any interest in nondisclosure, including confidentiality of the document being sought. Although the State Bar routinely receives requests for records, the Bar does not have a comprehensive rule governing access to records, which sets forth procedures to govern requests for records and a list of which records are exempt from disclosure. In March, the Executive Committee authorized release of a proposed new Division 3 to Title 6 of the State Bar Rules to govern Access to State Bar Records for a 90-day public comment period. The public comment period ended on June 15, 2015. No comments were received during the comment period. This item asks the Board to adopt new State Bar Rules 6.70 – 6.76 governing access to State Bar records effective January 1, 2016, and adopt the findings presented in this item supporting the rule adoption.

BACKGROUND

The California Public Records Act ("CPRA"), adopted in 1968, requires governmental records held by state and local agencies to be disclosed to the public, upon request, unless there is a specific reason not to do so. CPRA contains a specific list of exemptions detailing records that can be withheld from disclosure and also incorporates by reference other laws that require confidentiality. As a judicial branch agency, the State Bar is exempt from the definition of "state agency" and thus is not subject to the provisions of CPRA. (Cal. Gov't. Code § 6252(g).)

California Rule of Court 10.500, adopted in 2010, provides public access to judicial administrative records, upon request, unless there is a specific reason not to do so. Like CPRA,

Rule 10.500 contains a specific list of exemptions of types of records that can be withheld from disclosure, many of which are based on similar CPRA exemptions, and also incorporates by reference other laws that require confidentiality. Rule 10.500 also specifically incorporates terms used in CPRA and provides that it should be interpreted consistently with the interpretation applied to terms under CPRA. Rule 10.500 does not apply to the State Bar.¹

Although the State Bar is not subject to the provisions of CPRA or Rule 10.500, it does routinely receive requests from the public for access to State Bar documents. Without a comprehensive rule that provides a procedure for responding to these requests and a list of records that are exempt from disclosure, the Bar is required to apply a balancing test to each request, weighing the public's interest in disclosure of a record against any countervailing interest, including confidentiality of a record sought.

In March, the Executive Committee authorized release of a proposed new Division 3 to Title 6 of the State Bar Rules to govern Access to State Bar Records for a 90-day public comment period. The public comment period ended on June 15, 2015. No comments were received during the comment period.

DISCUSSION AND FINDINGS

Overview of Proposed Rules

Staff has drafted proposed rules to govern Access to State Bar Records, which would appear in the State Bar Rules as a new Division 3 of Title 6. The proposed rules are attached to this item as Exhibit 1. Similar to CPRA and Rule 10.500, the proposed rules governing Access to State Bar Records would generally provide broad public access to State Bar administrative records, subject to specific exemptions and incorporating by reference other laws and rules which provide that records are confidential. The specific exemptions of CPRA and Rule 10.500 reflect instances when a competing public policy consideration, such as public security or the right to privacy, outweighs the right to access public documents.

The proposed rules incorporate a list of exemptions for State Bar records that are based on similar exemptions included in Rule 10.500 and CPRA. In addition, based on input from State Bar senior management staff, the proposed rules contain additional proposed exemptions for particular categories of State Bar records that are maintained in confidence and should be exempt from disclosure. Lastly, the proposed rules provide a procedure to be followed when requests for State Bar records are made, which is consistent with the procedures set forth in CPRA and Rule 10.500. The item requests that the Board to adopt the rules effective January 1, 2016. This will allow interim time to complete the ongoing process to develop a record retention policy for the State Bar and address staffing needs for a public information officer function.

¹ Title 10 of the California Rules of Court is adopted by the Judicial Council, which may adopt rules for court administration and rules of practice and procedure for the trial and appellate courts. Cal. Const. art. VI, § 6(d). Accordingly, Rule 10.500(c)(3) defines "judicial branch entity" to include only the Supreme Court, each Court of Appeal, each superior court, the Judicial Council, and the staff of the Judicial Council.

Legal Background for Adoption of Rules

In 2004, voters approved amendments that added section 3(b) to article I of the California Constitution. The Constitution now provides that a statute, court rule, or other authority adopted after November 3, 2004, that limits the right of access to information concerning the conduct of the people's business must be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. Const., art. I § 3(b)(2).) The amendment states that it does not repeal or nullify exceptions to the right of access to public records or meetings of public bodies that were in effect on November 3, 2004. (Cal. Const., art. I §§ 3(b)(2) and (5).)

Findings

As noted above, as a judicial branch agency, the State Bar is exempt from CPRA and thus has historically had no rule governing public access to State Bar records. Adoption of the proposed rule will broaden access to the State Bar's administrative records by making them generally accessible in the same manner as provided by CPRA and Rule 10.500. Most of the exemptions incorporated into the proposed rules are based on identical or similar exemptions in CPRA, or on exemptions which were adopted by the Judicial Council in Rule 10.500 (also based on CPRA exemptions). Thus, the proposed rule will generally expand public access to State Bar administrative records and the exemptions will not limit or restrict the public's existing right of access.

The exemptions provided by the proposed rules which are the same or substantially similar to CPRA and Rule 10.500 are: Rule 6.72(A) [preliminary writings and drafts not retained in the ordinary course of business, subject to balancing test]; Rule 6.72(B) [records pertaining to pending or anticipated claims or litigation]; Rule 6.72(C) [personnel, medical, or other personal information]; Rule 6.72(D) [testing questions and examination materials]; Rule 6.72(E) [investigatory or security files]; Rule 6.72(G) [records whose disclosure is prohibited under existing law]; 6.72(H) [records which would compromise the security of the public, the Bar, or State Bar personnel]; 6.72(K) [records related to evaluations of or complaints against State Bar Court judges]; 6.72(L) [real estate appraisals and evaluations related to lease, acquisition or sale of property prior to closing of final deal]; 6.72(M) [deliberative process related to collective bargaining]; 6.72(Q) [trade secrets or privileged or confidential commercial or financial information submitted in RFP process or contractual relationship]; 6.72(R) [deliberative process, subject to balancing test]; 6.72(S) [general balancing test].

The exemptions proposed which are specific to the State Bar's needs and the types of records it holds are:

Rule 6.72(F) – Exemption for examination records

This exemption was drafted to protect personal examination records for employment, certification and licensing. It is designed to protect against disclosure of an individual's scores, record of success, and how many times an examination was taken. This type of information is also protected under CPRA. Government Code section 6254.13 prohibits disclosure of individual scores on tests administered statewide to public school students. This exemption will not limit or restrict the public's existing right of access.

Rule 6.72(I) – Member information subject to opt out

This exemption was drafted to prohibit distribution of member information when a member has chosen to exercise their right under Business and Professions Code section 6001 to prohibit or

restrict the sale or disclosure of member information not reasonably related to regulatory purposes. This exemption will not limit or restrict the public's existing right of access.

Rule 6.72(J) – Personal, Medical and Financial Information

This exemption was drafted to protect personal information that may be submitted to the State Bar by members or applicants. For example, personal financial information can be submitted by State Bar members seeking a fee waiver. Members submitting this information have the expectation that it will remain private. This exemption will not limit or restrict the public's existing right of access.

Rule 6.72(N) – Identity and Issues Related to Ethics Hotline

This exemption was drafted to protect the identity and personal information of callers to the State Bar's Ethics Hotline. The Ethics Hotline is offered by the Bar as a confidential research service available to assist lawyers in identifying professional responsibility issues. The confidential nature of the program is intended to avoid a chilling effect on a lawyer's willingness to seek assistance and to promote candor in a lawyer's communication of their facts and issues to Hotline staff. This exemption will not limit or restrict the public's existing right of access.

Rule 6.72(O) – Identity and Issues Related to COPRAC

This exemption was drafted to protect the identity of, information provided by and communications of attorneys seeking an opinion from the Committee on Professional Responsibility and Conduct ("COPRAC"), as well as to provide confidentiality for the deliberative process of COPRAC. COPRAC provides opinions on ethics questions presented by attorneys. COPRAC opinions promote lawyer awareness and compliance with professional responsibility standards. As with the Ethics Hotline, maintaining confidentiality avoids a chilling effect on a lawyer who wishes to seek an ethics opinion and might otherwise worry about their request becoming public. Confidentiality for the committee's deliberative process facilitates COPRAC's ability to consider and develop ethics opinions. Once an opinion is at a final stage, it is distributed for public comment before being finalized and published. This exemption will not limit or restrict the public's existing right of access.

Rule 6.72(P) – Identity and Issues Related to Lawyer Referral Hotline

This exemption was drafted to protect the identity and personal information of callers to the State Bar's Lawyer Referral Hotline. The Hotline refers callers to certified Lawyer Referral Services. Individuals calling the Hotline sometimes share details of their particular legal issue. It is appropriate to maintain the identity and personal information shared by these individuals in confidence to protect their privacy. This exemption will not limit or restrict the public's existing right of access.

FISCAL/PERSONNEL IMPACT

Following adoption, there will be potentially significant personnel costs associated with staff needed to monitor and respond to requests for access to State Bar records. However, adoption of the rule should reduce the demand for legal counsel with respect to such requests. This item proposes a January 1, 2016 effective date for the new rules to allow time for planning related to staffing needs.

RULE AMENDMENTS

Title 6, New Division 3, Chapter 1
New Rules 6.70 - 6.76

BOARD BOOK IMPACT

New Tab or Section Should Be Drafted.

BOARD COMMITTEE RECOMMENDATIONS

The Board Executive Committee recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees adopt new Rules 6.70 – 6.76 in a new Division 3 of Title 6 of the State Bar Rules; and it is

FURTHER RESOLVED, that the Board of Trustees adopt the Findings that appear in this agenda item; and it is

FURTHER RESOLVED, that new Rules 6.70 -6.76 will be effective January 1, 2016.

ATTACHMENT(S) LIST

- A.** Proposed New State Bar Rules 6.70 – 6.76