

AGENDA ITEM

711 SEPTEMBER 2016

DATE: September 12, 2016

TO: Board of Trustees

FROM: Office of General Counsel

SUBJECT: Request to Supreme Court for a Special Regulatory Assessment

EXECUTIVE SUMMARY

In the absence of a legislatively enacted fee bill for 2017, the State Bar is without legislative authority to require each active member of the State Bar to pay the basic \$315 regulatory fee in 2017. Pursuant to the September 8, 2016, letter from the Supreme Court of California, this agenda item seeks approval from the Board of Trustees to file a submission with the Court to request a special regulatory assessment of active California attorneys at a level necessary to ensure the full operation of the State Bar's public protection functions, including the disciplinary system.

BACKGROUND

Business & Professions Code¹ section 6140 authorizes the State Bar to collect an annual membership fee from each active member at a sum not exceeding three hundred fifteen dollars (\$315).² Section 6140 remains in effect only until January 1, 2017, and is repealed then by operation of law unless the date is extended by the legislature. The last day for the legislature to act was September 1, 2016. Because no fee bill was enacted, the State Bar is without legislative authority to require each active member of the State Bar to pay the basic \$315 membership fee in 2017. The State Bar now seeks approval from the Board of Trustees for the Office of General Counsel (OGC) to file a request with the California Supreme Court for an assessment at a level necessary to fulfill the State Bar's regulatory duties to protect the public, including maintaining the disciplinary system.³

¹ All statutory Section references are to the Business & Professions Code.

² Currently, there are two opt-outs from this amount: \$5 for legislative activities (Section 6140.05) and \$5 for the combination of Bar Relations and Elimination of Bias (*Keller v. State Bar of California* (1990) 496 U.S.1; Board Resolution, August 15, 2000.)

³ The State Bar may collect the following amounts without separate, specific authority from the legislature or the judiciary for each amount:

- (1) Annual membership fees for inactive members in an amount not exceeding \$75. (Section 6141.)
- (2) Client Security Fund mandatory fee of \$40 for active members and \$10 for inactive members. (Section 6140.55; *In Re Attorney Discipline* (1998) 19 Cal.4th 582.)

DISCUSSION

Filing a submission with the California Supreme Court to request an assessment to ensure funding at a level necessary to fulfill the State Bar's regulatory duties is consistent with the procedure used by the State Bar in the case of *In Re Attorney Discipline System*. In 1998, the State Bar filed a petition with the Court after the Governor vetoed the State Bar fee bill in October 1997. In that petition the State Bar requested the Court order a special regulatory assessment requiring active members of the State Bar to pay a mandatory fee along with other amounts authorized by existing statutes for the purpose of funding the Bar's disciplinary activities.⁴

In *In Re Attorney Discipline System*, the Court determined that it had both the duty and the authority to impose a regulatory fee upon attorneys for the purpose of supporting an attorney discipline system because the lack of a functioning attorney discipline system placed at grave risk the public, the integrity of the legal profession and the interests of the courts. The Court then imposed a special regulatory assessment on attorneys actively engaged in the practice of law to be used exclusively for attorney disciplinary purposes.⁵ The Court also appointed a

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- (3) Lawyer Assistance Program mandatory fee of \$10 for active members and \$5 for inactive members. (Section 6140.9.)
 - (4) Costs of the disciplinary system mandatory fees in an amount not to exceed \$25 for active and inactive members. (Section 6140.6; *In Re Attorney Discipline*.)
 - (5) Costs assessed against disciplined members. (Section 6140.7.)
 - (6) Administrative penalties and reasonable costs assessed for failure to comply with a binding mandatory fee arbitration award, judgment or agreement. (Section 6203(d)(3).)
 - (7) Certified Legal Specialist fees of \$360. (California Rule of Court, rule 9.35.)
 - (8) Voluntary recommended donation of \$75 to the California Bar Foundation. (Board Resolution, September 13, 2014.)
 - (9) Voluntary nonprofit organization free legal services to persons of limited means recommended donation of \$100, aka "Access to Justice". (Section 6033.)
 - (10) Voluntary legal services assistance fee of \$40. (Section 6140.03.) [OPT-OUT]
 - (11) Voluntary sections membership. (Section 6031.5(b).)
 - (12) Voluntary recommended donation of \$35 for the Conference of Delegates of California Bar Associations. (Section 6031.5(c).)
 - (13) Voluntary recommended donation of \$25 for the California Supreme Court Historical Society. (Section 6032.)

⁴ The State Bar filed its original request with the Court in June 1998 to issue an order to adopt a rule fixing the *full* active membership fees until the legislature enacted a fee bill. The Court denied that request, stating that it "encourages the other two branches of government and the State Bar to resolve this matter as quickly as possible..." Finally, in September 1998, with no political solution achieved, the State Bar renewed its petition, but this time requested an assessment for only the discipline system.

⁵ The Court assessment included the following disciplinary functions: Office of Chief Trial Counsel intake and enforcement; State Bar Court; Fee Arbitration; Competence; Membership Records; and, OGC support of discipline and admissions. At the time the Office of Probation, which monitors disciplined attorneys, was within OCTC.

special master charged with oversight of the funds collected to ensure that the money was utilized by the State Bar solely to fund disciplinary functions. The Court held that bar membership fees used to fund attorney discipline are not taxes or appropriations, and thus the Court's assessment of these regulatory fees did not violate the separation of powers doctrine by invading the legislative prerogative. Rather, the assessment reflected the Court's inherent and primary constitutional authority in the areas of attorney discipline and the well-established role of the State Bar as an administrative arm of the Court.

The State Bar now proposes to file a request with the California Supreme Court for an assessment of active attorneys to accomplish funding at a level necessary to fulfill the State Bar's broader regulatory duties, including discipline. For the following reasons, OGC recommends that the State Bar request from the Court a more expansive level of funding -- both in type and amount -- than the portion of the annual basic fees requested and granted in *In Re Attorney Discipline*.

With regard to the type of funding, subsequent to the assessment granted in 1998 pursuant to Senate Bill 163, Section 6001.1 was adopted to add a public protection charge.⁶ (Senate Judiciary Committee Analysis, 2011-2012 Regular Session, SB 163.) In addition to the disciplinary functions, State Bar programs that protect the public include: The Commission on Judicial Nominees Evaluation (assisting with the evaluation of judges); Center and Commission on Access to Justice (working to expand access to justice for all and improving the quality of legal services); California Young Lawyers Association (educating attorneys and the public and encouraging pro bono opportunities for lawyer); and, Office of Communications (educating attorneys and the public).⁷ In light of the well-established role of the State Bar as an administrative arm of the Court and within the context of the public protection mandate of the more recently enacted Section 6001.1, the Court would enhance the protection of the public by assessing a broader fee to fund these additional public protection functions of the State Bar over the narrow discipline function assessment ordered in *In Re Attorney Discipline*. Given the State Bar's statutory public protection mandate, and the Court's oversight of the Bar with respect to the full set of licensing, regulatory and disciplinary functions that comprise that mandate, the present Court may be asked to address this broader set of interests with a more expansive assessment.

With regard to the amount of the assessment, the Court's September 8 letter directs the State Bar to "specify the amount of assessment necessary to fund its discipline system." It does not provide a specific limitation as to amount. Referencing the mandate contained in Section 6140.16 for the State Bar to review workload standards of its disciplinary activities, the Court's letter also advises of its expectation that the State Bar will implement workforce planning recommendations by the December 31, 2016, statutory deadline. As the Board knows, the State Bar complied with the statutory mandate to conduct a workforce planning study, received a Workforce Planning Report and is now working on implementation of the recommendations. The recommendations propose the hire of additional staff into the Office of Chief Trial Counsel (OCTC) to ensure a fully functioning disciplinary system to protect the public. In addition, compliance with either the statutorily required 180-day backlog measure or the alternative measure proposed by the Bar in its 2016 *State Bar Backlog Report* will require a significant staffing increase for OCTC.

⁶ "Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (Added by Stats. 2011, ch. 417.)

⁷ There is of course a much broader set of State Bar programs that protect the public; the ones enumerated here are funded by annual member fees.

Under *In Re Attorney Discipline*, the Court may assess an amount greater than the statutory \$315 basic active member fee. Given the importance of advancing key workforce planning recommendations and ensuring adequate staffing for the State Bar's discipline system, consistent with the Court's request for an assessment amount to fund the discipline system the request to the Court should include options for the Court to consider for an active member fee increase designed to support these objectives.⁸

The Court directs a request be filed by September 30, 2016. The State Bar would ask the Court for a ruling reasonably in advance of December 1, 2016 – the date annual fee statements issue to members – so that members can be timely invoiced and the continuity of State Bar operations ensured.

FISCAL/PERSONNEL IMPACT

The annual mandatory fees from active members total approximately \$62 million.⁹ Without a fee bill or Court-ordered assessment, the State Bar will not be able to collect mandatory active member dues.¹⁰

At the time of the veto of the 1997 fee bill, there were approximately 700 employees of the State Bar. Without a fee bill or court-ordered assessment, in the first quarter of 1998 the State Bar laid off 6.4% of its employees and issued 60-day notices to nearly 75% of its remaining work force. Sixty employees voluntarily resigned. The projected layoffs became effective on or about June 26, 1998.

The staff of OCTC, for example, went from 283 to 20 employees. Work was suspended on 4,459 open investigations. The Bar closed its consumer complaint hotline and, at the Court's request, informed potential complainants that they could submit written complaints to be processed once OCTC resumed operations. By December 1998, the total pending complaints exceeded the 1985 backlog that had generated widespread criticism.

Similarly, the State Bar Court dismissed most of its employees and suspended proceedings in all but a few pending, egregious matters. Appointed by the California Supreme Court, State Bar judges cannot be terminated, though the judges worked for less than full salary during the period of the layoff.

Each day of delay of the legislative impasse reduced the ability of the State Bar to recall or rehire employees who were laid off. Many State Bar employees found other jobs, making permanent the loss of some of the most highly trained and experienced staff. After funding was finally restored, it took approximately two years before the State Bar was able to function fully again.

The absence of a court-ordered assessment of dues for 2017 would likewise require employee layoffs with the required outlay of severance pay and other benefits, generally replicating the 1998 experience. Without a 2017 assessment, the State Bar's property loans could be deemed in default. Default could require the diversion of a substantial majority of the State Bar's general fund surplus to pay the property loans, thereby reducing the funds available for State Bar operations. Most important, the absence of funding will once again severely undermine the Bar's primary purpose of public protection. As the Court in *In Re Attorney Discipline* stated

⁸ Calculated as a portion of member fees, and using the most recent active membership number of 186,580, the additional amount needed ranges from \$9 to \$56 per active member.

⁹ The State Bar Spending Plan, May 13, 2016.

¹⁰ The State Bar could issue invoices for voluntary payment of dues and the enumerated additional amounts. Historically, however, voluntary payments by the membership have not exceeded 25%.

about its assessment in 1998: "Our action today is intended to respond to an unprecedented emergency threatening the protection of the public, the integrity of the legal profession, and the interests of the courts. In short, the administration of justice is at risk."

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None

BOARD GOALS & OBJECTIVES

The statutory mandate is that protection of the public shall be the highest priority for the State Bar of California and in the Board of Trustees' exercise of their licensing, regulatory and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Section 6001.1.) As described above, the negative effect of the absence of a fee bill and the absence of judicial authorization to assess fees on the State Bar's primary mission of public protection and on the organization's employees could be catastrophic and far-reaching.

Approving the filing of a request with the Supreme Court for an order of assessment at a level necessary to fulfill the State Bar's broad regulatory duties is imperative so that the State Bar will be able to continue to fulfill both its regulatory duties to protect the public and its obligation as an employer to secure its workforce.

BOARD COMMITTEE RECOMMENDATIONS

The Board of Trustees approves the following resolution:

RESOLVED, that the Board of Trustees directs the Office of General Counsel of The State Bar of California to work with the President and President-elect to file a request with the California Supreme Court for an assessment of active attorneys at a level necessary to ensure the full functioning of the State Bar's public protection functions, including the disciplinary system.

ATTACHMENT(S) LIST

A. None