

AGENDA ITEM

NOVEMBER 2016

DATE: November 14, 2016

TO: Members, Regulation and Discipline Committee

FROM: Dag MacLeod, Director, Office of Research & Institutional Accountability

SUBJECT: Prioritization of Cases in Office of the Chief Trial Counsel

On August 31, the Assembly Committee on Judiciary sent a letter to Executive Director, Elizabeth Parker, requesting information on a wide range of topics about Bar operations. One of those questions asked: "How does the Bar prioritize its discipline cases today?"

The Office of the Chief Trial Counsel (OCTC) and State Bar Court (SBC) provided information regarding current prioritization strategies (Attached to this memorandum).

Bar staff are proposing to analyze this question further and seeking the input of members of the Regulation and Discipline Committee. Specific areas that merit further analysis regarding the prioritization of cases include the following:

- An assessment of whether or not the current prioritization categories merit modification;
- An assessment of whether or not the current prioritization policies employed by are consistently understood and applied by all staff; and
- An assessment of the operational impact of this prioritization on case processing, to ensure that the classification of cases in higher priority categories has an operational impact and results in these cases being handled in a manner consistent with the classification.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None.

BOARD GOALS & OBJECTIVES

Business and Professions Code section 6001.1 states that "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." Validating and / or improving the process by which OCTC prioritizes cases falls squarely within the public protection mission of the Bar.

Attachment: Extract from Elizabeth Parker's
Response to the Assembly Judiciary Committee, October 7, 2016

10) *How does the Bar prioritize its discipline cases today?*

Office of the Chief Trial Counsel Prioritization

The State Bar's Office of Chief Trial Counsel (OCTC) reviews any attorney discipline complaint that it receives to determine if the complaint alleges specific facts sufficient to establish an ethical violation. An effort is made to assure that any discipline complaint that alleges such sufficient facts proceeds to investigation. OCTC prioritizes any attorney discipline complaint that it investigates by assessing the likely discipline that the alleged misconduct would receive, if proved. There are three levels of priority given to investigation cases. Complaints that do not provide sufficient facts to establish a potential ethical violation are not investigated, and are closed.

With the information it has available at the outset of an investigation, OCTC assigns three levels of priority to the complaints it investigates. OCTC gives the highest priority to a complaint where (1) the attorney will potentially receive an actual suspension of at least two years; (2) the attorney's conduct in question potentially subjects the public, the courts, the administration of justice, or the legal profession to substantial harm; or (3) the attorney's conduct in question may significantly undermine the confidence of the public in the legal profession. Some examples of such complaints include cases that involve: misappropriation of client funds; fraud; loan modification schemes; multiple occurrences of client neglect or abandonment; the repeated filing of frivolous or harassing lawsuits; or significant misconduct by previously disbarred or resigned attorneys who were later reinstated to the practice of law.

With the information that is initially available, OCTC assigns intermediate priority to an attorney discipline complaint that is likely to result in a stayed suspension or an actual suspension of less than two years.

With the information that is initially available, OCTC assigns the third level of priority to an attorney discipline complaint that is likely to result in discipline of a public or private reproof or that may warrant an alternative to discipline. Examples include low-level criminal convictions that are unrelated to the practice of law and that do not involve significant harm to the public; certain reciprocal discipline matters (based on discipline imposed by another state for a low-level ethical violation); and cases that involve low-level ethical violations not demonstrating bad faith on the part of the attorney or harm to a client, the public, or the administration of justice.

Complaints about non-attorneys who are alleged to have engaged in the unauthorized practice of law are handled and prioritized as described in the response to question 12, below.

State Bar Court Prioritization

The State Bar Court adjudicates a variety of different proceedings. Most proceedings have specific timelines for the court to follow. Two specific case types are designated as expedited proceedings and, therefore, are given a higher priority. The two case types are:

- i) Standard 1.4(c)(ii) proceedings. This is an expedited proceeding in which a member of the State Bar seeks to be relieved from actual suspension pursuant to a Supreme Court order which requires, as a condition of resuming practice, that the member demonstrate to the Court's satisfaction his/her rehabilitation, fitness to practice and present learning and ability in the general law.
- ii) Involuntary Inactive Enrollment proceedings. This is an expedited proceeding to determine whether to place a member of the State Bar on inactive enrollment because the member's conduct poses a substantial threat of harm to clients or the public. (Bus. & Prof. Code, §6007(c)(1)-(3).)

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- 11) *Precisely what steps does the Bar take to identify the harm to the public from its discipline cases? What is then done to address that harm?*

As set forth above, involuntary inactive enrollment proceedings are expedited hearings to determine whether a State Bar member's conduct poses a substantial threat of harm to the member's clients or the public. If after a hearing, the evidence shows by clear and convincing evidence that:

- a) The attorney has caused or is causing substantial harm to the attorney's clients or the public;
- b) The injury to the attorney's clients or the public in denying the application will be greater than any injury to the attorney in granting it, or there is a reasonable likelihood the harm will continue or reoccur. Where the evidence shows a pattern of behavior, including acts likely to cause substantial harm, the burden of proof shifts to the attorney to show there is no reasonable likelihood the harm will reoccur or continue; and
- c) There is a reasonable probability that the OCTC prosecutor will prevail on the merits of the underlying disciplinary matter;

the court may order that the attorney be enrolled inactive pursuant to Business and Professions Code, section 6007, subdivision (c)(2) or may order that interim remedies be imposed pursuant to 6007, subdivision (h).

- 12) *Has the Bar fully implemented the new protocols for unlicensed practice of law cases developed this spring? If not, is the Bar planning to fully implement those protocols and, if so, by when and if not, why not? Will the protocols become official Rules? If so, when?*

OCTC has begun to implement the protocols, set forth in the draft Policy Directive, for non-attorneys engaged in the unauthorized practice of law (UPL).

Specifically, OCTC has taken steps to meet the substantive requirements for Intake resolutions and timing. As one example, in matters involving identity theft of a member, where the member is unaware of the identity theft, OCTC makes efforts to contact the member.

OCTC is committed to meeting the goal for completing the Intake process within 60 days. When OCTC closes a case at the Intake stage, it has established a process to notify the complainant and invite the complainant to provide additional information.

Once the case is forwarded to OCTC's Enforcement Unit, OCTC has established a process whereby that unit makes referrals to law enforcement, so that the law enforcement agency knows whom to contact to obtain information about the progress of OCTC's investigation.

The Enforcement Unit has also begun to implement the protocols as set forth in the draft Policy Directive. OCTC established a non-attorney/UPL team in its Enforcement Unit in its Los Angeles office. OCTC has also assigned new non-attorney cases to a limited number of attorneys and investigators in its San Francisco office.

OCTC Enforcement personnel investigate cases to determine whether the evidence is sufficient to demonstrate the unauthorized practice of law or whether there has been a violation of Business and Professions Code section 6126.7. If there is sufficient evidence of illegal activity, and an injunction and/or an assumption of the illegal law practice are warranted, OCTC proceeds with an action in superior court seeking appropriate orders. .

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The Enforcement Unit strives to complete its investigation of a complaint against a non-attorney within six months from the date on which OCTC received the complaint. The Enforcement Unit continues to work diligently on all of the non-attorney cases in its inventory.

Per statutory mandate, the Bar contemplates that OCTC will implement workforce planning recommendations by January 2017. Once the Bar implements those recommendations, it will be necessary to amend the draft Policy Directive to account for the recommended changes. After such an amendment, OCTC will formally adopt the Policy Directive. The Board's Regulation and Discipline Committee will oversee this process.

- 13) *What is the cost of this year's annual meeting? Next year's? How precisely is this funded, listing each funding source for each year's meeting and the amount of funding from each source?*

The Board of Trustees is currently undertaking a review of the Annual Meeting structure and costs. This review may result in significant changes to future Annual Meetings, beginning as early as 2017. The Board has directed Staff to develop a proposal for its consideration that will require the Annual Meeting to be fully self-supporting, or if used as a venue for other Bar activities, that holding a meeting as part of the Annual Meeting be no more expensive than would otherwise be the case if held in State Bar offices. To facilitate the Board's ability to exercise a wide range of options, selected 2018 and 2019 Annual Meeting hotel contracts have been renegotiated. The applicable Board agenda item is provided as Attachment D.

Estimated 2016 Annual Meeting projected budget expenses total \$619,800; budget revenue is estimated at \$626,602. Budgeted revenue sources include registration fees, exhibitor fees, ticketed event fees, and sponsorships. A breakdown of anticipated revenue by funding source is not available. Actual revenue and cost data will not be available for several months. Importantly, efforts have been made to reduce any General Fund subsidy for the 2016 meeting, as reflected by the cancellation of certain events that were to be funded in part by General Fund revenues that could instead be used to support public protection activities.

The 2017 Annual Meeting budget has not yet been finalized. As reflected in Attachment D, the Board had an option to cancel the 2017 hotel contract at no charge; it acted to exercise this option at its October 2, 2016 meeting.

- 14) *Please list each and every outside contract above \$50,000 that the Bar executed in the last two years, including any renewals or modifications of existing contracts, and the specific purpose of each contract. Please provide the total cost of each contract, including any and all supplemental payments, such as, for example, in kind payments or rent contributions. For each contract, please explain why the work required by the contract cannot be performed by in-house employees and what other alternatives, if any, were considered by the Bar. Please list which of these contracts can be reduced or cancelled while still protecting the public from harm? For those that cannot, please explain why not.*

See Attachment E, which reflects active contracts during the period January 1, 2015 to September 23, 2016.