

AGENDA ITEM IIIA

DECEMBER 2016

DATE: December 5, 2016

TO: Members, Board Executive Committee

FROM: Leah Wilson, Chief Operating Officer

SUBJECT: Proposed Adoption of Rule Authorizing the State Bar to Charge a Processing Fee for the Use of a Credit Card, Debit Card, or Electronic Funds Transfer – Return from Public Comment

EXECUTIVE SUMMARY

Currently, State Bar members may pay their annual membership fees by credit card, debit card, or electronic check. When these payments are made, the State Bar is required to pay a processing fee, which the State Bar now absorbs. On November 4, 2016, the Board Executive Committee authorized staff to release for a 30-day public comment period a proposed new State Bar Rule that would authorize the State Bar to charge members an additional fee to defray the costs incurred by processing fees relating to the payment of annual membership fees. This Agenda Item addresses the comments received, and proposes adoption of the new Rule, as released for public comment.

DISCUSSION

The State Bar currently allows members to pay their annual membership fees by credit card, debit card, or electronic check. When these payments are made, the State Bar is required to pay a processing fee. A processing fee is the amount the recipient of the payment is required to pay to process the transaction, and results from arrangements that can involve financial institutions, credit card companies, and third-party processors. The State Bar currently absorbs the processing fees.

The proposed new State Bar Rule, Title 2, Division 2, Rule 2.18, would provide as follows:

Rule 2.18 - Payment by credit card, debit card, or electronic funds transfer

The State Bar is authorized to charge members who choose to pay annual membership fees by credit card, debit card, or electronic funds transfer an additional fee to defray the costs incurred by that election. The State Bar's Executive Director or his or her designee is authorized to set the amount of any

additional fee the State Bar is authorized to charge members under this rule.

The deadline for public comments is December 5, 2016. We received thirteen comments through December 2, all of which are included in Attachment A. If any additional comments are received, staff will advise the Executive Committee at the meeting on December 6.

The comments essentially fall into two categories, with the vast majority having the same theme. Most expressed opposition based on the view that in order to avoid the payment of a processing fee, members will be forced to pay by paper check. That is not the case. Individual State Bar members have had the ability to pay membership fees online by Automated Clearing House (ACH) payments, sometimes referred to as eChecks. For the 2017 billing cycle, online payment functionality has been enhanced to allow for ACH payments by law firms and agencies. This option will be available for individual, firm and agency payors free of charge. Any bank account, whether savings or checking, allows for ACH transactions. Therefore, there will be no need to pay by paper check in order to avoid payment of a processing fee.¹

A second set of comments simply opposed the underlying policy and goal of the proposed new Rule, expressing the view that the State Bar should continue to absorb the processing fees. One attorney noted that when she shops, most establishments do not charge a processing fee as the cost of doing business. But the private sector is different. In California, a statute has been enacted to prohibit retailers from imposing a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means. (Civil Code, § 1748.1(a)).² In contrast, the Legislature has specifically authorized governmental entities to charge processing fees. Thus, Business and Professions Code section 6140 authorizes the State Bar to adopt a rule – such as the proposed new Rule – that allows the State Bar to charge members an additional fee to defray the cost incurred by processing fees relating to the payment of annual membership fees. Likewise, Government Code section 6159(h) provides that a court, city, or county (among other public agencies) may impose a fee for the use of a credit or debit card or electronic funds transfer, not to exceed the costs incurred by the agency in providing for such payments.

This proposal is not a profit-making endeavor. The new Rule will simply permit the State Bar to charge processing fees that it would otherwise be required to absorb. The associated savings will be invested in the State Bar's discipline system, furthering the State Bar's primary mission of public protection.

FISCAL/PERSONNEL IMPACT

The amount the State Bar would otherwise be required to absorb will vary over time. Increased use results in increased processing fees and decreased use results in decreased processing fees. In addition, processing fees and rates that are charged can vary over time. The precise fiscal impact therefore cannot be determined, but staff can make a reasonable estimate based

¹ Some government agencies cannot pay by ACH or by credit card (processing fee or not) as a result of their own regulations. They may therefore continue to pay by paper check, as a result of those regulations, but the State Bar is making ACH available to all.

² Similar statutes have been enacted in other states. In March 2015, the district court found the California statute unconstitutional, and prohibited the California Attorney General from enforcing it. The Attorney General has filed an appeal with the Ninth Circuit.

on current usage. Approximately 35-40% of the members currently pay their annual membership fees online. Using these percentages, and an average processing fee of 2.25%, the State Bar was required to absorb approximately \$512,000 to \$594,000 relating to the payment of 2016 annual membership fees. Pursuant to this proposal, savings of this anticipated amount will be invested in the discipline system in 2017.

RULE AMENDMENTS

New State Bar Rule, Title 2, Division 2, Rule 2.18

BOARD BOOK IMPACT

None.

RECOMMENDATION

It is recommended that the Board Executive Committee, acting on behalf of the Board of Trustees, and following consideration of the public comments received, adopt a new State Bar Rule authorizing the State Bar to charge members an additional fee to defray costs incurred by processing fees relating to the payment of annual membership fees.

RESOLUTION

RESOLVED, that the Board Executive Committee, acting on behalf of the Board of Trustees, and following consideration of the public comments received, hereby adopts new State Bar Rule, Title 2, Division 2, Rule 2.18, providing as follows:

Rule 2.18 - Payment by credit card, debit card, or electronic funds transfer

The State Bar is authorized to charge members who choose to pay annual membership fees by credit card, debit card, or electronic funds transfer an additional fee to defray the costs incurred by that election. The State Bar's Executive Director or his or her designee is authorized to set the amount of any additional fee the State Bar is authorized to charge members under this rule.

ATTACHMENT LIST

- A. Proposed Rule Authorizing the State Bar to Charge a Processing Fee for the Use of a Credit Card, Debit Card, or Electronic Funds Transfer – Public Comments