

AGENDA ITEM

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DATE: May 4, 2017

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Dag MacLeod, Director, Office of Research & Institutional Accountability
Suzanne Grandt, Assistant General Counsel, Office of the General Counsel

SUBJECT: Evaluation of the State Bar and the DOJ's retention of applicant fingerprint records and the impact on criminal complaint monitoring

EXECUTIVE SUMMARY

Staff to the Committee on Regulation and Discipline (RAD) have twice recommended to the Board of Trustees that the State Bar enter into a Subsequent Arrest Notification Contract with the California Department of Justice ("DOJ"). Board members have raised privacy and other concerns in connection with this recommendation. Consequently, RAD asked the Office of General Counsel ("OGC") to re-evaluate the State Bar's fingerprint retention policy and its statutory obligations. Upon analyzing the legislative history of Business and Professions Code section 6054, OGC concludes that the State Bar is obligated to receive criminal arrest notification services from the DOJ, regardless of countervailing privacy concerns.

Specifically, Business and Professions Code section 6054 **requires** the retention of "all fingerprint records of applicants admitted or members reinstated, or provided pursuant to subdivision (k) or (l) of Section 6068" for the "limited purpose of criminal arrest notification." Without entering into a Contract for Subsequent Arrest Notification with the DOJ there is no way for the State Bar to be notified of an applicant's criminal arrests subsequent to admission. Therefore, the State Bar should enter into a Contract for Subsequent Arrest Notification with the DOJ as soon as practicable, such that the State Bar is able to receive subsequent arrest notification services pursuant to Business and Professions Code section 6054.

Due to the highly sensitive and confidential nature of criminal arrest information, some of which is unnecessary for the State Bar's public protection mission, the Bar will need to immediately develop clear guidelines on how all arrest information from the DOJ is received, maintained and destroyed. As the Bar will be receiving arrest information that extends beyond the scope of what attorneys, courts and prosecutors are required to report, it is recommended that this policy include explicit guidelines for destroying such extraneous information upon receipt.

Lastly, the State Bar will need to revise its Moral Character Application instructions such that it corresponds with Business and Professions Code section 6054.

BACKGROUND

When an individual applies for State Bar membership, he or she must be fingerprinted as part of the Bar's moral character evaluation process. Business & Professional Code § 6054 provides, in pertinent part:

The State Bar of California shall require that an applicant for admission or reinstatement to the practice of law in California, or may require a member pursuant to subdivision (k) or (l) of Section 6068, be fingerprinted in order to establish the identity of the applicant and in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states. The information obtained as a result of the fingerprinting of an applicant or member shall be limited to the official use of the State Bar in establishing the identity of the applicant and in determining the character and fitness of the applicant for admission or reinstatement, and in discovering prior and subsequent criminal arrests of an applicant, member, or applicant for reinstatement. All fingerprint records of applicants who are denied admission to the State Bar shall be destroyed within one year of the decision not to admit. All fingerprint records of applicants admitted or members reinstated, or provided pursuant to subdivision (k) or (l) of Section 6068, shall be retained thereafter for the limited purpose of criminal arrest notification.

The Moral Character Application instructions further provide:

An applicant's fingerprints will be used solely to determine whether or not the applicant has a prior criminal record. The Committee will request that the criminal justice agencies return the fingerprints of all applicants and that the agencies neither copy the fingerprints nor disseminate them to others nor use them for any other purpose. Pursuant to Business and Professions Code Section 6054, the fingerprint cards of applicants who are admitted to practice law in California are retained for the limited purpose of criminal arrest notification.

Bar applicants who reside in California are required to submit fingerprints via Live Scan Technology. This means that the applicant is fingerprinted at a Live Scan location and their records are sent directly to the DOJ and the FBI for a background check. Bar applicants who reside outside of the State of California must submit their fingerprints via a physical fingerprint card since Live Scan Fingerprinting Agencies are only located in California. Applicants send these cards to the Bar which then forwards a percentage of these cards to the DOJ and FBI for a background check.

Despite the language in Business and Professions Code section 6054 and the Moral Character Application instructions mandating retention of admitted members' fingerprint records, neither the State Bar nor the DOJ retains Live Scan fingerprint images. However, the Bar does

store all hard copy fingerprint cards (i.e., fingerprint records of out-of-state applicants) in the Los Angeles office for a period of three years.

A Subsequent Arrest Notification Contract mandates that the DOJ retain all fingerprint records that are submitted by the Bar for licensing purposes after the date the Contract is signed. Practically, this means that, going forward, when an individual applies for Bar admission and that person's fingerprints are submitted to the DOJ, the DOJ will run a background check and then retain the fingerprint images. The DOJ will then automatically notify the Bar when one of these individuals is arrested in the State of California. See Pen. Code § 11105.2. Subsequently, the Bar will be notified of the disposition of the arrest.

As this Contract only applies to fingerprints submitted after the date it is signed, it will not enable the State Bar to receive any criminal for current members. Additionally, since this Contract is limited to "California only" arrests, the Bar would not be notified of subsequent federal and out of state arrests and dispositions.

These Contracts are common among state licensing agencies. The following professions are governed by statutes **requiring** that the regulating state entity enter into this Contract in connection with applying for a professional license: professional fiduciaries; real estate appraisers; proprietary private security officers; immigrations consultants; massage therapists; dental hygienists; and polysonographic technologists.

ANALYSIS

Business and Professions Code section 6054 mandates fingerprint record retention for purposes of "criminal arrest notification" and informs individuals that fingerprints are used for purposes of discovering both prior and "subsequent" criminal arrests. The term "criminal arrest notification" should be read as a reference to the DOJ's "subsequent arrest notification" pursuant to Penal Code section 11105.02 ("The Department of Justice may provide subsequent state or federal arrest or disposition notification to any entity authorized by state or federal law to receive state or federal summary criminal history information to assist in fulfilling employment, licensing, certification duties. . ."). This is because: 1) the only way the State Bar can be notified of arrests is through an arrest notification service and 2) the legislative history of Business and Professions Code section 6054 demonstrates this was drafter's intent. Entry into a Contract for Subsequent Arrest Notification is the only way to receive such notification services, (Penal Code 11105.2(c)). Accordingly, the State Bar must enter into such a contract in order to comply with state law.

First, Bus. & Prof Code § 6054 provides that information obtained as a result of fingerprinting an applicant or member shall be used for discovering prior and "**subsequent** criminal arrests." The only way the State Bar could discover "arrest information" subsequent to Bar admissions is through the DOJ. The statute goes on to state that records will be retained for purposes of criminal arrest "notification." The word "notification" is an active word, meaning the "action of notifying someone." Thus, it is clear on the face of the statute that the DOJ must provide this notification to the State Bar.

Second, Bus. & Prof Code § 6054 was amended to specifically permit fingerprint retention for the express purpose of arrest notification subsequent to Bar admission. This amendment was part of SB 148, a much larger piece of legislation aimed at reforming the State Bar discipline system. In a September 22, 1988 memo from State Senator Robert Presley to

the members of the California Senate Assembly, the intent of the bill was described as to “provide the California State Bar to more successfully ‘weed out’ the bad lawyers in California In the section titled “Enhances the State Bar’s Ability to Detect Unethical Behavior by Lawyers in This State and to Intervene to Prevent Matters from Getting Worse” the memo states that “section 4 would **require** the Bar to retain the fingerprints of new admittees, for **purposes of registering them with the state’s ‘Arrest Notification System’** to alert the Bar at point of arrest of any arrest for a crime.” (emphasis added). California’s current “arrest notification system” is the Subsequent Arrest Notification service provided pursuant to Penal Code 11105.02. Thus, the legislature **specifically intended** for the State Bar to receive arrest notification services when it amended Business and Professions Code section 6054.

At the March 10, 2017 meeting of RAD, members expressed concerns about privacy issues, as well as the over-inclusiveness of information received from the DOJ, some of which goes beyond the scope of mandated reporting requirements. Although these are clearly valid concerns, neither should prohibit the State Bar from entering into this contract. First, based on the current statutory scheme and well-established case law concerning fingerprinting and privacy, any lawsuit alleging a violation of a member’s privacy rights would be unsuccessful. Second, as there is no way of tailoring what arrest information the DOJ provides, the State Bar will have to implement new policy such that any extraneous information that is unnecessary for public protection purposes is destroyed. This should be part of a larger policy mandating how arrest information is received, retained and destroyed, and who at the State Bar can have access to and review such information.

Members of RAD also expressed concern that a State Bar member may have the expectation that his or her fingerprints will be destroyed after an initial background check is run. The Moral Character Instruction application states:

An applicant's fingerprints will be **used solely to determine whether or not the applicant has a prior criminal record**. The Committee will request that the criminal justice agencies return the fingerprints of all applicants and that the agencies neither copy the fingerprints nor disseminate them to others nor use them for any other purpose. (Emphasis added)

Complicating matters further is the fact that the instructions go on to refer to Bus & Prof Code § 6054’s retention obligation:

Pursuant to Business and Professions Code Section 6054, the fingerprint cards of applicants who are admitted to practice law in California **are retained** for the limited purpose of criminal arrest notification.

These two sentences appear to contradict one another. On one hand, the applicant is told that his or her fingerprints will **only** be used for an initial background and then returned to the State Bar. On the other hand, the applicant is told that upon admission, his or her fingerprints are retained for purposes of “criminal arrest notification.” Although it is not stated in the instructions, the only way in which the State Bar could receive notification of criminal arrests of an individual is from the DOJ, which would need access to an individual’s fingerprints in order to make this notification. Thus, the Moral Character Application instructions are contradictory and should be updated to reflect the language of Business and Professions Code 6054, which should provide the applicant explicit notice that his or her fingerprints will be retained by the DOJ.

In conclusion, staff recommends that: 1) the State Bar enter into a contract for Subsequent Arrest Notification; 2) the State Bar revise its Moral Character Application Instructions to mirror the language in the Business and Professions Code section 6054; and 3) the State Bar develop explicit processes necessary to implement the receipt, evaluation, and destruction of criminal arrest information received after entering into this Contract.

BOARD COMMITTEE RECOMMENDATIONS

The Regulation and Discipline Committee recommends that the Board of Trustees approve the following resolution:

RESOLVED, that upon the recommendation of the Regulation and Discipline Committee the Board of Trustees directs State Bar staff to enter into a contract with the California State Department of Justice to receive subsequent arrest notifications for all new applicants of the State Bar as soon as practical; and it is

FURTHER RESOLVED, that the State Bar will revise its Moral Character Application Instructions to mirror the language in Business and Professions Code section 6054, and provide the applicant explicit notice that his or her fingerprints will be retained by the DOJ; and it is

FURTHER RESOLVED, that State Bar staff will develop a process for receiving, evaluating, and, destroying additional criminal arrest information received by the DOJ.