

AGENDA ITEM III-A

MARCH, 2017

DATE: February 28, 2017

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

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

SUBJECT: Criminal Complaint Monitoring: Options for Evaluating and Improving Data on Criminal Charges against and Convictions of Attorneys

EXECUTIVE SUMMARY

Business and Professions Code section 6080 requires that attorneys who are charged with or convicted of certain crimes self-report that information to the State Bar. Business and Professions Code section 6101 requires that prosecuting attorneys and the Superior Courts report to the State Bar when an attorney is charged with or convicted of certain crimes.

Data reported to the Bar under these sections of the Business and Professions Code have never been audited and appear internally inconsistent. While the categories of charges and convictions that are mandated under the different sections of the Business and Professions Code do not overlap completely, attorneys self-report more than twice as many convictions than they report as charges.¹ Further, prosecutors report ten times the number of charges that attorneys self-report.

This memo provides a preliminary evaluation of the data reported under these sections of the Business and Professions Code. The memo goes on to discuss options for further evaluation of the data as well as options for policy modifications that would improve the Bar's confidence in the accuracy and completeness of data reported as mandated under these statutes.

BACKGROUND

Business and Professions Code section 6068(o) requires, in part, that all attorneys in California self-report "to the agency charged with attorney discipline ... the bringing of an indictment or information charging a felony against the attorney" and "the conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest" of certain felonies and misdemeanors. (The

¹ Reports of convictions by the Superior Courts are not included in the Annual Discipline Report and, as a result, the collection of this data is less conclusive than the collection of data on self-reports or reports by prosecuting attorneys. This report currently excludes any analysis of data reported by the Superior Courts. Bar staff plan to continue evaluating the different data sources and will provide an evaluation of the data reported by the Superior Courts in a future report.

full text of the relevant subsections of the Business and Professions Code is reproduced below in Table 1.)

Business and Professions Code section 6101 requires that prosecuting agencies notify the State Bar of any felony or misdemeanor charges filed against an attorney. This section of the Business and Professions code further requires that any court in which an attorney is convicted of a crime transmit a certified copy of the record of conviction to the State Bar. These reporting requirements are summarized below in Table 1.

Table 1: Statutes Defining Reportable Actions Related to Criminal Charges and Convictions

Mandated		
Reporter	Reportable Charges	Reportable Convictions
Self	“The bringing of an indictment or information charging a felony against the attorney.” (B&P §6068(o)(4))	“ The conviction of the attorney including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.” (B&P §6068(o)(5))
Prosecutor (District Attorney, City Attorney or Other)	“ ... the pendency of an action against an attorney charging a felony or misdemeanor” (B&P §6101(b))	None
Court	None	“The clerk of the court in which an attorney is convicted of a crime shall, within 48 hours after the conviction, transmit a certified copy of the record of conviction to the Office of the State Bar.” (B&P §6101(c))

DATA REPORTED TO THE STATE BAR UNDER THESE STATUTES

Business and Professions Code Section 6068

The 2015 Annual Discipline Report (published in 2016 with data through December 31, 2015) showed that from 2012 through 2015, the State Bar received an annual average of 16 self-reports of charges against attorneys under Business and Professions Code section 6068(o)(4) and an annual average of 39 self-reports of convictions under Business and Professions Code section 6068(o)(5).

Table 2: Reportable Actions by Attorneys under B&P 6068

	2012	2013	2014	2015	Annual Average
Charges					
6068(o)(4)	20	11	16	17	16
Convictions					
6068(o)(5)	47	44	38	29	39

The fact that, on average, more than twice as many convictions are reported as charges is not, by itself, an indication of under-reporting. The reporting requirement for convictions is broader than the reporting requirement for charges. As a result, the larger number of convictions reported may simply reflect the wider net that the statute casts for convictions.

However, a closer look at a subset of the data from 2013 through 2015 reveals very little correspondence between self-reporting of charges and subsequent self-reporting of convictions. Combining the two data sets produces 199 records over the three year period – 88 cases reported under Business and Professions Code section 6068(o)(4) and 111 reported under Business and Professions Code section 6068(o)(5). Out of 32 member numbers with a report of a *felony* conviction, 29 have no corresponding report of felony charges. Despite the different reporting requirements under these two subsections of the Business and Professions code, the reporting of felony convictions should always be preceded by a report of felony charges.

Business and Professions Code Section 6101

The data reported under the different subsections of Business and Professions Code 6068 can also be evaluated relative to the number of misdemeanor and felony charges brought by prosecutors and reported under Business and Professions Code section 6101(b). Annually, prosecutors report bringing an average of 164 cases charging a felony or misdemeanor.

Table 3: Reportable Actions by Prosecutors under B&P 6101

	2012	2013	2014	2015	Annual Average
Charges					
6101(b)	173	170	165	149	164

Again, as with the differences seen in Table 2, the reporting requirements under Business and Professions Code section 6101(b) do not align perfectly with the requirements contained in either section 6068(o)(4) or section 6068(o)(5). The reporting requirements for prosecutors under Business and Professions Code section 6101(b) include misdemeanor charges whereas the self-reporting requirements of charges under Business and Professions Code section 6068(o)(4) are limited to *felony* charges.

Looking again at a subset of the data from 2013 through 2015, however, reveals a similar lack of correspondence between charges reported to the Bar by prosecuting attorneys under Business and Professions Code section 6101(b) and the self-reporting mandated under sections 6068(o)(4) and 6068(o)(5).

Combining the three data sets – two data sets of self-reporting under section 6068 and the third of reports by prosecutors under section 6101 – yields a combined total of 683 records – the 199 records of self-reported charges and convictions mandated under sections 6068(o)(4) and 6068(o)(5) evaluated above, and an additional 484 cases reported by prosecutors under section 6101. Of the 484 charges reported by prosecutors, 94 are listed as felonies. Of the 94 felony charges, well over half – 57 of the records – have a unique member number; in other words, there is no matching record of the attorney self-reporting either a felony charge or felony conviction.

These estimates of the potential under-reporting by attorneys of charges and convictions against them may actually *understate* the under-reporting for a number of reasons. First, a matched record is not, by itself, evidence that attorneys reported both charges and convictions or that prosecutors and attorneys both reported as required under the statutes. Instead, many of the duplicate records appear to be duplicates reported by the prosecuting attorney or by the attorney charged with a crime. This may reflect the reporting of multiple charges by a prosecuting attorney and further review is needed. Nonetheless, in many cases the duplicate member records in the data file are duplicates reported under the same code section not, as we would expect, under a different code section.

The second reason why this initial review of the data may not capture the totality of the under-reporting is that we do not have estimates of the universe of criminal charges and criminal convictions of attorneys. In addition to whatever disincentive attorneys have for self-reporting, prosecutors' offices and Superior Courts may not always be aware that a particular defendant is an attorney. As a result, it is difficult to estimate how many criminal charges or convictions go unreported.

OPTIONS FOR FURTHER EVALUATION OF DATA ON CRIMINAL CONVICTIONS OF ATTORNEYS

Option 1: Study a Sample of Attorney Fingerprints

Bar applicants who reside in California are required to submit fingerprints via Live Scan Technology. This means that applicants are fingerprinted at a Live Scan location and their records are sent directly to the California State Department of Justice (DOJ) for a background check. The DOJ also forwards the records to the Federal Bureau of Investigation (FBI) to perform an FBI criminal background check. All Live Scan fingerprint records are subsequently maintained in the Bar's AS400 management system.

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 State Bar which then forwards a subset of these cards to the DOJ and FBI for a background check.² The Bar stores all hard copy fingerprint cards in the Los Angeles office for a period of three years.

To evaluate how complete the data are on criminal charges and convictions, the Bar could select a random sample attorney fingerprints and submit these to the DOJ and / or the FBI to

² The 2017 budget has allocated funds to modify this practice so that *all* out-of-state fingerprint cards will be submitted for a criminal background check.

determine the extent of compliance with the reporting requirements. It currently costs \$34 to submit fingerprints to the DOJ and an additional \$17 if the fingerprints are also forwarded to the FBI. A sample size of between 600 and 800 would provide confidence in the validity of the results the cost of which would range from between \$20,400 on the low end (if only DOJ background checks were conducted with a sample of 600) to as much as \$40,800 (if both DOJ and FBI background checks were run on a sample of 800).

Option 2: Enter into a Contract with the DOJ to Provide Notification to the Bar

The Bar could enter into a “Subsequent Arrest Notification Contract” with the DOJ. This is a contract mandating that the DOJ notify the State Bar of all members’ arrests within the state of California, and the dispositions of those arrests. By entering into the Subsequent Arrest Notification Contract with the DOJ, the State Bar authorizes the DOJ to retain an applicant’s fingerprints.

Under current policy, the DOJ conducts a background check but does not retain applicant’s fingerprints. However, an authorized agency or entity may request that the DOJ do so, for the limited purposes of updating an agency on new criminal information pertaining to an individual whose fingerprints had previously been submitted for employment, licensing or certification purposes. This process is referred to as a “subsequent arrest notification” and is authorized by Penal Code section 11105.2(a) as follows:

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, or the duties of approving relative caregivers, nonrelative extended family members, and resource families upon the arrest or disposition of any person whose fingerprints are maintained on file at the Department of Justice or the Federal Bureau of Investigation as the result of an application for licensing, employment, certification, or approval.³

While entering into a contract to receive subsequent arrest and disposition information would only cover newly licensed attorneys, it would begin to provide cross-validation for criminal conviction data submitted by new attorneys under Business and Professions Code section 6068, as well as independent reporting of cases that may not be self-reported or missed by prosecutors or Superior Courts under Business and Professions Code section 6101.

DISCUSSION

Data on criminal charges and convictions reported under Business and Professions Code sections 6068 and 6101 appear incomplete. State Bar staff can continue evaluating existing data and look more closely still at details of the case files to determine how frequently attorneys fail to report charges for which they are ultimately convicted. Differences in the reporting requirements contained in these sections of the Business and Professions Code, however,

³ Despite the fact Penal Code section 11105.2 permits notification of both state and federal arrests and dispositions, the Contract is limited to “California only” arrests and dispositions. This means that if a member is arrested in another state or country, the State Bar will not be notified.

make it difficult to say much beyond a very limited number of cases where either a prosecuting entity reported and the attorney may have failed to report, or the attorney reported a conviction but failed to report the charges.

Understanding the scope of the under-reporting will require additional information. That information could take the form of a sample of fingerprints that would be re-submitted to the DOJ and compared to State Bar records of self-reporting and reporting by prosecutors' offices. Alternatively, the Bar might set aside the question of missing data on current members of the Bar and tighten up the reporting requirements for new members of the Bar by entering into a subsequent arrest notification contract with the DOJ.

The possibility of entering into a subsequent arrest notification contract with the DOJ was introduced to the Board of Trustees in November, 2016 (see Appendix A). At that time, a number of Trustees raised concerns about the Bar entering into such a contract. One set of concerns revolved around the security of fingerprint data reported to the DOJ. Another set of concerns had to do with whether subsequent arrest notifications might cast the net too widely and provide the Bar with more information than is mandated. Finally, as a matter of process, the management of background checks and processing fingerprints of applicants to the Bar is managed by the Bar's Office of Admissions and the Board directed staff to share the report with the Committee of Bar Examiners.

Addressing the concerns raised by the Board in November in order:

- Because the Bar already retains fingerprint data, the question of whether entering into a contract with the DOJ to retain fingerprint data increases the risk of a data breach depends on three factors. First, it depends on the process of transferring data from the Bar to the DOJ and the security of that process. Second, it depends on the security of DOJ servers compared to those of the Bar. Third, taking into account the relative security of DOJ servers compared to those of the Bar, it depends on whether the Bar chooses to *transfer* the data off of Bar servers and onto DOJ servers or *copy* the data. If DOJ servers are more secure than those of the Bar, a transfer of fingerprint data to the DOJ may ultimately make the data more safe.

In addition, applicants for admission to the Bar already have an expectation that their fingerprints will be used for a criminal background check and that they will be retained thereafter for the purpose of subsequent criminal record checks. Business and Professions Code section 6054 reads:

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.

Although, there is no statutory explanation of how applicant fingerprints will be retained, or who shall maintain them, the Penal Code permits the retention of such information by the DOJ and there is no law or regulation preventing the Bar from submitting fingerprints to the DOJ for this type of limited retention. California case law is clear that licensing agencies have authority to submit fingerprints to the DOJ for permanent retention without violating an individual's privacy rights. Moreover, as the DOJ is the only entity

that can provide a criminal arrest notification across the entire state, the statute was arguably drafted with this very contract in mind.

- Entering into a subsequent arrest notification contract would necessarily provide information to the Bar that is outside of the scope of the mandatory reporting requirements contained in Business and Professions Code sections 6068 and 6101. The DOJ cannot tailor these notifications to restrict them to a specified set of charge codes, or to exclude arrests and only report charges and convictions. If, as it appears, the Bar is receiving *less* information than is mandated by statute, then the question appears to be one of balance. While the status quo likely errs on the side of under-inclusion, entering into a contract to receive subsequent arrest notifications would err on the side of over-inclusion.

The receipt of information that is not mandated – for example, arrest information that did not result in formal charges – may be handled by establishing that the Bar's point of contact for receipt of DOJ's information is outside of OCTC. Staff in the Office of Research and Institutional Accountability could receive the data and review it to determine whether charges or convictions reported by DOJ are covered under the mandated reporting rules. If the information was part of the Business and Professions Code mandate, then it would be forwarded to OCTC. If the information was not part of the mandate, it would not be forwarded to OCTC.

An additional concern related to over-inclusive receipt of criminal information from DOJ has to do with fingerprint records of applicants who fail the Bar exam and are not admitted to practice and attorneys who leave the profession. In these cases, the DOJ already has a clearly established mechanism for the removal of fingerprints from their records and notification process. The Bar would need to track resignations and applicants who failed the Bar exam but whose fingerprints were submitted to DOJ and then notify the DOJ to remove that person from the list of notifications.

- Following the meeting of the Committee on Regulation and Discipline in November 2016, Bar staff presented the report contained in Appendix A to the Committee of Bar Examiners. No formal action was taken by the Committee of Bar Examiners but they expressed some concern that the Bar relies on self-reporting by attorneys to capture this information and did not express any objections to entering into a contract with the DOJ to receive subsequent arrest notifications.

Because entering into a contract with the DOJ to receive subsequent arrest notifications would cover only new attorneys, staff recommend that RAD approve both options. If an evaluation of a sample of fingerprint data determines that the under-reporting of criminal complaints is minimal, then bringing new attorneys into the subsequent notification contract with the DOJ may be sufficient reassurance of the data quality. If the review of a sample of fingerprint data reveals that the problem of under-reporting is more widespread, then staff will bring these findings back to RAD for further discussion and possibly further action.

Staff further recommend that RAD direct staff to develop the processes necessary to implement the receipt, evaluation, and transfer of notifications from the DOJ to OCTC as appropriate and that staff return to RAD to report on the progress in implementing this recommendation.

FISCAL/PERSONNEL IMPACT

An additional \$20,000 to \$41,000 could be needed if the Board chooses to select a sample of attorneys and evaluate the criminal history data on them.

BOARD GOALS & OBJECTIVES

One of the first Goals under the 2017-2022, Five Year Strategic Plan refers to the need to “Successfully transition to the “new State Bar”— an agency focused on public protection, regulating the legal profession, and promoting access to justice. Underneath this heading, the plan goes on to specify the need to “Implement and pursue governance, composition, and operations reforms needed to ensure that the Board’s structure and processes optimally align with the State Bar’s public protection mission. These recommendations align squarely with this goal contained in the Strategic Plan.

BOARD COMMITTEE RECOMMENDATIONS

The Regulation and Discipline Committee approves the following resolution:

RESOLVED, that a sum not to exceed \$41,000 shall be allocated to submit a random sample of fingerprints to the California State Department of Justice. The findings from the Department of Justice’s criminal background checks will be compared to Bar records of self-reporting, prosecuting attorney reporting, and Superior Court reporting as mandated under Business and Professions Code sections 6068 and 6101. Bar staff will report the findings back to the Regulation and Discipline committee;

FURTHER RESOLVED, that Bar staff will enter into a contract with the California State Department of Justice to receive subsequent arrest notifications for all new members of the Bar as soon as practical. Bar staff will develop a process for receiving, evaluating, and, where appropriate, forwarding relevant information on criminal charges and convictions to OCTC and report back to the Committee on Regulation and Discipline on the status of implementing this resolution.

ATTACHMENT(S) LIST

- A. Disclosure of Criminal Arrest and Conviction History