

AGENDA ITEM

### III.E. JULY 2017

**DATE:** July 13, 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:** Implementation of New Policies to Receive Subsequent Arrest Notification from the Department of Justice

---

#### EXECUTIVE SUMMARY

Bar staff have been working to develop and implement new policies that will bring the Bar into compliance with Business and Professions Code section 6054. This report to the Committee on Regulation and Discipline (RAD) provides an update on the work undertaken since the last meeting of RAD in May 2017. The report also presents options for dealing with fingerprint cards of moral character determination applicants, submitted prior to January 1, 2017, that are in the possession of the Bar. The report also discusses options for re-fingerprinting active attorneys.

---

#### BACKGROUND

In previous reports to RAD (Attached, Appendices A, B, and C) Bar staff identified anomalies in Reportable Action data related to criminal charges and criminal convictions against attorneys. Business and Professions Code section 6068 requires that attorneys self-report to the Bar when they are charged or convicted of certain misdemeanors and felonies. Business and Professions Code section 6101 requires that prosecutors and courts report to the Bar when attorneys are charged and convicted of certain crimes. An analysis of these data indicated that the number of misdemeanor and felony charges and convictions reported were inconsistent and probably incomplete. As a result, Bar staff began evaluating alternative sources of data to validate the data reported by individual attorneys, prosecutors, and courts.

In the process of evaluating alternative data sources, staff discovered that Business and Professions Code 6054 *requires* that all fingerprints of licensed members of the Bar be retained “for the limited purpose of criminal arrest notification.” Because there is no method for receiving criminal arrest notification<sup>1</sup> other than by entering into a contract to receive subsequent arrest

---

<sup>1</sup> “Subsequent Arrest Notification” is actually a misnomer in that the reports generated by the DOJ include information on subsequent arrests, charges, and convictions of people for whom fingerprints are retained. The DOJ provides subsequent arrest notification to qualified licensing agencies and employers at no additional charge beyond the cost of the initial criminal background check.

notification from the California State Department of Justice (DOJ), staff concluded that the Bar must enter into such a contract with the DOJ.

Staff presented these findings to RAD in May and were directed to collect additional information regarding the Bar's current processes and policies. Since then, Bar staff have conducted further legal analysis; documented current processes for moral character determination applicants (moral character); developed new processes for getting the fingerprints of moral character applicants into the subsequent arrest notification process; amended language on the Bar's website regarding the moral character application process; developed options for getting all active attorneys re-fingerprinted, and; estimated the workload associated with various phases of this work.

## **DISCUSSION**

### **Moral Character Applicants**

As an initial step toward bringing the Bar into compliance with Business and Professions Code section 6054, the Bar entered into a contract with DOJ for subsequent arrest notification for *new* moral character applicants on June 29, 2017. This contract will ensure that the fingerprints of all moral character applicants received on or after July 1, 2017, will be retained by DOJ for purposes of subsequent arrest notification, and that these notifications will be transmitted to the Bar.

Additional information regarding fingerprint processing of moral character applicants follows.

#### ***In-State Applicants***

As part of the moral character determination process, in-state applicants to the Bar are directed to complete their criminal background check by submitting a *Request for Live-Scan Service* using a pre-populated application provided by the State Bar. That application can be taken to a wide array of approved third-party vendors throughout the state. Vendors then process applicant fingerprints, and transmit the data to the DOJ.

Prior to July 1, 2017, the *Request for Live-Scan Service* form included a section related to "Level of Service" which contained a box, pre-checked for a California DOJ background check – for in-state criminal history – and an empty box for the FBI background check – for out-of-state criminal history. Applicants were directed to "Only check both boxes if you lived 2 years or more outside of CA since age 21." As a result, not all in-state applicants had both a DOJ and FBI background check conducted.

This section of the form has now been modified so that both of the boxes are pre-populated with a check-mark and the directions regarding checking both boxes have been removed. Further, DOJ staff have confirmed that the level of service for background checks conducted under the new contract includes background checks for both in-state and out-of-state criminal history. Following those checks, the fingerprint record will be retained by DOJ and information on new arrests, charges, and convictions will be transmitted to the Bar.

#### ***Out-of-State Applicants***

Out-of-state moral character applicants to the Bar are required to submit two sets of fingerprint cards to the Office of Admissions. Prior to May 22, 2017, based on long-standing policy and

practice in the Office of Admissions, staff would only forward these cards to the DOJ if something in the application raised a concern regarding the applicant's moral character.

Effective May 23, 2017, the Office of Admissions began sending *all* fingerprint cards, received on or after January 1, 2017, to the DOJ for both DOJ and FBI criminal background checks. Effective July 1, the DOJ will retain the (now digitized) fingerprints and information regarding new arrests, charges, and convictions will be transmitted to the Bar. Once the fingerprints are digitized, the DOJ will destroy its copy of the fingerprint card; once the Bar receives confirmation that the DOJ has successfully digitized the fingerprints, Admissions staff will destroy their copy of the fingerprint card.

### Licensed Attorneys

Business and Professions Code section 6054 grants the Bar the explicit authority to require *applicants* and certain licensees<sup>2</sup> to be fingerprinted. The statute also anticipates that fingerprints will be retained so that the Bar can receive notifications of subsequent arrests. The relevant portion of Business and Professions Code section 6054 reads:

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* (emphasis added).

As a practical matter, there is no way for the Bar to comply with the mandate that it receive notification of subsequent arrests without requiring licensed attorneys to be re-fingerprinted.<sup>3</sup>

Options for re-fingerprinting licensees have begun to be drafted and discussed. The issues raised are manifold and include:

- a) the need for explicit authority to require re-fingerprinting and impose consequences for failure to comply;
- b) the need to develop a process for re-fingerprinting licensees and for imposing consequences for failure to comply;
- c) the need to develop new processes for receiving and routing subsequent arrest notifications, the volume of which may be quite significant if the perceived level of self-reporting is as incomplete as suspected, and;
- d) budgetary considerations and workload related to one-time and on-going costs of implementing this policy.

---

<sup>2</sup> Business and Professions Code 6068(k) and (l) allow the Bar to require fingerprinting of licensed attorneys who are on probation and those who have entered into Agreements in Lieu of Discipline .

<sup>3</sup> Because Live Scan fingerprints are sent directly to the DOJ, the Bar is never in possession of the actual fingerprints of applicants whose background check is conducted using Live Scan technology. One copy of the fingerprint cards of out-of-state applicants is retained as a back-up, but these are destroyed after three years. Thus, the Bar is not able simply to re-submit fingerprints in its possession to the DOJ to initiate the subsequent notification process for licensed attorneys.

Assuming that the necessary authority is granted to the Bar, there are a number of options for implementing a re-fingerprint requirement:

1. Phase in implementation over three years using the MCLE groups into which active attorneys are already divided. Approximately one third of licensed attorneys are in each of these MCLE groups and the Bar could establish a requirement that attorneys in each group be re-fingerprinted on approximately the same schedule that their MCLE compliance is due. Under this approach, the first group would be required to submit fingerprints in February, 2018, the last in February, 2020; or
2. Establish a hard deadline for all attorneys to comply by December 31, 2018; or
3. Establish a hard deadline for all attorneys to comply by December 31, 2019.

Under all of these scenarios, inactive attorneys would not be required to be re-fingerprinted unless and until they seek to change to active status. Re-fingerprinting would be required of these attorneys upon transitioning to active status.

Perhaps more challenging than determining the appropriate process for and timing of the re-fingerprinting effort, is the work that is needed to develop a comprehensive policy and staffing infrastructure to guide how subsequent arrest notification data will be handled. Information regarding licensees will need to be delivered to a department of the Bar *other than* the Office of the Chief Trial Counsel (OCTC) to determine whether the information is relevant. Subsequent arrest notifications are expected to be overly broad, including information that is not actionable (arrests, in particular, are not Reportable Actions). Staff in the entity that conducts the initial review and routing of the data will need to be trained to identify the information that will flow to OCTC, and a corresponding process for doing so needs to be established.

In addition, the DOJ must be notified when the Bar is no longer eligible to receive subsequent arrest notification data – this requirement will apply to both moral character applicants (expired or ineligible applications) and licensees (deceased, disbarred, resigned).

### Key Discussion Points

Staff will continue working to refine the details of implementing the new policy and will report back to RAD and the Board as the process unfolds. For the immediate term, there are two issues for consideration and discussion.

The first issue has to do with unprocessed fingerprint cards in the Bar's possession. As of this writing, approximately 3,900 fingerprint cards have never been sent to DOJ<sup>4</sup>. Office of Admissions staff are reviewing the cards to confirm the status of the applications. Most of the cards – just over 60 percent – are associated with applicants who have since become members of the Bar.

Bar staff recommend that the fingerprint cards for different groups be treated differently.

- Licensed Attorneys: fingerprint cards destroyed;
- Remaining Cards: submitted to DOJ for both in-state and out-of-state background check and for inclusion in the subsequent arrest notification process.

---

<sup>4</sup> Fingerprint cards submitted prior to January 1, 2017.

The second issue has to do with re-fingerprinting licensed attorneys. Three options are presented above, but these are purely illustrative and do not preclude other possible options for re-fingerprinting licensees.

### **FISCAL/PERSONNEL IMPACT**

Preliminary estimates of the one-time costs and workload suggest a substantial expense associated with re-fingerprinting the roughly 190,000 active members of the bar. DOJ background checks cost \$32 and FBI background checks cost \$17 for a total of \$49 per active member, or, approximately \$9.31 million. In addition, third party vendors who process Live Scan applications for the DOJ charge a separate fee, typically around \$30-\$35. At this point it is not clear who will bear these costs – the State Bar or licensed attorneys or some combination of both.

In addition to this significant one-time costs, there will be on-going costs associated with additional staffing in impacted Bar Offices. At this time, staff estimates that approximately 8 new staff will be needed, across the Office of Research & Institutional Accountability, OCTC, State Bar Court, and the Office of Probation. These estimates reflect General Fund staffing needs only; additional resources will likely also be required in the Office of Admissions, and perhaps the Lawyer Assistance Program.

### **RULE AMENDMENTS**

NA

### **BOARD BOOK IMPACT**

NA

### **BOARD GOALS & OBJECTIVES**

This initiative supports the Mission of the Bar that states “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.” It also supports Goal 1: “Successfully transition to the “new State Bar”— an agency focused on public protection, regulating the legal profession, and promoting access to justice”