

OPEN SESSION AGENDA ITEM

702 NOVEMBER 2017

DATE: October 27, 2017

TO: Members, Board of Trustees

FROM: James J. Chang, Assistant General Counsel

SUBJECT: Separation of the Sections from the State Bar Following Passage of SB 36

EXECUTIVE SUMMARY

SB 36 requires the State Bar to separate the Sections into a private nonprofit corporation effective January 1, 2018. This item provides an update on the work being conducted by State Bar staff and the Council of Sections to accomplish this transition. This item also details two agreements being negotiated between State Bar staff and the Council of Sections: (1) a Memorandum of Understanding detailing the terms of the separation of the Sections and the conditions for future collection of CLA membership fees by the State Bar; and (2) a potential services agreement under which the State Bar would provide staff support services and office space to the new Sections association during a transition period. The item seeks board authorization for staff to finalize negotiation of these agreements and return them to the Board for approval at its December 1, 2017, meeting.

BACKGROUND

In January 2017, the State Bar Board of Trustees voted to authorize staff to advance a legislative proposal for the State Bar's annual licensing fee bill that would include the separation of the Sections and California Young Lawyers Association (collectively, "Sections") from the State Bar.¹ The resulting legislation, SB 36 (2017), was signed into law by Governor Brown on October 2, 2017, and will be effective January 1, 2018.

SB 36 requires the State Bar to assist the Sections to incorporate as a private non-profit corporation, to be called the California Lawyers Association ("CLA"),² and requires the State Bar to collect membership fees for CLA on the annual licensing fee statement sent to all attorneys in California provided that CLA continues to serve a public purpose by providing low-cost legal education programming and that CLA continues to maintain a governance structure that protects equal representation of each Section on CLA's governing board. SB 36 also requires the State Bar to transfer to CLA the Sections' financial reserves, contracts, and intellectual property. SB 36 permits the State Bar to provide support services to CLA at cost.

¹ Item 701 January 2017 ("Separation of Sections from the State Bar in Context of 2017 Fee Bill").

² The name "California Lawyers Association" was approved by the Chief Justice of California by letter dated October 18, 2017.

DISCUSSION

A. Transition Update

The State Bar and the Council of Sections have been working diligently to prepare for the separation of the Sections. In August 2017, the Council of Sections retained a consulting firm led by former State Bar Senior Director of Education Pam Wilson to assist the Sections in planning the transition to a new association. The Council of Sections has established several transition working groups to manage the many aspects of establishing a new entity, including governance, finance, staffing, and marketing; the transition groups are meeting on a near-daily basis with broad participation from all Sections. The Sections also recently held the first Sections Convention in San Diego as a standalone event in place of the former State Bar Annual Meeting. The conference succeeded beyond expectations and will be a model for future CLA events.

In September 2017, the State Bar Board of Trustees instructed staff, upon the signing of SB 36 into law, to form the corporate entity to house the Sections, transfer an initial portion of the Sections' reserve funds, and negotiate agreements with the Sections for future dues collection and potential support services.³ After SB 36 was signed into law in early October, State Bar staff moved promptly to implement the board's directive. On October 16, 2017, the State Bar incorporated the California Lawyers Association as a shell entity to begin the process of transferring funds and contracts to CLA. The State Bar will retain full legal control of CLA until the State Bar transfers control on January 1, 2018 to a board of directors designated by the Council of Sections. On October 27, 2017, the State Bar issued payment of \$500,000 of Sections reserves to CLA as start-up funds to pay for transition activities.

B. Agreements to be Executed with CLA

SB 36 requires the State Bar to enter into a Memorandum of Understanding with CLA regarding the terms of separation and conditions for future collection of CLA membership fees.⁴ SB 36 also permits the State Bar to provide services to CLA at cost upon mutual consent.⁵

1. Memorandum of Understanding (Mandatory Obligations)

The Memorandum of Understanding (MOU) will address the mandatory items included in SB 36. The following principles to be included in the MOU have been preliminarily discussed between State Bar staff and the Council of Sections and are presented to the board for approval:

- Separation Terms – The MOU will memorialize the State Bar's statutory obligations to transfer to CLA no later than January 1, 2018, the Sections' intellectual property⁶ and

³ Item 706 September 2017 ("Sections – Formation of New Corporate Entity").

⁴ Section 24 of SB 36 (amended Bus. & Prof. Code § 6056 (f)) ("The Sections of the State Bar or the Association and the State Bar shall enter into a memorandum of understanding regarding the terms of separation of the Sections of the State Bar from the State Bar and mandatory duties of the Association.").

⁵ Section 21 of SB 36 (amended Bus. & Prof. Code § 6031.5(a)) ("The State Bar may provide the Association with administrative and support services, provided the Association agrees, before such services are provided, to the nature, scope, and cost of those services. The State Bar shall be reimbursed for the full cost of those services out of funds collected pursuant to subdivision (b) or funds provided by the Association.").

contracts⁷ entered into by the State Bar on behalf of the Sections. The MOU will further memorialize the State Bar's statutory obligation to transfer to the Sections their financial reserves no later than January 31, 2018.⁸

- Conditions of Future Dues Collection – SB 36 requires the State Bar to collect fees for CLA provided that the State Bar determines that (1) CLA is continuing to maintain a governance structure that provides for equal representation of each Section on the CLA board of directors; and (2) CLA is continuing to serve a public purpose by providing low-cost MCLE and information to the State Bar.⁹

State Bar staff have proposed that the CLA commission an annual performance audit certifying CLA's compliance with the statutory requirements regarding governance structure and provision of low-cost MCLE. The Council of Sections has requested that, following the Sections' enactment of its initial bylaws, the State Bar issue a determination as to whether the governance structure is in compliance with SB 36 and allow that initial determination to be relied on as a factor in future performance audits.

With respect to the statutory requirement that CLA provide information to the State Bar as requested,¹⁰ State Bar staff have proposed to define the information requested as the performance audit reports described above and an annual letter from the President of CLA to the Chair of the State Bar Board of Trustees reporting generally on the status and activities of CLA.

- Costs of Collection – SB 36 requires that CLA pay the State Bar the actual costs of collecting CLA membership fees. State Bar staff have proposed that the formula for determining actual costs be calculated in a manner similar to that currently used to

⁶ Section 24 of SB 36 (amended Bus. & Prof. Code § 6056.3(d)) ("All current intellectual property of the Sections of the State Bar . . . shall be transferred to and retained by the Association, including, but not limited to, publications, educational materials, online education, membership lists of section members, and products.").

⁷ Section 24 of SB 36 (amended Bus. & Prof. Code § 6056.3(a)) ("The State Bar shall work with the Association to transfer all contracts previously entered into by the State Bar on behalf of the sections, as soon as practicable, consistent with any contractual obligations and legal requirements, unless an alternative arrangement is mutually acceptable to the State Bar and the Association.").

⁸ Section 24 of SB 36 (amended Bus. & Prof. Code § 6056.3(a)) ("On or before January 31, 2018, the State Bar shall transfer to the Association all membership fees and other funds paid for membership in the sections or paid in sponsorships, donations, or funds for the benefit of the sections, including, but not limited to, State Bar section financial reserves, with an accounting that specifies which funds are attributable to each individual section of the Association.").

⁹ Section 21 of SB 36 (amended Bus. & Prof. Code § 6031.5(b)) ("Notwithstanding any other law, the State Bar shall collect fees for the Association provided the Board of Trustees of the State Bar determines that both of the following conditions are met: (1) the Association continues to comply with the requirements in subdivision (b) of Section 6056 [one section one vote], and (2) the Association continues to serve a public purpose by providing the services described in subdivision (f) of Section 6056 [low-to-no cost MCLE, advice to State Bar, and provision of legal education]. The Association shall pay for the actual costs of the collection.").

¹⁰ Section 24 of SB 36 (amended Bus. & Prof. Code § 6056(f)) (CLA must provide "[e]xpertise and information to the State Bar, as requested.").

assess collection costs for the Sections, and that the State Bar may deduct its costs from the funds collected on behalf of CLA.

2. Potential Services Agreement and Office Space Lease

SB 36 permits the State Bar to provide services to CLA upon mutual agreement provided that CLA reimburses the State Bar for the full costs of those services.¹¹ State Bar staff have engaged the Council of Sections in discussions regarding potential agreements under which the State Bar would provide the services of the current Office of Education staff and potentially lease to CLA the current Office of Education space for a term of six months to one year.

- Employee Services – The Council of Sections has requested that current Office of Education staff support CLA for a transitional period of six months to one year during which Sections staff would continue to perform their current job duties in support of the Sections and would help to train CLA's future permanent staff. State Bar staff have offered to provide employee services to CLA on the following terms:
 - Costs – CLA would pay the full actual costs of the employees who will support the Sections. These costs include salary and benefits (including annual raises to which employees may be entitled¹²) as well as any increased benefits costs that may be incurred by the State Bar in the ordinary course. Employment costs also include any costs incidental to employment that arise from special circumstances, such as termination payout packages.¹³
 - Employee Services Offered Collectively and not Individually – To ensure equity and fairness, the State Bar would only offer the services of its current Office of Education employees together and would not permit CLA to select only certain employees individually. However, individual employees would retain the right to refuse the assignment and instead request transfer to another position within the State Bar or to terminate their employment.
 - Employee Rights – Employees would retain all rights they enjoy as State Bar employees, including but not limited to the right to terminate their employment at will at any time, the right to request transfer to another job position within the State Bar, and the right to take a leave of absence for medical or family leave. CLA must agree to provide safe and lawful working conditions and to afford employees all protections to which they are entitled under State Bar employment policies (e.g. the right to work free from unlawful harassment and to avail themselves of the State Bar's complaint and grievance procedures).

¹¹ Section 21 of SB 36 (amended Bus. & Prof. Code § 6031.5(a)) ("The State Bar may provide the Association with administrative and support services, provided the Association agrees, before such services are provided, to the nature, scope, and cost of those services. The State Bar shall be reimbursed for the full cost of those services out of funds collected pursuant to subdivision (b) or funds provided by the Association.").

¹² State Bar employees may be entitled to merit-based increases of up to 5% annually unless they have reached the maximum compensation level for their classification.

¹³ Two Sections employees have accepted the Reduction in Force buyout program and are entitled to a severance package upon their separation from the State Bar. Buyout packages are charged to the budget of the department from which the employees are departing.

- Employment Conditions – CLA must implement a management structure which places all State Bar employees under the direct supervision of the State Bar's Office of Education Director, currently Tricia Horan. State Bar employees must generally continue to abide by State Bar employment and administrative policies.
- Potential Non-Availability of Employees; Effect of Separation or Leave – CLA must acknowledge that the State Bar cannot guarantee the availability of the covered employees through the full term of the agreement. The State Bar will not be liable for any reduction in services or consequential damages to CLA resulting from the departure of any or all State Bar employees who support CLA. Should a covered employee terminate his or her employment, be terminated, be transferred to another position within the State Bar, or otherwise become unavailable to support CLA, CLA will be responsible for paying the full costs of that employee for the period in which that employee was supporting CLA. Should a covered employee go on paid leave status for protected reasons, such as family or medical leave, CLA will be responsible for paying any continuing employment costs for that employee during the term.
- Office Space – The Council of Sections has requested information regarding a potential lease of the existing Office of Education space to CLA for a period of six months to one year. The State Bar has offered a rental rate discounted off of the prevailing market rental rate, similar to the discount enjoyed by the California Bar Foundation. The State Bar has also offered the Council of Sections the opportunity to rent technology equipment, service, and support at cost. The Council of Sections is considering the State Bar's offer and is also exploring other options for office space within downtown San Francisco.

C. Next Steps

State Bar staff will continue to negotiate the MOU and potential services agreement with the Council of Sections and will return the agreements to the Board of Trustees for approval at its December 1, 2017 meeting.

The State Bar will adopt the CLA bylaws (currently being developed by the Council of Sections) and transfer control of CLA to a board of directors designated by the Council of Sections on January 1, 2018.

The State Bar will continue to finalize Sections budget figures as part of its budgeting processes and will transfer to CLA the remainder of the Sections' reserves no later than January 31, 2018 as required by SB 36.

FISCAL/PERSONNEL IMPACT

Fiscal Impact – The departure of the Sections from the State Bar will result in the loss of the contribution of the indirect cost allocation for Sections; however this loss may be offset if CLA agrees to lease office space from the State Bar. The fiscal impact of the separation of the Sections from the State Bar will be further detailed as part of the 2018 budgeting process.

Personnel Impact – The current Office of Education employees will generally be re-assigned to other positions within the State Bar either upon the conclusion of the term of the potential services agreement to the Sections, or effective January 1, 2018, if no agreement is reached.¹⁴

RULE AMENDMENTS

None.

BOARD BOOK IMPACT

Main Section 5, Tab 5.4 of the Board Book containing the rules pertaining to the operation of the Sections should be removed following the separation of the Sections from the State Bar.

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: 1. Successfully transition to the “new State Bar”— an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Objective: a. Manage and support the transition of the State Bar Sections to a new standalone entity.

RECOMMENDATION

Staff recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees authorize staff to continue negotiation of a MOU and potential services agreement and office space lease with the Council of Sections consistent with the parameters described in this agenda item and instruct staff to bring the agreements back to the Board for approval at its December 1, 2017 meeting.

¹⁴ Two Office of Education employees have accepted the Reduction in Force package and will depart from the State Bar either upon the conclusion of the term of the services agreement or on December 28, 2017, if no agreement is reached.