

# **OPEN SESSION**

## **AGENDA ITEM**

### **705 DECEMBER 2017**

**DATE:** November 13, 2017

**TO:** Members, Board of Trustees

**FROM:** Saul Bercovitch, Office of General Counsel  
Linda Katz, Office of Research and Institutional Accountability

**SUBJECT:** MOU with State Bar Foundation and its Subsidiary: Affinity and Insurance Program Administration and Dissolve Professional Liability Insurance Committee

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#### **EXECUTIVE SUMMARY**

The State Bar sponsors several affinity and insurance programs, offering discounts and other benefits to licensed California attorneys. The State Bar derives revenue from and currently administers these programs. Senate Bill 36 (Jackson, Stats. 2017, ch. 422), which authorizes licensee fees for 2018, provides that the State Bar may transfer administration of these programs to the California Bar Foundation (the "Foundation"), if approved by the Board of Trustees and the Foundation. Senate Bill 36 further provides a formula for distribution of the revenue received from these programs, starting January 1, 2018. The State Bar wants to avail itself of the opportunity to transfer administration of these programs. This transfer aligns with the fee bill and the State Bar's revised structure, which is squarely focused on its public protection mission. In order to effectuate this transfer, the State Bar needs to enter into a Memorandum of Understanding ("MOU") with the Foundation and a Subsidiary of the Foundation, which will be formed to undertake the administration of the programs. At the Board of Trustees meeting on September 7, 2017, staff presented the essential terms and conditions of a proposed MOU to the Board. The Board authorized staff to move forward with negotiations and bring the final terms and conditions of the MOU to the Board for approval. Those negotiations have concluded and there is now a proposed MOU. This Agenda Item seeks the Board's approval to enter into that MOU.

This item also seeks to dissolve the Board's Professional Liability Insurance Committee. The responsibility for administration of the State Bar's Professional Liability Insurance Program will transfer to the Foundation, effective January 1, 2018, and the Foundation will be creating the necessary oversight committee, eliminating the need for a State Bar committee to perform this oversight.

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#### **BACKGROUND**

##### **The Fee Bill**

Senate Bill 36 adds Section 6141.3 to the Business and Professions Code. That Section addresses the State Bar's sponsored insurance and affinity programs; allocation of revenue received from these programs, starting January 1, 2018; and transfer of the administration of these programs from the State Bar to the Foundation. Specifically, new Section 6141.3 provides as follows:

6141.3. (a) Except as provided in subdivision (b), the State Bar shall provide offers of discounts and other benefits to active and inactive members of the State Bar, including, but not limited to, insurance and affinity programs. Any revenue generated by these programs shall be used as follows:

(1) The revenue received from the affinity programs shall support the programs of the California Bar Foundation.

(2) (A) For all other revenue received from January 1, 2018, until December 31, 2018, 50 percent of the revenue shall be used to assist the Association in transitioning to an independent entity, 25 percent of the revenue shall be distributed to qualified legal services projects and support centers as provided in Section 6216, and 25 percent shall be used to support the discipline functions of the State Bar or to support the Client Security Fund.

(B) For all other revenue received after December 31, 2018, 50 percent of the revenue shall be distributed to qualified legal services projects and support centers as provided in Section 6216, and 50 percent of the revenue shall be used to support the discipline functions of the State Bar or to support the Client Security Fund.

(b) Notwithstanding subdivision (a), if approved by the board of trustees and the California Bar Foundation, the State Bar may transfer administration of the programs offering discounts and other benefits to active and inactive members of the State Bar under subdivision (a) to the California Bar Foundation provided that any revenue received, less the administrative costs of the California Bar Foundation in operating the program, shall be distributed as follows on and after January 1, 2019:

(1) All of the revenue received from the affinity programs shall be kept by the California Bar Foundation, which shall distribute 50 percent of that revenue to support the programs of the California Bar Foundation and 50 percent of that revenue to qualified legal services projects and support centers as provided in Section 6216.

(2) For all other revenue received, 50 percent of the revenue shall be kept by the California Bar Foundation, which shall distribute 50 percent of that revenue to support the programs of the California Bar Foundation and 50 percent of that revenue to qualified legal services projects and support centers in accordance with the formula provided in Section 6216, and 50 percent of the revenue shall be used to support the discipline functions of the State Bar or to support the Client Security Fund.

(c) Given the public protection mission of the State Bar, the Legislature finds that it would be inappropriate for the State Bar to administer the program on a long-

term basis. Therefore, should the program continue to operate after December 31, 2018, it is the intent of the Legislature that the program be administered by an entity other than the State Bar.

### **Negotiations with the Foundation and Preparation of the MOU**

At the Board of Trustees meeting on September 7, 2017, staff presented the essential terms and conditions of a proposed MOU. Following that meeting, consistent with the Board's direction, staff moved forward to prepare and negotiate the final terms and conditions of the MOU. Those negotiations have concluded. The Foundation's Executive Director has agreed in principle to the terms and conditions of the MOU attached to this Agenda Item. The Foundation's Board has not yet met to approve the MOU, but will be meeting on December 7, 2017. Upon approval of the MOU by the Board of Trustees and the Foundation's Board, the State Bar will transfer administration of the affinity and insurance programs, effective January 1, 2018.

### **DISCUSSION**

#### **Essential Terms and Conditions of the MOU**

The final terms and conditions of the proposed MOU are attached this Agenda Item. A summary is set forth below.

##### *Structure of the agreement*

There has been one structural modification to the terms and conditions of the MOU from those presented to the Board of Trustees in September 2017. Specifically, based on the advice of its outside counsel, the Foundation will form a wholly owned subsidiary to assume these responsibilities. This change will have no material impact on the transfer of the administration from the State Bar or the respective rights and responsibilities under the MOU.

The proposed MOU refers to the Subsidiary as "Subsidiary, Inc." The Foundation is currently in the process of forming the new Subsidiary, including the selection of its name. That process will be finalized before the MOU is executed by the parties.

##### *Administration of the affinity and insurance programs*

The MOU specifies in detail the Subsidiary's duties and responsibilities relating to oversight and administration of the programs.

##### *Creation of an oversight committee*

The Subsidiary will create an oversight committee to oversee the ongoing administration of the programs. The State Bar will be entitled to appoint one member to serve on that oversight committee.

##### *Preparation of a budget and payment of administrative costs*

Under Senate Bill 36, upon transferring administration of the affinity and insurance programs, the revenue received from those programs, less the administrative costs of the Foundation in operating the programs, will be distributed as specified in Business and Professions Code section 6141.3. In order to properly account for the administrative costs, the Subsidiary will (1)

prepare an annual budget setting forth the projected costs of the Subsidiary's oversight and administration of the programs, allocating those costs between the affinity programs and the insurance programs; and (2) submit periodic invoices to the State Bar, setting forth the actual costs of the Subsidiary's oversight and administration of the programs, allocating those costs between the affinity programs and the insurance programs.

The State Bar will pay the amounts reflected in the invoices to cover the cost of oversight and administration of the programs. Administrative and oversight costs will be deducted from total revenues of the affinity programs, on the one hand, and the insurance programs, on the other hand, based on the Subsidiary's good faith estimate of the proportion of its costs incurred with respect to each such program.

Following receipt of an annual budget from the Subsidiary for 2018, the State Bar will advance twenty-five percent (25%) of the projected cost of the oversight and administration of the programs in 2018, to be subtracted from the amount that the Subsidiary actually invoices for 2018.

#### *Freedom to contract*

The Foundation and its Subsidiary will have the right to create new affinity and insurance programs, provided the new programs do not compete directly with existing State Bar programs.

The State Bar will be under no obligation to continue or renew any existing affinity or insurance program. If the State Bar decides not to renew an existing program, the State Bar will provide the Foundation and the Subsidiary with adequate notice and help facilitate the transition of such program to the Subsidiary, to the extent the program and the Subsidiary wish to pursue any such transition.

#### *Training and support*

The State Bar will provide training and ongoing support for the Subsidiary's administrative duties and responsibilities, and will appoint a designated State Bar contact for any ongoing questions or issues that may arise.

#### *Liability insurance coverage*

The State Bar currently has liability insurance policies that provide coverage for claims based on decisions affecting the affinity and insurance programs. The State Bar will work with its insurance broker to extend such coverage to the Foundation and the Subsidiary under these policies.

#### *Direct contractual relationships*

The State Bar will continue to maintain oversight of and administer its direct contractual relationships with the sponsored affinity and insurance entities. Where possible, consistent with the terms and conditions of any of these contracts, the State Bar will transfer its direct contractual relationship to the Subsidiary (or to the Foundation if directed by the Foundation).

#### *Accounting for and distribution of revenue*

The State Bar will account to the Subsidiary for the revenue it receives from the programs, provide periodic reports to the Subsidiary, and make periodic payments to the Subsidiary, consistent with Business and Professions Code Section 6141.3.

#### *Term of the MOU*

The MOU will continue in full force and effect until December 31, 2020, unless terminated in accordance with specified provisions of the MOU. Upon the expiration of the original term or any renewal term, the MOU will be automatically renewed for consecutive one-year periods, absent notice of termination.

#### **Effective Date of Transfer of Administration**

Under the MOU, the State Bar will transfer the State Bar's oversight and administration of the programs to the Subsidiary effective January 1, 2018. Staff therefore seeks the Board's approval at the December 1, 2017, meeting to enter into the MOU and move forward with the transfer.

#### **Professional Liability Insurance Committee**

The Board established a Professional Liability Insurance Committee (PLI Committee) in 1990. The purpose of the PLI Committee is to oversee the State Bar Approved Professional Liability Insurance Program; study and make recommendations and/or changes to the existing program; work to reduce the quantity and severity of attorney malpractice claims through attorney loss-prevention and competency education programs; and ensure that the program is philosophically and structurally attuned to the needs of California's attorneys and consumers. Given that these programs will no longer be administered by the State Bar, there is no longer a need to have this Committee in place. As noted above, the Foundation will be required to establish an oversight committee; it anticipated that a number of current members of the Bar's PLI Committee will be asked to participate as members of the Foundation's committee.

#### **FISCAL/PERSONNEL IMPACT**

The fiscal impact of the MOU itself is negligible. The fiscal impact of the provisions of Senate Bill 36 as related to affinity and insurance program revenue redirection is significant, estimated to reflect a \$1.5 million reduction to the 2018 State Bar's revenue budget.

#### **RULE AMENDMENTS**

None.

#### **BOARD BOOK IMPACT**

None.

## **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: (c): 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

## **RECOMMENDATION**

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

**RESOLVED**, that the Board of Trustees approves the transfer of the administration of the affinity and insurance programs from the State Bar to a Subsidiary of the California Bar Foundation, as set forth in the Memorandum of Understanding attached hereto as Attachment A; and it is

**FURTHER RESOLVED**, that the Board of Trustees authorizes staff to enter into the Memorandum of Understanding attached hereto as Attachment A; and it is

**FURTHER RESOLVED**, that the State Bar Professional Liability Insurance Committee is dissolved, effective immediately.

## **ATTACHMENT LIST**

- A. Memorandum of Understanding by and among the State Bar of California, the California Bar Foundation, and a Subsidiary of the California Bar Foundation

**AGENDA ITEM - 705 DECEMBER 2017**

**ATTACHMENT A**

**MEMORANDUM OF UNDERSTANDING BY AND AMONG THE STATE BAR  
OF CALIFORNIA, THE CALIFORNIA BAR FOUNDATION, AND  
[SUBSIDIARY, INC.] GOVERNING ADMINISTRATION OF SPONSORED  
AFFINITY AND INSURANCE PROGRAMS**

This Memorandum of Understanding (“MOU”) is entered into as of the last date written below (the “Effective Date”), by and among the State Bar of California (“State Bar”), a California public corporation located at 180 Howard Street, San Francisco, CA 94105, the California Bar Foundation (“Foundation”), a California non-profit public benefit corporation located at 180 Howard Street, San Francisco, CA 94105, and [Subsidiary, Inc.] (“Subsidiary”), a California corporation located at 180 Howard Street, San Francisco, CA 94105. Each of the State Bar, the Foundation and Subsidiary are referred to individually as a “party” and collectively as the “parties.”

**RECITALS**

1. The Foundation was created in 1990 as the Foundation of the State Bar of California. The Foundation was created as a supporting organization to the State Bar under Section 509(a)(3) of the Internal Revenue Code to assist in carrying out the charitable, educational, and public benefit purposes of the State Bar.
2. On May 22, 2014, the Board of Directors of the Foundation voted to change the Foundation’s legal status as a Section 509(a)(3) supporting organization of the State Bar. Subsequently, the Foundation’s Board voted to amend the Foundation’s Articles of Incorporation and Bylaws to change its corporate structure so that it would be an independent non-profit public benefit corporation. The amended Articles of Incorporation eliminated the provision that provided that the sole purpose of the Foundation is to carry out the charitable, educational and public benefit purposes of the State Bar, and broadened the mission of the Foundation to include any allowable exempt purposes under Section 501(c)(3) of the Internal Revenue Code. On July 18, 2014, the State Bar Board of Trustees approved these amended governance documents.
3. The Foundation’s mission is to build a better justice system for all Californians. The Foundation’s change in corporate structure did not impact its continuing support for the goals of the State Bar, and the Foundation has continued to support projects that advance the missions of both the Foundation and the State Bar.

4. The State Bar sponsors several affinity and insurance programs, offering discounts and other benefits to licensed California attorneys and other eligible participants. The State Bar derives revenue from and administers these programs.
5. Senate Bill 36 (Stats. 2017, ch. 422) adds Section 6141.3 to the Business and Professions Code. Section 6141.3 provides that the State Bar may transfer administration of the affinity and insurance programs to the Foundation, if approved by the State Bar's Board of Trustees and the Foundation. Section 6141.3 further provides a formula for the distribution of the revenue received from these affinity and insurance programs.
6. The State Bar and the Foundation now wish to effectuate the transfer of the administration of the affinity and insurance programs, consistent with Business and Professions Code Section 6141.3.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

#### **ARTICLE 1 – DEFINITIONS**

- 1.1 Affinity Programs. As used in this MOU, the term “affinity programs” means the following programs sponsored by the State Bar as of the Effective Date and any successor to any of the following programs that features substantially the same scope and terms to such program:

*Sponsored Business Entity / Product Offered:*

- a. Bank of America / banking and credit cards
- b. Clio / law practice management in the cloud
- c. Hertz and Dollar Rent A Car / car rentals
- d. Lenovo / computers and related products
- e. OfficeMax / office supplies
- f. UPS / shipping

- 1.2 Insurance Programs. As used in this MOU, the term “insurance programs” means the following insurance programs sponsored by the State Bar as of the Effective Date and any successor to any of the following insurance programs that features substantially the same scope and terms to such program:



*Type of Insurance / Broker / Carrier*

- a. Accidental Death and Dismemberment / Mercer / VOYA
- b. Business Office Package / Mercer / The Hartford
- c. Disability / AI&PS / Ameritas
- d. Life / Mercer / American General Life
- e. Long Term Care / AI&PS / Mass Mutual
- f. Healthcare / Mercer and Heffernan / Two brokers only, no designated carrier
- g. Professional Liability / Mercer / Arch Insurance Group
- h. Workers Compensation / Mercer and Barney & Barney / NOVA Casualty

**ARTICLE 2 – RIGHTS AND RESPONSIBILITIES OF THE FOUNDATION**

2.1 Subsidiary.

- a. In order to assume responsibility for the oversight and administration of the affinity programs and the insurance programs (collectively, the “programs”) while maintaining its status as an entity that is exempt from tax pursuant to Section 501(c)(3) of the Internal Revenue Code and that is not a private foundation within the meaning of Section 509(a) of the Internal Revenue Code, the Foundation has established Subsidiary to oversee and administer, and receive revenue from, the programs, on the terms and conditions as set forth below. Subsidiary will at all times be wholly-owned by the Foundation, and the Foundation will have at all times the exclusive authority to appoint the board of directors of Subsidiary.
- b. The net earnings of Subsidiary will be distributed by Subsidiary to be used in a manner consistent with the mandate of Business and Professions Code Section 6141.3(b).
- c. The Foundation will use its reasonable best efforts to ensure that Subsidiary has adequate personnel and resources to perform its obligations under this MOU.

2.2 Administration of the Affinity and Insurance Programs. Effective January 1, 2018, the State Bar will transfer the State Bar’s oversight and administration of the programs to Subsidiary. Subsidiary will act as an agent with full authority to act on

behalf of the State Bar with respect to those contracts, in each case relating to a program identified in Article 1.1 or 1.2 above, where the State Bar is a party to the contract in performing the duties and responsibilities described herein. As of January 1, 2018, Subsidiary's duties and responsibilities relating to oversight and administration of the programs will consist of the following, and any additional duties and responsibilities that are reasonably requested by the State Bar and agreed to by Subsidiary:

- a. Assessing the effectiveness and productivity of the programs, identifying areas of potential change, and evaluating potential continuance or renewal of the sponsorship of each of the programs.
- b. Proposing changes, enhancements, and other revisions to the programs and design of the programs.
- c. Obtaining actuarial, accounting, legal and other consulting services as may be needed in the judgment of Subsidiary to fulfill its duties and responsibilities as described herein.
- d. Requiring, designing, reviewing, evaluating and addressing issues identified by periodic reports provided by the sponsored business entities, brokers, and insurance carriers concerning the programs.
- e. Engaging in audits and reviews necessary to ensure the economic viability of the programs and the availability of the programs to the broadest range of California attorneys and other eligible participants.
- f. Considering premium rates, benefits, limitations, exclusions and other contract provisions in relation to the needs of California attorneys and other eligible participants generally, as well as the need to maintain the economic viability and stability of the programs.
- g. Interacting with sponsored business entities, brokers, and insurance carrier representatives of the programs to anticipate, implement and evaluate program changes, coverages, and other matters that may be necessary to respond to the evolving needs of California's attorneys and precipitate additional growth of the programs, consistent with the economic stability of the programs.
- h. Overseeing and interacting with sponsored business entities, brokers, and insurance carrier representatives of the programs to ensure the broadest dissemination of information regarding the programs, the ease of applying for the programs, and other steps that may be necessary or appropriate to precipitate program growth consistent with the economic stability of the programs.

- i. Serving as the main point of contact for California attorneys and other eligible participants or beneficiaries under an affinity program or insurance program. Addressing general questions and referring individuals to brokers and vendors, so that brokers and vendors can provide clarity on the offerings and assist in determining whether State Bar program benefits are able to meet a prospective participant's needs. Serving as liaison between California attorneys, other eligible participants, or beneficiaries and the business entities, brokers, and insurance carrier representatives of the programs for any issues that need to be escalated to a designated representative at the State Bar, brokers, vendors or insurance carrier representatives. Subsidiary staff will work with the designated representatives, as appropriate, to monitor responses to and resolution of any issues.
- j. Interacting with sponsored business entities, brokers, and insurance carrier representatives of the programs to assess ongoing competitiveness and participant satisfaction levels.
- k. Engaging in efforts to assess the marketing of the programs, in coordination with the State Bar. In conjunction with sponsored entities, developing a strategic marketing plan and proposing language for promotional material. Promoting the programs in appropriate media, which may include the Foundation's website on terms and conditions to be agreed upon between the Foundation and Subsidiary.
- l. Reviewing and approving all marketing for the programs on an ongoing basis.
- m. In collaboration with the State Bar, providing oversight of the co-branded web pages of each affinity program and insurance program, to which the Calbar Connect site links. In the event ownership and control of the Calbar Connect site is transferred from the State Bar to the Foundation or Subsidiary, Subsidiary will have sole responsibility for this function.
- n. Ensuring that the programs are structurally attuned to and operated to the benefit of California's attorneys and other qualified participants, and performing the oversight of the programs that a prudent sponsor would undertake.

Notwithstanding anything in this MOU potentially to the contrary, in no event shall Subsidiary or the Foundation have any responsibility to do any of the following:

- a. Advocate on behalf of individual California attorneys and other eligible participants desiring coverage under one or more of the sponsored insurance programs or those who may be declined such coverage.

- b. Provide funds to cover costs of audits associated with affinity and insurance programs under this MOU.
  - c. Provide detailed information about insurance programs such as a quote for costs of premiums or other details that a broker or insurance carrier would be reasonably expected to have knowledge of and be able to provide to interested attorneys or other eligible participants.
- 2.3 Creation of an Oversight Committee. Subsidiary will create a committee (the “Oversight Committee”) to oversee the ongoing administration of the programs by Subsidiary. The State Bar will be entitled to appoint one member to serve on the Oversight Committee. This committee will be separate and apart from the Board of Directors for the Subsidiary.
- 2.4 Preparation of a Budget. Subsidiary will prepare an annual budget setting forth the projected costs of Subsidiary’s oversight and administration of the programs, allocating those costs between the affinity programs and the insurance programs. Budgeted costs may include any amounts Subsidiary projects that it will be required to pay to the Foundation in respect of Foundation resources that are used by Subsidiary in overseeing and administering the programs.
- 2.5 Submission of Invoices. Subsidiary will submit quarterly invoices to the State Bar, setting forth the actual costs of Subsidiary’s oversight and administration of the programs, allocating those costs between the affinity programs and the insurance programs. Invoiced costs may include amounts paid by Subsidiary to the Foundation in respect of Foundation resources that are used by Subsidiary in overseeing and administering the programs.
- 2.6 Foundation and Subsidiary Freedom to Contract. The Foundation and Subsidiary each have the right to enter into any contracts directly for the purpose of creating new affinity programs and insurance programs, subject to Article 2.7.
- 2.7 No Competing Programs. Neither the Foundation nor Subsidiary will enter into any affinity or sponsorship arrangements that compete directly with any of the affinity programs or insurance programs identified in Article 1.1 or Article 1.2 without the express prior written consent of the State Bar.

### **ARTICLE 3 – RIGHTS AND RESPONSIBILITIES OF THE STATE BAR**

- 3.1 Training and Support. The State Bar will provide training and ongoing support for Subsidiary’s administrative duties and responsibilities as Subsidiary (or the Foundation) requests, as described in Article 2.1. Without limiting the generality

- of the foregoing, the State Bar shall appoint a designated contact from the State Bar to act as liaison, answer any questions regarding history of administration of affinity and insurance programs under the State Bar, and also provide any documentation needed to carry out administration of programs such as contact information for members of the State Bar.
- 3.2 Liability Insurance Coverage. The State Bar will work with its insurance broker to extend coverage to the Foundation and Subsidiary under any of the State Bar's liability insurance policies that provide coverage for claims based on decisions affecting the programs, provided, however, that the State Bar will be under no obligation to extend such coverage in connection with any program for which there is a transfer of the direct contractual relationship to Subsidiary or the Foundation pursuant to Article 3.3.
- 3.3 Transfer of Direct Contractual Relationships. Where possible, consistent with the terms and conditions of any State Bar contract with an entity identified in Article 1.1 and Article 1.2, the State Bar will transfer its direct contractual relationship to Subsidiary (or to the Foundation if directed by the Foundation).
- 3.4 Oversight and Administration of Non-Transferable Direct Contractual Relationships. The State Bar will continue to maintain oversight of and administer its direct contractual relationships with the sponsored entities identified in Article 1.1 and Article 1.2. The State Bar will track revenue generated that is, under the terms and conditions of the contracts with those sponsored entities, payable to the State Bar, which is received by the State Bar for its own benefit and for the benefit of Subsidiary and the Foundation. The State Bar will ensure compliance with the terms and conditions of each contract. The State Bar will provide Subsidiary (and the Foundation) with such documentation and information as Subsidiary (or the Foundation) may reasonably request to ensure compliance with the terms and conditions of contracts governing any non-transferable direct contractual relationships. The State Bar will provide direct access to brokers, vendors, and insurance carriers so that Subsidiary can interface directly with brokers, vendors, and insurance carriers for issues regarding day-to-day administration of the programs.
- 3.5 Accounting for and Distribution of Revenue. The State Bar will account to Subsidiary for the revenue it receives from the programs, provide periodic reports to Subsidiary, and make periodic payments to Subsidiary, consistent with Business and Professions Code Section 6141.3. As used in Business and Professions Code Section 6141.3, "revenue received from the affinity programs" covers revenue received from the affinity programs, as defined in Article 1.1, and "all other revenue received" covers revenue received from the insurance programs, as defined in Article 1.2. Consistent with Business and Professions Code Section 6141.3, the revenue (less the administrative costs of Subsidiary in operating the

- programs, as demonstrated in the invoices submitted by Subsidiary pursuant to Article 2.5) will be distributed to Subsidiary for use as set forth in Article 2.1. The parties, through their respective Executive Directors or designees, will mutually agree to the specific reporting and payment schedule after the Effective Date.
- 3.6 Payment of Invoices. The State Bar will pay to Subsidiary the amounts reflected on invoices submitted by Subsidiary, pursuant to Article 2.5, to cover the cost of oversight and administration of the programs. Administrative and oversight costs will be deducted from total revenues of the affinity programs, on the one hand, and the insurance programs, on the other hand, based upon Subsidiary's good faith estimate of the proportion of its costs incurred with respect to each such program.
- 3.7 Advance Payment of Administrative Costs. Following receipt of an annual budget from Subsidiary for 2018 pursuant to Article 2.4, the State Bar will advance to Subsidiary twenty-five percent (25%) of the projected cost of Subsidiary's oversight and administration of the programs in 2018. The amount advanced will be subtracted from the amount that Subsidiary invoices for 2018, pursuant to Article 2.5.
- 3.8 State Bar Freedom to Contract. The State Bar may choose to continue or review any existing affinity program or insurance program, at its discretion, but will be under no obligation to continue or renew any existing affinity program or insurance program. If the State Bar decides not to renew an existing program under this MOU, the State Bar will provide the Foundation and Subsidiary with reasonable notice and make reasonable efforts to facilitate the transition of such program to Subsidiary, to the extent Subsidiary and the relevant vendor, broker or insurance carrier associated with the program wish to pursue any such transition.

#### **ARTICLE 4 - TERM AND TERMINATION**

- 4.1 Term. This MOU will be effective as of the last date signed below, and will continue in full force and effect until December 31, 2020, unless earlier terminated in accordance with the provisions of this Article.
- 4.2 Renewal. Upon the expiration of the original term of this MOU or any renewal term, this MOU will be automatically renewed for consecutive one-year periods, unless either party provides written notice of termination in accordance with Article 4.3 or Article 4.4. During any renewal term, the terms and conditions set forth in this MOU will remain in full force and effect, unless modified in accordance with Article 6.6.
- 4.3 Termination for Cause. Either party may terminate this MOU upon thirty (30) days' written notice to the other party in the event of the material failure of or material breach by the other party to perform its material obligations to be

- performed by such other party hereunder, which failure continues uncured for thirty (30) business days after written notice thereof (such uncured failure constituting "Cause"), specifying, with reasonable detail, the events, actions or circumstances constituting such failure or breach.
- 4.4 At Will Termination. Either party may terminate this MOU, with or without Cause, upon one hundred and eighty (180) days' written notice.
- 4.5 Effect of Termination. In the event of termination in accordance with this Article 4, this Agreement shall forthwith become of no further force or effect, provided that nothing herein shall relieve any party for any material breach of any material obligation hereof. Notwithstanding any termination, Subsidiary will submit to the State Bar a final invoice for services provided by Subsidiary through the effective date of such termination, and the State Bar will pay the invoiced amount to Subsidiary within thirty (30) days after the receipt of such invoice.
- 4.6 Program Revenues Post-Termination. Any program revenues that are held by the State Bar at the effective time of any expiration or termination of this MOU or are received by the State Bar subsequent to such time shall be held by the State Bar for the benefit of Subsidiary and the Foundation to the full extent specified by Business and Professions Code Section 6141.3. Program revenues that are for the benefit of the Foundation pursuant to Section 6141.3 shall be transferred to Subsidiary or (at the direction of the Foundation) the Foundation as soon as is practicable following receipt of such revenues by the State Bar. The provisions of this Article 4.6 shall survive the expiration or termination of this MOU and shall apply without regard to the cause of any termination of this MOU.

## **ARTICLE 5 - DISPUTE RESOLUTION**

The parties will use their best efforts to resolve any dispute arising under this MOU by good faith negotiation and mutual agreement. Such best efforts shall include use of the notice and cure procedures set forth in Article 4.3 above, where applicable, before invoking dispute resolution pursuant to this Article. If a controversy or claim should arise and either party should desire to submit the matter to dispute resolution in accordance with this Article, that party will present a written request for dispute resolution to the other party, which request will make reference to this Article and contain a sufficient description of the controversy. The notice, if issued by the Foundation, will be signed by its Executive Director or designee, and, if issued by the State Bar, will be signed by its Executive Director or designee. Upon tender of the request for dispute resolution, those individuals, or their respective designees, will meet and will attempt to resolve the matter(s) identified in the request. If the matter has not been resolved within thirty (30) days of their first meeting or as otherwise extended by mutual agreement, the matter will then be referred to the Executive Director of the State Bar and the Executive Director of the Foundation for potential settlement of the dispute. The Executive Director of the State Bar and the

Executive Director of the Foundation will meet for negotiations within fourteen (14) days of the end of the time period referred to above, or as otherwise extended by mutual agreement. If the parties are unable to resolve the dispute through these negotiations, the parties shall submit the matter to binding arbitration. Any such dispute, or any controversy or claim arising out of or relating to this MOU, or the breach thereof, shall be settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules. The number of arbitrators shall be one and the arbitrator shall be mutually acceptable to the parties. The place of arbitration shall be San Francisco, California. California law shall apply. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

## **ARTICLE 6 - GENERAL PROVISIONS**

- 6.1 Entire Agreement. This MOU supersedes any and all other agreements, either oral or written, which may exist between the parties, and contains all of the covenants and agreements between the parties as of the effective date of this MOU. By signing below, each party acknowledges that no representations, inducements, promises or agreements which are not embodied herein have been made by any party and that no agreement, statement or promise not contained herein will be binding on the parties.
- 6.2 Waiver. No term or provision herein will be deemed waived and no breach excused unless such waiver or consent is expressly stated in writing and signed by the party claimed to have waived or consented. Any consent by any party to or waiver of a breach by the other, whether express or implied, will not constitute a consent to, waiver of, or excuse for any subsequent breach, whether similar to the prior breach or not.
- 6.3 Jurisdiction. This MOU is deemed to have been made and entered into by the parties at San Francisco, California, and will be construed according to the laws of the State of California. Subject to Article 5, any litigation arising out of this MOU will be filed in the appropriate court in San Francisco, California.
- 6.4 Titles. The titles used herein are not a part of this MOU and are included solely for convenience and have no bearing upon and do not in any way limit the application of the terms and conditions of this MOU.
- 6.5 Severability. If any provision of this MOU is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions will nevertheless continue in full force without being impaired or invalidated in any way.
- 6.6 Changes. No amendment, alteration or variation of the terms of this MOU will be valid unless made in writing and signed by the parties hereto.



- 6.7 Authority. Each party hereby represents and warrants that it has full power and authority to enter into and perform its respective obligations under this MOU and that the person signing this MOU has been properly authorized and empowered to enter into this MOU on behalf of such party. Each party acknowledges that it has read, understands and agrees to be bound by this MOU.
- 6.8 Notice. Any notices required will be in writing and will be sent by personal delivery or first class mail to the other party, addressed to the party's principal office, attention of the Executive Director.
- 6.9 Counterparts. This MOU may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this MOU delivered by facsimile, e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this MOU.

IN WITNESS WHEREOF, the parties hereto have executed this MOU as of the last date written below.

**THE STATE BAR OF CALIFORNIA**

By: \_\_\_\_\_

Print: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**CALIFORNIA BAR FOUNDATION**

By: \_\_\_\_\_

Print: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**[SUBSIDIARY]**

By: \_\_\_\_\_

Print: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_