



The State Bar *of California*

OPEN SESSION

AGENDA ITEM

JULY 2019

PROGRAMS COMMITTEE III.A

DATE: July 11, 2019

TO: Members, Programs Committee

FROM: Donna S. Hershkowitz, Chief of Programs

SUBJECT: Discussion of Possible Rule and Practice Changes Related to Reporting, Display, and Public Nature of Licensee Information – Informational Item

EXECUTIVE SUMMARY

Objective g of Goal 2 of the State Bar strategic plan requires all attorneys to report firm size and practice type to the State Bar and to maintain and update that information. In the process of developing the rule change to implement that objective, staff realized that adding these requirements to the list of information a licensee is required to report is only one piece of a broader puzzle. This agenda item gathers all of those pieces together to give the Board of Trustees the necessary context so that all of the pieces can ultimately be considered together. This is an informational item only. Feedback from the Board will be used to develop a rule proposal that will be presented in September 2019.

BACKGROUND

ITEMS LICENSEES ARE REQUIRED TO REPORT

Rule 2.2 of the State Bar Rules provides that a licensee record contains public information, and lists the following information as included as part of the public licensee record:

- Name
- State Bar number
- Physical address and e-mail address
- Telephone number
- Date of admission in California

- Places and dates of admission in any other jurisdiction
- License status and date of transfer from one status to another
- Date and period of any discipline
- Any other information as directed by the Supreme Court or required by law

Some of this information is provided by licensees and other information, such as date and period of discipline, is derived from State Bar records. Some is displayed on the licensee profile, and some is not. Although the language of the rule provides that this information is the public licensee record, the list does not purport to be, and is not, the complete list of items that are subject to public disclosure.

Business and Professions Code section 6002.1 contains a similar list of information that licensees are required to provide, and also includes on that list all specialties in which the licensee is certified.

In addition to the above, pursuant to the California Rules of Court, rule 9.9, attorneys are, with limited exception, required to provide the State Bar a private e-mail address, that is, an e-mail address not to be disclosed on the State Bar's website or otherwise provided to the public without the licensee's consent. The purpose of this private e-mail is to facilitate communications by the State Bar with its licensees.

Business and Professions Code section 6212 also requires licensees to report all account information required by the State Bar, in the manner specified by the State Bar, regarding Interest on Lawyers' Trust Accounts (IOLTA).

ITEMS LICENSEES MAY REPORT

In addition to the above categories of information defined as part of the licensee record, the State Bar collects the following:

- Fax number
- Law school from which the licensee graduated
- Section membership
- Undergraduate school from which the licensee graduated (collected on the oath card at the time of admission into the State Bar)

The State Bar also created the opportunity for licensees to have an "enhanced" or "expanded" profile. Information that may be submitted for this expanded profile is:

- Office website
- Photo
- Practice areas
- Languages spoken by the attorney or office staff

PUBLIC RECORDS, “OPT OUT,” AND INFORMATION CURRENTLY DISPLAYED

Business and Professions Code section 6026.11, effective January 1, 2016, makes the State Bar of California subject to the California Public Records Act (CPRA), providing that *all* public records and writings of the State Bar are subject to the CPRA.

Business and Professions Code section 6002.1 (g) provides: “The State Bar shall conspicuously publicize . . . that its licensees have the right to limit the sale or disclosure of licensee information not reasonably related to regulatory purposes. In those communications the State Bar shall . . . note the simple procedure by which a licensee may exercise his or her right to prohibit or restrict, at the licensee’s option, the sale or disclosure of licensee information not reasonably related to regulatory purposes.”

Business and Professions Code section 6009.5 provides that “[a]ny demographic data collected shall be used only for general purposes and shall not be identified to any individual licensee or his or her State Bar record.”

The language of Business and Professions Code section 6002.1 pre-dated the provision making the State Bar subject to the CPRA, and is not consistent with the CPRA. In an attempt to conform the prior ability to opt out with the CPRA, State Bar policy on opt out changed in 2016, as reflected in the following language posted on the State Bar website:

The State Bar roll of attorneys, including official membership information, has always been and remains public.

However, this information will now be subject to public records requests pursuant to CPRA. The CPRA removes restrictions on the types of entities that are eligible to obtain lists, and other publicly available information. However, only certain information will be shared for members who have opted out of being contacted.

The following public profile information will be provided regardless of an attorney’s opt-out preference:

- Name
- Address
- Phone number
- Bar number
- Certified legal specialization
- Bar license status
- Bar license status history
- Discipline history

The following public profile information may be provided for those attorneys who have not opted out:

- Public email address
- Fax number
- Undergraduate school
- Law school
- Section membership

Prior to that time, licensees were told the following: “The bar has a policy under which members’ [sic] names are provided at cost to a restricted list of outside entities that meet certain criteria. The names are provided for a one-time use to, among others, MCLE providers, the Foundation of the State Bar, local bars and bar-approved insurance providers.”¹

Although better than the former opt out policy, staff question whether the revised opt out policy is compliant with the CPRA.

Not all information that is defined as part of the licensee record is publicly displayed as part of the attorney profile. Specifically, place and date of admission in other jurisdictions is not displayed. Additionally, in an effort to align the attorney profile with the State Bar’s regulatory mission after the separation of the sections, the website, photo, and practice areas that are part of the expanded profile are no longer displayed. In addition, although applicants for admission to the State Bar are told “the information on the [Oath] Card becomes part of your permanent record with the State Bar, is a matter of public record, and *will appear on the State Bar’s website*,”² in fact, undergraduate school, which is included on the oath card, was taken off the attorney profile on the website in 2018, along with the expanded profile information.

TIMING OF REPORTING

Rule 2.3 of the State Bar Rules requires licensees to update the State Bar within 30 days of a change of name, physical address, telephone, or e-mail.

Business and Professions Code section 6002.1 provides that physical address, discipline imposed by another jurisdiction, and information that may be required by agreement with or by condition of probation imposed by an attorney disciplinary agency must be reported within 30 days of any change. Licensees must notify the State Bar of any change in specialties in which the attorney is certified, and any other jurisdiction in which the attorney is admitted on or before the first day of February of each year.

¹ California Bar Journal, January 2005, <http://archive.calbar.ca.gov/archive/Archive.aspx?articleId=60038&categoryId=60038&month=1&year=2005>

² State Bar Enrollment and Receiving Your Bar Number, <https://www.calbar.ca.gov/Portals/0/documents/admissions/gbx/Enrollment-Information-201707.pdf>. Emphasis added.

DISCUSSION

ITEMS LICENSEES ARE REQUIRED TO REPORT

In addition the elements licensees are currently required to report, staff would like to pursue rule changes to also require the reporting of firm size and practice type (e.g., government, private practice, not for profit, in house counsel, etc.). As discussed with the Programs Committee at the May meeting, the Strategic Plan objective to require reporting of firm size and practice type was initially envisioned as a preventative approach to provide attorneys with information and tools they need when they switch firm types, especially when switching to a solo practice or a small firm. The Office of Chief Trial Counsel posited that attorney misconduct can often arise out of simple lack of knowledge of one's responsibilities. Although attorneys are expected to be aware of their obligations, and, as the saying goes, ignorance of the law is no excuse, that ignorance may result in client harm or other misconduct. An attorney who transitions from government or a large firm, for example, may have never had access to a client trust account, and may be unaware of the requirements. The goal of this objective was to have a means of identifying when an attorney became a solo practitioner or went to a small firm, so the State Bar could provide the attorney with resources to aid in the transition. The Office of Chief Trial Counsel envisioned emailing a welcome or congratulatory letter to attorney, noting their recent transition and, for example, providing links to the State Bar Client Trust Accounting Handbook, information about State Bar Ethics School or State Bar Client Trust Accounting School, a list of the most common types of misconduct, etc.

In addition, staff propose to improve our efforts to get client trust account information from licensees. Although statute currently requires licensees to report client trust account information in the manner requested by the State Bar, we believe including it in the same rule that requires reporting and maintaining of physical address, e-mail, telephone, etc. is appropriate. Staff also propose to address this technologically. Currently, for example, attorneys are required to verify their address each year when they go into My State Bar Profile (MSBP) as part of the licensee renewal process. They are also prompted to verify their address if it has been more than six months since they have last accessed MSBP. Staff believe that this same process should be used for client trust account information and all mandatory reporting items that are subject to change. The one exception to this would be for the list of other jurisdictions in which the licensee is admitted to practice. Although staff believe that routine verification of that information is important, Business and Professions Code section 6002.1, as currently written, appears to limit that information to annual reporting.

A final item to add to the mandatory reporting, raised with the Board at the May 2019 Programs Committee meeting, is whether to also require the reporting of whether the attorney has malpractice insurance. This item emanates from the work of the Malpractice Insurance Working Group (MIWG). A majority of the MIWG recommended that attorneys be required to report as part of the annual license renewal process whether or not they are insured. The Board might also consider requiring attorneys to report whether they have malpractice insurance in amounts of at least \$100,000 per claim/\$300,000 annual aggregate. The MIWG unanimously

agreed that if malpractice insurance becomes mandatory, these amounts are appropriate to ensure public protection. The Board could conclude that even if not mandatory, disclosure that an attorney has malpractice insurance of such an amount would be appropriate.

ITEMS LICENSEES MAY REPORT

As noted above, in addition to the information that is identified in Rule 2.2 as part of the licensee record, the State Bar collects: fax number; law school from which the licensee graduated; section membership; undergraduate school from which the licensee graduated; and the information in the “expanded profile” (website, photo, practice areas, and languages spoken by the attorney or office staff).

It seems that the concept of creating an expanded profile grew out of the Member Services Initiative, launched by the Board of Governors in 2001. This initiative was “aimed at creating a more member centric State Bar responsive to member practice needs and bar services and benefits[, because while the State Bar has many regulatory functions, it also has many associational characteristics.”³ The Board agenda item in 2008 which identified these additional elements to report expressly noted that then-existing law authorized the State Bar “to engage in activities that ‘may advance the professional interests of the members of the State Bar.’ (Cal. Bus & Prof. Code, § 6031, subd. (a).)”⁴

The expanded profile was discussed as a member benefit and a business opportunity for lawyers who do not participate in lawyer referral services. In particular, it was noted that “Board members believe allowing self-designation of practice areas is an important member benefit that should be offered.”⁵

As noted in the Background section, above, in an effort to align the attorney profile with the State Bar’s regulatory mission after the separation of the sections, the website, photo, and practice areas that are part of the expanded profile are no longer displayed. The history noted above supports that decision, as these items were added to the profile as a “member benefit” and a “business opportunity” for lawyers, falling within the trade associational functions in which the State Bar no longer engages. At this same time, staff ceased displaying undergraduate institution. Staff believe it would be appropriate to:

- Eliminate from the oath card the field for undergraduate institution, and update the instructions accordingly;

³ Board of Governors Agenda Item 701, November 2008, “Find A Lawyer” — Proposed Adoption of Program Recommendations.

⁴ Id. That statute has since been amended and no longer refers to advancing the professional interests of attorneys.

⁵ Id.; Board of Governors Agenda Item 701, May 2009, “Find a Lawyer” – Proposed Adoption of Program Recommendations (Revised). As a side note, a key issue that required further study (a task force) and a return of this item to the Board after its initial presentation in November 2008 was the issue of whether these additional items would be searchable or simply displayed on the attorney’s profile. The discussions appeared to be quite lively, and the votes close.

- Terminate the “expanded profile” option. Currently attorneys are still submitting information (website, photo, practice areas), but have not been instructed that the State Bar ceased displaying it;
- Terminate the maintenance of fax numbers;
- Maintain the reporting of section membership, as that is subject to the MOU executed by the State Bar and the California Lawyers Association;⁶ and
- Continue to allow attorneys to report languages spoken in their office, as this is the most closely tied to the State Bar’s public protection mission.

PUBLIC RECORDS, “OPT OUT,” AND INFORMATION CURRENTLY DISPLAYED

Staff believe the current rule structure and opt out language may result in attorneys erroneously believing that only those pieces of information specifically identified in Rule 2.2 are public. All information reported by attorneys, unless otherwise exempt from disclosure under the CPRA, is public information and can be disclosed pursuant to a proper request – whether or not it is publicly displayed on the attorney profile or otherwise on the website.

Based on the notification provided in anticipation of the CPRA becoming applicable to the State Bar, attorneys who have “opted out” believe that their public e-mail address, fax number, undergraduate school, law school, and section membership, though posted on their attorney profile, will not be shared pursuant to public records requests. All attorneys who elected to opt out should be notified that information of this type maintained by the State Bar is public, and would be subject to disclosure. To the extent any of these fields are optional, but still maintained by the State Bar, it would be appropriate to notify these attorneys of the opportunity to update their profile to delete non-required information so that going forward, this information would not be maintained by the State Bar. To the extent the State Bar no longer has the information, logically, it cannot disclose it.

Along with the rule proposal to be presented to the Board in September, staff will clearly identify what information is proposed to be displayed on the attorney profile, what information attorneys will be required to provide and maintain, and what information remains optional. For example, although staff will be proposing to amend the rule to mandate the reporting of client trust account information, neither the fact that the attorney has a trust account, nor the account number, would be displayed as part of the attorney profile.

TIMING OF REPORTING

To ensure that we have the most accurate information possible as part of the attorney record, staff believe that all of the following information should be verified annually as part of the license renewal process, and within 30 days of a change in the information:

⁶ “The State Bar will continue to identify membership of CLA Sections as an attribute on public attorney profiles on the State Bar website with a notation that CLA is an independent organization and is not part of the State Bar.” Memorandum of Understanding Between The State Bar of California and California Lawyers Association; General Provisions, paragraph 9.

- Name
- Physical address
- E-mail address for State Bar communications
- Firm size (new)
- Practice type (new)
- Client Trust Account information (new)

Should the Board decide to also mandate the reporting of malpractice insurance, the same timeline would apply.

Statute currently limits the ability to collect information on admission to practice law in other jurisdictions to once per year. As a result, pending statutory change, staff would propose to require attorneys to verify this information only as part of the license renewal process.

As noted in the “Items Licensees Must Report” section, we believe a technological solution will assist in ensuring routine and accurate reporting, by requiring licensees to verify this information when accessing MSBP to pay fees, or if they have not accessed MSBP in at least six months.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: g. No later than January 1, 2019, require all attorneys to report firm size and practice type to the State Bar and to maintain and update that information.

RECOMMENDATIONS

None

ATTACHMENT(S) LIST

None