



The State Bar of California

OPEN SESSION AGENDA ITEM 702 JANUARY 2023

DATE: January 19, 2023

TO: Members, Board of Trustees

FROM: Donna S. Hershkowitz, Chief of Programs & Legislative Director
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SUBJECT: Approval of 2023 Legislative Priorities

EXECUTIVE SUMMARY

Each year, following discussions with the Board of Trustees' legislative liaisons, staff recommend affirmative legislative proposals (or priorities) for Board approval. With this approval, staff continue to develop the proposals, conduct necessary research, and begin communications with key stakeholders to determine whether and how to pursue these priorities during the current legislative session.

This agenda item identifies twelve affirmative legislative proposals for Board consideration addressing minor changes to statutes relating to the discipline system, increased fees and funding, efforts to improve oversight of client trust accounts, efficiencies, and technical amendments. Staff plan to return to the Board in March with additional proposals which may address the following: more significant improvements to the discipline system, including an expansion of the types of information in a disciplinary investigation that are subject to disclosure; governance reforms, based on recommendation of the Ad Hoc Committee on Oversight & Accountability Reforms; and other items. Staff may also return to seek Board approval for positions on pending legislation.

BACKGROUND

In January 2018, the Board adopted a statement of purpose and guiding principles for the State Bar's legislative program. The guiding principles were intended to signal both internally and externally the types of matters on which the State Bar engages with the legislative and executive branches in light of the separation of the sections and the emergence of the State Bar primarily as a regulatory entity. The guiding principles for the type of legislation on which the State Bar will engage were derived from the State Bar's strategic plan.

In May 2022, the Board adopted revisions to that document reflecting the new strategic plan. The revised [State Bar Legislative Program: Purpose and Guiding Principles](#), also establishes that the Executive Director, in consultation with the Board chair and vice-chair, shall be responsible for determining legislative priorities on matters that affect the internal operations of the State Bar. As a result, such issues are not included in this agenda item.

DISCUSSION

At this time, staff is recommending that Board adopt 12 affirmative legislative proposals including minor changes to statutes relating to the discipline system, increased fees and funding, efforts to improve oversight of client trust accounts, efficiencies, and technical amendments, as legislative priorities for the 2023 legislative year.

FEES AND FUNDING

Annual Licensing Fee

As discussed by the Board's Finance Committee on January 6, 2023, the State Bar has received one license fee increase in the past 25 years, a \$71 increase in the General Fund portion of the licensing fee adopted in 2019 effective with the 2020 licensing year. The breakdown of the increase was \$21 to address the operating deficit, \$17 to expand retiree health to all employees, \$13 to add positions in the Office of Chief Trial Counsel, \$13 to help pay for salary increases due to a Cost of Living Adjustment (COLA), and \$7 to help with information technology replacements. In addition, there were special assessments for building improvements (\$4 for ten years), technology improvements (\$5 for five years), and to increase the General Fund reserve balance (\$3 for one year)." (See [Finance Committee Agenda Item II.A., January 6, 2023](#)). That increase pales in comparison to the rising costs faced by the State Bar as of that time, and since.¹ The agenda item will not repeat all of the information contained in the agenda item on the budget or presented orally to the Finance Committee on January 6, as the Board is expected to discuss this matter itself on January 19. However, a couple of key facts may be useful for the Board's consideration:

- General Fund reserves are projected to be approximately \$10.3 million or 10.9 percent as of the end of 2022, below the Board's minimum threshold for reserve funding (17 percent, or 2 months of operating expenses)
- The Finance Committee may be forced to recommend to the Board a budget that requires deficit spending for 2023 despite aggressive salary savings targets, virtual elimination of travel expenses, no staff growth, and minimal spending on information technology, despite the need.
- The COLA of 5 percent for non-attorneys and 10 percent for senior and supervising attorneys effective for fiscal year 2023 included in the recently negotiated union

¹ In developing the [Senate Bill 211 Case Processing Standards Proposal](#), the State Bar consulted with three national experts, including Robert Fellmeth, Price Professor of Public Interest and Executive Director of the Consumer Protection Policy Center at the University of San Diego School of Law. As part of his final comments on the proposal, set forth in Appendix A, Professor Fellmeth notes "current fees are just over [one-half] of the fees in 1992 if compensating for inflation." See p. 53.

collective bargaining agreement increases personnel expenses \$4.5 million State Bar-wide. The additional COLA of 2.5 percent for each of the following two years will further push the demand for increased funding.

- The current and past MOUs guarantee 5 percent salary increases annually for all staff meeting expectations (step increases).
- Any prior assumptions that the sale of the State Bar's San Francisco building would provide substantial revenue to address funding issues have been significantly tempered. The real estate market for commercial properties has deteriorated, and office space vacancy is at an all time high. As a result, the value of the building has decreased 15 to 20 percent from the appraised value since the same time last year. It is very difficult to know what the actual sale price would be or if the State Bar would get an offer that makes the sale viable.

In light of the above, the Finance Committee on January 6, came to the conclusion that it would be irresponsible of the Board of Trustees not to seek legislation in 2023 to increase attorney licensing fees.

The 2022 fee bill, AB 2958 (Ch. 419, Stats. of 2022), described the scope of the 2023 audit of the Bar conducted by the State Auditor as evaluating each program or division of the State Bar receiving support for the annual State Bar licensing fees and other fees required of active and inactive licensees. In doing so, the statute directs that the audit shall include a calculation of how much fee revenue would be needed from licensees to fully cover the costs of performing existing tasks and responsibilities and additional proposed expenditures necessary to meet the Bar's public protection function. (See Bus. and Prof. Code, sec. 6145.)

As a result, the Board should expect that the Legislature would await the April delivery of the audit results before determining whether and to what extent they agree a fee increase would be appropriate, but staff believe it is important to signal now that the Bar requires a fee increase to perform its public protection function and will be looking to engage with the Legislature in the coming months on the amount of resources required. Staff recommend that the Board delegate to staff, in consultation with the legislative liaisons, the authority to identify the proper amount of a fee increase for which to advocate.

General Fund Support for the Judicial Nominees Evaluation (JNE) Commission

In late 2021 staff began conversations with the State Department of Finance to try to secure General Fund support for the JNE Commission. The JNE Commission assists the Governor in the judicial selection process. It was created by Government Code section 12011.5, which requires the Governor to submit to JNE the names of all potential appointees or nominees for judicial office in California. The JNE Commission conducts investigations of all candidates submitted by the Governor, and rates each candidate as exceptionally qualified, well qualified, qualified, or not qualified. Reports from the JNE Commission are submitted directly to the Judicial Appointments Secretary. The only role of the State Bar Board of Trustees is to appoint members of the commission. Due to the confidential nature of the work, the commission's candidate ratings are not submitted to the Board of Trustees; the ratings are submitted only to

the governor through the Judicial Appointments Secretary. With very limited exceptions, the Board has no role in the work of the JNE Commission.

The Board of Trustees does adopt the rules governing the JNE Commission, consistent with the language of statute, but overall, the work of JNE is entirely in support of the governor obligation to appoint judicial officers.

In light of this, the State Bar believes that the work of the JNE Commission should be funded by the State's General Fund, and not by licensees. The current condition of the State Bar's budget further argues that General Fund support to carry out these functions is critical. The costs of operating the JNE Commission, including staff whose sole responsibility is support for the commission and two-day in person meetings approximately six times per year for 38 commissioners is approximately \$1 million.

No funding was added to the budget for the Governor's office, nor provided directly to the State Bar for support of the JNE Commission in 2022, and the governor's office and Department of Finance have indicated that no funding would be provided in 2023. Staff believe the Board should adopt as a legislative priority seeking additional funding, even if only a share of what the State Bar currently expends, to support the judicial selection process.

Fee Revenue Supporting Diversity, Equity, and Inclusion (DEI)

In 2022, the Board adopted as a legislative priority increasing the amount of the licensing fee that is earmarked for DEI activities by \$1, increasing it from \$2 to \$3, and changing the fee from an opt out to a part of the mandatory fees. This small change was estimated to increase the DEI funding available to the State Bar by \$450,000–\$500,000. The increase was designed to support the recommendations contained the 2021–2022 Biennial Diversity Report to the Legislature. This request for additional funding was not included in the fee bill.

The State Bar's commitment to DEI is well-documented in the 2022–2027 Strategic Plan, as well as the Operational Plan designed to implement the Strategic Plan. A sampling of the operational activities identified in the Operational Plan includes:

- Launch the DEI Leadership Seal Program, and have the State Bar pursue qualification for the Leadership Seal
- Complete updated study on racial disparities in attorney discipline
- Provide implicit bias training for decision-makers to OCTC and SBC staff
- Develop resource guide/toolkit to amplify calls to action contained in the Diversity Report Card
- Redesign Leadership Bank Program to include additional criteria such as social responsibility and diversity, equity, and inclusion goals
- Determine whether there are discipline disparities based on firm size and/or practice type and attempt to identify causes of any disparities
- Analyze 10-year trends in data regarding inactive licensees to identify any demographic or geographic patterns

- Review innovative DEI practices from other industries that may be adaptable to the legal profession
- Identify specific needs of attorneys from disenfranchised and underserved communities and begin offering assistance through support LAP and targeted MCLE and online resources

Staff recommend that the Board adopt as a legislative priority seeking additional funding for the State Bar's external and internal DEI efforts, and to do so by converting the contribution to the Elimination of Bias Fund to a mandatory fee and increasing the amount. Staff further recommend that the Board delegate to staff, in consultation with the legislative liaisons, the authority to determine the amount of the increase needed following the release of the 2023–2024 Biennial Diversity Report to the Legislature, scheduled for release March 15.

DISCIPLINE SYSTEM

For the most part the initial recommended discipline related legislative priorities are minor, technical amendments to existing law. Staff anticipate bringing more significant proposals to the Board in March emanating from, among other things, the Ad Hoc Committee on Oversight & Accountability Reforms. In addition, staff may bring to the Board language to improve public protection by expanding the types of information in a disciplinary investigation that may be subject to disclosure.

The State Bar Court proposed, and OCTC agrees, that the State Bar should pursue the following technical amendments related to the discipline system:

- Business and Professions Code section 6007(b)(2) authorizes the State Bar Court to enroll a licensee as inactive if the court makes an order assuming jurisdiction over the licensee's law practice pursuant to sections 6180.5 or 6190.3. Section 6190.3 deals with service of an application for a hearing. The correct reference here is 6190.34.
- Business and Professions Code section 6007(d)(2) requires the State Bar Court to terminate an involuntary inactive enrollment under certain circumstances, including when "the State Bar Court makes an order regarding the recommended actual suspension" in the underlying probation matter. This language is incorrect. The State Bar Court makes recommendations to the Supreme Court for discipline involving stayed or actual suspension, probation, or disbarment. Staff propose to amend the language as follows: The State Bar Court shall terminate an enrollment under this subdivision upon expiration of a period equal to the period of stayed suspension in the probation matter, or until the ~~State Bar Court makes an order regarding the recommended actual suspension in the probation matter~~ effective date of a Supreme Court order imposing an actual suspension on account of the probation violation or other disciplinary matter, whichever occurs first.
- Business and Professions Code section 6102 identifies the consequences if an attorney was convicted a crime that involved moral turpitude or is a felony under the laws of

California, the United States, or any U.S. state or territory. Subdivision (d) provides the two requirements that must be met to deem a conviction of another state a felony under the laws of the California. The language of the section is imprecise, however, and it is possible someone could read it as requiring only one or the other of the two conditions to be present. Staff therefore recommend adding an “and” to clarify that both requirements must be satisfied to deem the conviction a felony.

- Business and Professions Code section 6102 (e) currently states that if the court finds that the crime of which an attorney was convicted did not involve moral turpitude, the court shall dismiss the proceedings. Caselaw dictates, however, that if the facts and circumstances involve other misconduct warranting discipline, the Court should to impose the appropriate discipline. Current, longstanding practice, is in conformity with caselaw. Staff recommend amending section 6102 as follows: “. . . if after adequate notice and opportunity to be heard ... the court finds that the crime of which the attorney was convicted, or the circumstances of its commission, involved moral turpitude, it shall enter an order disbarring the attorney or suspending him or her from practice for a limited time, according to the gravity of the crime and the circumstances of the case; otherwise it shall dismiss the proceedings determine if the facts and circumstances surrounding the conviction involve other misconduct warranting discipline, and if so, impose the appropriate discipline.”

Staff recommend that the Board adopt as legislative priorities the four technical amendments described above.²

Tools to Enforce Reimbursement of the Client Security Fund

The Ninth Circuit recently concluded that debt owed to the Client Security Fund (CSF) may be dischargeable in bankruptcy because it is akin to an insurance reimbursement fund. (*Kassas v. State Bar of California* (2022) 49 F.4th 1158.) Staff recommend that the Board adopt as a legislative priority amending section 6140.5 of the Business and Professions Code to clarify that CSF payment obligations are akin to disciplinary costs and monetary sanctions, payable to and for the benefit of the State Bar, and therefore should be non-dischargeable in bankruptcy.

Specifically, staff recommend that the statute be amended to state that "the obligation to reimburse CSF is imposed as a penalty, payable to and for the benefit of the State Bar of California, a public corporation created pursuant to Article VI of the California Constitution, to promote rehabilitation and to protect the public. This subdivision is declaratory of existing law."

This language mirrors a recent amendment to Business and Professions Code section 6086.10, proposed by the State Bar after the Ninth Circuit found attorney discipline costs dischargeable in bankruptcy. After the statute was amended to expressly state the purpose of the discipline

² Staff is aware that one of the topics of focus for the Ad Hoc Commission on the Discipline System was moral turpitude. However, the two proposals identified here as proposed legislative priorities do not implicate the same issues or the recommendations put forth by the Ad Hoc Commission, and are technical clean-up. Staff does anticipate coming forward at a future Board meeting with proposals for legislative change advanced by the Ad Hoc Commission. However, it would be premature to do so now.

costs, the Ninth Circuit overruled its prior decision and found discipline costs non-dischargeable in bankruptcy under 11 U.S.C section 523(a)(7).

REGULATION: EFFORTS TO IMPROVE OVERSIGHT OF TRUST ACCOUNTS

Overdrafts and misappropriations from attorney trust accounts present serious consumer protection issues, however the Bar currently lacks the ability to verify information attorneys self-report about the trust accounts. As a key implementation feature of the Client Trust Account Protection Program, staff recommend that the Board adopt as a legislative priority amending section 6091.1 of the Business and Professions Code to expand mandated bank reporting on client trust accounts to the State Bar. This amendment would require banks to report important data about each attorney trust account they maintain so that the Bar can verify attorney reported data, detect potential misappropriation of funds, and identify noncompliance with statutes and State Bar rules. Specifically, additional bank reported data would allow the State Bar to conduct targeted outreach to help well-intentioned attorneys get into compliance and prosecute those found to be intentionally misappropriating funds.

Staff has been and will continue to work with stakeholders, including banks, to understand the specific data points that will be most useful in the regulation and auditing of client trust accounts, revisit current reporting requirements, and propose statutory language that will streamline the bank reporting process in a way that provides maximum value to client protection.

EFFICIENCIES AND TECHNICAL AMENDMENTS

Slight Extension to the Time to Produce the Annual Audited Financial Statement

Business and Professions Code section 6145(a) requires the State Bar, annually, submit to the Legislature an audited financial statement. The statute requires the submission within 120 days of the close of the fiscal year, i.e., April 30. The Office of Finance and the outside auditors who conduct the financial statement audit have both commented that this requirement creates a very short turnaround time and is shorter than government agencies typically have to conduct such an audit. Despite our best efforts, the 120-day requirement results in insufficient time for the Audit Committee effectively to review the audit and the State Bar response. To ensure that the Board of Trustees, through the Audit Committee, is exercising its due diligence and meeting its fiduciary responsibilities, staff recommend a short, 30-day increase to the statutory requirement, extending the deadline from the end of April to the end of May. This change would still provide the Legislature sufficient time to consider the Bar's financial condition, and the findings of the auditor, in determining the licensing fee for the following year.

Improvements to the State Bar's Reporting Requirements

As a result of the submission deadlines for a few legislatively mandated reports, the Board of Trustees either has had to schedule special meetings to consider the report or does not receive the report until after it is submitted to the Legislature. To avoid the need for special meetings of the Board of Trustees, and to afford the Board the opportunity to contribute to the reports, staff recommend moving the due date of legislatively mandated reports to the end of months

in which the Board is regularly scheduled to meet. Staff believe this would impact the due dates of three reports:

- Lawyer Assistance Program Annual Report – change the due date from March 1 to March 30.
- Biennial Diversity Report – change the due date from March 15 to March 30
- Annual Discipline Report – change the due date from October 31 to November 30.

Staff do not believe that the delay in the submission of these reports would negatively impact the ability of the Legislature to consider the contents of the reports in a timely manner.

In addition, staff believe that some of the legislatively mandated reports, though once important, may have outlasted their value. For example, in 1999, the Legislature enacted Article 10.5 of the State Bar Act (commencing with section 6175) regulating the sale of financial products, including long-term care insurance and life insurance, by lawyers to clients who are elders or dependent adults. At the same time, the Legislature required the State Bar to report annually on the number of complaints filed against attorneys alleging a violation of this article. Prior to 2019, this was a standalone report. At the request of the State Bar, language was included in the fee bill to allow this information to be reported as part of the Annual Discipline Report. However, since 2001, the State Bar has received only 20 complaints alleging violations of the financial products statutes, and none for the period of January 1, 2015, through June 30, 2022. The State Bar receives approximately 15,000 complaints per year; a special reporting requirement for this type of complaint seems unnecessary at this time. Staff therefore recommend that the Board authorize staff to work with the Legislature on eliminating unnecessary reports.

Amendments to Statutes Incorrectly Referencing the Committee of Bar Examiners

A recent review of the State Bar Act revealed several statutes that reference the Committee of Bar Examiners, or “the examining committee,” for activities and responsibilities that are performed by State Bar staff. The amendments proposed are not intended to take any responsibility away from the committee or to eliminate any right applicants may have to request a review by the committee, but to clear up issues that are incorrect or could cause confusion. Although the full list of proposed amendments is not yet final, a few examples include:

- Business and Profession Code section 6060.3 provides timelines for when applications to take the bar examination are to be filed “with the examining committee.” The reference should be to the State Bar. The committee does not accept or review applications to take the bar exam.
- Business and Professions Code section 6060.6 provides that the “Committee of Bar Examiners” may accept for registration an application from an individual containing a federal tax identification number, or other appropriate identification number in lieu of a social security number. The statute goes on to say that the “State Bar” may process an application for license containing a federal tax identification number in lieu of a social security number. The fact that the statute distinguishes between the State Bar and the committee creates even more confusion than a simple erroneous reference would.

Applicants register with the State Bar, not with the Committee of Bar Examiners.

- Business and Professions Code section 6065 provides applicants who did not pass the bar exam the ability to inspect their examination papers for a defined period of time “at the office of the examining committee.” Again, this reference should be changed to State Bar to avoid any confusion as to where such inspections may take place.

FISCAL/PERSONNEL IMPACT

All of the proposals detailed in this agenda item either produce new revenue or are revenue neutral. Because the more substantive proposals included here are conceptual in nature (such as the license fee increase), the amount of the anticipated increase in revenue cannot be anticipated at this time.

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- a. 5. Reduce the time from Client Security Fund application to payout by reassessing rules and policies, streamlining processes, and increasing funding as necessary.

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- d. 1. Align and implement recommendations of the Special Discipline Case Audit Committee and the Ad Hoc Commission on the Discipline System.

Goal 3. Protect the Public by Regulating the Legal Profession

- d. 1. Implement the Client Trust Account Protection Program.

Goal 4. Protect the Public by Engaging Partners

- d. 1. Collaborate with the legislature and other stakeholders to increase public protection and support the State Bar’s mission.

RECOMMENDATIONS

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees adopts as a legislative priority securing an increase in the attorney licensing fee to support the operations of the State Bar; and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority seeking funding for the work of the JNE Commission, including staff necessary to support the efforts of the JNE Commission, and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority increasing the funding available to use for efforts to improve diversity, equity, and inclusion in the legal profession; and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority seeking the technical amendments identified in this agenda item to address inaccuracies in the discipline system statutes, and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority clarifying that reimbursement owed to the Client Security Fund is a penalty, payable to and for the benefit of the State Bar of California and is necessary to promote rehabilitation and to protect the public; and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority ensuring that the Audit Committee has sufficient ability to consider the report of outside auditors regarding the Bar's financial statement by delaying by 30 days the deadline to submit the audited financial statement to the Legislature; and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority both making adjustments to the timelines for submission of legislative mandated reports to allow the opportunity for Board review, and eliminating unnecessary reports; and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority updating incorrect references to the Committee of Bar Examiners or the examining committee to instead reference the State Bar.

ATTACHMENT LIST

None