



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM 708 MAY 2023**

**DATE:** May 18, 2023

**TO:** Members, Board of Trustees

**FROM:** Leah T. Wilson, Executive Director  
Ellin Davtyan, General Counsel  
Caroline Holmes, Assistant General Counsel

**SUBJECT:** Discussion and Approval of Agreement Regarding the California Department of Justice's Investigation of State Bar Whistleblower and Whistleblower Retaliation Complaints

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### **EXECUTIVE SUMMARY**

The State Bar's Office of Human Resources currently receives and investigates whistleblower and whistleblower retaliation complaints against State Bar personnel. During the Special Meeting of the Board of Trustees on March 24, 2023, the State Bar's current whistleblower policy was clarified to address the specific issue of complaints against individuals who report directly to the Board (general counsel, executive director, and chief trial counsel). This agenda item proposes a comprehensive new Whistleblower Antiretaliation Program (WAP) that will be administered by the California Department of Justice (DOJ) and will supersede all existing whistleblower-related policies and processes extant at the State Bar. The WAP will provide a process whereby individuals can bring whistleblower and whistleblower retaliation complaints against State Bar personnel directly to the DOJ for review and investigation without prior review by the State Bar. The WAP is designed to ensure a fair and neutral whistleblower and whistleblower retaliation complaint investigation process. This agenda item recommends the Board's approval of an interagency agreement with the DOJ to administer the WAP on behalf of the State Bar.

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## BACKGROUND

The State Bar takes whistleblower and whistleblower retaliation complaints seriously. Under the State Bar's current whistleblower policy, the Office of Human Resources investigates whistleblower and whistleblower retaliation complaints and, where necessary, partners with the Office of General Counsel to engage an external investigator to assist with such investigations. The Ad Hoc Committee on Oversight & Accountability Reforms has been considering important reforms to strengthen governance and oversight over the State Bar's discipline system, including the enhancement of the State Bar's response to whistleblower complaints. At its March 24, 2023, special meeting, the Board was informed of modifications to the current whistleblower policy. As modified, any whistleblower and whistleblower retaliation complaints alleging improper governmental activity by the executive director, general counsel, or chief trial counsel are routed to the chair of the Board of Trustees and chair of the Audit Committee for oversight of the investigation and, where appropriate, oversight of an external investigator. If the complaint is about the general counsel, the executive director will support the chairs' oversight of the investigation and will wall off the Office of General Counsel. If the complaint is against the executive director or chief trial counsel, the Office of General Counsel will support the chairs' oversight of the investigation, and the executive director or chief trial counsel will be walled off from the investigation. Of course, any complaints that raise allegations of attorney misconduct will continue to be routed to the special deputy trial counsel administrator for the State Bar's Rule 2201 Program. The purpose of the changes to the State Bar's current whistleblower policy is to ensure that the subject of the complaint is not involved in its review.

This agenda item presents a comprehensive new whistleblower program, the WAP, that will be administered by the DOJ and will supersede all existing whistleblower-related policies and processes extant at the State Bar. The WAP provides a process whereby individuals can bring whistleblower and whistleblower retaliation complaints against State Bar personnel directly to the DOJ for review and investigation without prior review by the State Bar. This agenda item presents a one-year interagency agreement with the DOJ to implement the new WAP.

The DOJ is uniquely well-positioned to administer the WAP because it already reviews and investigates whistleblower complaints against the California State Auditor pursuant to the California Whistleblower Protection Act (Cal. Gov't Code § 8547, *et. seq.*) and the Alternative Whistleblower System (Cal. Code Regs. tit. 2, § 61300, *et. seq.*). Under the California Whistleblower Protection Act, the California State Auditor is responsible for reviewing and investigating whistleblower and whistleblower retaliation complaints against most state agencies in California. The DOJ is responsible for reviewing and investigating whistleblower and whistleblower retaliation complaints against the California State Auditor under the Alternative Whistleblower System to avoid any conflicts of interest. Because those laws and regulations do not currently apply to the State Bar, the State Bar is not under the California State Auditor's or the DOJ's jurisdiction to review and investigate whistleblower and whistleblower retaliation complaints against other state agencies.

Under the WAP, the DOJ's existing infrastructure for reviewing and investigating whistleblower and whistleblower retaliation complaints against the California State Auditor will be seamlessly leveraged to review and investigate whistleblower and whistleblower retaliation complaints against the State Bar. The DOJ will be able to use the same standards that it applies when reviewing complaints against the California State Auditor when reviewing complaints against the State Bar (Cal. Code Regs. tit. 2, § 61300, *et seq.*). The selection of a different agency or organization to handle the WAP would require significant time and investment in developing a system and infrastructure to process complaints.

Mirroring the State Bar's WAP after the existing Alternative Whistleblower System will also help to instill public trust in the new program. The DOJ has a reputation for skillfully handling sensitive workplace investigations on a variety of topics. The DOJ's existing infrastructure, coupled with its depth of experience in this area, will ensure that this new program launches successfully. It will also instill confidence in individuals who want to submit whistleblower and whistleblower retaliation complaints because they will know their complaints will be handled with skill and care. Review and investigation of whistleblower complaints by the DOJ without prior review by the State Bar will ensure a fair and neutral whistleblower and whistleblower retaliation complaint investigation process under the WAP.

## **DISCUSSION**

It is proposed that the State Bar enter into an interagency agreement with the DOJ for the DOJ's administration of the State Bar's WAP; a general description of the DOJ's process for reviewing and investigating State Bar whistleblower and whistleblower retaliation complaints is provided below.

### **ELIGIBLE COMPLAINTS**

The WAP will accept any complaints alleging that a current or former State Bar employee, agent, and/or officer (including a member of the Board of Trustees or any Board subentity) failed to act competently, ethically, legally, and properly in accomplishing their duties and/or engaged in whistleblower retaliation (collectively referred to as "improper governmental activity" under the WAP).

### **REPORTING COMPLAINTS**

State Bar employees and members of the public will be able to submit whistleblower and whistleblower retaliation complaints, including anonymous complaints, to the DOJ via email, phone, U.S. mail, or a complaint form on the State Bar's website. All complaints will be automatically directed to the DOJ for review without prior review by the State Bar.

### **COMPLAINT REVIEW AND ASSESSMENT**

The DOJ will review complaints to determine whether, based on an independent and objective analysis of the information provided by the complainant, the complaint constitutes a good-faith allegation of an improper governmental activity. This review will determine whether the submitted complaint is subject to the WAP (see Eligible Complaints above). If the DOJ

determines that a complaint is not subject to the WAP, the DOJ will notify the State Bar within three days of its determination. The DOJ will also share the complainant's contact information (unless anonymous) and other relevant information with the State Bar, so that the State Bar may engage in further investigation as appropriate.

### **ASSIGNMENT TO AN INDEPENDENT INVESTIGATOR**

If the DOJ determines that a complaint is subject to the WAP and has sufficient information to warrant further investigation, then the DOJ will assign a competent, independent investigator to investigate the complaint. The independent investigator will be thoroughly screened for conflicts of interest.

### **INVESTIGATION**

The independent investigator will conduct an investigation that complies with best practices and is consistent with the California Whistleblower Protection Act (Cal. Gov't Code § 8547, *et. seq.*) and the Alternative Whistleblower System (Cal. Code Regs. tit. 2, § 61300, *et. seq.*). The investigator will obtain and review relevant documents and other evidence. The investigator will also interview relevant witnesses. The investigator will keep confidential records of the investigation process.

### **COMPLETION OF THE INVESTIGATION**

If the independent investigator finds that it is more likely than not that an employee, agent, or officer of the State Bar has engaged in an improper governmental activity, the investigator will prepare a written investigation report. The investigator will provide by secure means a copy of the report and all evidence gathered during the investigation to the State Bar's general counsel (or director of the Office of Human Resources, if the complaint is about the general counsel). The chair of the Board of Trustees and the chair of the Audit Committee will also receive a copy of the written investigation report. If the executive director or chief trial counsel is a subject of the report, the general counsel will report directly to the chairs. If the general counsel is a subject of the report, the director of the Office of Human Resources will report directly to the chairs.

### **RESPONSE**

The State Bar will take appropriate action to address the improper governmental activity identified in the investigation report, commensurate with the circumstances. Appropriate action may include referrals to law enforcement; disciplinary, administrative, judicial, or similar adjudicatory proceedings relating to the underlying complaint or investigation; and/or corrective or disciplinary action against a current State Bar employee, agent, or officer related to the underlying complaint or investigation.

### **CONFIDENTIALITY**

All investigations, including draft reports, documents, materials, recordings, photographs, audit and investigation records, and similar evidence gathered, will be confidential. However, the State Bar or independent investigator may make certain disclosures as necessary to carry out

the State Bar's appropriate action to address the improper governmental activity identified in the investigation report.

### **FISCAL/PERSONNEL IMPACT**

The DOJ will bill the State Bar at its usual hourly rates for the time spent by its personnel in connection with the WAP, including reviewing complaints, retaining and contracting with independent investigators, and communicating with the State Bar regarding the WAP. The State Bar will reimburse the DOJ at an hourly rate not to exceed \$500 for the actual, necessary, and reasonable direct costs of the independent investigator's investigative services. The total cost for an investigation should not exceed \$50,000 absent exceptional circumstances and prior additional approval from the State Bar. The maximum cost for this agreement is \$100,000 unless the State Bar provides prior additional approval. The initial term of the agreement will be for one year. The agreement will be funded by the General Counsel's budget.

### **AMENDMENTS TO RULES**

None

### **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

### **STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS**

Goal 4. Protect the Public by Engaging Partners: Engage partners and stakeholders to enhance public protection and restore the State Bar's credibility, reputation, and impact.

### **RECOMMENDATIONS**

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

**RESOLVED**, that the Board of Trustees authorizes the general counsel and executive director to negotiate and enter into the agreement with DOJ in the amount not to exceed \$100,000, and subject to the general terms of the contract described herein.

### **ATTACHMENT LIST**

None