



The State Bar of California

OPEN SESSION AGENDA ITEM 707 MAY 2023

DATE: May 18, 2023

TO: Members, Board of Trustees

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SUBJECT: Discussion and Adoption of Additional 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.

At its January meeting, the Board approved a number of 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. This agenda item seeks Board approval to supplement that list with additional proposals stemming from recommendations from the Ad Hoc Committee on Oversight & Accountability Reforms and the Committee of Bar Examiners, revise previously adopted priorities, and adopt other measures for operational improvement.

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, such as legislation impacting the State Bar as an employer, as an owner of commercial property, as a state agency subject to contracting requirements, open meeting requirements, and open records requirements. As a result, such issues are not included in this agenda item.

In December 2022, the Board established the Ad Hoc Committee on Oversight & Accountability Reforms to consider various structural and operational reforms in response to the failings brought to light by the May and Lazar reports.

DISCUSSION

The revised and added legislative priorities proposed here are divided into two categories: first, those that support a path to improvement and increased accountability following the revelations contained in the May and Lazar reports, and second, proposals that are more operational in nature.

PATH TO IMPROVEMENT AND INCREASED ACCOUNTABILITY

The release of the May and Lazar reports demonstrates the commitment of the current Board and State Bar leadership to accountability and transparency. Details of those reports indicate a troubling history at the State Bar, including one in which a powerful attorney engaged in egregious efforts to buy relationships and exercise influence at the State Bar—at all levels—which likely impacted the handling of some complaints against him and causing some of those complaints to be closed improperly. These reports highlighted systemic organizational dysfunction that persisted for many years. The State Bar owes it to the public and its stakeholders to provide them with confidence that the instances described in these reports cannot and will not happen again. To this end, the Board's Ad Hoc Committee on Oversight & Accountability Reforms has considered a host of measures focused on codifying and enhancing the current Board's commitment to transparency, accountability, and improvement of the discipline system, securing the fiscal stability of the State Bar, and working to build back trust.

Inspector General/Discipline Monitor

One issue explored by the Ad Hoc Committee is whether a 13-member volunteer Board had sufficient insight into the work of the Office of Chief Trial Counsel to meet its mandate to exercise effective and appropriate oversight over the discipline process. As part of that analysis, at its January 2023 meeting, the Board heard from the Inspector General over California's prison system, as well as the head of the Office of Ethics, Compliance and Audit Services at University of California Office of the President. These presenters described their governance models for oversight of complaint processes. Ultimately, the committee recommended that the Board establish a position—a discipline monitor or an Inspector General—responsible for monitoring and auditing the investigative and prosecutorial function of the Office of Chief Trial Counsel, the special disciplinary trial counsel (2201 Program), and the Complaint Review Unit

(CRU). The committee envisioned this position, reporting directly to the Board, would work closely with the Board's designated discipline liaisons and would:

- Identify and prioritize areas or issues for the Board's discipline liaison focus;
- Develop recommendations for corrective/remedial or other actions for the Board of Trustees and ensure that appropriate corrective and remedial measures are taken when problems are identified;
- Regularly review performance and outcome data;
- Assess the implementation of selected policies, procedures, initiatives, and internal controls for effectiveness and impact;
- Assist in developing internal controls that help reduce compliance risk; and
- Manage the discipline case external audit process.

Staff has begun discussions with key stakeholders and believes that an Inspector General reporting directly to the Board of Trustees may not be seen as impartial. Thus, while creation of this position may be an effective means for the Board to acquire additional tools to exercise more direct oversight over the discipline process, it may not engender confidence and trust in key stakeholders that the State Bar has taken meaningful steps to exercise strong oversight of the discipline process. The creation of this position may not achieve the intended goals of the Ad Hoc Committee if those outside the State Bar do not believe this position to be an independent overseer. The Board may therefore wish to consider whether to explore having the Inspector General, funded by the State Bar, housed within, and reporting to, the Supreme Court.

Enhanced Conflict of Interest Policies

In connection with the State Bar's ongoing enhancement of conflict of interest policies and procedures discussed with the Board at its January 2023 meeting ([Five Years of Reform Continues: Discussion of Options for Governance and Oversight](#)), the Ad Hoc Committee asked staff to analyze whether the State Bar should seek modifications to the Political Reform Act (PRA), Government Code sections 81000, *et seq.*, as well as to conflicts statutes related to government contracting, Government Code sections 1090, *et seq.*, to clarify whether and how these provisions apply to the State Bar.

The PRA contains various good governance provisions applicable to California state and local public officials, including provisions regarding disqualification from government decision-making where personal financial interests are implicated, financial interest disclosure provisions setting forth requirements for conflict of interest codes and Form 700 reporting, and provisions for administrative enforcement by the Fair Political Practices Commission (FPPC). Under current law, Trustees and State Bar employees are not subject to the PRA in certain respects (e.g., they are not bound by the disqualification requirements, the FPPC cannot enforce disqualification rules against the State Bar, and they most likely are not bound by the PRA's restrictions on post-employment activities), and in other respects, the PRA appears to apply to the State Bar, but the extent and details of the coverage are unclear (e.g., provisions pertaining to conflict of interest codes). While the State Bar will be able to achieve the substance of its planned conflicts enhancements without statutory change (e.g., through an update to the

conflict of interest code for Trustees approved by the Supreme Court and through internal rules and policies), statutory revisions to expand and clarify the PRA's applicability to the State Bar may have benefits in terms of greater clarity, adding FPPC administrative enforcement mechanisms, and demonstrating the State Bar's commitment to reform and accountability in this area.

Government Code sections 1090, *et seq*, imposes strict requirements to avoid government contracting decisions affected by personal financial interests. Although not subject by law to the requirements of this section, the State Bar's policy and practice has in fact been to act in accordance with its requirements. Staff recommends codifying that practice.

With respect to personal, nonfinancial conflicts, the State Bar Act requires recusal of Trustees and designated State Bar employees from decisions where "there exists a personal nonfinancial interest that *will* prevent [them] from applying disinterested skill and undivided loyalty to the State Bar in making or participating in the making of decisions." Cal. Bus. & Prof. § 6036(b) (emphasis added). While the PRA does not address such non-financial conflicts, under the common law, courts have long held that the "law will not permit [a public official] to place himself in a position in which he *may* be tempted by his own private interests to disregard those of his principal." (*Noble v. City of Palo Alto* (1928) 89 Cal. App. 47, 51.) So that section 6036(b) is in line with the common law, staff proposes amending the section to clarify that recusal is required where a personal non-financial interest *may* prevent a Trustee or employee from applying disinterested skill and undivided loyalty to a decision—not just when such an interest *will* affect decision-making.

The Ad Hoc Committee believes these changes are important to buttress the Board's commitment to accountability and transparency.

Participation in the State Budget Process

At the January and March Board meetings, staff informed the Board of the continuing interest on the part of some legislative staff in including the State Bar in the state budget process. A recommendation to include the State Bar in the budget process was also raised by the Legislative Analyst's Office in its response to the State Bar's proposed case processing standards. Legislative staff interested in this proposal have indicated their intent that with this change the setting of the licensing fee would be handled through the budget process, while the policy committees in the Legislature would maintain oversight of other governance issues.

This issue has been raised by legislative staff for several years. In 2019, the annual fee legislation, SB 176, included the following in an uncodified section of legislative intent: "It is the intent of the Legislature that . . . [t]he State Bar be included as part of the annual budget process for the State of California beginning with the 2021–22 fiscal year." In a signing message on the bill, Governor Newsom noted: "I acknowledge the Legislature's intent. However, the Administration will need to work closely with the State Bar to understand the implications [of] including the Bar in the state budget process. As such, I am directing the Department of Finance to begin discussions with the State Bar but I am not committing to including the State Bar in the annual budget process."

To date, the Department of Finance has not initiated or responded to requests to engage in discussions on this matter.

The Ad Hoc Committee believes that the Board's commitment to transparency and accountability will be served by embracing the State Bar's inclusion in the state budget process. Staff note, however, that timing and resources will need to be part of any proposal to move the State Bar to the state budget process for a number of reasons, including:

- The State Bar will likely need to transition its fiscal year to align with the state fiscal year (July 1–June 30).
- Neither the State Bar's finance nor legislative affairs offices are properly resourced to handle the development of Budget Change Proposals (BCPs) for requests for increased funding, re-allocation of existing funds, addition of new positions, development of new programs, or other things for which BCPs may be required.

Fee Increase Sought for 2025/ Flexible Use of Building Sale Proceeds

Business and Professions Code¹ Section 6140 sets the base license fee for active attorneys at \$390 for 2023. Each year, the Legislature must, by statute, adopt the fee for the following year.

In January, the Board adopted as legislative priority securing a fee increase for 2024. This was an entirely appropriate response to the State Bar's budget situation, which projected that the State Bar's reserves would not be sufficient to sustain the Bar at the current funding levels (which included operational cut backs, a high vacancy rate, and hiring freezes) through 2024. The recently issued report from the State Auditor, entitled *The State Bar of California: It Will Need a Mandatory Licensing Fee Increase in 2024 to Support Its Operations*, reached the same conclusion.² The auditor recommended a \$24 increase in the licensing fee for active attorneys and a \$6 increase for inactive attorneys to address the Bar's growing costs and rebuild the reserve.³

Section 6144.1 prohibits the State Bar from expending the net proceeds from the sale of real property "for any purpose until approved by the Legislature by statute." The statute provides a small exception regarding the net proceeds from the sale of the State Bar's San Francisco office building, noting that up to 10 percent of the net proceeds may be used every fiscal year for improvement of the State Bar's discipline system. The remainder, however, may not be expended absent approval by the Legislature by statute.

State Bar staff have communicated with legislative staff that if we are able to sell the San Francisco building at an acceptable price, and the Legislature removes restrictions on how the proceeds of the sale may be used, the Bar would be able to meet its financial obligations in 2024 without a fee increase. An increase would still be required in 2025. This one-year delay in seeking a fee increase will allow the Bar to demonstrate its commitment to improvement to the

¹ All further statutory references are to this code unless otherwise noted.

² Report of the California State Auditor, April 13, 2023, may be accessed here: <http://www.bsa.ca.gov/pdfs/reports/2022-031.pdf>.

³ Id. at pp. 9,14.

Legislature and the public and to begin to rebuild the trust that is necessary to gain legislative support for a fee increase.

Additional Measures to Improve Transparency and Accountability

Staff, under the guidance of the Ad Hoc Committee on Accountability & Oversight Reforms, are continuing to explore other options to improve transparency and accountability in ways that would provide the State Bar's legislative partners with greater insight into the workings of the State Bar and the Board of Trustees. The Ad Hoc Committee debated approaches to do so, including consideration of the appointment of legislators to the Board of Trustees, that would benefit from more discussion with legislative staff before presenting fully to the Board.

OPERATIONAL PROPOSALS

In addition to the legislative proposals adopted in January 2023 as priorities, additional operational proposals have been identified for the Board's consideration.

Two-year Terms for Board of Trustees Chair

Section 6021 specifies that the term of the Board chair and vice-chair are one year. The Ad Hoc Committee on Accountability & Oversight Reforms recommends the Board amend section 6021 to provide for a two-year term for the chair of the Board. The concept of a one-year chair term is a vestige of the time when the Board included elected members and the State Bar served not just as a regulatory entity but also as a trade association. In those times, the State Bar sought to provide leadership and service opportunities for many lawyers as a means of assisting them in advancing their professional interests. The then-named "president" of the State Bar identified their priorities at the start of each year, which had the possibility of upending the work in progress at that time. With the transition to a regulatory entity and the end of elected Board positions, the "president" became the Board "chair" and their selection the responsibility of the Supreme Court. For the 2022–2023 Board year, the Supreme Court appointed Ruben Duran as Chair for a second consecutive year to allow for continuity while the State Bar was dealing with important, transformational issues.

The committee believes that a one-year term as chair can be disruptive to the State Bar accomplishing its objectives and recommends formally switching to a two-year term for chair.

Admissions Proposal

Section 6065 gives those who did not pass the California Bar Exam the opportunity, "within four months after the results" have been released, the right to "inspect his or her papers at the office of the examining committee . . . whether the record thereof is marked upon the examination or otherwise." Rule 4.62 of the State Bar Rules, on the other hand, states that within 60 days of the release of examination results, examination answers to the written portions of the examination shall be returned to applicants who have failed the California Bar Examination or who have passed or failed the First-Year Law Students' Examination. Current practice does not conform precisely to either the rule or statute. Prior to 2019, the Office of Admissions mailed exam result letters by USPS to applicants the week after the release of results, and approximately 30 days later, exam answers were mailed. Since the launch of the

Admissions Information Management System (AIMS) in 2019, however, applicant answers are posted electronically to the Applicant Portal on the same day as the release of results. Applicants are able to view, print, and download their exam results immediately upon releasing results. Results are no longer mailed to applicants, nor are applicants required to come to the State Bar to view their answers. However, due to space constraints within AIMS, the answers generally remain accessible for 30 days. Answers not downloaded or printed by the applicant within 30 days cease to be available through the Applicant Portal.⁴ The Committee of Bar Examiners recommends that the Board adopt as a legislative priority a statutory change to address the inconsistency between current practice and section 6065. At the same time, the Committee of Bar Examiners is also pursuing a rule change (also before the Board at this May meeting) to mirror current practice. Since current practice provides applicants the ability to print or download their answers, the committee believe this provides significantly better access than envisioned in the rule or statutory language. The committee also recommends striking the statutory language which suggests that there may be markings from the graders on the answers. Staff believes this language may contribute to the false expectations of applicants. Whether their answers are accessed via the Applicant Portal or in person, there are no markings for applicants to review.

STATUS UPDATES

Public Disclosures of Pending Investigations – Business and Professions Code Section 6086.1

As the Board is aware, in recent months, the issue of what information about complaints against licensees may be disclosed pursuant to section 6086.1 of the Business and Professions Code has been the subject of much consternation among the media, licensees, and legislative staff, among others. Statutory language sets forth, with specificity, the information that may be disclosed in those instances the chief trial counsel or the Board chair determine that disclosure is necessary for public protection. Although not seeking to advance changes to this statutory scheme as a legislative priority, at the March Board meeting, staff informed the Board of their plan to provide technical assistance to legislative staff by vetting language with key stakeholders. Staff has since submitted to legislative staff a series of suggested amendments to the statute that would clarify the circumstances under which the State Bar may disclose otherwise confidential information about a complaint against a licensee. The suggested language was informed by a series of conversations with attorney stakeholders, including representatives from the California Lawyers Association (CLA), Consumer Attorneys of California (CAOC), California Defense Counsel, California Employment Lawyers Association (CELA), Association of Discipline Defense Counsel (ADDC), California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE), and the California District Attorneys Association (CDAA), as well as representatives from transparency advocates including the First Amendment Coalition, the California Newspapers Association, and the Centers for Public Interest Law.

⁴ Once the exam answers are removed from the portal, applicants may still get copies of their answers from the most recently administered exam remain by submitting the Document Copy Request Form along with payment of required fee.

Generally speaking, the attorney groups and transparency groups took diametrically opposed positions. The transparency groups advocated for more disclosure than what the suggested amendments would allow—some of them arguing that all investigative files should be public. On the other hand, the attorney groups argued for less disclosure, and argued strongly that due process demands that licensees have sufficient opportunity to challenge the disclosure before any public announcement is authorized. The State Bar’s interest is in having clear language and a common understanding of what information is permitted to be disclosed, and the circumstances under which disclosure is appropriate.

Ultimately, the language crafted for legislative staff consideration would, among other things, clarify that waivers of confidentiality (i.e., the decision to disclose investigations) may extend to both closed and pending investigations; authorize the chief trial counsel or chair of the Board of Trustees to waive confidentiality if an investigation is based on allegations that include the conviction of a crime, include public imposition of discipline in another jurisdiction, or have become generally known to the public; and codifies the factors to be considered by the chief trial counsel and/or chair of the State Bar Board of Trustees in determining whether to waive confidentiality. This language is staff’s best attempt at allowing the disclosure of relevant information under appropriate circumstances to align with the State Bar’s mission of public protection, while balancing fairness to licensees. We understand that this topic is likely to be raised at the legislative oversight hearing later this month and have advised legislative staff that we are available to provide additional technical assistance on any statutory changes contemplated as requested.

FISCAL/PERSONNEL IMPACT

FEE INCREASE SOUGHT FOR 2025: As noted above, the only way in which the State Bar will be able to stave off the need for a fee increase until the 2025 licensing year will be if the Legislature removes existing obstacles to the use of net proceeds from the sale of the State Bar’s San Francisco building. Absent this, the State Bar will require a fee increase to meet its 2024 obligations.

INSPECTOR GENERAL/DISCIPLINE MONITOR OVER THE DISCIPLINE SYSTEM: The State Bar budget currently includes funding for a compliance position that is currently vacant. That position could be reclassified to create the Inspector General/Discipline Monitor position, wherever it may be housed. Depending on classification and salary, there could be additional funding needed to support this position. In addition, at least one new administrative position will be required.

NEW EX OFFICIO MEMBERS OF THE BOARD: This proposal will have minor, but absorbable costs related to travel to in person Board meetings and related expenses.

STATE BUDGET PROCESS: As noted above, additional resources will be required to roll the State Bar into the state budget process. If included in the budget process, the State Bar may realize more reasonable and appropriate fee increases than it has experienced thus far in its history.

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

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

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

- d. 2. Develop strategies to effectively investigate and prosecute attorneys who commit misconduct, regardless of the nature of their practice, including attorneys in large organizations and firms.

Goal 4. Protect the Public by Engaging Partners

- a. 1. Increase access to State Bar data and performance outcomes.

Goal 4. Protect the Public by Engaging Partners

- b. 1. Create and sustain partnerships with other organizations, entities, and stakeholder groups.

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 establishing an Inspector General/Discipline Monitor position, as contemplated by the Ad Hoc Committee on Accountability & Oversight Reforms, and directs staff to continue to explore where the position should be housed; and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority making statutory changes to the Political Reform Act and statutes relating to government contracting to strengthen conflict of interest rules that apply to the Board of Trustees

and State Bar staff in furtherance of the Board's commitment to transparency and accountability; and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority incorporating the State Bar into the state budget process so long as sufficient resources and time are provided to make the necessary alterations to current processes, and directs staff to work with the Department of Finance and the Legislature to address those matters; and it is

FURTHER RESOLVED, that the Board of Trustees revises the previously adopted legislative priority of seeking a fee increase to instead defer seeking a fee increase for one year if the State Bar is able to sell the San Francisco building at an acceptable price, and the Legislature removes restrictions on how the proceeds of the sale may be used; and it is

FURTHER RESOLVED, that the Board of Trustees directs staff to continue to explore with the Legislature other measures to enhance transparency and accountability; and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority changing the term of the Board chair from one-year to two-years; and it is

FURTHER RESOLVED, that the Board of Trustees adopts as a legislative priority amending Business and Professions Code section 6065 to align the statutory language with current practice.

ATTACHMENT LIST

None