



# The State Bar of California

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## OPEN SESSION AGENDA ITEM 50-4 MARCH 2024

**DATE:** March 21, 2024

**TO:** Members, Board of Trustees

**FROM:** George Cardona, Chief Trial Counsel

**SUBJECT:** Delegation to Chief Trial Counsel to Develop Policy Relating to Bus. & Prof. Code Section 6086.1(c)

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### EXECUTIVE SUMMARY

This item seeks delegation to the chief trial counsel to develop a policy relating to bringing requests for waivers of confidentiality to the Board for its consideration pursuant to Business and Professions Code section 6086.1, subdivision (c), and State Bar Rule of Procedure 2302.

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### BACKGROUND

Disciplinary investigations are confidential pursuant to Business and Professions Code section 6086.1, subdivision (b). [SB 40](#), signed by the governor on October 10, 2023, substantially amended section 6086.1, redefining the criteria and procedures for waiving confidentiality and, for the first time, providing a mechanism for the full Board of Trustees rather than only the chair or chief trial counsel to consider whether to waive confidentiality.<sup>1</sup>

As amended, the State Bar can only waive the confidentiality under one of two procedures. First, the full Board may vote in closed session to waive confidentiality if warranted for the protection of the public. (§ 6086.1, subd. (c)(1).) In assessing whether to waive confidentiality, the Board is required to apply a “presumption in favor of maintaining confidentiality” and consider, at a minimum, three specific statutory factors. (§ 6086.1, subd. (c)(1)(B).) Second, “the Chief Trial Counsel, with the written concurrence of the chair of the board,” may waive confidentiality without a full board vote, but only where (1) the provisions for board action are inadequate to protect the public and (2) disclosure is not only “warranted for protection of the public” but also “necessary to prevent an immediate harm to the public,” such as “ongoing

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<sup>1</sup> All further references are to the Business and Professions Code unless otherwise stated.

fraud, theft, or embezzlement.” (§ 6086.1, subd. (b)(2)(A).) In either case, the statute provides that, following waiver, the State Bar may only “confirm the fact of an investigation or proceeding,” provide a “brief factual summary to identify the subject matter,” and provide “the status of the investigation or proceeding.” (§ 6086.1, subds. (b)(2)(B) and (c)(2).)

## **DISCUSSION**

Prior to the enactment of SB 40, which, among other things, amended section 6086.1, only the chair or the chief trial counsel could waive confidentiality if either the chair or the chief trial counsel determined that doing so was warranted for the protection of the public. Section 6086.1, subdivision (c), now authorizes the full Board of Trustees to consider, in closed session, whether to waive confidentiality. In response to the statutory amendment to section 6086.1, the State Bar amended its implementing rule, Rule of Procedure 2302 to align with the new statutory requirements. The Board adopted amended Rule of Procedure 2302 at its March 1, 2024, meeting (after having been adjourned from the February 26, 2024, meeting).

Separate from the amendments to Rule of Procedure 2302, this item seeks delegation to the chief trial counsel to develop a policy for bringing requests for waiver of confidentiality to the Board for its consideration, including the timing of when to bring such requests to the Board. Any such policy will comply with section 6086.1 and State Bar Rule of Procedure 2302 and ensure that a standard practice applies to bringing requests for confidentiality to the Board for its consideration.

## **FISCAL/PERSONNEL IMPACT**

None

## **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

- b. 2. Demonstrate transparency and, within constraints imposed by law, maximize disclosure in public communication.

## **RECOMMENDATIONS**

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

**RESOLVED**, that the Board of Trustees delegates authority to the Chief Trial Counsel to develop a policy for bringing requests for waiver of confidentiality to the Board for its consideration pursuant to Business and Professions Code section 6086.1 and State Bar Rule of Procedure 2302.

**ATTACHMENT LIST**

None