

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE
PROPOSED CALIFORNIA RULE OF COURT REGARDING FINGERPRINTING OF ACTIVE LICENSED ATTORNEYS

SUPREME COURT
FILED

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Deputy



PREPARED BY
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE
PROPOSED CALIFORNIA RULES OF COURT

I. INTRODUCTION

This request is submitted in response to this Court’s October 20, 2017, letter directing the State Bar to present to the Court a rule to “facilitate implementation of the fingerprinting requirement for all State Bar applicants and all active attorney members” following Senate Bill (“SB”) 36’s recent amendment to Business and Professions Code section¹ 6054.

The Board of Trustees (“Board”) of the State Bar of California (“State Bar”) respectfully requests that the California Supreme Court (“Court”) approve a proposed Rule of Court² regarding the fingerprinting of active licensed attorneys. The text of the proposed Rule is provided as Appendix 1.

II. BACKGROUND

A. Recent Amendments to Business & Professions Code section 6054

Since 1987, section 6054 required applicants for admission or reinstatement to the State Bar to be fingerprinted and for such fingerprints to be retained for “purposes of criminal arrest notification.” On January 1, 2018, SB 36 amended section 6054 to authorize the State Bar to require *attorneys* to be fingerprinted for

¹ All section references are to the Business and Professions Code unless otherwise stated.

² Rule references are to the California Rules of Court unless otherwise stated.

the purpose of obtaining criminal conviction information and to discover prior and subsequent criminal arrests.

The full text of section 6054, as amended by SB 36, is as follows:

(a) State and local law enforcement and licensing bodies and departments, officers and employees thereof, and officials and attachés of the courts of this state shall cooperate with and give reasonable assistance and information, including the providing of state summary criminal history information and local summary criminal history information, to the State Bar of California or any authorized representative thereof, in connection with any investigation or proceeding within the jurisdiction of the State Bar of California, regarding the admission to the practice of law or discipline of attorneys or their reinstatement to the practice of law.

(b) The State Bar of California shall require that an applicant for admission or reinstatement to the practice of law in California, or may require a member to submit or resubmit fingerprints to the Department of Justice in order to establish the identity of the applicant and in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states. The information obtained as a result of the fingerprinting of an applicant or member shall be limited to the official use of the State Bar in establishing the identity of the applicant and in determining the character and fitness of the applicant for admission or reinstatement, and in discovering prior and subsequent criminal arrests of an applicant, member, or applicant for reinstatement. The State Bar shall notify the Department of Justice about individuals who are no longer members and applicants who are denied admission to the State Bar within 30 days of any change in status of a member or denial of admission. All fingerprint records of applicants admitted or members reinstated, or provided by a member, shall be retained thereafter by the Department of Justice for the limited purpose of criminal arrest notification to the State Bar.

(c) The State Bar shall request from the Department of Justice subsequent arrest notification service, as provided pursuant to Section 11105.2 of the Penal Code, for applicants to, and members of, the State Bar.

(d) If required to be fingerprinted pursuant to this section, a member of the State Bar who fails to be fingerprinted may be enrolled as an inactive member pursuant to rules adopted by the board of trustees.

(e) The State Bar shall report to the Supreme Court and the Legislature by March 15, 2018, regarding its compliance with the requirements of this section.

Section 6054 authorizes the State Bar to require submission or resubmission of attorney fingerprints to the California Department of Justice (“DOJ”), and requires that “[a]ll fingerprint records of applicants admitted or members reinstated, or provided by a member, be retained thereafter by the Department of Justice for the limited purpose of criminal arrest notification to the State Bar.” The statute, however, is silent with respect to how the State Bar may implement attorney fingerprinting requirements, giving no specific compliance timeframe nor any designation as to who should bear the costs associated with the processing and furnishing of submissions provided by members. The amendment removed language mandating that the State Bar bear costs associated with the processing of applicant fingerprints.

Following the approval of SB 36, on October 20, 2017, Tani G. Cantil-Sakauye, Chief Justice of California, sent a letter to State Bar President Michael Colantuono and Executive Director Leah Wilson, addressing the then-upcoming

amendments.³ The letter directed the State Bar “to consider and present to the [C]ourt any proposed court rules that may be appropriate to facilitate implementation of the fingerprinting requirement for all State Bar applicants and all active attorney members.” *Id.*

B. History of the Current Proposal

Pursuant to the Court’s directive, at its November 3, 2017, meeting the Board authorized a 45-day public comment period for a proposed Court Rule requiring all active licensed attorneys to submit or resubmit fingerprints to the DOJ by a set deadline and to pay the fingerprint processing and furnishing costs in connection with such submissions.⁴ The proposed Rule did not address fingerprinting for applicants for admission to the State Bar because all applicants are currently fingerprinted pursuant to section 6054.

The public comment period began on November 9, 2017, and closed on December 26, 2017. On December 7, and December 11, 2017, the State Bar sent out two emails to California attorneys (both active and inactive) informing them that the “State Bar plans to re-fingerprint active attorneys.” The email directed attorneys to the State Bar website page to review the proposed Rule. A link to the public comment page was also featured on the State Bar homepage for approximately three weeks. A short description regarding the Rule and a link to

³ The October 20, 2017, letter is provided as Appendix 2.

⁴ The November 3, 2017, Board Agenda Item is provided as Appendix 3.

the public comment page was also posted multiple times on the State Bar's public Facebook page and Twitter account.

The State Bar received 2,604 public comments. The full text of these comments was provided as Attachment 4 to the January 27, 2018, Board Agenda Item, herein provided as Appendix 4. Although the comments were overwhelmingly negative, the vast majority of comments were received from attorneys, a group not expected to view the proposed Rule favorably. Staff created a summary of the issues, concerns, reactions and/or questions raised in the public comments, organized into 24 categories, and provided accompanying responses. *See generally*, Appendix 4.

There were also a small number of comments received in support of the fingerprinting Rule. *See* Appendix 4 at 13-14. These comments focused on the strong public policy reasons for receiving attorney's criminal information in order for the State Bar to ensure that licensees are not committing criminal acts that may constitute disciplinable conduct. *Id.*

Upon consideration of the public comments, and after additional staff analysis, on January 27, 2018, the Board approved various modifications to the proposed Rule. These modifications did not change the purpose of the Rule, which is to require licensed attorneys to be fingerprinted in accordance with State Bar

procedures, and to pay the fingerprint processing and furnishing costs in connection therewith. The Board approved the following modifications:

- Clarification of the language requiring attorneys to be fingerprinted;
- Clarification as to which attorneys are required to be fingerprinted;
- Process for exempting attorneys residing in foreign jurisdictions who do not have access to fingerprinting services;
- Authorization to require re-fingerprinting of attorneys after December 1, 2019, as needed;
- Addition of language regarding confidentiality of information obtained by the State Bar from the DOJ;
- Addition of requirement that the Board develop procedures for granting waivers of fingerprint processing costs for licensed attorneys with demonstrable financial hardship; and
- Process for exempting attorneys who are unable to be fingerprinted.

See Attachment 1 to Appendix 4.

The Board also authorized staff to add language mandating fingerprinting requirements for attorneys permitted to practice in California pursuant to California Rule of Court Rules 9.44 through 9.46.

The amended proposed Rule was submitted for a 30-day public comment period from February 1, 2018, through March 3, 2018. On February 16, 2018, the State Bar sent an email to all California attorneys alerting them of the amended proposed Rule and the public comment process. The State Bar received 169 new public comments. The new comments overwhelmingly reflected the same concerns and themes that were addressed in the January 27, 2018, Board Agenda item (Appendix 4) on this topic. The only exceptions were two comments seeking clarification in the language regarding fingerprinting active attorneys in foreign jurisdictions. In response to these comments, the Board approved a minor clarification to the proposed Rule. *See* March 9, 2018, Board Agenda Item, provided herein as Appendix 5.

On March 9, 2018, the Board passed a resolution directing staff to transmit the amended proposed Rule to the Supreme Court with a recommendation of approval. On the same day, the Board approved a notification and penalty schedule, reflecting the requirement that all active attorneys be fingerprinted by December 1, 2019. The Board also approved a policy for fee reductions for attorneys with demonstrable financial hardship. Lastly, the Board authorized staff to make available for a 30-day public comment a proposed State Bar Rule regarding the impact of non-compliance with State Bar fingerprinting requirements. *See* Appendix 5.

III. SUPREME COURT AUTHORITY TO APPROVE THE PROPOSED RULE

The Court has inherent and primary constitutional authority over attorney admissions and the practice of law in California. *In Re Attorney Discipline*, (1998) 19 Cal.4th 582. In sections 6076 and 6077, the Legislature acknowledges the Court's authority over the professional conduct of licensed attorneys. While the Legislature may enact statutes relating to the minimum qualifications required for the practice of law, the Court is the final policy maker and may establish more stringent requirements through its inherent powers over the practice of law:

Legislative regulations regarding the qualifications of attorneys are, at best, but minimum standards unless the courts themselves are satisfied that such qualifications as are prescribed by legislative enactment are sufficient ... In other words, the courts in the exercise of their inherent power may demand more than the legislature has required ... [W]hen the matter at issue involves minimum standards for engaging in the practice of law, it is this court and not the Legislature which is the final policy maker.

In re Attorney Discipline System, supra, 19 Cal.4th at 602.

In adopting a Rule regarding fingerprinting, the Court would be acting pursuant to its inherent and primary power over the practice of law.

IV. POLICY CONSIDERATIONS AND BASIS OF THE PROPOSAL

The proposed Rule is submitted to the Court in response to this Court's October 20, 2017, directive. This Court has made the determination that "requiring fingerprints of all applicants and active members is a critical component of public

protection and strengthens the State Bar's discipline system." Appendix 2. To be clear, fingerprinting attorneys is the only way for the State Bar to receive criminal record information and subsequent notification of an attorney's criminal activity. California's interest in regulating the legal profession and protecting the public from attorneys who have been convicted of crimes cannot seriously be questioned.

On June 28, 2017, the State Bar entered into a Subsequent Arrest Notification⁵ contract with the DOJ for applicants to the State Bar (the "Applicant Contract"). Pursuant to the Applicant Contract, the DOJ is now retaining applicant fingerprint records in order to notify the State Bar of subsequent arrests and convictions of those individuals. Thereafter, on August 28, 2017, the State Bar entered into a second contract with the DOJ for licensees (the "Licensee Contract"). However, the DOJ is unable to provide the State Bar arrest notification for licensees because, prior to the execution of the Applicant Contract, the DOJ was not retaining fingerprint records of individuals applying to the State Bar.

Although all State Bar applicants submitted fingerprints at one point in their admissions process, the State Bar had only retained fingerprint records for a small subset of these applicants. Specifically, at the time that the Applicant Contract was executed, the State Bar had possession of approximately 3,000 fingerprint cards. Of these, approximately 1,500 are associated with now active licensed attorneys.

⁵ The term "arrest notification" includes notification of both arrests and the dispositions thereof. See Penal Code section 11105.2(a).

Following the execution of the Licensee Contract, the State Bar submitted the fingerprint records of these attorneys to the DOJ.⁶ Thus, pursuant to the Licensee Contract, the DOJ will provide subsequent arrest notification services for these attorneys. However, the only way for the State Bar to receive arrest notification for all other active licensed attorneys is for those individuals to submit new fingerprint records to the DOJ to be retained pursuant to the Licensee Contract. *See Appendix 3, at 3.*

Accordingly, the State Bar has proposed a Rule that requires all attorneys, with the exception of those for whom the State Bar is already receiving subsequent arrest notification services (i.e, the approximately 1,500 attorneys referenced above), to be fingerprinted by December 1, 2019, based on a schedule developed by the Board.

The Rule also authorizes the State Bar to have ongoing authority to require fingerprinting of attorneys after December 1, 2019, for whom the Bar is not receiving subsequent arrest notification services, as well as for attorneys who transfer to active status after December 1, 2019. This will ensure that the State Bar is in continued compliance with section 6054.

⁶ The State Bar has also submitted the hard copy fingerprint cards of approximately 1,500 applicants whose applications are still pending, so that they can be retained pursuant to the Applicant Contract.

A. Attorneys Required to be Fingerprinted

The proposed Rule mandates fingerprinting for *active* attorneys only. Not only is the Court's directive limited to "active" licensees, but inactive attorneys are not able to practice law in California, so the public protection concerns are lessened. The proposed Rule requires that inactive attorneys be fingerprinted prior to being placed on active status.

The Rule also provides an exemption for attorneys in foreign countries if the jurisdiction does not have fingerprinting services or the attorney is unable to access or afford such services. An example may be an attorney in the military. However, the attorney must provide fingerprints if he or she returns to the United States for a period of 60 days or more. This exemption is narrow, as most countries have a United States embassy which will provide fingerprinting services. The rationale for this exemption is the substantial hardship imposed on this group of attorneys if forced to travel to another country, or to the United States, to comply with the fingerprinting requirement.

Lastly, the Rule allows the State Bar to require attorneys admitted to practice in California pursuant to California Rule of Court, rules 9.44 (registered foreign legal consultants), 9.45 (registered legal services attorneys) and 9.46 (registered in-house counsel) to be fingerprinted if the State Bar is not already receiving subsequent arrest notification services for these attorneys. Attorneys admitted to

practice in California under these rules are required to pass a State Bar moral character determination, which includes fingerprinting pursuant to section 6054. Thus, the DOJ will be retaining the fingerprints of attorneys who applied for admission under these Rules after the execution of the Applicant Contract, for the purpose of subsequent arrest notification. The Court Rules also require that these attorneys submit to the disciplinary authority of the State Bar. *See* Rules 9.44-9.46.

B. Confidentiality

Section 6054 states that “The information obtained as a result of the fingerprinting of an applicant or member shall be limited to the official use of the State Bar in establishing the identity of the applicant and in determining the character and fitness of the applicant for admission or reinstatement, and in discovering prior and subsequent criminal arrests of an applicant, member, or applicant for reinstatement.” The statute is silent regarding the confidentiality of information specifically obtained through the subsequent arrest notification system. Accordingly, the State Bar proposes language mandating that such information shall be “Confidential and shall be used solely for State Bar licensing and regulatory purposes.”

C. Fingerprint Submission and Processing Costs

SB 36 eliminated language in section 6054 that previously required “all costs of providing criminal history information, and the processing of fingerprints for, the State Bar, except for print furnishing and encoding, to be borne by the State Bar.” The total cost of “fingerprint furnishing,” plus the cost of “fingerprint processing” associated with the DOJ and FBI background checks on all active licensed attorneys in the State of California is estimated to total \$15.51 million. *See* Appendix 3, at 7.

The proposed Rule requires licensed attorneys to bear all costs associated with the submission of fingerprints to the DOJ for processing (costs for running the criminal background check, which is \$49 for both a DOJ and FBI record check), as well as print furnishing costs (the cost to the vendor of physically fingerprinting the individual). This is in line with the procedures of various other licensing entities. *See e.g.*, California Code of Regulations, title 16 (“16 CCR”), section 2010.05 (requiring veterinarians to submit fingerprints for the purpose of conducting criminal records searches “if an electronic record of the submission of fingerprints no longer exists or was never created” and that “the licensee shall pay any costs for furnishing the fingerprints and conducting the searches.”); 16 CCR § 1132 (dental hygienists); 16 CCR § 2517.5 (vocational nurses); 16 CCR §

1399.419.2 (acupuncturists); 16 CCR § 2575.5 (psychiatric technicians); 16 CCR § 37.5 (accountants)⁷.

The Rule also mandates that the Board develop procedures for “granting waivers of the processing costs of running DOJ and FBI background checks for licensed attorneys with demonstrable financial hardship.” Similar to fee reductions and waivers in licensee dues, this will assist low-income attorneys with fulfilling their licensing requirements. On March 9, 2018, the Board adopted a policy for providing such waivers. *See* Appendix 5.

D. Attorneys Who are Physically Unable to be Fingerprinted

The last section of the proposed Rule provides specific exemptions for attorneys who are unable to be fingerprinted due to “disability, illness, accident or other circumstances beyond their control.” The language in this section was modeled after Penal Code section 11105.7, to assure full compliance with the Americans with Disabilities Act and the Fair Employment and Housing Act. The Rule also permits the DOJ to make an independent determination that the licensee is unable to submit legible fingerprints. This would apply in cases where a

⁷ There are also similar regulations that contain identical language regarding the submission of fingerprints in the event the fingerprints “do not exist,” but do not specify who will bear the costs for such submission. *See e.g.*, 16 CCR § 1399.722 (requiring podiatrists to submit a full set of fingerprints to the DOJ if, “regardless of the date of initial licensure”, “an electronic record of the submission of fingerprints no longer exists.”); 16 CCR § 4120 (requiring applicants for renewal of occupational therapy license to submit fingerprints to the DOJ if fingerprints had not been previously submitted or for whom a record of submission of fingerprints no longer exists); 16 CCR § 1419 (same requirement for renewal of registered nurses).

licensee may be able to be fingerprinted, but those fingerprints are not readable.

E. Non-Compliance with Fingerprinting Requirements

Section 6054(d) states that “If required to be fingerprinted pursuant to this section, a member of the State Bar who fails to be fingerprinted may be enrolled as an inactive member pursuant to rules adopted by the board of trustees.”

Accordingly, the proposed Rule reflects this requirement by providing that “[f]ailure to be re-fingerprinted if required may result in involuntary inactive enrollment pursuant to Business and Professions Code section 6054(d).”

On March 9, 2018, the State Bar authorized a 30-day public comment period for a proposed State Bar Rule regarding non-compliance of attorney fingerprinting requirements. The proposed Rule mandates that attorneys will be enrolled as inactive if it is determined that the attorney is not in compliance with State Bar fingerprinting requirements. The public comment period began on March 21, 2018, and ends on April 20, 2018. No public comments have been received as of the date of this filing.


V. CONCLUSION

The Board of Trustees of the State Bar of California respectfully requests that the Supreme Court approve the proposed California Rule of Court, as set forth in Appendix 1.

DATED: March 29, 2018

Respectfully submitted,

VANESSA L. HOLTON
ROBERT G. RETANA
SUZANNE C. GRANDT

By: 

VANESSA L. HOLTON
The State Bar of California


**WORD COUNT CERTIFICATE PURSUANT TO
CALIFORNIA RULE OF COURT 8.504(d)(1)**

Pursuant to rule 8.504(d)(1) of the California Rules of Court, I hereby certify that this request contains 3,445 words. I have relied on the word count function of the computer program used to prepare this request.

DATED: March 29, 2018

Respectfully submitted,

VANESSA L. HOLTON
ROBERT G. RETANA
SUZANNE C. GRANDT

By: 

VANESSA L. HOLTON
The State Bar of California

APPENDIX 1

1. **Licensed Attorney Fingerprinting**

a) **Subsequent Arrest Notification:** The State Bar shall enter into a contract with the California Department of Justice for Subsequent Arrest Notification services for licensed active California attorneys and attorneys permitted to practice in the State of California pursuant to California Rule of Court Rules 9.44, 9.45 and 9.46.

(i) The State Bar is already receiving Subsequent Arrest Notification services for some attorneys. The State Bar will consider these attorneys as having already satisfied the fingerprinting requirement of this rule and are thereby exempt. The State Bar shall notify all attorneys to check their MyStateBar Profile for information as to whether they have been deemed to have already satisfied the requirement.

b) **Active Licensed Attorneys:** Each active licensed attorney, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.

c) **Inactive Licensed Attorneys:** Inactive licensed attorneys, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted prior to being placed on active status.

d) **Active Licensed Attorneys in Foreign Countries:** Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule shall have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction where the attorney is physically located, or the attorney is able to provide evidence that he/she is unable to access or afford such services, the attorney must notify the State Bar using a form available through the attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States for a period of not less than 60 days.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation that requires all attorneys required to be fingerprinted under section 1(b) to be fingerprinted by December 1, 2019.

The State Bar has ongoing authority to require re-fingerprinting after December 1, 2019, for attorneys for whom it is not receiving subsequent arrest notification services and for attorneys transferring to active status. Failure to be re-fingerprinted if required may result in involuntary inactive enrollment pursuant to Business and Professions Code section 6054(d).

The State Bar has authority to require re-fingerprinting after December 1, 2019, for attorneys permitted to practice in the State of California pursuant to California Rule of Court Rules 9.44, 9.45, and 9.46 for whom it is not receiving subsequent arrest notification services. Failure to be re-fingerprinted if required may result in a State Bar determination that the attorney cease providing legal services in California.

3. Information Obtained by Subsequent Arrest Notification; Limitations on Disclosure

Any information obtained by the State Bar through the Subsequent Arrest Notification System shall be Confidential and shall be used solely for State Bar licensing and regulatory purposes.

4. Fingerprint Submission and Processing Costs

Except as described in 4(a), all costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

a) The Board of Trustees of the State Bar must develop procedures for granting waivers of the processing costs of running DOJ and FBI background checks for licensed attorneys with demonstrable financial hardship.

5. Attorneys Who are Physically Unable to be Fingerprinted

a) If the DOJ makes a determination pursuant to California Penal Code section 11105.7 that the attorney is presently unable to provide legible fingerprints, the attorney will have been deemed to have complied with the requirement of Section 1(b).

b) Attorneys may also submit notification to the State Bar directly through their MyStateBar profile that they are unable to submit fingerprints due to disability, illness, accident, or other circumstances beyond their

control. The State Bar will evaluate the notification and may require additional evidence. If the State Bar determines that the attorney is unable to submit fingerprints based on the information provided, the attorney will have been deemed to have complied with the requirement of Section 1(b).

c) This section shall only apply to those persons who are unable to supply legible fingerprints due to disability, illness, accident, or other circumstances beyond their control and does not apply to persons who are unable to provide fingerprints because of actions they have taken to avoid submitting their fingerprints.

APPENDIX 2



Supreme Court of California

350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4797

TANI G. CANTIL-SAKAUYE
CHIEF JUSTICE OF CALIFORNIA

(415) 865-7060

October 20, 2017

Michael G. Colantuono, President, Board of Trustees
Leah Wilson, Executive Director
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: State Bar Fingerprinting

Dear Mr. Colantuono and Ms. Wilson:

As you know, Senate Bill No. 36 amended Business and Professions Code section 6054 to authorize the State Bar of California to require any applicant for admission and any current member of the State Bar to submit or resubmit fingerprints to the Department of Justice in order to establish the applicant's identity and to determine whether the applicant or member has a record of criminal conviction in this state or elsewhere. Such fingerprint records must be retained by the Department of Justice for the limited purpose of criminal arrest notification to the State Bar. Requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system. Accordingly, now that Governor Brown has signed Senate Bill No. 36, the State Bar is directed to consider and present to the court any proposed court rules that may be appropriate to facilitate implementation of the fingerprinting requirement for all State Bar applicants and all active attorney members.

Sincerely,

A handwritten signature in blue ink, reading "T. Cantil-Sakauye", is positioned below the word "Sincerely,".

Tani G. Cantil-Sakauye

cc: Hannah-Beth Jackson, Chair of the Senate Judiciary Committee
Mark Stone, Chair of the Assembly Judiciary Committee

APPENDIX 3

OPEN SESSION
BOT AGENDA ITEM NO. 701
NOVEMBER 2017

DATE: November 3, 2017

TO: Members, Board of Trustees

FROM: State Bar Staff

SUBJECT: Proposed California Rule of Court Regarding Fingerprinting of Active Licensed Attorneys – Request for Public Comment

EXECUTIVE SUMMARY

This agenda item requests the Board of Trustees to authorize a 45-day public comment period for a proposed court rule to implement a fingerprinting requirement for active licensed attorneys under the recent amendments to Business and Professions Code section¹ 6054, effective January 1, 2018. Pursuant to the California Supreme Court's recent directive, the proposed rule requires all active licensed attorneys to submit or resubmit fingerprints to the Department of Justice by a set deadline and to pay the fingerprint processing and furnishing costs in connection with such submissions.

BACKGROUND

On October 20, 2017, Tani G. Cantil-Sakauye, Chief Justice of California, sent a letter to State Bar President Michael Colantuono and Executive Director Leah Wilson, regarding Senate Bill ("SB") No. 36's recent amendment to section 6054 authorizing the State Bar of California ("State Bar") to require attorneys to submit or resubmit fingerprint records to the California Department of Justice ("DOJ") in order to receive subsequent arrest notification for these individuals. The Court's letter is Attachment 1. The full text of section 6054, as amended by SB 36, is as follows:

(a) State and local law enforcement and licensing bodies and departments, officers and employees thereof, and officials and attachés of the courts of this state shall cooperate with and give reasonable assistance and information, including the providing of state summary criminal history information and local summary criminal history information, to the State Bar of California or any authorized representative thereof, in connection with any investigation or proceeding within the jurisdiction of the State Bar of California, regarding the admission to the practice of law or discipline of attorneys or their reinstatement to the practice of law.

(b) The State Bar of California shall require that an applicant for admission or reinstatement to the practice of law in California, or may require a member to submit or resubmit fingerprints to the Department of Justice in order to establish

¹ Unless otherwise stated, all section citations are to the Business and Professions code.

the identity of the applicant and in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states. The information obtained as a result of the fingerprinting of an applicant or member shall be limited to the official use of the State Bar in establishing the identity of the applicant and in determining the character and fitness of the applicant for admission or reinstatement, and in discovering prior and subsequent criminal arrests of an applicant, member, or applicant for reinstatement. The State Bar shall notify the Department of Justice about individuals who are no longer members and applicants who are denied admission to the State Bar within 30 days of any change in status of a member or denial of admission. All fingerprint records of applicants admitted or members reinstated, or provided by a member, shall be retained thereafter by the Department of Justice for the limited purpose of criminal arrest notification to the State Bar.

(c) The State Bar shall request from the Department of Justice subsequent arrest notification service, as provided pursuant to Section 11105.2 of the Penal Code, for applicants to, and members of, the State Bar.

(d) If required to be fingerprinted pursuant to this section, a member of the State Bar who fails to be fingerprinted may be enrolled as an inactive member pursuant to rules adopted by the board of trustees.

(e) The State Bar shall report to the Supreme Court and the Legislature by March 15, 2018, regarding its compliance with the requirements of this section.

While section 6054 authorizes the State Bar to require submission or resubmission of attorney fingerprints to the DOJ, it does not obligate the State Bar to do so. The statute is also silent in regard to how the State Bar may implement attorney fingerprinting requirements, including with respect to a compliance timeframe and who should bear the costs associated with the processing and furnishing of these submissions. The statute also removes language mandating that the State Bar bear costs associated with the processing of applicant fingerprints.

The Supreme Court's October 20, 2017, letter obligates the State Bar to require attorney submission of fingerprints to the DOJ. It states: "requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system." See Attachment 1. In its letter, the Court directs the State Bar "to consider and present to the [C]ourt any proposed court rules that may be appropriate to facilitate implementation of the fingerprinting requirement for all State Bar applicants and all active attorney members." *Id.*

In connection with the statutory changes, State Bar staff has been re-evaluating its current policies and procedures for applicant fingerprinting, and determining what processes are necessary for the submission of active attorney fingerprints to the DOJ and the subsequent receipt of criminal information. This evaluation includes an analysis of anticipated operational impact on the State Bar, including a review of staffing needs. Accordingly, this agenda item provides the Board with an overview of these analyses and a proposed court rule requiring all active licensed attorneys² to submit or resubmit fingerprints to the DOJ. The proposed rule also includes a timeframe for compliance with this requirement and a requirement that licensed attorneys bear all costs associated with fingerprint submission.

² State Bar applicants are already required to be fingerprinted pursuant to section 6054.

Pursuant to State Bar Board Book Rule 1.10, staff recommends that the Board request a 45-day public comment period on the proposed rule.

DISCUSSION

I. The State Bar's Subsequent Arrest Notification Contracts with the DOJ

As reported to the Board earlier this year, staff determined that it was necessary for the State Bar to enter into a contract for Subsequent Arrest Notification ("SAN") in order to comply with section 6054's fingerprint retention requirements. Prior to SB 36, section 6054 required that only State Bar applicants be fingerprinted and that such fingerprint records "be retained thereafter for the limited purpose of criminal arrest notification." Although the State Bar was requiring applicants for admission to be fingerprinted, the State Bar had not entered into a contract for the DOJ to retain these fingerprints. As such, the State Bar was not receiving SANs for any applicant after admission to the State Bar.³

Upon realizing the error, the State Bar entered into a SAN contract with the DOJ on June 28, 2017, effective July 1, 2017 (the "Applicant Contract"). Attachment 2 is the Applicant Contract. Pursuant to the Applicant Contract, the DOJ is now retaining applicant fingerprint records in order to notify the State Bar of subsequent arrests of those individuals.

The State Bar subsequently entered into a second contract with the DOJ for active licensees (the "Licensee Contract"). Attachment 3 is the Licensee Contract.

Although the Licensee Contract currently provides for SAN services for all licensed attorneys, the DOJ is unable to provide arrest notification for the vast majority of this population. This is because fingerprint records previously submitted by licensed attorneys as part of their moral character application were not retained by the DOJ because no contract was previously in place permitting such retention.

As also previously explained to the Board, the State Bar has only retained fingerprint records of a small subset of applicants who submitted fingerprints using hard copy fingerprint cards within the past three years. Of these applicants, approximately 1,500 are now active licensed attorneys. Following the execution of the Licensee Contract, the State Bar submitted the fingerprint records of these attorneys to the DOJ⁴. Thus, pursuant to the Licensee Contract, the DOJ will provide SAN services for these attorneys. However, the only way for the State Bar to receive arrest notification for all other active licensed attorneys is for those individuals to submit new fingerprint records to the DOJ to be retained pursuant to the Licensee Contract.

³ The term "arrest notification" includes notification of both arrests and the dispositions thereof. See Cal Pen. Code § 11105.2(a).

⁴ The State Bar has also submitted the hard copy fingerprint cards of approximately 1,500 applicants whose applications are still pending, so that they can be retained pursuant to the Applicant Contract.

II. Operational Analysis

A. Fingerprint Processing and Subsequent Arrest Notification Review and Response Procedures

In order to handle the influx of criminal information that will flow from the State Bar's two contracts with the DOJ, staff has re-evaluated its current processes and created certain new procedures.

1. New Procedures Related to State Bar Applicants

Pursuant to the Applicant Contract, effective July 1, 2017, enrollment in the SAN system now occurs as a byproduct of the criminal background check run on all applicants to the State Bar. Thus, following an applicant's submission of fingerprints to the DOJ, the Office of Admissions ("Admissions") receives electronic notification through a secure File Transfer Protocol ("FTP"), indicating whether a criminal history for the applicant was found. When a criminal history is found, Admissions receives this information electronically through the same secure FTP. Admissions will continue to receive notification of any criminal information until the applicant is admitted to the State Bar. While it is not anticipated that a large number of applicants will pick up additional arrests, charges, or convictions during the limited amount of time that most applicants are in this status, there are applicants who spend years attempting to pass the bar exam and whose moral character evaluation will need to be reconsidered by Admissions when new information comes to light as a result of SAN. Admissions has yet to receive any SAN hits on applicants who were fingerprinted since July 1, 2017, and staff is working to develop guidelines governing the review of this information when it is eventually received.

Another process for Admissions to manage is the notification to the DOJ when an applicant is denied admission to the State Bar. The State Bar is obligated to notify the DOJ when an applicant is denied admission so that the DOJ can destroy those individuals' fingerprints. See Cal Pen Code § 11105.2(f); section 6054, as amended by SB 36. An applicant is denied admission to the State Bar if he or she has not been admitted to the State Bar within three years of submitting a moral character application, provided there is no approved extension. An applicant who fails the bar exam may retake the exam within this time period without needing to be re-fingerprinted each time he or she registers for the exam.

On October 3, 2017, the Committee of Bar Examiners approved an applicant fingerprint processing protocol requiring Admissions to inform the DOJ when SAN is no longer required for individual applicants whose positive moral character determination has expired, their application has been abandoned, or who are otherwise ineligible for admission. Admissions staff will review moral character applications monthly to determine which applicants have applications meeting these requirements. The names of those applicants will then be transmitted to the DOJ through a formal "No Longer Interested" notification form each month.

2. New Procedures Related to Currently Licensed Attorneys

To effectuate the submission of licensed attorney fingerprints to the DOJ and the receipt of SAN for licensed attorneys, staff plans to upload a pre-populated and individualized Live Scan form on each attorney's My State Bar Profile page. These forms will include essential information for appropriate fingerprint routing: a "Mail Code" and "Applicant Type" agreed upon by the DOJ and the State Bar.

After an attorney has submitted fingerprints through the Live Scan process using this pre-populated form, the DOJ will run both a California and a national (FBI) background check and transmit that data to the State Bar. Receipt of the information from the DOJ will trigger the automatic population of the State Bar's records and compliance database indicating that the attorney has complied with the fingerprinting requirement and is now registered in the SAN system. Background checks that contain criminal history information will be routed to a secure terminal in the Office of Research and Institutional Accountability ("ORIA"), where dedicated staff will use specified decision rules to determine what additional steps, if any, need to be taken.

These decision rules, which have not yet been finalized, will address two different groups of licensed attorneys:

a. *Attorneys whose criminal record preceded admission to the State Bar.* If the date of the criminal history information *preceded* the completion of the moral character determination, ORIA staff will research the case to determine if the information found in the criminal background check was already disclosed as part of the attorney's moral character application. If the information was already disclosed, then the criminal history record will be destroyed and no further action will be taken. If the information was *not* already disclosed, staff will forward the record to Admissions for further analysis to determine what action, if any, should be taken.

b. *Attorneys whose criminal record occurred after admission to the State Bar:* If the date of the criminal history information follows the attorney's admission to the State Bar, ORIA staff will research the case to determine if the information found in the criminal background check was already disclosed to the Office of Chief Trial Counsel ("OCTC"). If the information was already known to OCTC, then the criminal history record will be destroyed and no further action will be taken. If the information in the criminal history was *not* already known to OCTC, then ORIA staff will forward the record to OCTC for further analysis to determine what action, if any, should be taken.

It will also be necessary to remove attorneys from the SAN system when they transition to certain statuses. Similar to the process being developed in Admissions, staff is working to develop a monthly routine for identifying attorneys who permanently resign from the State Bar, are disbarred, or die in order to submit this information to the DOJ through the "No Longer Interested" form⁵.

B. Implementation Costs

The costs associated with the fingerprinting of active licensed attorneys are outlined below. The State Bar will also incur costs associated with the implementation of the above processes and procedures. Estimates of these costs are based on the number of applicants and active licensed attorneys shown below in Table 1.

⁵ Cal Pen Code § 11105.2(d) requires the State Bar to immediately notify the DOJ when a "license or certification is revoked" and "when [an] applicant may no longer renew or reinstate the license or certificate."

Table 1

Licensed Attorneys in California	
Active	189,167
Inactive	57,434
Average Annual Number of Moral Character Applications	
	7,807

1. Fingerprint Processing and Furnishing Costs

It costs \$32 for the DOJ to process fingerprint records and an additional \$17 for the FBI background check, for a total cost of \$49 per individual. See <https://oag.ca.gov/sites/all/files/agweb/pdfs/fingerprints/forms/fees.pdf>. Prior to the recent amendments to section 6054, “[A]ll costs of providing criminal history information to, and the processing of fingerprints for, the State Bar, except for print furnishing and encoding, as required by this section, shall be borne by the State Bar.” SB 36 removes this language from section 6054, leaving the statute silent as to the responsibility for fingerprinting costs for applicants and licensed attorneys.

Applying the costs of fingerprint processing to all active licensed attorneys in California would result in a cost of approximately \$9.27 million. See Table 2.

Table 2

Cost of Enrolling Active Attorneys in SAN System	
DOJ & FBI Background Checks (per attorney)	\$49
Costs for 189,167 Active Attorneys	\$9,269,183

In addition the costs for processing, there is a cost for the actual fingerprint “furnishing.” This is a term used for the process performed by the service center that physically takes fingerprint images and submits them to the DOJ, using either Live Scan technology (California residents) or hard copy fingerprint cards (out-of-state residents). Historically, applicants have been required to pay these costs.

A review of fingerprint servicing locations in the State of California indicates that, depending on location, these services range in cost from \$5 through \$100 with an average cost of \$33. See <https://oag.ca.gov/fingerprints/locations> (listing service locations by county and the costs charged at each location). While many sheriff and police departments offer these services for \$5 (for example, the Lassen County Sheriff’s Department and Mariposa County Sheriff’s Department), many other departments charge much higher amounts. For example, the Richmond Police Department charges \$59, the Pinole Police Department charges \$50, and the Contra Costa Sheriff’s Department charges \$35. Certain jail facilities, such as the Mono County Jail, provide free fingerprint services.

Using the average cost of \$33 per fingerprint, the total cost of fingerprint furnishing for licensed attorneys is \$6.24 million dollars. See Table 3.

Table 3

Cost of Fingerprint Furnishing

Fingerprint "Furnishing" Cost (average per attorney)	\$33
Total Cost for Fingerprinting 189,167 Active Attorneys	\$6,242,511

Combined, the total cost of fingerprint furnishing plus the cost of conducting DOJ and FBI background checks on all active licensed attorneys in the State of California is approximately \$15.51 million. As discussed in more detail below, staff proposes that a court rule mandate that licensed attorneys bear these costs.

2. Anticipated Staffing Needs

While the costs of background checks and fingerprint furnishing are straightforward, calculating the staffing needs for implementing this policy requires additional information, much of which needs to be estimated. The rate at which attorneys are actually charged and convicted of crimes, the number of these cases that have gone un-reported, and the severity of the crimes are all unknown. Nor is it known how many attorneys will fail to comply with a fingerprinting requirement, need their status changed for such failure to comply, will contact the State Bar to inquire about the policy, or will request an extension or other accommodation.

Attachment 5 provides detailed lists of the functions and tasks that staff anticipate will need to be undertaken and the number of anticipated additional positions. Rather than calculating a single estimate, a range including a low, medium, and high estimate is provided for each of nine departments of the State Bar that will be impacted by this policy.

The detailed task and time estimates in Attachment 5 suggest a need for new staff that could be as few as 9 Full Time Equivalent (FTE) staff on the low end, and as many as 29 FTE on the high end. A number of the key parameters used to generate these estimates are summarized immediately below:

- The relevant number of charges and convictions for calculating new workload is not the total but, rather, the number of *previously undisclosed* criminal charges and convictions, i.e., *net* of those already reported;
- The rate of involvement in the criminal justice system for attorneys is assumed to be:
 - greater than current rate of criminal complaints in the State Bar's discipline system (.00122);
 - less than the rate of arrests for the general adult population in California (.042); and
 - greater than the rate for physicians (.00303)⁶, in part because attorneys experience alcohol dependence at a rate over twice that of physicians.⁷
- For initial implementation, the *annual* arrest rate needs to be multiplied by a factor reflecting the years of criminal activity that has gone un-reported. Approximately twenty seven (27) years have lapsed since the legislation mandating SAN. 27 is used as the

⁶ This is based on reporting by the Medical Board of California.

⁷ See Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," *Journal of Addiction Medicine*, Volume 10, Number 1, January/February 2016.

multiplier for the high-end estimates of the number of arrest records that will need to be reviewed; 10 is used as the multiplier for the low-end estimates, and 20 is used as the multiplier for the middle-range estimates. On an ongoing basis, this multiplier will not be necessary.

- Not all attorneys will come into the system at the same time. If the policy is implemented over two years, all of the annual estimates need to be cut in half to account for the introduction into the system of half of the attorney population each year.

The implications of these assumptions are as follows:

- At twice the rate of arrests for physicians (.00606), the annual number of arrests for half of the attorney population (95,000) is 576;
- Subtracting the number of criminal conviction cases reported in 2016 (232), the *net* number of annual arrests for half of the attorney population is 344; and
- Estimating that over the last 27 years some proportion of the new arrests are those of attorneys who had already been arrested previously, the low-end estimate of arrest records that will need to be reviewed is 3,437, the middle-range estimate is 6,874, and the high-end estimate is 9,280.

Table 4

Estimated Staffing Need by State Bar Department (Full Time Equivalent Staff – FTE)	Low	Medium	High
Office of the Chief Trial Counsel	3.95	7.85	10.58
State Bar Court	0.58	1.11	1.48
Office of Probation	1.64	3.23	4.34
Office of Admissions	0.35	0.64	0.85
Attorney Regulation and Consumer Resources ⁸	0.32	0.57	1.08
Call Center	0.31	0.57	1.10
Information Technology (fixed estimate, no range)	0.76	0.76	0.76
Office of General Counsel	0.70	2.65	6.27
Office of Research & Institutional Accountability	0.81	1.56	2.09
Totals	9.42	18.94	28.55

Given the uncertainty inherent in many of the parameters that are necessary for estimating the workload, State Bar staff proposes adding nine FTE, consistent with the low end of the range, with the specific allocation to be determined at a later date and the possibility of revisiting the need for staff as implementation moves forward.⁹

⁸ Formerly known as Member Records and Compliance

⁹ The 2018 budget only accounts for four FTE. This is due to a combination of financial constraints, the fact staff anticipates that the workload will grow over time, and the assumption that a conservative approach can be modified over time.

In addition to the detailed worksheets provided in Attachment 5, below is a narrative summary of the major functions for which additional resources will be needed in different departments of the State Bar.

- Additional Information Technology resources to:
 - finalize the design of, build, and maintain the new interface for the secure FTP between the DOJ and the State Bar;
 - re-design the interface between databases in Admissions and those in Attorney Regulation and Consumer Resources, and to provide resources to attorneys through their My State Bar Profile web page;
 - develop processes and maintain the system for re-routing SAN notifications from Admissions to ORIA when applicants to the State Bar become attorneys; and
 - develop new fields, codes, and data transfer routines for State Bar records on attorneys documenting compliance with the fingerprint requirements and the registration of licensed attorneys in the SAN system;
- Additional resources in ORIA to review background checks and route results to the appropriate department;
- Additional resources in Attorney Regulation and Consumer Resources to implement the notification to licensed attorneys of the new policy, respond to correspondence regarding the policy, develop and implement a system of reminder notifications, implement administrative sanctions for attorneys who fail to comply, release the sanctions when compliance is completed, and compile reports of attorneys who resign, are disbarred or die, for transmission to the DOJ to remove from the SAN system;
- Additional resources in Admissions to review background checks that contain information that licensed attorneys failed to disclose on their moral character application and to compile names of applicants whose positive moral character determination has expired, their application has been abandoned, or who are otherwise ineligible for admission, for transmission to the DOJ to remove from the SAN system;
- Additional resources in OCTC to review background checks that contain criminal charge or conviction information not previously disclosed by licensed attorneys or reported by either superior courts or prosecuting attorneys and to prosecute in appropriate cases;
- Additional resources for the State Bar Court to adjudicate cases that OCTC pursues related to criminal charges and convictions uncovered through the re-fingerprinting process and SAN system;
- Additional resources for the Office of Probation to monitor compliance with the terms of probation imposed upon attorneys who failed to disclose criminal histories; and,
- Additional resources for the Office of General Counsel for any legal work associated with the implementation of the fingerprinting requirement.

III. Proposed California Supreme Court Rule

A. Language of Proposed Rule

1. Licensed Attorney Fingerprinting

Each active licensed attorney of the State Bar for whom the State Bar does not currently have fingerprint images shall, pursuant to the procedure identified by the State Bar, submit fingerprint images to the Department of Justice for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.¹⁰ Inactive licensed attorneys for whom the State Bar does not have fingerprint images must submit fingerprint images to the Department of Justice prior to seeking active status.

The State Bar shall request from the Department of Justice subsequent arrest notification service for its active licensed attorneys, pursuant to Business and Professions Code section 6054.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation of subsection (a) that requires all active licensed attorneys for whom the State Bar does not have fingerprint images to submit fingerprints to the Department of Justice by December 1, 2019.

3. Fingerprint Submission and Processing Costs

All costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

The State Bar will cover the DOJ and FBI processing costs for licensed attorneys who have been granted a fee scaling or fee waiver for annual membership fees pursuant to State Bar Rule 2.15(A) or 2.16(C)(3)(c). These attorneys will pay for all third party print furnishing costs.

Attachment 4 is the full text of the proposed rule.

¹⁰ The proposed rule is limited to only those active licensed attorneys the State Bar does not have fingerprint images for because, as discussed above, the State Bar has already submitted the fingerprint records of approximately 1,500 active licensed attorneys, in addition to the fingerprint records of out-of-state applicants whose State Bar admission is still pending.

B. Policy Analysis

1. All Licensed Attorneys Must Submit or Resubmit Fingerprints By December 1, 2019, on a Schedule Designated by the Board of Trustees

As recognized in the Court's October 20, 2017 letter, requiring fingerprints of all applicants and active members is a "critical component of public protection and strengthens the State Bar's discipline system." Although there are certain criminal reporting requirements for licensed attorneys, courts, and prosecutors, an evaluation of the data reported to the State Bar suggests significant underreporting by licensed attorneys. For example, simply comparing the raw numbers reported by attorneys to the numbers reported by superior courts and prosecuting attorneys, the State Bar found that on average the number of charges attorneys reported was less than half the number of convictions reported by the courts.

Because the specific reporting requirements differ between those charges that attorneys are required to self-report and the convictions that courts are required to report, this discrepancy may be attributed to the differences in the reporting requirements. However, looking more closely at court reported convictions, State Bar staff found that out of 32 felony convictions reported by the courts over a three year time period, 29 of these cases had no corresponding record of a self-report by the attorney of the charges, despite the attorney's obligation to do so pursuant to section 6068(o)(5). Similarly, comparing specific cases where prosecuting attorneys reported filing felony charges against a licensed attorney revealed that that less than half of these cases had been self-reported by the attorney.

Of course, there is also no accurate way to determine whether courts and prosecutors are adequately reporting charges and convictions to the State Bar. Thus, utilization of the automated SAN process through the DOJ will vastly improve the reliability and validity of the data on criminal charges and convictions of licensed attorneys in California.

The proposed rule requires the Board to adopt an implementation schedule with a deadline of December 2019. The Board is in the best position to evaluate State Bar workload and coordinate with the relevant State Bar departments, in order to determine the best use of State Bar resources. The December 1, 2019 deadline provides an almost two year window for active attorneys to be fingerprinted on a set schedule.

2. Licensed Attorneys Should Bear the Cost of Fingerprint Submission, With Cost Reductions for Financial Hardship

SB 36 amends section 6054 to eliminate the language requiring the State Bar to pay for the costs of fingerprint processing of applicants.¹¹ The statute is silent as to whether the licensed attorney must pay for the costs of submission or resubmission of fingerprint to the DOJ, including processing costs. The proposed rule requires licensed attorneys to bear all costs associated with the submission of fingerprints to the DOJ, including print furnishing costs. This means that the attorney will pay the print furnishing costs directly to the vendor at the time he or

¹¹ The proposed rule only applies to costs for licensed attorneys. Staff is not proposing any changes to the current process for applicant fingerprints. Currently, applicants pay third party furnishing costs, and the State Bar pays for DOJ and FBI processing costs. This status quo approach will not result in any new costs to the State Bar as related to the fingerprinting process itself.

she is fingerprinted. The \$49 processing costs will be reflected through an increase in the attorney's fee statement.

The rule also provides that licensed attorneys who have been granted reductions in their annual membership fees based on financial hardship have the same reductions applied to fingerprint processing costs. State Bar rule 2.15(A) provides "fee scaling" for "[a]n active member who has a total gross annual individual income from all sources of less than \$40,000." State Bar rule 2.16(c)(3)(2) permits the Secretary to waive up to \$1,000 in annual membership fees if the member "has a total gross annual household income from all sources of \$20,000 or less."

There are currently 1,184 licensed attorneys who have been granted fee scaling pursuant to rule 2.15(A), and 271 licensed attorneys who have been granted a fee reduction pursuant to rule 2.16(c)(3)(2). As these attorneys will still need to be re-fingerprinted, the State Bar will have to cover the full DOJ and FBI processing costs. This will result in a projected total cost to the State Bar of approximately \$71,295.00.

Attorneys who have been granted these reductions must still pay the third party vendor furnishing costs.

a) Financial Burden on the State Bar if Required to Bear Costs

The projected total cost (processing and furnishing costs) for all active licensed attorney fingerprints to be submitted to the DOJ would be approximately \$15.51 million. If the cost were to be borne by the State Bar, and member fees were not increased to cover these costs, funding would need to be available from the State Bar's General Fund or Admissions Fund. The General Fund accounts for spendable resources that can be used to support most aspects of the State Bar's operations. The Admissions Fund accounts for fees and expenses related to administering the bar examination and other requirements for admission to the practice of law in California. Money in other funds is restricted via statute, bond covenants or similar external restrictions, and is therefore not available to pay fingerprinting costs.

The amount of available funding the State Bar has in the General Fund and Admissions Fund to pay fingerprinting costs can be determined looking at two alternative measures: (1) Reserves, a short-term measure, identifies the availability of cash and other current assets that can be used to pay liabilities in the near future and (2) Fund balance, a long-term measure, calculates the financial condition of the fund, considering all assets and liabilities incurred to date. Reserves and fund balance for the General Fund and Admissions Fund projected through December 31, 2017 follows (in thousands):

	Reserve Amount	Minimum Required Reserve	Available Reserve	Total Fund Balance	Less FB Restricted or Invested in Capital Assets	Available Fund Balance
General Fund	\$21,442	\$15,178	\$12,264	\$82,225	\$(104,433)	\$(22,208)
Admissions Fund	3,465	2,796	3,465	3,465	-	3,465

The reserve amount above represents working capital (current assets minus current liabilities and amounts that are non-spendable, restricted or committed). The required reserve represents the Board of Trustees' policy that all funds carry a minimum reserve representing at least two months of annual expenses.

Total fund balance above represents the fund's total assets minus total liabilities. Available fund balance represents the spendable portion of the fund balance. The General Fund's total fund balance is substantially less than the reserve amount because non-current assets (primarily capital assets) exceed non-current liabilities (primarily pension liability). Of the General Fund's \$82.2 million projected total fund balance, \$104.4 million is not available, resulting in a negative \$22.2 million of available fund balance. The unavailable fund balance is composed of capital assets and revenues restricted for the Legal Services Trust, Bank Settlement, Legal Specialization Lawyers Assistance Program, Justice Gap and Equal Access programs.

The available reserve and available fund balance for the General Fund and Admissions Fund are expected to further decline in 2018 by approximately \$6.8 million and \$240,000, respectively, according to the State Bar's 2018 preliminary budget. The Admissions Fund is projected to fall below the Board of Trustees' minimum reserve requirement of two months operating expenses by approximately \$322,000 at the end of 2018.

In addition to the reserves discussed above, the State Bar is projecting a current year savings (projected as approximately \$3,047,000 as of August 31, 2017) of funds administered by a Special Master overseeing an assessment fund to support the State Bar's discipline operation. The State Bar could request that the Special Master allow this savings to be used to offset a portion of estimated fingerprinting costs. However, this would represent only a small percentage of the total costs necessary to pay for the fingerprinting of all active attorneys. Furthermore, there is no new funding available to offset the staffing costs, described above. As such, any current year savings could be applied to these new staffing needs.

b) Other Entities Shift the Full Cost of Fingerprint Resubmission to Licensees

Requiring licensees to pay the cost of submitting or resubmitting fingerprints to the DOJ, including in circumstances where fingerprints were previously submitted, is in line with the procedures of various other licensing entities. See 16 California Code of Regulations ("CCR") § 2010.05 (requiring veterinarians to submit fingerprints for the purpose of conducting criminal records searches "if an electronic record of the submission of fingerprints no longer exists or was never created" and that "the licensee shall pay any costs for furnishing the fingerprints and conducting the searches."); 16 CCR § 1132 (dental hygienists); 16 CCR § 2517.5 (vocational nurses); 16 CCR § 1399.419.2 (acupuncturists); 16 CCR § 2575.5 (psychiatric technicians); 16 CCR § 37.5 (accountants).

There are also similar regulations that contain identical language regarding the submission of fingerprints in the event the fingerprints "do not exist," but do not specify who will bear the costs for such submission. See *e.g.*, 16 CCR § 1399.722 (requiring podiatrists to submit a full set of fingerprints to the DOJ if, "regardless of the date of initial licensure", "an electronic record of the submission of fingerprints no longer exists."); 16 CCR § 4120 (requiring applicants for renewal of occupational therapy license to submit fingerprints to the DOJ if fingerprints had not been previously submitted or for whom a record of submission of fingerprints no longer exists); 16 CCR § 1419 (same requirement for renewal of registered nurses).

These regulations were adopted pursuant to statutes authorizing licensing boards to adopt regulations necessary to properly regulate their profession. See Bus. & Prof. Code §§ 4808, 2404, 1906, 2841.1, 4933, 4504, and 5010. As such, the boards of these entities determined that, in the interest of public protection, it was necessary to require the re-submission of licensee fingerprints in certain circumstances. See *e.g.*, Bus. & Prof. Code § 2842 ("protection of

the public shall be the highest priority for the Board of Vocational Nursing and Psychiatric Technicians of the State of California in exercising its licensing, regulatory, and disciplinary functions.”).

Notably, these regulations require licensees to pay costs associated with submission of fingerprint records, even if they previously submitted fingerprints with their initial licensing application. These regulations were adopted to ensure that the DOJ and/or FBI had fingerprint records for all current licensees. As with other California licensing entities, the State Bar endeavors to ensure that the DOJ has fingerprint records of all its licensees in order to effectively regulate the profession and protect the public.

FISCAL/PERSONNEL IMPACT

See Discussion Section, II.B.

RECOMMENDATION

RESOLVED, that the Board of Trustees authorizes staff to make available for a 45-day public comment period, the proposed rule to the California Supreme Court included as Attachment 4 to this agenda item.

ATTACHMENT(S) LIST

- ATTACHMENT 1 - October 20, 2017 Letter from the California Supreme Court
- ATTACHMENT 2 - June 28, 2017 Contract with DOJ
- ATTACHMENT 3 - August 28, 2017 Contract with DOJ
- ATTACHMENT 4 - Text of Proposed Rule to the California Supreme Court
- ATTACHMENT 5 - Detailed Workload / Staffing Estimates

ATTACHMENT 1



Supreme Court of California

350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4797

TANI G. CANTIL-SAKAUYE
CHIEF JUSTICE OF CALIFORNIA

(415) 865-7060

October 20, 2017

Michael G. Colantuono, President, Board of Trustees
Leah Wilson, Executive Director
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: State Bar Fingerprinting

Dear Mr. Colantuono and Ms. Wilson:

As you know, Senate Bill No. 36 amended Business and Professions Code section 6054 to authorize the State Bar of California to require any applicant for admission and any current member of the State Bar to submit or resubmit fingerprints to the Department of Justice in order to establish the applicant's identity and to determine whether the applicant or member has a record of criminal conviction in this state or elsewhere. Such fingerprint records must be retained by the Department of Justice for the limited purpose of criminal arrest notification to the State Bar. Requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system. Accordingly, now that Governor Brown has signed Senate Bill No. 36, the State Bar is directed to consider and present to the court any proposed court rules that may be appropriate to facilitate implementation of the fingerprinting requirement for all State Bar applicants and all active attorney members.

Sincerely,

A handwritten signature in blue ink, reading "T. Cantil-Sakauye", is positioned below the word "Sincerely,".

Tani G. Cantil-Sakauye

cc: Hannah-Beth Jackson, Chair of the Senate Judiciary Committee
Mark Stone, Chair of the Assembly Judiciary Committee

ATTACHMENT 2



CONTRACT FOR SUBSEQUENT ARREST NOTIFICATION SERVICE

Department of Justice
Bureau of Criminal Information and Analysis
P.O. Box 903417
Sacramento, CA 94203-4170

The agency listed below is authorized to receive state summary criminal history information from the files of the Department of Justice (DOJ) for employment, licensing, or certification purposes. This agency further requests that fingerprint transactions submitted for this purpose be retained in DOJ's files for **California only** subsequent arrest notification service pursuant to section 11105.2 of the California Penal Code. **Fingerprint submissions received before the effective date of this contract will not be retained by the California Department of Justice.**

AGENCY NAME: State Bar of California

AGENCY ADDRESS: 180 Howard Sreet

CITY: San Francisco

STATE: CA

ZIP CODE: 94105

ORI NUMBER: (If Applicable) A1104

CONTACT PERSON(S): Dag MacLeod

CONTACT PERSON(S) TELEPHONE: +1 (415) 538-2102

Please retain the following authorized categories:

☐ ALL EMPLOYEES ☐ ALL VOLUNTEERS

☒ ALL LICENSES, CERTIFICATIONS, OR PERMITS

☐ OTHER: (specify) _____

Effective July 1, 2017 for all
Fingerprints Submissions for
Mailing Code A05878

This agency certifies that, to its knowledge, there is no statute or regulation prohibiting this notification and that all requirements for criminal record security and privacy of individuals will be met. This agency will notify the Bureau of Criminal Information and Analysis when it no longer has a legitimate interest in a subject, as required by section 11105.2 of the California Penal Code. The agency agrees to immediately return any subsequent arrest notification received from DOJ for any person unknown to the agency.

Leah T. L.
Signature of Agency Representative

6/28/17
Date

Leah T. Wilson
Print Name

COO
Title of Agency Representative

FOR DOJ USE ONLY:

☐ Approved ☐ Not Authorized

Signature of DOJ Representative

Effective Date

ATTACHMENT 3



CONTRACT FOR SUBSEQUENT ARREST NOTIFICATION SERVICE

Department of Justice
Bureau of Criminal Information and Analysis
P.O. Box 903417
Sacramento, CA 94203-4170

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AGENCY NAME: State Bar of California

AGENCY ADDRESS: 180 Howard Sreet

CITY: San Francisco

STATE: CA

ZIP CODE: 94105

ORI NUMBER: (If Applicable) A1104

CONTACT PERSON(S): Dag MacLeod

CONTACT PERSON(S) TELEPHONE: +1 (415) 538-2102

Please retain the following authorized categories:

☐ ALL EMPLOYEES ☐ ALL VOLUNTEERS

☒ ALL LICENSES, CERTIFICATIONS, OR PERMITS

State Bar of California Licenses: B&P 6054

☐ OTHER: (specify) _____

This agency certifies that, to its knowledge, there is no statute or regulation prohibiting this notification and that all requirements for criminal record security and privacy of individuals will be met. This agency will notify the Bureau of Criminal Information and Analysis when it no longer has a legitimate interest in a subject, as required by section 11105.2 of the California Penal Code. The agency agrees to immediately return any subsequent arrest notification received from DOJ for any person unknown to the agency.

Keith Wilson
Signature of Agency Representative

8/28/17
Date

Keith Wilson
Print Name

COO
Title of Agency Representative

FOR DOJ USE ONLY:

☐ Approved ☐ Not Authorized

Signature of DOJ Representative

Effective Date

ATTACHMENT 4

1. Licensed Attorney Fingerprinting

Each active licensed attorney of the State Bar for whom the State Bar does not currently have fingerprint images shall, pursuant to the procedure identified by the State Bar, submit fingerprint images to the Department of Justice for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests. Inactive licensed attorneys for whom the State Bar does not have fingerprint images must submit fingerprint images to the Department of Justice prior to seeking active status.

The State Bar shall request from the Department of Justice subsequent arrest notification service for its active licensed attorneys, pursuant to Business and Professions Code section 6054.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation of subsection (a) that requires all active licensed attorneys for whom the State Bar does not have fingerprint images to submit fingerprints to the Department of Justice by December 1, 2019.

3. Fingerprint Submission and Processing Costs

All costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

The State Bar will cover the DOJ and FBI processing costs for licensed attorneys who have been granted a fee scaling or fee waiver for annual membership fees pursuant to State Bar Rule 2.15(A) or 2.16(C)(3)(c). These attorneys will pay for all third party print furnishing costs.

ATTACHMENT 5

Office of Admissions - Detailed Workload Estimates for Fingerprinting

Functions & Tasks	Time per Task (minutes)	Annual Frequency (2018-2019)*			Post-2019 Annual
		Low (10 yr)	Medium (20 yr)	High (27 yr)	
1. Review background checks that contain un-disclosed criminal history information.		172	344	464	50
<i>Tasks</i>					
Create hard-copy case file	10				
Enter data in AS 400	5				
Conduct additional research	30				
Prepare recommendation for CBE	60				
Present case to CBE	10				
Prepare disposition	30				
Finalize case file including data entry	10				
Subtotal (minutes)	155				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.28	0.56	0.75	0.08
2. Troubleshooting and error elimination					
<i>Tasks</i>					
Work with IT when RAP sheet cannot be connected to applicant or licensee	30				
Work with DOJ and ARCR when fingerprint submission fails, second print required	60				
Work with DOJ and ARCR when FP clears with DOJ but not FBI (unable to read)	30				
Subtotal (minutes)	120				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.00	0.00	0.01	0.00
3. Policy development and Staff compliance					
<i>Tasks</i>					
Development of policies for evaluating and managing Subsequent Arrest Notifications	2,400	0.025			
Development (revision) of policies for management of expired applications	2,400	0.025			
Ensuring compliance with new policies including staff training & monitoring	3,300		0.034		
Compliance with Custodian of Records & other DOJ policies	1,000		0.010		
Creating the No Longer Interested List (NLI) and transmitting to DOJ.	720		0.008		
Compliance with Penal Code §11105.2-purging documents appropriately	720		0.008		
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.050	0.060		
Admissions Workload Totals as Full Time Equivalent Staff (FTE) †		0.33	0.61	0.81	0.14

* For Function 1, the number of Subsequent Arrest Notifications (SANs) for which Admissions will be responsible is deflated by 95 percent of the total. This is because Admissions will be responsible for only those criminal charges and convictions that occurred prior to admission to the Bar, a much shorter period of time than the period of time after admission.

* For Function 2, the number of cases requiring troubleshooting and error elimination is reduced still further, assuming an error rate of only one percent of the background checks handled by Admissions.

* For Function 3, development of policy tasks are assumed to occur once; compliance tasks are assumed to occur once per year per employee. The NLI and purging task will occur monthly.

† FTE is calculated using the estimated work year value that was adopted by the Judicial Council of California for the Resource Assessment Study model. That model estimates a work year of 219 days once vacation, sick time, holidays, and weekends are subtracted. The productive work day is estimated at approximately 7.3 hours to account for two fifteen minute breaks and another approximately 10 minutes for administrative functions. Under these assumptions, there are approximately 1,598 hours available in the work year, or 95,900 minutes.

The actual hours worked by staff will vary depending on a number of factors that cannot be modeled here.

Attorney Regulation and Consumer Resources - Detailed Workload Estimates for Fingerprinting

Functions & Tasks	Time per Task (minutes)	Annual Frequency (2018-2019)*			Post-2019 Annual
		Low	Medium	High	
1. Notify attorneys of new policy, deadlines, resources for compliance		4	6	12	4
<i>Tasks</i>					
Prepare contact lists of attorneys by compliance group / compliance status	60				
Draft language for notification	120				
Send notification	30				
Query database to identify attorneys not yet in compliance	60				
Draft language for reminder notifications	120				
Send reminder notifications to non-compliant attorneys	30				
Subtotal (Minutes)	420				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.02	0.03	0.05	0.02
2. Impose administrative sanctions on attorneys for failure to comply					
<i>Tasks</i>					
Query licensee database and confirm lack of compliance, time frame, notifications	60				
Draft language notifying licensees that they will be suspended	120				
Send notification	30				
Conduct final query to confirm lack of compliance, time frame, notifications	60				
Change attorney status to "inactive - FP compliance"	120				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.02	0.02	0.05	0.02
3. Data management and Correspondence					
Change attorney status back to "active" from "inactive" following compliance	15				
Review e-mail correspondence, reply as appropriate, forward when necessary	15				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.22	0.44	0.88	0.44
3. Policy development and staff compliance					
<i>Tasks</i>		One Time FTE	Annual FTE		
Development of policies for evaluating and managing Subsequent Arrest Notifications	2,400	0.025			
Work with IT on modifications to MyStateBar pages and information contained there	2,400	0.025			
Development (revision) of policies for management of expired applications	2,400	0.025			
Ensuring compliance with new policies including staff training & monitoring	3,300		0.034		
Compliance with Custodian of Records & other DOJ policies	1,000		0.010		
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.075	0.045		
ARCRC Workload Totals as Full Time Equivalent Staff (FTE) †		0.33	0.56	1.05	0.52

* For Function 1, frequencies refer to number of times per year: low estimates would be quarterly, high estimates would be monthly.

* For Functions 2 and 3, attorneys are currently reclassified from "Active" to "Inactive" in batch following the passage of specific deadlines. Reactivation from "Inactive" to "Active" occurs on an individual basis and currently occurs approximately 1,400 times per year. Assumption is that implementation of new policies on fingerprinting will result in half as many attorneys falling out of compliance on the low end (700), the same amount on the medium estimate, and twice as many on the high-end estimate.

† FTE is calculated using the estimated work year value that was adopted by the Judicial Council of California for the Resource Assessment Study model. That model estimates a work year of 219 days once vacation, sick time, holidays, and weekends are subtracted. The productive work day is estimated at approximately 7.3 hours to account for two fifteen minute breaks and another approximately 10 minutes for administrative functions. Under these assumptions, there are approximately 1,598 hours available in the work year, or 95,900 minutes. The actual hours worked by staff will vary depending on a number of factors that cannot be modeled here.

Resource Center - Detailed Workload Estimates for Fingerprinting

	Time per Task (minutes)	Annual Frequency (2018-2019)*			Post-2019 Annual
		Low (2.5%)	Medium (5%)	High (10%)	
1. Respond to phone calls regarding new policy and compliance		2,375	4,750	9,500	2,500
<i>Tasks</i>					
Respond to phone inquiries regarding new policy.	10				
Subtotal (Minutes)	10				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.25	0.50	0.99	0.26
2. Policy development and staff compliance		One Time FTE		Annual FTE	
<i>Tasks</i>					
Development of phone scripts and policy documents for staff	2,400	0.025			
Ensuring compliance with new policies including staff training & monitoring	3,300		0.034		
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.025	0.034		
		(one-time costs included in 2018-2019 range)			Post-2020 Annual
		Low	Medium	High	
Resource Center Workload Totals as Full Time Equivalent Staff (FTE) †		0.27	0.52	1.02	0.30

* For Function 1, frequencies are calculated on the low end as 2.5 percent of 190,000 active attorneys contacting the State Bar, as 5 percent at the middle of the range, and at 10 percent for the high-end. Annual frequencies are assumed to fall by about one half of the low-end estimate once the policy is established.

† FTE is calculated using the estimated work year value that was adopted by the Judicial Council of California for the Resource Assessment Study model. That model estimates a work year of 219 days once vacation, sick time, holidays, and weekends are subtracted. The productive work day is estimated at approximately 7.3 hours to account for two fifteen minute breaks and another approximately 10 minutes for administrative functions. Under these assumptions, there are approximately 1,598 hours available in the work year, or 95,900 minutes. The actual hours worked by staff will vary depending on a number of factors that cannot be modeled here.

Attorney Regulation and Consumer Resources - Detailed Workload Estimates for Fingerprinting

Functions & Tasks	Time per Task (minutes)	Frequency (one-time)
1. Design and build new interface for FTP with DOJ to handle two separate channel initial responses and subsequent arrest notifications		
<i>Tasks</i>		
Requirement Gathering for Admission and Membership channels	16,200	1
Design the solution that meets all business requirements	6,000	1
Review with key stakeholders and obtain approvals	480	1
Build the solution as described in the requirements and design	28,800	1
Conduct Unit Testing	2,400	1
Conduct Quality Assurance (QA) Testing and obtain approvals for the solution	3,600	1
Conduct User Acceptance (UAT) Testing and obtain approvals for the solution	4,800	1
Prepare the implementation and Change Management (CMR) form	960	1
Implement the solution	240	1
Post-Implementation testing and confirmation	240	1
Provide post implementation support	4,800	1
Project Closure	240	1
Subtotal (minutes)	68,760	
Subtotal - Workload as Full Time Equivalent Staff (FTE) †	0.72	

	Time per Task (minutes)	Frequency (annually)
3. Develop routines and schedules for system maintenance		
<i>Tasks</i>		
Assure that daily scheduled jobs are executed on the scheduler	2,190	1
DOJ data is updated necessary database components	2,190	1
Monitor and Troubleshoot production issues and resolve	3,600	1
Design and build additional enhancements per business units need	11,520	1
Train business team members as needed	240	1
Monthly system and database maintenance	720	1
Subtotal (minutes)	20,460	1
Subtotal - Workload as Full Time Equivalent Staff (FTE) †	0.21	1

	One Time FTE	Annual FTE
IT Workload Totals as Full Time Equivalent Staff (FTE) †	0.72	0.21

Additional detail re: building the solution under Function 1:

- Build an exception process for the people who are not matched by system.
- Build an exception process for DOJ rejected responses
- Build an extract process for ORIA and other departments as needed
- Build new database tables to host all new data elements
- Integrate fingerprinting with other applications such as membership, OCTC, Admission etc.
- Identify roles and access level for different business groups
- Build a search tool to identify the DOJ responses
- Build an UI to extract the list of members who needs to be fingerprinted
- Build an UI to track the list of members who completed the fingerprinting
- Build a process for NLI
- Fix the bugs in existing Admission applications

† FTE is calculated using the estimated work year value that was adopted by the Judicial Council of California for the Resource Assessment Study model. That model estimates a work year of 219 days once vacation, sick time, holidays, and weekends are subtracted. The productive work day is estimated at approximately 7.3 hours to account for two fifteen minute breaks and another approximately 10 minutes for administrative functions. Under these assumptions, there are approximately 1,598 hours available in the work year, or 95,900 minutes. The actual hours worked by staff will vary depending on a number of factors that cannot be modeled here.

Office of the Chief Trial Counsel - Detailed Workload Estimates for Fingerprinting

Functions & Tasks	Time per Task (minutes)	Annual Frequency (2018-2019)			Post-2019
		Low (10 yr)	Medium (20 yr)	High (27 yr)	Annual
1. Intake case processing - review un-disclosed criminal history information.		3,437	6,874	9,280	344
<i>Tasks</i>					
Create hard-copy case file	5				
Enter data in AS 400 / Odyssey	5				
Prepare closing letter or forward for further invesgitation / prosecution	20				
Case monitoring for charged cases	30				
Subtotal (minutes)	60				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		2.15	4.30	5.81	0.22
		Annual Frequency (2018-2019)* (5% of cases proceed)			Post-2019
		Low (10 yr)	Medium (20 yr)	High (27 yr)	Annual
2. Investigation and prosecution of attorneys with un-disclosed criminal history information.		172	344	464	17
<i>Tasks</i>					
Develop investigation plan, review, approve, finalize	360				
Investigation, document review, communication	240				
Preparation of offers, negotiation, settlement	240				
Subtotal (minutes)	840				
		1.51	3.01	4.06	0.15
		Annual Frequency (2018-2019)* (5% of cases proceed)			
		Low (10 yr)	Medium (20 yr)	High (27 yr)	
3. Trial		9	17	23	1
Preparation for trial, argument, trial	2,400				
Trial	2,400				
Post disposition case management	480				
Subtotal (minutes)	5,280				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.47	0.95	1.28	0.05
		One Time FTE	Annual FTE		
4. Policy development and staff compliance					
<i>Tasks</i>					
Development of policies for evaluating and managing Subsequent Arrest Notifications	2,400	0.025			
Development (revision) of policies for handling undisclosed criminal history	2,400	0.025			
Ensuring compliance with new policies including staff training & monitoring	3,300		0.034		
Compliance with Custodian of Records & other DOJ policies	1,000		0.010		
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.050	0.045		
		(one-time costs inlcuded in 2018-2019 range)			Post-2020
		Low (10 yr)	Medium (20 yr)	High (27 yr)	Annual
OCTC Workload Totals as Full Time Equivalent Staff (FTE) †		4.18	8.31	11.20	0.46

All caseload estimates assume only the NET increase in criminal record reports as a result of Subsequent Arrest Notification.

* For Function 2, the frequency is reduced based on an assumption that 95 percent of cases will close at Intake.

* For Function 3, the frequency is reduced again by 95 percent on the assumption that 95 percent of cases close in Office of Investigations.

† FTE is calculated using the estimated work year value that was adopted by the Judicial Council of California for the Resource Assessment Study model. That model estimates a work year of 219 days once vacation, sick time, holidays, and weekends are subtracted. The productive work day is estimated at approximately 7.3 hours to account for two fifteen minute breaks and another approximately 10 minutes for administrative functions. Under these assumptions, there are approximately 1,598 hours available in the work year, or 95,900 minutes.

The actual hours worked by staff will vary depending on a number of factors that cannot be modeled here.

State Bar Court - Detailed Workload Estimates for Fingerprinting

Functions & Tasks	Time per Task (minutes)	Annual Frequency (2018-2019)			Post-2019 Annual
		Low (10 yr)	Medium (20 yr)	High (27 yr)	
1. Case Preparation and Case Management		9	17	23	1
<i>Tasks</i>					
Enter data in AS 400 / Odyssey	20				
Calendar management	45				
Early Neutral Evaluation	240				
Subtotal (minutes)	305				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.03	0.05	0.07	0.00
3. Trial					
Preparation for trial, argument, trial	2,400				
Trial	2,400				
Post disposition case management	480				
Subtotal (minutes)	5,280				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.47	0.95	1.28	0.05
2. Policy development and staff compliance		One Time FTE Annual FTE			
Development of policies for evaluating and managing Subsequent Arrest Notifications	2,400	0.025			
Development (revision) of policies for case management on undisclosed criminal history	2,400	0.025			
Ensuring compliance with new policies including staff training & monitoring	3,300		0.034		
Compliance with Custodian of Records & other DOJ policies	1,000		0.010		
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.050	0.045		
SBC Workload Totals as Full Time Equivalent Staff (FTE) †		(one-time costs included in 2018-2019 range)			Post-2019
		Low (10 yr)	Medium (20 yr)	High (27 yr)	Annual
		0.55	1.05	1.40	0.09

All caseload estimates assume only the NET increase in criminal record reports as a result of Subsequent Arrest Notification.

† FTE is calculated using the estimated work year value that was adopted by the Judicial Council of California for the Resource Assessment Study model. That model estimates a work year of 219 days once vacation, sick time, holidays, and weekends are subtracted. The productive work day is estimated at approximately 7.3 hours to account for two fifteen minute breaks and another approximately 10 minutes for administrative functions. Under these assumptions, there are approximately 1,598 hours available in the work year, or 95,900 minutes. The actual hours worked by staff will vary depending on a number of factors that cannot be modeled here.

Office of Probation - Detailed Workload Estimates for Fingerprinting

Functions & Tasks	Time per Task (minutes)	Annual Frequency (2018-2019)*			Post-2019
		Low (10 yr)	Medium (20 yr)	High (27 yr)	Annual
1. Intake case processing of new probationers		344	687	928	69
<i>Tasks</i>					
Create case file, data entry	10				
Prepare correspondence, arrange for meeting w/ respondent	30				
Intake meeting	120				
Case monitoring for charged cases	240				
Subtotal (minutes)	400				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		1.43	2.87	3.87	0.29
2. Sanctions and Probation failures		Annual Frequency (2018-2019)* (5% of cases proceed)			Post-2019
		Low (10 yr)	Medium (20 yr)	High (27 yr)	Annual
<i>Tasks</i>		17	34	46	3
Prepare documentation on non-compliance	120				
Transmit documents and communicate with OCTC	240				
Subtotal (minutes)	360				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.06	0.13	0.17	0.01
3. Trial		Annual Frequency (2018-2019)* (5% of cases proceed)			
		Low (10 yr)	Medium (20 yr)	High (27 yr)	
Preparation for trial, argument, trial	480	1	2	2	0
Trial	320				
Post disposition case management	20				
Subtotal (minutes)	820				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.01	0.01	0.02	0.00
4. Policy development and staff compliance		One Time FTE	Annual FTE		
<i>Tasks</i>					
Development of policies for evaluating and managing Subsequent Arrest Notifications	2,400	0.025			
Ensuring compliance with new policies including staff training & monitoring	3,300		0.034		
Compliance with Custodian of Records & other DOJ policies	1,000		0.010		
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.025	0.045		
		(one-time costs included in 2018-2019 range)			Post-2019
Office of Probation Workload Totals as Full Time Equivalent Staff (FTE) †		Low (10 yr)	Medium (20 yr)	High (27 yr)	Annual
		1.53	3.04	4.09	0.35

All caseload estimates assume only the NET increase in criminal record reports as a result of Subsequent Arrest notification.

* For Function 1, the number of Subsequent Arrest Notifications (SANs) for which the Office of Probation will be responsible is deflated by 99% of the total based on an assumption that only one percent of cases will result in probation.

† FTE is calculated using the estimated work year value that was adopted by the Judicial Council of California for the Resource Assessment Study model. That model estimates a work year of 219 days once vacation, sick time, holidays, and weekends are subtracted. The productive work day is estimated at approximately 7.3 hours to account for two fifteen minute breaks and another approximately 10 minutes for administrative functions. Under these assumptions, there are approximately 1,598 hours available in the work year, or 95,900 minutes.

The actual hours worked by staff will vary depending on a number of factors that cannot be modeled here.

Office of General Counsel - Detailed Workload Estimates for Fingerprinting

Functions & Tasks	Time per Task (minutes)	Annual Frequency (2018-2019)			Post-2019 Annual
		Low	Medium	High	
1. Respond to ad-hoc inquiries re: policy		100	500	1,000	100
Conduct analysis, meet w/ staff, draft responses	90				
Subtotal (minutes)	90				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.09	0.47	0.94	0.09
		Annual Frequency (2018-2020)			
		Low	Medium	High	
2. Legal work associated with implementation of the policy		5	20	50	
Review of policy papers and opinions	480				
Investigation and research	2,400				
Document preparation and filing	4,800				
Negotiation and brief drafting	2,400				
Subtotal (minutes)	10,080				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.53	2.10	5.26	0.00
3. Policy development and review		One Time FTE	Annual FTE		
Tasks					
Work with various Bar divisions to draft and review sanctions policy	4,800				
Write reports to Board of Trustees making recommendations re: sanctions	2,400				
Report to Board of Trustees re: policy implementation and issues	480				
Subtotal (minutes)	7,680				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.08			
		(one-time costs included in 2018-2019 range)			Post-2019 Annual
		Low	Medium	High	
OGC Workload Totals as Full Time Equivalent Staff (FTE) †		0.70	2.65	6.27	0.09

† FTE is calculated using the estimated work year value that was adopted by the Judicial Council of California for the Resource Assessment Study model. That model estimates a work year of 219 days once vacation, sick time, holidays, and weekends are subtracted. The productive work day is estimated at approximately 7.3 hours to account for two fifteen minute breaks and another approximately 10 minutes for administrative functions. Under these assumptions, there are approximately 1,598 hours available in the work year, or 95,900 minutes. The actual hours worked by staff will vary depending on a number of factors that cannot be modeled here.

Office of Research & Institutional Accountability - Detailed Workload Estimates for Fingerprinting

	Time per Task (minutes)	Annual Frequency (2018-2019)*			Post-2019 Annual
		Low (10 yr)	Medium (20 yr)	High (27 yr)	
1. Review criminal history information & route		3,437	6,874	9,280	344
<i>Tasks</i>					
Review criminal history information determine routing	15				
Destroy records where criminal history was already known	10				
Subtotal (Minutes)	25				
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.90	1.79	2.42	0.09
2. Project management and compliance enforcement		One Time FTE	Annual FTE		
<i>Tasks</i>					
Schedule and lead inter-divisional meetings on fingerprint policy	2,400	0.025			
Review and maintain schedules of Custodian of Records and other compliance documents	2,400	0.025			
Write reports to Board of Trustees making recommendations re: sanctions	2,400	0.025			
Coordination with DOJ on data transmission	4,800		0.050		
Create and transmit the No Longer Interested List (NLI) to DOJ.	720		0.008		
Compliance monitoring for Penal Code §11105.2 document purging	720		0.008		
Report to Board of Trustees re: policy implementation and issues	480		0.005		
Subtotal - Workload as Full Time Equivalent Staff (FTE) †		0.075	0.065		
		(one-time costs included in 2018-2019 range)			Post-2019
		Low	Medium	High	Annual
ORIA Workload Totals as Full Time Equivalent Staff (FTE) †		0.97	1.87	2.49	0.15

* Unlike workload estimates for OCTC, SBC, and Probation where the filings estimates are based on NET complaints, this function is entirely new and the caseload estimates assume all new workload. Annual frequencies are assumed to fall by about one half of the low-end estimate once the policy is established.

† FTE is calculated using the estimated work year value that was adopted by the Judicial Council of California for the Resource Assessment Study model. That model estimates a work year of 219 days once vacation, sick time, holidays, and weekends are subtracted. The productive work day is estimated at approximately 7.3 hours to account for two fifteen minute breaks and another approximately 10 minutes for administrative functions. Under these assumptions, there are approximately 1,598 hours available in the work year, or 95,900 minutes. The actual hours worked by staff will vary depending on a number of factors that cannot be modeled here.

APPENDIX 4

**OPEN SESSION
AGENDA ITEM**

704 JANUARY 2018

DATE: January 27, 2018

TO: Members, Board of Trustees

FROM: Suzanne Grandt, Assistant General Counsel and Dag MacLeod, Director,
Office of Research & Institutional Accountability

SUBJECT: Proposed Rule of Court Re Fingerprinting Active Licensed Attorneys -
Return From Public Comment and Operational Planning and Preparation

EXECUTIVE SUMMARY

On November 3, 2017, the Board of Trustees (Board) authorized a 45-day public comment period for a proposed California Supreme Court (Court) rule implementing a fingerprinting requirement for active licensed attorneys pursuant to recent amendments to Bus. & Prof. Code § 6054, effective January 1, 2018. Over 2,600 public comments were received.

This agenda item is divided into two major parts. The first part summarizes and responds to the public comments including proposed changes to the rule stemming from the comments received. The proposed changes to the rule do not impact the purpose of the rule, which is to require licensed attorneys to be fingerprinted and to pay the fingerprint processing and furnishing costs in connection therewith. Staff recommends that the Board authorize an additional 30-day public comment period for the amended proposed rule of Court.¹

The second part of this agenda item provides a detailed overview of the work completed to date in preparation for fully implementing the proposed rule by the deadline established by the Board of Trustees of December 1, 2019.

¹ Attachment 1 provides the clean text of the amended proposed rule. Attachment 2 provides the redline/strikeout version of the rule, showing changes to the amended proposed rule from the original proposed rule issued for the 45-day public comment period.

PART ONE

RETURN FROM PUBLIC COMMENT: BACKGROUND

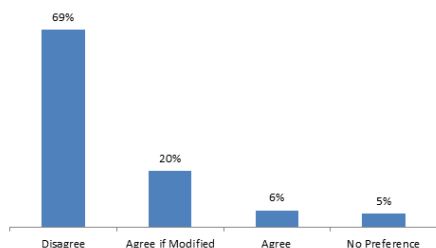
On November 3, 2017, the Board authorized a 45-day public comment period for a rule implementing a fingerprinting requirement for active licensed attorneys. The corresponding Board agenda item is provided as Attachment 3. The comment period began on November 9, 2017, and closed on December 26, 2017.

On December 7, and December 11, 2017, the State Bar sent out two emails to California attorneys (both active and inactive) informing them that the “State Bar plans to re-fingerprint active attorneys.” The email directed attorneys to the State Bar website page for the proposed rule accessible to all members of the public at <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2017-Public-Comment/2017-15>.

A link to the public comment page was also featured on the State Bar homepage for approximately three weeks. Lastly, a short description regarding the rule and a link to the public comment page was also posted multiple times on the State Bar’s public Facebook page and Twitter account.

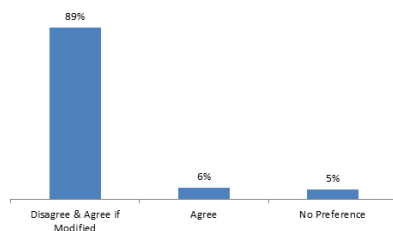
The State Bar received 2,604 public comments. The full text of these comments is provided as Attachment 4.

Figure 1 summarizes the comments according to agreement with the proposed rule:



Notably the commenters who “agreed only if modified” primarily expressed identical concerns as those who “disagreed” with the rule, making the distinction inconsequential. For instance, many attorneys “disagreed” with the rule because they felt they should not have to pay for the fingerprinting, while other attorneys “agreed only if modified” because they felt the rule should be altered to remove the payment requirement or to shift the costs to the State Bar.

Figure 2, therefore, combines “disagree” with “agree only if modified”:



I. Public Comments: General Observations

As reflected in the tables above, the comments were overwhelmingly negative. Notably, the vast majority of comments were received from attorneys, a group not expected to view the proposed rule favorably. Attorneys expressed strong disagreement with the proposition that they would be asked to re-submit fingerprints, and pay for such re-submission, when they had already provided fingerprints upon application for admission to the State Bar. The vast majority of commenters expressed concerns reflecting similar themes: that the rule is unnecessary, redundant, time consuming, expensive, ineffective, insulting and a violation of privacy.

Moreover, attorneys were understandably confused as to why the fingerprints they had submitted during the admissions process were not sufficient. Attorneys also had numerous questions regarding details of the re-fingerprinting process, such as costs and implementation procedures, and how the State Bar plans to use criminal history information, specifically arrests, upon receipt. Part Two of this report provides the overview of implementation procedures developed to date. If the proposed rule is adopted by the Court, these procedures, along with instructions and a Frequently Asked Questions document, will be published by the State Bar.

II. DISCUSSION

The chart below reflects a summary of the issues, concerns, reactions and/or questions raised in the public comments, organized into 24 categories. The majority of written comments fall into 2-5 categories. Although it is difficult, if not impossible, to fit every impression and/or comment into a specific category, staff read all 2,604 public comments and used its best efforts to categorize them by general topic and/or issue.

Comments that simply stated “agree” or “disagree” with no explanation are not included in this chart. Comments that did not articulate a question, topic, or issue were also not included. For instance, many comments summarily indicated that the proposed rule was “ridiculous” or “stupid.” Certain topics and/or issues may also not be included in this chart due to the fact that the comments were not logically comprehensible, and/or the issues raised were inapplicable.

Comments that agreed with the proposed rule without modification are not included in this chart; however, these comments are equally important. Excerpts of some of these favorable comments received are provided following the chart.

	Category	#	Response
1	Burdensome: The rule creates an unnecessary burden on both the attorney as well as the State Bar ² .	548	<p>All licensing requirements impose some burden. Importantly, this is a one- time requirement. It is at most a few hours out of an attorney's day, which is negligible compared to the other licensing requirements mandated by the State Bar, such as Mandatory Continuing Legal Education. The State Bar will provide attorneys with a list of Live Scan locations in California, organized by county (available at https://oag.ca.gov/fingerprints/locations). Larger businesses, such as law firms, as well as county law associations and other groups are also encouraged to bring fingerprint processing services on site.</p> <p>Any burden (to either the State Bar or attorneys) is outweighed by the public protection value of having all active attorneys' fingerprints on file</p>

² The burden to out-of-state and foreign attorneys is addressed in a subsequent category.

			with the California Department of Justice (DOJ) for the purpose of subsequent arrest notification (SAN).
2	<p>No legitimate public protection purpose: The rule serves no legitimate purpose and is generally unnecessary.</p>	512	<p>The State Bar is acting pursuant to the California legislature and Court's determinations that arrest notification for active licensed attorneys is an essential component of the State Bar's public protection mission.</p> <p>Bus. & Prof. Code § 6054 was amended in 1989 to require fingerprint retention for the express purpose of arrest notification subsequent to State Bar admission.</p> <p>The Court recently reiterated the importance of SAN in its October 20, 2017, letter to the State Bar. See Attachment 3, at p. 11. In this letter, the Court directed the State Bar to implement a re-fingerprinting requirement, because "requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system." <i>Id.</i></p> <p>There are numerous other California professions that require licensee fingerprints to be retained by the DOJ in order to receive SAN. These professions include, but are not limited to, physicians, surgeons, professional fiduciaries, certified public accountants, real estate appraisers, proprietary private security officers, immigration consultants, massage therapists, dental hygienists, and polysomnographic technologists.</p> <p>As with other California licensing entities, the State Bar endeavors to ensure it receives SAN for its licensees in order to effectively regulate the legal profession and protect the public. While attorneys were all fingerprinted upon admission, good moral character requirements should not, and do not, end after an individual is admitted to the State Bar. This is the rationale underlying Bus. & Prof. Code § 6101 ("Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension.") and Bus. & Prof. Code § 6106 ("The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.").</p>
3	<p>Already fingerprinted: The rule is redundant and unnecessary because all attorneys were already fingerprinted.</p> <p>Many attorneys were also already fingerprinted for</p>	697	<p>While attorneys were fingerprinted prior to their admission to the State Bar, neither the State Bar nor the DOJ was retaining the vast majority of those fingerprints until August 2017.</p> <p>Specifically, attorneys who submitted fingerprints using Live Scan technology (those residing in California when they applied for admission), had their fingerprints submitted directly to the DOJ and the FBI for a background check. The State Bar never received those fingerprints, so they were unable to retain them. These fingerprints were also not retained by the DOJ or FBI, as there was no contract in place with either entity mandating fingerprints be retained until the August 28, 2017, contract with the DOJ.</p> <p>Attorneys who resided outside of California when they applied for</p>

	other purposes, such as for employment or other license applications/renewals.		<p>admission submitted fingerprint images to the State Bar using a hard copy fingerprint card. The State Bar then transmitted these images to the DOJ and the FBI. Prior to August 28, 2017, the State Bar was only retaining these hard copy cards for a three-year period. After this three-year period, the fingerprint cards were destroyed.</p> <p>Thus, as of August 28, 2017 (the date of the DOJ SAN contract for licensed attorneys) the only active attorneys whose fingerprint images the State Bar had in its possession were those attorneys who applied for admission after August 28, 2014 (approximately 1,500 active attorneys). The State Bar has since submitted these fingerprint cards to the DOJ for retention pursuant to the SAN contract. These active attorneys will be exempt from the fingerprinting requirement. Attorneys will be able to determine whether they are exempt through a link on their MyStateBar profile.</p> <p>There is no way for staff to receive criminal information from the DOJ for the approximately 245,000 other attorneys without new fingerprint images for these attorneys. The DOJ will not provide criminal record information without biometric identification.</p> <p>The DOJ will also not share fingerprint images or criminal record information between entities. Thus, if an attorney's fingerprint images are retained by the DOJ for a different purpose (such as employment background check or upon application for a different license), the DOJ will not run a background check using those images and provide the results to the State Bar. The DOJ will also not transfer the fingerprint images to either the State Bar or into the State Bar's SAN system.</p> <p>Notably, there are numerous other professions that require the re-submission of licensee fingerprints, despite the fact the licensee may have already submitted them. See e.g., 16 CCR § 1399.722 (requiring podiatrists to submit a full set of fingerprints to the DOJ if, "regardless of the date of initial licensure", "an electronic record of the submission of fingerprints no longer exists."); 16 CCR § 4120 (requiring applicants for renewal of occupational therapy license to submit fingerprints to the DOJ if fingerprints had not been previously submitted or for whom a record of submission of fingerprints no longer exists); 16 CCR § 1419 (same requirement for renewal of registered nurses). These regulations were adopted pursuant to statutes authorizing licensing boards to adopt regulations necessary to properly regulate their profession. See Bus. & Prof. Code §§ 4808, 2404, 1906, 2841.1, 4933, 4504, and 5010.</p>
4	Expensive: The rule imposes a harsh financial burden on attorneys by requiring them to pay full fingerprinting costs.	413	<p><u>Attorney Costs:</u> The State Bar estimates the total costs for fingerprinting to be approximately \$82 per active attorney (\$49 for the cost of the background check and approximately \$33 for the print furnishing costs). See Attachment 3 at p. 6. This is a one-time cost for the attorney (or the attorney's employer), and is a small fraction of the yearly costs attorneys are required to pay to maintain their licenses each year.</p> <p>Moreover, while there is a set cost for running the background check (the "processing costs"), the \$33 print furnishing cost is an estimate. "Print furnishing" is a term used for the process performed by the service center that physically takes fingerprint images and submits them to the</p>

	The rule will also cost the State Bar considerable money to implement, taking funds away from other valuable State Bar services.		<p>DOJ, using either Live Scan technology (California residents) or hard copy fingerprint cards (out-of-state residents). A review of fingerprint servicing locations in the State of California (available at https://oag.ca.gov/fingerprints/locations) indicates that, depending on location, these services can be between \$5- \$20. For example, numerous Live Scan locations in Los Angeles county and almost every location in San Diego county charges between than \$10-15. Certain jail facilities also provide free fingerprint services.</p> <p>Lastly, the proposed rule provides that licensed attorneys who have been granted certain reductions in their annual membership fees based on financial hardship will not be required to pay the \$49 processing fee.</p> <p><u>State Bar Costs:</u> The State Bar anticipates some increased expenses in implementing the new rule, primarily in the form of increased staffed needs. See <i>generally</i>, Attachment 3. However, the State Bar is acting pursuant to the Legislature and Court's recognition that these expenses are outweighed by public protection considerations.</p>
5	The State Bar should pay for all fingerprinting costs: Since re-fingerprinting is only necessary due to the State Bar's failure to act in accordance with statutory requirements, the State Bar should bear all costs of re-fingerprinting.	362	<p>If the State Bar were to pay all costs of attorney fingerprinting, it would cost the State Bar approximately \$15.51 million, not including the costs the State Bar will incur for increased staffing and other operational and administrative costs. Staff has already detailed the available fund balances for these costs in the November 3, 2017, board Agenda Item. See Attachment 3, at p. 12. The State Bar does not have adequate resources available in any fund to cover these staggering costs.</p> <p>Moreover, requiring licensees to pay the cost of submitting or re-submitting fingerprints to the DOJ, including in circumstances where fingerprints were previously submitted, is in line with the procedures of various other licensing entities. See 16 CCR § 2010.05 (requiring veterinarians to submit fingerprints for the purpose of conducting criminal records searches "if an electronic record of the submission of fingerprints no longer exists or was never created" and that "the licensee shall pay any costs for furnishing the fingerprints and conducting the searches."); 16 CCR § 1132 (dental hygienists); 16 CCR § 2517.5 (vocational nurses); 16 CCR § 1399.419.2 (acupuncturists); 16 CCR § 2575.5 (psychiatric technicians); 16 CCR § 37.5 (accountants).</p>
6	Unconstitutional: The rule violates a number of constitutional rights, including the 4th, 5th, and 14th amendments.	60	This rule is a valid exercise of the State's regulation of the legal profession.
7	Privacy: The rule constitutes an invasion of	278	This rule is a valid exercise of the State's regulation of the legal profession.

	privacy.		
8	<p>Security: Commenters expressed concerns regarding the fact the State Bar and the government will have unfettered access to their fingerprint images and other confidential information.</p> <p>Many expressed specific concern that the <i>federal</i> government would be retaining or having access to their fingerprint images.</p>	42	<p>As an initial matter, these concerns apply not only to the proposed rule, but to Bus. & Prof. Code § 6054 generally. This statute was promulgated decades ago, and has always mandated the fingerprinting of applicants for purposes of obtaining criminal information from the state and federal government. In other words, applicant fingerprints have been sent to both the DOJ and the FBI for years.</p> <p><u>Security of Fingerprint images:</u> The State Bar will not be retaining any fingerprint images. Rather, fingerprints submitted via Live Scan will be sent directly to the DOJ for retention and the State Bar will never receive a copy. While fingerprints submitted using a hard copy fingerprint card will be sent to the State Bar for transmittal to the DOJ, the State Bar will immediately destroy any copies of the fingerprint card once it receives criminal information back from the DOJ.</p> <p>While the DOJ will submit all fingerprint images to the FBI for a federal background check, no fingerprint imaging information will be kept by the FBI. The only entity retaining the images will be the DOJ.</p> <p><u>Security of CORI and SAN:</u> If the rule is promulgated, the State Bar will be receiving back confidential criminal offender record information ("CORI") from the DOJ and FBI, and will also be receiving SAN for applicants and attorneys. The State Bar has been regularly receiving CORI regarding applicants for decades. The only change is that the State Bar will now be receiving SAN for applicants and attorneys, which will increase the volume of criminal information it receives.</p> <p>The State Bar continues to be governed by DOJ rules and regulations pertaining to the security and destruction of CORI information. Staff is also working on updated security policies and procedures, which will be made publicly available.</p> <p>Further, improper dissemination of confidential criminal information, by the State Bar, DOJ, or FBI, is governed by statute. Cal. Penal Code § 11076 ("Criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute.").</p> <p>It is also a misdemeanor for agencies to improperly disseminate this information to unauthorized persons or entities. See Cal. Penal Code § 11142 ("Any person authorized by law to receive a record or information obtained from a record who knowingly furnishes the record or information to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor").</p> <p>Staff recommends that there be an additional provision to the rule to clarify that all SAN information received by the State Bar shall be confidential and used for licensing purposes only.</p>
9	Current criminal	150	The unreliability of the State Bar's current reporting system is one of the main reasons this rule is necessary. Staff research suggests that, under

	<p>reporting requirements</p> <p>are sufficient: There are already criminal reporting requirements for prosecutors, courts, and attorneys, making the SAN system unnecessary.</p>		<p>the current reporting framework, there is significant underreporting by prosecutors, courts, and attorneys. See Attachment 3 at p. 11.</p>
10	<p>Alternative options: Commenters urged staff to consider alternative means to discover criminal history information, such as yearly oath cards by attorneys.</p>	59	<p>SAN allows the State Bar to have reliable and continuously updated access to an attorney's criminal information. There is no other alternative option that provides this information.</p>
11	<p>Burden for out- of-state attorneys: The language of the rule states that attorneys must submit fingerprint images to the DOJ via Live Scan technology, which is only available in California. Accordingly, attorneys stressed that this creates an unfair burden for out-of-state attorneys to travel to California to get</p>	81	<p>Attorneys residing outside of California are able to submit fingerprint images to the State Bar using a hard copy fingerprint card which can be completed at any fingerprint processing location within their state. The State Bar will then submit the fingerprint images to the DOJ and FBI.</p> <p>Accordingly, the rule should be changed to eliminate the language implying that attorneys must submit the fingerprint images directly to the DOJ.</p>

	fingerprinted.		
12	Burden on foreign attorneys: The rule creates an undue burden on attorneys residing overseas, as they may not have access to fingerprinting locations.	25	The rule should be modified to address active attorneys residing in foreign jurisdictions.
13	Exempt specific groups of attorneys: Commenters suggested that the rule should apply to only select groups of attorneys, including but not limited to, attorneys who have committed wrongdoing, newly licensed attorneys, or attorneys who have been practicing for many years.	61	The purpose of the rule is to effectively monitor the legal profession and to get information on all licensed attorneys. Limiting the rule to select subsets of attorneys would defeat the key purpose of the rule, which is to access criminal information that would not otherwise be known to the State Bar. Notably, the Legislature has not done so.
14	Increase in inactive attorneys: The rule will encourage attorneys to either remain inactive or go inactive.	8	There is always the possibility that an attorney will choose to go inactive rather than comply with the rules and regulations of the profession. That prospect, however, does not excuse compliance with the statute.
15	Unreliable: Commenters	20	No methods of identification are 100% accurate. That said, the Legislature has mandated fingerprinting and there are no other

	indicated that fingerprint information is not a reliable identifier. ³		alternatives that provide the type of data the State Bar is seeking. The identification is reliable enough that hundreds of agencies and employers utilize fingerprinting for licensing, certification and employment purposes.
16	Why now?: Commenters expressed curiosity as to what prompted this proposed rule.	30	As outlined in Attachment 3, the reason the rule is being proposed now is due to the recent statutory amendment to Bus. & Prof. Code § 6054, effective January 1, 2018. This statute was amended following the State Bar's discovery that it was not in compliance with the SAN contract requirement in place since 1989.
17	Overbroad: Commenters were concerned about the fact that State Bar will receive arrest information, which is not a reportable offense.	125	<p>A State Bar independent entity, distinct from the Office of Chief Trial Counsel ("OCTC"), will review arrest information when it is received by the State Bar. Only arrests that are determined to constitute a disciplinable offense will be forwarded to OCTC. OCTC will then conduct an investigation independent of the criminal justice system to determine whether to pursue disciplinary charges.</p> <p>The criminal justice system is distinct from the State Bar. The State Bar independently evaluates attorney conduct for purposes of regulation and public protection. Accordingly, certain arrests may be actionable if the arrest is for a disciplinable offense. See Bus. & Prof. Code § 6106 ("The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.") (emphasis added).</p>
18	Inactive attorneys should be treated the same as active attorneys: Commenters indicated that ALL attorneys should be required to be re-fingerprinted.	4	Inactive attorneys are not able to practice law in the State of California. Accordingly, the public protection concerns are lessened.

³ The concern that some individuals are unable to be fingerprinted is addressed in a different category (#24)

19	<p>B&P Code § 6054 Doesn't Require re-fingerprinting: Bus. & Prof.</p> <p>Code 6054, as recently amended by SB 36, authorizes, but does not obligate, the State Bar to re-fingerprint active attorneys.</p>	30	The Court's October 20, 2017 letter directs the State Bar to require the fingerprinting of all active attorneys. See Attachment 3, at p. 2, 11.
20	<p>Exempt attorneys who applied for admission to the State Bar prior to January 1, 1989: Prior to January 1, 1989, the State Bar had no obligation to have applicant fingerprints be retained by the DOJ.</p> <p>Accordingly, commenters felt that attorneys who applied for admission prior to this date should be exempt from the rule.</p>	4	For public protection purposes, the statute and the rule apply to all licensed attorneys, not just those attorneys who applied after the original requirement was promulgated.
21	<p>Timing is unclear: It is not clear if this is a one time or an ongoing requirement.</p>	40	The rule provides for all active attorneys to be fingerprinted on or before December 1, 2019. This is a one-time requirement. However, there may be circumstances where re-fingerprinting is needed at a later time. For instance, the State Bar is required to notify the DOJ if individuals are no longer attorneys such that the DOJ can destroy their fingerprints and cease providing SAN. See Cal. Penal Code § 11105.2(d). Thus, if an attorney is disbarred, or resigns, and then later applies for re-admission,

			<p>he will need to be re-fingerprinted.</p> <p>The rule should be clarified to provide the State Bar with the ongoing authority to re-fingerprint in these situations, or in other cases in which it is discovered that for some reason the State Bar is no longer receiving SAN for a specific attorney. Moreover, many attorneys will also change from inactive to active status after December 1, 2019.</p>
22	Implementation: Commenters expressed concern that the rule lacks clarity on process and procedures for the re-fingerprinting processes.	15	Implementation procedures, instructions, and a Frequently Asked Question document will be issued by the State Bar upon Court adoption of the rule.
23	Disability concerns: Commenters expressed concern for the fact that the rule does not provide exceptions for those attorneys whose fingerprints are unreadable, who are unable to provide fingerprints, or who do not have fingerprints because of a disability.	5	The proposed rule should be amended to incorporate disability protections.
24	Extend fee processing waivers: A small number of commenters suggested that processing fee waivers should be extended to	4	The proposed rule should be amended to provide the Board the authority to implement fingerprinting fee waivers. This will allow the Board to develop its own policies regarding what groups of attorneys should be granted fee waivers.

attorneys who have received fee scaling under State Bar Rule 2.15(B) (attorneys who work for certain		
qualified legal services). The commenters stressed the proposed rule would impose tremendous costs to underfunded qualified legal service providers and support programs.		

In addition to the proposed rule changes, noted above, stemming from an analysis of comments received, staff has also identified an additional modification to clarify application of the rule to attorneys practicing in California under the Court’s Special Admissions rules. See Division 4 of the California Rule of Court (“Appearances and Practice by Individuals Who are Not Members of the State of California”).

Although many Special Admission categories require a State Bar moral character determination, attorneys applying for authorization to practice under these provisions do not apply for general admission to the State Bar. *Id.* The legislative intent of the 1989 amendment to Bus. & Prof. Code § 6054 was for the State Bar to retain fingerprints of applicants for admission to the State Bar such that the State Bar could receive arrest notification for its licensees. Since individuals in these Special Admissions categories are not State Bar licensees, they do not need to be re-fingerprinted.

Lastly, as noted above, there were a small number of comments received that favor the re-fingerprinting rule.⁴ These include:

- “I am a CA licensed attorney since 2001. I am also a domestic violence survivor and the founder of SOAR for Justice. My ex-spouse, also a CA attorney, was abusive towards me for 10 years. I obtained a domestic violence restraining order in against him in San Diego County and this did not impact his ability to practice law. If he had been required to re-fingerprint, however, the state bar may have learned about his moral turpitude. As a result of the violence, I have relocated with my child to Massachusetts to escape my abuser. He continues to

⁴ These comments are provided as submitted.

practice law in San Diego. I believe the state bar should include the existence of a domestic violence restraining order as a basis for disbarment.”

- “I think this is a good idea because many attorneys with drug and alcohol problems seem to be "under the radar" and knowing if there has been a relapse is important for the public interest. In addition, those with mental health disabilities, which might include elder attorneys who should be retiring, could be detained for driving recklessly, for example.”
- “I think anything that encourages law abiding behavior and maintains the integrity of the law profession is a good move. There are already too many attorneys, many with questionable judgment, as evidenced by their criminal convictions.”
- “I believe this change is long overdue and will help ensure the integrity of the attorney ranks. It is consistent with the licensing schemes for other professions.”
- “This a rule is long overdue [sic], criminal behavior should not be tolerated when your [sic] an Officer of the Court. Being able to identify when a member is on a criminal lifestyle serves the public interest as to prevent that behavior from escalating.”
- “The benefits of required fingerprinting and criminal history verification are numerous and compelling. Fingerprinting permits positive identification of attorneys with relevant convictions, thus enabling the Bar to exercise appropriate discretion— a valuable disciplinary tool that the Bar has been lacking for the past 30 years.

As attorneys, we owe a duty to the state of California to ensure that members of our profession are adhering to the law of the land. We cannot stand for a system that would deprive the public of this critically important benefit because we don't think we should have to pay for it. And it would equally harm the public if the Bar were forced to divert existing funds away from its work disciplining unethical and incompetent attorneys in order to pay for the costs of submitting existing attorneys' fingerprints to the Department of Justice.

While it is extremely unfortunate that we attorneys should have to pay again to submit our fingerprints due to the Bar's own lack of compliance with the law, it is the right thing to do to protect the people of California. “

RECOMMENDATION

State Bar Rule 1.10 mandates that all rules proposed by the State Bar to the Court be circulated for public comment. Pursuant to this rule, substantive amendments to proposed rules must also be circulated for public comment. See Rule 1.10 (B)(2) (2). As staff recommends substantive amendments to the rule, an additional public comment period is required.

Attachment 1 provides the clean text of the revised proposed rule. Attachment 2 provides the redline/strikeout version of the rule, showing changes to the proposed rule from the rule issued for the 45-day public comment period.

PROPOSED BOARD RESOLUTION

RESOLVED, that the Board of Trustees authorizes staff to make available for a 30-day public comment period, the amended proposed rule to the California Supreme Court included as Attachment 1 to this Agenda Item.

ATTACHMENT(S) LIST

Attachment 1. Clean Text of Proposed Amended Rule

Attachment 2. Redline Text of Proposed Amended Rule Showing Changes to the Draft submitted for public comment

Attachment 3. November 17, 2017 Agenda Item requesting public comment authorization

Attachment 4. Full Text of Public Comments – Available at http://www.calbar.ca.gov/Portals/0/documents/publicComment/2018/Public_Comments_Attachment_4_Comments-received.pdf

PART TWO

PLANNING AND PREPARATION FOR RE-FINGERPRINTING ACTIVE, LICENSED ATTORNEYS: BACKGROUND

In preparation for the implementation of a new Rule of Court requiring the re-fingerprinting of active, licensed attorneys, a multi-divisional team of Bar staff has been working to develop the technology, policies, and procedures necessary to implement the policy by the deadline of December 1, 2019, established by the Board of Trustees in its proposed rule. Part Two of this report provides a detailed overview of the work completed to date, proposed processes for reviewing criminal records of licensed attorneys, an implementation schedule, and the remaining steps necessary to successfully implement this new Rule of Court.

DISCUSSION

In June 2017, the Bar entered into a contract with the DOJ to receive Subsequent Arrest Notification (SAN) for all *applicants* to the Bar whose fingerprints were processed after July 1, 2017. In August, the Bar entered into a contract with the California State Department of Justice (DOJ) to allow for the receipt of SAN on *attorneys*.

DOJ policies, however, do not allow for agencies such as the Bar to receive SAN on anyone who has not been identified through fingerprinting. And, because the Bar had not previously entered into a contract with DOJ to receive SAN, DOJ did not retain fingerprint records of attorneys whose fingerprints were processed prior to July 1, 2017. As a result, it is not possible for the Bar to receive SAN information on any attorney's fingerprinted prior to July 1, 2017 unless the attorney is re-fingerprinted.

Assuming that the Supreme Court adopts a new Rule of Court to require the re-fingerprinting of attorneys in California, the receipt of SAN from the DOJ will involve two distinct phases of work. The initial phase of work will involve the re-fingerprinting approximately 190,000 active attorneys in California and processing of the results of those fingerprints. The subsequent phase will involve the "maintenance" of the new work created by the receipt of SAN information.

In addition to the different phases of work required to implement this rule, the receipt of criminal history and SAN information will have a distinct impact upon different divisions of the Bar:

- Applicants for admission to the Bar whose fingerprints were processed after July 1, 2017, are already enrolled in the SAN system. As a result, the Office of Admissions has already begun adapting its business processes and procedures to address the receipt of this information on applicants;
- The Office of Attorney Regulation and Consumer Resources (ARCR) has not yet been affected but will play a central role in the implementation of the new Rule. ARCR records will be used for notifying attorneys of their obligations under the rule, sending reminders, posting information on attorneys' My State Bar Profile pages on the Bar's web site, tracking compliance, and, if necessary, sanctioning attorneys for non-compliance;
- The Office of the Chief Trial Counsel (OCTC), Office of Probation, and State Bar Court can expect an increase in the volume of work related to SAN sent by the DOJ. But the expectation is that the implementation of a new rule on fingerprinting will not result in significant operational changes to these components of the discipline system;

- Information Technology (IT) staff have been central to all of the work to date and will continue to play a critical role throughout the implementation. The IT team working on this project has established and tested new channels for the transmission of data from the DOJ; they have built new interfaces for reviewing DOJ data electronically and comparing the information with State Bar records; they have created automated routines for the processing of information and population of new fields in the records of attorneys to track compliance; and, they will continue to work closely with all Bar staff on developing and implementing the technology requirements of this policy;
- The Office of Research and Institutional Accountability (ORIA) is working as the project lead, coordinating the work of different divisions across the Bar. ORIA will remain heavily involved throughout the implementation phase of the project. Depending on how SAN information is routed following implementation, ORIA's work may end, or the unit may continue to play a supportive role to OCTC once the Bar has completed the re-fingerprinting of attorneys.

The following discussion looks first at data transfer and the process of matching and validating records, focusing on those aspects of the process that are the same for applicants to the Bar and for licensed attorneys. This section includes a discussion of new processes already adopted in the Office of Admissions and the proposed processes for reviewing criminal histories of attorneys and routing this information to OCTC.

After that, the report looks at aspects of the process that will differ between the Office of Admissions and ORIA. This section provides information on proposed guidelines that will be followed for routing information on the criminal histories of applicants and licensed attorneys.

The section after that proposes a timeline for implementation of the requirement including a single period for compliance of all attorneys followed by a warning period, and two successive periods of graduated sanctions for failure to comply. This section also looks at the question of active, out-of-state attorneys, and active attorneys who reside outside of the country.

The remainder of the report then discusses the discontinuation of SAN for applicants and attorneys when their statuses change (applications that are withdrawn and licensed attorneys who are disbarred, resign, or are deceased); data security, and; the final phase of work, maintenance of the receipt of SAN information once the implementation phase of the Rule is completed.

DATA TRANSFER, MATCHING AND VALIDATION OF RECORDS

After entering into the contract with the DOJ to receive SAN information on licensed attorneys, Bar IT staff began working with the DOJ to establish protocols for secure data transfer of information from the DOJ. The Bar already has a secure, electronic data transfer process in place to receive background check information from the DOJ for *applicants* to the Bar and, in certain respects, the creation of a new, secure channel to receive SAN information on licensed attorneys runs parallel to the existing process.

There are, however, important differences in the two processes. And, the development of new processes to receive SAN for licensed attorneys has already resulted in the creation of new tools and streamlined processes that are being used in the Office of Admissions to review background checks sent as part of an applicant's moral character evaluation.

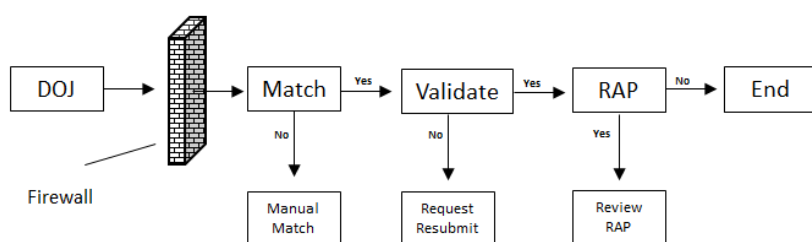
Receipt of Criminal History Information – Processes that Apply to Applicants and Attorneys

Enrolment into the SAN system begins with a background check. The submission of fingerprints by an applicant or attorney results in the production of a report on the individual's entire criminal history (a Record of Arrest and Prosecution, RAP) that is transmitted to the Bar.⁵

IT staff developed a new, automated process for the matching of records when the Bar receives the initial background check, shown in Figure 1, below. The vast majority of cases will follow the path of the horizontal arrows, which is entirely automated and defined by the following key actions.

- DOJ - the results of the background check are sent from DOJ and pass through a secure fire-wall onto a State Bar server;
- Match - the identity of the subject of the background check is matched against Bar records of applicants and attorneys and moved forward when the identity is established;
- Validate - the DOJ indicates that it was able to process the fingerprints (it was not rejected due to un-readable prints) and moves forward again;
- RAP - the DOJ indicates that it has no record of arrest and prosecution for the subject of the check and the process ends.

Figure 1 – Initial Phase of Data Receipt – No Criminal Record



During this initial phase of receipt and processing a number of additional automated procedures take place, not pictured in Figure 1.

- Match – when an attorney's or applicant's fingerprints are matched, a "flag" will be created on the attorney or applicant's record indicating compliance with the fingerprinting requirement;
- Validate – when an attorney or applicant's fingerprints cannot be read by the DOJ, the information moves into a queue for further processing to alert the attorney or applicant that fingerprints must be resubmitted.

Because this initial phase of matching and validating fingerprints is common to the review of background checks for both applicants and attorneys, the Office of Admissions is already using

⁵ All background checks will include both a California state-specific check, run by the DOJ, and an FBI check which runs against Federal criminal databases including criminal history data reported by other states. The data transmission for both checks runs through the California State DOJ, and the processes described here apply to both of these checks. For the sake of clarity, the different background checks will be singled out only when there is a difference in the process for handling the two types of checks.

the new technology developed by the Bar's IT Office. As a result of this work, the process has already been improved in the Office of Admissions.

Previously, Office of Admissions staff assigned to the Moral Character evaluation would print hard copies of the report transmitted by the DOJ and compare the information contained in those reports to the records of applicants to establish a match. The new process developed by the Bar's IT team conducts an automated match and completes the processing for applicants under three conditions: their application information is identical to DOJ records; their fingerprints were readable, and their RAP indicates no criminal history (the horizontal path defined in Figure 1).

When records do *not* match – for example, because of a transposed digit in a Social Security number or birthdate – the DOJ report is placed in a work queue that integrates with the records of the Office of Admissions. Using the new interface developed by IT, Office of Admissions staff can now review the unmatched record on the same screen as applicant data and, where appropriate, complete a manual matching of records entirely within the electronic interface.⁶

Review of Criminal History Information – Processes that Will Differ for Applicants and Attorneys
When the result of the criminal background check is positive – that is, when there is a criminal history for the applicant or attorney – the work flow requires manual intervention. This flow is depicted in Figure 1 by the horizontal path up until RAP at which point it follows the arrow down to “Review RAP.” At this point, the processes followed by the Office of Admissions will diverge from the processes followed by the ORIA.

Office of Admissions Review of Applicants' Criminal History

In the Office of Admissions, the handling of criminal history information depends on the stage of case processing for the application. Criminal history information is reviewed to determine how to route the information: if the applicant is in the pre-processing phase, the results are submitted to the assigned pre-processing clerk; if the applicant's case has already been assigned to a moral character analyst at the time that criminal history information is discovered, the findings are submitted to the corresponding moral character analyst.

In the event that a criminal history or subsequent arrest information is received for an applicant who has since become a licensed attorney, the record will be routed to ORIA. All arrest information obtained during a background check or as a result of a subsequent arrest will be evaluated against applicant reports and the applicant file in its entirety. The information will be assessed to determine first whether the applicant already reported the incident and, if so, whether the account matches the report received by the Office of Admissions. If the incident was already reported and matches the report received by the Office of Admissions, then no additional processing is required.

In cases where an applicant did not already report relevant criminal history information to the Office of Admissions, the information will be considered as part of the moral character

⁶ In addition to match failures that result from simple errors in data entry or the transposition of numbers in key identifiers, the Office of Admissions also receives criminal history information on applicants who are not yet in the system at all because fingerprints were submitted prior to the submission of other application materials. The Office of Admissions holds onto these applications for three months before destroying those results and alerting the DOJ that the agency is no longer interested in arrest information for this individual.

determination. The applicant's candor, severity of the arrest, charges, or conviction, and its impact, rehabilitation (or potential for rehabilitation) and accountability are other factors considered in the moral character determination. Cases with complex circumstances or requiring input from the applicant, are submitted to the Committee of Bar Examiner's Moral Character subcommittee for an informal conference. At the conclusion of each informal conference, subcommittee members are required to make a positive or negative determination, or to "abey" the case. A positive determination clears the case. A negative determination leads to a denial of the application but allows the applicant to wait two years before re-applying or allows the applicant to appeal through the State Bar Court. An abeyance determination grants the applicant time to participate in rehabilitation.

Office of Research & Institutional Accountability Review of Attorneys' Criminal History

Attorney background checks that contain criminal history information will be retrieved by staff in ORIA from a secure terminal. ORIA staff will follow a number of decision rules regarding the information to determine whether to forward the information to the Office of the Chief Trial Counsel.

The first decision rule for evaluating criminal record information has to do with the date of arrest, charge, or conviction on the record. The remaining questions flow from that date as shown in Figure 2, below.

Figure 2 – Simplified Decision Rules for Routing of Criminal Record Information

- Did the date of the criminal history information precede the attorney's admission to the Bar?
 - If "yes":
 - Was the criminal history information known to the Office of Admissions and considered during the attorney's moral character evaluation?
 - If "yes", then the record is destroyed and no further action is taken;
 - If "no", then the record is transferred to OCTC for review.
 - If "no":
 - Was the criminal history information known to OCTC?
 - If "yes", then the record is destroyed and no further action is taken;
 - If "no", then the record is transferred to OCTC for review.

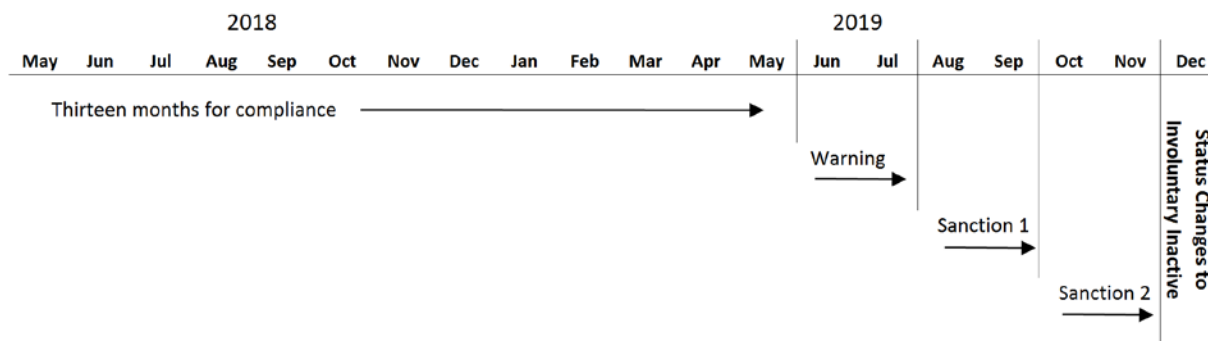
The actual decision rules for evaluating and acting on criminal history have additional nuances related to whether the information pertains to arrests, charges, or convictions, and the age and type of charge (misdemeanors or felonies). Attachment 5 provides a more detailed decision matrix and the guidelines that will be used to determine whether or not to forward a record to OCTC.

ENFORCEMENT OF REQUIREMENT FOR RE-FINGERPRINTING

The proposed rule requiring the re-fingerprinting of attorneys approved by the Board of Trustees directs the Bar to complete the re-fingerprinting of active attorneys by December 1, 2019 (Attachment 1). This relatively short time-frame for implementation will expedite the Bar's compliance with Business and Professions Code 6054 and suggests the need to establish a single compliance period for all active attorneys with frequent notification and graduated sanctions for failure to comply.

The exact time frames for implementation will depend on the date when a new rule, if approved, becomes effective. The phases through which notification and sanctions proceed, however, can be mapped out and are presented in Figure 3, below, under an assumption of an April 30 effective date for the new rule.

Figure 3 – Proposed Timeline and Phases for Implementation of Re-Fingerprinting



With an April 30 effective date, Figure 3 shows that a full 13 months could be established for compliance with the re-fingerprinting mandate followed by:

- a two-month warning period during which communication is more frequent and the consequences for failure to comply are emphasized more strongly;
- a two-month period during which active members who have not complied would be required to pay a limited monetary sanction for late compliance;
- a two-month period during which active members who have not complied would be required to pay a larger monetary sanction for late compliance.

Communications with licensed attorneys should be frequent and targeted. Although active attorneys will be the principal target of the communications, inactive attorneys and attorneys who are in statuses that would allow them to reactivate their licenses without re-fingerprinting will need to be alerted to the new requirements also.⁷ The requirements for reactivation of

⁷ Attorneys who are on Probation and complete a suspension without conditions other than the suspension are generally reactivated without any additional conditions. While these suspensions are relatively short and will mostly fall within the compliance period, there may be suspensions that conclude following the compliance period and will need to be addressed. Similarly, attorneys who are suspended and subject to additional conditions – such as the payment of restitution – may become eligible to have their licenses reactivated following compliance with these terms and outside of the compliance period.

licenses following a period of being in inactive status (or any other status from which an attorney could return to active status) should be changed to include the submission of fingerprints to the DOJ.

On-going tracking using the records of the Office of Attorney Regulation and Consumer Resources will allow for the delivery of e-mail notifications that only remind those attorneys whose fingerprints have not been received as of a specific date. These records can also be used to create a personalized notification on the My State Bar Profile pages on the Bar's web site, alerting attorneys if the Bar has not yet received their fingerprints or, conversely, notifying them that their fingerprints were received. The My State Bar Profile page will also be used to deliver the Live Scan form to attorneys with the required data-transmission codes that the DOJ uses to link fingerprints with the Bar.

Active out-of-state attorneys will pose a special challenge because of the potentially labor-intensive process for acquiring fingerprints from out-of-state attorneys. Currently the Office of Admissions mails blank fingerprint cards to out-of-state applicants to the Bar, then receives these cards from the applicants once their fingerprints have been taken, and transmits the cards to the DOJ. There are currently approximately 20,000 out-of-state attorneys in active status. Bar staff are communicating with the DOJ to explore options for fingerprinting out-of-state active attorneys that would avoid the multiple steps of communication and mailing involved in the process employed by the Office of Admissions for out-of-state applicants.⁸

DISCONTINUATION OF DATA TRANSMISSION FROM THE DOJ

The receipt of SAN information from DOJ creates an additional obligation for the State Bar: notification of the DOJ when SAN information on applicants and attorneys is no longer needed. The formal process for removing people from the SAN system is referred to as a "No Longer Interested" (NLI) notification. In the Office of Admissions, applicants will remain registered for the transmission of subsequent arrest data to the Bar until their application is abandoned, denied, expired or withdrawn either administratively or by the applicant. When an application has reached any of these stages, the applicant's name and identifying information will be added to an NLI file which will be submitted to the DOJ on a monthly basis.

For active attorneys, SAN will be discontinued when attorneys move out of either active or inactive status and into any one of three categories: disbarred, resigned, or deceased. Information technology staff are developing the automated routine that will track status changes, create a NLI list, and place a flag on the records of former attorneys to indicate that they have been removed from the SAN system.

DATA SECURITY

ORIA staff are currently reviewing Bar protocols regarding data security including access to secure terminals and assessing the adequacy of the number and location of "custodians of records" in different Offices of the Bar. Typically an agency establishes one or more custodians of records whose role is to ensure that all staff with access to criminal history information have signed documents attesting to their awareness of the confidentiality of criminal history

Additional requirements will need to be established to ensure that attorneys who may have been suspended during the compliance period are re-fingerprinted prior to becoming active again.

⁸ Another almost 2,000 active attorneys reside in foreign countries. Amendments to the proposed Rule of Court contained in Part One of this report address a process for dealing with these cases.

information and the criminal penalties associated with the unauthorized transmission of this information. Custodians of records need to be fingerprinted with SAN information on them routed to the DOJ.

MAINTENANCE OF SUBSEQUENT ARREST NOTIFICATIONS FOLLOWING IMPLEMENTATION

Direct Receipt of Subsequent Arrest Notification Information in OCTC

One of the key benefits of the role performed by ORIA in the implementation phase is to regulate the flow of information to OCTC to ensure that only relevant criminal history information is forwarded to OCTC. Relevance relates to whether the Office of Admissions or OCTC was already aware of the information *and* whether the information is covered under the statutes that govern the reporting of criminal history information (Business and Professions Code Sections 6068(o)(4), 6068(o)(5), 6101(a) and 6101(b)).

Following the implementation phase, it will no longer be necessary to screen criminal history information to determine whether the information was known to OCTC. It may, however, be useful to retain ORIA in a gatekeeper role to evaluate whether the information *should* be transmitted to OCTC. Whether ORIA should continue to play this role will depend on striking a balance between an attorney's privacy rights and the Bar's public protection obligation and should be discussed in more detail by the Board of Trustees.

Office of Admissions Subsequent Arrest Notification

As noted above, applicants will remain registered for receipt of subsequent arrest data until the application is abandoned, denied, expired or withdrawn (administrative withdrawal or applicant withdrawal). When an application has reached any of these stages, the DOJ will be notified that the State Bar "is no longer interested" (NLI) in this applicant. An NLI report will be generated on a monthly basis to ensure that the State Bar is no longer receiving information for applicants that are no longer pursuing licensing.

Applicants who are not admitted into the practice of law and whose applications remain active may be reported to the Office of Admissions through the SAN system. The Office of Admissions will need to establish policies for how to assess the information reported through the SAN system, whether to reopen moral character evaluations based on the information.

FISCAL/PERSONNEL IMPACT

Bar staff anticipate that implementation of a new rule mandating the re-fingerprinting of attorneys will carry with it significant fiscal and personnel impacts. These costs were estimated at \$.6 million in the budget submitted to the Board of Trustees on November 3, 2017, but will depend upon the volume of previously unknown criminal history information discovered during the re-fingerprinting of licensed attorneys. On-going costs will depend on the amount and type of contact with the criminal justice system reported through the SAN process that was previously missed through self-reporting and reporting by prosecuting attorneys and courts.

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: 1. Successfully transition to the "new State Bar"—an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Objective: Implementation of a new rule mandating the re-fingerprinting of attorneys so that the Bar receives SAN information from the DOJ will bring the Bar into compliance with its statutory

obligations under Business and Professions Code 6054. Moreover, the implementation of this rule will provide the Bar with more accurate and complete information on criminal activity of attorneys.

ATTACHMENT(S) LIST

Attachment 5. Draft Decision Rules for Handling Records of Arrest and Prosecution

ATTACHMENT 1

1. Licensed Attorney Fingerprinting

a) Subsequent Arrest Notification: The State Bar shall enter into a contract with the California Department of Justice for Subsequent Arrest Notification services for licensed active California attorneys, pursuant to Business and Professions Code section 6054.

(i) The State Bar is already receiving Subsequent Arrest Notification services for some attorneys. The State Bar will consider these attorneys as having already satisfied the fingerprinting requirement of this rule and are thereby exempt. The State Bar shall notify all attorneys to check their MyStateBar Profile for information as to whether they have been deemed to have already satisfied the requirement.

b) Active Licensed Attorneys: Each active licensed attorney, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.

c) Inactive Licensed Attorneys: Inactive licensed attorneys, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted prior to being placed on active status.

d) Active Licensed Attorneys in Foreign Countries: Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction that the attorney is physically located, the attorney must notify the State Bar using a form available through the attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States, provided, that within 60 days of returning (even temporarily) to the United States, such attorney shall be fingerprinted.

e) Special Admissions: This Rule only applies to attorneys of the State Bar. It does not apply to attorneys who are permitted to practice in the State of California pursuant to California Rule of Court Rules 9.40 through 9.48.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation that requires all active licensed attorneys required to be fingerprinted under section 1(b) to be fingerprinted by December 1, 2019.

The State Bar has ongoing authority to require re-fingerprinting after December 1, 2019 attorneys for whom it is not receiving subsequent arrest notification services and for attorneys transferring to inactive status

3. Information Obtained by Subsequent Arrest Notification; Limitations on Disclosure

Any information obtained by the State Bar through the Subsequent Arrest Notification System shall be Confidential and shall be used solely for State Bar licensing and regulatory purposes.

4. Fingerprint Submission and Processing Costs

Except as described in 4(a), all costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

a) The Board of Trustees of the State Bar must develop procedures for granting waivers of fingerprint processing costs for licensed attorneys with demonstrable financial hardship.

5. Attorneys Who are Physically Unable to be Fingerprinted

a) If the DOJ makes a determination pursuant to California Penal Code section 11105.7 that the attorney is presently unable to provide legible fingerprints, the attorney will have been deemed to have complied with the requirement of Section 1.

b) Attorneys may also submit notification to the State Bar directly through their MyStateBar profile that they are unable to submit fingerprints due to disability, illness, accident, or other circumstances beyond their control. The State Bar will evaluate the notification and may require additional evidence. If the State Bar determines that the attorney is unable to submit fingerprints based on the information provided, the attorney will have been deemed to have complied with the requirement of section 1(b).

c) This section shall only apply to those persons who are unable to supply legible fingerprints due to disability, illness, accident, or other circumstances beyond their control and does not apply to persons who are unable to provide fingerprints because of actions they have taken to avoid submitting their fingerprints.

ATTACHMENT 2

1. Licensed Attorney Fingerprinting

a) Subsequent Arrest Notification: The State Bar shall enter into a contract with the California Department of Justice for Subsequent Arrest Notification services for licensed active California attorneys, pursuant to Business and Professions Code section 6054.

(i) The State Bar is already receiving Subsequent Arrest Notification services for some attorneys. The State Bar will consider these attorneys as having already satisfied the fingerprinting requirement of this rule and are thereby exempt. The State Bar shall notify all attorneys to check their MyStateBar Profile for information as to whether they have been deemed to have already satisfied the requirement.

b) Active Licensed Attorneys: Each active licensed attorney, with the exception of those attorneys specifically exempt under subsection 1(a)(i), ~~of the State Bar for whom the State Bar does not currently have fingerprint images~~ shall, pursuant to the procedure identified by the State Bar, be fingerprinted ~~submit fingerprint images to the Department of Justice~~ for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.

~~Inactive licensed attorneys for whom the State Bar does not have fingerprint images must submit fingerprint images to the Department of Justice prior to seeking active status.~~

c) ~~The State Bar shall request from the Department of Justice subsequent arrest notification service for its active licensed attorneys, pursuant to Business and Professions Code section 6054.~~ **Inactive Licensed Attorneys:** Inactive licensed attorneys, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted prior to being placed on active status.

d) Active Licensed Attorneys in Foreign Countries: Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction that the attorney is physically located, the attorney must notify the State Bar using a form available through the attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States, provided, that within 60 days of returning (even temporarily) to the United States, such attorney shall be fingerprinted.

e) Special Admissions: This Rule only applies to attorneys of the State Bar. It does not apply to attorneys who are permitted to practice in the State of California pursuant to California Rule of Court Rules 9.40 through 9.48.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation ~~of subsection (a)~~ that requires all active licensed attorneys ~~required for whom the State Bar does not have fingerprint images to be fingerprinted under section 1(b) submit fingerprints to the Department of Justice~~ by December 1, 2019.

The State Bar has ongoing authority to require re-fingerprinting after December 1, 2019 attorneys for whom it is not receiving subsequent arrest notification services and for attorneys transferring to inactive status.

3. Information Obtained by Subsequent Arrest Notification; Limitations on Disclosure

Any information obtained by the State Bar through the Subsequent Arrest Notification System shall be Confidential and shall be used solely for State Bar licensing and regulatory purposes.

3.4. Fingerprint Submission and Processing Costs

Except as described in 4(a), All costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

a) The Board of Trustees of the State Bar must develop procedures for granting waivers of fingerprint ~~will cover the DOJ and FBI processing costs for licensed attorneys with demonstrable financial hardship. who have been granted a fee scaling or fee waiver for annual membership fees pursuant to State Bar Rule 2.15(A) or 2.16(C)(3)(c). These attorneys will pay for all third party print furnishing costs.~~

5. Attorneys Who are Physically Unable to be Fingerprinted

a) If the DOJ makes a determination pursuant to California Penal Code section 11105.7 that the attorney is presently unable to provide legible fingerprints, the attorney will have been deemed to have complied with the requirement of Section 1.

b) Attorneys may also submit notification to the State Bar directly through their MyStateBar profile that they are unable to submit fingerprints due to disability, illness, accident, or other circumstances beyond their control. The State Bar will evaluate the notification and may require additional evidence. If the State Bar determines that the attorney is unable to submit fingerprints based on the information provided, the attorney will have been deemed to have complied with the requirement of section 1(b).

c) This section shall only apply to those persons who are unable to supply legible fingerprints due to disability, illness, accident, or other circumstances beyond their control and does not apply to persons who are unable to provide

fingerprints because of actions they have taken to avoid submitting their fingerprints.

ATTACHMENT 3

OPEN SESSION
BOT AGENDA ITEM NO. 701
NOVEMBER 2017

DATE: November 3, 2017

TO: Members, Board of Trustees

FROM: State Bar Staff

SUBJECT: Proposed California Rule of Court Regarding Fingerprinting of Active Licensed Attorneys – Request for Public Comment

EXECUTIVE SUMMARY

This agenda item requests the Board of Trustees to authorize a 45-day public comment period for a proposed court rule to implement a fingerprinting requirement for active licensed attorneys under the recent amendments to Business and Professions Code section¹ 6054, effective January 1, 2018. Pursuant to the California Supreme Court's recent directive, the proposed rule requires all active licensed attorneys to submit or resubmit fingerprints to the Department of Justice by a set deadline and to pay the fingerprint processing and furnishing costs in connection with such submissions.

BACKGROUND

On October 20, 2017, Tani G. Cantil-Sakauye, Chief Justice of California, sent a letter to State Bar President Michael Colantuono and Executive Director Leah Wilson, regarding Senate Bill ("SB") No. 36's recent amendment to section 6054 authorizing the State Bar of California ("State Bar") to require attorneys to submit or resubmit fingerprint records to the California Department of Justice ("DOJ") in order to receive subsequent arrest notification for these individuals. The Court's letter is Attachment 1. The full text of section 6054, as amended by SB 36, is as follows:

(a) State and local law enforcement and licensing bodies and departments, officers and employees thereof, and officials and attachés of the courts of this state shall cooperate with and give reasonable assistance and information, including the providing of state summary criminal history information and local summary criminal history information, to the State Bar of California or any authorized representative thereof, in connection with any investigation or proceeding within the jurisdiction of the State Bar of California, regarding the admission to the practice of law or discipline of attorneys or their reinstatement to the practice of law.

(b) The State Bar of California shall require that an applicant for admission or reinstatement to the practice of law in California, or may require a member to submit or resubmit fingerprints to the Department of Justice in order to establish

¹ Unless otherwise stated, all section citations are to the Business and Professions code.

the identity of the applicant and in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states. The information obtained as a result of the fingerprinting of an applicant or member shall be limited to the official use of the State Bar in establishing the identity of the applicant and in determining the character and fitness of the applicant for admission or reinstatement, and in discovering prior and subsequent criminal arrests of an applicant, member, or applicant for reinstatement. The State Bar shall notify the Department of Justice about individuals who are no longer members and applicants who are denied admission to the State Bar within 30 days of any change in status of a member or denial of admission. All fingerprint records of applicants admitted or members reinstated, or provided by a member, shall be retained thereafter by the Department of Justice for the limited purpose of criminal arrest notification to the State Bar.

(c) The State Bar shall request from the Department of Justice subsequent arrest notification service, as provided pursuant to Section 11105.2 of the Penal Code, for applicants to, and members of, the State Bar.

(d) If required to be fingerprinted pursuant to this section, a member of the State Bar who fails to be fingerprinted may be enrolled as an inactive member pursuant to rules adopted by the board of trustees.

(e) The State Bar shall report to the Supreme Court and the Legislature by March 15, 2018, regarding its compliance with the requirements of this section.

While section 6054 authorizes the State Bar to require submission or resubmission of attorney fingerprints to the DOJ, it does not obligate the State Bar to do so. The statute is also silent in regard to how the State Bar may implement attorney fingerprinting requirements, including with respect to a compliance timeframe and who should bear the costs associated with the processing and furnishing of these submissions. The statute also removes language mandating that the State Bar bear costs associated with the processing of applicant fingerprints.

The Supreme Court's October 20, 2017, letter obligates the State Bar to require attorney submission of fingerprints to the DOJ. It states: "requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system." See Attachment 1. In its letter, the Court directs the State Bar "to consider and present to the [C]ourt any proposed court rules that may be appropriate to facilitate implementation of the fingerprinting requirement for all State Bar applicants and all active attorney members." *Id.*

In connection with the statutory changes, State Bar staff has been re-evaluating its current policies and procedures for applicant fingerprinting, and determining what processes are necessary for the submission of active attorney fingerprints to the DOJ and the subsequent receipt of criminal information. This evaluation includes an analysis of anticipated operational impact on the State Bar, including a review of staffing needs. Accordingly, this agenda item provides the Board with an overview of these analyses and a proposed court rule requiring all active licensed attorneys² to submit or resubmit fingerprints to the DOJ. The proposed rule also includes a timeframe for compliance with this requirement and a requirement that licensed attorneys bear all costs associated with fingerprint submission.

² State Bar applicants are already required to be fingerprinted pursuant to section 6054.

Pursuant to State Bar Board Book Rule 1.10, staff recommends that the Board request a 45-day public comment period on the proposed rule.

DISCUSSION

I. The State Bar's Subsequent Arrest Notification Contracts with the DOJ

As reported to the Board earlier this year, staff determined that it was necessary for the State Bar to enter into a contract for Subsequent Arrest Notification ("SAN") in order to comply with section 6054's fingerprint retention requirements. Prior to SB 36, section 6054 required that only State Bar applicants be fingerprinted and that such fingerprint records "be retained thereafter for the limited purpose of criminal arrest notification." Although the State Bar was requiring applicants for admission to be fingerprinted, the State Bar had not entered into a contract for the DOJ to retain these fingerprints. As such, the State Bar was not receiving SANs for any applicant after admission to the State Bar.³

Upon realizing the error, the State Bar entered into a SAN contract with the DOJ on June 28, 2017, effective July 1, 2017 (the "Applicant Contract"). Attachment 2 is the Applicant Contract. Pursuant to the Applicant Contract, the DOJ is now retaining applicant fingerprint records in order to notify the State Bar of subsequent arrests of those individuals.

The State Bar subsequently entered into a second contract with the DOJ for active licensees (the "Licensee Contract"). Attachment 3 is the Licensee Contract.

Although the Licensee Contract currently provides for SAN services for all licensed attorneys, the DOJ is unable to provide arrest notification for the vast majority of this population. This is because fingerprint records previously submitted by licensed attorneys as part of their moral character application were not retained by the DOJ because no contract was previously in place permitting such retention.

As also previously explained to the Board, the State Bar has only retained fingerprint records of a small subset of applicants who submitted fingerprints using hard copy fingerprint cards within the past three years. Of these applicants, approximately 1,500 are now active licensed attorneys. Following the execution of the Licensee Contract, the State Bar submitted the fingerprint records of these attorneys to the DOJ⁴. Thus, pursuant to the Licensee Contract, the DOJ will provide SAN services for these attorneys. However, the only way for the State Bar to receive arrest notification for all other active licensed attorneys is for those individuals to submit new fingerprint records to the DOJ to be retained pursuant to the Licensee Contract.

³ The term "arrest notification" includes notification of both arrests and the dispositions thereof. See Cal Pen. Code § 11105.2(a).

⁴ The State Bar has also submitted the hard copy fingerprint cards of approximately 1,500 applicants whose applications are still pending, so that they can be retained pursuant to the Applicant Contract.

II. Operational Analysis

A. Fingerprint Processing and Subsequent Arrest Notification Review and Response Procedures

In order to handle the influx of criminal information that will flow from the State Bar's two contracts with the DOJ, staff has re-evaluated its current processes and created certain new procedures.

1. New Procedures Related to State Bar Applicants

Pursuant to the Applicant Contract, effective July 1, 2017, enrollment in the SAN system now occurs as a byproduct of the criminal background check run on all applicants to the State Bar. Thus, following an applicant's submission of fingerprints to the DOJ, the Office of Admissions ("Admissions") receives electronic notification through a secure File Transfer Protocol ("FTP"), indicating whether a criminal history for the applicant was found. When a criminal history is found, Admissions receives this information electronically through the same secure FTP. Admissions will continue to receive notification of any criminal information until the applicant is admitted to the State Bar. While it is not anticipated that a large number of applicants will pick up additional arrests, charges, or convictions during the limited amount of time that most applicants are in this status, there are applicants who spend years attempting to pass the bar exam and whose moral character evaluation will need to be reconsidered by Admissions when new information comes to light as a result of SAN. Admissions has yet to receive any SAN hits on applicants who were fingerprinted since July 1, 2017, and staff is working to develop guidelines governing the review of this information when it is eventually received.

Another process for Admissions to manage is the notification to the DOJ when an applicant is denied admission to the State Bar. The State Bar is obligated to notify the DOJ when an applicant is denied admission so that the DOJ can destroy those individuals' fingerprints. See Cal Pen Code § 11105.2(f); section 6054, as amended by SB 36. An applicant is denied admission to the State Bar if he or she has not been admitted to the State Bar within three years of submitting a moral character application, provided there is no approved extension. An applicant who fails the bar exam may retake the exam within this time period without needing to be re-fingerprinted each time he or she registers for the exam.

On October 3, 2017, the Committee of Bar Examiners approved an applicant fingerprint processing protocol requiring Admissions to inform the DOJ when SAN is no longer required for individual applicants whose positive moral character determination has expired, their application has been abandoned, or who are otherwise ineligible for admission. Admissions staff will review moral character applications monthly to determine which applicants have applications meeting these requirements. The names of those applicants will then be transmitted to the DOJ through a formal "No Longer Interested" notification form each month.

2. New Procedures Related to Currently Licensed Attorneys

To effectuate the submission of licensed attorney fingerprints to the DOJ and the receipt of SAN for licensed attorneys, staff plans to upload a pre-populated and individualized Live Scan form on each attorney's My State Bar Profile page. These forms will include essential information for appropriate fingerprint routing: a "Mail Code" and "Applicant Type" agreed upon by the DOJ and the State Bar.

After an attorney has submitted fingerprints through the Live Scan process using this pre-populated form, the DOJ will run both a California and a national (FBI) background check and transmit that data to the State Bar. Receipt of the information from the DOJ will trigger the automatic population of the State Bar's records and compliance database indicating that the attorney has complied with the fingerprinting requirement and is now registered in the SAN system. Background checks that contain criminal history information will be routed to a secure terminal in the Office of Research and Institutional Accountability ("ORIA"), where dedicated staff will use specified decision rules to determine what additional steps, if any, need to be taken.

These decision rules, which have not yet been finalized, will address two different groups of licensed attorneys:

a. *Attorneys whose criminal record preceded admission to the State Bar.* If the date of the criminal history information *preceded* the completion of the moral character determination, ORIA staff will research the case to determine if the information found in the criminal background check was already disclosed as part of the attorney's moral character application. If the information was already disclosed, then the criminal history record will be destroyed and no further action will be taken. If the information was *not* already disclosed, staff will forward the record to Admissions for further analysis to determine what action, if any, should be taken.

b. *Attorneys whose criminal record occurred after admission to the State Bar:* If the date of the criminal history information follows the attorney's admission to the State Bar, ORIA staff will research the case to determine if the information found in the criminal background check was already disclosed to the Office of Chief Trial Counsel ("OCTC"). If the information was already known to OCTC, then the criminal history record will be destroyed and no further action will be taken. If the information in the criminal history was *not* already known to OCTC, then ORIA staff will forward the record to OCTC for further analysis to determine what action, if any, should be taken.

It will also be necessary to remove attorneys from the SAN system when they transition to certain statuses. Similar to the process being developed in Admissions, staff is working to develop a monthly routine for identifying attorneys who permanently resign from the State Bar, are disbarred, or die in order to submit this information to the DOJ through the "No Longer Interested" form⁵.

B. Implementation Costs

The costs associated with the fingerprinting of active licensed attorneys are outlined below. The State Bar will also incur costs associated with the implementation of the above processes and procedures. Estimates of these costs are based on the number of applicants and active licensed attorneys shown below in Table 1.

⁵ Cal Pen Code § 11105.2(d) requires the State Bar to immediately notify the DOJ when a "license or certification is revoked" and "when [an] applicant may no longer renew or reinstate the license or certificate."

Table 1

Licensed Attorneys in California	
Active	189,167
Inactive	57,434
Average Annual Number of Moral Character Applications	
	7,807

1. Fingerprint Processing and Furnishing Costs

It costs \$32 for the DOJ to process fingerprint records and an additional \$17 for the FBI background check, for a total cost of \$49 per individual. See <https://oag.ca.gov/sites/all/files/agweb/pdfs/fingerprints/forms/fees.pdf>. Prior to the recent amendments to section 6054, “[A]ll costs of providing criminal history information to, and the processing of fingerprints for, the State Bar, except for print furnishing and encoding, as required by this section, shall be borne by the State Bar.” SB 36 removes this language from section 6054, leaving the statute silent as to the responsibility for fingerprinting costs for applicants and licensed attorneys.

Applying the costs of fingerprint processing to all active licensed attorneys in California would result in a cost of approximately \$9.27 million. See Table 2.

Table 2

Cost of Enrolling Active Attorneys in SAN System	
DOJ & FBI Background Checks (per attorney)	\$49
Costs for 189,167 Active Attorneys	\$9,269,183

In addition the costs for processing, there is a cost for the actual fingerprint “furnishing.” This is a term used for the process performed by the service center that physically takes fingerprint images and submits them to the DOJ, using either Live Scan technology (California residents) or hard copy fingerprint cards (out-of-state residents). Historically, applicants have been required to pay these costs.

A review of fingerprint servicing locations in the State of California indicates that, depending on location, these services range in cost from \$5 through \$100 with an average cost of \$33. See <https://oag.ca.gov/fingerprints/locations> (listing service locations by county and the costs charged at each location). While many sheriff and police departments offer these services for \$5 (for example, the Lassen County Sheriff’s Department and Mariposa County Sheriff’s Department), many other departments charge much higher amounts. For example, the Richmond Police Department charges \$59, the Pinole Police Department charges \$50, and the Contra Costa Sheriff’s Department charges \$35. Certain jail facilities, such as the Mono County Jail, provide free fingerprint services.

Using the average cost of \$33 per fingerprint, the total cost of fingerprint furnishing for licensed attorneys is \$6.24 million dollars. See Table 3.

Table 3

Cost of Fingerprint Furnishing

Fingerprint "Furnishing" Cost (average per attorney)	\$33
Total Cost for Fingerprinting 189,167 Active Attorneys	\$6,242,511

Combined, the total cost of fingerprint furnishing plus the cost of conducting DOJ and FBI background checks on all active licensed attorneys in the State of California is approximately \$15.51 million. As discussed in more detail below, staff proposes that a court rule mandate that licensed attorneys bear these costs.

2. Anticipated Staffing Needs

While the costs of background checks and fingerprint furnishing are straightforward, calculating the staffing needs for implementing this policy requires additional information, much of which needs to be estimated. The rate at which attorneys are actually charged and convicted of crimes, the number of these cases that have gone un-reported, and the severity of the crimes are all unknown. Nor is it known how many attorneys will fail to comply with a fingerprinting requirement, need their status changed for such failure to comply, will contact the State Bar to inquire about the policy, or will request an extension or other accommodation.

Attachment 5 provides detailed lists of the functions and tasks that staff anticipate will need to be undertaken and the number of anticipated additional positions. Rather than calculating a single estimate, a range including a low, medium, and high estimate is provided for each of nine departments of the State Bar that will be impacted by this policy.

The detailed task and time estimates in Attachment 5 suggest a need for new staff that could be as few as 9 Full Time Equivalent (FTE) staff on the low end, and as many as 29 FTE on the high end. A number of the key parameters used to generate these estimates are summarized immediately below:

- The relevant number of charges and convictions for calculating new workload is not the total but, rather, the number of *previously undisclosed* criminal charges and convictions, i.e., *net* of those already reported;
- The rate of involvement in the criminal justice system for attorneys is assumed to be:
 - greater than current rate of criminal complaints in the State Bar's discipline system (.00122);
 - less than the rate of arrests for the general adult population in California (.042); and
 - greater than the rate for physicians (.00303)⁶, in part because attorneys experience alcohol dependence at a rate over twice that of physicians.⁷
- For initial implementation, the *annual* arrest rate needs to be multiplied by a factor reflecting the years of criminal activity that has gone un-reported. Approximately twenty seven (27) years have lapsed since the legislation mandating SAN. 27 is used as the

⁶ This is based on reporting by the Medical Board of California.

⁷ See Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," *Journal of Addiction Medicine*, Volume 10, Number 1, January/February 2016.

multiplier for the high-end estimates of the number of arrest records that will need to be reviewed; 10 is used as the multiplier for the low-end estimates, and 20 is used as the multiplier for the middle-range estimates. On an ongoing basis, this multiplier will not be necessary.

- Not all attorneys will come into the system at the same time. If the policy is implemented over two years, all of the annual estimates need to be cut in half to account for the introduction into the system of half of the attorney population each year.

The implications of these assumptions are as follows:

- At twice the rate of arrests for physicians (.00606), the annual number of arrests for half of the attorney population (95,000) is 576;
- Subtracting the number of criminal conviction cases reported in 2016 (232), the *net* number of annual arrests for half of the attorney population is 344; and
- Estimating that over the last 27 years some proportion of the new arrests are those of attorneys who had already been arrested previously, the low-end estimate of arrest records that will need to be reviewed is 3,437, the middle-range estimate is 6,874, and the high-end estimate is 9,280.

Table 4

Estimated Staffing Need by State Bar Department (Full Time Equivalent Staff – FTE)	Low	Medium	High
Office of the Chief Trial Counsel	3.95	7.85	10.58
State Bar Court	0.58	1.11	1.48
Office of Probation	1.64	3.23	4.34
Office of Admissions	0.35	0.64	0.85
Attorney Regulation and Consumer Resources ⁸	0.32	0.57	1.08
Call Center	0.31	0.57	1.10
Information Technology (fixed estimate, no range)	0.76	0.76	0.76
Office of General Counsel	0.70	2.65	6.27
Office of Research & Institutional Accountability	0.81	1.56	2.09
Totals	9.42	18.94	28.55

Given the uncertainty inherent in many of the parameters that are necessary for estimating the workload, State Bar staff proposes adding nine FTE, consistent with the low end of the range, with the specific allocation to be determined at a later date and the possibility of revisiting the need for staff as implementation moves forward.⁹

⁸ Formerly known as Member Records and Compliance

⁹ The 2018 budget only accounts for four FTE. This is due to a combination of financial constraints, the fact staff anticipates that the workload will grow over time, and the assumption that a conservative approach can be modified over time.

In addition to the detailed worksheets provided in Attachment 5, below is a narrative summary of the major functions for which additional resources will be needed in different departments of the State Bar.

- Additional Information Technology resources to:
 - finalize the design of, build, and maintain the new interface for the secure FTP between the DOJ and the State Bar;
 - re-design the interface between databases in Admissions and those in Attorney Regulation and Consumer Resources, and to provide resources to attorneys through their My State Bar Profile web page;
 - develop processes and maintain the system for re-routing SAN notifications from Admissions to ORIA when applicants to the State Bar become attorneys; and
 - develop new fields, codes, and data transfer routines for State Bar records on attorneys documenting compliance with the fingerprint requirements and the registration of licensed attorneys in the SAN system;
- Additional resources in ORIA to review background checks and route results to the appropriate department;
- Additional resources in Attorney Regulation and Consumer Resources to implement the notification to licensed attorneys of the new policy, respond to correspondence regarding the policy, develop and implement a system of reminder notifications, implement administrative sanctions for attorneys who fail to comply, release the sanctions when compliance is completed, and compile reports of attorneys who resign, are disbarred or die, for transmission to the DOJ to remove from the SAN system;
- Additional resources in Admissions to review background checks that contain information that licensed attorneys failed to disclose on their moral character application and to compile names of applicants whose positive moral character determination has expired, their application has been abandoned, or who are otherwise ineligible for admission, for transmission to the DOJ to remove from the SAN system;
- Additional resources in OCTC to review background checks that contain criminal charge or conviction information not previously disclosed by licensed attorneys or reported by either superior courts or prosecuting attorneys and to prosecute in appropriate cases;
- Additional resources for the State Bar Court to adjudicate cases that OCTC pursues related to criminal charges and convictions uncovered through the re-fingerprinting process and SAN system;
- Additional resources for the Office of Probation to monitor compliance with the terms of probation imposed upon attorneys who failed to disclose criminal histories; and,
- Additional resources for the Office of General Counsel for any legal work associated with the implementation of the fingerprinting requirement.

III. Proposed California Supreme Court Rule

A. Language of Proposed Rule

1. Licensed Attorney Fingerprinting

Each active licensed attorney of the State Bar for whom the State Bar does not currently have fingerprint images shall, pursuant to the procedure identified by the State Bar, submit fingerprint images to the Department of Justice for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.¹⁰ Inactive licensed attorneys for whom the State Bar does not have fingerprint images must submit fingerprint images to the Department of Justice prior to seeking active status.

The State Bar shall request from the Department of Justice subsequent arrest notification service for its active licensed attorneys, pursuant to Business and Professions Code section 6054.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation of subsection (a) that requires all active licensed attorneys for whom the State Bar does not have fingerprint images to submit fingerprints to the Department of Justice by December 1, 2019.

3. Fingerprint Submission and Processing Costs

All costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

The State Bar will cover the DOJ and FBI processing costs for licensed attorneys who have been granted a fee scaling or fee waiver for annual membership fees pursuant to State Bar Rule 2.15(A) or 2.16(C)(3)(c). These attorneys will pay for all third party print furnishing costs.

Attachment 4 is the full text of the proposed rule.

¹⁰ The proposed rule is limited to only those active licensed attorneys the State Bar does not have fingerprint images for because, as discussed above, the State Bar has already submitted the fingerprint records of approximately 1,500 active licensed attorneys, in addition to the fingerprint records of out-of-state applicants whose State Bar admission is still pending.

B. Policy Analysis

1. All Licensed Attorneys Must Submit or Resubmit Fingerprints By December 1, 2019, on a Schedule Designated by the Board of Trustees

As recognized in the Court's October 20, 2017 letter, requiring fingerprints of all applicants and active members is a "critical component of public protection and strengthens the State Bar's discipline system." Although there are certain criminal reporting requirements for licensed attorneys, courts, and prosecutors, an evaluation of the data reported to the State Bar suggests significant underreporting by licensed attorneys. For example, simply comparing the raw numbers reported by attorneys to the numbers reported by superior courts and prosecuting attorneys, the State Bar found that on average the number of charges attorneys reported was less than half the number of convictions reported by the courts.

Because the specific reporting requirements differ between those charges that attorneys are required to self-report and the convictions that courts are required to report, this discrepancy may be attributed to the differences in the reporting requirements. However, looking more closely at court reported convictions, State Bar staff found that out of 32 felony convictions reported by the courts over a three year time period, 29 of these cases had no corresponding record of a self-report by the attorney of the charges, despite the attorney's obligation to do so pursuant to section 6068(o)(5). Similarly, comparing specific cases where prosecuting attorneys reported filing felony charges against a licensed attorney revealed that that less than half of these cases had been self-reported by the attorney.

Of course, there is also no accurate way to determine whether courts and prosecutors are adequately reporting charges and convictions to the State Bar. Thus, utilization of the automated SAN process through the DOJ will vastly improve the reliability and validity of the data on criminal charges and convictions of licensed attorneys in California.

The proposed rule requires the Board to adopt an implementation schedule with a deadline of December 2019. The Board is in the best position to evaluate State Bar workload and coordinate with the relevant State Bar departments, in order to determine the best use of State Bar resources. The December 1, 2019 deadline provides an almost two year window for active attorneys to be fingerprinted on a set schedule.

2. Licensed Attorneys Should Bear the Cost of Fingerprint Submission, With Cost Reductions for Financial Hardship

SB 36 amends section 6054 to eliminate the language requiring the State Bar to pay for the costs of fingerprint processing of applicants.¹¹ The statute is silent as to whether the licensed attorney must pay for the costs of submission or resubmission of fingerprint to the DOJ, including processing costs. The proposed rule requires licensed attorneys to bear all costs associated with the submission of fingerprints to the DOJ, including print furnishing costs. This means that the attorney will pay the print furnishing costs directly to the vendor at the time he or

¹¹ The proposed rule only applies to costs for licensed attorneys. Staff is not proposing any changes to the current process for applicant fingerprints. Currently, applicants pay third party furnishing costs, and the State Bar pays for DOJ and FBI processing costs. This status quo approach will not result in any new costs to the State Bar as related to the fingerprinting process itself.

she is fingerprinted. The \$49 processing costs will be reflected through an increase in the attorney's fee statement.

The rule also provides that licensed attorneys who have been granted reductions in their annual membership fees based on financial hardship have the same reductions applied to fingerprint processing costs. State Bar rule 2.15(A) provides "fee scaling" for "[a]n active member who has a total gross annual individual income from all sources of less than \$40,000." State Bar rule 2.16(c)(3)(2) permits the Secretary to waive up to \$1,000 in annual membership fees if the member "has a total gross annual household income from all sources of \$20,000 or less."

There are currently 1,184 licensed attorneys who have been granted fee scaling pursuant to rule 2.15(A), and 271 licensed attorneys who have been granted a fee reduction pursuant to rule 2.16(c)(3)(2). As these attorneys will still need to be re-fingerprinted, the State Bar will have to cover the full DOJ and FBI processing costs. This will result in a projected total cost to the State Bar of approximately \$71,295.00.

Attorneys who have been granted these reductions must still pay the third party vendor furnishing costs.

a) Financial Burden on the State Bar if Required to Bear Costs

The projected total cost (processing and furnishing costs) for all active licensed attorney fingerprints to be submitted to the DOJ would be approximately \$15.51 million. If the cost were to be borne by the State Bar, and member fees were not increased to cover these costs, funding would need to be available from the State Bar's General Fund or Admissions Fund. The General Fund accounts for spendable resources that can be used to support most aspects of the State Bar's operations. The Admissions Fund accounts for fees and expenses related to administering the bar examination and other requirements for admission to the practice of law in California. Money in other funds is restricted via statute, bond covenants or similar external restrictions, and is therefore not available to pay fingerprinting costs.

The amount of available funding the State Bar has in the General Fund and Admissions Fund to pay fingerprinting costs can be determined looking at two alternative measures: (1) Reserves, a short-term measure, identifies the availability of cash and other current assets that can be used to pay liabilities in the near future and (2) Fund balance, a long-term measure, calculates the financial condition of the fund, considering all assets and liabilities incurred to date. Reserves and fund balance for the General Fund and Admissions Fund projected through December 31, 2017 follows (in thousands):

	Reserve Amount	Minimum Required Reserve	Available Reserve	Total Fund Balance	Less FB Restricted or Invested in Capital Assets	Available Fund Balance
General Fund	\$21,442	\$15,178	\$12,264	\$82,225	\$(104,433)	\$(22,208)
Admissions Fund	3,465	2,796	3,465	3,465	-	3,465

The reserve amount above represents working capital (current assets minus current liabilities and amounts that are non-spendable, restricted or committed). The required reserve represents the Board of Trustees' policy that all funds carry a minimum reserve representing at least two months of annual expenses.

Total fund balance above represents the fund's total assets minus total liabilities. Available fund balance represents the spendable portion of the fund balance. The General Fund's total fund balance is substantially less than the reserve amount because non-current assets (primarily capital assets) exceed non-current liabilities (primarily pension liability). Of the General Fund's \$82.2 million projected total fund balance, \$104.4 million is not available, resulting in a negative \$22.2 million of available fund balance. The unavailable fund balance is composed of capital assets and revenues restricted for the Legal Services Trust, Bank Settlement, Legal Specialization Lawyers Assistance Program, Justice Gap and Equal Access programs.

The available reserve and available fund balance for the General Fund and Admissions Fund are expected to further decline in 2018 by approximately \$6.8 million and \$240,000, respectively, according to the State Bar's 2018 preliminary budget. The Admissions Fund is projected to fall below the Board of Trustees' minimum reserve requirement of two months operating expenses by approximately \$322,000 at the end of 2018.

In addition to the reserves discussed above, the State Bar is projecting a current year savings (projected as approximately \$3,047,000 as of August 31, 2017) of funds administered by a Special Master overseeing an assessment fund to support the State Bar's discipline operation. The State Bar could request that the Special Master allow this savings to be used to offset a portion of estimated fingerprinting costs. However, this would represent only a small percentage of the total costs necessary to pay for the fingerprinting of all active attorneys. Furthermore, there is no new funding available to offset the staffing costs, described above. As such, any current year savings could be applied to these new staffing needs.

b) Other Entities Shift the Full Cost of Fingerprint Resubmission to Licensees

Requiring licensees to pay the cost of submitting or resubmitting fingerprints to the DOJ, including in circumstances where fingerprints were previously submitted, is in line with the procedures of various other licensing entities. See 16 California Code of Regulations ("CCR") § 2010.05 (requiring veterinarians to submit fingerprints for the purpose of conducting criminal records searches "if an electronic record of the submission of fingerprints no longer exists or was never created" and that "the licensee shall pay any costs for furnishing the fingerprints and conducting the searches."); 16 CCR § 1132 (dental hygienists); 16 CCR § 2517.5 (vocational nurses); 16 CCR § 1399.419.2 (acupuncturists); 16 CCR § 2575.5 (psychiatric technicians); 16 CCR § 37.5 (accountants).

There are also similar regulations that contain identical language regarding the submission of fingerprints in the event the fingerprints "do not exist," but do not specify who will bear the costs for such submission. See *e.g.*, 16 CCR § 1399.722 (requiring podiatrists to submit a full set of fingerprints to the DOJ if, "regardless of the date of initial licensure", "an electronic record of the submission of fingerprints no longer exists."); 16 CCR § 4120 (requiring applicants for renewal of occupational therapy license to submit fingerprints to the DOJ if fingerprints had not been previously submitted or for whom a record of submission of fingerprints no longer exists); 16 CCR § 1419 (same requirement for renewal of registered nurses).

These regulations were adopted pursuant to statutes authorizing licensing boards to adopt regulations necessary to properly regulate their profession. See Bus. & Prof. Code §§ 4808, 2404, 1906, 2841.1, 4933, 4504, and 5010. As such, the boards of these entities determined that, in the interest of public protection, it was necessary to require the re-submission of licensee fingerprints in certain circumstances. See *e.g.*, Bus. & Prof. Code § 2842 ("protection of

the public shall be the highest priority for the Board of Vocational Nursing and Psychiatric Technicians of the State of California in exercising its licensing, regulatory, and disciplinary functions.”).

Notably, these regulations require licensees to pay costs associated with submission of fingerprint records, even if they previously submitted fingerprints with their initial licensing application. These regulations were adopted to ensure that the DOJ and/or FBI had fingerprint records for all current licensees. As with other California licensing entities, the State Bar endeavors to ensure that the DOJ has fingerprint records of all its licensees in order to effectively regulate the profession and protect the public.

FISCAL/PERSONNEL IMPACT

See Discussion Section, II.B.

RECOMMENDATION

RESOLVED, that the Board of Trustees authorizes staff to make available for a 45-day public comment period, the proposed rule to the California Supreme Court included as Attachment 4 to this agenda item.

ATTACHMENT(S) LIST

- ATTACHMENT 1 - October 20, 2017 Letter from the California Supreme Court
- ATTACHMENT 2 - June 28, 2017 Contract with DOJ
- ATTACHMENT 3 - August 28, 2017 Contract with DOJ
- ATTACHMENT 4 - Text of Proposed Rule to the California Supreme Court
- ATTACHMENT 5 - Detailed Workload / Staffing Estimates

ATTACHMENT 4

Public comments on the proposed rule have been compiled into a single document and can be found at the following URL:

[http://www.calbar.ca.gov/Portals/0/documents/publicComment/2018/
Public_Comments_Attachment_4_Comments-received.pdf](http://www.calbar.ca.gov/Portals/0/documents/publicComment/2018/Public_Comments_Attachment_4_Comments-received.pdf)

Attachment 5 – Draft Decision Rules for Handling Records of Arrest and Prosecution

RAP Sheet Information	Condition 1	Condition 2	Action
Arrest / No Charges or Conviction	Arrest occurred before the attorney's admission to the bar, and the arrest was reported to Committee of Bar Examiners.	None	Close
	Arrest occurred before attorney was admitted to the bar, but the arrest was not reported to Committee of Bar Examiners.	Applicant had duty to report arrest to CBE (criminal proceedings were pending during moral character evaluation)	Transmit to OCTC Intake Unit
		Applicant did not have duty to report	Close
	Arrest occurred after attorney was admitted to the bar, and arrest was previously known to the Office of Chief Trial Counsel.	None	Close
	Arrest occurred after the attorney was admitted to the bar, but the arrest was not previously known to the Office of Chief Trial Counsel.	Arrest was for a felony	Transmit to OCTC Intake Unit
		Arrest occurred within the past five years	Transmit to OCTC Intake Unit
		Arrest more than five years old and for misdemeanor	Close
Charges / No Conviction	Charge occurred before the attorney's admission to the bar, and the charge was reported to Committee of Bar Examiners.	None	Close
	Charge occurred before attorney was admitted to the bar, but the charge was not reported to Committee of Bar Examiners.	Applicant had duty to report charge to CBE (criminal proceedings were pending during moral character evaluation)	Transmit to OCTC Intake Unit
		Applicant had duty to report charge to CBE (criminal proceedings were pending during moral character evaluation) AND charges still pending	Transmit to OCTC Conviction Monitoring Unit
		Applicant did not have a duty to report	Close
	Charge occurred after attorney was admitted to the bar, and charge was previously known to the Office of Chief Trial Counsel.	None	Close
	Charge occurred after the attorney was admitted to the bar, but the charge was not previously known to the Office of Chief Trial Counsel.	Charge was for a felony	Transmit to OCTC Intake Unit
		Charge occurred within the past five years	Transmit to OCTC Intake Unit
Conviction	Conviction occurred before attorney's admission to the bar, and the conviction was reported to Committee of Bar Examiners.	None	Close
	Conviction occurred before attorney's admission to bar, but the conviction was not reported to Committee of Bar Examiners.	None	Transmit to OCTC Conviction Monitoring Unit
	Conviction occurred after the attorney's admission, but was previously known to the Office of Chief Trial Counsel.	None	Close
	Conviction occurred after the attorney's admission to bar, but was not previously known to the Office of Chief Trial Counsel.	None	Transmit to OCTC Conviction Monitoring Unit

APPENDIX 5

OPEN SESSION

702 AGENDA ITEM

MARCH 2018

BOARD OF TRUSTEES, ITEM 702

DATE: March 9, 2018

TO: **Members, Board of Trustees**

FROM: Suzanne Grandt, Assistant General Counsel, Carolina Almarante, Program Analyst, Office of Research and Institutional Accountability

SUBJECT: Proposed Rule of Court Re Fingerprinting Active Licensed Attorneys: Return from Public Comment and Approval of State Bar Policies

EXECUTIVE SUMMARY

On January 27, 2018, staff presented the Board of Trustees (Board) with an overview of the approximately 2,600 public comments received on a proposed California Supreme Court (Court) Rule implementing a fingerprinting requirement for licensed attorneys pursuant to recent amendments to Business and Professions (B&P) Code section 6054, effective January 1, 2018. Staff organized the comments, and responses thereto, and made revisions to the proposed Court Rule based on the comments. The Board authorized an additional 30 day period for public comment on the amended proposed Rule. The State Bar received 169 new public comments pursuant to the February comment period.

This agenda item is divided into four primary sections. The first addresses the new public comments and recommends that the Board direct staff to petition the Court for adoption of the proposed Rule.

The second discusses staff's proposed schedule for the fingerprinting of attorneys, and recommends that the Board adopt this schedule.

The third discusses staff's proposed approach for granting reductions in fingerprint processing fees for attorneys with demonstrable financial hardship, and recommends approval of this policy by the Board.

Finally, the Board is asked to authorize, for a 30-day public comment period, a proposed State Bar Rule regarding the impact of non-compliance with the proposed Court Rule.

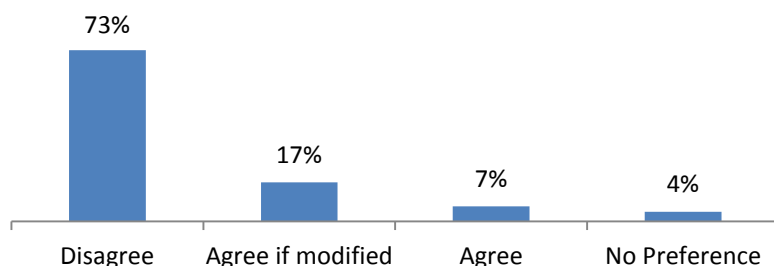
I. RETURN FROM PUBLIC COMMENT

On November 3, 2017, the Board authorized a 45-day public comment period for a proposed Rule implementing a fingerprinting requirement for licensed attorneys. The public comment period began on November 9, 2017, and closed on December 26, 2017. The State Bar received over 2,600 public comments. At the January 27, 2018, Board meeting, staff

summarized the public comments and presented revisions to the proposed Rule based on those comments. The Board accordingly authorized an additional 30-day public comment period for the amended proposed Rule. The corresponding Board agenda item is provided as Attachment A. The second comment period began on February 1, 2018, and ended on March 3, 2018.

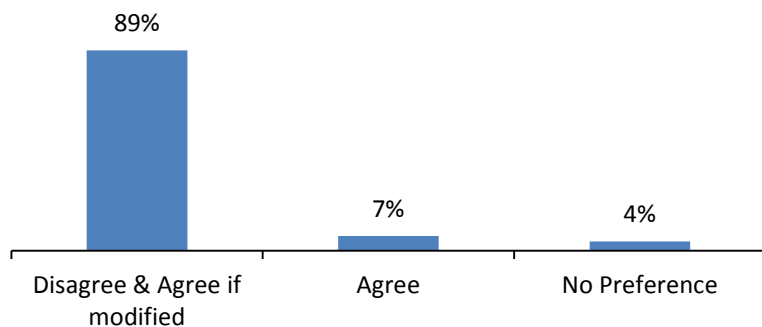
On February 16, 2018, the State Bar sent an email to all California attorneys (active and inactive) alerting them of the amended proposed Rule and the public comment process. The State Bar received 169 new public comments. The full text of these comments is provided as Attachment B.

Figure 1 – Summary of New Comment on Amended Proposed Rule



As with the first set of public comments, commenters who “agreed only if modified” primarily expressed identical concerns as those who “disagreed” with the Rule, making the distinction inconsequential. For instance, many attorneys “disagreed” with the Rule because they felt they should not have to pay for the fingerprinting, while other attorneys “agreed only if modified” because they felt the Rule should be altered to remove the payment requirement or to shift the costs to the State Bar.

Figure 2 – Summary of New Comments on Amended Proposed Rule (“disagree” and “agree only if modified” combined)



The comments overwhelmingly reflect the same concerns and themes that were addressed in the January 27, 2018, Board Agenda item on this topic. The only exception to this general observation about the similarity of comments to those received in the first round, were two comments seeking clarification in the language regarding fingerprinting active attorneys in foreign jurisdictions. The language of the amended proposed Rule currently provides:

Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction that the attorney is physically located, the attorney must notify the State Bar using a form available through the

attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States, provided, that within 60 days of returning (even temporarily) to the United States, such attorney shall be fingerprinted.

The commenters pointed out that this language is unduly restrictive because fingerprint services may be located in the jurisdiction but may be prohibitively expensive and/or otherwise inaccessible. Commenters also indicated that a strict reading of the last sentence of the Rule would mandate that an attorney only in the United States for a week who then returns to a foreign country would only have 60 days to be fingerprinted. Staff suggests clarifying the Rule as follows:

Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction ~~that the where the~~ attorney is physically located, or the attorney is able to provide evidence that he/she is unable to access or afford such services, the attorney must notify the State Bar using a form available through the attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States for a period of not less than 60 days. ~~provided, that within 60 days of returning — (even temporarily) to the United States, such attorney shall be fingerprinted.~~

With this minor modification, staff recommends that the Board approve sending the amended proposed Rule (provided as Attachment C) to the California Supreme Court for approval.

II. FINGERPRINT SCHEDULING

The proposed Court Rule provides that "The Board of Trustees of the State Bar must develop a schedule for implementation that requires all attorneys required to be fingerprinted under section 1(b) to be fingerprinted by December 1, 2019."

In order to effectuate this requirement, staff in the Office of Attorney Regulation and Consumer Resources (ARCR) – the Office of the State Bar responsible for maintaining attorney records and monitoring compliance with Minimum Continuing Legal Education requirements – will provide impacted attorneys with detailed instructions on how to successfully comply with the Rule and the requisite timeline for such compliance. ARCR will provide impacted attorneys with advance notification of the proposed penalty schedule which is outlined in Table 1 below.

The proposed notification and penalty schedule has six stages of notifications. The initial notification will occur within seven business days from which the Rule is approved by the Court. Reminder notifications will be sent approximately every two months thereafter until compliance or penalties begin to attrite. The penalties specified in Stages 4 and 5 are cumulative. The first penalty will be levied on May 1, 2019. Penalties will increase thereafter up to the date of involuntary suspension, December 1, 2019.

Table 1 – Proposed Notification and Penalty Schedule for Active and Inactive Attorneys¹

Stage	Description	Timeline
Stage 1	Initial Notice of Fingerprint Requirement	May 2018
Stage 2	Noncompliance Reminders	June 1, 2018 - Jan 31, 2019
	First Reminder	June 1, 2018 - July 31, 2018
	Second Reminder	Aug 1, 2018 - Sept 30, 2018
	Third Reminder	Oct 1, 2018 - Nov 30, 2018
	Fourth Reminder	*Dec 3, 2018- Jan 31, 2019
Stage 3	Final Warning Notice	Feb 1, 2019
	Approx. 3 months to comply	Feb 2, 2019 - Apr 30, 2019
Stage 4	Monetary Penalty I - \$75	May 1, 2019
	Approx. 3 months to comply	May 2, 2019 - July 31, 2019
Stage 5	Monetary Penalty II- \$100	Aug 1, 2019
	Approx. 4 months to comply	Aug 2, 2019 - November 30, 2019
	Final Warning Notice of Status Change	Nov 1, 2019
Stage 6	Status Change to Involuntary Inactive	**Dec 1, 2019
* 12/1/18 falls on a Saturday **12/1/19 falls on a Sunday		

Staff reviewed the varying circumstances in which an attorney's status with the State Bar can change and the corresponding varying notification requirements. As a result, staff determined that it was necessary to distinguish the different types of notification language and penalty timelines based on an attorney's status, or Group. The notifications to each Group will provide specific and customized information as follows:

Group A: Compliance Satisfied. Licensed active attorneys for which the State Bar already receives subsequent arrest notifications will not be required to be re-fingerprinted.

Group B: Active Licensed Attorneys. These are all active licensed attorneys as of the date that the Rule is issued except for those who are in compliance (Group A). The number of licensed attorneys in this Group is currently 189,176 active attorneys. These attorneys will be required to re-submit fingerprints to the DOJ and FBI by the target deadlines described above.

Group C: Inactive Attorneys. Licensed attorneys who have voluntarily chosen an inactive status will be notified to comply with the Rule prior to transitioning to active status.

Group D: Not Eligible Attorneys. Licensed attorneys who are not eligible to practice law due to disciplinary and/or administrative actions taken by the State Bar (i.e. involuntarily inactive) will be required to be fingerprinted as a condition of reinstatement pursuant to B&P Code section 6054(b). If not required to apply for reinstatement, licensees must submit proof of fingerprinting within 90 days of transfer to active status or penalties will be imposed.

¹The Proposed Notification and Penalty Schedule assumes the Court will promulgate the proposed Rule by April 30, 2018. The schedule will need to be modified, if the Rule is adopted after the estimated April date.

Group E: Future Active Attorneys. The re-fingerprint requirement will apply to future active attorneys, meaning to those who become State Bar licensees after the date that the Rule is issued and for whom the Bar does not already receive subsequent arrest notification information. This will likely be a small population because attorneys are fingerprinted upon application to the State Bar, and the State Bar entered into a subsequent arrest notification contract for applicants effective July 1, 2017. Accordingly, this Group should be limited to attorneys who applied for admission prior to July 1, 2017, but for some reason are not yet admitted at the time the Rule is promulgated. Staff proposes to split this Group into two categories:

(i) All newly licensed attorneys admitted to the State Bar after February 1, 2019, for whom the State Bar is not already receiving subsequent arrest notifications will receive a 90-day extension of the re-fingerprinting requirement, meaning that the due date for re-fingerprinting for this population will be March 1, 2020.

(ii) All newly licensed attorneys admitted to the State Bar after December 1, 2019, for whom the State Bar is not receiving subsequent arrest notifications will be required to submit fingerprints within 90 days of admission.

Group F: Judges. Judicial officers will not be required to be re-fingerprinted.

Group G: Selected Special Admissions Attorneys. If adopted, the Court Rule will provide the State Bar authority to re-fingerprint attorneys permitted to practice in California pursuant to California Rule of Court rules 9.44 (registered foreign legal consultants), 9.45 (registered legal service attorneys), and 9.46 (registered in house counsel). The Office of Admissions will provide notification to these attorneys regarding the new requirement and they will have 120 days from the date the notice is issued to be fingerprinted or face monetary penalties followed by termination of right to practice in California.²

III. FEE REDUCTIONS

The proposed Court Rule states that “The Board of Trustees of the State Bar must develop procedures for granting waivers of the processing costs of running DOJ and FBI background checks for licensed attorneys with demonstrable financial hardship.”

The “processing costs” referred to in the Rule are the costs of the DOJ and FBI background checks which total \$49 (\$32 for the DOJ background check and \$17 for the FBI background check). This is separate from the costs for fingerprint “furnishing” which is the term used to refer to the process performed by a service center of physically taking the fingerprint images using either Live Scan technology (California residents) or hard copy fingerprint cards (out-of-state residents).

Staff recommends fee reductions mirroring the fee waivers and scaling in place for certain licensees’ annual licensing fees pursuant to State Bar Rule 2.10 *et seq.* Specifically, pursuant to State Bar Rule 2.16(C)(1)(c), attorneys with a total gross annual household income from all sources of \$20,000 or less may be granted a waiver of up to 50 percent of annual membership fees. Pursuant to State Bar Rule 2.16(A), licensees who have a total gross annual individual

² Pursuant to the proposed Rule, these individuals are not mandated to be fingerprinted by the December 1, 2019, deadline. This is because these attorneys are required to renew their applications either yearly (registered in house counsel) or every three years (registered legal services attorneys). Accordingly, by December 2019, most of these individuals will have already been either re-fingerprinted or no longer practicing law in California.

income from all sources of less than \$40,000 may be granted a 25 percent reduction in annual membership fees. Accordingly, these same classes of licensees would be granted reductions of 50 percent or 25 percent of the \$49 processing fee costs.

Practically, the State Bar would not be able to pay 25 or 50 percent of the processing fees up front. Accordingly, staff proposes providing eligible attorneys with pre-populated forms with the State Bar billing code, such that the State Bar pays the full fingerprinting costs up front. The 50 or 75 percent “owed” to the State Bar by the attorney would be included in the next licensee billing statement generated.

Additional fee-related public comment was received suggesting that fee waivers should be provided for eligible attorney pursuant to State Bar Rule 2.16(B). Pursuant to this Rule, certain attorneys are provided a 25 percent reduction in annual licensing fees, if their employer receives State Bar Legal Services Trust Fund grants and is a qualified legal service project or qualified support center as defined by statute. In 2017, there were 1,186 attorneys whose employers receive reductions under this Rule. Practically, these fee reductions amount to a donation by the State Bar to these qualified legal services organizations.

Staff does not recommend providing reductions in processing costs for attorneys in this category for the following reasons. First, if the attorney is in a difficult financial situation he/she will be granted a waiver under one of the other considerations discussed above. Second, State Bar Rule 2.15(B) provides a 25 percent reduction for the *employer* paying the employee's fees. The proposed Rule contemplates the State Bar developing procedures for waivers for “*attorneys* with demonstrable financial hardship.” Finally, it is not practicable for staff to apply the reductions to employers, rather than individual licensees.

In sum, staff proposes the following policy for fee reductions:

The State Bar will cover a percentage of fingerprint processing costs for licensed attorneys who are eligible for fee scaling or fee waiver of annual licensing fees pursuant to State Bar Rules 2.15(A) and 2.16(C)(1)(c). These attorneys will receive a subsidy for fingerprint processing costs at the same percentage levels as provided for in these Rules; these attorneys will however have to pay for all third-party print furnishing costs.

IV. PROPOSED STATE BAR RULE

B&P Code section 6054(d) states “If required to be fingerprinted pursuant to this section, a member of the State Bar who fails to be fingerprinted may be enrolled as an inactive member pursuant to Rules adopted by the board of trustees.” A proposed Rule, entitled Noncompliance with Attorney Fingerprinting Requirements, has been developed to satisfy this requirement; it is provided as Attachment D.

Pursuant to State Bar Board Book Rule 1.10, staff recommends that the Board request a 30-day public comment period for proposed Rule.

FISCAL/PERSONNEL IMPACT

The total cost to the State Bar of the proposed approach to the application of various fee waiver provisions is approximately **\$128,025**. This estimate takes into account the 277 licensees granted fee reductions in 2017 under State Bar Rule 2.16(c)(1)(c) and the 9,897 licensees granted fee reductions in 2017 under State Bar Rule 2.16(A). These costs will be realized over budget years 2018 and 2019.

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 1. Successfully transition to the “new State Bar”— an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Objective: c

Implement and pursue governance, composition, and operations reforms needed to ensure that the Board’s structure and processes optimally align with the State Bar’s public protection mission.

RECOMMENDATION

It is recommended that the Board of Trustees approve the following resolutions:

RESOLVED, that the Board of Trustees hereby authorizes staff to submit the proposed Court Rule, attached hereto as Attachment C, to the California Supreme Court for approval; and it is

FURTHER RESOLVED, that the Board of Trustees hereby adopts the proposed Notification and Penalty Schedule as described in this Board Item; and it is

FURTHER RESOLVED, that the Board of Trustees hereby adopts the proposed policy for fingerprint processing fee reductions as described in this Board Item; and it is

FURTHER RESOLVED, that the Board of Trustees authorizes staff to make available for a 30-day public comment period the proposed State Bar Rule attached hereto as Attachment D.

ATTACHMENT(S) LIST

- A.** January 27, 2018 Board Agenda Item
- B.** Text of Public Comment
- C.** Text of Proposed California Rule of Court
- D.** Text of Proposed State Bar Rule

ATTACHMENT A

**OPEN SESSION
AGENDA ITEM**

704 JANUARY 2018

DATE: January 27, 2018

TO: Members, Board of Trustees

FROM: Suzanne Grandt, Assistant General Counsel and Dag MacLeod, Director,
Office of Research & Institutional Accountability

SUBJECT: Proposed Rule of Court Re Fingerprinting Active Licensed Attorneys -
Return From Public Comment and Operational Planning and Preparation

EXECUTIVE SUMMARY

On November 3, 2017, the Board of Trustees (Board) authorized a 45-day public comment period for a proposed California Supreme Court (Court) rule implementing a fingerprinting requirement for active licensed attorneys pursuant to recent amendments to Bus. & Prof. Code § 6054, effective January 1, 2018. Over 2,600 public comments were received.

This agenda item is divided into two major parts. The first part summarizes and responds to the public comments including proposed changes to the rule stemming from the comments received. The proposed changes to the rule do not impact the purpose of the rule, which is to require licensed attorneys to be fingerprinted and to pay the fingerprint processing and furnishing costs in connection therewith. Staff recommends that the Board authorize an additional 30-day public comment period for the amended proposed rule of Court.¹

The second part of this agenda item provides a detailed overview of the work completed to date in preparation for fully implementing the proposed rule by the deadline established by the Board of Trustees of December 1, 2019.

¹ Attachment 1 provides the clean text of the amended proposed rule. Attachment 2 provides the redline/strikeout version of the rule, showing changes to the amended proposed rule from the original proposed rule issued for the 45-day public comment period.

PART ONE

RETURN FROM PUBLIC COMMENT: BACKGROUND

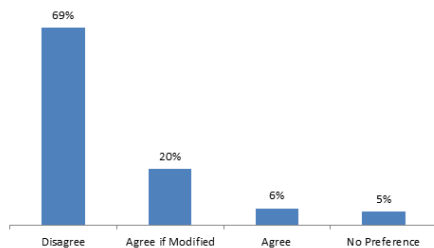
On November 3, 2017, the Board authorized a 45-day public comment period for a rule implementing a fingerprinting requirement for active licensed attorneys. The corresponding Board agenda item is provided as Attachment 3. The comment period began on November 9, 2017, and closed on December 26, 2017.

On December 7, and December 11, 2017, the State Bar sent out two emails to California attorneys (both active and inactive) informing them that the “State Bar plans to re-fingerprint active attorneys.” The email directed attorneys to the State Bar website page for the proposed rule accessible to all members of the public at <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2017-Public-Comment/2017-15>.

A link to the public comment page was also featured on the State Bar homepage for approximately three weeks. Lastly, a short description regarding the rule and a link to the public comment page was also posted multiple times on the State Bar’s public Facebook page and Twitter account.

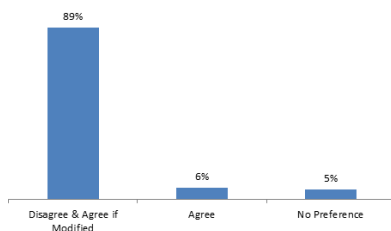
The State Bar received 2,604 public comments. The full text of these comments is provided as Attachment 4.

Figure 1 summarizes the comments according to agreement with the proposed rule:



Notably the commenters who “agreed only if modified” primarily expressed identical concerns as those who “disagreed” with the rule, making the distinction inconsequential. For instance, many attorneys “disagreed” with the rule because they felt they should not have to pay for the fingerprinting, while other attorneys “agreed only if modified” because they felt the rule should be altered to remove the payment requirement or to shift the costs to the State Bar.

Figure 2, therefore, combines “disagree” with “agree only if modified”:



I. Public Comments: General Observations

As reflected in the tables above, the comments were overwhelmingly negative. Notably, the vast majority of comments were received from attorneys, a group not expected to view the proposed rule favorably. Attorneys expressed strong disagreement with the proposition that they would be asked to re-submit fingerprints, and pay for such re-submission, when they had already provided fingerprints upon application for admission to the State Bar. The vast majority of commenters expressed concerns reflecting similar themes: that the rule is unnecessary, redundant, time consuming, expensive, ineffective, insulting and a violation of privacy.

Moreover, attorneys were understandably confused as to why the fingerprints they had submitted during the admissions process were not sufficient. Attorneys also had numerous questions regarding details of the re-fingerprinting process, such as costs and implementation procedures, and how the State Bar plans to use criminal history information, specifically arrests, upon receipt. Part Two of this report provides the overview of implementation procedures developed to date. If the proposed rule is adopted by the Court, these procedures, along with instructions and a Frequently Asked Questions document, will be published by the State Bar.

II. DISCUSSION

The chart below reflects a summary of the issues, concerns, reactions and/or questions raised in the public comments, organized into 24 categories. The majority of written comments fall into 2-5 categories. Although it is difficult, if not impossible, to fit every impression and/or comment into a specific category, staff read all 2,604 public comments and used its best efforts to categorize them by general topic and/or issue.

Comments that simply stated “agree” or “disagree” with no explanation are not included in this chart. Comments that did not articulate a question, topic, or issue were also not included. For instance, many comments summarily indicated that the proposed rule was “ridiculous” or “stupid.” Certain topics and/or issues may also not be included in this chart due to the fact that the comments were not logically comprehensible, and/or the issues raised were inapplicable.

Comments that agreed with the proposed rule without modification are not included in this chart; however, these comments are equally important. Excerpts of some of these favorable comments received are provided following the chart.

	Category	#	Response
1	Burdensome: The rule creates an unnecessary burden on both the attorney as well as the State Bar ² .	548	<p>All licensing requirements impose some burden. Importantly, this is a one- time requirement. It is at most a few hours out of an attorney's day, which is negligible compared to the other licensing requirements mandated by the State Bar, such as Mandatory Continuing Legal Education. The State Bar will provide attorneys with a list of Live Scan locations in California, organized by county (available at https://oag.ca.gov/fingerprints/locations). Larger businesses, such as law firms, as well as county law associations and other groups are also encouraged to bring fingerprint processing services on site.</p> <p>Any burden (to either the State Bar or attorneys) is outweighed by the public protection value of having all active attorneys' fingerprints on file</p>

² The burden to out-of-state and foreign attorneys is addressed in a subsequent category.

			with the California Department of Justice (DOJ) for the purpose of subsequent arrest notification (SAN).
2	<p>No legitimate public protection purpose: The rule serves no legitimate purpose and is generally unnecessary.</p>	512	<p>The State Bar is acting pursuant to the California legislature and Court's determinations that arrest notification for active licensed attorneys is an essential component of the State Bar's public protection mission.</p> <p>Bus. & Prof. Code § 6054 was amended in 1989 to require fingerprint retention for the express purpose of arrest notification subsequent to State Bar admission.</p> <p>The Court recently reiterated the importance of SAN in its October 20, 2017, letter to the State Bar. See Attachment 3, at p. 11. In this letter, the Court directed the State Bar to implement a re-fingerprinting requirement, because "requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system." <i>Id.</i></p> <p>There are numerous other California professions that require licensee fingerprints to be retained by the DOJ in order to receive SAN. These professions include, but are not limited to, physicians, surgeons, professional fiduciaries, certified public accountants, real estate appraisers, proprietary private security officers, immigration consultants, massage therapists, dental hygienists, and polysomnographic technologists.</p> <p>As with other California licensing entities, the State Bar endeavors to ensure it receives SAN for its licensees in order to effectively regulate the legal profession and protect the public. While attorneys were all fingerprinted upon admission, good moral character requirements should not, and do not, end after an individual is admitted to the State Bar. This is the rationale underlying Bus. & Prof. Code § 6101 ("Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension.") and Bus. & Prof. Code § 6106 ("The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.").</p>
3	<p>Already fingerprinted: The rule is redundant and unnecessary because all attorneys were already fingerprinted.</p> <p>Many attorneys were also already fingerprinted for</p>	697	<p>While attorneys were fingerprinted prior to their admission to the State Bar, neither the State Bar nor the DOJ was retaining the vast majority of those fingerprints until August 2017.</p> <p>Specifically, attorneys who submitted fingerprints using Live Scan technology (those residing in California when they applied for admission), had their fingerprints submitted directly to the DOJ and the FBI for a background check. The State Bar never received those fingerprints, so they were unable to retain them. These fingerprints were also not retained by the DOJ or FBI, as there was no contract in place with either entity mandating fingerprints be retained until the August 28, 2017, contract with the DOJ.</p> <p>Attorneys who resided outside of California when they applied for</p>

	other purposes, such as for employment or other license applications/renewals.		<p>admission submitted fingerprint images to the State Bar using a hard copy fingerprint card. The State Bar then transmitted these images to the DOJ and the FBI. Prior to August 28, 2017, the State Bar was only retaining these hard copy cards for a three-year period. After this three-year period, the fingerprint cards were destroyed.</p> <p>Thus, as of August 28, 2017 (the date of the DOJ SAN contract for licensed attorneys) the only active attorneys whose fingerprint images the State Bar had in its possession were those attorneys who applied for admission after August 28, 2014 (approximately 1,500 active attorneys). The State Bar has since submitted these fingerprint cards to the DOJ for retention pursuant to the SAN contract. These active attorneys will be exempt from the fingerprinting requirement. Attorneys will be able to determine whether they are exempt through a link on their MyStateBar profile.</p> <p>There is no way for staff to receive criminal information from the DOJ for the approximately 245,000 other attorneys without new fingerprint images for these attorneys. The DOJ will not provide criminal record information without biometric identification.</p> <p>The DOJ will also not share fingerprint images or criminal record information between entities. Thus, if an attorney's fingerprint images are retained by the DOJ for a different purpose (such as employment background check or upon application for a different license), the DOJ will not run a background check using those images and provide the results to the State Bar. The DOJ will also not transfer the fingerprint images to either the State Bar or into the State Bar's SAN system.</p> <p>Notably, there are numerous other professions that require the re-submission of licensee fingerprints, despite the fact the licensee may have already submitted them. See e.g., 16 CCR § 1399.722 (requiring podiatrists to submit a full set of fingerprints to the DOJ if, "regardless of the date of initial licensure", "an electronic record of the submission of fingerprints no longer exists."); 16 CCR § 4120 (requiring applicants for renewal of occupational therapy license to submit fingerprints to the DOJ if fingerprints had not been previously submitted or for whom a record of submission of fingerprints no longer exists); 16 CCR § 1419 (same requirement for renewal of registered nurses). These regulations were adopted pursuant to statutes authorizing licensing boards to adopt regulations necessary to properly regulate their profession. See Bus. & Prof. Code §§ 4808, 2404, 1906, 2841.1, 4933, 4504, and 5010.</p>
4	Expensive: The rule imposes a harsh financial burden on attorneys by requiring them to pay full fingerprinting costs.	413	<p><u>Attorney Costs:</u> The State Bar estimates the total costs for fingerprinting to be approximately \$82 per active attorney (\$49 for the cost of the background check and approximately \$33 for the print furnishing costs). See Attachment 3 at p. 6. This is a one-time cost for the attorney (or the attorney's employer), and is a small fraction of the yearly costs attorneys are required to pay to maintain their licenses each year.</p> <p>Moreover, while there is a set cost for running the background check (the "processing costs"), the \$33 print furnishing cost is an estimate. "Print furnishing" is a term used for the process performed by the service center that physically takes fingerprint images and submits them to the</p>

	The rule will also cost the State Bar considerable money to implement, taking funds away from other valuable State Bar services.		<p>DOJ, using either Live Scan technology (California residents) or hard copy fingerprint cards (out-of-state residents). A review of fingerprint servicing locations in the State of California (available at https://oag.ca.gov/fingerprints/locations) indicates that, depending on location, these services can be between \$5- \$20. For example, numerous Live Scan locations in Los Angeles county and almost every location in San Diego county charges between than \$10-15. Certain jail facilities also provide free fingerprint services.</p> <p>Lastly, the proposed rule provides that licensed attorneys who have been granted certain reductions in their annual membership fees based on financial hardship will not be required to pay the \$49 processing fee.</p> <p><u>State Bar Costs:</u> The State Bar anticipates some increased expenses in implementing the new rule, primarily in the form of increased staffed needs. See <i>generally</i>, Attachment 3. However, the State Bar is acting pursuant to the Legislature and Court's recognition that these expenses are outweighed by public protection considerations.</p>
5	The State Bar should pay for all fingerprinting costs: Since re-fingerprinting is only necessary due to the State Bar's failure to act in accordance with statutory requirements, the State Bar should bear all costs of re-fingerprinting.	362	<p>If the State Bar were to pay all costs of attorney fingerprinting, it would cost the State Bar approximately \$15.51 million, not including the costs the State Bar will incur for increased staffing and other operational and administrative costs. Staff has already detailed the available fund balances for these costs in the November 3, 2017, board Agenda Item. See Attachment 3, at p. 12. The State Bar does not have adequate resources available in any fund to cover these staggering costs.</p> <p>Moreover, requiring licensees to pay the cost of submitting or re-submitting fingerprints to the DOJ, including in circumstances where fingerprints were previously submitted, is in line with the procedures of various other licensing entities. See 16 CCR § 2010.05 (requiring veterinarians to submit fingerprints for the purpose of conducting criminal records searches "if an electronic record of the submission of fingerprints no longer exists or was never created" and that "the licensee shall pay any costs for furnishing the fingerprints and conducting the searches."); 16 CCR § 1132 (dental hygienists); 16 CCR § 2517.5 (vocational nurses); 16 CCR § 1399.419.2 (acupuncturists); 16 CCR § 2575.5 (psychiatric technicians); 16 CCR § 37.5 (accountants).</p>
6	Unconstitutional: The rule violates a number of constitutional rights, including the 4th, 5th, and 14th amendments.	60	This rule is a valid exercise of the State's regulation of the legal profession.
7	Privacy: The rule constitutes an invasion of	278	This rule is a valid exercise of the State's regulation of the legal profession.

	privacy.		
8	<p>Security: Commenters expressed concerns regarding the fact the State Bar and the government will have unfettered access to their fingerprint images and other confidential information.</p> <p>Many expressed specific concern that the <i>federal</i> government would be retaining or having access to their fingerprint images.</p>	42	<p>As an initial matter, these concerns apply not only to the proposed rule, but to Bus. & Prof. Code § 6054 generally. This statute was promulgated decades ago, and has always mandated the fingerprinting of applicants for purposes of obtaining criminal information from the state and federal government. In other words, applicant fingerprints have been sent to both the DOJ and the FBI for years.</p> <p><u>Security of Fingerprint images:</u> The State Bar will not be retaining any fingerprint images. Rather, fingerprints submitted via Live Scan will be sent directly to the DOJ for retention and the State Bar will never receive a copy. While fingerprints submitted using a hard copy fingerprint card will be sent to the State Bar for transmittal to the DOJ, the State Bar will immediately destroy any copies of the fingerprint card once it receives criminal information back from the DOJ.</p> <p>While the DOJ will submit all fingerprint images to the FBI for a federal background check, no fingerprint imaging information will be kept by the FBI. The only entity retaining the images will be the DOJ.</p> <p><u>Security of CORI and SAN:</u> If the rule is promulgated, the State Bar will be receiving back confidential criminal offender record information ("CORI") from the DOJ and FBI, and will also be receiving SAN for applicants and attorneys. The State Bar has been regularly receiving CORI regarding applicants for decades. The only change is that the State Bar will now be receiving SAN for applicants and attorneys, which will increase the volume of criminal information it receives.</p> <p>The State Bar continues to be governed by DOJ rules and regulations pertaining to the security and destruction of CORI information. Staff is also working on updated security policies and procedures, which will be made publicly available.</p> <p>Further, improper dissemination of confidential criminal information, by the State Bar, DOJ, or FBI, is governed by statute. Cal. Penal Code § 11076 ("Criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute.").</p> <p>It is also a misdemeanor for agencies to improperly disseminate this information to unauthorized persons or entities. See Cal. Penal Code § 11142 ("Any person authorized by law to receive a record or information obtained from a record who knowingly furnishes the record or information to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor").</p> <p>Staff recommends that there be an additional provision to the rule to clarify that all SAN information received by the State Bar shall be confidential and used for licensing purposes only.</p>
9	Current criminal	150	The unreliability of the State Bar's current reporting system is one of the main reasons this rule is necessary. Staff research suggests that, under

	<p>reporting requirements</p> <p>are sufficient: There are already criminal reporting requirements for prosecutors, courts, and attorneys, making the SAN system unnecessary.</p>		<p>the current reporting framework, there is significant underreporting by prosecutors, courts, and attorneys. See Attachment 3 at p. 11.</p>
10	<p>Alternative options: Commenters urged staff to consider alternative means to discover criminal history information, such as yearly oath cards by attorneys.</p>	59	<p>SAN allows the State Bar to have reliable and continuously updated access to an attorney's criminal information. There is no other alternative option that provides this information.</p>
11	<p>Burden for out- of-state attorneys: The language of the rule states that attorneys must submit fingerprint images to the DOJ via Live Scan technology, which is only available in California. Accordingly, attorneys stressed that this creates an unfair burden for out-of-state attorneys to travel to California to get</p>	81	<p>Attorneys residing outside of California are able to submit fingerprint images to the State Bar using a hard copy fingerprint card which can be completed at any fingerprint processing location within their state. The State Bar will then submit the fingerprint images to the DOJ and FBI.</p> <p>Accordingly, the rule should be changed to eliminate the language implying that attorneys must submit the fingerprint images directly to the DOJ.</p>

	fingerprinted.		
12	Burden on foreign attorneys: The rule creates an undue burden on attorneys residing overseas, as they may not have access to fingerprinting locations.	25	The rule should be modified to address active attorneys residing in foreign jurisdictions.
13	Exempt specific groups of attorneys: Commenters suggested that the rule should apply to only select groups of attorneys, including but not limited to, attorneys who have committed wrongdoing, newly licensed attorneys, or attorneys who have been practicing for many years.	61	The purpose of the rule is to effectively monitor the legal profession and to get information on all licensed attorneys. Limiting the rule to select subsets of attorneys would defeat the key purpose of the rule, which is to access criminal information that would not otherwise be known to the State Bar. Notably, the Legislature has not done so.
14	Increase in inactive attorneys: The rule will encourage attorneys to either remain inactive or go inactive.	8	There is always the possibility that an attorney will choose to go inactive rather than comply with the rules and regulations of the profession. That prospect, however, does not excuse compliance with the statute.
15	Unreliable: Commenters	20	No methods of identification are 100% accurate. That said, the Legislature has mandated fingerprinting and there are no other

	indicated that fingerprint information is not a reliable identifier. ³		alternatives that provide the type of data the State Bar is seeking. The identification is reliable enough that hundreds of agencies and employers utilize fingerprinting for licensing, certification and employment purposes.
16	Why now?: Commenters expressed curiosity as to what prompted this proposed rule.	30	As outlined in Attachment 3, the reason the rule is being proposed now is due to the recent statutory amendment to Bus. & Prof. Code § 6054, effective January 1, 2018. This statute was amended following the State Bar's discovery that it was not in compliance with the SAN contract requirement in place since 1989.
17	Overbroad: Commenters were concerned about the fact that State Bar will receive arrest information, which is not a reportable offense.	125	<p>A State Bar independent entity, distinct from the Office of Chief Trial Counsel ("OCTC"), will review arrest information when it is received by the State Bar. Only arrests that are determined to constitute a disciplinable offense will be forwarded to OCTC. OCTC will then conduct an investigation independent of the criminal justice system to determine whether to pursue disciplinary charges.</p> <p>The criminal justice system is distinct from the State Bar. The State Bar independently evaluates attorney conduct for purposes of regulation and public protection. Accordingly, certain arrests may be actionable if the arrest is for a disciplinable offense. See Bus. & Prof. Code § 6106 ("The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.") (emphasis added).</p>
18	Inactive attorneys should be treated the same as active attorneys: Commenters indicated that ALL attorneys should be required to be re-fingerprinted.	4	Inactive attorneys are not able to practice law in the State of California. Accordingly, the public protection concerns are lessened.

³ The concern that some individuals are unable to be fingerprinted is addressed in a different category (#24)

19	<p>B&P Code § 6054 Doesn't Require re-fingerprinting: Bus. & Prof.</p> <p>Code 6054, as recently amended by SB 36, authorizes, but does not obligate, the State Bar to re-fingerprint active attorneys.</p>	30	<p>The Court's October 20, 2017 letter directs the State Bar to require the fingerprinting of all active attorneys. See Attachment 3, at p. 2, 11.</p>
20	<p>Exempt attorneys who applied for admission to the State Bar prior to January 1, 1989: Prior to January 1, 1989, the State Bar had no obligation to have applicant fingerprints be retained by the DOJ.</p> <p>Accordingly, commenters felt that attorneys who applied for admission prior to this date should be exempt from the rule.</p>	4	<p>For public protection purposes, the statute and the rule apply to all licensed attorneys, not just those attorneys who applied after the original requirement was promulgated.</p>
21	<p>Timing is unclear: It is not clear if this is a one time or an ongoing requirement.</p>	40	<p>The rule provides for all active attorneys to be fingerprinted on or before December 1, 2019. This is a one-time requirement. However, there may be circumstances where re-fingerprinting is needed at a later time. For instance, the State Bar is required to notify the DOJ if individuals are no longer attorneys such that the DOJ can destroy their fingerprints and cease providing SAN. See Cal. Penal Code § 11105.2(d). Thus, if an attorney is disbarred, or resigns, and then later applies for re-admission,</p>

			<p>he will need to be re-fingerprinted.</p> <p>The rule should be clarified to provide the State Bar with the ongoing authority to re-fingerprint in these situations, or in other cases in which it is discovered that for some reason the State Bar is no longer receiving SAN for a specific attorney. Moreover, many attorneys will also change from inactive to active status after December 1, 2019.</p>
22	Implementation: Commenters expressed concern that the rule lacks clarity on process and procedures for the re-fingerprinting processes.	15	Implementation procedures, instructions, and a Frequently Asked Question document will be issued by the State Bar upon Court adoption of the rule.
23	Disability concerns: Commenters expressed concern for the fact that the rule does not provide exceptions for those attorneys whose fingerprints are unreadable, who are unable to provide fingerprints, or who do not have fingerprints because of a disability.	5	The proposed rule should be amended to incorporate disability protections.
24	Extend fee processing waivers: A small number of commenters suggested that processing fee waivers should be extended to	4	The proposed rule should be amended to provide the Board the authority to implement fingerprinting fee waivers. This will allow the Board to develop its own policies regarding what groups of attorneys should be granted fee waivers.

attorneys who have received fee scaling under State Bar Rule 2.15(B) (attorneys who work for certain		
qualified legal services). The commenters stressed the proposed rule would impose tremendous costs to underfunded qualified legal service providers and support programs.		

In addition to the proposed rule changes, noted above, stemming from an analysis of comments received, staff has also identified an additional modification to clarify application of the rule to attorneys practicing in California under the Court’s Special Admissions rules. See Division 4 of the California Rule of Court (“Appearances and Practice by Individuals Who are Not Members of the State of California”).

Although many Special Admission categories require a State Bar moral character determination, attorneys applying for authorization to practice under these provisions do not apply for general admission to the State Bar. *Id.* The legislative intent of the 1989 amendment to Bus. & Prof. Code § 6054 was for the State Bar to retain fingerprints of applicants for admission to the State Bar such that the State Bar could receive arrest notification for its licensees. Since individuals in these Special Admissions categories are not State Bar licensees, they do not need to be re-fingerprinted.

Lastly, as noted above, there were a small number of comments received that favor the re-fingerprinting rule.⁴ These include:

- “I am a CA licensed attorney since 2001. I am also a domestic violence survivor and the founder of SOAR for Justice. My ex-spouse, also a CA attorney, was abusive towards me for 10 years. I obtained a domestic violence restraining order in against him in San Diego County and this did not impact his ability to practice law. If he had been required to re-fingerprint, however, the state bar may have learned about his moral turpitude. As a result of the violence, I have relocated with my child to Massachusetts to escape my abuser. He continues to

⁴ These comments are provided as submitted.

practice law in San Diego. I believe the state bar should include the existence of a domestic violence restraining order as a basis for disbarment.”

- “I think this is a good idea because many attorneys with drug and alcohol problems seem to be "under the radar" and knowing if there has been a relapse is important for the public interest. In addition, those with mental health disabilities, which might include elder attorneys who should be retiring, could be detained for driving recklessly, for example.”
- “I think anything that encourages law abiding behavior and maintains the integrity of the law profession is a good move. There are already too many attorneys, many with questionable judgment, as evidenced by their criminal convictions.”
- “I believe this change is long overdue and will help ensure the integrity of the attorney ranks. It is consistent with the licensing schemes for other professions.”
- “This a rule is long overdue [sic], criminal behavior should not be tolerated when your [sic] an Officer of the Court. Being able to identify when a member is on a criminal lifestyle serves the public interest as to prevent that behavior from escalating.”
- “The benefits of required fingerprinting and criminal history verification are numerous and compelling. Fingerprinting permits positive identification of attorneys with relevant convictions, thus enabling the Bar to exercise appropriate discretion— a valuable disciplinary tool that the Bar has been lacking for the past 30 years.

As attorneys, we owe a duty to the state of California to ensure that members of our profession are adhering to the law of the land. We cannot stand for a system that would deprive the public of this critically important benefit because we don't think we should have to pay for it. And it would equally harm the public if the Bar were forced to divert existing funds away from its work disciplining unethical and incompetent attorneys in order to pay for the costs of submitting existing attorneys' fingerprints to the Department of Justice.

While it is extremely unfortunate that we attorneys should have to pay again to submit our fingerprints due to the Bar's own lack of compliance with the law, it is the right thing to do to protect the people of California. “

RECOMMENDATION

State Bar Rule 1.10 mandates that all rules proposed by the State Bar to the Court be circulated for public comment. Pursuant to this rule, substantive amendments to proposed rules must also be circulated for public comment. See Rule 1.10 (B)(2) (2). As staff recommends substantive amendments to the rule, an additional public comment period is required.

Attachment 1 provides the clean text of the revised proposed rule. Attachment 2 provides the redline/strikeout version of the rule, showing changes to the proposed rule from the rule issued for the 45-day public comment period.

PROPOSED BOARD RESOLUTION

RESOLVED, that the Board of Trustees authorizes staff to make available for a 30-day public comment period, the amended proposed rule to the California Supreme Court included as Attachment 1 to this Agenda Item.

ATTACHMENT(S) LIST

Attachment 1. Clean Text of Proposed Amended Rule

Attachment 2. Redline Text of Proposed Amended Rule Showing Changes to the Draft submitted for public comment

Attachment 3. November 17, 2017 Agenda Item requesting public comment authorization

Attachment 4. Full Text of Public Comments – Available at http://www.calbar.ca.gov/Portals/0/documents/publicComment/2018/Public_Comments_Attachment_4_Comments-received.pdf

PART TWO

PLANNING AND PREPARATION FOR RE-FINGERPRINTING ACTIVE, LICENSED ATTORNEYS: BACKGROUND

In preparation for the implementation of a new Rule of Court requiring the re-fingerprinting of active, licensed attorneys, a multi-divisional team of Bar staff has been working to develop the technology, policies, and procedures necessary to implement the policy by the deadline of December 1, 2019, established by the Board of Trustees in its proposed rule. Part Two of this report provides a detailed overview of the work completed to date, proposed processes for reviewing criminal records of licensed attorneys, an implementation schedule, and the remaining steps necessary to successfully implement this new Rule of Court.

DISCUSSION

In June 2017, the Bar entered into a contract with the DOJ to receive Subsequent Arrest Notification (SAN) for all *applicants* to the Bar whose fingerprints were processed after July 1, 2017. In August, the Bar entered into a contract with the California State Department of Justice (DOJ) to allow for the receipt of SAN on *attorneys*.

DOJ policies, however, do not allow for agencies such as the Bar to receive SAN on anyone who has not been identified through fingerprinting. And, because the Bar had not previously entered into a contract with DOJ to receive SAN, DOJ did not retain fingerprint records of attorneys whose fingerprints were processed prior to July 1, 2017. As a result, it is not possible for the Bar to receive SAN information on any attorney's fingerprinted prior to July 1, 2017 unless the attorney is re-fingerprinted.

Assuming that the Supreme Court adopts a new Rule of Court to require the re-fingerprinting of attorneys in California, the receipt of SAN from the DOJ will involve two distinct phases of work. The initial phase of work will involve the re-fingerprinting approximately 190,000 active attorneys in California and processing of the results of those fingerprints. The subsequent phase will involve the "maintenance" of the new work created by the receipt of SAN information.

In addition to the different phases of work required to implement this rule, the receipt of criminal history and SAN information will have a distinct impact upon different divisions of the Bar:

- Applicants for admission to the Bar whose fingerprints were processed after July 1, 2017, are already enrolled in the SAN system. As a result, the Office of Admissions has already begun adapting its business processes and procedures to address the receipt of this information on applicants;
- The Office of Attorney Regulation and Consumer Resources (ARCR) has not yet been affected but will play a central role in the implementation of the new Rule. ARCR records will be used for notifying attorneys of their obligations under the rule, sending reminders, posting information on attorneys' My State Bar Profile pages on the Bar's web site, tracking compliance, and, if necessary, sanctioning attorneys for non-compliance;
- The Office of the Chief Trial Counsel (OCTC), Office of Probation, and State Bar Court can expect an increase in the volume of work related to SAN sent by the DOJ. But the expectation is that the implementation of a new rule on fingerprinting will not result in significant operational changes to these components of the discipline system;

- Information Technology (IT) staff have been central to all of the work to date and will continue to play a critical role throughout the implementation. The IT team working on this project has established and tested new channels for the transmission of data from the DOJ; they have built new interfaces for reviewing DOJ data electronically and comparing the information with State Bar records; they have created automated routines for the processing of information and population of new fields in the records of attorneys to track compliance; and, they will continue to work closely with all Bar staff on developing and implementing the technology requirements of this policy;
- The Office of Research and Institutional Accountability (ORIA) is working as the project lead, coordinating the work of different divisions across the Bar. ORIA will remain heavily involved throughout the implementation phase of the project. Depending on how SAN information is routed following implementation, ORIA's work may end, or the unit may continue to play a supportive role to OCTC once the Bar has completed the re-fingerprinting of attorneys.

The following discussion looks first at data transfer and the process of matching and validating records, focusing on those aspects of the process that are the same for applicants to the Bar and for licensed attorneys. This section includes a discussion of new processes already adopted in the Office of Admissions and the proposed processes for reviewing criminal histories of attorneys and routing this information to OCTC.

After that, the report looks at aspects of the process that will differ between the Office of Admissions and ORIA. This section provides information on proposed guidelines that will be followed for routing information on the criminal histories of applicants and licensed attorneys.

The section after that proposes a timeline for implementation of the requirement including a single period for compliance of all attorneys followed by a warning period, and two successive periods of graduated sanctions for failure to comply. This section also looks at the question of active, out-of-state attorneys, and active attorneys who reside outside of the country.

The remainder of the report then discusses the discontinuation of SAN for applicants and attorneys when their statuses change (applications that are withdrawn and licensed attorneys who are disbarred, resign, or are deceased); data security, and; the final phase of work, maintenance of the receipt of SAN information once the implementation phase of the Rule is completed.

DATA TRANSFER, MATCHING AND VALIDATION OF RECORDS

After entering into the contract with the DOJ to receive SAN information on licensed attorneys, Bar IT staff began working with the DOJ to establish protocols for secure data transfer of information from the DOJ. The Bar already has a secure, electronic data transfer process in place to receive background check information from the DOJ for *applicants* to the Bar and, in certain respects, the creation of a new, secure channel to receive SAN information on licensed attorneys runs parallel to the existing process.

There are, however, important differences in the two processes. And, the development of new processes to receive SAN for licensed attorneys has already resulted in the creation of new tools and streamlined processes that are being used in the Office of Admissions to review background checks sent as part of an applicant's moral character evaluation.

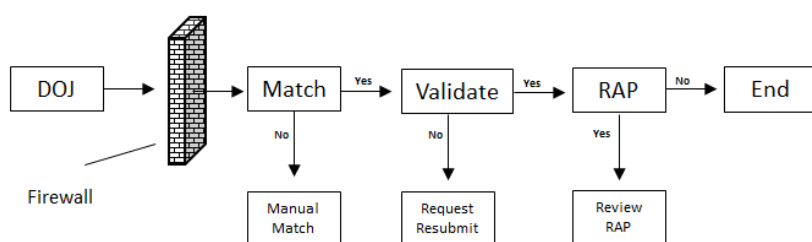
Receipt of Criminal History Information – Processes that Apply to Applicants and Attorneys

Enrolment into the SAN system begins with a background check. The submission of fingerprints by an applicant or attorney results in the production of a report on the individual's entire criminal history (a Record of Arrest and Prosecution, RAP) that is transmitted to the Bar.⁵

IT staff developed a new, automated process for the matching of records when the Bar receives the initial background check, shown in Figure 1, below. The vast majority of cases will follow the path of the horizontal arrows, which is entirely automated and defined by the following key actions.

- DOJ - the results of the background check are sent from DOJ and pass through a secure fire-wall onto a State Bar server;
- Match - the identity of the subject of the background check is matched against Bar records of applicants and attorneys and moved forward when the identity is established;
- Validate - the DOJ indicates that it was able to process the fingerprints (it was not rejected due to un-readable prints) and moves forward again;
- RAP - the DOJ indicates that it has no record of arrest and prosecution for the subject of the check and the process ends.

Figure 1 – Initial Phase of Data Receipt – No Criminal Record



During this initial phase of receipt and processing a number of additional automated procedures take place, not pictured in Figure 1.

- Match – when an attorney's or applicant's fingerprints are matched, a "flag" will be created on the attorney or applicant's record indicating compliance with the fingerprinting requirement;
- Validate – when an attorney or applicant's fingerprints cannot be read by the DOJ, the information moves into a queue for further processing to alert the attorney or applicant that fingerprints must be resubmitted.

Because this initial phase of matching and validating fingerprints is common to the review of background checks for both applicants and attorneys, the Office of Admissions is already using

⁵ All background checks will include both a California state-specific check, run by the DOJ, and an FBI check which runs against Federal criminal databases including criminal history data reported by other states. The data transmission for both checks runs through the California State DOJ, and the processes described here apply to both of these checks. For the sake of clarity, the different background checks will be singled out only when there is a difference in the process for handling the two types of checks.

the new technology developed by the Bar's IT Office. As a result of this work, the process has already been improved in the Office of Admissions.

Previously, Office of Admissions staff assigned to the Moral Character evaluation would print hard copies of the report transmitted by the DOJ and compare the information contained in those reports to the records of applicants to establish a match. The new process developed by the Bar's IT team conducts an automated match and completes the processing for applicants under three conditions: their application information is identical to DOJ records; their fingerprints were readable, and their RAP indicates no criminal history (the horizontal path defined in Figure 1).

When records do *not* match – for example, because of a transposed digit in a Social Security number or birthdate – the DOJ report is placed in a work queue that integrates with the records of the Office of Admissions. Using the new interface developed by IT, Office of Admissions staff can now review the unmatched record on the same screen as applicant data and, where appropriate, complete a manual matching of records entirely within the electronic interface.⁶

Review of Criminal History Information – Processes that Will Differ for Applicants and Attorneys
When the result of the criminal background check is positive – that is, when there is a criminal history for the applicant or attorney – the work flow requires manual intervention. This flow is depicted in Figure 1 by the horizontal path up until RAP at which point it follows the arrow down to “Review RAP.” At this point, the processes followed by the Office of Admissions will diverge from the processes followed by the ORIA.

Office of Admissions Review of Applicants' Criminal History

In the Office of Admissions, the handling of criminal history information depends on the stage of case processing for the application. Criminal history information is reviewed to determine how to route the information: if the applicant is in the pre-processing phase, the results are submitted to the assigned pre-processing clerk; if the applicant's case has already been assigned to a moral character analyst at the time that criminal history information is discovered, the findings are submitted to the corresponding moral character analyst.

In the event that a criminal history or subsequent arrest information is received for an applicant who has since become a licensed attorney, the record will be routed to ORIA. All arrest information obtained during a background check or as a result of a subsequent arrest will be evaluated against applicant reports and the applicant file in its entirety. The information will be assessed to determine first whether the applicant already reported the incident and, if so, whether the account matches the report received by the Office of Admissions. If the incident was already reported and matches the report received by the Office of Admissions, then no additional processing is required.

In cases where an applicant did not already report relevant criminal history information to the Office of Admissions, the information will be considered as part of the moral character

⁶ In addition to match failures that result from simple errors in data entry or the transposition of numbers in key identifiers, the Office of Admissions also receives criminal history information on applicants who are not yet in the system at all because fingerprints were submitted prior to the submission of other application materials. The Office of Admissions holds onto these applications for three months before destroying those results and alerting the DOJ that the agency is no longer interested in arrest information for this individual.

determination. The applicant's candor, severity of the arrest, charges, or conviction, and its impact, rehabilitation (or potential for rehabilitation) and accountability are other factors considered in the moral character determination. Cases with complex circumstances or requiring input from the applicant, are submitted to the Committee of Bar Examiner's Moral Character subcommittee for an informal conference. At the conclusion of each informal conference, subcommittee members are required to make a positive or negative determination, or to "abey" the case. A positive determination clears the case. A negative determination leads to a denial of the application but allows the applicant to wait two years before re-applying or allows the applicant to appeal through the State Bar Court. An abeyance determination grants the applicant time to participate in rehabilitation.

Office of Research & Institutional Accountability Review of Attorneys' Criminal History

Attorney background checks that contain criminal history information will be retrieved by staff in ORIA from a secure terminal. ORIA staff will follow a number of decision rules regarding the information to determine whether to forward the information to the Office of the Chief Trial Counsel.

The first decision rule for evaluating criminal record information has to do with the date of arrest, charge, or conviction on the record. The remaining questions flow from that date as shown in Figure 2, below.

Figure 2 – Simplified Decision Rules for Routing of Criminal Record Information

- Did the date of the criminal history information precede the attorney's admission to the Bar?
 - If "yes":
 - Was the criminal history information known to the Office of Admissions and considered during the attorney's moral character evaluation?
 - If "yes", then the record is destroyed and no further action is taken;
 - If "no", then the record is transferred to OCTC for review.
 - If "no":
 - Was the criminal history information known to OCTC?
 - If "yes", then the record is destroyed and no further action is taken;
 - If "no", then the record is transferred to OCTC for review.

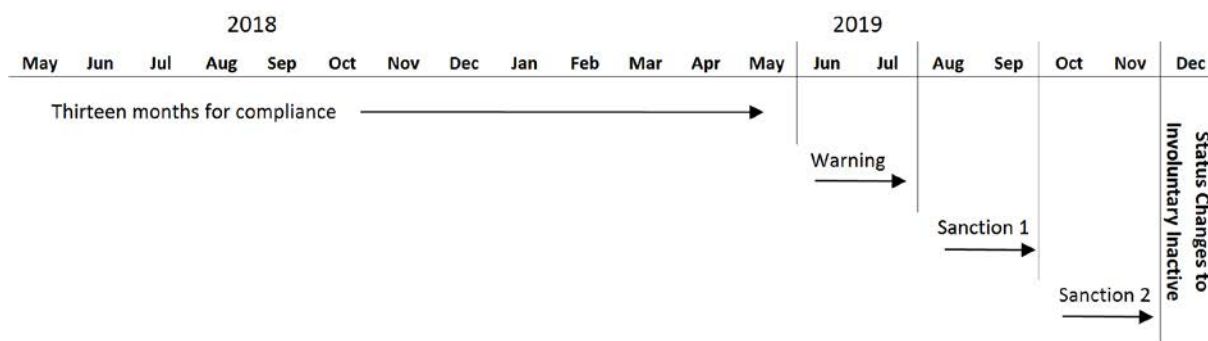
The actual decision rules for evaluating and acting on criminal history have additional nuances related to whether the information pertains to arrests, charges, or convictions, and the age and type of charge (misdemeanors or felonies). Attachment 5 provides a more detailed decision matrix and the guidelines that will be used to determine whether or not to forward a record to OCTC.

ENFORCEMENT OF REQUIREMENT FOR RE-FINGERPRINTING

The proposed rule requiring the re-fingerprinting of attorneys approved by the Board of Trustees directs the Bar to complete the re-fingerprinting of active attorneys by December 1, 2019 (Attachment 1). This relatively short time-frame for implementation will expedite the Bar's compliance with Business and Professions Code 6054 and suggests the need to establish a single compliance period for all active attorneys with frequent notification and graduated sanctions for failure to comply.

The exact time frames for implementation will depend on the date when a new rule, if approved, becomes effective. The phases through which notification and sanctions proceed, however, can be mapped out and are presented in Figure 3, below, under an assumption of an April 30 effective date for the new rule.

Figure 3 – Proposed Timeline and Phases for Implementation of Re-Fingerprinting



With an April 30 effective date, Figure 3 shows that a full 13 months could be established for compliance with the re-fingerprinting mandate followed by:

- a two-month warning period during which communication is more frequent and the consequences for failure to comply are emphasized more strongly;
- a two-month period during which active members who have not complied would be required to pay a limited monetary sanction for late compliance;
- a two-month period during which active members who have not complied would be required to pay a larger monetary sanction for late compliance.

Communications with licensed attorneys should be frequent and targeted. Although active attorneys will be the principal target of the communications, inactive attorneys and attorneys who are in statuses that would allow them to reactivate their licenses without re-fingerprinting will need to be alerted to the new requirements also.⁷ The requirements for reactivation of

⁷ Attorneys who are on Probation and complete a suspension without conditions other than the suspension are generally reactivated without any additional conditions. While these suspensions are relatively short and will mostly fall within the compliance period, there may be suspensions that conclude following the compliance period and will need to be addressed. Similarly, attorneys who are suspended and subject to additional conditions – such as the payment of restitution – may become eligible to have their licenses reactivated following compliance with these terms and outside of the compliance period.

licenses following a period of being in inactive status (or any other status from which an attorney could return to active status) should be changed to include the submission of fingerprints to the DOJ.

On-going tracking using the records of the Office of Attorney Regulation and Consumer Resources will allow for the delivery of e-mail notifications that only remind those attorneys whose fingerprints have not been received as of a specific date. These records can also be used to create a personalized notification on the My State Bar Profile pages on the Bar's web site, alerting attorneys if the Bar has not yet received their fingerprints or, conversely, notifying them that their fingerprints were received. The My State Bar Profile page will also be used to deliver the Live Scan form to attorneys with the required data-transmission codes that the DOJ uses to link fingerprints with the Bar.

Active out-of-state attorneys will pose a special challenge because of the potentially labor-intensive process for acquiring fingerprints from out-of-state attorneys. Currently the Office of Admissions mails blank fingerprint cards to out-of-state applicants to the Bar, then receives these cards from the applicants once their fingerprints have been taken, and transmits the cards to the DOJ. There are currently approximately 20,000 out-of-state attorneys in active status. Bar staff are communicating with the DOJ to explore options for fingerprinting out-of-state active attorneys that would avoid the multiple steps of communication and mailing involved in the process employed by the Office of Admissions for out-of-state applicants.⁸

DISCONTINUATION OF DATA TRANSMISSION FROM THE DOJ

The receipt of SAN information from DOJ creates an additional obligation for the State Bar: notification of the DOJ when SAN information on applicants and attorneys is no longer needed. The formal process for removing people from the SAN system is referred to as a "No Longer Interested" (NLI) notification. In the Office of Admissions, applicants will remain registered for the transmission of subsequent arrest data to the Bar until their application is abandoned, denied, expired or withdrawn either administratively or by the applicant. When an application has reached any of these stages, the applicant's name and identifying information will be added to an NLI file which will be submitted to the DOJ on a monthly basis.

For active attorneys, SAN will be discontinued when attorneys move out of either active or inactive status and into any one of three categories: disbarred, resigned, or deceased. Information technology staff are developing the automated routine that will track status changes, create a NLI list, and place a flag on the records of former attorneys to indicate that they have been removed from the SAN system.

DATA SECURITY

ORIA staff are currently reviewing Bar protocols regarding data security including access to secure terminals and assessing the adequacy of the number and location of "custodians of records" in different Offices of the Bar. Typically an agency establishes one or more custodians of records whose role is to ensure that all staff with access to criminal history information have signed documents attesting to their awareness of the confidentiality of criminal history

Additional requirements will need to be established to ensure that attorneys who may have been suspended during the compliance period are re-fingerprinted prior to becoming active again.

⁸ Another almost 2,000 active attorneys reside in foreign countries. Amendments to the proposed Rule of Court contained in Part One of this report address a process for dealing with these cases.

information and the criminal penalties associated with the unauthorized transmission of this information. Custodians of records need to be fingerprinted with SAN information on them routed to the DOJ.

MAINTENANCE OF SUBSEQUENT ARREST NOTIFICATIONS FOLLOWING IMPLEMENTATION

Direct Receipt of Subsequent Arrest Notification Information in OCTC

One of the key benefits of the role performed by ORIA in the implementation phase is to regulate the flow of information to OCTC to ensure that only relevant criminal history information is forwarded to OCTC. Relevance relates to whether the Office of Admissions or OCTC was already aware of the information *and* whether the information is covered under the statutes that govern the reporting of criminal history information (Business and Professions Code Sections 6068(o)(4), 6068(o)(5), 6101(a) and 6101(b)).

Following the implementation phase, it will no longer be necessary to screen criminal history information to determine whether the information was known to OCTC. It may, however, be useful to retain ORIA in a gatekeeper role to evaluate whether the information *should* be transmitted to OCTC. Whether ORIA should continue to play this role will depend on striking a balance between an attorney's privacy rights and the Bar's public protection obligation and should be discussed in more detail by the Board of Trustees.

Office of Admissions Subsequent Arrest Notification

As noted above, applicants will remain registered for receipt of subsequent arrest data until the application is abandoned, denied, expired or withdrawn (administrative withdrawal or applicant withdrawal). When an application has reached any of these stages, the DOJ will be notified that the State Bar "is no longer interested" (NLI) in this applicant. An NLI report will be generated on a monthly basis to ensure that the State Bar is no longer receiving information for applicants that are no longer pursuing licensing.

Applicants who are not admitted into the practice of law and whose applications remain active may be reported to the Office of Admissions through the SAN system. The Office of Admissions will need to establish policies for how to assess the information reported through the SAN system, whether to reopen moral character evaluations based on the information.

FISCAL/PERSONNEL IMPACT

Bar staff anticipate that implementation of a new rule mandating the re-fingerprinting of attorneys will carry with it significant fiscal and personnel impacts. These costs were estimated at \$.6 million in the budget submitted to the Board of Trustees on November 3, 2017, but will depend upon the volume of previously unknown criminal history information discovered during the re-fingerprinting of licensed attorneys. On-going costs will depend on the amount and type of contact with the criminal justice system reported through the SAN process that was previously missed through self-reporting and reporting by prosecuting attorneys and courts.

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: 1. Successfully transition to the "new State Bar"—an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Objective: Implementation of a new rule mandating the re-fingerprinting of attorneys so that the Bar receives SAN information from the DOJ will bring the Bar into compliance with its statutory

obligations under Business and Professions Code 6054. Moreover, the implementation of this rule will provide the Bar with more accurate and complete information on criminal activity of attorneys.

ATTACHMENT(S) LIST

Attachment 5. Draft Decision Rules for Handling Records of Arrest and Prosecution

ATTACHMENT 1

1. Licensed Attorney Fingerprinting

a) Subsequent Arrest Notification: The State Bar shall enter into a contract with the California Department of Justice for Subsequent Arrest Notification services for licensed active California attorneys, pursuant to Business and Professions Code section 6054.

(i) The State Bar is already receiving Subsequent Arrest Notification services for some attorneys. The State Bar will consider these attorneys as having already satisfied the fingerprinting requirement of this rule and are thereby exempt. The State Bar shall notify all attorneys to check their MyStateBar Profile for information as to whether they have been deemed to have already satisfied the requirement.

b) Active Licensed Attorneys: Each active licensed attorney, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.

c) Inactive Licensed Attorneys: Inactive licensed attorneys, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted prior to being placed on active status.

d) Active Licensed Attorneys in Foreign Countries: Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction that the attorney is physically located, the attorney must notify the State Bar using a form available through the attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States, provided, that within 60 days of returning (even temporarily) to the United States, such attorney shall be fingerprinted.

e) Special Admissions: This Rule only applies to attorneys of the State Bar. It does not apply to attorneys who are permitted to practice in the State of California pursuant to California Rule of Court Rules 9.40 through 9.48.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation that requires all active licensed attorneys required to be fingerprinted under section 1(b) to be fingerprinted by December 1, 2019.

The State Bar has ongoing authority to require re-fingerprinting after December 1, 2019 attorneys for whom it is not receiving subsequent arrest notification services and for attorneys transferring to inactive status

3. Information Obtained by Subsequent Arrest Notification; Limitations on Disclosure

Any information obtained by the State Bar through the Subsequent Arrest Notification System shall be Confidential and shall be used solely for State Bar licensing and regulatory purposes.

4. Fingerprint Submission and Processing Costs

Except as described in 4(a), all costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

a) The Board of Trustees of the State Bar must develop procedures for granting waivers of fingerprint processing costs for licensed attorneys with demonstrable financial hardship.

5. Attorneys Who are Physically Unable to be Fingerprinted

a) If the DOJ makes a determination pursuant to California Penal Code section 11105.7 that the attorney is presently unable to provide legible fingerprints, the attorney will have been deemed to have complied with the requirement of Section 1.

b) Attorneys may also submit notification to the State Bar directly through their MyStateBar profile that they are unable to submit fingerprints due to disability, illness, accident, or other circumstances beyond their control. The State Bar will evaluate the notification and may require additional evidence. If the State Bar determines that the attorney is unable to submit fingerprints based on the information provided, the attorney will have been deemed to have complied with the requirement of section 1(b).

c) This section shall only apply to those persons who are unable to supply legible fingerprints due to disability, illness, accident, or other circumstances beyond their control and does not apply to persons who are unable to provide fingerprints because of actions they have taken to avoid submitting their fingerprints.

ATTACHMENT 2

1. Licensed Attorney Fingerprinting

a) Subsequent Arrest Notification: The State Bar shall enter into a contract with the California Department of Justice for Subsequent Arrest Notification services for licensed active California attorneys, pursuant to Business and Professions Code section 6054.

(i) The State Bar is already receiving Subsequent Arrest Notification services for some attorneys. The State Bar will consider these attorneys as having already satisfied the fingerprinting requirement of this rule and are thereby exempt. The State Bar shall notify all attorneys to check their MyStateBar Profile for information as to whether they have been deemed to have already satisfied the requirement.

b) Active Licensed Attorneys: Each active licensed attorney, with the exception of those attorneys specifically exempt under subsection 1(a)(i), ~~of the State Bar for whom the State Bar does not currently have fingerprint images~~ shall, pursuant to the procedure identified by the State Bar, be fingerprinted ~~submit fingerprint images to the Department of Justice~~ for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.

~~Inactive licensed attorneys for whom the State Bar does not have fingerprint images must submit fingerprint images to the Department of Justice prior to seeking active status.~~

c) ~~The State Bar shall request from the Department of Justice subsequent arrest notification service for its active licensed attorneys, pursuant to Business and Professions Code section 6054.~~ **Inactive Licensed Attorneys:** Inactive licensed attorneys, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted prior to being placed on active status.

d) Active Licensed Attorneys in Foreign Countries: Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction that the attorney is physically located, the attorney must notify the State Bar using a form available through the attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States, provided, that within 60 days of returning (even temporarily) to the United States, such attorney shall be fingerprinted.

e) Special Admissions: This Rule only applies to attorneys of the State Bar. It does not apply to attorneys who are permitted to practice in the State of California pursuant to California Rule of Court Rules 9.40 through 9.48.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation ~~of subsection (a)~~ that requires all active licensed attorneys ~~required for whom the State Bar does not have fingerprint images to be fingerprinted under section 1(b) submit fingerprints to the Department of Justice~~ by December 1, 2019.

The State Bar has ongoing authority to require re-fingerprinting after December 1, 2019 attorneys for whom it is not receiving subsequent arrest notification services and for attorneys transferring to inactive status.

3. Information Obtained by Subsequent Arrest Notification; Limitations on Disclosure

Any information obtained by the State Bar through the Subsequent Arrest Notification System shall be Confidential and shall be used solely for State Bar licensing and regulatory purposes.

3.4. Fingerprint Submission and Processing Costs

Except as described in 4(a), All costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

a) The Board of Trustees of the State Bar must develop procedures for granting waivers of fingerprint ~~will cover the DOJ and FBI processing costs for licensed attorneys with demonstrable financial hardship. who have been granted a fee scaling or fee waiver for annual membership fees pursuant to State Bar Rule 2.15(A) or 2.16(C)(3)(c). These attorneys will pay for all third party print furnishing costs.~~

5. Attorneys Who are Physically Unable to be Fingerprinted

a) If the DOJ makes a determination pursuant to California Penal Code section 11105.7 that the attorney is presently unable to provide legible fingerprints, the attorney will have been deemed to have complied with the requirement of Section 1.

b) Attorneys may also submit notification to the State Bar directly through their MyStateBar profile that they are unable to submit fingerprints due to disability, illness, accident, or other circumstances beyond their control. The State Bar will evaluate the notification and may require additional evidence. If the State Bar determines that the attorney is unable to submit fingerprints based on the information provided, the attorney will have been deemed to have complied with the requirement of section 1(b).

c) This section shall only apply to those persons who are unable to supply legible fingerprints due to disability, illness, accident, or other circumstances beyond their control and does not apply to persons who are unable to provide

fingerprints because of actions they have taken to avoid submitting their fingerprints.

ATTACHMENT 3

OPEN SESSION
BOT AGENDA ITEM NO. 701
NOVEMBER 2017

DATE: November 3, 2017

TO: Members, Board of Trustees

FROM: State Bar Staff

SUBJECT: Proposed California Rule of Court Regarding Fingerprinting of Active Licensed Attorneys – Request for Public Comment

EXECUTIVE SUMMARY

This agenda item requests the Board of Trustees to authorize a 45-day public comment period for a proposed court rule to implement a fingerprinting requirement for active licensed attorneys under the recent amendments to Business and Professions Code section¹ 6054, effective January 1, 2018. Pursuant to the California Supreme Court's recent directive, the proposed rule requires all active licensed attorneys to submit or resubmit fingerprints to the Department of Justice by a set deadline and to pay the fingerprint processing and furnishing costs in connection with such submissions.

BACKGROUND

On October 20, 2017, Tani G. Cantil-Sakauye, Chief Justice of California, sent a letter to State Bar President Michael Colantuono and Executive Director Leah Wilson, regarding Senate Bill ("SB") No. 36's recent amendment to section 6054 authorizing the State Bar of California ("State Bar") to require attorneys to submit or resubmit fingerprint records to the California Department of Justice ("DOJ") in order to receive subsequent arrest notification for these individuals. The Court's letter is Attachment 1. The full text of section 6054, as amended by SB 36, is as follows:

(a) State and local law enforcement and licensing bodies and departments, officers and employees thereof, and officials and attachés of the courts of this state shall cooperate with and give reasonable assistance and information, including the providing of state summary criminal history information and local summary criminal history information, to the State Bar of California or any authorized representative thereof, in connection with any investigation or proceeding within the jurisdiction of the State Bar of California, regarding the admission to the practice of law or discipline of attorneys or their reinstatement to the practice of law.

(b) The State Bar of California shall require that an applicant for admission or reinstatement to the practice of law in California, or may require a member to submit or resubmit fingerprints to the Department of Justice in order to establish

¹ Unless otherwise stated, all section citations are to the Business and Professions code.

the identity of the applicant and in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states. The information obtained as a result of the fingerprinting of an applicant or member shall be limited to the official use of the State Bar in establishing the identity of the applicant and in determining the character and fitness of the applicant for admission or reinstatement, and in discovering prior and subsequent criminal arrests of an applicant, member, or applicant for reinstatement. The State Bar shall notify the Department of Justice about individuals who are no longer members and applicants who are denied admission to the State Bar within 30 days of any change in status of a member or denial of admission. All fingerprint records of applicants admitted or members reinstated, or provided by a member, shall be retained thereafter by the Department of Justice for the limited purpose of criminal arrest notification to the State Bar.

(c) The State Bar shall request from the Department of Justice subsequent arrest notification service, as provided pursuant to Section 11105.2 of the Penal Code, for applicants to, and members of, the State Bar.

(d) If required to be fingerprinted pursuant to this section, a member of the State Bar who fails to be fingerprinted may be enrolled as an inactive member pursuant to rules adopted by the board of trustees.

(e) The State Bar shall report to the Supreme Court and the Legislature by March 15, 2018, regarding its compliance with the requirements of this section.

While section 6054 authorizes the State Bar to require submission or resubmission of attorney fingerprints to the DOJ, it does not obligate the State Bar to do so. The statute is also silent in regard to how the State Bar may implement attorney fingerprinting requirements, including with respect to a compliance timeframe and who should bear the costs associated with the processing and furnishing of these submissions. The statute also removes language mandating that the State Bar bear costs associated with the processing of applicant fingerprints.

The Supreme Court's October 20, 2017, letter obligates the State Bar to require attorney submission of fingerprints to the DOJ. It states: "requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system." See Attachment 1. In its letter, the Court directs the State Bar "to consider and present to the [C]ourt any proposed court rules that may be appropriate to facilitate implementation of the fingerprinting requirement for all State Bar applicants and all active attorney members." *Id.*

In connection with the statutory changes, State Bar staff has been re-evaluating its current policies and procedures for applicant fingerprinting, and determining what processes are necessary for the submission of active attorney fingerprints to the DOJ and the subsequent receipt of criminal information. This evaluation includes an analysis of anticipated operational impact on the State Bar, including a review of staffing needs. Accordingly, this agenda item provides the Board with an overview of these analyses and a proposed court rule requiring all active licensed attorneys² to submit or resubmit fingerprints to the DOJ. The proposed rule also includes a timeframe for compliance with this requirement and a requirement that licensed attorneys bear all costs associated with fingerprint submission.

² State Bar applicants are already required to be fingerprinted pursuant to section 6054.

Pursuant to State Bar Board Book Rule 1.10, staff recommends that the Board request a 45-day public comment period on the proposed rule.

DISCUSSION

I. The State Bar's Subsequent Arrest Notification Contracts with the DOJ

As reported to the Board earlier this year, staff determined that it was necessary for the State Bar to enter into a contract for Subsequent Arrest Notification ("SAN") in order to comply with section 6054's fingerprint retention requirements. Prior to SB 36, section 6054 required that only State Bar applicants be fingerprinted and that such fingerprint records "be retained thereafter for the limited purpose of criminal arrest notification." Although the State Bar was requiring applicants for admission to be fingerprinted, the State Bar had not entered into a contract for the DOJ to retain these fingerprints. As such, the State Bar was not receiving SANs for any applicant after admission to the State Bar.³

Upon realizing the error, the State Bar entered into a SAN contract with the DOJ on June 28, 2017, effective July 1, 2017 (the "Applicant Contract"). Attachment 2 is the Applicant Contract. Pursuant to the Applicant Contract, the DOJ is now retaining applicant fingerprint records in order to notify the State Bar of subsequent arrests of those individuals.

The State Bar subsequently entered into a second contract with the DOJ for active licensees (the "Licensee Contract"). Attachment 3 is the Licensee Contract.

Although the Licensee Contract currently provides for SAN services for all licensed attorneys, the DOJ is unable to provide arrest notification for the vast majority of this population. This is because fingerprint records previously submitted by licensed attorneys as part of their moral character application were not retained by the DOJ because no contract was previously in place permitting such retention.

As also previously explained to the Board, the State Bar has only retained fingerprint records of a small subset of applicants who submitted fingerprints using hard copy fingerprint cards within the past three years. Of these applicants, approximately 1,500 are now active licensed attorneys. Following the execution of the Licensee Contract, the State Bar submitted the fingerprint records of these attorneys to the DOJ⁴. Thus, pursuant to the Licensee Contract, the DOJ will provide SAN services for these attorneys. However, the only way for the State Bar to receive arrest notification for all other active licensed attorneys is for those individuals to submit new fingerprint records to the DOJ to be retained pursuant to the Licensee Contract.

³ The term "arrest notification" includes notification of both arrests and the dispositions thereof. See Cal Pen. Code § 11105.2(a).

⁴ The State Bar has also submitted the hard copy fingerprint cards of approximately 1,500 applicants whose applications are still pending, so that they can be retained pursuant to the Applicant Contract.

II. Operational Analysis

A. Fingerprint Processing and Subsequent Arrest Notification Review and Response Procedures

In order to handle the influx of criminal information that will flow from the State Bar's two contracts with the DOJ, staff has re-evaluated its current processes and created certain new procedures.

1. New Procedures Related to State Bar Applicants

Pursuant to the Applicant Contract, effective July 1, 2017, enrollment in the SAN system now occurs as a byproduct of the criminal background check run on all applicants to the State Bar. Thus, following an applicant's submission of fingerprints to the DOJ, the Office of Admissions ("Admissions") receives electronic notification through a secure File Transfer Protocol ("FTP"), indicating whether a criminal history for the applicant was found. When a criminal history is found, Admissions receives this information electronically through the same secure FTP. Admissions will continue to receive notification of any criminal information until the applicant is admitted to the State Bar. While it is not anticipated that a large number of applicants will pick up additional arrests, charges, or convictions during the limited amount of time that most applicants are in this status, there are applicants who spend years attempting to pass the bar exam and whose moral character evaluation will need to be reconsidered by Admissions when new information comes to light as a result of SAN. Admissions has yet to receive any SAN hits on applicants who were fingerprinted since July 1, 2017, and staff is working to develop guidelines governing the review of this information when it is eventually received.

Another process for Admissions to manage is the notification to the DOJ when an applicant is denied admission to the State Bar. The State Bar is obligated to notify the DOJ when an applicant is denied admission so that the DOJ can destroy those individuals' fingerprints. See Cal Pen Code § 11105.2(f); section 6054, as amended by SB 36. An applicant is denied admission to the State Bar if he or she has not been admitted to the State Bar within three years of submitting a moral character application, provided there is no approved extension. An applicant who fails the bar exam may retake the exam within this time period without needing to be re-fingerprinted each time he or she registers for the exam.

On October 3, 2017, the Committee of Bar Examiners approved an applicant fingerprint processing protocol requiring Admissions to inform the DOJ when SAN is no longer required for individual applicants whose positive moral character determination has expired, their application has been abandoned, or who are otherwise ineligible for admission. Admissions staff will review moral character applications monthly to determine which applicants have applications meeting these requirements. The names of those applicants will then be transmitted to the DOJ through a formal "No Longer Interested" notification form each month.

2. New Procedures Related to Currently Licensed Attorneys

To effectuate the submission of licensed attorney fingerprints to the DOJ and the receipt of SAN for licensed attorneys, staff plans to upload a pre-populated and individualized Live Scan form on each attorney's My State Bar Profile page. These forms will include essential information for appropriate fingerprint routing: a "Mail Code" and "Applicant Type" agreed upon by the DOJ and the State Bar.

After an attorney has submitted fingerprints through the Live Scan process using this pre-populated form, the DOJ will run both a California and a national (FBI) background check and transmit that data to the State Bar. Receipt of the information from the DOJ will trigger the automatic population of the State Bar's records and compliance database indicating that the attorney has complied with the fingerprinting requirement and is now registered in the SAN system. Background checks that contain criminal history information will be routed to a secure terminal in the Office of Research and Institutional Accountability ("ORIA"), where dedicated staff will use specified decision rules to determine what additional steps, if any, need to be taken.

These decision rules, which have not yet been finalized, will address two different groups of licensed attorneys:

a. *Attorneys whose criminal record preceded admission to the State Bar.* If the date of the criminal history information *preceded* the completion of the moral character determination, ORIA staff will research the case to determine if the information found in the criminal background check was already disclosed as part of the attorney's moral character application. If the information was already disclosed, then the criminal history record will be destroyed and no further action will be taken. If the information was *not* already disclosed, staff will forward the record to Admissions for further analysis to determine what action, if any, should be taken.

b. *Attorneys whose criminal record occurred after admission to the State Bar:* If the date of the criminal history information follows the attorney's admission to the State Bar, ORIA staff will research the case to determine if the information found in the criminal background check was already disclosed to the Office of Chief Trial Counsel ("OCTC"). If the information was already known to OCTC, then the criminal history record will be destroyed and no further action will be taken. If the information in the criminal history was *not* already known to OCTC, then ORIA staff will forward the record to OCTC for further analysis to determine what action, if any, should be taken.

It will also be necessary to remove attorneys from the SAN system when they transition to certain statuses. Similar to the process being developed in Admissions, staff is working to develop a monthly routine for identifying attorneys who permanently resign from the State Bar, are disbarred, or die in order to submit this information to the DOJ through the "No Longer Interested" form⁵.

B. Implementation Costs

The costs associated with the fingerprinting of active licensed attorneys are outlined below. The State Bar will also incur costs associated with the implementation of the above processes and procedures. Estimates of these costs are based on the number of applicants and active licensed attorneys shown below in Table 1.

⁵ Cal Pen Code § 11105.2(d) requires the State Bar to immediately notify the DOJ when a "license or certification is revoked" and "when [an] applicant may no longer renew or reinstate the license or certificate."

Table 1

Licensed Attorneys in California	
Active	189,167
Inactive	57,434
Average Annual Number of Moral Character Applications	
	7,807

1. Fingerprint Processing and Furnishing Costs

It costs \$32 for the DOJ to process fingerprint records and an additional \$17 for the FBI background check, for a total cost of \$49 per individual. See <https://oag.ca.gov/sites/all/files/agweb/pdfs/fingerprints/forms/fees.pdf>. Prior to the recent amendments to section 6054, “[A]ll costs of providing criminal history information to, and the processing of fingerprints for, the State Bar, except for print furnishing and encoding, as required by this section, shall be borne by the State Bar.” SB 36 removes this language from section 6054, leaving the statute silent as to the responsibility for fingerprinting costs for applicants and licensed attorneys.

Applying the costs of fingerprint processing to all active licensed attorneys in California would result in a cost of approximately \$9.27 million. See Table 2.

Table 2

Cost of Enrolling Active Attorneys in SAN System	
DOJ & FBI Background Checks (per attorney)	\$49
Costs for 189,167 Active Attorneys	\$9,269,183

In addition the costs for processing, there is a cost for the actual fingerprint “furnishing.” This is a term used for the process performed by the service center that physically takes fingerprint images and submits them to the DOJ, using either Live Scan technology (California residents) or hard copy fingerprint cards (out-of-state residents). Historically, applicants have been required to pay these costs.

A review of fingerprint servicing locations in the State of California indicates that, depending on location, these services range in cost from \$5 through \$100 with an average cost of \$33. See <https://oag.ca.gov/fingerprints/locations> (listing service locations by county and the costs charged at each location). While many sheriff and police departments offer these services for \$5 (for example, the Lassen County Sheriff’s Department and Mariposa County Sheriff’s Department), many other departments charge much higher amounts. For example, the Richmond Police Department charges \$59, the Pinole Police Department charges \$50, and the Contra Costa Sheriff’s Department charges \$35. Certain jail facilities, such as the Mono County Jail, provide free fingerprint services.

Using the average cost of \$33 per fingerprint, the total cost of fingerprint furnishing for licensed attorneys is \$6.24 million dollars. See Table 3.

Table 3

Cost of Fingerprint Furnishing

Fingerprint "Furnishing" Cost (average per attorney)	\$33
Total Cost for Fingerprinting 189,167 Active Attorneys	\$6,242,511

Combined, the total cost of fingerprint furnishing plus the cost of conducting DOJ and FBI background checks on all active licensed attorneys in the State of California is approximately \$15.51 million. As discussed in more detail below, staff proposes that a court rule mandate that licensed attorneys bear these costs.

2. Anticipated Staffing Needs

While the costs of background checks and fingerprint furnishing are straightforward, calculating the staffing needs for implementing this policy requires additional information, much of which needs to be estimated. The rate at which attorneys are actually charged and convicted of crimes, the number of these cases that have gone un-reported, and the severity of the crimes are all unknown. Nor is it known how many attorneys will fail to comply with a fingerprinting requirement, need their status changed for such failure to comply, will contact the State Bar to inquire about the policy, or will request an extension or other accommodation.

Attachment 5 provides detailed lists of the functions and tasks that staff anticipate will need to be undertaken and the number of anticipated additional positions. Rather than calculating a single estimate, a range including a low, medium, and high estimate is provided for each of nine departments of the State Bar that will be impacted by this policy.

The detailed task and time estimates in Attachment 5 suggest a need for new staff that could be as few as 9 Full Time Equivalent (FTE) staff on the low end, and as many as 29 FTE on the high end. A number of the key parameters used to generate these estimates are summarized immediately below:

- The relevant number of charges and convictions for calculating new workload is not the total but, rather, the number of *previously undisclosed* criminal charges and convictions, i.e., *net* of those already reported;
- The rate of involvement in the criminal justice system for attorneys is assumed to be:
 - greater than current rate of criminal complaints in the State Bar's discipline system (.00122);
 - less than the rate of arrests for the general adult population in California (.042); and
 - greater than the rate for physicians (.00303)⁶, in part because attorneys experience alcohol dependence at a rate over twice that of physicians.⁷
- For initial implementation, the *annual* arrest rate needs to be multiplied by a factor reflecting the years of criminal activity that has gone un-reported. Approximately twenty seven (27) years have lapsed since the legislation mandating SAN. 27 is used as the

⁶ This is based on reporting by the Medical Board of California.

⁷ See Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," *Journal of Addiction Medicine*, Volume 10, Number 1, January/February 2016.

multiplier for the high-end estimates of the number of arrest records that will need to be reviewed; 10 is used as the multiplier for the low-end estimates, and 20 is used as the multiplier for the middle-range estimates. On an ongoing basis, this multiplier will not be necessary.

- Not all attorneys will come into the system at the same time. If the policy is implemented over two years, all of the annual estimates need to be cut in half to account for the introduction into the system of half of the attorney population each year.

The implications of these assumptions are as follows:

- At twice the rate of arrests for physicians (.00606), the annual number of arrests for half of the attorney population (95,000) is 576;
- Subtracting the number of criminal conviction cases reported in 2016 (232), the *net* number of annual arrests for half of the attorney population is 344; and
- Estimating that over the last 27 years some proportion of the new arrests are those of attorneys who had already been arrested previously, the low-end estimate of arrest records that will need to be reviewed is 3,437, the middle-range estimate is 6,874, and the high-end estimate is 9,280.

Table 4

Estimated Staffing Need by State Bar Department (Full Time Equivalent Staff – FTE)	Low	Medium	High
Office of the Chief Trial Counsel	3.95	7.85	10.58
State Bar Court	0.58	1.11	1.48
Office of Probation	1.64	3.23	4.34
Office of Admissions	0.35	0.64	0.85
Attorney Regulation and Consumer Resources ⁸	0.32	0.57	1.08
Call Center	0.31	0.57	1.10
Information Technology (fixed estimate, no range)	0.76	0.76	0.76
Office of General Counsel	0.70	2.65	6.27
Office of Research & Institutional Accountability	0.81	1.56	2.09
Totals	9.42	18.94	28.55

Given the uncertainty inherent in many of the parameters that are necessary for estimating the workload, State Bar staff proposes adding nine FTE, consistent with the low end of the range, with the specific allocation to be determined at a later date and the possibility of revisiting the need for staff as implementation moves forward.⁹

⁸ Formerly known as Member Records and Compliance

⁹ The 2018 budget only accounts for four FTE. This is due to a combination of financial constraints, the fact staff anticipates that the workload will grow over time, and the assumption that a conservative approach can be modified over time.

In addition to the detailed worksheets provided in Attachment 5, below is a narrative summary of the major functions for which additional resources will be needed in different departments of the State Bar.

- Additional Information Technology resources to:
 - finalize the design of, build, and maintain the new interface for the secure FTP between the DOJ and the State Bar;
 - re-design the interface between databases in Admissions and those in Attorney Regulation and Consumer Resources, and to provide resources to attorneys through their My State Bar Profile web page;
 - develop processes and maintain the system for re-routing SAN notifications from Admissions to ORIA when applicants to the State Bar become attorneys; and
 - develop new fields, codes, and data transfer routines for State Bar records on attorneys documenting compliance with the fingerprint requirements and the registration of licensed attorneys in the SAN system;
- Additional resources in ORIA to review background checks and route results to the appropriate department;
- Additional resources in Attorney Regulation and Consumer Resources to implement the notification to licensed attorneys of the new policy, respond to correspondence regarding the policy, develop and implement a system of reminder notifications, implement administrative sanctions for attorneys who fail to comply, release the sanctions when compliance is completed, and compile reports of attorneys who resign, are disbarred or die, for transmission to the DOJ to remove from the SAN system;
- Additional resources in Admissions to review background checks that contain information that licensed attorneys failed to disclose on their moral character application and to compile names of applicants whose positive moral character determination has expired, their application has been abandoned, or who are otherwise ineligible for admission, for transmission to the DOJ to remove from the SAN system;
- Additional resources in OCTC to review background checks that contain criminal charge or conviction information not previously disclosed by licensed attorneys or reported by either superior courts or prosecuting attorneys and to prosecute in appropriate cases;
- Additional resources for the State Bar Court to adjudicate cases that OCTC pursues related to criminal charges and convictions uncovered through the re-fingerprinting process and SAN system;
- Additional resources for the Office of Probation to monitor compliance with the terms of probation imposed upon attorneys who failed to disclose criminal histories; and,
- Additional resources for the Office of General Counsel for any legal work associated with the implementation of the fingerprinting requirement.

III. Proposed California Supreme Court Rule

A. Language of Proposed Rule

1. Licensed Attorney Fingerprinting

Each active licensed attorney of the State Bar for whom the State Bar does not currently have fingerprint images shall, pursuant to the procedure identified by the State Bar, submit fingerprint images to the Department of Justice for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.¹⁰ Inactive licensed attorneys for whom the State Bar does not have fingerprint images must submit fingerprint images to the Department of Justice prior to seeking active status.

The State Bar shall request from the Department of Justice subsequent arrest notification service for its active licensed attorneys, pursuant to Business and Professions Code section 6054.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation of subsection (a) that requires all active licensed attorneys for whom the State Bar does not have fingerprint images to submit fingerprints to the Department of Justice by December 1, 2019.

3. Fingerprint Submission and Processing Costs

All costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

The State Bar will cover the DOJ and FBI processing costs for licensed attorneys who have been granted a fee scaling or fee waiver for annual membership fees pursuant to State Bar Rule 2.15(A) or 2.16(C)(3)(c). These attorneys will pay for all third party print furnishing costs.

Attachment 4 is the full text of the proposed rule.

¹⁰ The proposed rule is limited to only those active licensed attorneys the State Bar does not have fingerprint images for because, as discussed above, the State Bar has already submitted the fingerprint records of approximately 1,500 active licensed attorneys, in addition to the fingerprint records of out-of-state applicants whose State Bar admission is still pending.

B. Policy Analysis

1. All Licensed Attorneys Must Submit or Resubmit Fingerprints By December 1, 2019, on a Schedule Designated by the Board of Trustees

As recognized in the Court's October 20, 2017 letter, requiring fingerprints of all applicants and active members is a "critical component of public protection and strengthens the State Bar's discipline system." Although there are certain criminal reporting requirements for licensed attorneys, courts, and prosecutors, an evaluation of the data reported to the State Bar suggests significant underreporting by licensed attorneys. For example, simply comparing the raw numbers reported by attorneys to the numbers reported by superior courts and prosecuting attorneys, the State Bar found that on average the number of charges attorneys reported was less than half the number of convictions reported by the courts.

Because the specific reporting requirements differ between those charges that attorneys are required to self-report and the convictions that courts are required to report, this discrepancy may be attributed to the differences in the reporting requirements. However, looking more closely at court reported convictions, State Bar staff found that out of 32 felony convictions reported by the courts over a three year time period, 29 of these cases had no corresponding record of a self-report by the attorney of the charges, despite the attorney's obligation to do so pursuant to section 6068(o)(5). Similarly, comparing specific cases where prosecuting attorneys reported filing felony charges against a licensed attorney revealed that less than half of these cases had been self-reported by the attorney.

Of course, there is also no accurate way to determine whether courts and prosecutors are adequately reporting charges and convictions to the State Bar. Thus, utilization of the automated SAN process through the DOJ will vastly improve the reliability and validity of the data on criminal charges and convictions of licensed attorneys in California.

The proposed rule requires the Board to adopt an implementation schedule with a deadline of December 2019. The Board is in the best position to evaluate State Bar workload and coordinate with the relevant State Bar departments, in order to determine the best use of State Bar resources. The December 1, 2019 deadline provides an almost two year window for active attorneys to be fingerprinted on a set schedule.

2. Licensed Attorneys Should Bear the Cost of Fingerprint Submission, With Cost Reductions for Financial Hardship

SB 36 amends section 6054 to eliminate the language requiring the State Bar to pay for the costs of fingerprint processing of applicants.¹¹ The statute is silent as to whether the licensed attorney must pay for the costs of submission or resubmission of fingerprint to the DOJ, including processing costs. The proposed rule requires licensed attorneys to bear all costs associated with the submission of fingerprints to the DOJ, including print furnishing costs. This means that the attorney will pay the print furnishing costs directly to the vendor at the time he or

¹¹ The proposed rule only applies to costs for licensed attorneys. Staff is not proposing any changes to the current process for applicant fingerprints. Currently, applicants pay third party furnishing costs, and the State Bar pays for DOJ and FBI processing costs. This status quo approach will not result in any new costs to the State Bar as related to the fingerprinting process itself.

she is fingerprinted. The \$49 processing costs will be reflected through an increase in the attorney's fee statement.

The rule also provides that licensed attorneys who have been granted reductions in their annual membership fees based on financial hardship have the same reductions applied to fingerprint processing costs. State Bar rule 2.15(A) provides "fee scaling" for "[a]n active member who has a total gross annual individual income from all sources of less than \$40,000." State Bar rule 2.16(c)(3)(2) permits the Secretary to waive up to \$1,000 in annual membership fees if the member "has a total gross annual household income from all sources of \$20,000 or less."

There are currently 1,184 licensed attorneys who have been granted fee scaling pursuant to rule 2.15(A), and 271 licensed attorneys who have been granted a fee reduction pursuant to rule 2.16(c)(3)(2). As these attorneys will still need to be re-fingerprinted, the State Bar will have to cover the full DOJ and FBI processing costs. This will result in a projected total cost to the State Bar of approximately \$71,295.00.

Attorneys who have been granted these reductions must still pay the third party vendor furnishing costs.

a) Financial Burden on the State Bar if Required to Bear Costs

The projected total cost (processing and furnishing costs) for all active licensed attorney fingerprints to be submitted to the DOJ would be approximately \$15.51 million. If the cost were to be borne by the State Bar, and member fees were not increased to cover these costs, funding would need to be available from the State Bar's General Fund or Admissions Fund. The General Fund accounts for spendable resources that can be used to support most aspects of the State Bar's operations. The Admissions Fund accounts for fees and expenses related to administering the bar examination and other requirements for admission to the practice of law in California. Money in other funds is restricted via statute, bond covenants or similar external restrictions, and is therefore not available to pay fingerprinting costs.

The amount of available funding the State Bar has in the General Fund and Admissions Fund to pay fingerprinting costs can be determined looking at two alternative measures: (1) Reserves, a short-term measure, identifies the availability of cash and other current assets that can be used to pay liabilities in the near future and (2) Fund balance, a long-term measure, calculates the financial condition of the fund, considering all assets and liabilities incurred to date. Reserves and fund balance for the General Fund and Admissions Fund projected through December 31, 2017 follows (in thousands):

	Reserve Amount	Minimum Required Reserve	Available Reserve	Total Fund Balance	Less FB Restricted or Invested in Capital Assets	Available Fund Balance
General Fund	\$21,442	\$15,178	\$12,264	\$82,225	\$(104,433)	\$(22,208)
Admissions Fund	3,465	2,796	3,465	3,465	-	3,465

The reserve amount above represents working capital (current assets minus current liabilities and amounts that are non-spendable, restricted or committed). The required reserve represents the Board of Trustees' policy that all funds carry a minimum reserve representing at least two months of annual expenses.

Total fund balance above represents the fund's total assets minus total liabilities. Available fund balance represents the spendable portion of the fund balance. The General Fund's total fund balance is substantially less than the reserve amount because non-current assets (primarily capital assets) exceed non-current liabilities (primarily pension liability). Of the General Fund's \$82.2 million projected total fund balance, \$104.4 million is not available, resulting in a negative \$22.2 million of available fund balance. The unavailable fund balance is composed of capital assets and revenues restricted for the Legal Services Trust, Bank Settlement, Legal Specialization Lawyers Assistance Program, Justice Gap and Equal Access programs.

The available reserve and available fund balance for the General Fund and Admissions Fund are expected to further decline in 2018 by approximately \$6.8 million and \$240,000, respectively, according to the State Bar's 2018 preliminary budget. The Admissions Fund is projected to fall below the Board of Trustees' minimum reserve requirement of two months operating expenses by approximately \$322,000 at the end of 2018.

In addition to the reserves discussed above, the State Bar is projecting a current year savings (projected as approximately \$3,047,000 as of August 31, 2017) of funds administered by a Special Master overseeing an assessment fund to support the State Bar's discipline operation. The State Bar could request that the Special Master allow this savings to be used to offset a portion of estimated fingerprinting costs. However, this would represent only a small percentage of the total costs necessary to pay for the fingerprinting of all active attorneys. Furthermore, there is no new funding available to offset the staffing costs, described above. As such, any current year savings could be applied to these new staffing needs.

b) Other Entities Shift the Full Cost of Fingerprint Resubmission to Licensees

Requiring licensees to pay the cost of submitting or resubmitting fingerprints to the DOJ, including in circumstances where fingerprints were previously submitted, is in line with the procedures of various other licensing entities. See 16 California Code of Regulations ("CCR") § 2010.05 (requiring veterinarians to submit fingerprints for the purpose of conducting criminal records searches "if an electronic record of the submission of fingerprints no longer exists or was never created" and that "the licensee shall pay any costs for furnishing the fingerprints and conducting the searches."); 16 CCR § 1132 (dental hygienists); 16 CCR § 2517.5 (vocational nurses); 16 CCR § 1399.419.2 (acupuncturists); 16 CCR § 2575.5 (psychiatric technicians); 16 CCR § 37.5 (accountants).

There are also similar regulations that contain identical language regarding the submission of fingerprints in the event the fingerprints "do not exist," but do not specify who will bear the costs for such submission. See *e.g.*, 16 CCR § 1399.722 (requiring podiatrists to submit a full set of fingerprints to the DOJ if, "regardless of the date of initial licensure", "an electronic record of the submission of fingerprints no longer exists."); 16 CCR § 4120 (requiring applicants for renewal of occupational therapy license to submit fingerprints to the DOJ if fingerprints had not been previously submitted or for whom a record of submission of fingerprints no longer exists); 16 CCR § 1419 (same requirement for renewal of registered nurses).

These regulations were adopted pursuant to statutes authorizing licensing boards to adopt regulations necessary to properly regulate their profession. See Bus. & Prof. Code §§ 4808, 2404, 1906, 2841.1, 4933, 4504, and 5010. As such, the boards of these entities determined that, in the interest of public protection, it was necessary to require the re-submission of licensee fingerprints in certain circumstances. See *e.g.*, Bus. & Prof. Code § 2842 ("protection of

the public shall be the highest priority for the Board of Vocational Nursing and Psychiatric Technicians of the State of California in exercising its licensing, regulatory, and disciplinary functions.”).

Notably, these regulations require licensees to pay costs associated with submission of fingerprint records, even if they previously submitted fingerprints with their initial licensing application. These regulations were adopted to ensure that the DOJ and/or FBI had fingerprint records for all current licensees. As with other California licensing entities, the State Bar endeavors to ensure that the DOJ has fingerprint records of all its licensees in order to effectively regulate the profession and protect the public.

FISCAL/PERSONNEL IMPACT

See Discussion Section, II.B.

RECOMMENDATION

RESOLVED, that the Board of Trustees authorizes staff to make available for a 45-day public comment period, the proposed rule to the California Supreme Court included as Attachment 4 to this agenda item.

ATTACHMENT(S) LIST

- ATTACHMENT 1 - October 20, 2017 Letter from the California Supreme Court
- ATTACHMENT 2 - June 28, 2017 Contract with DOJ
- ATTACHMENT 3 - August 28, 2017 Contract with DOJ
- ATTACHMENT 4 - Text of Proposed Rule to the California Supreme Court
- ATTACHMENT 5 - Detailed Workload / Staffing Estimates

ATTACHMENT 4

Public comments on the proposed rule have been compiled into a single document and can be found at the following URL:

[http://www.calbar.ca.gov/Portals/0/documents/publicComment/2018/
Public_Comments_Attachment_4_Comments-received.pdf](http://www.calbar.ca.gov/Portals/0/documents/publicComment/2018/Public_Comments_Attachment_4_Comments-received.pdf)

Attachment 5 – Draft Decision Rules for Handling Records of Arrest and Prosecution

RAP Sheet Information	Condition 1	Condition 2	Action
Arrest / No Charges or Conviction	Arrest occurred before the attorney's admission to the bar, and the arrest was reported to Committee of Bar Examiners.	None	Close
	Arrest occurred before attorney was admitted to the bar, but the arrest was not reported to Committee of Bar Examiners.	Applicant had duty to report arrest to CBE (criminal proceedings were pending during moral character evaluation)	Transmit to OCTC Intake Unit
		Applicant did not have duty to report	Close
	Arrest occurred after attorney was admitted to the bar, and arrest was previously known to the Office of Chief Trial Counsel.	None	Close
	Arrest occurred after the attorney was admitted to the bar, but the arrest was not previously known to the Office of Chief Trial Counsel.	Arrest was for a felony	Transmit to OCTC Intake Unit
		Arrest occurred within the past five years	Transmit to OCTC Intake Unit
		Arrest more than five years old and for misdemeanor	Close
Charges / No Conviction	Charge occurred before the attorney's admission to the bar, and the charge was reported to Committee of Bar Examiners.	None	Close
	Charge occurred before attorney was admitted to the bar, but the charge was not reported to Committee of Bar Examiners.	Applicant had duty to report charge to CBE (criminal proceedings were pending during moral character evaluation)	Transmit to OCTC Intake Unit
		Applicant had duty to report charge to CBE (criminal proceedings were pending during moral character evaluation) AND charges still pending	Transmit to OCTC Conviction Monitoring Unit
		Applicant did not have a duty to report	Close
	Charge occurred after attorney was admitted to the bar, and charge was previously known to the Office of Chief Trial Counsel.	None	Close
	Charge occurred after the attorney was admitted to the bar, but the charge was not previously known to the Office of Chief Trial Counsel.	Charge was for a felony	Transmit to OCTC Intake Unit
		Charge occurred within the past five years	Transmit to OCTC Intake Unit
Conviction	Conviction occurred before attorney's admission to the bar, and the conviction was reported to Committee of Bar Examiners.	None	Close
	Conviction occurred before attorney's admission to bar, but the conviction was not reported to Committee of Bar Examiners.	None	Transmit to OCTC Conviction Monitoring Unit
	Conviction occurred after the attorney's admission, but was previously known to the Office of Chief Trial Counsel.	None	Close
	Conviction occurred after the attorney's admission to bar, but was not previously known to the Office of Chief Trial Counsel.	None	Transmit to OCTC Conviction Monitoring Unit

ATTACHMENT B

From the choices below, we ask that you indicate your position on the proposed rule. (This is a required field.)	ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.
DISAGREE with the proposed Rule	I do not see the point of the rule. It will unnecessarily increase costs and be a large inconvenience for attorneys. The State Bar, once again, treats its members as criminals instead of professionals. I am adamantly opposed to this rule.
DISAGREE with the proposed Rule	This is an onerous requirement for someone practicing outside the state and I will be going inactive if it is implemented.
AGREE ONLY if Modified	<p>I am concerned that some arrest records are so old that information regarding disposition of the matter may not be readily available from the local archives. I know of once instance in which the arrest occurred more than 25 years ago, the fingerprint record and the charge record are in the DOJ computer files, but the files do not contain a record of the disposition of the matter, which was a local matter in another state. In this instance, a record of the dismissal of the charge can not be easily obtained, or may never be obtainable, due to no fault of the attorney.</p> <p>In such a situation, there must be some provision for the attorney to be permitted to continue to practice, and not to be placed on inactive status, pending the obtaining of the record of the disposition of the matter.</p>
AGREE ONLY if Modified	<p>The accommodation for attorneys in foreign jurisdictions needs to be modified to reflect practicality. Firstly, while fingerprinting services might be available in a certain jurisdiction, they may not be practically available. For example, they may be available only if requested by a foreign police organ, such as the FBI. Or they may be available at extreme cost. Or they may be available but not recognized as valid under US authority rules for fingerprinting. Therefore, the rule for attorneys in foreign jurisdictions should state that they can choose whether to utilize fingerprinting services in a foreign jurisdiction, if available, or submit to fingerprinting in California upon return. Secondly, temporary returns may be as short as passing through the transit lounge. Or the return might be only during weekends/holidays, when fingerprinting services are unavailable. In any case, during short trips (for business or for pleasure), it may not be realistic to force the attorney to submit to fingerprinting. Further, the benefits of US arrest records for attorneys who do not reside in the US (and therefore are unlikely to be arrested within the US) do not justify the extreme requirements of the draft rule. The rule should instead set a minimum US-presence time period for foreign-based attorneys to get fingerprinted. Taking into account both issues above, below is a revised draft:</p>

	<p>Active Licensed Attorneys in Foreign Countries: Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule may comply by either (i) having their fingerprints taken by a licensed fingerprinting service agency in a foreign country, and submitting the hard copy fingerprint card to the State Bar; or (ii) notifying the State Bar using a form available through the attorney's My State Bar Profile pledging that the attorney will be fingerprinted within 60 days after the attorney returns to the United States for a period not less than 60 days. Such attorney will be exempt from providing fingerprints until such time.</p>
AGREE ONLY if Modified	<p>Once again , the State demonstrates that it has changed from the organization whose primary mission was to represent the interests of the legal profession while regulating the practice of law, to one whose obvious focus is pandering to the Legislature & the public hysteria & mob rule that often drives the Legislature.</p> <p>There simply is no demonstrable need for generalized attorney.finger-printing, & the State Bar should have actively lobbied both the Legislature & the Supreme Court to prevent the adoption & implementation of the underlying legislation.</p> <p>Secondly, there's an old saying: "if you want it, you pay or it." At the very least, if the public demands such a process, it should pay for it through a Legislative appropriation using public funds, not picking the pockets of the legal profession once again. At minimum the State Bar should use its ability to delay implementation until such an appropriation is made.</p> <p>I make these comments as a retired attorney (and a public interest attorney at that!) who would currently be exempt from this absurd process, because SOME ONE NEEDS TO SPEAK OUT AGAINST THIS ABSURDITY!</p>
DISAGREE with the proposed Rule	<p>I submitted my finger prints to the State Bar when I was admitted to practice. Why again?</p> <p>Is there such a problem that would require the inconvenience and expense to all members to go through this process?</p> <p>What are the security and privacy safe guards for this?</p>
DISAGREE with the proposed Rule	<p>We were required to be fingerprinted when we became members of the Bar. We should not have to do it again because the fingerprints were lost or disposed of.</p>

DISAGREE with the proposed Rule	<p>To require all California licensed attorneys to submit another full set of fingerprints is wasteful and shameful as most attorneys have already submitted fingerprints as part of the application process to become licensed in California. To then require those attorneys who have already been fingerprinted as part of the application process to pay for the costs and suffer the loss of the time it takes to be fingerprinted again is outrageous. How incompetent and wasteful can those agencies be which already have the fingerprints of most California attorneys? It seems like an unconstitutional invasion of privacy and a discriminatory profiling of a group of generally highly ethical people to require them to submit their biometric data without probable cause of having done anything improper. The low level of data security practiced by the agencies collecting this data means hackers will use 3D printers or other technology to counterfeit fingerprints and place them at the scene of crimes committed by persons other than the attorney whose fingerprints were stolen. Mandatory collection of biometric data from criminals is understandable and reasonable. With respect to non-criminals, either everyone should be required to submit their biometric data or no one should be required to submit such data.</p>
DISAGREE with the proposed Rule	<p>I submitted a full set of fingerprints as part of my application to become a member of the State Bar. This new requirement is therefore unnecessary.</p> <p>If the State Bar has lost or discarded my fingerprints, then I should not have to bear the cost of being fingerprinted once again.</p> <p>Is there evidence that California lawyers are suffering unreported criminal convictions in such numbers as to justify this inconvenience? Without such evidence, there is no good reason to impose this requirement.</p> <p>This is a waste of my time.</p>
DISAGREE with the proposed Rule	<p>Only if the state bar bears the cost.</p>
DISAGREE with the proposed Rule	<p>To Whom it may concern:</p> <p>I disagree with the proposed rule. With the amount of information the government and other agencies are already collecting regarding American citizens, including attorneys, they certainly do not need to fingerprint attorneys for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests. They already have access to this information, as well as other information they are violating our constitutional rights to obtain. This rule should not be implemented.</p> <p>Sincerely, Kathryn Hodgkin</p>

AGREE ONLY if Modified	<p>I think the requirement for attorneys to pay for their own fingerprinting is onerous. If this is a requirement that the State Bar seeks, it should deduct it from the annual bar dues. For attorneys whose employers do not pay for bar dues and other professional fees (public interest attorneys, many government attorneys) this is an added burden and barrier to their practice. I think the rule should be modified to deduct the cost of fingerprinting and time to conduct the printing from at the annual bar dues for at least the attorneys who pay their own bar dues.</p> <p>Thank you, Alexa Engelman</p>
DISAGREE with the proposed Rule	<p>I've been paying Bar dues for approximately 25 years. When I first was admitted and fingerprinted, I assumed that my prints would be entered and kept in a State DOJ database. Each year I paid my dues, I assumed that the maintenance cost of that database was included in the dues price.</p> <p>Instead, through a decades-long error WHOLLY THE FAULT OF BAR STAFF, none of my dues payments have gone to maintain that fingerprint record.</p> <p>The costs of correcting this egregious, extensive, ongoing error by the Bar should come from cuts to Bar programs and Bar staff pay. I've already paid the cost of maintaining the fingerprint database. The Bar mismanaged those funds and spent them on other things. I should not have to pay twice for the same service when I am a wholly innocent party!</p>
DISAGREE with the proposed Rule	<p>The proposed rule would create an unnecessary burden and expense on attorneys and the bar. It would be a particular burden to sole practitioners with narrow existing profit margins: requiring both the time and expense of fingerprinting.</p>
DISAGREE with the proposed Rule	<p>This rule will be tedious, unnecessarily time consuming, and costly. The rule does not take into consideration the financial needs of nonprofit and government attorneys, who earn significantly less than their corporate sector colleagues. This rule seems to unnecessarily target attorneys with criminal records irrespective of their rehabilitation or the reasons for which they might have a criminal record. There are surely less intrusive and discriminatory methods by which the CA State Bar can police practicing attorneys to ensure we are not committing fraud or other crimes. I strongly oppose this rule.</p>
DISAGREE with the proposed Rule	<p>I see no rational purpose to getting new fingerprints. I furnished prints when I applied to the Bar. Use those prints. Contrary to public opinion attorneys are not criminals and we should not be treated as such. This process involves unnecessary time and expense. If you have any reasonable suspicion that I have committed any criminal act please furnish that information to me. Otherwise, leave me alone.</p>

AGREE ONLY if Modified	I work in the legal publishing industry, rather than for a law firm or other organization that represents clients. My employer requires me to be an active member of the Bar, primarily as a means of assuring minimal expertise with respect to our products and market. In my position, I do not represent any clients, nor do I represent my employer. I find the mandatory fingerprinting rule burdensome and unnecessary for Bar members in my position, who are essentially inactive members of the Bar, although technically active. I think the rule should contain an exemption for Bar members who certify that they do not engage in the representation of any legal clients. I think the fingerprinting serves no purpose for people in my position. I suspect there are other bar members who work for corporations or other employers, but are not directly engaging in the practice of law or representation of clients, and think such an exemption should apply to them. Of course, the proposed exemption would not apply if the member does represent clients outside his or her employment.
DISAGREE with the proposed Rule	More bureaucracy, more money to the state for a solution to a nonexistent problem
AGREE ONLY if Modified	I am not concerned with having to provide my fingerprints. But I am concerned with the ability of the State Bar (or whoever will retain the fingerprints) to keep that information safe from disclosure. Fingerprints are essential identification information and can be used improperly if obtained by someone without authority to possess them and with improper intent. Given the frequency of data breaches even among companies and organizations who supposedly take appropriate precaution to safeguard information, the State Bar should not be able to retain fingerprint information in any sort of database unless it can provide a guarantee that the information will be securely maintained. Attorney fingerprint information must be securely safeguarded against theft.
DISAGREE with the proposed Rule	The rule is overbroad on its face and potentially violates the privacy of all in house attorneys licensed in California, many of whom already undergo rigorous background checks by Kroll and agencies experienced in collecting and storing data related to fingerprints and identity. It is unclear what purpose is served by collecting arrest data in California to interfere with the employment relationship of attorneys with their employers, data which is prohibited from being used in employment applications. The moral character application and bar exam should have been sufficient and the State Bar should bear the costs of admitting attorneys who subsequently violate our State's laws.
DISAGREE with the proposed Rule	The proposed rule is over broad in that it seeks information about attorneys for whom there is no legitimate reason to suspect any sort of wrongdoing: the vast majority of the approx. 190,000 California attorneys have not been accused of any action, criminal and/or disciplinary, that would justify State Bar discipline. As to those attorneys who are currently (or in the future are) subject to State Bar discipline based on failure to report and/or criminal actions, there may be a legitimate purpose to require fingerprinting.

	<p>The State Bar should actually believe in the honesty of each and every member of the bar unless and until they are given a legitimate reason not to.</p> <p>Attorneys not under investigation should not be required to pay the cost of the live scans, etc.</p> <p>Further: there are other methods for criminal background checks that do not require live scans. If/when a search of such records reveals 1 or more convictions of the sort that support discipline, then the Bar could forward a (form) letter requiring that particular attorney to submit live scan fingerprints or be subject to discipline for same. Some for of this kind of rule would likely be far more acceptable to me and other California attorneys.</p>
DISAGREE with the proposed Rule	<p>We already submitted a valid set of fingerprints when we applied to take the bar examination. It is a waste of money to reprint all admitted attorneys when you already have our fingerprints on file. You can scan those files into the computer for a complete electronic copy for the DOJ</p> <p>New applicants to the State Bar and those seeking re-admission should have their fingerprints live scanned into the DOJ system, not existing members in good standing.</p>
DISAGREE with the proposed Rule	<p>The proposed rule would create an unnecessary burden and expense on attorneys and the bar. It would be a particular burden to sole practitioners with narrow existing profit margins: requiring both the time and expense of fingerprinting.</p> <p>The goal of the proposed rule could be satisfied simply and cost effectively by having bar members report any arrests at the time of annual membership renewal. The bar already uses a similar method for MCLE reporting requirements. Routine and random audits of bar members, like those currently conducted for MCLE compliance, could be implemented as the enforcement mechanism.</p>
AGREE ONLY if Modified	<p>If there is anything I have learned in the past 30+ years as an attorney is that fairness is the cornerstone of our justice system. The State Bar is a vehicle by which we ensure our justice system is fair for our clients. Making those who hold themselves to the high standard that is the California Bar pay to inform the State Bar there is no criminal record is unfair when there are only few who should not be practicing law because of their criminal conduct. Thus a waiver, credit or refund for all costs associated with the fingerprinting process should be implemented for those who demonstrate through their fingerprinting that there was nothing to worry about.</p> <p>Additionally, those of us who choose to provide our talents as attorneys to the indigent through service at a non-profit civil legal services provider are not doing it for the money. We choose to do this work because of the inequity of the system should the poor person not be in the position to hire an attorney to</p>

	<p>protect his/her rights. Pay at these civil legal services providers is low in comparison to the knowledge and experience levels of large law firms or other government jobs. Thus, a waiver, credit or other lower costs allowance for those of us in this work is appropriate. One might think that the cost is paid for by the non-profit, but that makes an assumption that may not be true in all instances AND when donations to non-profits are in jeopardy saving every expense where possible is important for those non-profits that will pay for the costs associated with this rule.</p>
AGREE with the proposed Rule	<p>I am quite certain that I was required to submit a card with my fingerprints when I applied for admission to the State Bar of Michigan back in 1974, along with a police report from each jurisdiction where I had previously resided. The police report simply reported whether there was any criminal arrest or record in that jurisdiction. I was admitted to the California State Bar in 1984 as a practicing attorney from Michigan (I am now on inactive status as a retiree). I do not recall whether I had to submit similar documentation when being admitted to the California State Bar in 1984. But I do believe that such documentation is both appropriate and necessary for any person being licensed to practice law in any state---especially California---where we have such a large problem with illegal immigration, along with rampant criminal abuse of many lawful immigrants who do not have access to the help they need.</p> <p>As a state bar, we must police our own ranks and aggressively prevent anyone from practicing law who fails to meet the highest standards of competence, integrity, loyalty and honor to the Constitution, trustworthiness, and citizenship in general. In my opinion, criminal background checks are not too invasive, costly, or burdensome and should be required of all applicants for trust-related professional licenses, including attorneys, accountants and medical professionals, Professional Engineers, etc. I also believe the same requirements should apply to anyone seeking to be employed by any type of law enforcement agency, or seeking political office at any & all levels of government. We live in a world of deceit, fakery, predation and perversion. Without proactive safeguards, the public is at the mercy of greedy predators. Pass this legislation quickly, please!!! Thank you.</p>
DISAGREE with the proposed Rule	<p>The Bar seems bent on adopting this proposed Rule despite the fact that 89% of the initial comments opposed the Rule. Members have raised significant objections on both legal and cost grounds. The Bar does not appear to have responded to the legal issues raised (privacy and data protection issues being my chief concern, but also constitutional and procedural issues), and the answer to the cost questions is "other agencies have members bear the costs, so no problem." (To which any parent will tell you - if all your friends were jumping off the bridge, would you?).</p> <p>Section 6054 does not require that this process be in place. The costs are significant, the benefits slight. I request that the Board of Trustees address these issues seriously, not with the mere platitude that in some unclear manner, implementing the Rule will not be a problem.</p>

	Thank you, Paul Mahler.
DISAGREE with the proposed Rule	For privacy's sake, I disagree with the state bar keeping a record of everyone's fingerprints. I definitely agree with fingerprints being used as part of a background check process for admission to the state bar, but I do not want the organization keeping those fingerprints. It would be a privacy and health violation to keep other specimens (ex: a blood sample), and this is not that different--it is still private bodily information.
DISAGREE with the proposed Rule	This rule places a significant financial burden on attorneys, particularly those currently living outside the United States.
DISAGREE with the proposed Rule	I disagree with the collection and storing of fingerprint information. I have grave concerns about the security of such information. The information is highly sensitive and could be used to gain access to valuable information such as passwords. I do not see the necessity of having more of my personal and private information potentially available to hackers when there are other less means to achieve the goal of the rule.
AGREE ONLY if Modified	There needs to be some sort of strict requirements placed on the Bar for secure storage and/or destruction after a period of time of the fingerprints. Otherwise, in the event of a security breach, thousands of people will have lost not only the standard-issue personally identifying information, but their own prints. Given the increasing use of fingerprints to unlock any number of pieces of technology, failure to properly secure these prints could have untold negative consequences.
DISAGREE with the proposed Rule	I explained in a comment to the original proposed rule why I believe this provision is unnecessary. For the same reasons, I believe the amended proposed rule is also unnecessary. In addition, I note that B&P Code sec. 6504 does not require that all licensed attorneys be re-fingerprinted. It states only that the State Bar "may" require them to be fingerprinted. Also, subsection (b) of the amended proposed rule is vague, since it does not describe the "procedure identified by the State Bar" for fingerprinting, nor invite public comment on that procedure.
DISAGREE with the proposed Rule	Californians already have to go through an expensive, detailed, invasive process to become a member of the Bar, which goes above and beyond what could reasonably be considered professionally necessary. I do not know of another profession in which someone desiring to enter the field is forced to pay upwards of several hundred dollars to have an organization pry into their background in anywhere near as much detail as the Moral Character application requires, including the medical field, in which professionals literally hold lives in their hands on a daily basis. Adding to the existing intrusions with even more stringent requirements, now being forced onto those who have already been deemed to have met the high standard to which California attorneys are held, is unreasonable, unfair, and unnecessary,

	<p>particularly because the Bar currently receives subsequent arrest notifications for relevant crimes. Beyond this, California attorneys are already obligated to pay more in yearly dues than any other state and this rule will impose yet another compulsory financial burden for California Bar members, not to even mention the valuable time the execution of this gratuitous order will rob from our lives. If the determination is that fingerprinting is an integral component of potential attorney background checks, then it should be made an element of future Moral Character applications and their exorbitant accompanying fees, both of which are already non-negotiable, and not imposed as another bureaucratic mandate involuntarily compelled of currently practicing attorneys. Please do not support this needless and invasive rule!</p>
DISAGREE with the proposed Rule	Strongly disagree with this. I fail to see how this isn't just an arbitrary finger printing requirement. I do not see any real world problem that this requirement solves.
DISAGREE with the proposed Rule	This proposed rule adds another burden on attorneys without any real benefit to the public.
DISAGREE with the proposed Rule	TO MUCH BIG BROTHER
DISAGREE with the proposed Rule	<p>I disagree with the proposed rule for the same reason as the vast majority of commenters, whose views were summarized by the staff analysis thusly: "The vast majority of commenters expressed concerns reflecting similar themes: that the rule is unnecessary, redundant, time consuming, expensive, ineffective, insulting and a violation of privacy."The staff's analysis and rejection of these comments was inadequate and demonstrates that the proposed rule should not be adopted.1. The staff ignored the views of the vast majority of commenters. The staff noted that 89 percent of commenters opposed the rule. This is an overwhelming majority of commenters. The staff dismissed these comments because they came from attorneys by saying "Notably, the vast majority of comments were received from attorneys, a group not expected to view the proposed rule favorably." This comment by the staff suggest bias against the views of attorneys. Attorneys will support sensible rules that promote the profession and the interests of the public. This proposed rule, however, fails that test, and it is for that reason, and no other, that those most likely understand the costs and (imagined) benefits of the rule uniformly oppose it.2. The staff gave no reason why the proposed rule was not unduly burdensome. The staff's response to the burdensomeness objection was that it was a "one-time" requirement and that the burden was "outweighed by the public protection value of having all active attorneys' fingerprints on file." This conclusory analysis would never pass muster in any court in California. First, the staff itself estimates that this "one-time" requirement will cost more than \$15.5 million (see response to comment 5). This is not an insubstantial amount. It is so large that the staff cries poverty as an explanation for why the State Bar cannot shoulder this huge expense itself, and yet the staff sees no</p>

	<p>reason why California's attorneys should not pay what the board itself is unwilling to pay. Second, the \$15.5 million estimate does not account for the value of the attorneys' time. If 200,000 lawyers must spend 2 hours on this requirement, at an average hourly rate of \$100 per hour (which is much lower than reality), then compliance with this requirement costs another \$40 million, on top of the \$15.5 million in out of pocket costs. Against this massive cost, the staff's only justification is that this burden is "outweighed by the public protection value of having all active attorneys' fingerprints on file". Shockingly, the staff offers *no evidence* of *any* public protection value of having all active attorneys' fingerprints on file. In response to comment #2 ("No Legitimate Public Protection"), the staff cites no scientific evidence but only a naked appeal to authority: "The State Bar is acting pursuant to the California legislature and Court's determinations that arrest notification for active licensed attorneys is an essential component of the State Bar's public protection mission." Whether or not the State Bar is acting pursuant to the determinations of others does not answer the question of whether any evidence exists that the public will truly be protected. The vacuous response to objections that the rule serves no legitimate public protection purpose suggests that such evidence does not exist. A cost-benefit analysis requires knowing both the costs and the benefits. The costs can be easily estimated (upwards of \$50 million in attorney time and out-of-pocket expenses), but it appears that no effort has been made to estimate the benefits. How many members of the public will be protected by this fingerprinting program? How much money will they save? From the response to comment #2, it is clear that the State Bar has not spent any time or effort to answer those two basic questions. Until it does, adoption of this rule is arbitrary and capricious, based on imaginary benefits that cannot be quantified or proven. There are other problems with the proposed rule, but if the State Bar will not address the basic problem that no one has shown that this rule will actually benefit any substantial number of members of the public, then there is no point in further comment. The staff have already treated dismissively the opinions of nearly 90 percent of attorneys who took the time to comment. But if the Bar will not listen to the membership, then before adopting this rule, please commission an expert who can estimate the benefits so they can be weighed against the costs.</p>
DISAGREE with the proposed Rule	<p>This is a complete waste of time and money for attorneys licensed in California. Why should the state's attorneys bear the burden of the bar's inability to keep arrest records or whatever else from those already finger printed? If the state bar wants to be seen as doing something, fine, but leave the rest of us out of it.</p>
DISAGREE with the proposed Rule	<p>1501 Sixth Street I have been fingerprinted while serving in the United States Army. I have been fingerprinted while serving as a school teacher. I have been fingerprinted when applying for my law license. There is no reason in logic or practicality to require another set of fingerprints. If the State Bar wants to run a criminal check on my fingerprints, they already have them on file and they do not need another set, they haven't changed. This is a waste of time and resources. I</p>

	vehemently oppose. Rex A. Cluff, Attorney-at-law.
AGREE with the proposed Rule	The more transparency in the legal profession, the better. Fingerprint away!
DISAGREE with the proposed Rule	Unduly burdensome, redundant, and prejudicial. Completely unnecessary and a waste of time
State No Preference	Two comments: 1) At page 16 of the first attachment, Part Two, (in the preamble), you state that staff is "...working to develop the technology ... necessary to implement the policy by the deadline of" 12/1/2019. Yet at page 20, you indicate the intent to "... complete the re-fingerprinting of active attorneys by" 12/1/2019. How are you going to complete the re-fingerprinting if the "technology," etc. is not implemented until the same deadline is reached? 2) A stated excuse for all of this is that neither the State Bar nor DOJ retained all the fingerprints we submitted when being admitted to practice in this fine State. How long before the State Bar and DOJ destroys all of the records this time? There is no provision requiring retention of the records you are requiring of us.
AGREE ONLY if Modified	As a deputy district attorney, I have already been fingerprinted and "live scanned". As it applies to prosecutors, this is an unnecessary duplication. Prosecutors should be exempted from the rule.
DISAGREE with the proposed Rule	Don't you have anything better to do than to fix problems that don't exist. How much more trouble time, and expense are you going to put attorneys through just to claim you have benefited the public, which of course this rule will do nothing for and just make a lot of money for people who finger printing and some administrators who will have some make work to do to justify their salary. THIS IS NOT A PROBLEM. I HAVE NEVER READ OF ONE CASE THAT THE ATTORNEY'S FINGERPRINTS WOULD SOLVE. IF YOU HAVE ANY INSTANCES, PLEASE TELL US. SEEMS TO ME THIS IS LIKE HAVING VOTER ID LAWS WHEN THERE IS NO EVIDENCE VOTER FRAUD IS A PROBLEM. PLEASE GET LIVES AND THINK OF SOMETHING THAT WILL REALLY BENEFIT THE PUBLIC.
AGREE ONLY if Modified	I was told that fingerprinting costs \$100, so if the state bar pays for it and it doesn't increase our state bar fees, then fine. Also, I don't think we should have to do it every year. Can it be every few years, like when we have to report MCLE or can there just be an audit of fingerprinting for some people who report when we do our MCLE reporting?

DISAGREE with the proposed Rule	There is too much interference with this rule. Please stop wasting time with this. There can't be that many criminal attorneys that would justify this thought or action. It is a severe strain on our time and money.
DISAGREE with the proposed Rule	<p>The fingerprinting of all (well almost all attorneys) is not called for by the enabling legislation. The past law and new legislative (Bus. & Prof. Code 6054, as recently amended by SB 36), authorizes, but does not obligate, the State Bar to re-fingerprint active attorneys. This should be sufficient for the Bar to administer reasonable supervision of attorney conduct. Re-fingerprinting the entire membership is someone's poor idea and is not called for by public policy, necessity or common sense.</p> <p>The Bar seeks to add 9 FTE staff and impose 15 million dollars in costs on its membership for a problem caused by failure of Bar staff / Board to take advantage of fingerprinting information submitted and costs already borne by membership in prior years. The adding up of individual fingerprint fees does not include any analysis of opportunity costs or impact on efficiency or effectiveness of DOJ and other agencies in having to process generally unnecessary duplicative fingerprinting of the vast majority of lawyers that will show no arrest or convictions. How much will the DOJ be affected by the diversion of labor, even if reimbursed, in processing over 100,000 fingerprint requests. What a waste of time, effort and resources (except of the 9 staff that will be added to the Bar and provided presumably decent wages). Will the Bar staff who are not lawyers be required to be fingerprinted?</p> <p>Who is responsible for this classic example of bureaucratic over-reach?</p>
DISAGREE with the proposed Rule	<p>1. The rule is redundant and unnecessary because all attorneys were already fingerprinted for admission to the bar. Many others also have been live scan fingerprinted for other purposes including without limitation application to the California Secretary of State for a Notary Commission.</p> <p>2. The State Bar should take notice of the attached case in which the CA State Board of Accountancy, which also obtains fingerprints in processing CPA applicants. The State Board of Accountancy was rebuked in its attempt to force a CPA to submit a live scan as a condition to license renewal because the Board of Accountancy, like the State Bar, failed to retain the original fingerprint records of its applicants.</p> <p>3. The State Bar proposes to waste cumulatively over \$15,000,000 for a grossly disproportionate result to find perhaps 4 or 5 attorneys that violated their professional responsibility to self report applicable events.</p> <p>4. The proposed rule creates an unnecessary burden on the State Bar resources to process the 250,000 reports that it will receive from the CA Dept. of Justice.</p> <p>5. The rule is unnecessary because rules are already in place which require</p>

	<p>CA prosecutors, court clerks and other lawyers to report a lawyers arrest, conviction or misconduct.</p> <p>6. Cal. B&P Code Sec. 6054 authorizing the State Bar to collect fingerprints is optional, "may", and does not require the State Bar to do so. This rule should only be applied prospectively to new applicants to the State Bar.</p>
AGREE ONLY if Modified	<p>People should be allowed to use existing finger printing information, if they already have that, instead of paying for yet another round of the finger printing. This new requirement imposes financial burdens on people who work in public services or non-profit organizations: figure printing is already required for their public service positions and they should not be forced to pay again for the finger printing, especially since their salaries are low. This new requirement also wastes resources by requiring duplicative finger printing.</p>
DISAGREE with the proposed Rule	<p>I DISAGREE with the proposed rule change. We were already fingerprinted. The rule imposes an unfair burden on attorneys. There is no evidence that the Bar's system is inadequate for tracking criminal convictions or that self-reporting is ineffective. If it is, then perhaps the moral character examination should be strengthened. Clarify the rules on self-reporting and make any and all convictions mandatory self-reporting as part of annual dues paying. This is unnecessary bureaucratic overreaching.</p>
AGREE ONLY if Modified	<p>I do not care if I have to be re-fingerprinted. However, it is the Bar that lost my original fingerprints, not me. The Bar should pay for re-fingerprinting.</p>
DISAGREE with the proposed Rule	<p>I agree with the "vast majority of commenters" who "expressed concerns reflecting similar themes: that the rule is unnecessary, redundant, time consuming, expensive, ineffective, insulting and a violation of privacy."</p>
DISAGREE with the proposed Rule	<p>This is a wholly unnecessary invasion of privacy rights, not to mention an unjustified collection of personal data. The State Bar already receives reports of any criminal conviction of members.</p>
DISAGREE with the proposed Rule	<p>I cannot understand why after 29 years the State Bar staff wants to implement a portion of B&P Code section 6054 which it has never implemented and which is STILL not mandatory but a permissive section to implement.</p> <p>Of course, the obvious is since the reorganization of the Bar with much of the responsibilities being taken away there is a need to justify budgets and personnel. But that at the expense of current attorneys, possibly ruining many lives who have been outstanding for many years and now will be snagged in a gill-net fish-net style hunt by the State Bar staff?</p> <p>First I find the whole thing appalling. The prosed rule is not in the public's interest, but in the interest of those who wish to retain their jobs at the State Bar. So concerning moral turpitude, I am guessing the State Bar staff finds their motivation as okay?</p> <p>Here is a problem for staff.... they NEVER enforced the discretionary portion</p>

	<p>of B&P Code 6054 concerning subsequent follow-up finger printing and background checks.</p> <p>Since the State Bar has never enforced that provision, they cannot start now.</p> <p>In law, "desuetude" is the legal doctrine that long and continued non-use of a law renders it invalid. And note, the SCOTUS specifically validated this doctrine in <i>Griswold v. Connecticut</i>. As SCOTUS stated, in <i>Poe v Ullman</i>, "Deeply embedded traditional ways of carrying out state policy are often tougher and truer law than the dead words of the written text."</p> <p>The proposed rule violates law. I expect it to be challenged.</p>
State No Preference	<p>Section 1(d) of the proposed rules provides, "Such attorney will be exempt from providing fingerprints until he or she return to the United States, provided, that within 60 days of returning (even temporarily) to the United States, such attorney shall be fingerprinted.</p> <p>If my temporary visit to the United States is less than 60 days, for example a few days vacation trip to Los Angeles, am I still required to submit my fingerprints to the State Bar? or if my temporary stay in the United States is less than 60 days, am I exempt from the fingerprint requirements until I return to the United States for more than 60 days?</p>
DISAGREE with the proposed Rule	<p>I was already fingerprinted. If the rule passes and I decide not to resign, then the State Bar will pay all fees, mileage, and time to get re-fingerprinted, at my hourly rate of \$350.00 per hour. I am ashamed that the State Bar is resorting to police state tactics with regard to this fingerprinting fiasco. rth</p>
State No Preference	<p>1. I should be grateful if you could clarify Section 1(b) of the Proposed Rule. What does "...for the purpose of obtaining criminal offender information regarding state and federal level convictions and arrests" mean? Does this mean that the proposed fingerprinting requirement is imposed only active licensed attorneys who want to obtain criminal offender information of a third party regarding state and federal level convictions and arrests? or are all active licensed attorneys required to submit their fingerprinting records so that the State Bar of California can obtain criminal offender information of the active licensed attorneys regarding state and federal level convictions and arrests?</p> <p>2. I should be grateful if you could clarify Section 1(d) of the Proposed Rule. Assuming that Active licensed attorneys who are residing outside in the United States and fingerprinting services are not available in their jurisdiction. If the fingerprinting is required only active licensed attorneys who want to obtain criminal offender information of a third party regarding state and federal level convictions and arrests and I do not want to obtain such information, then am I still required to notify so through My State Bar Profile or no notification is required because I do not want to obtain such information?</p>

	<p>If fingerprinting is required all Active licensed attorneys regardless of he or she wants to obtain such information, does the State Bar of California provide us information of fingerprinting service locations throughout California so that I can take my fingerprint when I enter into the United States? I may visit Los Angeles temporarily and thus, I may be able to take fingerprinting services only in Los Angeles.</p>
DISAGREE with the proposed Rule	<p>I am strongly opposed. I felt that it was very onerous to become licensed nearly 25 years ago and would take hours to get re-fingerprinted (being out of state) as I know I was fingerprinted back in 1994 in CA and again in 1995 when I became barred in Nevada. I have committed no crimes (I have one traffic ticket and one parking ticket from my entire lifetime). I feel this is punishing me for being a good citizen as I'll have to waste half a day or more to get fingerprinted. I am strongly opposed to taking this time from my schedule and I might consider becoming inactive merely to avoid the time waste that fingerprinting entails in Nevada (every person who works in gaming gets a gaming card which requires fingerprinting--so there are very long lines, like the DMV...this is NOT a fast process). Please look to police offenders some other way than to punish everyone for the misdeeds of a few people.</p>
DISAGREE with the proposed Rule	<p>This is stupid and big brotherish.</p>
AGREE ONLY if Modified	<p>Many attorneys have been recently had the live scan fingerprinting done for other reasons (notary or other licenses) and it seems an unnecessary duplication to require it again.</p>
DISAGREE with the proposed Rule	<p>This is wasteful and harmful. All attorneys are already required to comply with moral character and fitness background checks (which already include fingerprinting), which are extensive, time consuming, and expensive and are already required to report any criminal activity to the California Bar. In addition, the California Bar as a progressive organization is behind such movements as "ban the box," and requiring all attorneys to get fingerprinted just adds to the money-making criminal industrial complex. There are already other methods in place to protect the public against bad attorneys and this just creates one more financial barrier to being an attorney and is money thrown away to an industry that is forever selling products to governments and organizations in the name of safety. No thank you.</p>
DISAGREE with the proposed Rule	<p>Hello- I am an active California *NOTARY PUBLIC*. This year, I am renewing my Notary commission and will be submitting LiveScan fingerprints as part of the Notary application process.</p> <p>Why can't those records be used by the Bar at the same time? By the way, Livescan is not an inexpensive fee - 4 years ago the best price I found was \$69.</p> <p>Also, why can't DMV fingerprint records be used?</p>

<p>DISAGREE with the proposed Rule</p>	<p>I would like to provide a couple of additional and different comments to my original ones I sent a couple of days ago.</p> <p>In looking at staff's comments for justification for charging attorneys the fees for the finger printing and background checks, staff stated that the law was enacted in 1989 and never enforced, so therefore for the State Bar to pay for the fingerprinting and background checks it would be cost prohibitive as amounting to about \$15.5 Million.</p> <p>This admission is interesting from two standpoints.</p> <p>First, under California law, the State Bar will be liable for the for the \$15.5 Million if they now enforce it and charge attorneys the fees. In this regard Gov't Code section 815.6 states, " Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."</p> <p>However, and more importantly, the admission by staff was they have never enforced this law since it was enacted in 1989, which was 29 years ago. That means the law is no longer valid to be enforced.</p> <p>In law, desuetude is the doctrine that causes statutes, similar legislation or legal principles to lapse and become unenforceable by a long habit of non-enforcement or lapse of time. It is the legal doctrine that long and continued non-use of a law renders it invalid. And please note that SCOTUS upheld this doctrine in the case of Griswold v. Connecticut.</p> <p>From a legal standpoint, it would seem to me that the only way the State Bar may move forward with it plan of retroactively fingerprinting and gathering background checks of all attorneys and have the attorneys pay for it is for the State Bar to lobby the State Legislature for a new law authorizing such actions, because under current laws etc., it does not seem legally possible and will most certainly be challenged in court which would unnecessarily involve the payment of attorneys fees for the State Bar to defend.</p>
<p>AGREE ONLY if Modified</p>	<p>Why should I have to bear the costs for re-fingerprinting? I just had to pay for fingerprinting last year when I was applying for admission, and now you want me to pay again? I'm on a fixed income working at a non-profit, and I can barely keep up with rent and everything. And I'll already have to take time off to go do this re-fingerprinting and pay for transportation to/from there, which will likely be across the Bay. The Bar or the State should pay for this. Not all attorneys make six or seven-figure salaries in lavish private firms; many of us are in the legal aid work, and rules like this requiring us to pay even more money (when really the State should be subsidizing Bar fees generally) further deter attorneys from seeking public interest work. How can you claim to want</p>

	to close the "justice gap," but then implement rules like this?
DISAGREE with the proposed Rule	<p>As an attorney admitted in multiple jurisdictions for 25+ years, I do not see why I should be subjected to this regime. First, it seems that, to the extent California enacts this practice, other states in which I am admitted may also, and I would incur costs in complying with each state's requirement. Second, it would seem that an affirmation by the attorney, at the time of paying dues and/or certifying cle compliance, would serve the purpose reasonably well, would not cost additional money and would provide record evidence from the attorney which, if false, could lead to disbarment. Third, prosecutors involved in litigation will know that the person being prosecuted is an attorney (by virtue of their investigation) and the burden should be placed on the prosecutors to forward results of any criminal prosecution of a CA attorney to the CA Bar.</p> <p>This rule simply makes no sense for attorneys who have been practicing law for the better part of a quarter-century and I am against its implementation to me.</p>
DISAGREE with the proposed Rule	I am convinced that when I was first admitted in 1976 that I had to provide at the very least a thumb print so that a moral character enquiry could be made. I had to give a full set of prints when I became a paramedic while I was in law school. I have provided fingerprints to the government several times in my life. I hear your fingerprints don't change and there are plenty of mine exant throughout government agencies all over the state. It's not a big deal but I just don't want a lot of my time wasted with what seems at least in my personal case - foolishness.
DISAGREE with the proposed Rule	Do not want increased big brother.
DISAGREE with the proposed Rule	<p>The Cost of this outrageous rule must be borne on the State Bar. It is a TAX on attorneys who are license PRIOR TO enactment of the rule because each attorney has already paid fees for their "background" check when they were licensed. There is no VOTE by 2/3 of the Bar membership authorizing this tax which is being masked as a "fee." There is no Due Process being offered in how these fees are calculated. Everyone had submitted print cards to your organization in that process. Attorneys who are licensed AFTER the rule are different--the fees can be charged. If an attorney does not want to be printed or refuses to be printed then the consequence I assume is disbarment? Or the inability to practice? Arrest records oftentimes and the CALDOJ and FBI files on many people are inaccurate. This will lead</p>

	<p>to thousands of attorneys having an OSC (Order to Show Cause) to the Bar if the BAR receives information on an arrest for a felony or crime that appears a misdemeanor involving moral turpitude. I have been the recent victim of such a erroneous transfer of information by your organization and I claim damages for malicious prosecution by your Bar. I can see the future of what will come--- the Bar becoming a defendant in many federal suits by lawyers who will claim violations of their rights under 42 USC 1983 and the Bane Act, C.C. Section 52.1 et seq. Older attorneys with arthritis and impairment mobility issues covered by the ADA (American's with Disabilities Act) who cannot complete printing will be without a way to earn a living. As well, will the prints be run annually? Or bi-annually? or once? A lawyer's word that she has not been convicted of a crime is not good enough under oath to comply with this process? IT IS A DISGRACE THAT OUR BAR HAS BECOME A NATIONAL DISGRACE when officers of the court are subject to "booking" like this when no crime and no reasonable suspicion, much less probable cause that a crime has been committed is afoot! I'm ashamed of this RULE and ashamed that I cannot stop this outrageous and contemptuous behavior of a once-proud and model Bar Association. You already get conviction information. Arrest records should not and cannot be in the possession of your organization because that information is confidential and serves no purpose other than to harass and selectively prosecute certain attorneys not in favor with the current management of the Bar. This rule is an affront to the meaning of the word "Counselor and Attorney at Law" AND MUST BE RESCINDED IMMEDIATELY. It's a bad idea and worse it will lead to litigation and costs of such that may bankrupt the State Bar. Then the Legislature will turn over all YOUR functions to a State Agency (which is what they really have wanted all along.)</p>
DISAGREE with the proposed Rule	<p>An arrest is not a conviction. The idea that any "governing" body, other than law enforcement or courts of competent jurisdiction, would have the right to insert itself in a criminal proceeding before its conclusion (I have NO doubt the Bar would do so) is abhorrent. The State Bar has proven to be useless to most practicing attorneys. Simple client complaints, which are deemed to be</p>

	<p>unwarranted, always begin with the attorney having to prove - at great time and expense - that they have NOT done anything wrong.</p> <p>I had to provide my fingerprints PRIOR to being admitted to practice in California. Fingerprints don't change, so why are additional prints necessary? Further, the idea that attorneys should be required to pay for this intrusion into their private lives is not only disgusting, but yet another way for the Bar to stick its unwelcome hands in our pockets.</p>
DISAGREE with the proposed Rule	<p>I. THE STATE BAR CAUSED THIS PROBLEM AND SHOULD PAY FOR IT Bus. & Prof. Code § 6054 was amended in 1989 to require fingerprint retention for the express purpose of arrest notification subsequent to State Bar admission. Yet the State Bar admits that "neither the State Bar nor the DOJ was retaining the vast majority of those fingerprints until August 2017." As this problem arose due the State Bar not retaining fingerprints until 2017 despite a 1989 mandate, the State Bar should itself pay for its failure to follow the law and not pass the costs to the attorneys who have complied with the law.</p> <p>II. THE STATE BAR'S MATH APPEARS INACCURATE The State Bar similarly states as follows: "The State Bar estimates the total costs for fingerprinting to be approximately \$82 per active attorney (\$49 for the cost of the background check and approximately \$33 for the print furnishing costs). See Attachment 3 at p. 6. This is a one-time cost for the attorney (or the attorney's employer), and is a small fraction of the yearly costs attorneys are required to pay to maintain their licenses each year." Then it states as follows: "If the State Bar were to pay all costs of attorney fingerprinting, it would cost the State Bar approximately \$15.51 million." So, $\\$15,510,000 / \\$82 = \\$189,146.34$. Now, the State Bar website states there are 189,967 active attorneys, 60,429 inactive attorneys, 2,171 judges, and 14,107 ineligible attorneys. Thus, the estimates appear a bit off; someone competent needs to re-do the math. There exists no reason to trust any of the State Bar's numbers; we need independent experts.</p> <p>III. THE STATE BAR HAS THE MONEY TO PAY FOR FINGERPRINTING More importantly, per the State Bar website, the State Bar Budget for 2017 stated the Bar had total revenues of \$146,000,000, and that it had \$89,994,000 in reserves. Thus, \$15.51 million cost of fingerprinting appears a proverbial "drop-in-the-bucket" and will barely dent the State Bar's 2017 reserves ($\\$89.99M - \\$15.51M = \\$74.48M$). What can the State Bar not cover with the remaining \$74,484,000 of reserves? With approximately \$90 million in current reserves and only \$15 million in fingerprinting costs, the State Bar possesses nearly 6x the cash it needs to implement and pay the costs of its "witch hunt."</p> <p>IV. THE STATE BAR CLAIMS THAT FINGERPRINTING WILL BE "ONE-TIME" WITHOUT ANY GUARANTEE By putting the onus on attorneys to pay for fingerprints without any guarantee that it will remain a "once-in-a-lifetime" fee, the State Bar can just as easily pass a new rule that requires annual, semi-annual, quarterly, monthly, weekly, or daily fingerprinting, because, with this Rule, the State Bar has taken the public policy position that society cannot trust Attorneys to do their duty to their profession, their clients, and to the state's</p>

and nation's legal systems. Someone need merely claim that there exists a scourge of unscrupulous attorneys who routinely commit crimes, get arrested, then go to work the next day to prey upon clients to pass a new mandate every few years for more frequent fingerprinting. There exists no possibility of a guarantee of "once-in-a-lifetime" fingerprints, until the State Bar has a system to all retain bar applicants' initial fingerprint submissions for all eternity as the law has required since 1989.

V. THE STATE BAR CLAIMS THAT IT WILL NOT RETAIN FINGERPRINT IMAGESThe State Bar has also stated that "The State Bar will not be retaining any fingerprint images." If the State Bar will not retain the images, how will it comply with Bus. & Prof. Code § 6054 that requires fingerprint retention?! Thus, the State Bar has contradicted itself, because there exists no guarantee that the Department of Justice will retain the fingerprints as evidenced by what has happened since 1989. Without the State Bar retaining fingerprint images itself, there exists a certainty that the State Bar will require more fingerprinting as it blames the DOJ for its own systemic problems and loss of records. The State Bar has a legal mandate to monitor for arrests subsequent to State Bar admission, but there exists no way for the State Bar to do this without having the initial applicant fingerprints in its files and running them itself when it feels the need.

VI. TO PREVENT ABUSE OF THE FINGERPRINTING MANDATE AND ABUSE OF ATTORNEYS, THE STATE BAR SHOULD BEAR THE COST OF FINGERPRINTING AND MAINTAINING ATTORNEY FINGERPRINTS It becomes easy to make mandates if one does not have to pay for them. If the State Bar has to pay all of the costs of fingerprinting, the economic costs of this poorly conceived "feel-good" program will force the State Bar to exercise fiscal self-restraint. Without fiscal self-restraint, the State Bar will likely become more Orwellian and absurdly meet its mandate by requiring Attorneys to get fingerprinted frequently to make sure it gets notified when an attorney gets arrested, because, again, there exists no guarantee that DOJ will remain a functional bureaucracy that does what it should. The DOJ has its focus elsewhere.

VII. MASS RE-FINGERPRINTING MANDATE APPEARS OVERBROADThe State Bar states that "the [Supreme] Court directed the State Bar to implement a re-fingerprinting requirement, because 'requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system.'" Let's look at that logic: For all attorneys who submitted fingerprints after the 1989 mandate, the State Bar should have retained the fingerprints pursuant to Bus. & Prof. Code § 6054. For attorneys who submitted fingerprints before the mandate took effect in 1989, does there exist a holding finding Bus. & Prof. Code § 6054 retroactive? No one has explained where the Supreme Court has derived the authority to issue new mandates on fingerprinting beyond those required by the legislature. Since lawyers interact with the public, are health screenings, immunizations, and invasive medical procedures next? Where does protection of the public end?! Since the Supreme Court has determined that arrest notification for active licensed attorneys constitutes an essential component of

	<p>the State Bar's public protection mission, it should require local law enforcement to notify the state bar of an attorney's arrest and/or put the onus on attorney's to self-report arrests or risk disbarment. However, re-fingerprinting all attorneys clearly constitutes an over-broad means of identifying an exceptionally narrow subset of attorneys for the purpose of arrest notification, where the likelihood is that over 95% of attorneys will never have an arrest record.</p> <p>VIII. FINGERPRINTING REQUIREMENT FOR JUDGES? If the State Bar and Supreme Court wish to protect the public, it should likewise require the fingerprinting of judges. The consequences to the public of having a judge with an arrest on his or her record adjudicating a case appear far more dire than having an attorney with an arrest record representing a client. In any context, an attorney's case load contains a fraction of the cases of a court's docket.</p> <p>IX. CONCLUSION We need better minds thinking through this policy. Does anyone even have an accurate estimate of the percentage of persons admitted to practice law in California have an arrest record?! Even if we knew exactly how many attorneys and judges have an arrest record, does anyone have an estimate for what percentage of those persons we would deem unfit to practice law or sit on the bench? While it seems perfectly reasonable to have all applicants to the practice of law submit fingerprints for the purpose of arrest notification subsequent to State Bar admission, it does not seem reasonable to have those who have dutifully practiced law for decades to resubmit fingerprints, especially those who have submitted fingerprints after 1989 but whose fingerprints the State Bar and Department of Justice decided to discard in violation of law. The better solution is to have attorneys self-report arrests each year when they pay their renewal fees. It seems reasonable that Attorneys and Judges should have a once-in-a-lifetime duty to submit certified docket sheets showing terminated proceedings or certified letters of no record to the State Bar for each arrest they have had since admission so that the State Bar may do its due diligence of investigating persons who may have become unfit to participate in our profession.</p>
DISAGREE with the proposed Rule	<p>I suggest that, at the very least, an exemption be made for attorneys who have been practicing in CA for a minimum of 25 years without any public disciplinary record. This year marks my 50th year as an active attorney in CA, and, frankly, I deem it ludicrous to be required to be re-fingerprinted. I have no public nor private disciplinary record and certainly no criminal convictions. It was a huge nuisance the first time around, although originally the cost was only \$8. And now, we are being expected not only to pay for the fingerprinting, but also the costs of securing local AND FBI reports? Ridiculous!</p>
DISAGREE with the proposed Rule	<p>By introduction, I am a Libertarian. Hence, that is where I am coming from when I comment about this new rule concerning finger printing.</p> <p>I am outraged as to staff's comments concerning their justification concerning placing the cost tab on us!</p>

	<p>Staff admitted in their comments that this law was enacted in 1989 and that staff has not enforced the law since it was enacted. First, I kind of remember from law school about the lack of validity of laws which have never been enforced.</p> <p>That being aside, since staff has never enforced the law since it was enacted 1989, I am certain that their excuse will be that they didn't have the staff to do it, but now that their responsibilities have been cut, they now have the staff to enforce the law.</p> <p>But here is the kicker, they want to do it retroactively, and they want the lawyers who have faithfully paid their dues since 1989 to pay for their lack of doing their job since 1989.</p> <p>This is exactly the kind of issue Libertarians dislike and get motivated to litigate.</p>
DISAGREE with the proposed Rule	<p>I have never commented about things like this before, but this one really got my attention. Before becoming a private practice attorney, I worked for California government for 25 years. In this I have an understanding how government divisions work, which in this instance comes down to justifying your budget to justify your job.</p> <p>This is why you motivated me to comment. Obviously with the restructuring of the State Bar with taking away many of the functions it used to perform, the work load is way down to from before. Hence, instead of reducing the work force (which is what a company would do), the government needs to somehow justify its existing staff. Thus, it must create work.</p> <p>That is the basis of this new rule on finger printing, it is a make work project to justify your budget and the number of your FTEs.</p> <p>The logic is so twisted that the whole thing constitutes moral turpitude in itself.</p> <p>Why? Because obviously you guys are hoping to snag a whole bunch of stuff from some good lawyers' distant past and bring it up today, which will justify your existence to investigate them today for disciplinary charges. In the meantime, you are destroying some peoples lives who have been good and decent people, for the purpose of justifying your existence.</p> <p>Now despite that your motivations are not illegal, the actions of retroactively enforcing a law which hasn't been enforced since it was enacted almost 30 years ago is illegal and a farce.</p> <p>It is illegal because it has never been enforced, but more importantly it violates several Constitutional principles. If the rule is enacted, I will be</p>

	<p>talking with other lawyers concerning testing it in court.</p>
<p>AGREE ONLY if Modified</p>	<p>Nothing in the proposal indicates what possible benefit the state bar or the department of justice would get out of re-fingerprinting. Having fingerprints on file makes sense. Requiring anyone to have livescan done multiple times does not. The requirement should simply be that the state bar check the member's number for proof of fingerprinting and if proof cannot be found then re-fingerprinting would be required. The amount of time and money wasted in taking and processing re-fingerprinting could be better spent in thousands of ways.</p>
<p>DISAGREE with the proposed Rule</p>	<p>When I applied to the State Bar I had to submit fingerprints. I presume that the State Bar still has my fingerprints on file, and they can be scanned or otherwise formatted for use by law enforcement or the State Bar if needed. There is no reason whatsoever to impose on active Bar members a requirement to be re-fingerprinted. This is especially true of members like myself who are without criminal records and without any State Bar complaints or discipline actions. There is no harm to the public that would be addressed, and there is no reason to subject active Bar members to the cost and inconvenience of duplicating records that already exist.</p> <p>The State Bar has not supplied its members with any rationale for this nuisance. The State Bar has a mission to protect the public, but it should also advocate for it's members. This rule is not rationally related to any legitimate public purpose and it should be rejected.</p>
<p>AGREE ONLY if Modified</p>	<p>During the process of applying for the California State Bar, I was required to submit fingerprints. My fingerprints were taken at the office of the San Diego County Sheriff and sent to the California State Bar, which rejected my fingerprints and requested a new set on multiple occasions. Each time the California State Bar requested a new set of fingerprints, I had my fingerprints taken at the San Diego County Sheriff's Office and on either the third or fourth try, my fingerprints were accepted by the California State Bar. I do not know why the California State Bar was unable to use my fingerprints the first few times that the San Diego County Sheriff took my fingerprints. I lack the expertise to differentiate between a usable and an unusable set of fingerprints.</p> <p>Sometimes a good faith effort to comply with a rule fails, for reasons that are not within the attorney's control and the effort to comply must be repeated. The proposed rule should provide a clear definition of what constitutes compliance, such as obtaining a set of fingerprints from an entity approved by the California State Bar and submitting the fingerprints in the manner approved by the California State Bar. If an attorney has complied with the California State Bar's procedure and for some reason the fingerprints are not usable, the remedy should be to require the attorney to submit another set of fingerprints. Suspension should be the remedy for willful non-compliance only.</p>

<p>DISAGREE with the proposed Rule</p>	<p>The State Bar of California already required me to be fingerprinted in order to become licensed as an attorney in California in conjunction with the Department of Justice in 1986. Why should I be fingerprinted again, my fingerprints have not changed and why should I pay this unnecessary expense?</p> <p>I have no criminal record, Use the ones you already have if you want them. It would be a hardship for me to pay for this and I will apply for a waiver. Besides, the fact that the DOJ has them so does the Department of Homeland Security who takes fingerprints for Trusted Traveler Status and TSA pre-check., Instead of dreaming up unnecessary ways to waste time and resources why don't you coordinate with the government agencies that ALREADY HAVE FINGERPRINTS? Must you start another database? How can you possibly justify this?</p> <p>have no problem with either the State of California or the Federal government having my fingerprints, but both of you already do, so how about a check the box exemption? If anyone should take fingerprints in California it ought to be the Department of Motor Vehicles and then use them for identification, voter registration, whatever, but I am not going to be fingerprinted again. Besides which, I have indistinct prints and they will not be usable. Multiple attempts were made when I applied to get licensed, the DOJ held up my admission because they couldn't read them and they were accompanied by an affidavit by the several officers who tried in 1986 so I wasn't sworn in until January 1987, and they are not readable by computer now when I try to use the machine for Quick entry into the country and I have to have my passport inspected instead as do other members of my family who also have indistinct prints.</p>
<p>DISAGREE with the proposed Rule</p>	<p>Are you aware how . . . well, how stupid this proposal sounds? An explanation would be helpful. Attorneys are exempt (I think) if the State Bar is receiving Subsequent Arrest Notification services for them—but you don't tell anybody what "Subsequent Arrest Notification services" means. Subsequent to what? It sounds like if an attorney has been arrested and you find about it, she doesn't have to be re-fingerprinted. How can you expect meaningful comments to the gibberish that you put out? Fingerprints don't expire. Why don't you just use the prints that I gave you when I became licensed? Having two TWO sets of my prints doesn't make anybody safer.</p>
<p>DISAGREE with the proposed Rule</p>	<p>Creating additional personal records that will end up in an electronic database creates additional risks to licensed members that a third-party hacker and or identity thieves can steal their information. Such electronic threats continue to become more enhanced. This creates additional security threats to members of the California Bar.</p> <p>Attorneys already have to undergo background checks with the DOJ, so this seems unnecessary.</p> <p>Additional fees upon licensed practitioners do not seem just, in this case.</p>

DISAGREE with the proposed Rule	<p>I understand the need to print people seeking admission or re-admission; I see no need to print all attorneys. Subdivision (b) of Bus and Prof Code section 6054 does not require all attorneys be printed. WHY THE NEED?</p> <p>Big Brother is watching!</p>
DISAGREE with the proposed Rule	<p>I write today to voice my opposition to the proposed rule that would require all licensed attorney to be fingerprinted. This rule change would be an unacceptable invasion of privacy that violates all fundamental tenants in our legal framework where a citizen is presumed not guilty unless the State can prove otherwise. In a previous career, I witnessed the imposition of mandatory random drug testing that placed this pillar of our jurisprudence on its head. I do not want to see a repeat of this reversal in my chosen profession. As George Orwell wrote in Animal Farm, "Two legs good, four legs bad." Followed by "Two legs good, four legs better."</p>
DISAGREE with the proposed Rule	<p>I strongly oppose the proposed Rule and consider it an unnecessary and costly burden.</p>
DISAGREE with the proposed Rule	<p>I concur with the many, many comments already posted stating that this is yet another government imposed expense on small/solo practices (and small business in general). I also see it as unnecessary, an invasion of privacy, and another example of how our Bar Association is not advocating for California attorneys, but rather imposing more and more burdens on us.</p> <p>If it is to be implemented, please take note that like many lawyers I am already fingerprinted every four years as a California NOTARY PUBLIC. I suggest that the many California attorneys who are also notary publics be exempt, and the system to be established somehow capture the necessary information from the notary fingerprinting.</p>
AGREE with the proposed Rule	<p>I oppose any requirement for an attorney in good standing to re finger-printed since this was done when I first registered as a licensed Attorney in California in 1982. I have been an active member continuously since that time, had no violations or discipline and have in every other way been a model representative as an attorney. I do not believe any attorney who has not had any problems should be re finger-printed; the records should still be in the system..</p>
DISAGREE with the proposed Rule	<p>The potential for governmental abuse far outweighs any dubious protections to the public. The state bar once again is demonstrating that it does not represent its members. Fingerprints can be misused by state and federal governmental agencies or even hacked and stolen. This rule only benefits bureaucrats who will adminiiter the program.</p>
AGREE with the proposed Rule	<p>20134 Romar Street</p> <p>I see no reason not to fingerprint - indeed, I see the need to fingerprint all people, lawyers, judges, clerks who are part of the legal process.</p> <p>I see no reason to have a public comment period - I see it as a waste of time</p>

	and money.
DISAGREE with the proposed Rule	I have been a member of the bar since 1998. I oppose the rule in its current form. It imposes cost and inconvenience on all active / inactive members without any apparent need. Has the prior regime concerning this issue proven ineffective?
DISAGREE with the proposed Rule	I have previously submitted a comment. I would like to be able to read the comments of other attorneys. This is necessary to make the comments truly public.
DISAGREE with the proposed Rule	<p>At a minimum the bar should set up a free livescan operation at all state bar offices!</p> <p>All members deserve the option of going to a state bar office and having a state bar employee do the scan for no additional charge.</p> <p>The bar has many many employees. Surely, some of them are qualified to learn how to take fingerprints.</p> <p>Take some responsibility! Spend a tiny fraction of OUR state bar dues to something that is your ethical responsibility! The state bar created this problem. The state bar should spend some of OUR dues to offer no-cost repeat fingerprinting of members.</p> <p>The bar can afford to buy some scan equipment, and can afford to designate a few employees to do this work!</p> <p>The way this debacle has been handled is an embarrassment, and has brought the reputation of the state bar to a new low among its members.</p> <p>Members of the bar deserve to be treated with dignity and respect, not patronizing contempt and disdain. This is supposed to be OUR organization. The vast majority of us are NOT criminals!</p> <p>Who do you represent?</p>
DISAGREE with the proposed Rule	<p>The rule violates a number of constitutional rights, 4th, 5th, and 14th amendments, constitutes an invasion of privacy, it's redundant, abusive and serves no legitimate purpose.</p> <p>CA attorneys are under constant scrutiny by courts and clients, and the State Bar assiduously considers any complaints.</p> <p>Additionally, CRC 9.10 has vested high authority to the State Bar to discipline attorneys convicted of crimes. While many accused of misdemeanor offenses are not booked and fingerprinted, requiring CA Bar members to submit to fingerprint without probable cause shocks our conscience.</p> <p>I strongly oppose this unconstitutional proposed rule.</p>

<p>DISAGREE with the proposed Rule</p>	<p>It is obvious from the State Bar responses to all comments that you are going to proceed with your plan in any way you want regardless of all public comments.</p> <p>I found it interesting to read selected quotes only in favor of your program in the body of your response, while there were no similar quotes in opposition. This is not a balanced document.</p> <p>I do not believe the response from the BAR that it is not able to afford the processing costs that must be passed on to members. We already pay millions of dollars every year. If the money was more efficiently spent, you could afford the cost.</p> <p>Will members who are already paying scaled dues have to go through the further humiliation and embarrassment of providing details of their financial hardship to the State BAR? Do you really want to waste hours of time going through personal financial documents on a case by case basis? What was wrong with an automatic waiver for members paying scaled dues? Do you really think you should make people paying scaled dues pay the costs of your mistakes?</p> <p>Nowhere in any of the materials do I see anything resembling a humble or heartfelt apology for the mismanagement that led to this debacle. It would go a long ways to read a sincere and meaningful apology from the State Bar for the obvious mistakes that have led to this huge problem and a promise to work hard to avoid any type of similar situation like this ever again in the future.</p> <p>Has anyone at the State Bar taken any personal responsibility for what happened? Who exactly is responsible for the mistakes that caused this problem?</p>
<p>AGREE ONLY if Modified</p>	<p>Many attorneys have recently enrolled in the TSA Pre-check program operated by the Transportation Security Administration (TSA). Application and approval for the TSA Pre-Check program requires submitting fingerprints and passing an FBI background check - exactly the same procedure mandated under the new Rule. This is redundant, expensive, and burdensome on individual attorneys.</p> <p>Attorneys enrolled in TSA pre-check already have their fingerprint information on-file with the Federal Government. Accordingly, the rule should be amended to exempt from the re-fingerprinting requirement any attorneys who are enrolled in the TSA Pre-check program.</p> <p>Rather, the State Bar should contract with the TSA and Justice Department to receive the state mandated subsequent arrest information directly from the DOJ for all attorneys presently enrolled in TS Pre-check. Thus, instead of bearing the cost and inconvenience of duplicative finger-printing and</p>

	<p>background check, individual attorneys could simply provide the state bar with their "Known Traveler Number" (KTN), issued by the TSA. The KTN can be directly matched with the biometric information already on-file with the federal government. The cost to the state bar to implement this approach would be minimal, and the burden and cost on a large number of attorneys would be greatly reduced.</p> <p>see: https://www.tsa.gov/precheck</p>
DISAGREE with the proposed Rule	<p>My recall is that I was fingerprinted in connection with the California Bar Exam. What happened to those records?</p> <p>I have yet to see an explanation of why it is desirable to do it again at my expense and inconvenience, mostly things seem based on "staff recommends." This is the common reasoning at the local government and administrative level, and is used when the representatives of those affected do not have a solid clue as to why. What are the actual benefits and who is benefiting? My own, I believe conservative, cost estimate is \$5 million in other people's (not the bar organization's) money. The is based only on assumed direct costs of \$25 each for 200,000 California attorneys, and does not consider any other potential factors (e.g. inconvenience, lost time, different costs in foreign jurisdictions).</p> <p>Would it not be easier, and probably almost as effective, for all California law enforcement agencies to report if the subject person was identified as a lawyer (by statement or possession of a bar card. And for California attorneys to report their representation of another attorney (or themselves) an applicable situation?</p> <p>Lastly, what is the purpose of reporting an arrest of an attorney beyond the reporting of similar arrests for no-attorneys? Are we, via our legislature and governor, now thinking that the arrest itself is a statement of some form of wrongdoing? I hope not, and have grave doubts about the constitutionality if there are any potential repercussions for the attorney..</p>
DISAGREE with the proposed Rule	<p>This is another government interference with business and professionalism. We all had to get fingerprints when we applied to be admitted to the California State Bar. Now we have to go through the annoying and time consuming process of being fingerprinted again. For what? Because a very few criminals may attempt to get around the system. They will do so anyway. Stop this bureaucratic nonsense. The California Supreme Court made another mistake recently in not reducing the California Bar Exam grading minimum. Why should California be the very hardest bar exam to pass based solely on too tough grading? Simply to keep the number of attorneys down. Again nonsense.</p>
AGREE ONLY if Modified	<p>While I don't have strenuous objections to the inconvenience of having to be fingerprinted again, I strongly object to bearing the cost.</p> <p>It was the incompetence or inattention of the California Bar Association, or</p>

	<p>whatever other entity was given the responsibility of maintaining the records, that has caused the need for fingerprinting again of attorneys that have already been fingerprinted. That entity whose negligence was the cause of problem should bear the expense of correcting the problem.</p> <p>The funds should come out of the budget of the California Bar Association, not imposed upon attorneys who did not contribute to the problem.</p>
DISAGREE with the proposed Rule	The BAR should waive all costs for attorneys subject to fee scaling, as provided in the original proposal. Why make it more complicated than that?
DISAGREE with the proposed Rule	Despite overwhelming negative comments about the rule as first proposed, the Bar ignores those comments, and sets out a bogus 30-day additional comment period that it has already announced it is going to ignore. There was a time that the State Bar promoted respect for the integrity of attorneys. This rule that equates the practice of law with drunk driving and treats practicing lawyers as criminals is offensive and promotes disrespect for lawyers. As a member of the state bar for now 48 years I am disgusted with the actions of its leadership.
DISAGREE with the proposed Rule	<p>I was required to submit fingerprints when I took the bar exam in 1987. What happened to those submissions and why is a new submission required?</p> <p>I suggest that the bar use the fingerprints already submitted with any application to take the bar and submit them to the proper authorities.</p>
DISAGREE with the proposed Rule	All attorneys had to be fingerprinted to be admitted. I sent my prints in long ago. This rule is an unnecessary burden, especially on attorneys who may not have access to a fingerprinting location. Requiring attorneys to be re-printed just benefits companies that take prints. Who lobbied for this rule?
DISAGREE with the proposed Rule	This is unnecessary. It is a waste of time for the State Bar and for attorneys who would have to comply with the requirements. It is also unreasonably bears the burden on attorneys to pay for fingerprinting, when we have already previously completed fingerprinting. The requirements to become an maintain attorney are already sufficient.
DISAGREE with the proposed Rule	This is a ridiculous rule and an invasion of privacy. It is going to cost me time and money and accomplish nothing. Do we have an epidemice of attorenys with criminal records who are hiding their identify. I doubt it. Besides, the federal government already has my fingerprints through the TSA. This is stupid, so I assume the State Bar will enact it.
DISAGREE with the proposed Rule	<p>All California attorneys were fingerprinted. The State Bar failed to keep track of those fingerprints or discarded them or didn't care. Now it seeks to shift the costs to its members. What tells us that it will get its act together this time?</p> <p>I have a feeling is that this requirement will become recurrent, like payment of dues or MCLE.</p>

<p>DISAGREE with the proposed Rule</p>	<p>I am sure that the State Bar of California sincerely believes fingerprinting all attorneys is absolutely necessary to fulfill its duty to protect the public, but I doubt that there has been any major problem with the current system. The proposed fingerprinting rule may make it more convenient for the State Bar to gather information on attorneys it may wish to consider disciplining. Still, this is the sort of rule that makes things easy for the State Bar, but is rather burdensome for individual members. I suspect this will be accomplished through the LifeScan process. That is not convenient. Cooperating police departments are sometimes difficult to locate and the expense can be burdensome.</p> <p>I would ask, "Is the proposed rule absolutely necessary?" To be sarcastic, maybe all members of the Bar should be required to self-report any violation of the law, rules of professional conduct, or Business and Professions Code violations on a weekly basis. The effort to protect the public is reaching the point of diminishing returns. The State Bar Court was a good idea. The office prosecuting violations is a good idea. Fingerprinting members to be able to contract with federal and probably state, territory and commonwealth police departments is simply overkill.</p> <p>William B. Dixon SBN: 70655</p>
<p>DISAGREE with the proposed Rule</p>	<p>If you want prints, require applicants for the bar exam provide them. It's ridiculous to ask for 200,000 attorneys to submit prints, The bar and the DOJ have far more important things to do. Further, those employed with government agencies have already submitted prints. Why should they have to do it again?</p>
<p>AGREE ONLY if Modified</p>	<p>I was fingerprinted when I was admitted to the bar in 1980. As I understand it, the State Bar destroyed the file. I do not object to re-fingerprinting -- mistakes get made. Rather, I object to doing it at my own expense. Even though the expense will be minimal and at some point the State Bar members pay for State Bar expenses anyway, you have mishandled the process. You ask your members to take responsibility for their mistakes. Try doing so yourself. I propose the Bar 1) pay for re-fingerprinting out of its operating budget and 2) clearly communicate to its members the Bar's responsibility for the mistake and apologize.</p>
<p>DISAGREE with the proposed Rule</p>	<p>This request for comment does not meet legal requirements as it fails to directly show the amendeds version of the (redlined) initial proposed rule for ready comparison rendering this solicitation for comments unnecessarily confusing therefore wrongly purporting to solicit informed comments on the amended proposed rule when it does not do so in a readily comprehensive manner making the responses' basis one of not being readily informed. Moreover the location and identification of asterisk references in the State Bar supplied form solicitation are not readily apparent again rendering it unnecessarily confusing establishing that the result of the survey will be an unfair representation of intended comments. Thank you.</p>

AGREE with the proposed Rule	While I agree with the proposal my concern is the fingerprint process for those CA lawyers who reside outside the State of California. There should be some provision that allows such persons to obtain fingerprinting in the state in which they reside and then submitted to the CA State Bar. Please give this serious consideration since the inconvenience/burden to those out of State lawyers is unfair and/or unreasonable when reasonable and less burdensome alternatives exist. Thank you
DISAGREE with the proposed Rule	No real public safety benefit here. Just wasting the time and money of attorneys. Besides, I'm licensed by another state agency that has my fingerprints. So, there's no benefit here to anyone except the fingerprint company.
AGREE ONLY if Modified	I have been licensed to practice law in California since 1984. As I recall, I had to submit fingerprints as part of the process to be licensed. Fingerprints generally do not change. My fingerprints haven't changed. I've never been arrested or charged with a crime. Why can't you use the fingerprints provided in 1984 and the fingerprints of other law-abiding, California licensed attorneys who provided fingerprints when they were licensed?
DISAGREE with the proposed Rule	I was fingerprinted when I joined the bar, 10 years ago. Has the State Bar been so careless with my sensitive fingerprint records that they lost them? If those fingerprint records are still on file, then further printing is unnecessary. Perhaps the bar should focus on its own administrative competence instead of shifting the burden onto its members.
AGREE with the proposed Rule	Thank you! I think this is a great idea. I work for a state agency where the Legislature removed the criminal background information section on the STD 678. Proponents of the legislative change said it was an invasion of privacy. I disagree. With California's liberal gun laws and the rise of workplace violence, I would feel much safer knowing the Bar is proactively policing its members. Only those who have something to hide will object to this proposal. For those who object to the cost, well that's too bad. Fingerprinting is standard for most professional licenses (even simple notary commissions) and it is the cost of doing business as an attorney.
AGREE ONLY if Modified	As far as I can see this rule does not take into account what will happen if a person's fingerprints no longer are "readable" and therefore do not provide proof of identity. As people age there comes a time when their finger tips become worn to the point that the ridges on the fingertips no longer are visible, and thus they no longer have identifiable finger prints. In my case for instance, this has happened. Thus I am no longer identifiable by a print of my finger tips. This rule needs to be modified to account for the possibility that this has occurred over time, and thus allow for another, more reliable, biometric to be used in place of fingerprints if necessary.
AGREE ONLY if Modified	The rule should not apply to already licensed attorneys. It should apply only to new admittees and to attorneys who have been disciplined,

DISAGREE with the proposed Rule	<p>I live outside California and work for the federal government, which already has my fingerprints. It would be a heavy burden for me to travel back to California to be fingerprinted, when I have already been fingerprinted multiple times throughout my career. This rule is also redundant, because prosecutors have requirements to report crimes, and would be a waste of time to have the bar research my criminal history when state and federal official already have done so. My work requires a security clearance, which includes a very thorough background check. I do not want to bear the expense of the CA bar's inability to cooperate with state and local law enforcement. This would unnecessarily increase bar dues, to pay for the processing, and would provide little to no added benefit. This rule would also probably cause litigation on the constitutionality of the rule, which is an expense I do not want to pay for with my bar dues. This rule is also extremely broad, in that it would provide the State Bar personal private information that it would not otherwise be entitled to.</p> <p>Why does the bar need this information? Is the bar having problems with prosecutors not reporting offenses? There is no understandable reason why the State Bar would need me to pay for very expensive travel to fly across the country to get fingerprinted, when I am thoroughly checked through the FBI in order to do my job. Unless you can give me a good reason why the bar needs me to do that, I adamantly oppose this rule.</p>
AGREE ONLY if Modified	I am a California Notary Public as well as an admitted attorney, and as a Notary I am required to submit fingerprints and be checked by California and federal authorities every four years. It would be redundant to have to go through the process for the State Bar and incur needless additional expense.
AGREE with the proposed Rule	This should have been done a long time ago. But these days fingerprints are rather old fashioned in law enforcement; if the State Bar is really serious about this, a DNA sample should be required as well. The integrity of the bar is key to the public's perception of the legal system, which is not terribly positive these days.
DISAGREE with the proposed Rule	I had read the original rule and commented and have now read the new rule (together with comments previously submitted and staff comments). I still disagree with what staff has proffered from a couple of standpoints. The first is Constitutional and the other (albeit maybe Constitutional) is unduly burdensome. I also see that there is a political component to this concerning the recent reorganization of the State Bar and budget concerns (which dovetails into a Constitutional evidentiary issue). But I will leave that aside. The Constitutional issue is that the proposed rule is overly broad and violates due process. Allow me to give you an example. Let's say attorney A has been practicing 25 years, has been in good standing, has had no problems with clients. Has conducted his practice with good moral standards and the like. Not even close to being considered a lawyer unfit to practice or being disbarred for moral turpitude. But now let us also assume that same attorney A, 20 years ago got arrested for a simple DUI. No complications like a car crash or others involved. Just had a couple of glasses of wine with dinner, and was

	<p>just over the limit and got arrested. As a result, instead of fighting it, the attorney simply plead guilty to move on in life. This attorney's finger print file will now turn up that 20 year old arrest, and under the new rules of the State Bar of total intolerance with DUI arrests, that attorney who has never driven impaired since and has had a complete and total clean record will be disbarred. Obviously, under those circumstances, the new rule is unconstitutional as being over broad and violating due process. This can be fixed (I will discuss below). The next is the issue of fee shifting. I understand staff's reaction and subsequent comments concerning attorneys paying for this, but there are a couple of problems. But instead of getting down into the weeds of all the issues, I will just highlight one. Staff's comments point out that the implementation of this new rule is because they hadn't done what they were suppose to do under the law since 1989. So, now the solution and cost of the staff not doing their job for what they were paid to do for the past 29 years must fall on the attorneys who have been paying their dues and paying their salaries for these past 29 years? And the justification is that it would cost the State Bar over \$15 Million? If staff had done their job for the past 29 years, they would not be facing this cost issue. Moreover, the cost shifting issue in staff's revised rule does not even come close to addressing the problem. Rather than getting into the obvious political/budget issues facing the State Bar, as they relate to this new proposal, and referencing the obvious Constitutional problems facing the rule, I suggest that there is a middle ground. With regard to the over broad and due process issues, the Rule can be revised to make exceptions. Meaning, using the example above, if the Rule is implemented as proposed, the attorney in the above example will be up for disciplinary action. Obviously that would be wrong. In this regard, tailor the Rule more narrowly. For example, any attorney who has had no arrests/convictions in the last 15 years are exempt from review. And any attorney in the last 10 years who has committed a misdemeanor, with a clean record since will receive special consideration. Concerning the fee shifting issue, of course the staff's recommendation is a start concerning attorney's who already qualify for reduced State Bar fees, but that does not address the fee shifting issue. Thus, I propose a compromise that for those attorneys which qualify for a State Bar fee reduction, all fees for finger printing etc. are waived and for all other attorneys a 50 percent reduction in their dues fee bill is given.</p>
DISAGREE with the proposed Rule	<p>You can access my finger print through the California DMV. I have practiced law in California for over 50 years without this demeaning and burdensome rule. Find something else to waste your time upon but not mine..</p>
DISAGREE with the proposed Rule	<p>This comment is being submitted from CA even if the IP address may indicate otherwise for privacy concerns.</p> <p>(1) We attorneys, especially those of us who are struggling just to be profitable, already have fees and expenses too high to offset. Do not place the cost for this program on our backs. Find the money somewhere else if it is implemented at all.</p>

	<p>(2) The collection of fingerprints seems unnecessary, an intrusion into privacy, and another opportunity for identity thieves to intercept critical information. The state already has every bit of background data on its attorneys (social security numbers, criminal histories, current and former names, etc.). This step should not be taken and, if it is, robust security protocols must be put in place for our security and the state's potential liability.</p>
DISAGREE with the proposed Rule	<p>1. I disagree with the Rule because it compels an attorney to undertake all of the expense for fingerprinting costs which undoubtedly will be passed on to the clients and the public at large.</p> <p>2. The rule is redundant because this attorney was fingerprinted before admission and so the record is already on file so it imposes an unnecessary burden on the attorney.</p> <p>3. The rule imposes a harsh penalty and burden for attorneys who do not reside in California which would require those attorneys not residing in California to travel to a designated place in California to be fingerprinted again, which creates a class of individuals, along with foreign attorneys who reside outside the United States, and divides those two classes, giving preference to someone who resides outside of the U.S. such that they may submit hard copy fingerprint cards, and discriminates against those who do not reside in California, but reside in the United States. Thus someone living in Hawaii or Maine, or Florida or Alaska would have to travel a great distance at personal expense, and pay the whole costs to do what has already been done in the past, submit more fingerprints though they've already been submitted.</p> <p>4. It's an invasion of privacy.</p> <p>5. There is no compelling interest that overrides both privacy and pecuniary interests of the attorney and presumes wrongdoing without proof or just cause to believe that someone has engaged in any wrongdoing.</p> <p>6. There is no pending investigation requiring fingerprints.</p> <p>7. Fingerprints can be unreliable.</p> <p>8. The Bar is not required to compel re-fingerprinting. It may which it did as a condition of admission, not continuing enrollment. Hence re-fingerprinting appears to be an unnecessary and burdensome task and amounts to nothing more than a tax.</p> <p>9. Requiring additional, redundant re-fingerprinting becomes additionally burdensome.</p>

	<p>I can probably think of a few more issues here, but suffice it to say that unless there is a basis to continuously re-fingerprint attorneys who have already filed their fingerprints with the Bar, it just makes no sense. Its oppressive.</p>
DISAGREE with the proposed Rule	<p>The California State Bar has created an ambiguous and fascist rule that renders each attorney guilty until proven innocent. If an attorney has been falsely accused, what will happen? I ask because I was the victim of false accusations in 2016, all of which charges were dropped, dismissed or discharged. The charges were used to prevent me from doing discovery in an ongoing case and to maliciously harass and abuse me. What is the point of these fingerprinting rules? I took the fingerprints in 2002 in California in order to do some substitute teaching, and again in 2013-14 in New Mexico to do some substitute teaching. It makes sense to get fingerprinted when you are part of a school and have access to children. What is the point of treating lawyers like this? This is so fascist, and it will prove to be something that harms innocent people.</p>
AGREE with the proposed Rule	<p>The right to practice is a privilege hard fought thru tribulations. It's a honor to be in Practice, to serve the people, helping clients right the unjust or at least try to find equity in the system. Don't know why an attorney would not agree unless they have something to hide. Also, there are livescan locations everywhere nowadays. I remember providing fingerprints before, so it's not an extra burden.</p>
DISAGREE with the proposed Rule	<p>This is a solution in search of a problem. Fingerprinting is not even in the top 100 list of things that are wrong with the legal system. How about focusing instead on, say, finding ways to make litigation less expensive, so middle-class people can afford to enforce their rights?</p>
DISAGREE with the proposed Rule	<p>Stop treating us all like criminals. The vast majority of attorneys are ethical and honorable. The Bar already has an incredible number of investigators and prosecutors. This proposal is insulting and demeaning.</p>
AGREE with the proposed Rule	<p>I remember being fingerprinted for State Bar in 1996 after I Passed Bar Exam. What happened between then and now? Strange</p>

DISAGREE with the proposed Rule	This rule is totally unnecessary and indicative of our continuously overreaching bureaucracy. I was fingerprinted when I obtained my license. Whatever happened to limited government intrusion? If there is a criminal allegation or conviction involving an attorney, the DA/prosecutor involved would know based upon the RAP sheet indicating the individual has a license to practice law, the involved Court reporting requirements to the DOJ of any conviction as well as the DOJ and the individual's reporting requirements. I really do not agree to this invasion of my privacy and sharing of my fingerprints or incurring the time and expense. I am concerned about the true current intent for this rule as well as the future currently unspecified uses that are not unusual to follow "innocent" new rules, regulations and laws. I particularly don't like the continuing mandatory nature for maintaining my license.
DISAGREE with the proposed Rule	This is an incredible invasion of privacy. I understand it would make it easier for the State Bar to learn of convictions but I see the loss of privacy to every single lawyer in the state to be far too great to warrant such a rule. I strongly oppose this proposed rule.
DISAGREE with the proposed Rule	I strongly disagree with this rule, not only is this a financial burden on new attorneys but it is a burden and hassle for existing attorneys. We as attorneys are already obligated by the rules of professional responsibility to report and criminal convictions. This is just another way that the bar is targeting their own members. We understand that the bar isn't there to protect attorneys but to protect the public why cause more unnecessary burdens on us. This is ridiculous and should not pass.
DISAGREE with the proposed Rule	If you implement this rule, I will immediately resign from the Bar. I spent 30 yrs w/law enforcement b 4 passing the Bar. This rule is an insult to me!,,
DISAGREE with the proposed Rule	Invasive of privacy and there is no guarantee that the Sheriff or whoever takes the prints will not keep a copy. This seems like a Fourth or Fifth Amendment violation - no probable cause to demand prints. I oppose this proposal. You already made me submit fingerprints in 1983 when I took the Bar Exam. Plus it costs money I can ill afford.
DISAGREE with the proposed Rule	Fingerprinting admitted Attorneys is a waste of resources and imposes additional financial burden to Attorneys. Moreover, by making fingerprinting mandatory, the Bar risks losing donations included with Attorneys' yearly Bar fees. Attorneys will likely offset the cost of fingerprinting by removing voluntary donations to needed legal services.
DISAGREE with the proposed Rule	Fingerprinting is already conducted during the application process to the bar. This is unnecessary and excessive. There are other alternatives for the bar to obtain such information that does not require even more than the already high bar fees attorneys are expected to pay to remain active (even inactive) in California.

AGREE ONLY if Modified	As an attorney who has held a security clearance with the Federal Government continuously for the last 30 years I have been subject to periodic re-investigations approximately every five years, including provision of fingerprint cards. These records are on file with the Federal Government Joint Personnel Adjudication System (JPAS) and the Scattered Castles systems and providing them again would entail unnecessary cost and duplication of effort, together with the ever-present opportunity for error that multiple records introduces. I would request that attorneys, such as myself, who are similarly situated should have this requirement waived.
DISAGREE with the proposed Rule	<p>ALL ATTORNEYS SUBMITTED FINGER PRINTS AND HAD BACKGROUND CHECKS SENT TO THE STATE BAR WHEN ADMITTED TO THE BAR. THE BAR APPARENTLY DOES NOT HAVE THEM/DID NOT KEEP THEM, BUT IT NOW WISHES TO HOIST THE PROBLEM UPON THE ATTORNEYS. IT WAS NOT AND IS NOT THE ATTORNEY'S OBLIGATION TO ENSURE THAT THE BAR KEEPS THE DOCUMENTS THAT THE ATTORNEYS SUBMIT.</p> <p>NO ATTORNEY SHOULD BE REQUIRED TO GO TO THE TIME OR EXPENSE TO (1) GO GET AND RESUBMIT FINGERPRINTS, OR (2) EXPEND THE COST OF HAVING TO DO SO.</p> <p>FURTHER, THE BAR CAN FULFILL ITS MISSION TO MONITOR ATTORNEYS WITHOUT FINGERPRINTS AND THERE HAS BEEN NO EFFORT TO RESOLVE ITS SELF-MADE PURPORTED PROBLEM BY FINDING A DIFFERENT SOLUTION TO MONITORING ATTORNEYS WITHOUT USING FINGERPRINTS. THIS PROPOSED RULE ATTEMPTS TO HAVE THE ATTORNEYS BEAR THE BURDEN OF RESOLVING FOR THE BAR A PROBLEM THAT DOES NOT EXIST.</p>
AGREE with the proposed Rule	We lawyers are in a position of trust and can lose our license to practice law if convicted of certain crimes. I am in favor of this proposed rule, as it reflects the position of trust that we hold and it provides a means of catching convictions for crimes that could result in debarment.
DISAGREE with the proposed Rule	It is already difficult and very expensive to meet the requirements for maintaining active bar status in CA. For those of us who work in the non-profit field and practice public interest law, bar dues and MCLE requirements already constitute a significant financial burden. Additionally, on top of law school and the notoriously onerous CA bar exam, we have gone through rigorous screenings in order to be admitted to the bar, including an invasive and expensive background check. The proposed measures would only make the legal field more inaccessible, at a time when it is clear that our field desperately needs an infusion of new perspectives and skills from people of diverse backgrounds.

DISAGREE with the proposed Rule	<p>This is an absolute waste of time and money. This completely unnecessary fingerprinting requirement is unjustifiably burdensome on practicing attorneys. It is also redundant, since for at least 20 years every attorney admitted to practice law in California has been required to submit their fingerprints. The requirement is also an unwarranted further intrusion into attorneys' privacy; despite the fact that attorneys' fingerprints have already been submitted to the State Bar, the new set of fingerprints will obviously be shared with a wider array of law enforcement agencies—the security of which is not truly known. Simply belonging to a profession should not mean that you have no privacy rights.</p> <p>Lastly, the supposed benefit to the public appears to be tenuous at best. Rather, this proposal appears to be just the latest example of the State Bar having too much time on its hands and rather than doing something that would provide a tangible benefit, instead just creates another level of bureaucratic red tape and costs—passed on to the practicing attorneys.</p> <p>Do something worthwhile for a change and rescind this stupid proposal.</p>
AGREE ONLY if Modified	Why are you requiring just fingerprints? Why not DNA or fingerprints *and* DNA?
DISAGREE with the proposed Rule	<p>I read all 169 comments to the original, horrible proposed rule, and the proposed changes make little sense except that the bar hopes to frustrate, anger and disappoint a few less people with its absurd new suggestions. So many questions but I will limit to this: Are you singling out private criminal defense attorneys for this fingerprint requirement simply on the assumption that DAs, CPs and even PD/APD already submit fingerprints? What does fingerprinting an attorney have to do with his/her accessing criminal histories as part of his/her job anyway? Does it confer special status on the attorney? Hold him/her to a higher standard? Are we not all officers of the court? Will judges also be fingerprinted? (I hope so!) What IS the point?! I reiterate the objections already made and will cite the codes here for brevity's sake: No PP, RR#, AF!, BR., \$\$, \$M, PRY., Ex#, #1, UNCONST., OOSB., and IMPLEM. PS -- Shame on you if you lost or destroyed these records and are now scrambling to figure out how to reacquire them. You've really lost credibility with your membership on this one.</p>
DISAGREE with the proposed Rule	<p>1- We did this to apply for the Bar exam; no need to waste time, money and resources to do it again.</p> <p>2- The assumption that all lawyers are cheats and/or in need of personal oversight is repugnant.</p> <p>3- Fingerprints will not protect clients, advance causes/defenses, create/aid civility, or prevent bad lawyers from chugging along.</p>

DISAGREE with the proposed Rule	<p>I do not believe that sufficient justification has been provided for such a financially burdensome new "tax" on attorneys which invades their privacy and exposes their very personal identifying information to fraud and abuse. Will the next step be to require any attorney who wants to practice law in this state to provide a DNA sample so the Bar can monitor attorneys with genetic markers determined to be risky?</p> <p>How many attorneys do the proponents of this rule think will be "caught" by this new rule and how much harm is this new rule expected to prevent? Compare this to the number of "innocent" attorneys who will now have to take the time and pay the costs to comply and the risk they will face if this data is compromised and/or abused.</p> <p>Will the State Bar be willing to pay the damages if this information they are collecting is compromised or abused given that fingerprints are now being used as a security measure to protect data?</p> <p>This appears to be more of a public relations matter than an action to address a pressing crisis. I do not think the proponents have adequately thought through the dangers of maintaining a bio-metric database on every person with a law license. This is a very bad idea which will not end well.....</p>
DISAGREE with the proposed Rule	<p>What problem exists that this rule is proposed to solve?</p> <p>Unless there is serious problem that California lawyers are convicted of crimes and these lawyers are not reporting the conviction and the State Bar /Supreme Court does not know who they are, why is this necessary?</p> <p>It seems to me that its too easy to require more and more monitoring of individuals by organizations, corporations and government. Why don't we just turn over all private data of all persons so that we can all be monitored all of the time? And then where will we be?</p>
State No Preference	I am not clear about why a less intrusive alternative but effective, reliable method has not been offered to identify attorneys who apparently commit a sufficient number of unsolved crimes to warrant reprinting us all.
DISAGREE with the proposed Rule	Attorneys should not be required to be fingerprinted.
DISAGREE with the proposed Rule	I used to work as a senior software engineer and customer support staff for NEC Corporation of America supporting the fingerprint search system of the California Department of Justice. I have some familiarity with the fingerprint search and archival software systems use by the CA DOJ. I believe that it is not necessary to ask all the members to do a new LiveScan of their fingerprints again. This will cost millions of dollars when there are alternatives that accomplish the same thing. All members should have their fingerprint clearance when they applied for the moral character determination. The state bar can prepare a list of members' names, SSNs and the addresses at

	the time of the fingerprint submission for the moral character determination. The DOJ can then arrange for a batch job to search for any recent criminal records. I would like to volunteer to be on the advisory committee for this project or to be a liaison with the CA and NEC, if there is any. If the State Bar requires any technical services (e.g. programming, record extraction and preparation, etc.) I would like to propose a bid.
DISAGREE with the proposed Rule	I believe this is wasteful, costly and will not substantially improve the quality of legal representation in the state of California. It will not significantly reduce criminal conduct, the use of false identities, or the awarding of lawyer credentials to existing criminals. However, it will impose great expense and inconvenience on California lawyers. As with most such requests for input, I doubt you are taking the positions of individual lawyers very seriously. Find the actual violators and pursue them, without imposing additional duties on many thousands of existing attorneys. Further, don't invite additional responsibilities with the intent of soaking all California lawyers for the greater expense of supporting the expansion of your organization. If you undertake this, you should assure the membership you will take any additional administrative burden "out of hide." There are enough lawyers who work for the government like myself who aren't anxious to see the dues go up yet again.
State No Preference	Please provide information regarding where and how attorneys are to be printed. Please provide forms and specific locations as well as deadlines.
State No Preference	Hi, I have a quick questions about fingerprinting attorneys. One of my partners at Jenner & Block told me that all old fingerprints are to be destroyed and all active attorneys need to get re-fingerprinted. I was reading all the information online and I am getting mixed information. Do all attorneys need to be re-fingerprinted?
DISAGREE with the proposed Rule	Alternative identification and notification of conviction not based on finger print data should suffice, to notify the BAR, court record by name address and or drivers' license number, etc. Should be sufficient to the purpose, State Bar should explore other sources as most counties maintain criminal court case information on their websites.
AGREE ONLY if Modified	I have no objection to being fingerprinted; however I have two objections: 1. There is no provision in your description for the State Bar to first determine if a lawyer has already been fingerprinted and his/her fingerprints are on file. I know that over the years (I have been practicing since 1954 and may have forgotten) there have been public agencies and others which required fingerprints, and I am sure mine are on the federal and state service. I don't mind the State Bar finding out at my expense, but why not save us all the time? 2. I no longer drive and would have to hire a car to drive me to the location. In Los Angeles County that could be quite a trip! Why not modify the rule to allow licensed notary public (who take fingerprints every day) to come by and take the fingerprints of those who cannot travel to the location? I would appreciate answers.

DISAGREE with the proposed Rule	I oppose the new fingerprinting requirement for two primary reasons. First, gathering new fingerprints for all attorneys will create a massive database of highly personal information. The proposed rule says nothing about who will have access to this information and how the access will be controlled or monitored. Since I became licensed (and was fingerprinted) 20+ years ago, the specter of identity theft has become far more threatening. Until the State Bar can create a rule with the appropriate protocol to protect the data of thousands of California attorneys, the proposed requirement is dangerous to all of us. Second, the cost of implementing this rule will be enormous. Others have commented on the cost to individual attorneys, but the cost to the State Bar, the Department of Justice, and the taxpayers would far outweigh any potential benefit of this rule. Thank you for considering my comments.
DISAGREE with the proposed Rule	Attorneys are fingerprinted when we apply to become attorneys after passing the bar exam. Since our fingerprints are already on file, requiring additional fingerprinting seems not only redundant, but also an unnecessary expense for us. Why would you want to put us through that AGAIN? You should simply seek to have the California Bureau of Investigation cooperate with you in pursuing your goal. That is an easier and faster approach that would spare your members unnecessary expense and irritation.
DISAGREE with the proposed Rule	ALL ATTORNEYS SUBMITTED FINGER PRINTS AND HAD BACKGROUND CHECKS SENT TO THE STATE BAR WHEN ADMITTED TO THE BAR. THE BAR APPARENTLY DOES NOT HAVE THEM/DID NOT KEEP THEM, BUT IT NOW WISHES TO HOIST THE PROBLEM UPON THE ATTORNEYS. IT WAS NOT AND IS NOT THE ATTORNEY'S OBLIGATION TO ENSURE THAT THE BAR KEEPS THE DOCUMENTS THAT THE ATTORNEYS SUBMIT. NO ATTORNEY SHOULD BE REQUIRED TO GO TO THE TIME OR EXPENSE TO (1) GO GET AND RESUBMIT FINGERPRINTS, OR (2) EXPEND THE COST OF HAVING TO DO SO. FURTHER, THE BAR CAN FULFILL ITS MISSION TO MONITOR ATTORNEYS WITHOUT FINGERPRINTS AND THERE HAS BEEN NO EFFORT TO RESOLVE ITS SELF-MADE PURPORTED PROBLEM BY FINDING A DIFFERENT SOLUTION TO MONITORING ATTORNEYS WITHOUT USING FINGERPRINTS. THIS PROPOSED RULE ATTEMPTS TO HAVE THE ATTORNEYS BEAR THE BURDEN OF RESOLVING FOR THE BAR A PROBLEM THAT DOES NOT EXIST. THIS IS INSANE.
AGREE	I am so glad Fingerprinting is being instituted.
State No Preference	Hello, I have been fingerprinted multiple times. I have been live-scanned in order to work in the CA. Probation Camps and also to teach at Los Angeles Valley College. I am also a Marriage and Family Therapist and had to be live-scanned as a part of the licensing process. For those of us that are on record with the State of California already, do we still need to do it for our law licenses? Thank you
DISAGREE with the proposed Rule	I am against this. I believe it to be overly intrusive, and a waste of time and money. There is little public safety benefit to be had as compared to the intrusion and costs associated with finger printing roughly 170,000 California

	Attorneys in this state and around the world.
DISAGREE with the proposed Rule	Having read through the Board of Trustees' responses to the public comments, I see that even though the comments were overwhelmingly negative, the Board is determined to ram through this proposal over the objections of the lawyers that will be affected by this new "Big Brother" rule. I looked at all the objections and agree with virtually all of them, particularly those that view the rule as superfluous. I know from personal experience that the Bar receives complaints of current attorney wrongdoing constantly, yet often seems to lack the resources to deal with even the most egregious cases. What's the purpose of creating a whole new obligation on the Bar to explore past allegations of criminal activity, when there are plenty of current misconduct issues to deal with?
DISAGREE with the proposed Rule	I object to the proposed rule. I volunteer at a local school and have had to be fingerprinted. I understand the purpose of that requirement. However, attorneys fingerprinting prevents what, exactly? Where is the pervasive problem or known set of problems this requirement will address? Have there been a string of attorney misconduct cases or attorney crimes that previous fingerprinting would have prevented? A google search provides no comprehensive explanation, except that the California Supreme Court has stated that "requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system." See https://www.acbanet.org/2017/11/30/public-comment-fingerprinting-attorneys/ . How is the public served? How is the discipline process strengthened? Where are the case studies of rogue attorneys whose bad acts justify this requirement? I oppose attorney fingerprinting.
DISAGREE with the proposed Rule	I oppose this action by the State Bar. I'm not opposed to taking action against attorneys convicted of a criminal offense. The proposal to finger print hundreds of thousands of attorneys to find the very few who may have been arrested is overkill of the worst kind. If an attorney is convicted of an offense the court where he or she is convicted is the best source of the information. This works for DUIs, for sexual registration, etc.
DISAGREE with the proposed Rule	The rule is still necessary as members of the state bar are already fingerprinted prior to admission and are required to report certain crimes committed to the state bar. There is no need for a one central government database to contain uniquely identifiable biometrics of an individual for such purposes, as the risk of these being hacked and stolen is so great these days. Furthermore, once someone has such unique identifiable characteristics stolen, there is no way to change it, like a hacked password. This is a very dangerous proposition that the State Bar is seeking.
DISAGREE with the proposed Rule	I oppose the proposed fingerprinting rule. Given the *overwhelming* opposition to fingerprinting received during the recent (first round) public comment period, more acceptable alternatives need to be pursued that would reasonably accomplish the desired public policy objectives. If this were instead a proposal to fingerprint all illegal immigrants in California in the

	name of protecting the public, I doubt very much that the State Bar, the California Supreme Court, and the Legislature would be so supportive.
DISAGREE with the proposed Rule	The proposal is ridiculous and demeans the profession
DISAGREE with the proposed Rule	<p>To begin with, the proposed rule is unnecessary and does not serve the public interest. Chief Justice Cantil-Sakauye’s October 20, 2017, letter erroneously asserts that “requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar’s discipline system.” But applicants are already required to submit fingerprints and licensed attorneys are already required to report felony indictments, charges, and convictions (and certain, limited types of misdemeanor convictions) to the Bar. (Cal. Bus. & Prof. Code § 6068(o)(4)-(5).) Notably, attorneys are currently not required to report arrests or most misdemeanor convictions. The Bar’s new fingerprinting rule should adhere to these same distinctions. Instead, the proposed rule does not further protect the public or strengthen the Bar’s discipline; what it does do is create a near-certain disparate impact on attorneys of color, who, due to systemic racism, are at a disproportionately higher risk of false arrest or arrests that otherwise do not lead to a disposition. The proposed rule also places an undue financial burden on legal services attorneys by failing to include a blanket waiver of their processing fees. Neither Business and Professions Code § 6054, nor Chief Justice Cantil-Sakauye’s October 20, 2017, letter mandates that the Bar search for arrests. Indeed, the Chief Justice’s letter discusses convictions only and makes no mention of arrests, and the Code says the Bar “may” require a member or applicant to be fingerprinted “in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states” (emphasis added). Relying on mere arrests that did not result in a conviction as supposed evidence of an attorney’s unfitness or professional misconduct runs contrary to the important and ongoing efforts in California and around the country to reduce the obstacles, policies, and stigma that misdemeanor convictions and arrests pose to individuals in employment and housing, such as “Ban the Box,” (See the Fair Chance Act, AB 1008; see also the April 25, 2012 EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 [“The fact of an arrest does not establish that criminal conduct has occurred. Arrests are not proof of criminal conduct.”]; DFEH regulations [2 CCR § 11017.1(b)(1)] and Labor Code § 432.7 prohibit employers from considering arrest records when making any employment decisions). As these agencies and the California Legislature recognize, basing employment and housing decisions on arrest records has a disparate and negative impact on people of color. (See, e.g., 2 CCR § 11017.1(a) [prohibits “forms of criminal history in employment decisions if doing so would have an adverse impact on individuals on a basis enumerated in the Act that the employer cannot prove is job-related and consistent with business necessity or if the employee or applicant has demonstrated a less discriminatory alternative</p>

	<p>means of achieving the specific business necessity as effectively”].)The disparate impact of arrest-record searches is further compounded by the frequency of mistaken “hits” created by fingerprint searches, in which the fingerprints are mistakenly matched with the wrong individual. At a minimum, attorneys of color are much more likely to be required to expend time, money, and stress to respond to Bar inquiries related to arrests that did not lead to a conviction, and many such attorneys may be subject to disproportionate and unfair discipline and damage to their professional reputation due to arrests and misdemeanor convictions.</p>
DISAGREE with the proposed Rule	<p>The amendment does not alleviate the concerns I expressed last December in my initial objection to the proposed rule. 1. The fingerprinting requirement is a gross invasion of personal privacy and dignity. The crimes of a small number of attorneys do not justify imposing this burden on all who have done nothing wrong. 2. No factual support for the proposition that numerous attorneys' crimes go unreported to the State Bar has been shown. Courts or district attorneys should report convictions to the State Bar. 3. The requirement is onerous, cumbersome, and expensive.</p>
AGREE ONLY if Modified	<p>This rule is overly burdensome and unnecessary for attorneys who already were required to submit fingerprints for admittance to the CA bar. Fingerprints are unique and should not change with time. Fingerprinting is expensive and takes time out of an attorneys day. This disproportionately impacts newly admitted attorneys who recently submitted and paid for fingerprinting.</p> <p>It is fine to require it for newly licensed, registered in-house counsel, etc.</p>
DISAGREE with the proposed Rule	<p>Why would lawyers need to provide their fingerprints again, if the state bar has already collected them and we have been told that fingerprints are unique and do not change over time? Does this mean that the state bar is trying to find a new way to make money off of something that already exists or does this mean that the state bar is trying to make money off of documentation that it</p>

	recklessly lost and has not been able to recover?
DISAGREE with the proposed Rule	One possible modification to this otherwise intrusive and costly rule would be to require the re-fingerprinting of persons who were accepted to the Bar before the introduction of LiveScan. Otherwise, it seems that the only problem for the Bar is that it doesn't communicate well with the numerous other governmental systems that already have fingerprints on file. On the other hand, asking long-time Bar members who have otherwise spotless records is yet another unfair intrusion. I would prefer to see the Bar look into how it gathers and organizes this extremely personal and cyber-vulnerable information before just blithely "telling" -- assuming that everyone looks regularly at their Bar profile -- members that they must comply.
DISAGREE with the proposed Rule	There are already criminal reporting requirements for attorneys so this seems unnecessary. It's also another expense. It trenches on privacy rights. It's a bad idea.
AGREE ONLY if Modified	Thank you so much for accepting our late submission of a public comment. Thank you for incorporating some of the changes that we supported in the prior round. We continue to urge the State Bar, however, to waive the DOJ and FBI fees for all attorneys employed by legal aid organizations, as defined under Cal B&P 6213. These organizations, all of whom receive funding by the State Bar to serve low-income individuals, may face an organizational financial hardship when paying to re-fingerprint all of their attorneys on staff. Waiving the DOJ and FBI fees is a small expense for an organization the size of the State Bar, but is an encouraging message to send to the organizations who serve our most vulnerable Californians. The State Bar, if it chose to waive the fees, would be telling the organizations that it would rather they spend their limited budget on client services than on fees for fingerprinting attorneys who have already been fingerprinted. Most particularly, the State Bar's recognition of the financial impact on lower-income attorneys by waiving the DOJ and FBI fees is appreciated by the legal aid community. Additionally, the provision of an alternative for those who are unable to provide a fingerprint recognizes the important work of disability rights advocates to urge for reasonable alternatives, rather than hard rules, for attorneys with disabilities.
DISAGREE with the proposed Rule	I am a practicing attorney for more than 31 years. In the more than 31 years of practice I have had two traffic tickets. One for speeding in 1995, and one for crossing the double yellow line in 2016. Thus, I find the idea of fingerprinting attorneys who are held to the highest standards of moral and ethical practices to be an insult to the profession and to me personally. For this institution to buy into the rampant fear that professionals are somehow hiding criminal conduct is ridiculous. I am therefore against fingerprinting on moral, professional and ethical grounds.

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February 17, 2018

Colantuono, Highsmith & Whatley, PC
420 Sierra College Dr Ste 140
Grass Valley, CA 95945
Attn: Board of Trustee Chair, Michael Colantuono

Re: Fingerprinting

Dear Mr. Michael Colantuono,

I had read the original proposed rule and commented. Interestingly, in the report forwarded to you, my comments mirrored the majority of other attorneys throughout the State. I have now read the new proposed rule together with staff's replies to the concerns proffered by attorneys to the original rule. Based both upon staff's comments and the new proposed rule, I have additional concerns. Because I feel these concerns are important and may have legal ramifications, I felt compelled to write to you directly.

The first concern is the Constitutionality of the proposed rule. My other concern (which may also have a Constitutional component) is that the proposed rule is unduly burdensome. In addition, although it seems that there is possibly a political motivational component to this proposed rule stemming from the recent reorganization of the State Bar and thus budget justification trepidation for staff, I will leave that issue aside and only address the legal issues facing attorneys.

The Constitutional issue is that the proposed rule is overly broad.

Allow me to give you an example. Let's say attorney Y has been practicing 25 years, has been in good standing, has had no problems with clients. Has conducted his practice with good moral standards and the like. Not even close to being considered a lawyer requiring disciplinary review, unfit to practice or being disbarred for moral turpitude or the like.

But now let us also assume that same attorney 20 years ago got arrested for a simple DUI. No complications like a car crash or others involved. Just had a couple of glasses of wine with dinner, and was just over the limit and got arrested. As a result, instead of challenging the arrest, the attorney simply plead guilty to move on in life.

Under the proposed rule, this attorney's finger print file will now turn up that 20 year old arrest, and under the State Bar's (seemingly new) intolerance with DUI arrests¹, that attorney who has never driven impaired since and has had a complete and total clean record might be disbarred.

Obviously, under those circumstances, the new rule is unconstitutional as being over broad and possibly violating due process. (A legal challenge, if the rule is adopted, I certainly would expect

¹ This month's Bar Journal has an extensive list of disbarments, many of which were based upon uncomplicated DUI arrests.

from the body of attorneys the new rule would affect.) This can be fixed (I will discuss below).

My second concern is that the proposed rule is overly burdensome as it relates to the fee shifting. I understand staff's reaction with regards to the attorneys' comments about paying for this, but there are a couple of problems with staff's explanation. Instead of getting down into the weeds with all the issues, I will just highlight one.

Staff's comments point out that the implementation of this new rule is because they hadn't done what they were suppose to do under the law since 1989.

So now, the solution of the staff not doing their job for what they were paid to do for the past 29 years must fall on the attorneys who have been paying their dues and paying their salaries for these past 29 years? And the justification of having attorneys bear the burden of payment is that it would cost the State Bar over \$15 Million? If staff had done their job for the past 29 years, they would not be facing this \$15 Million cost issue.

The bottom line is that how staff has attempted to address the attorney comments about the cost shifting in the original rule, does not even come close to addressing the problem in the new rule for the attorneys or for any possible legal fallout if it is implemented.

For both of my concerns, I suggest that there is a middle ground, and I believe the middle ground would survive any legal challenge that might arise.

With regard to the over broad and due process issues, the rule can be revised to make exceptions. Meaning, in using the example above, if the rule is implemented as proposed, attorney Y will automatically be up for disciplinary review and possible action. That would be the wrong result.

In this regard, tailor the rule more narrowly. For example, any attorney who has had no arrests/convictions for something like a simple DUI in the last 15 years are exempt from disciplinary review. And any attorney in the last 7 years who has committed a misdemeanor (like a simple DUI), but has had a clean record since will receive special consideration.

With regards to the fee shifting issue, of course the staff's recommendation is a start concerning attorneys who already qualify for reduced State Bar fees, but, it doesn't go far enough, and doesn't address the fee shifting issue for other attorneys. Thus, I propose a compromise as follows: For those attorneys which qualify for a State Bar fee reduction, all fees for finger printing, background check etc., are borne by the State Bar; alternatively those attorneys simply do not have to submit the finger prints etc. Concerning all other attorneys, I propose a 50 percent fee sharing of the finger printing, background check etc. This can be implemented with 50 percent of the total costs borne by the attorneys applied as a fee reduction in that year's Bar dues bill.

The only alternative, I could envision to this compromise, would be that none of the 1989 law is enforced retroactively and that staff simply start enforcing it going forward with new members.

Thank you in advance for your consideration, sincerely,



William Hansult

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February 20, 2018

Colantuono, Highsmith & Whatley, PC
420 Sierra College Dr Ste 140
Grass Valley, CA 95945
Board of Trustee Chair, Michael Colantuono

Re: Fingerprinting - Addendum

Dear Michael Colantuono,

Since I sent you a letter concerning the aforementioned subject a few of days ago, a legal issue was brought to my attention which I felt significant enough to provide this addendum.

As you know, staff in their report to you, with regards to justifying charging attorneys for the finger printing and background checks, stated that they had never enforced the law (Business & Professions Code § 6054) which was enacted in 1989 (29 years ago), and thus to retroactively collect finger prints and background checks for all attorneys would cost about \$15.5 Million.

Staff's admission did not specifically state a reason to you why they never enforced that provision of the B&P Code, but they did state that they wanted to enforce it now, retroactively and have members of the Bar bear the costs.

It was just pointed out to me that besides the initial finger printing and background checks required to be licensed, any subsequent finger printing and back ground checks were not (and STILL are not) mandatory under the law. In this regard B&P Code § 6054 (b) states, "The State Bar of California shall require that an applicant for admission or reinstatement to the practice of law in California, or may require a member to submit or resubmit fingerprints to the Department of Justice in order to establish the identity of the applicant and in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states."

I find it very curious that suddenly staff has a sense of urgency to implement, retroactively, a portion of the B&P Code which is not and never has been mandatory to implement and for which they never did implement in 29 years. With that, in my first letter I mentioned that there might be a political, budgetary motivation for this urgency, and the above provides circumstantial evidence of that.

More importantly, however, in my first letter I gave you a hypothetical example of an attorney who has had a clean record in all aspects the entire time of practicing, but had an uncomplicated DUI 20 years ago and with the implementation of staff's new rule, would sweep up this otherwise outstanding attorney in an unnecessary disciplinary proceeding. I ask you, what good can come of that? It makes no sense and given the almost 300K of attorneys, that example would be common place.

In addition, because staff has admitted they have never enforced this portion of the B&P Code, I would expect a legal challenge under the legal doctrine of "desuetude" which SCOTUS upheld as a valid doctrine under *Griswold v. Connecticut et.al.* Nothing good could come from that either.



ATTACHMENT C

1. Licensed Attorney Fingerprinting

a) Subsequent Arrest Notification: The State Bar shall enter into a contract with the California Department of Justice for Subsequent Arrest Notification services for licensed active California attorneys and attorneys permitted to practice in the State of California pursuant to California Rule of Court Rules 9.44, 9.45 and 9.46.

(i) The State Bar is already receiving Subsequent Arrest Notification services for some attorneys. The State Bar will consider these attorneys as having already satisfied the fingerprinting requirement of this rule and are thereby exempt. The State Bar shall notify all attorneys to check their MyStateBar Profile for information as to whether they have been deemed to have already satisfied the requirement.

b) Active Licensed Attorneys: Each active licensed attorney, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.

c) Inactive Licensed Attorneys: Inactive licensed attorneys, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted prior to being placed on active status.

d) Active Licensed Attorneys in Foreign Countries: Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction where the attorney is physically located, or the attorney is able to provide evidence that he/she is unable to access or afford such services, the attorney must notify the State Bar using a form available through the attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States for a period of not less than 60 days.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation that requires all attorneys required to be fingerprinted under section 1(b) to be fingerprinted by December 1, 2019.

The State Bar has ongoing authority to require re-fingerprinting after December 1, 2019 for attorneys for whom it is not receiving subsequent arrest notification services and for attorneys transferring to active status. Failure to be re-fingerprinted if required may result in involuntary inactive enrollment pursuant to Business and Professions Code section 6054(d).

The State Bar has authority to require re-fingerprinting after December 1, 2019, for attorneys permitted to practice in the State of California pursuant to California Rule of Court Rules 9.44, 9.45, and 9.46 for whom it is not receiving subsequent arrest notification services. Failure to be re-fingerprinted if required may result in a State Bar determination that the attorney cease providing legal services in California.

3. Information Obtained by Subsequent Arrest Notification; Limitations on Disclosure

Any information obtained by the State Bar through the Subsequent Arrest Notification System shall be Confidential and shall be used solely for State Bar licensing and regulatory purposes.

4. Fingerprint Submission and Processing Costs

Except as described in 4(a), all costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

- a)** The Board of Trustees of the State Bar must develop procedures for granting waivers of the processing costs of running DOJ and FBI background checks for licensed attorneys with demonstrable financial hardship.

5. Attorneys Who are Physically Unable to be Fingerprinted

- a)** If the DOJ makes a determination pursuant to California Penal Code section 11105.7 that the attorney is presently unable to provide legible fingerprints, the attorney will have been deemed to have complied with the requirement of Section 1.
- b)** Attorneys may also submit notification to the State Bar directly through their MyStateBar profile that they are unable to submit fingerprints due to disability, illness, accident, or other circumstances beyond their control. The State Bar will evaluate the notification and may require additional evidence. If the State Bar determines that the attorney is unable to submit fingerprints based on the information provided, the

attorney will have been deemed to have complied with the requirement of section 1(b).

c) This section shall only apply to those persons who are unable to supply legible fingerprints due to disability, illness, accident, or other circumstances beyond their control and does not apply to persons who are unable to provide fingerprints because of actions they have taken to avoid submitting their fingerprints.

ATTACHMENT D

Noncompliance with Attorney Fingerprinting Requirement

Definition

Noncompliance is failure to submit proof that fingerprints have been taken in accordance with State law and State Bar procedures.

Enrollment as inactive for fingerprinting noncompliance

A licensee determined by the State Bar to be in noncompliance with State Bar fingerprinting requirements will be enrolled as inactive and not eligible to practice law. The enrollment is administrative and no hearing is required.

All licenses will receive notices of non-compliance at least 60 days prior to involuntary inactive enrollment.

Reinstatement following fingerprinting noncompliance

Enrollment as inactive for fingerprinting noncompliance terminates when a licensee submits proof of compliance.