**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

# REQUEST OF THE STATE BAR OF CALIFORNIA FOR SPECIAL REGULATORY ASSESSMENT


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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

# REQUEST OF THE STATE BAR OF CALIFORNIA FOR SPECIAL REGULATORY ASSESSMENT

## I. INTRODUCTION

After full negotiation involving stakeholders and multiple legislative hearings, the California Legislature adjourned its 2015-2016 Regular Session on August 31, 2016, without having enacted a fee bill authorizing the State Bar of California ("State Bar") to collect from active members the basic annual membership fee of $315 provided under Business and Professions Code[1] section 6041. In the absence of a fee bill and without an order of special regulatory assessment ("Assessment") from this Court, the State Bar will be without the necessary revenue to operate beyond early 2017. In response to this Court's letter to the State Bar of September 8, 2016, the State Bar requests the Court to adopt a rule imposing an Assessment on attorneys actively engaged in the practice of law. Consistent with the September 12, 2016, resolution of its Board of Trustees, the State Bar provides several options from which the Court can select a level of Assessment.

[1] All further section references are to the California Business and Professions Code, unless otherwise specified.

The Court may grant the State Bar's request pursuant to its inherent power to regulate the legal profession and in light of the well-established role of the State Bar as an administrative arm of the California Supreme Court. As more fully set forth herein, an Assessment is required to fund the State Bar's public protection functions, including a fully operational disciplinary system. As described in this Court's decision in *In re Attorney Discipline System* (1998) 19 Cal.4th 582, the absence of State Bar funding presents a substantial risk to the continuity of those functions. The lack of a functioning attorney disciplinary system places the public, the integrity of the legal profession and the interest of the courts all at great risk. The absence of funding also threatens the employment security of the State Bar work force, which is essential to the State Bar's continued performance of its public protection functions.

The State Bar respectfully asks this Court to rule on its request by the end of November 2016 so that it may issue its annual membership fee statements as customary on December 1; and so that it may collect the Assessment on a schedule that continues State Bar operations without harm to the public, the profession or the judiciary.

## II. THE STATE BAR OF CALIFORNIA

### A. Origin and Purpose of the State Bar of California

In 1927, the California Legislature created the State Bar with the enactment of the State Bar Act. (Stats. 1927, ch. 34, p. 38; *Greene v. Zank* (1984) 158 Cal.App.3d 497, 504.)[2] The State Bar Act describes the role of the State Bar:

> The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public.

(§ 6031, subd. (a).)

In 1960, the electorate amended the California Constitution to declare the State Bar a constitutional body to which all practicing California attorneys must belong.[3] The State Bar's mandate was most recently articulated in 2012 when the Legislature adopted for the first time a public protection charge:

> Protection of the public shall be the highest priority for the State Bar of California and the

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[2] The current version of the State Bar Act is found in section 6000 et seq. (Added by Stats. 1939, ch. 34, p. 347, § 1.)

[3] Article VI, section 9, of the California Constitution states: "The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record."

> board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

(§ 6001.1)

The State Bar is a public corporation created as an administrative arm of the California Supreme Court for the purpose of assisting in matters of admission and discipline of attorneys. (*In re Attorney Discipline System, supra,* 19 Cal.4th 582, 599-600.) The State Bar also assists in many other regulatory functions. The Court possesses the expressly reserved, primary inherent judicial authority to regulate the practice of law, which includes the power to admit and discipline attorneys. (*Id.* at pp. 592, 599-600.) As an integrated or unified bar, the State Bar is authorized to engage in a broad spectrum of activities to promote the improvement of the administration of justice, which encompasses at one end its core functions to assist in regulating the legal profession and at the other end to "advance the professional interests of the members of the State Bar … ." (§ 6031, subd. (a); *Keller v. State Bar of California* (1990) 496 U.S. 1, 5, 15.)

### B. Public Protection Functions of the State Bar of California Funded by Mandatory Fees

#### 1. Office of Chief Trial Counsel

The State Bar's Office of Chief Trial Counsel ("OCTC") prosecutes members of the State Bar for violations of the State Bar Act and the

California Rules of Professional Conduct. The intake and enforcement units of OCTC receive and investigate complaints and prosecute members for ethical violations. Cases originate from complaints by members of the public, referrals from judicial officers and matters initiated by the State Bar." (§§ 6049.1; 6068, subd. (o); 6086.7; 6086.8; & 6091.1.)

If sufficient evidence develops to proceed with prosecution, trial counsel file charges in the State Bar Court. In the absence of a negotiated resolution, the case proceeds to trial in the hearing department of the State Bar Court. A trial court decision can be appealed to the review department of the State Bar Court by either OCTC and/or the member. Thereafter, OCTC and/or the member can petition for review in the Supreme Court. Upon the filing of any State Bar Court recommendation for discipline, with the exception of a reproval imposed by the State Bar Court, the decision and record is transmitted to the Supreme Court. Discipline is imposed by Supreme Court final order.

OCTC also receives and investigates complaints and pursues statutorily-prescribed remedies against non-attorneys who engage in the unauthorized practice of law. (§ 6125 et seq.) When appropriate, OCTC refers the matter to a district attorney's office for possible criminal prosecution. (§ 6126, subd. (a).) OCTC may also apply to the appropriate superior court for the court to assume jurisdiction over the practice of non-

attorneys who hold themselves out as authorized to practice law. (§ 6126.3.) OCTC may seek civil penalties and equitable remedies against a non-member who engages in misleading advertising by using words in a foreign language that imply that the person is authorized to practice law such as "notario" or "notario public." (§ 6126.7.)

In 2015, OCTC received 15,796 new complaints against members of the Bar, closed 15,706 cases and filed formal charges in the State Bar Court in 558 cases. The Supreme Court issued final orders that disbarred 174 attorneys and suspended 247 attorneys. Four thousand six hundred and fifty-nine attorney discipline cases were pending in OCTC by the end of 2015. In 2015, there were 581 cases opened, 655 cases resolved, and 463 cases pending at the end of the year against non-attorneys alleged to have engaged in the unauthorized practice of law. The 2015 Annual Discipline Report[4] shows that the backlog of complaints against attorneys pending for more than six months had dropped to its lowest level since 2009. Even though the number of filings in State Bar Court decreased compared to 2014, the number of attorneys suspended or disbarred increased in 2015.

Between January 1 and August 31, 2016, OCTC received approximately 10,211 new complaints against members, closed approximately 9,579 cases and filed formal charges in the State Bar Court

[4] The State Bar of California, *Attorney Discipline Report for the Year Ending December 31, 2015* (April 30, 2016) <http://www.calbar.ca.gov/AboutUs/Reports.aspx> [as of Sept. 26, 2016].

in approximately 330 cases. There were approximately 4,687 attorney discipline cases pending in OCTC at the end of August 2016. At that time, there were 276 cases pending against non-attorneys alleged to have engaged in the unauthorized practice of law.

2. State Bar Court

The State Bar Court is the independent, adjudicative entity acting as an administrative arm of the Supreme Court to hear and decide attorney disciplinary and regulatory proceedings and to make recommendations to the Supreme Court regarding those matters. The State Bar Court consists of a five-judge hearing department and a three-judge review department in Los Angeles and San Francisco. The hearing department is the trial level of the State Bar Court. The review department is the appellate level of the State Bar Court. On September 19, 2016, there were approximately 500 matters pending in the hearing department and 41 matters in the review department.

3. Fee Arbitration

The State Bar must maintain a system of fee arbitration and mediation of disputes between clients and members concerning fees or costs charged by attorneys for professional services. (§ 6200, subd. (a).) The State Bar's fee arbitration program includes a network of local programs sponsored by 41 participating county bar associations. (§ 6200, subd. (d).) Attorney participation is mandatory if requested by clients.

A special committee appointed by the State Bar in 1973 to study the viability of a fee arbitration program reported that disputes over professional fees were at the core of many disciplinary complaints.[5] The special committee specifically found that "[m]any disciplinary complaints could be avoided if an effective fee dispute mechanism existed" and predicted that "many of the unconscionable fee disciplinary complaints may be shifted to requests for arbitration under the system." (*Id.* at pp. 6, 8-9.)

In 2015, the State Bar fee arbitration program received 3,900 calls from clients and attorneys about the program. Over 1,200 arbitrations were handled by local bar associations and the State Bar in 2015. The program is also responsible for assisting clients in enforcing arbitration awards where an attorney refuses to comply with a binding arbitration award to return unearned fees. (§ 6203, subd. (d).)

4. Office of Probation[6]

The Office of Probation monitors disciplined attorneys who are required to comply with probation or reproval conditions pursuant to orders issued by the Supreme Court and/or the State Bar Court.

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[5] The State Bar of California, *Report of Special Committee on Resolution of Attorney Fee Disputes* (April 29, 1976), at p. 6.

[6] The Office of Probation was part of the OCTC in 1998, and was therefore not listed separately in the assessment ordered in *In re Attorney Discipline System, supra,* 19 Cal.4th 582, 621. The Office of Probation ultimately became an independent department in or around 2003.

5. Office of Professional Competence

The State Bar's Office of Professional Competence ("OPC") is responsible for administering programs and activities aimed at enhancing lawyer competence and preventing lawyer misconduct. A primary function of OPC is to administer the State Bar's Ethics Hotline -- a telephone ethics information and research service that heightens awareness and assists thousands of attorneys to conform their practice to ethical standards. By offering members an opportunity to present ethical issues and referring them to relevant authorities and materials, the Ethics Hotline prevents violations of the State Bar Act and the California Rules of Professional Conduct before they occur.

In 2015, the Ethics Hotline received and responded to more than 13,400 calls, which together with return and follow-up calls totaled more than 20,000 calls. Of the 2015 inquiries, 19 percent concerned fees and costs for professional services; 17 percent concerned communications with clients, opposing counsel or parties, witnesses and others; 15 percent concerned relations with clients and conflicts of interest; 12 percent concerned client confidences and secrets; and 11 percent concerned lawyer advertising.

In addition, OPC serves as staff to the Board of Trustees and its committees, special commissions and task forces involved in the development of proposed amendments to the California Rules of

Professional Conduct and other regulatory authorities on legal ethics. OPC staffs: (1) the Standing Committee on Professional Responsibility and Conduct, which is charged with developing the State Bar's advisory legal ethics opinions and ethics alert articles; and (2) the Commission for the Revision of the Rules of Professional Conduct, which is preparing recommendations for comprehensive amendments to the Rules (§ 6076) in accordance with this Court's instructions for project completion by March 31, 2017.

OPC also monitors attorney compliance with statutory restrictions on demand letters sent to a potential defendant in construction-related disability access claims pursuant to section 6106.2 and Civil Code section 55.32, which were enacted by Senate Bill No. 1186. (Sen. Bill No. 1186 (2011-2012 Reg. Sess.) § 5.) OPC's work in this area protects potential defendants from lawyers who might otherwise misuse disability access laws to obtain quick monetary settlements without regard to the actual implementation of repairs of property deficiencies.[7]

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[7] The purpose of Senate Bill 1186 is set forth in an uncodified section of the bill, which states:

> The Legislature finds and declares that a very small number of plaintiffs' attorneys have been abusing the right of petition under Sections 52 and 54.3 of the Civil Code by issuing a demand for money to a California business owner that demands the owner pay a quick settlement of the attorney's alleged claim under those laws or

6. Office of Member Records and Compliance

The Office of Member Records and Compliance ("Member Records") is responsible for billing any costs and penalties that persons licensed to practice law in California must pay. (§ 6143.) These include reimbursements to the Client Security Fund[8] (§ 6140.5) and costs imposed by disciplinary orders of this Court. (§ 6140.7.) In addition, Member Records is responsible for maintaining the roll of attorneys admitted to practice law, including: each member's current physical address, telephone number, and email address; any specialties in which the member is

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> else incur greater liability and legal costs if a lawsuit is filed. These demands for money allege one or more, but frequently multiple, claims for asserted violations of a construction-related accessibility standard and often demand a quick money settlement based on the alleged multiple claims without seeking and obtaining actual repair or correction of the alleged violations on the site. These "pay me now or pay me more" demands are used to scare businesses into paying quick settlements that only financially enrich the attorney and claimant and do not promote accessibility either for the claimant or the disability community as a whole. These practices, often involving a series of demand for money letters sent to numerous businesses, do not promote compliance with the accessibility requirements and erode public support for and confidence in our laws.

(Sen. Bill No. 1186 (2011-2012 Reg. Sess.) § 24.)

[8] The Client Security Fund provides reimbursement to victims of attorney misconduct.

certified; any other jurisdictions in which the member is admitted and dates of such admission; any record of discipline, including terms and conditions of any probation imposed, and, if suspended or disbarred, dates of any reinstatement. (Cal. Rules of Court, rule 9.6; § 6002.1.) Member Records also administers the transfer of members from active to inactive status, whether voluntarily requested by the member (§ 6005), or involuntarily imposed (§§ 6007; 6070, subd. (a); 6143; 6143.5; 6203, subd. (d); Cal. Rules of Court, rule 9.22).

Member Records is also responsible for monitoring attorney compliance with Minimum Continuing Legal Education requirements, and administering the Law Corporation and Limited Liability Partnership, and Special Master Registration programs. Member Records maintains a dedicated call center for attorneys with questions about their ongoing regulatory and licensing requirements.

7. Office of General Counsel

The Office of General Counsel ("OGC") provides legal advice and representation to all State Bar entities, including OCTC, on a variety of issues including those arising from its disciplinary system. OGC reviews and responds to petitions, briefs, and other pleadings filed in the Supreme Court pursuant to California Rules of Court, rule 9.13, seeking review of decisions by the State Bar Court concerning members or prospective members. OGC prepares petitions to the Supreme Court on behalf of

OCTC, seeking review of recommendations and decisions of the State Bar Court pursuant to California Rules of Court, rule 9.14. OGC defends State Bar actions on behalf of OCTC and responds to civil complaints filed in state and federal courts arising from State Bar disciplinary proceedings and admissions decisions. OGC responds to civil and criminal subpoenas and requests to OCTC under the California Public Records Act. (Gov. Code, § 6250 et seq.) OGC responds to bankruptcy petitions seeking to discharge costs or reimbursements ordered in disciplinary proceedings. OGC files judgments in the superior courts to enforce orders assessing disciplinary costs against disciplined attorneys. OGC drafts and negotiates contracts supporting the work of OCTC, including agreements related to expert witness retention, hiring, and information technology to maintain and develop OCTC's electronic case management and data retention systems. OGC also staffs the Commission for the Revision of the Rules of Professional Conduct, which, as mentioned above, is currently evaluating the existing California Rules of Professional Conduct, and will prepare the petitions to this Court for approval of the proposed amended rules.

Starting in 2016, following a recommendation of the California State Auditor to provide more effective oversight of OCTC disciplinary complaint closures, OGC reviews closed complaints at the request of complainants to determine whether to recommend to OCTC that these complaints be reopened for investigation. Also starting in 2016, OGC has

assisted in the administration of a system of outside special deputy trial counsel to handle disciplinary inquiries and complaints against attorneys where the Chief Trial Counsel ("CTC") has a conflict as defined in Rules of Procedure of the State Bar of California, rule 2201.

OGC provides advice and representation to all State Bar entities involved in the State Bar's public protection functions, including the Department of Admissions and its Committee of Bar Examiners.

8. Commission on Judicial Nominees Evaluation

Established pursuant to Government Code section 12011.5, the Commission on Judicial Nominees Evaluation ("JNE") is the State Bar entity that must evaluate all candidates under consideration for a judicial appointment by the Governor. JNE's work promotes a California judiciary of quality and integrity by providing independent, comprehensive, accurate, and fair evaluation of candidates.

9. Center on Access to Justice

The need for affordable legal assistance for low and moderate income Californians far outstrips availability for critical legal issues affecting basic human needs such as shelter, sustenance, safety, health, and family integrity.[9] Thousands of Californians who seek help are turned

[9] ABA Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (2016), at pp. 11-13. <http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf> [as of Sept. 26, 2016].

away because legal aid providers do not have sufficient resources to assist all who qualify for their services. Millions more moderate-income Californians are ineligible for free legal aid yet they cannot afford to pay for lawyers.[10] Since 2000, the number of Californians living in poverty has increased by more than 25 percent from 6 million to over than 8 million, and the number of Californians over 65 has increased from 3.5 million to over 4.5 million.

The purpose of the State Bar's Center on Access to Justice ("Center") is to pursue access and ensure fairness for all in California's justice system. The Center does so by identifying and developing resources for legal services organizations; developing education and training programs for pro bono work; coordinating legal aid in the aftermath of disasters; administering California's Lawyer Referral Service certification program and bilingual hotline; and, working on a variety of public policy initiatives to promote access to justice including language access, supporting the representation of unaccompanied minors, and preparing advocates to represent veterans and clients with disabilities.

California, once a leader in civil legal services funding, is now out of step with states across the country. In 2015, at least 20 other states

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[10] The State Bar of California, *Civil Justice Strategies Task Force Report & Recommendations* (2015), at p. 7. <http://board.calbar.ca.gov/docs/AgendaItem/Public/agendaitem1000013042.pdf> [ as of Sept. 26, 2016].

provided more funding per eligible person than California. Local legal services organizations therefore rely on the State Bar to provide significant annual funding for their operations and to identify and develop additional resources to support their critical work. Working with the California Commission on Access to Justice and the Legal Aid Association of California, the State Bar recently helped to make millions of dollars of federal funding available for legal aid organizations to support their work with crime victims. The State Bar also played a critical role this year in helping to secure a 50 percent increase in the Equal Access Fund, which funds legal aid providers. The State Bar recently received and is administering over $45 million from the settlement of a lawsuit brought by the United States Department of Justice against two major financial institutions for mortgage fraud. The Legal Services Trust Fund, with the Center, is granting the funds to legal aid organizations for legal work they do related to community redevelopment and foreclosure prevention.

Last year, the State Bar brought together rural legal aid providers with a national rural fundraising expert to discuss best practices and innovative ways of increasing resources in rural communities. The State Bar also worked with legislative staff to identify a funding source for California's Public Interest Attorney Loan Repayment Program.

The Center hosts the Pathways to Justice Conference, the only statewide training event for California's access to justice community. The

Conference is attended by approximately 300 legal services lawyers, pro bono attorneys, court staff and judges, law professors, bar leaders, and other justice partners. In addition to protecting the public by increasing lawyer competency, the Center's trainings and coordination help save scarce resources for legal services programs.

Through the Center's Lawyer Referral Service website and bilingual hotline, the State Bar provides legal referral information to thousands of Californians each year. In 2015, over 45,000 people called the hotline, which directs individuals to certified lawyer referral services, legal aid programs, court-based self-help programs, and other legal resources available in the callers' local communities. The State Bar provides support and staffing for two active volunteer entities, the California Commission on Access to Justice, and the Standing Committee on the Delivery of Legal Services. In conjunction with these groups, the State Bar engages in wide-reaching initiatives that increase access to justice and protect the public.

A lack of adequate legal assistance can result in dire consequences, including a loss of income, housing, or educational opportunities; family instability; damage to physical or mental health; or physical violence or threats of violence.[11] Californians across the state need meaningful and

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[11] Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study (CNSS)* (Aug. 2014) American Bar Foundation <http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_sandefur_justice_in_the_

timely access to a functioning judicial system in order to resolve disputes and protect their rights. The lack of access to legal assistance may result in self-help criminal conduct, which victimizes other citizens and taxes the resources of law enforcement and the courts. The State Bar's access to justice activities are, thus, a matter of vital public protection.

10. California Commission on Access to Justice

The California Commission on Access to Justice ("Commission") was founded by the State Bar in 1997 as a collaborative effort among all branches of government and community leaders dedicated to finding long-term solutions to the chronic lack of legal assistance available for low-income, vulnerable Californians. The Commission's members are appointed by the California Supreme Court, the State Bar, the Governor's Office and the Legislature, among other entities.

The Commission has been instrumental in establishing the Equal Access Fund and creating or promoting other significant access initiatives, such as court self-help centers, language access in California courts, limited scope representation risk management materials, and modest means incubator projects. Through these activities, the State Bar has been able to assist in the protection of Californians across the state, including some of the state's most vulnerable residents and communities.

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contemporary_usa_final.pdf> [as of Sept. 26, 2016].

Recent highlights from the Center's work with the Commission include: unlocking significant new funding sources for legal aid organizations, reducing economic barriers to access justice; promoting full participation in trial and appellate courts for low and moderate income litigants, and encouraging new lawyers to serve low and moderate income clients.

The collaboration of the Center and the Commission provide a statewide infrastructure for protecting the public through expanded access to the courts and legal services. This is particularly important given the enormity of the justice gap and the size, scale, geographic, and racial, ethnic, and language diversity of the state.

11. California Young Lawyers Association

The California Young Lawyers Association ("CYLA") is the nation's largest association of young lawyers. Membership is mandatory for attorneys under the age of 35 or with fewer than five years in practice. CYLA's goal is to aid in the transition to practice of young attorneys and to support their service to the public. The work of CYLA encompasses legal training and education, improvement of the quality of legal services available to the people of California and pro bono opportunities. CYLA sponsors an annual symposium for its members and all California lawyers to obtain practical skills training and continuing legal education at reduced costs. In 2014, the State Bar Board of Trustees amended CYLA's charge to

include a CYLA member as an approved auditor of Minimum Continuing Legal Education providers on behalf of the State Bar. CYLA provides speakers and topics relevant to young lawyers at both the Solo & Small Firm Summit and the State Bar Annual Meeting. CYLA provides a monthly article for inclusion in the Calbar Journal and created the 10-Minute Mentor Program, which features an online collection of videos from leading lawyers in their area of expertise. Recently, CYLA has partnered with the Lawyer Assistance Program to provide assistance to lawyers who are grappling with stress, anxiety, depression or substance abuse.

12. The Office of Communications

The Office of Communications ("Communications") is responsible for ensuring that the general public and the legal community are informed about the State Bar's public protection role and knows how to access its services and resources. Communications is tasked with conveying critical information to Californians about how to protect themselves from attorney misconduct, including by filing complaints against attorneys with OCTC or seeking compensation for harm through the Client Security Fund. Communications also provides information about how to find a lawyer, including how low-income Californians can access legal services. Communications is at the center of the various areas of the State Bar's work to assist clients in obtaining legal assistance and advice. It is also in the process of updating the State Bar website and digital communications to be

fully accessible to people with disabilities and those with varying degrees of web access. Communications also provides important updates for attorneys licensed in California regarding rules and ethics guiding the profession, as well as ongoing education to improve competence.

### C. State Bar Reports and Implementation of Increased Public Protection Functions

Since the appointment of new State Bar leadership in September 2015, the focus of the organization has been on reform – on the State Bar's own initiative and on recommendations from legislatively mandated reports. In addition to regularly required performance and financial audits, on May 15, 2016, the State Bar obtained and submitted to the Legislature four reports in compliance with § 6140.16:[12] a workforce planning report

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[12] Section 6140.16 provides as follows:
(a) To align its staffing with its mission to protect the public as provided in Section 6001.1 and to provide guidance to the State Bar and the Legislature in allocating resources, the State Bar shall develop and implement a workforce plan for its discipline system and conduct a public sector compensation and benefits study. The workforce plan and compensation study shall be used to reassess the numbers and classifications of staff required to conduct the activities of the State Bar's disciplinary activities.
(b) The workforce planning shall include the development and recommendation of an appropriate backlog goal, an assessment of the staffing needed to achieve that goal while ensuring that the discipline process is not compromised, and the creation of policies and procedures sufficient to provide adequate guidance to the staff of each unit within the discipline system.
(c) In addition to the requirements in subdivisions (a) and (b), the State Bar shall conduct a thorough analysis of its priorities and necessary operating costs and develop a spending plan, which includes its fund balances, to determine a reasonable amount for the annual membership fee that reflects its actual or known costs and those to implement its workforce plan.

by the National Center for State Courts analyzing the State Bar's discipline system;[13] a public sector compensation and benefits report;[14] a backlog standard report;[15] and a spending plan that outlines the resources needed to implement workforce planning and backlog standard recommendations.[16] Also, pursuant to § 6001.2, in August 2016, the State Bar issued the Governance in the Public Interest Taskforce Report,[17] after holding a series of public meetings beginning in December 2015. This report also provides recommendations for reform of the State Bar.

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(d) The State Bar shall submit a report on its workforce plan and spending plan to the Legislature by May 15, 2016, so that the plans can be reviewed in conjunction with the bill that would authorize the imposition of the State Bar's membership fee. The report shall be submitted in compliance with Section 9795 of the Government Code. The State Bar shall complete and implement its workforce plan by December 31, 2016.

[13] National Center for State Courts, *State Bar of California Workforce Planning* (May 10, 2016) < http://www.calbar.ca.gov/AboutUs/Reports.aspx> [as of Sept. 26, 2016]. (State Bar Appendix A.)

[14] Engelmann, *Total Compensation Study, The State Bar of California, Office of the Chief Trial Counsel, Phase I* (May 10, 2016) CPS HR Consulting <http://www.calbar.ca.gov/AboutUs/Reports.aspx> [as of Sept. 26, 2016].

[15] The State Bar of California, *State Bar Backlog* (May 13, 2016) <http://www.calbar.ca.gov/AboutUs/Reports.aspx> [as of Sept. 26, 2016]. (State Bar Appendix B.)

[16] The State Bar of California, *Spending Plan* (May 13, 2016) <http://www.calbar.ca.gov/AboutUs/Reports.aspx> [as of Sept. 26, 2016]. (State Bar Appendix C.)

[17] The State Bar of California, *Governance in the Public Interest Task Force Report* (Aug. 2016) <http://www.calbar.ca.gov/AboutUs/Reports.aspx> [as of Sept. 26, 2016].

The State Bar has already begun implementing reforms. For example, in February 2016, the Board of Trustees adopted a proposed $146.1 million 2016 budget reflecting a 6.2 percent reduction from the 2015 budget.[18] It initiated the acquisition of a new case management system for OCTC, the State Bar Court and the Office of Probation. The State Bar has embraced transparency through robust implementation of systems to comply with the California Public Records and Bagley-Keene Open Meeting Acts, including the webcasting of Board of Trustees meetings. The Board of Trustees has adopted, among others, report recommendations to reform the State Bar's spending practices, clarify the State Bar's public protection mission, review the Board's governance structure and implement workforce planning, which involves wholesale restructuring of the State Bar discipline system.

## III. STATE BAR SPECIAL REGULATORY ASSESSMENTS

### A. 1998 Request for Special Regulatory Assessment

In 1998, the State Bar requested a special assessment from this Court after then Governor Pete Wilson vetoed Senate Bill No. 1145 during the 1997-1998 Regular Session, which would have authorized the State Bar to

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[18] The State Bar of California, *2017 Proposed Final Budget* (Feb. 12, 2016), at p. 1. <http://www.calbar.ca.gov/ AboutUs/Reports.aspx> [as of Sept. 26, 2016]. (State Bar Appendix D.)

collect mandatory basic fees from active members.[19] In its decision in *In re Attorney Discipline System*, the Court established two important principles relevant to the State Bar's current request. First, the power to regulate the practice of law, including the power to admit and to discipline attorneys, is *among* the inherent powers of the Supreme Court. (*In re Attorney Discipline System, supra,* 19 Cal.4th 582, 592; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48.) This Court explained: "The important difference between regulation of the legal profession and regulation of other professions is this: Admission to the bar is a *judicial function,* and members of the bar are *officers of the court,* subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and *primary regulatory power.*" (*In re Attorney Discipline System, supra,* 19 Cal.4th 582, 593, quoting 1 Witkin Cal Procedure (4th ed. 1996) Attorneys, § 356, p. 438 [original italics].)

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[19] In *In re Attorney Discipline System, supra*, 19 Cal.4th 586, the State Bar requested and this Court granted only the portion of the basic fees and collateral amounts that supported the disciplinary functions and administration of the admissions functions. The discipline functions for which an assessment was ordered in 1998 were: OCTC, the State Bar Court, Members Records, OPC, Office of Probation, Fee Arbitration and OGC's support of the discipline functions.

In its September 1998 request for a special regulatory assessment, the State Bar sought only 65 percent of the funding that it had requested of the Court in June 1998. The State Bar's understanding is that this partial amount was the calculated need at that time when almost the entire workforce had been laid off and operating costs were lower. At any rate, those conditions do not inform the present request by which the State Bar wishes to avoid layoffs and operate for the full year in 2017.

Second, the inherent authority extends to the power to impose fees to fund an attorney discipline system within the State Bar without violating the separation of powers between the judiciary and the legislature or other constitutional prohibition. This Court stated: (*In re Attorney Discipline System, supra*, 19 Cal.4th 582, 606, quoting *In re Lavine* (1935) 2 Cal.2d 324, 328) "In exercising our disciplinary powers over attorneys, we 'may demand more than the legislature has required' in its regulation of the same area."

### B. The Court's Authority to Grant the State Bar's 2017 Request for Special Regulatory Assessment

In its September 8, 2016, letter this Court directs the State Bar to "submit a request to the court for an interim Special Regulatory Assessment to fund the Bar's discipline system until such time as legislation is enacted that provides for its funding." The letter recognizes that not only discipline and admissions are within its inherent authority. "It has long been established that the Supreme Court of California possesses the inherent constitutional power to regulate the practice of law, which *includes* the power to admit and to discipline attorneys." (Emphasis added.) In its letter, the Court refers to a *functioning* discipline system. "The court's principal concern in disciplinary proceedings is protection of the public and preservation of confidence in the legal profession, interests served by

maintaining the highest possible professional standards for attorneys. [Citations.]" (*Baker v. State Bar* (1989) 49 Cal.3d 804, 822.)

After the 1998 assessment, the 2012 legislative enactment that became section 6001.1 introduced for the first time a broader "public protection" charge. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 163 (2011-2012 Reg. Sess.) as amended Sept. 2, 2011, p. 1.) Public protection must "include three core elements: reactive, proactive, and activities that contribute to the effective functioning of the legal system and the diversity of the profession."[20]

Reactive public protection includes the State Bar's discipline functions. Proactive public protection includes public outreach and programs that provide attorney education, and are also within the Court's inherent authority. (See Cal. Rules of Court, rule 9.31; *Warden v. State Bar* (1999) 21 Cal.4th 628, 653 [dissent opn. Kennard, J.].) Public protection activities that contribute to the effective functioning of the legal system include JNE, by ensuring high quality judicial appointees (see *Hoffman v. State Bar of California* (2003) 113 Cal.App.4th 630, 635), and the Center and Commission, by ensuring the public's access to legal services. (See *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45). Pro bono work, which is expected of attorneys (§ 6073; *In re Glass* (2014) 58 Cal.4th

[20] The State Bar of California, *Governance in the Public Interest Task Force Report* (Aug. 2016), at p. 17. <http://www.calbar.ca.gov/AboutUs/Reports.aspx> [as of Sept. 26, 2016].

500, 526), is promoted by programs such as CYLA. The public outreach and communications with members of the bar handled by Communications contribute to the effective functioning of the legal system and thus fall within the public protection mission of the State Bar.

### C. Options For a Special Regulatory Assessment to Fund the State Bar in 2017

Section 6140 authorizes an annual membership fee for active members of the State Bar at a sum not to exceed $315.[21] In the current absence of a State Bar fee bill, this section is repealed on January 1, 2017. The $315 basic amount has not been increased since 2007. (Assem. Bill 1529 (2005 -2006 Reg. Sess.) § 2.). Independent of a fee bill or judicial order for active member dues, the State Bar may collect only certain other mandatory and voluntary amounts.[22] State Bar Appendix E is a copy of the sample 2016 State Bar fee statement.

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[21] Currently, there are two opt-outs from this amount: $5 for Legislative Activities (§ 6140.05) and $5 for Elimination of Bias/Bar Relations. (*Keller v. State Bar of California, supra,* 496 U.S.1; *Brosterhous v. State Bar* (1995) 12 Cal.4th 315.

[22] These amounts are:

- Annual membership fees for inactive members in an amount not exceeding $75 (§ 6141);
- Client Security Fund mandatory fee of $40 for active members and $10 for inactive members (§ 6140.55; *In re Attorney Discipline System, supra,* 19 Cal.4th 582, 617, 623);
- Lawyer Assistance Program mandatory fee of $10 for active members and $5 for inactive members (§ 6140.9);
- Costs of the disciplinary system mandatory fees in an amount not to exceed $25 for active and inactive members (§ 6140.6; *In re Attorney*

The following table entitled "Assessment Options" sets forth a summary of options for the Court to consider in determining the level of an Assessment for the State Bar's operations in 2017. A brief description of the components of these options is set forth below the table. State Bar Appendix F, attached to the Declaration of State Bar Chief Operating Officer Leah Wilson, provides a detailed review of the State Bar budget as related to the mandatory fee assessment, including revenues and expenses, as well as a full overview of the methodology used to develop the Assessment Option figures.

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*Discipline System, supra,* 19 Cal.4th 582, 623);

- Costs assessed against disciplined members (§ 6140.7);
- Administrative penalties and reasonable costs assessed for failure to comply with a binding mandatory fee arbitration award, judgment or agreement (§ 6203, subd. (d)(3));
- Certified Legal Specialist fees (Cal. Rules of Court, rule 9.35);
- Voluntary recommended donation of $75 to the California Bar Foundation (Board Resolution, September 13, 2014);
- Voluntary contribution of $100 to support nonprofit organizations that provide free legal services to persons of limited means (§ 6033);
- Voluntary fee of $40 for legal services assistance (§ 6140.03);
- Voluntary sections fees (§ 6031.5, subd. (b));
- Voluntary donations on behalf of the Conference of Delegates of California Bar Associations (§ 6031.5, subd. (c)); and
- Voluntary fees on behalf of and for the purpose of funding the California Supreme Court Historical Society (§ 6032).

## ASSESSMENT OPTIONS

| | Discipline Functions | | | Public Protection Functions | | |
|---|---|---|---|---|---|---|
| **Base Cost Per Member** | | | $280 | | | $305 |
| | | | | | | |
| **Possible Add-Ons** | | | | | | |
| Implement Workforce Planning Only | | | $9 | | | $9 |
| Implement Backlog Reduction *Only* | to 180 days | to 197 days | to 243 days | to 180 days | to 197 days | to 243 days |
| | $53 | $46 | $26 | $53 | $46 | $26 |
| Implement Workforce Planning **AND** Backlog Reduction | To 180 Days | to 197 days | to 243 days | to 180 days | to 197 days | to 243 days |
| | $56 | $48 | $28 | $56 | $48 | $28 |
| Appointment of Monitor | | | $2.50 | | | $2.50 |
| | | | | | | |
| **Adjustments for Opt-Outs** | | | | | | |
| Legislative Activities | | | $5 | | | $5 |
| Elimination of Bias and Bar Relations | | | $5 | | | $5 |
| **CPM Range** | | | **$280-$348.50** | | | **$305-$373.50** |

*Base Cost Per Member*: Amounts reflect the level of funding needed to support Discipline or Public Protection programs to maintain the status quo. Figures in this row reflect an offset of non-mandatory member fee revenue that can be used to support discipline or public protection functions.

*Implement Workforce Planning Only*: Statutorily mandated workforce planning was completed in May 2016. (State Bar Appendix A.) Implementing Workforce Planning recommendations for OCTC alone will require an additional $9 per active member. This funding will be used to increase OCTC personnel.

*Implement Backlog Reduction Only*: A statutorily mandated Backlog Report was completed in May, 2016. (State Bar Appendix B.) That report identifies the number of additional staff needed to achieve various case processing timeline goals including the current statutory target of 180 days, and feasible and enhanced goals of 243 and 197 days respectively. Additional per-member assessments ranging from $26 to $56 are needed to achieve backlog reduction goals; funding will be used to increase OCTC personnel.

*Implement Workforce Planning and Backlog Reduction*: Economies of scale are realized by addressing both workforce planning and backlog reduction recommendations. Additional funding needed to implement both ranges from $28 to $56 per member.

*Appoint Monitor*: The State Bar estimates the cost of an individual to monitor and report on the State Bar's progress in reforming its discipline system to be $450,000 annually. This translates to a per-member cost of $2.50.

*Adjust for Legislative Activities Opt-Out*: Section 6140.05 provides for a $5 deduction from the mandatory fee set forth in § 6140, subd. (a) for Legislative Activities. A $5 increase to the per-member Assessment established by the Court is needed to account for this deduction.

*Adjust for Elimination of Bias and Bar Relations Opt-Out*: Board of Trustees' action in 2001 established an additional $5 deduction from the mandatory fee set forth in § 6140, subd. (a) to support the State Bar's work to increase diversity in the legal profession and judiciary, and ensure strong connections with local and affinity bar associations. A $5 increase to the per-member Assessment established by the Court is needed to account for this deduction.

## IV. PAST IS PROLOGUE: WITHOUT A COURT-ORDERED SPECIAL REGULATORY ASSESSMENT, PUBLIC PROTECTION IS THREATENED

Without a Court-ordered assessment for 2017, the State Bar will not be able to collect mandatory active member dues and the present operations of the State Bar will cease. The conditions and experiences of the State Bar after the 1997 failure of the Legislature to enact a fee bill are instructive. At the beginning of 1998, there were approximately 700 employees of the State Bar. In the first quarter of that year, the State Bar laid off 6.4 percent of its employees and issued 60-day notices to nearly 75 percent of its remaining work force.[23] Sixty employees voluntarily resigned. The projected layoffs became effective on or about June 26, 1998.

[23] Many of the employees who were not laid off remained employed because their positions were user-funded. This, for example, included the Office of Admissions, which is funded by applicants to the bar examinations.

The staff of OCTC shrunk from 285 to 20 employees. Work was suspended on 4,459 open investigations. The Bar closed its consumer complaint hotline and, at the Court's request, informed potential complainants to submit written complaints that would be processed when the Bar was again able to do so. By December 1998, total pending complaints exceeded the 1985 backlog that had generated widespread criticism. The State Bar Court laid off 45 of its 52 employees and suspended proceedings in all but a few egregious matters. The State Bar Court judges worked for less than full salary. Because no employees remained, Fee Arbitration stopped enforcing arbitration awards. The Office of Probation was reduced to one employee. The Ethics Hotline shut down. Member Records was reduced from 25 to 8 employees. The State Bar terminated many contracts and leases.

Each day of legislative impasse reduced the ability of the State Bar to recall or rehire employees. Many found other jobs, making permanent the loss of some of the State Bar's highly trained and most experienced staff. Fewer than 25 percent of attorneys paid dues voluntarily. After the funding was finally restored, it took approximately two years before the State Bar was able to function in full. (*In re Attorney Discipline System, supra,* 19 Cal.4th 582, 614.)

Without a Court-ordered assessment of fees for 2017, the past will most certainly be prologue. The State Bar would need to begin issuing layoff notices by January 31, 2016, with an expected significant reduction in staff to occur by April 1. The State Bar would be required to provide significant severance pay and other required benefits to laid-off employees. Without an assessment, the State Bar's bank loans on its real property may default and divert the majority of its reserves to paying off the loans, thereby reducing the funds available for State Bar operations.

## V. CONCLUSION

In 1998, consistent with its inherent authority to regulate the legal profession, this Court promulgated a rule that ordered an assessment of California attorneys for the State Bar's discipline system after the Governor vetoed a legislative fee bill. After the Court's ruling, the Legislature in 2012 enacted section 6001.1, which contained for the first time a public protection charge. As such, the State Bar's primary role is to support broader public protection, a definition that includes both reactive and proactive functions as well as contributions to the effective functioning of the legal system. With this role in mind, the State Bar has begun to implement various reforms – some self-initiated and others the product of legislatively mandated study and recommendation - with the funding available to it by statute.

After substantial negotiations by and between both houses of the Legislature, as well as the involvement of various stakeholders, including the active engagement of the Chief Justice of this Court, the 2015-2016 Regular Legislative Session ended without a fee bill that would enable the State Bar to continue its public protection functions throughout 2017. In light of the legislative impasse, the predicted impairment of the State Bar's ability to maintain its public protection functions, and the inevitable harm to the public, judicial intervention is necessary to grant the requested relief at this time. While this Court has traditionally respected the Legislature's role in regulating the admission and discipline of attorneys, it retains its ultimate constitutional power in this area. There is clear legal authority for the Court to grant the State Bar's request for an Assessment to fund fully the State Bar's regulatory functions. The State Bar has analyzed the operational and financial characteristics of its various public protection functions to enable the Court the make an informed choice in considering the State Bar's request for an Assessment of its members.

The State Bar asks this Court to act expeditiously to prevent a recurrence of the conditions that took place in 1998 when, in the absence of a legislatively authorized fee, the State Bar virtually ceased to operate. In explaining its adoption then of a rule imposing an assessment on active members, the Court stated: "Our action today is intended to respond to an unprecedented emergency threatening the protection of the public, the

integrity of the legal profession, and the interests of the courts. In short, the administration of justice is at risk." (*In re Attorney Discipline System, supra,* 19 Cal.4th 582, 625.)

Dated: September 30, 2016

Respectfully submitted,

VANESSA L. HOLTON
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