AGENDA ITEM

<u>JULY</u> 113
Proposed Pursuit Policy for Collection of Court-Ordered Disciplinary Costs and Client Security Fund Obligations

DATE: June 29, 2007

TO: Board Committee on Operations
Members of the Board of Governors

FROM: Marie M. Moffat, General Counsel
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RE: Proposed Pursuit Policy for Collection of Disciplinary Costs and Client Security Fund Obligations

Executive Summary

In April 2007, the Supreme Court amended the California Rules of Court to set forth the procedure for the State Bar to obtain money judgments in the Superior Courts to enforce court-ordered disciplinary cost and Client Security Fund restitution obligations under statutory amendments enacted in Statutes of 2004, Chapter 334. The California State Auditor's 2007 report on the State Bar also included a recommendation that in its enforcing disciplinary obligations under the new procedures that the State Bar adopt and implement a "policy for pursuing debtors." In this item, Staff now seeks the Board of Governors' approval of a pursuit policy to efficiently direct the State Bar's limited resources in seeking judgments against those Respondents with existing obligations and going forward.

BACKGROUND:

Effective January 1, 2004, the State Bar obtained statutory amendments to the Business and Professions Code that allow the State Bar to enforce court-ordered disciplinary cost and Client Security Fund restitution obligations as money judgments. In order to implement the legislation, it was necessary to seek approval of an amendment to California Rule of Court 9.23. In April 2007, the Supreme Court amended the California Rules of Court to set forth the procedure for obtaining these money judgments in the Superior Courts. In the California State Auditors biennial audit of the State Bar (Bus. & Prof. Code, § 6145, subd. (b)), the final report issued on April 26, 2007, included a review of the State Bar's efforts to implement the statutory amendments and a recommendation that the State Bar adopt a "policy for pursing debtors." (California State Auditor Report 2007-030, pp. 26-28, 30.)

The State Bar now seeks to establish a Pursuit Policy to efficiently direct the State Bar's use of its resources in seeking judgments against Respondents to enforce these existing and future obligations imposed in disciplinary proceedings.

Disciplinary Cost Obligations

Business and Professions Code section 6086.10, subdivision (a), provides that final Supreme Court disciplinary orders or orders accepting a resignation with disciplinary charges pending shall include a direction that the member pay costs. This subdivision also requires that costs be awarded in any State Bar Court order imposing a public reproval on a member. Before January 1, 2004, these disciplinary costs were collected either by adding the assessed costs to the member's annual membership fee or as a condition of the member's reinstatement to active membership. (Bus. & Prof. Code, § 6140.7.) Statutes 2003, chapter 334, section 4, amended Business and Professions Code section 6086.10, subdivision (a), to provide: "An order pursuant to this subdivision is enforceable both as provided in Section 6140.7 and as a money judgment."

Client Security Fund Obligations

Similarly, Business and Professions Code section 6140.5, subdivision (d), requires an attorney whose misconduct has caused the payment of funds to a claimant from the State Bar's Client Security Fund (CSF) to "reimburse the fund for all moneys paid out."[1] Before January 1, 2004, the amount of restitution—like the disciplinary costs—was either added to the attorney's annual membership fee or paid as a condition of reinstatement of membership. (Bus. & Prof. Code, § 6140.5, subd. (c).) The law now provides that this assessment "may also be enforced as a money judgment" if it has been included in any final order of the Supreme Court imposing discipline or accepting a resignation with disciplinary charges pending or in any State Bar Court order imposing a public reproval on the member. (Bus. & Prof. Code, § 6140.5, added Stat. 2003, ch. 334, § 7.)

Rule of Court, Rule 9.23 - Procedure for Obtaining Money Judgments

Following the amendments to the Business and Professions Code, the State Bar sought amendments to the Rules of Court to set forth the procedure and venue for filing these judgments. In April 2007, the Supreme Court adopted Rule of Court, Rule 9.23 (hereinafter "Rule 9.23"). Rule 9.23, subd. (b) provides that the State Bar may present certified copies of a final disciplinary order, certificate of costs and a record of the Client Security Fund payment to the clerk of any Superior Court to obtain an immediate judgment. Subdivision (c) provides that motions for compromise of these judgments

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[1] Business and Professions Code section 6140.5 requires the State Bar to establish and administer the CSF, which is funded by an assessment paid by California attorneys as part of the annual bar membership fee, to compensate clients injured by the misconduct of members of the legal profession. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 555 [216 Cal.Rptr. 367, 702 P.2d 525].)

must be heard in the State Bar Court. Often, in the case of attorneys who are suspended from the practice of law, assessments of disciplinary costs are broken down into three or more yearly payment obligations as a condition of continued practice. The State Bar Court allows other payment plans or relief as it deems appropriate (Bus. & Prof. Code, § 6086.10, subd. (c); Rules Proc. State Bar, rule 282) and Rule 9.23 confirms that after a judgment has been filed in the superior court, it is the State Bar Court that is the appropriate venue for seeking approvals of any compromise to the obligations that a Respondent must pay.

<u>2004 to Present - Pilot Program and Due Diligence Preparations</u>

While awaiting the adoption of this Rule of Court, and at the recommendation of the State Auditor, the State Bar began preparing for the effectuation of this program. The Office of General Counsel instituted a Pilot Program, consisting of the Top 100 discipline debtors and those who incurred discipline obligations in 2003 and 2004. OGC collected the financial data, and, with the assistance of the Finance Department, audited and reconciled the electronic data with that contained in the certified Supreme and State Bar Court orders and CSF documents.[2] OGC sent demand letters to 541 attorneys as part of the Pilot Program. When 40% of the letters were returned as undeliverable, OGC applied and obtained authorization from the Department of Motor Vehicles to obtain otherwise confidential address information. Using this information, new letters were sent out and the Bar obtained voluntary compliance in the amount of $111,504.34.

During this time, the State Bar also researched analogous procedures used by other regulatory bodies. The State Bar met with representatives of the Administrative Office of the Courts and the Los Angeles and San Francisco Superior Courts. The net result of these efforts was the cooperative development and approval of procedures and forms of judgment to be used in the implementation of the statutory authority once the Rule of Court was approved. The results of OGC's pilot project, consisting of data verification, document collection and work-ups for the Top 100 discipline debtors, resulted in some recommendations for modification to the forms, as did the final language of the Rule of Court. These non-substantive changes to the form of judgment are still pending before the Los Angeles County Superior Court Clerk's Executive Committee, but have been approved for use in the San Francisco Superior Court.

OGC also met with representatives of the Administrative Office of the Courts (AOC) regarding its Court-Ordered Debt Collection Program and worked out an agreement to allow the State Bar to participate in the AOC's Request for Proposal process and, additionally, to include the State Bar's specific collection requirements its next RFP.

Further, OGC planned a meeting with several collection agencies to determine whether their services could meet the State Bar's business needs.

Following the April 2007 adoption of the Rule of Court, the State Bar began filing judgments in the San Francisco County Superior Court on June 8, 2007. This effort will

[2] Based on the difficulties with this process, OGC recommended that IT develop a new system for housing, compiling and recalling this financial data, which is currently in development.

continue in earnest upon completion of the State Bar's Cost Recovery (CR) module, currently in development by the State Bar's Department of Information & Technology. The module will create, for the first time, a single repository for all disciplinary cost and Client Security Fund information, and will create a place to store new financial data resulting from the State Bar's collections efforts and money judgment enforcement.

DISCUSSION

Overview of State Bar Debt

The State Bar may enforce, as money judgments, debts up to ten years old. Nearly $19 million of the State Bar's total debt is beyond this statute of limitations. The State Bar's disciplinary cost debt, as accumulated over the past ten years is $8,172,449. Client Security Fund payouts over the past ten years totaled $48,435,978. It should be noted that, in the past, the State Bar Court rarely imposed a Client Security Fund obligation in orders accepting resignations or imposing disbarment on an attorney. In fact, of the existing Client Security Fund debt obligations, only 2-3% (between $968,720 - $1,453,079) have an associated disciplinary order that allows for immediate judgment. Therefore, approximately 97-98% of all existing Client Security Fund obligations may not be enforced as money judgments under the statutory scheme. In order to collect on the majority of these Client Security Fund obligations, the State Bar is required to file a subrogation lawsuit under Business and Professions Code 6140.5, subd. (b) and obtain a judgment via traditional civil litigation processes. Conversely, virtually all disciplinary orders have an associated cost obligation. Only private reprovals, and Agreements in Lieu of Discipline (which are not considered discipline), do not impose costs.

Proposed Pursuit Policy

The proposed Pursuit Policy, attached hereto in its entirety as Exhibit 1, excludes from collection, as "Do Not Pursue" for any of the following:

1) The debtor is making timely payments under an approved payment plan;
2) The debt has been discharged in bankruptcy between May 10, 2001 and January 1, 2004;[3]
3) The debtor is deceased with no assets;
4) The projected costs exceed the likely recovery; or
5) Other good cause as determined by the General Counsel.

Under the proposed policy, other debts, not falling within the above guidelines, would be pursued based upon their age and amount, with thresholds set at ten years or $500. Old or small debts - more than ten years old or less than $500 - would be sent to collection agencies. New or large debts - less than ten years old or more than $500 -

[3] This is the period following the date of the decision *In Re Taggart*, 249 F.3d 987 (9th Cir. 2000), finding that discipline costs were dischargeable in bankruptcy because the California Legislature did not intend the costs to be sanctions and the effective date of the clarifying amendment in Assembly Bill No. 1708 (2003-2004 Regular Session) overruling *Taggart*. *In Re Finley*, 2007 WL 1231621 (Bkrtcy.N.D.Cal.), ***3-*4**.

would be pursued by docketing of the judgment and recording of abstracts of judgments. Where there is a valid address available for a respondent and assets can be located, additional steps will be taken to enforce the judgment based on a case-by-case cost-benefit analysis.

This proposed Pursuit Policy further acknowledges the State Bar Court's authority to approve compromises the judgments under Rule 292 of the Rules of Procedure of the State Bar and Rule 9.23.

Because the Pursuit Policy is intended to establish guidelines for the Office of General Counsel to manage the filing of judgments, it is exempt from the requirements of public comment as an internal management document. Rules for Public Comment § 3(a).

FISCAL AND PERSONNEL IMPACT:

The Office of General Counsel has estimated a budget requirement for 2007 of $145,884 for non-personnel litigation costs to enforce court-ordered discipline costs and Client Security Fund obligations as money judgments.

BOARD BOOK/ADMINISTRATIVE MANUAL UPDATE:

The Pursuit Policy, if adopted, would be appropriate for inclusion as a new section in the Board Book, under Tab 18 – Staffing – Section 7.5 [NEW] – Pursuit Policy for Court-Ordered Discipline Costs and Client Security Fund Obligations.

RULE AMENDMENTS:

None.

PROPOSED BOARD RECOMMENDATON:

Should the Board Committee on Operations agree with the propose recommendation, the following resolution would be in order:

> **RESOLVED** that the Board Committee on Operations recommends that the Board of Governors adopt a formal Pursuit Policy for court-ordered disciplinary cost and Client Security Fund obligations, in the form attached hereto.

Should the Board agree with the propose recommendation, the following resolution would be in order:

> **RESOLVED** that the Board of Governors hereby adopts a formal Pursuit Policy for court-ordered disciplinary cost and Client Security Fund obligations, in the form attached hereto.