

AGENDA ITEM

MAY 162
Immediate Action Items

DATE: May 13, 2009

TO: Members, Board of Governors
Members, Board Committee on Stakeholder Relations

FROM: Anthony Williams, State Bar Legislative Representative

SUBJECT: Immediate Action Items – AB 48, AB 484, AB 590, AB 663, AB 764, AB 984, SB 94, SB 377

EXECUTIVE SUMMARY

The State Bar's Office of Governmental Affairs has identified several bills introduced in the California Legislature in 2009 that are of potential interest to the State Bar. These bills all have been amended since the last Board meeting, several of them very recently. This is therefore the first Board meeting that provides an opportunity to address these bills. In addition, the bills will receive final consideration by the Legislature before the next Board meeting, so they need to be considered as back-to-back items at this Board meeting. The State Bar's Office of Governmental Affairs has reviewed the bills and proposes that the Board Committee on Stakeholders Relations recommend that the full Board of Governors take the positions shown below on the bills in question. Questions regarding this agenda item should be directed to Anthony Williams, State Bar Legislative Representative at (916) 448-4000 or Saul Bercovitch, Legislative Counsel at (415) 538-2306.

BACKGROUND

The State Bar's Office of Governmental Affairs has identified eight bills recently amended in the California Legislature in 2009 that are of potential interest to the State Bar. All of the bills relate directly to the State Bar and/or attorney ethical practices. The State Bar's Office of Governmental Affairs has reviewed these bills, and proposes that the Board Committee on Stakeholders Relations recommend that the full Board of Governors take the positions on the bills as described in detail below.

1. [AB 48 \(Portantino\)](#) (As amended 4/02/09) -- Bureau for Private Postsecondary Education.

Status: Assembly Appropriations

Description: AB 48 would express the intent of the Legislature to enact legislation to re-establish a Bureau of Private Postsecondary Education, encourage the Department of Consumer Affairs to fulfill the Bureau's investigative and informational role during the interim period, and continue the existence of the Private Postsecondary and Vocational Education Administration Fund under the administration of the Department of Consumer Affairs. The bill has sections that exempt the State Bar of California and legal education institutions from its scope.

The section that proposes to exempt legal education institutions that are either accredited or overseen by the Committee of Bar Examiners provides as follows:

A law school or institution that solely offers education programs in law leading to a Juris Doctor (J.D.) degree, Bachelor of Laws (LL.B.) degree, or other law study degree that is regulated by the Committee of Bar Examiners pursuant to Section 6046.7 of the Business and Professions Code.

However, this language does not also exempt from the provisions of the bill those unaccredited law schools that are currently overseen by the Committee of Bar Examiners pursuant to B&P Section 6060.7. Without this exemption, there would be duplicative and unclear oversight by both the Committee and the Bureau created by AB 48. Specifically, State Bar Office of Admissions staff suggests that the exemption language be revised to the following:

Law schools and law study programs subject to the approval, regulation and oversight of the Committee of Bar Examiners pursuant to Sections 6046.7 and 6060.7(b) of the Business and Professions Code.

Recommendation: **Neutral with amendments** to revise the exemption provisions as indicated above.

2. [AB 484 \(Eng\)](#) (As amended 4/20/09) – Franchise Tax Board: professional or occupational licenses.

Status: Assembly Business and Professions Committee

Description: AB 484 would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes. Under the measure the State Bar must provide the Franchise Tax Board (FTB) with the name, and SSN or

federal taxpayer identification number of each bar member. If any member has failed to pay taxes, the FTB will mail a preliminary notice to the member, indicating a possible suspension of their license if they do not cure. Failure to pay unpaid taxes prior to the date certain results in automatic suspension of the member's license.¹ The FTB will mail notice of the suspension to the State Bar and the licensee. Compliance with the member's tax obligation cancels the suspension. FTB may defer or cancel any suspension based on a financial hardship hearing.

As currently written, AB 484 will create a separation of powers issue in its application to lawyers, since the FTB—an executive branch agency—will have the authority to suspend the licenses of members of the State Bar—a judicial branch agency operating under the inherent authority of the Supreme Court. The Supreme Court discussed the Court's role in disciplining attorneys in *In re Attorney Discipline System*, 19 Cal.4th 582 (1988). The court concluded that:

The power to regulate the practice of law, including the power to admit and to discipline attorneys, is among the inherent powers of the courts (Cal. Const., art. VI, § 1). Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. This is necessarily so. An attorney is an officer of the court, and whether a person shall be admitted or disciplined is a judicial, not a legislative, question. The important difference between regulation of the legal profession and regulation of other professions is that 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...

The California Supreme Court has respected the exercise by the Legislature, under the police power, of a reasonable degree of regulation of the legal profession and practice of law in this state. This pragmatic approach is grounded in the Supreme Court's recognition that the separation of powers principle does not command a hermetic sealing off of the three branches of government from one another. In the field of attorney-client conduct, the judiciary and the Legislature are in some sense partners in regulation. Legislative regulation of matters related to the admission and discipline of attorneys is neither exclusive nor final, however. Legislative regulations regarding the qualifications of attorneys are, at best, but minimum standards unless the courts themselves are satisfied that such qualifications are sufficient. In other words, the courts in the exercise of their inherent power may demand more than the Legislature has required. It is the court and not the Legislature that is the final policymaker.

1 Proposed Revenue and Taxation Code section 19265(B)(3), in part, provides: "If any licensee subject to paragraph (2) fails to pay the unpaid taxes or to enter into an installment payment agreement, as described in Section 19008, to satisfy the unpaid taxes prior to the date certain provided in the preliminary notice of suspension, his or her license shall be **automatically suspended by operation of this section**, . . ." (Emphasis added.)

In allowing the FTB to discipline attorneys, the Legislature would be making a fundamental policy decision that a lawyer's failure to pay income tax necessarily means that the lawyer is unfit to practice law and needs to be disciplined in order to protect the public. Although the primacy of the Supreme Court's regulation of attorneys permits a reasonable degree of legislative regulation, there is existing Supreme Court precedent on the specific issue of a lawyer's failure to pay taxes. For example, in *In re Fahey* (1973) 8 Cal.3d 842, the Supreme Court exonerated an attorney from disciplinary charges that were based on a criminal conviction for willful failure to pay federal income taxes for three years. In so finding, the court said, "[c]learly we do not condone respondent's income tax delinquencies. His conduct has demeaned not only himself but also the high profession which he serves. We hold, however, that under the circumstances of this case such conduct does not constitute moral turpitude and so does not "characterize him as un-suitable to practice law." (*Fahey* at p. 854.) Thus, rather than the policy of automatic suspension contemplated by the proposed legislation, the existing Judicial Branch approach is to consider the facts and circumstances of an individual lawyer's failure to pay taxes.

Finally, while California would not be the first state to impose automatic attorney discipline for a failure to pay taxes, other states conform to the policy of allowing their respective state Supreme Court to execute the disciplinary action.²

Unlike Section 17520 of the Family Code, which requires the State Bar to suspend the licenses of those not in compliance with a child support order, AB 484 will allow the FTB to usurp the power of the Judiciary in the licensure of the State Bar members. The proposed Bill differs significantly in its operation from Section 17520 of the Family Code related to child support enforcement. Under this Section, the Department of Child Support Services (DCSS) circulates a consolidated certified list of persons not in compliance with a child support order. The State Bar then determines whether an applicant for issuance or renewal of a license is on the most recent list. If the applicant or member appears on the list, the Bar has the authority to withhold issuance or renewal, and the Bar is responsible for issuing notice to the member of their noncompliance. The Bar is also permitted to issue notice to any member who appears on a supplemental list, which contains persons who have been out of compliance with their child support orders for more than four months. The Bar can suspend members on the supplemental list if they fail to comply within 150 days of the notice.

A program targeting members who are non-compliant with tax obligations could operate in a similar fashion and likely avoid the constitutional defect in the current version of AB 484 as such a revision arguably preserves the primacy of the Supreme Court at least in regards to the operational aspects of implementing the Legislature's automatic

² Missouri Supreme Court Rule 5.245 allows the director of revenue to report delinquent taxpayers to the clerk of the Supreme Court. The clerk then notifies the lawyer that their license is subject to automatic suspension unless the matter is resolved within 30 days of the notice.

Texas Tax Code § 191.1441 requires that each attorney pay a \$200 per year tax to practice law, which is collected by the Texas Supreme Court. Failure to pay the tax within 90 days of the date it is due results in suspension by the Supreme Court.

suspension policy. However, in initial discussions with the AB 484's author, it does not appear that they would be willing to amend the bill to conform it to that process.

Recommendation: **Oppose unless amended** to delete attorneys from the bill's application or conform the process to what is currently used for child support enforcement.

3. [AB 590 \(Feuer\)](#) (As amended 04/30/09) – Legal Aid.

Status: Assembly Appropriations.

Description: AB 590 enacts the Sargent Shriver Civil Counsel Act of 2009, which would provide for the appointment of counsel to represent low-income parties in civil matters involving critical issues affecting basic human needs in those specified courts selected by the Judicial Council as provided in this section. According to the Assembly Judiciary Committee analysis of this measure, AB 590 “seeks to address the large and growing problem of unrepresented parties in a court system designed to function with skilled legal advocates on both sides presenting the law and the fact to a neutral judge or jury.”

The pilot projects would be funded by a \$10 increase on the following court-related fees: issuing a writ for the enforcement of an order or judgment, issuing an abstract of judgment, recording or registering any license or certificate, issuing an order of sale, and filing and entering an award under the Workers' Compensation Law.

AB 590 also would prohibit a person or organization that is not a legal aid organization, as defined, from using the term "legal aid," or any variant or similar name in any firm name, trade name, fictitious business name, or other designation, or on any advertisement, letterhead, business card, or sign. The bill would subject a person or organization that violates this prohibition to civil liability.

These are both issues addressed in the Action Plan For Justice, published in 2007 by the Access to Justice Commission to provide a blueprint for ways to significantly improve access to our judicial system for vulnerable Californians. Furthermore, the State Bar has consistently led and supported efforts to ensure that the public is protected from activities by lawyers or legal organizations that are misleading or fraudulent. Through both the Office of the Chief Trial Counsel and efforts to educate consumers, the Bar takes very seriously the need to protect the public in this regard, including supporting recent legislative efforts providing expanded authority to enforce prohibitions against the unauthorized practice of law. AB 663 seeks to address problems created when legal consumers are misled into believing that a lawyer or law firm is providing free or reduced legal services through so called “legal aid” organizations. It is consistent with the Bar's public protection function to ensure that consumers are not misled.

Recommendation: **Support.**

4. [AB 663 \(Jones\)](#) (As introduced 04/29/08) – Legal Aid; Civil Court Interpreters.

Status: Assembly Appropriations.

Description: AB 663 also implements two key recommendations of the California Commission on Access to Justice 2007 “Action Plan for Justice” report. This bill would prohibit a person or organization that is not a legal aid organization, as defined, from using the term "legal aid," or any variant or similar name in any firm name, trade name, fictitious business name, or other designation, or on any advertisement, letterhead, business card, or sign. The bill would subject a person or organization that violates this prohibition to civil liability. This bill would also permit the Judicial Council to establish a pilot project in selected counties for the provision of language interpreters in civil proceedings for indigent persons. The cost providing the interpreters would be funded by a \$15 fee on telephonic appearances.

As with AB 590 above, the bill’s provisions related to preventing legal aid fraud are consistent with the Bar’s longstanding public protection functions. The Bar has also consistently supported efforts to expand and ensure access to justice for all Californians. Because this bill seeks to expand the provisions of interpreter services as discussed in the “Action Plan,” the measure is also consistent with those goals.

Recommendation: **Support.**

5. [AB 764 \(Nava\)](#) (As amended April 20, 2009) – Real Estate Mortgage Loans.

Status: Assembly Appropriations.

6. [SB 94 \(Calderon\)](#) (As amended April 28, 2009) – Mortgage Loans.

Status: Senate Appropriations.

Description: AB 764 would prohibit any person from claiming, demanding, charging, receiving, collecting or contracting for advance fees for performing services for borrowers in connection with the modification of the terms of a residential mortgage loan, unless the person is a licensed real estate broker. This measure also requires any advance fee agreement used by a real estate broker to be approved by the Department of Real Estate prior to use. In addition, the bill prohibits advertisements used in obtaining loan modification agreements from using words, letters, initials, symbols, or other devices that are similar to those used by a governmental agency or nonprofit entity, and increases the fines for publishing such advertisements without the commissioner's approval and for unlawfully charging advance fees for loan modifications.

Among other provisions related to real estate licensees and those subject to various finance and lending provisions, SB 94 would make it unlawful for *any person* who solicits customers for the purpose of helping negotiate a mortgage loan modification or

other form of mortgage loan forbearance for a fee or other compensation, or who otherwise offers to perform these services for a borrower for a fee or other compensation, to do any of the following:

- (1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.
- (2) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation.
- (3) Take any power of attorney from the borrower for any purpose.

SB 94 also requires any person who solicits customers to provide loan modification or forbearance services to provide a specified statement prior to entering into any agreement for those services. The statement essentially indicates that the services may be available at no cost from the lender or a HUD counseling agency.

It is not clear whether SB 94's provisions are intended to apply only to one-to-four unit "residential" real estate mortgages, or to all mortgages including commercial loan workouts. Given the impetus behind both AB 764 and SB 94, and the fact that commercial loan transactions involve more sophisticated parties on both sides, application to non-residential mortgages seems inappropriate.

AB 764 and SB 94 are intended to address the problem of real estate loan modification fraud. According to the Office of the Chief Trial Counsel, the Bar has been receiving between 850 and 900 complaints per month from consumers related to the foreclosure crisis. In addition, the State Bar Journal reports that attorneys have been calling the ethics hotline at a rate of more than 200 per month about the foreclosure and loan modification business, some seeking assistance in handling inquiries from loan consultants.

In response to concerns also expressed by attorneys, the Bar's Committee on Professional Responsibility and Conduct issued an "Ethics Alert" on Legal Services to Distressed Homeowners and Foreclosure Consultants and Homeowners. The alert reminds California lawyers of the existing ethical rules that may apply in the event a foreclosure consultant or other non-lawyer requests assistance from a lawyer and/or refers potential distressed homeowner clients to the lawyer. There have been serious concerns about foreclosure consultants and others who are not licensed real estate brokers "collaborating" with attorneys to avoid existing regulations prohibiting advance fee arrangements. The OCTC has also sent a number of notices to attorneys who have advertised foreclosure or loan modification services to ensure that their activities comply with the Rules of Professional Conduct.

While AB 764 and SB 94 do not expressly apply to attorneys, the intent of the measure is to curtail the payment of advance fees for services that may be obtained at no cost from the borrower's lender or a HUD counseling agency, or worse, for the promise of services that are never performed. From a policy and public protection standpoint,

there is no logical reason why the same restrictions should not clearly apply to attorneys. In fact, many “foreclosure” and “loan modification” consultants have teamed with attorneys in order to avoid the advance fee restrictions under current law. In addition, unscrupulous attorneys have exploited this loophole to their own advantage under the auspices of their law license. In at least one advertisement for foreclosure/loan modification services, an attorney declared they were “licensed by the State Bar;” in an attempt to give the impression that their services had the imprimatur of the State Bar when, in fact, they are simply licensed to practice law.

Therefore, staff recommends that that State Bar support these measures and request amendments to provide expressly that a violation of its provisions by an attorney is also a basis for attorney discipline by the Bar in addition to other civil and criminal penalties that may apply. However, as it relates to SB 94, staff recommends that clarification, or appropriate amendments, be sought to ensure that the bill’s provisions do not apply to commercial mortgage loan transactions.

Recommendation: **Support with amendments** to apply the bill’s provisions to attorneys as indicated above.

7. [AB 984 \(Nava\)](#) – Law School Accreditation.

Status: Assembly Judiciary; 2-year bill.

Description: AB 984 would require the Committee of Bar Examiners (CBE) to seek recognition by the Council for Higher Education Accreditation (CHEA) and to establish an accreditation subcommittee with the authority to adopt policies, rules and procedures relative to the law school accreditation process. The bill also would require the CBE to “adopt an appellate process for which a law school denied certification may appeal that denial, subject to review by the Council for Higher Education Accreditation (CHEA) or the appellate division of the superior court.” According to the State Bar Office of Admissions, the CHEA it recognizes accreditation organizations, such as the Western Association of Schools and Colleges, but that the State Bar, a governmental body, is not eligible to seek CHEA recognition. Furthermore, CHEA has a process for the review of its recognition committee’s recommendations of the denial of applications by accrediting organizations seeking recognition by CHEA, but does not consider appeals in the manner that appears to be contemplated by the language in the current version of AB 984. According to the current State Bar *Accreditation Rules*, if a law school’s accreditation is terminated by the CBE, “(a) law school may seek review of termination of its accreditation before the California Supreme Court pursuant to its rules.”

Aside from the technical issues raised above, this bill would require a fundamental shift in the oversight and accreditation of law schools by the State Bar from the CBE to a 7 member *subcommittee* appointed by the Governor (1), Legislature (2), CALS Deans (2), and the CBE (2).

This measure was introduced by Assemblymember Nava at the request of the California Accredited Law Schools Deans (CALs Deans). The CALs Deans had expressed concerns to members of the Legislature related to the *Guidelines for Accredited Law School Rules (Guidelines)* currently under consideration by the Committee of Bar Examiners. The Bar participated in discussions on AB 984 at the invitation of Assemblymembers Nava and Monning. As a result of those discussions, a proposal was developed to create a CBE advisory committee on matters relating to the promulgation of new rules, guidelines and amendments to the *Accredited Law School Rules* and the *Guidelines*. At its May 8, 2009, meeting, the CBE adopted the proposal.

As a result of the CBE's action to create the advisory committee, staff from Assemblymember Nava's office indicated Mr. Nava's intention to make AB 984 a two-year bill. This effectively means that the bill will not be considered for enactment this year, but could return next year. Mr. Nava had indicated that if a non-legislative solution were reached, such as the creation of the advisory committee, he would not pursue the legislation. However, until AB 984 is dropped or amended into a different bill, staff recommends that the Bar formally oppose this measure.

Recommendation: **Oppose.**

8. [SB 377 \(Corbett\)](#) – Judges.

Status: Senate Appropriations.

Description: This bill would, upon legislative appropriation in the Budget Act, authorize 50 new superior court judgeships. Under this bill, the new judgeships would be allocated to the various superior courts pursuant to uniform criteria for assessing the need for additional trial court judges updated and approved by the Judicial Council on February 23, 2007.

This bill, sponsored by the Judicial Council, is the fourth in a series of bills to authorize 150 new judgeships in California to meet the increased judicial workload. While the first two bills creating 50 judges each were enacted—SB 56 (Dunn, Chapter 206, Statutes of 2006) and AB 159 (Jones, Chapter 722, Statutes of 2007)—as the third and final 50 judges were contained in SB 1150 (Corbett, 2008), which failed passage.

The State Bar has consistently supported the creation of new judgeships to address the continuing shortage in the number of trial court judgeships and the resulting impact on access to justice and the orderly resolution of disputes.

Recommendation: **Support.**

FISCAL/STAFF IMPACT

None.

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

RECOMMENDATION

The State Bar's Office of Governmental Affairs has reviewed the legislation described above, and proposes that the Board Committee on Stakeholder Relations recommend that the Board of Governors take the following positions: 1) Remain neutral with amendments to AB 48 (Portantino); 2) Oppose AB 484 (Eng) unless amended; 3) support AB 590 (Feuer); 4) Support AB 663 (Jones); 5) Support AB 764 (Nava) and SB 94 (Calderon) with amendments; 6) Oppose AB 984 (Nava); and 7) Support SB 377 (Corbett).

RESOLUTION

If the Board Committee on Stakeholder Relations agrees with the above recommendation, the following resolution is suggested:

RESOLVED, that the Board Committee on Stakeholder Relations recommends that the Board of Governors:

- Remain neutral on AB 48 (Portantino), which would re-establish the Bureau of Private Postsecondary Education, with amendments to provide appropriate exemptions for schools regulated by the State Bar Committee of Bar Examiners.
- Oppose AB 484 (Eng), which would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes, unless amended.
- Support AB 590 (Feuer), which would create a cause of action for the misuse of the name "legal aid," and create a pilot project to provide for appointed counsel in certain civil proceedings.
- Supports AB 663 (Jones), which would create a cause of action for the misuse of the name "legal aid", and create pilot projects to provide for interpreters in certain civil proceedings.
- Supports AB 764 (Nava) and SB 94(Calderon), which, among other things, would prohibit certain advance fees for loan modification services. However, seek amendments to provide that the bills' prohibitions apply to

attorneys, to provide expressly that a violation of the provisions by an attorney is also a basis for attorney discipline by the Bar, but to clarify that SB 94 does not apply to commercial real estate loan transactions.

- Oppose AB 984 (Nava), which would revise the authority of the Committee of Bar Examiners to accredit and regulate law schools.
- Support SB 377 (Corbett), which creates 50 new trial court judgeships.

If the Board of Governors concurs with BCSR's recommendation, the following resolution is suggested:

RESOLVED, that, upon recommendation of the Board Committee on Stakeholder Relations, the Board of Governors hereby:

- Remains neutral on AB 48 (Portantino), which would re-establish the Bureau of Private Postsecondary Education, with amendments.
- Opposes AB 484 (Eng), which would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes, unless amended.
- Supports AB 590 (Feuer), which would create a cause of action for the misuse of the name "legal aid", and create a pilot project to provide for appointed counsel in certain civil proceedings.
- Supports AB 663 (Jones), which would create a cause of action for the misuse of the name "legal aid", and create pilot projects to provide for interpreters in certain civil proceedings.
- Supports AB 764 (Nava) and SB 94(Calderon), which, among other things, would prohibit certain advance fees for loan modification services, with amendments.
- Oppose AB 984 (Nava), which would revise the authority of the Committee of Bar Examiners to accredit and regulate law schools.
- Support SB 377 (Corbett), which creates 50 new trial court judgeships.