

# AGENDA ITEM

**MARCH 113**  
**Immediate Action Items -  
Legislative**

**DATE:** March 2, 2010

**TO:** Members, Board of Governors  
Members, Board Committee on Operations

**FROM:** Jennifer Wada, State Bar Legislative Representative

**SUBJECT:** Immediate Action Items – Legislative

## **EXECUTIVE SUMMARY**

The State Bar's Office of Governmental Affairs has identified several bills recently introduced in the California Legislature in 2010 that are of potential interest to the State Bar. This is therefore the first Board meeting that provides an opportunity to address these bills. The State Bar's Office of Governmental Affairs has reviewed the bills and proposes that the Board Committee on Operations 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 Jennifer Wada, 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 introduced in the California Legislature in 2010 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 Operations recommend that the full Board of Governors take the positions on the bills as described in detail below.

1. [AB 2227 \(Villines\)](#) (As introduced 2/10/10) – Attorneys: contingency fees

Status: Assembly, awaiting committee referral

Description: AB 2227 is currently a spot bill (no substantive changes to the law; a

placeholder bill). The bill currently amends section 6147 of the State Bar Act related to contingency fees. The change merely deletes the operative date of the section (January 1, 2000). The author indicates that he does not intend to move the bill forward in this form, nor does he intend to pursue any substantive changes to the State Bar Act.

The language of the bill reads:

SECTION 1. Section 6147 of the Business and Professions Code is amended to read:

6147. (a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

(1) A statement of the contingency fee rate that the client and attorney have agreed upon.

(2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

(3) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.

(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.

(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

~~(d) This section shall become operative on January 1, 2000.~~

Recommendation: **Watch** for any substantive amendments to the State Bar Act.

2. [AB 2485 \(Feuer\)](#) (As introduced 2/19/10) – Uniform Filing Fees: counsel pro hac vice

Status: Assembly, awaiting committee referral

Description: AB 2485 would increase the fee for filing in the superior court an application to appear as counsel pro hac vice from \$250 to \$500. This proposal is one of many attempts to increase filing fees in an effort to acquire new revenue for the

courts. This bill is sponsored by the Consumer Attorneys of California but it could be abandoned if this fee increase is folded into a broader court budget proposal.

The State Bar currently receives \$50 per attorney, per case to fund administrative costs related to reviewing the application. The application must be filed with the court in which the out-of-state attorney wishes to appear and a copy of the application is to be served on The State Bar of California. The State Bar is considered the custodian of records for PHV applications and does not approve or disapprove the PHV application. The State Bar verifies whether the applicant is a licensed attorney and how often the out-of-state attorney has applied to appear as counsel pro hac vice but actual approval of the application is determined by the court in which the attorney wishes to appear. Because this proposal is intended to provide new revenue to the courts, it is unlikely the legislation would result in an increase in the amount the State Bar currently receives to be the custodian of these records.

Recommendation: **Watch**

3. [AB 2649 \(Torrico\)](#) (As introduced 2/19/10), [ABX8 8 \(Committee on Budget\)](#), [SBX8 8 \(Committee on Budget\)](#) – Franchise Tax Board: professional or occupational licenses. (All three bills are identical).

Status: AB 2649 – Assembly, awaiting committee referral

ABX8 8 – Assembly Rules Committee

SBX8 8 – Senate Floor, eligible for a floor vote

Description: AB 2649, ABX8 8 and SBX8 8 would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes. These bills would create a separation of powers issue in their application to lawyers. In substance, the measures are the same as AB 484 (Eng) of 2009, which the Board of Governors voted to oppose unless amended, to deal with the separation of powers issue.

Under these measures 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.<sup>1</sup> 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.

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<sup>1</sup> Proposed Revenue and Taxation Code section 19265(a)(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.)

As currently written, these bills will create a separation of powers issue in their 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 the regulation of 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.

In allowing the FTB to suspend an attorney’s license, 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. 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.

Unlike Section 17520 of the Family Code, which governs suspension of the licenses of those not in compliance with a child support order, these bills would allow the FTB to usurp the power of the Judiciary in the licensure of the State Bar members. The proposed bills differ significantly in their 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.

Consistent with the prior position taken by the Board of Governors on AB 484 (Eng) of 2009, the State Bar's Office of Governmental Affairs has been working with interested parties to craft amendments that would avoid the separation of powers issue.

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

4. [AB 2764 \(Committee on Judiciary\)](#) (As introduced 2/25/10) – The State Bar Act: fees

Status: Assembly, awaiting committee referral

Description: AB 2764 is the State Bar's 2011 fee bill. It is in spot bill form at this time and more substantive language will be amended in as a result of ongoing negotiations with the Judiciary committees and other stakeholders. The only changes currently proposed in AB 2764 revise the dates to account for the 2011 fee year. The annual membership fee for active members remains at \$315 and the fee for inactive members remains at \$75. The current bill text is as follows:

SECTION 1. Section 6140 of the Business and Professions Code is amended to read:

6140. (a) The board shall fix the annual membership fee for active members for ~~2010~~ 2011 at a sum not exceeding three hundred fifteen dollars (\$315).

(b) The annual membership fee for active members for 2010 is payable on or before the first day of ~~March 2010~~ *February of each year*. If the board finds it appropriate and feasible, it may provide by rule for payment of fees on an

installment basis with interest, by credit card, or other means, and may charge members choosing any alternative method of payment an additional fee to defray costs incurred by that election.

~~—(c) Notwithstanding subdivision (a) of Section 6141, the annual membership fee for inactive members for 2010 is payable on or before the first day of March 2010.~~

~~—(d)~~

(c) This section shall remain in effect only until January 1 ~~, 2011~~ 2012 , and, as of that date, is repealed, unless a later enacted statute, that is enacted before January 1, ~~2011~~ 2012 , deletes or extends that date.

**Recommendation: Sponsor/Support**

5. **AB 2766 (Committee on Judiciary)** (As introduced 2/25/10) – Attorneys

**Status:** Assembly, awaiting committee referral

**Description:** AB 2766 makes a technical correction to the definition of “eligible institution” as defined in section 6213 of the Business & Professions Code related to IOLTA accounts. In 2009, the Assembly Judiciary committee was informed of this error after it was caught by State Bar staff. The committee is correcting this error in AB 2766. The change is as follows:

(k) "Eligible institution" means either of the following:

(1) A bank, savings and loan, or other financial institution regulated by a federal or state agency that pays interest or dividends ~~in~~ on the IOLTA account and carries deposit insurance from an agency of the federal government.

(2) Any other type of financial institution authorized by the Supreme Court.

**Recommendation: Support**

6. **SB 1098 (Corbett)** (As introduced 2/17/10) – Athlete agents

**Status:** in Senate Business & Professions Committee

**Description:** SB 1098 would amend section 6106.7 of the State Bar Act but only as it relates to professional sports service contracts. This section currently provides that violation of the Miller-Ayala Athlete Agents Act or the laws of any other state regulating athlete agents shall constitute cause for the imposition of attorney discipline. The bill would replace the Miller-Ayala Athlete Agents Act with the Uniform Athlete Agents Act, which would regulate specified activities of an athlete agent in representing or seeking to represent student athletes and professional athletes. To the extent the State Bar Act is amended, it is only for purposes of conforming the law to the new Act. The existing Business and Professions code section 6106.7 would sunset on July 1, 2011 and a new section 6106.7 would become operative. That section would read:

Section 6106.7 is added to the Business and Professions Code, to read:

6106.7. (a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to violate any provision of the Uniform Athlete Agents Act (Chapter 2.5 (commencing with Section 18900) of Division 8) or to violate any provision of the law of any other state regulating athlete agents.

(b) This section shall become operative on July 1, 2011.

State Bar staff has reviewed this bill and at this time, does not believe it poses any major issue. Staff states that even if an issue is discovered, legislative engagement may not be necessary in light of the Supreme Court case providing that a lawyer is bound to conform to the standards of attorney when rendering both legal and non-legal services to a client (see, *Layton v. State Bar (1990) 50 Cal.3d 889*).

Recommendation: **Watch**, to ensure the State Bar Act is not negatively impacted.

#### **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 Operations recommend that the Board of Governors take the following positions: 1) Watch AB 2227 (Villines), AB 2485 (Feuer), AB 2521 (Torrico) and SB 1098 (Corbett); 2) Oppose AB 2649 (Torrico), ABX8 8 (Committee on Budget), and SBX8 8 (Committee on Budget) unless amended; 3) Support AB 2764 (Committee on Judiciary) and AB 2766 (Committee on Judiciary)

#### **RESOLUTION**

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

**RESOLVED**, that the Board Committee on Operations recommends that the Board of Governors:

- Watch AB 2227 (Villines), which amends the State Bar Act in a nonsubstantive manner.

- Watch AB 2485 (Feuer), which would increase the fee for filing in the superior court an application to appear as counsel pro hac vice from \$250 to \$500.
- Watch AB 2521 (Torricono), which would eliminate the authority of the Judicial Council to perform audits and reviews of court financial records.
- Watch SB 1098 (Corbett), which would replace the Miller-Ayala Athlete Agents Act with the Uniform Athlete Agents Act.
- Oppose AB 2649 (Torricono), which would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes, unless amended.
- Oppose ABX8 8 (Committee on Budget), which would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes, unless amended.
- Oppose SBX8 8 (Committee on Budget), which would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes, unless amended.
- Support AB 2764 (Committee on Judiciary), which would amend the State Bar Act as it relates to attorney fees.
- Support AB 2766 (Committee on Judiciary), which would make a technical correction to the definition of “eligible institution” as defined in section 6213 of the Business & Professions Code related to IOLTA accounts.

If the Board of Governors concurs with recommendation of the Board Committee on Operations, the following resolution is suggested:

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

- Watches AB 2227 (Villines), which amends the State Bar Act in a nonsubstantive manner.
- Watches AB 2485 (Feuer), which would increase the fee for filing in the superior court an application to appear as counsel pro hac vice from \$250 to \$500.
- Watches AB 2521 (Torricono), which would eliminate the authority of the Judicial Council to perform audits and reviews of court financial records.

- Watches SB 1098 (Corbett), which would replace the Miller-Ayala Athlete Agents Act with the Uniform Athlete Agents Act.
- Opposes AB 2649 (Torrico), which would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes, unless amended.
- Opposes ABX8 8 (Committee on Budget), which would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes, unless amended.
- Opposes SBX8 8 (Committee on Budget), which would authorize the suspension of professional and occupational licenses, including attorneys, for failure to pay state taxes, unless amended.
- Supports AB 2764 (Committee on Judiciary), which would amend the State Bar Act as it relates to attorney fees.
- Supports AB 2766 (Committee on Judiciary), which would make a technical correction to the definition of “eligible institution” as defined in section 6213 of the Business & Professions Code related to IOLTA accounts.