

AGENDA ITEM

JANUARY 122

DATE: January 1, 2011

TO: Members, Regulation, Admissions and Discipline Oversight
Members, Board of Governors

FROM: Robert A. Hawley, Deputy Executive Director

SUBJECT: Response to State Auditor: Updating Formula for Assessing
Costs of Discipline Proceedings

EXECUTIVE SUMMARY

By statute, the State Bar Court assesses against attorneys found culpable of disciplinary violations, costs incurred by the State Bar in successfully prosecuting the proceeding. These costs are assessed based on a formula that the State Bar has developed with the assistance of expert consultants. The formula has been periodically updated to address inflationary factors. In 2009, the California Bureau of State Audits (State Auditor) recommended that the State Bar update the disciplinary cost formula last updated in 2002. The State Auditor also recommended that the State Bar develop a method for adjusting the cost formula automatically annually to remain current with inflation. The State Bar reported to the State Auditor that it was retaining the appropriate experts to update the formula and to develop a method to adjust the formula annually to track inflation. HFH Consultants were retained to undertake this task. They have reported that the existing cost formula should be adjusted for 2011 by approximately 40%. They also recommend a methodology be adopted to allow the cost formula to automatically readjust annually tied to indices of the U.S. Department of Labor, Bureau of Labor Statics, blending the Employment Cost Index (ECI) with the Consumer Price Index (CPI). This is before the Board for approval. If you have questions, please contact Robert.Hawley@calbar.ca.gov; 415-538-2277.

BACKGROUND

In 1986, the Legislature authorized the State Bar to collect costs of disciplinary proceedings from respondent attorneys found culpable of disciplinary offenses. The Legislature also authorized cost recovery by respondents who were exonerated in State Bar disciplinary proceedings. The State Bar is authorized to recover its administrative and investigatory costs, but not attorneys fees or expert witness costs. [Business & Professions Code §6086.10 (Attachment 1).] In 1988, the State Bar's Board of Governors established a cost formula for determining the costs to be assessed against

respondents. The formula is based upon the cost of “average” disciplinary proceedings at various stages of the system, rather than upon the actual costs of a specific disciplinary case.

At the conclusion of a disciplinary proceeding, the State Bar’s Office of the Chief Trial Counsel (OCTC) prepares and files cost certificates with the State Bar Court based on the formula. The respondent attorney has the opportunity to challenge the cost assessment. Once approved by the State Bar Court, the cost assessment is incorporated into the disciplinary order. Under Business & Professions Code §6140.7 [Attachment 1], unpaid disciplinary costs are added to and become a part of a member’s annual licensing fees, which must be paid in order for the license to practice law to be renewed annually.

In 1996, then Executive Director Herbert Rosenthal, appointed a special task force to review the 1988 disciplinary cost recovery system and evaluate whether the existing formula was still efficacious in light of changes that had taken place in the disciplinary system and inflationary factors since 1988. This was consistent with the California Auditor’s recommendations at that time.

The State Bar retained the consulting firm of Hilton Farnkopf & Hobson (HFH) to provide their expertise to the State Bar’s task force as it re-examined the cost formula. As a result of this review and analysis, a recommendation was made to the Board of Governors in July 1997 to continue using the formulaic “average costs” model as opposed to specifically incurred costs and expand the factors included in the overall calculated average. As the Board was contemplating adoption of the HFH/Task Force recommendations, the State Bar’s funding authority for 1998 was vetoed by then Governor Wilson. Regular business operations of the State Bar of California ceased. The cost issue was not readdressed until the State Bar was returned to “normal” operations in 2000 under then Executive Director Judy Johnson.

Due to the passage of time since HFH and the Task Force made its 1997 recommendations, in 2000, HFH was re-retained to review its 1997 recommendations and update them as appropriate based upon inflationary factors. As a result, in June 2002, the Board of Governors adopted an updated discipline cost model based upon the cost study conducted by the task force and HFH. The State Bar has continued to operate under the 2002 cost formula until the present time.

The State Bar’s efforts to recover the costs of its discipline system from those attorneys found culpable of disciplinary offenses has been a point of ongoing interest and comment by the State Auditor. In its most recent 2009 audit report, the State Auditor made Recommendation #6, among others not addressed here, which states in pertinent part:

“To ensure that it maximizes the amounts that it may recover to defray the expenses of disciplining attorneys, the State Bar should update annually its formula for billing discipline costs....”

In its response to the State Auditor's recommendation, the State Bar reported that it was retaining experts to examine and update the formula to address inflationary factors since 2002, as well as develop a potential methodology for an annual formula adjustment based upon inflationary factors. The State Bar retained HFH for this project, the same consultants used in 1997 and 2002, to re-examine and update the cost formula.

ISSUE

Before the Board for approval and adoption is the HFH recommendation that the existing cost formula be adjusted for 2011 by approximately 40%. This is approximately the same increase that was recommended in 2002. [Attachment 3]. They also recommend a methodology be adopted to allow the cost formula to automatically readjust annually tied to indices of the U.S. Department of Labor, Bureau of Labor Statics, and in particular blending, the Employment Cost Index (ECI) with the Consumer Price Index (CPI). [Attachment 3].

CONCLUSION

HFH completed its analysis and report in December 2010. It is attached as Attachment 2. Based upon the data it reviewed, HFH concluded that the formulaic approach to cost assessments that was first developed in 1988, enhanced in 1997 and most recently updated in 2002, remains a viable and efficacious tool for assessing costs. Historically, the use of this formulaic approach has not received any significant challenge. HFH found, not surprisingly, that significant inflationary factors have occurred since the formula was last adjusted in 2002.

As a result, HFH recommends a significant adjustment for 2011 of approximately 40%. HFH also recommends that, to minimize such major spikes in periodic adjustments to the formula, the formula be annually adjusted by tying it to indices published by the United States Department of Labor, Bureau of Labor Statistics. To reach the most appropriate adjustment, HFH recommends that the formula be tied to two indices, the Department of Labor Employment Cost Index (ECI), which tracks labor costs, and the Consumer Price Index (CPI), which tracks overhead or general operating costs. HFH recommends adjusting the discipline cost formula January 1 of each year based upon blending these two indices, blending them 60% ECI and 40% CPI. A synopsis of HFH's recommendations is attached as Attachment 3.

DISCUSSION

See above in Background.

FISCAL / PERSONNEL IMPACT:

There is no personnel impact. There is no negative fiscal impact. There may be a potential positive revenue impact based upon the collection of costs under this formula.

RULE AMENDMENTS:

Not Applicable.

BOARD BOOK IMPACT:

Not Applicable.

RECOMMENDATION

Approval and adoption of the cost formula adjustments is recommended.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Regulation, Admissions and Discipline Oversight Committee agree with the above recommendation, the following resolution is suggested:

RESOLVED, that the Regulation, Admissions and Discipline Oversight Committee recommends that the Board of Governors approve and adopt the updated discipline cost model reflected in Attachment 2 and attached hereto; and it is;

FURTHER RESOLVED, that the updated cost model apply to discipline costs assessed in all matters in which a notice of disciplinary charges or a pre-notice stipulation pursuant to Rules 132 – 135, Rules and Procedure of the State Bar of California, is filed on or after the Board’s action this date; and it is

FURTHER RESOLVED that commencing January 1, 2012, and each January 1 thereafter, the discipline cost model be automatically adjusted to address inflationary factors by multiplying the then current disciplinary costs by 1 plus the sum of 60% of the annual percentage change in the Department of Labor, Bureau of Labor Statistics, Employment Cost Index (ECI) and 40% of the annual percentage change in the Consumer Price Index (CPI); and it is

FURTHER RESOLVED that the discipline cost model, as adjusted in this way each year, apply to discipline costs assessed in all matters in which a notice of disciplinary charges or pre-notice stipulation pursuant to Rule 132 -135, Rules of Procedure of the State Bar of California, is filed on or after January 1 of that same year.

PROPOSED BOARD RESOLUTION:

Should the Board concur with the Regulation, Admissions and Discipline Oversight Committee's recommendation, the following resolution is suggested:

RESOLVED, that upon the recommendation of the Regulation, Admissions and Discipline Oversight Committee, the Board of Governors hereby approves and adopts the updated discipline cost model reflected in Attachment 2 and attached hereto; and it is

FURTHER RESOLVED, that the updated cost model apply to discipline costs assessed in all matters in which a notice of disciplinary charges or a pre-notice stipulation pursuant to Rules 132 – 135, Rules and Procedure of the State Bar of California, is filed on or after the Board's action this date; and it is

FURTHER RESOLVED that commencing January 1, 2012, and each January 1 thereafter, the discipline cost model be automatically adjusted to address inflationary factors by multiplying the then current disciplinary costs by 1 plus the sum of 60% of the annual percentage change in the Department of Labor, Bureau of Labor Statistics, Employment Cost Index (ECI) and 40% of the annual percentage change in the Consumer Price Index (CPI); and it is

FURTHER RESOLVED that the discipline cost model, as adjusted in this way each year, apply to discipline costs assessed in all matters in which a notice of disciplinary charges or pre-notice stipulation pursuant to Rule 132 -135, Rules of Procedure of the State Bar of California, is filed on or after January 1 of that same year.