

AGENDA ITEM

March 2011

DATE: February 22, 2011

TO: Members, Regulation, Admissions and Discipline Oversight

FROM: James Towery, Chief Trial Counsel

SUBJECT: Description of Major Misappropriations Prosecution Team and Related Initiatives; Posting of Consumer Alert of Major Misappropriation Charges on Member's Profile Page--Request for Public Comment

EXECUTIVE SUMMARY

Lawyer misappropriation of client funds poses a vexing problem where a relatively small number of lawyers cause a disproportionate amount of harm to clients and the public. To improve the efficiency and speed with which the Office of the Chief Trial Counsel prosecutes this relatively small number of serious offenders, we have formed a new vertical prosecutorial team to fast track and aggressively prosecute major misappropriation cases.

The goals of the Major Misappropriation Team involve early identification of lawyers who have stolen \$25,000 or more from clients; expediting the investigation of these cases; and accelerating prosecution by filing a notice of disciplinary charges and/or other interim remedies, such as pursuing Section 6007(c) involuntary inactive enrollment "threat of harm" petitions. We believe that such aggressive measures are necessary to swiftly remove these lawyers from practice to avoid further harm to other clients and the public.

A particularly challenging aspect of major misappropriation cases is adequately ensuring the protection of unsuspecting current or prospective clients from the risk of continuing harm when a lawyer remains on active status after a major misappropriation charge is filed and remains pending in the State Bar Court. Currently, the State Bar posts on its website's member profile page a filed notice of disciplinary charges and any response to the notice, until such time as an order or decision is filed resolving the disciplinary matter. The website does not currently post a petition filed under Business & Professions Code section 6007(c) to enroll an attorney involuntarily on inactive status based on "threat of harm" to clients or the public.

We believe that in order to sufficiently warn and prevent future harm to clients and the public about lawyers charged with major misappropriation of client funds, the Bar's website policy should be extended to post a Consumer Alert displayed prominently on the member's profile page. The Consumer Alert and informational text, coupled with a disclaimer, would be posted upon filing either a notice of disciplinary charges or a petition under Business & Professions Code section 6007(c) in the State Bar Court, when either includes a charge of misappropriation of client funds in the amount of \$25,000 or more, whether as a single charge or aggregate of charges.

We are seeking your Committee's authorization to release for public comment, for a period of 45 days, the proposed policy regarding posting a Consumer Alert on a member's State Bar website profile page. The policy also provides for posting a filed petition under section 6007(c), which relies on a major misappropriation of client funds, and any response, as set forth in Attachment A.

For any questions about this agenda item, please contact Jill Sperber, Special Assistant to the Chief Trial Counsel, at jill.sperber@calbar.ca.gov or (415) 538-2023.

BACKGROUND

1. Description of New Major Misappropriations Prosecution Team and Related Initiatives

Recognizing that the few lawyers who steal from their clients cause a disproportionate amount of harm to clients, the public, and maintenance of the highest standards of the legal profession, the Office of the Chief Trial Counsel (OCTC) formed a new vertical team to improve our prosecution of these serious offenders. Effective February 1, 2011, OCTC created the Major Misappropriations Team to give the highest priority to a swift and aggressive prosecution of these relatively few attorneys who misappropriate substantial sums from their clients. Underscoring the disproportionate amount of harm these lawyers cause, in 2009 for example, 59% of the total \$3.5 million in claims paid by the Client Security Fund to clients—a sum of \$2,037,121—involved reimbursement due to lawyer misappropriation, by far the largest dollar amount paid in any single category of Fund claims.

Goals and Definition of Major Misappropriation. The goals of the Team involve the early identification of attorneys suspected of major misappropriation, aggressive investigation, and accelerated filing of either a Notice of Disciplinary Charges or, where appropriate, expedited inactive enrollment petitions under Business & Professions Code section 6007(c). The Major Misappropriations Team will be responsible for all cases where the attorney has willfully misappropriated \$25,000 or more in client funds, either from a single client or from multiple clients in that aggregate amount. As of February 15, 2011, the Team identified 113 pending investigations of misappropriation charges

involving approximately 50 lawyers which meet the dollar threshold criteria for major misappropriation fast-track prosecution.

Composition of Team. The initial staffing plan is to have three lawyers and two investigators full time in Los Angeles, and one attorney and one investigator part time in San Francisco. Supervising Trial Counsel Joseph Carlucci from the Los Angeles office is in charge of the Team, which is part of a Trial Unit under the management of Assistant Chief Trial Counsel Alan Gordon.

Expedited Process for Investigation and Prosecution. Major misappropriation cases will be fast-tracked as soon as OCTC's Intake Unit receives a complaint that appears to meet the threshold requirements of a major misappropriation. The Team's leader will promptly evaluate the complaint to determine if it is appropriate for handling by the Major Misappropriation Team. If the complaint meets the established criteria for major misappropriation prosecution, the complaint will be assigned to a Team investigator and prosecuting attorney for vertical investigation and prosecution. We anticipate improving our prosecutorial efficiency in such matters because the same prosecutor who oversees the investigation will also handle the case through Notice filing and trial, including any appeal.

Whenever possible, the Team will aggressively investigate and attempt to quickly resolve major misappropriation cases, if possible, short of filing disciplinary charges. For example, rather than initially prepare and serve a subpoena duces tecum for the lawyer's bank records, which can be time consuming, the investigator may elect to first initiate a meeting with the lawyer at his or her law office to examine the lawyer's financial records required by rule 4-100(C), Rules of Professional Conduct.

In our experience, given the limited defenses available in most misappropriation matters, in person meetings held early in the investigation stage also conserve prosecutorial efforts and valuable resources: we may be able to reach an appropriate stipulation or other resolution, including a stipulation to disbarment, without filing formal proceedings.¹

Interim Remedies to Protect the Public. To ensure protection of the public by removing a lawyer suspected of major misappropriation from active practice as quickly as possible, the Major Misappropriation Team will, where appropriate, seek statutory interim remedies, including involuntary inactive enrollment pursuant to Business and Professions Code section 6007(c). Section 6007(c) provides a procedure for the State Bar to petition the State Bar Court to involuntarily enroll the lawyer inactive, pending the filing and resolution of disciplinary charges, where the lawyer poses a substantial threat of harm to clients and the public.

¹ A lawyer's failure to preserve client funds in a client trust account is a strict liability offense under Rule of Professional Conduct 4-100(A). Where there is reasonable cause to believe that a lawyer took client funds, whether intentionally or acting with gross negligence, the State Bar will also charge the commission of an act of moral turpitude. (Bus. & Prof. Code §6106.)

Referrals to Law Enforcement. Another important component of the Team’s mission is to refer lawyers who have committed theft of client funds to law enforcement for criminal prosecution. To this end, the Team has already established direct contacts within many district attorneys’ offices and police agencies. The Team will assist law enforcement by providing comprehensive evidentiary documents and internal summaries of suspected misconduct.

2. Proposal to Post a Consumer Alert for Lawyers Charged with a Major Misappropriation of Client Funds

To complement the Major Misappropriation Team’s aggressive prosecution of lawyers involved in a major misappropriation of client funds and adequately protect clients and the public from the risk of further harm from lawyers who remain on active status pending prosecution of a major misappropriation charge or charges, we propose here a new initiative: posting a Consumer Alert online on the member’s State Bar website profile page when a charge of misappropriation is filed in the State Bar Court. This Consumer Alert, coupled by a disclaimer about filed charges, would be posted upon the filing of a major misappropriation charge in a notice of disciplinary charges or section 6007(c) petition requesting the lawyer’s involuntary inactive enrollment.

ISSUE

Whether the Board Committee on Regulation, Admissions & Discipline should authorize release, for a 45 day period, for public comment the attached proposed policy set forth in Attachment A. The policy contains two parts. First, the State Bar would post on a member’s State Bar website profile page a prominent Consumer Alert to warn clients and the public of charge(s) filed against the member involving a misappropriation of \$25,000 or more of client funds. The second part of the policy authorizes posting a involuntary inactive enrollment petition filed under Business & Professions Code section 6007(c) when a basis for the application is a misappropriation of \$25,000 or more of client funds and any response until a decision or order issues from the State Bar Court.

DISCUSSION

By statute, hearings and records of original disciplinary proceedings, including filing for involuntary inactive enrollment under Section 6007(c), are public following the filing of a Notice of Disciplinary Charges. (Bus. & Prof. Code §§6086(a)(1), 6086.1(a)(2)(A), 6086.1(b); rule 5.9, Rules Proc. of State Bar.) Until fairly recently, the State Bar did not post the notice of disciplinary charges online.² In mid- 2008, the Board of Governors approved a new policy authorizing the State Bar to post a filed notice of disciplinary charges and any reply on a member’s profile page on the Bar’s website under a section entitled, “Disciplinary and Related Actions.”

² In or about July 2005, the State Bar began posting disciplinary decisions and orders on stipulated dispositions on the member’s profile page on the State Bar’s website.

Upon approval of this policy, the Board recognized that posting this information helps to fulfill the State Bar's duty to protect the public, which includes informing the public about the work of the State Bar, the right of all persons to make complaints against attorneys, and the nature and procedures of the discipline system protection. A true and correct copy of the filed Notice is now posted as a PDF on the member's profile page on the State Bar website. This is the only way for a member of the public to review disciplinary charges pending against a lawyer on the Bar's website.

In contrast, a petition filed by the State Bar under Business & Professions Code section 6007(c) to enroll an attorney involuntarily on inactive status based on "threat of harm" to clients or the public, although such proceedings are public, is not currently authorized for posting on the Bar's website.

We acknowledge that the posted notice of disciplinary charges, once opened and read, discloses any misappropriation charge filed against a lawyer.³ However, we believe that stronger public protection measures are warranted to protect current or prospective clients from additional harm by posting a prominent Consumer Alert of a member's pending charge involving a major misappropriation of client funds on his or her State Bar member profile page.

The proposed Consumer Alert would contain the following message:

CONSUMER ALERT The State Bar of California has filed disciplinary charges against this attorney alleging that the attorney engaged in a major misappropriation of client funds. In order to read the Notice of Disciplinary Charges filed by the State Bar against this attorney, click [here](#). To learn more about the general nature of the disciplinary offense of misappropriation of client funds by an attorney, click [here](#).

To ensure fair treatment of accused members, a disclaimer would follow any Consumer Alert explaining that filed charges are only allegations and the member is presumed to be innocent until the charges have been proven. The proposed disclaimer language would read as follows:

DISCLAIMER: Any Notice of Disciplinary Charges filed by the State Bar contains only allegations of professional misconduct. The attorney is presumed to be innocent of any misconduct warranting discipline until the charges have been proven.

³ Rule 5.41(B), Rules of Proc. of the State Bar, requires a notice of disciplinary charges to, *inter alia*: "(1) cite the statutes, rules, or Court orders that the member allegedly violated or that warrant the proposed action; (2) contain a statement of facts comprising the violations in sufficient detail to permit the preparation of a defense; [and] (3) relate the stated facts to the statutes, rules or Court orders that the member allegedly violated or that warrant the proposed action...."

To see a mock-up of the proposed Consumer Alert and Disclaimer on a member's profile page, see Attachment B referring to John Doe #999999. As with the policy on removing a filed notice and any response, the Consumer Alert and Disclaimer would similarly be removed upon the filing of a State Bar Court decision or order.

For the reasons stated above, a Consumer Alert and accompanying disclaimer should also be posted online upon the filing of a petition seeking the member's involuntary inactive enrollment under Business & Professions Code section 6007(c) [threat of public harm] when the petition includes, as a basis for application, a major misappropriation of client funds.⁴ The Consumer Alert and Disclaimer would be removed upon the filing of a State Bar Court decision or order.

Finally, to be consistent with the State Bar's policy on filed notices of disciplinary charges and to adequately protect the public, we believe that the Board should also approve online posting of a filed section 6007(c) petition involving an allegation of a major misappropriation of client funds and any reply until the State Bar Court files a decision or order.

We believe that the proposed policy, confined to the filing of either a notice of disciplinary charges or a section 6007(c) involving a major misappropriation of client funds, satisfies due process considerations of the respondent about whom a Consumer Alert is made. Two separate disclaimers will appear on the member's profile page. Both the current disclaimer in the section entitled "Disciplinary and Related Actions" and the proposed disclaimer for posting a Consumer Alert caution that pending charges should not be considered as evidence of culpability until the charges are proven. In addition, a notice of disciplinary charges requires "reasonable cause" to believe that a member has committed a violation of the State Bar Act or Rules of Professional Conduct and a "fair, adequate and reasonable opportunity" for the member to deny or explain the matters which are the subject to the notice." (Rule 2604, Rules Proc. of State Bar.)

Similarly, a petition under section 6007(c) must include, in addition to sufficient proof of the presence and continued risk of substantial client or public harm, a verified application which includes facts supported by declarations, transcripts or requests for judicial notice, alleges disciplinary violations, and relates the facts with particularity to support the rule, order or statutory violations. (Rule 5.226, Rules of Proc.) Any order finding that the lawyer's conduct poses a substantial threat of harm to clients or the public warranting interim suspension must be based on a finding that "there is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter." (Bus. & Prof. Code §6007(c)(2)(C).)

⁴ To proceed under Business & Professions Code section 6007(c), rule 5.226, Rules of Proc., requires a verified application which must identify any investigation matters or pending disciplinary proceedings relied on by case number and complaining witness name (if any). "Otherwise, the application itself must cite the statutes, rules or court orders allegedly violated, or that warrant involuntary inactive enrollment. It must also state the particular acts or omissions that constitute the alleged violation or violations, or that form the basis for warranting involuntary inactive enrollment."

FISCAL / PERSONNEL IMPACT:

Some personnel impact is involved, to the extent that staff will be required to identify whether a notice of disciplinary charges or a section 6007(c) petition involves a major misappropriation of client funds, post, and eventually remove the consumer alert and disclaimer upon the filing of a decision or order resolving the proceedings. Where a filed section 6007(c) petition relies upon a charge of major misappropriation of client funds, staff would also be required to identify such petitions, post them, and eventually remove the petition and any response upon the filing of a decision or order resolving the proceedings.

RULE AMENDMENTS:

Not applicable.

BOARD BOOK IMPACT:

Not applicable.

RECOMMENDATION

The Office of the Chief Trial Counsel recommends that the Board Committee on Regulation, Admissions & Discipline release the proposed policy authorizing the posting of a consumer alert online when a member is charged, by notice of disciplinary charges or section 6007(c) petition, with major misappropriation of client funds, as set forth as Attachment A, for a 45-day public comment period.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should this Board Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions & Discipline hereby authorizes the release of the proposed policy attached as Attachment A regarding 1) the online posting of a Consumer Alert and disclaimer on the member's State Bar profile page when a major misappropriation of client funds charge is filed in a notice of disciplinary charges or relied on in a section Business & Professions Code section 6007(c) petition, until the State Bar Court files a decision or order; and 2) the online posting of a Business & Professions Code section 6007(c) petition which relies on major misappropriation of client funds, and any response, until the State Bar Court files a decision or order; and it is

FURTHER RESOLVED, that the release of the attached policy statement set forth in Attachment A for public comment does not constitute, and shall not be considered, as approval of the Board of Governors of the State Bar of the matters published.