

AGENDA ITEM

MAY 122

DATE: April 25, 2011

TO: Members, Regulation, Admissions and Discipline Oversight

FROM: James Towery, Chief Trial Counsel

SUBJECT: Posting of Consumer Alert of Major Misappropriation Charges on Member's Profile Page— Request for Approval Following Return from Public Comment

EXECUTIVE SUMMARY

Currently, the State Bar posts on its website's member profile page any filed notice of disciplinary charges and response until such time as an order or decision is filed resolving the disciplinary matter. The Office of the Chief Trial Counsel (OCTC) recommends that in order to sufficiently warn and prevent future harm to current and prospective clients and the public about lawyers charged with major (\$25,000 or more) misappropriation of client funds, the Bar's website policy should be extended to post a Consumer Alert and disclaimer displayed prominently on the member's profile page.

Under OCTC's two-part proposal, a 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. The proposal also provides for posting any filed petition under section 6007(c), which relies on a major misappropriation of client funds and any response until an order or decision is filed.

Attachment A reflects the proposed policy for posting a Consumer Alert on a member's State Bar website profile page. Attachment B illustrates a mock up of a fictitious member's profile page to show the proposed Consumer Alert and disclaimer language and its proposed placement near the top of the member's page.

The RAD Committee authorized release of this proposal at its March 4, 2011 meeting for a 45-day public comment period ending April 21, 2011. OCTC received a total of 34 comments. (Attachment C is a summary of the comments; Attachment D provides all comments received.) While most of the comments oppose the proposal, opposition is based on the misconception that a client's mere complaint of misappropriation, without

investigation or opportunity to reply by the lawyer, triggers the consumer alert posting. Other comments express the concern that posting an alert short of adjudicatory findings lacks sufficient due process protections.

The current proposal clearly requires either a filed charge or petition based on a charge of misappropriation before any consumer alert posting goes online. Such filings are made only after a completed investigation, review of bank records, and interviews of witnesses, including ample opportunity for the lawyer to reply. Before charges are filed, trial counsel is also required to determine that reasonable cause exists for notice filing and provide the attorney with another opportunity to reply and resolve the matter before filing a notice of charges.

OCTC believe these safeguards amply satisfy the due process concerns raised during public comment. In addition, in view of data showing that more than 97% of filed misappropriation charges during the past six years resulted in culpability, OCTC continues its recommendation that the Board, upon this Committee's recommendation, extend the State Bar's website policy to include the proposal 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.

ISSUE

Whether the Board Committee on Regulation, Admissions & Discipline should recommend approval to the Board of Governors the attached proposed policy set forth in Attachment A following its return from public comment and consideration of comments received.

The policy contains two parts. First, the State Bar would post on a member's State Bar profile page a prominently placed 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 proposal authorizes posting an 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.

BACKGROUND

1. Current Policy of Online Posting of Notices of Disciplinary Charges

By statute, hearings and records of original disciplinary proceedings are public following the filing of a Notice of Disciplinary Charges. (Bus. & Prof. Code §§6086.1(a)(1), 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.¹ 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."

In approving 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 also public, is not currently authorized for posting on the Bar's website.

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

The Office of the Chief Trial Counsel (OCTC) recently formed a Major Misappropriation Team. 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, (OCTC) proposes here an extension of current website policy: posting a Consumer Alert online on the member's State Bar website profile page, coupled by a disclaimer about filed charges, upon the filing of a major misappropriation charge in a notice of disciplinary charges or Business and Professions Code section 6007(c) petition requesting the lawyer's involuntary inactive enrollment. Major misappropriation is defined as the taking of client funds in the amount of \$25,000 or more, whether as a single charge or total of multiple charges.

With the exception of posting a section 6007(c) petition based on major misappropriation, this proposal does not involve posting additional information not currently accessible on a member's profile page. OCTC acknowledges that the posted notice of disciplinary charges, once opened and read, discloses any misappropriation charge filed against a lawyer.² The current location of the notice of disciplinary charges at the bottom of the member's page, posted as a "PDF" document that must be opened,

¹ 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.

² 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...."

in OCTC's view, does not provide unfamiliar prospective or current clients with an obvious "up front" warning.³ OCTC believes that stronger public protection measures are warranted than the current notice posting provides to adequately protect the public by posting a prominently located Consumer Alert of a member's pending charge involving a major misappropriation of client funds on his or her State Bar member profile page while such charges are pending.

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.

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. 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, OCTC believes that the Board should also approve online posting of a filed section 6007(c) petition involving an allegation of a

³ In its comment (#33), HALT not only supports the proposal but also encourages the Board to support a more prominent display of notices of disciplinary charges on the member's profile page to assist consumers more quickly discern information about the member.

major misappropriation of client funds and any reply until the State Bar Court files a decision or order. The website does not currently post a petition filed under Business & Professions Code section 6007(c) to enroll an attorney on interim inactive status based on “threat of harm” even though such petitions, like notices of disciplinary charges, are public pleadings.

This proposed policy, confined to the filing of either a notice of disciplinary charges or a section 6007(c) petition involving a major misappropriation of client funds, satisfies due process considerations of the attorney 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.)⁴ 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).)

3. Public Comments Received and OCTC’s Continued Support for the Proposal

At its March 4, 2011 meeting, the Regulation, Admissions and Discipline (RAD) Committee authorized release of the proposed policy set forth in Attachment A for a 45 day public comment period, which ended April 21, 2011. A total of 34 comments were received. For a summary of comments, see Attachment C. To view the comments received, see Attachment D.

All but one of the comments received from individuals are active or inactive members of the Bar, and HALT submitted the only comment from an organization. Three comments

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.”

support the proposal without qualification. Several additional comments appear to support the proposal but state that any dollar threshold (i.e., \$25, 000 or more) should be eliminated for posting a consumer alert because of the seriousness of theft regardless of the amount taken. Three additional comments appear to “oppose” the proposal but simultaneously state that the authors would support the proposal as long as adequate due process safeguards exist to protect against unfounded charges.

The vast majority of comments (19) oppose the proposal, most of them expressing the same general concern: posting an alert based upon a client’s mere accusation of a misappropriation may irreparably and unfairly harm a lawyer’s career and reputation. These comments warn of disgruntled or non-paying clients who may make unfair and unjust accusations against innocent lawyers. Four comments appear to oppose the proposal, not in concept, but as to the timing or process: some comments suggest waiting until after an adjudicatory finding of theft. Two comments received were neutral on the proposal but offered other observations.

a. Summary of Due Process Protections to Protect the Attorney from Unfounded Complaints

The comments opposed to the proposal rely upon a central misconception: that posting a consumer alert would be triggered by a mere complaint by a client. Under this view, the proposal violates the attorney’s due process, is subject to abuse by unscrupulous clients, and would unfairly harm the innocent lawyer’s reputation and career.

OCTC fully appreciates that mere accusations are not evidence of guilt and warrant full investigation and assessment of the evidence before a determination is made to proceed with formal disciplinary charges. Upon receipt of information that a colorable violation of misappropriation occurred, the investigator interviews witnesses, subpoenas and reviews applicable bank records, and must offer an opportunity for the lawyer to reply to the complaint (or reportable action by the bank, if triggered by a bounced check from a client trust account).

In response to the concern that spiteful or clients delinquent in paying their attorney’s fees can essentially cause irreparable harm to an innocent attorney’s reputation, all complaints are investigated and the respondent is contacted for a reply. When a client reports a theft of funds to the State Bar, the attorney is required by statute to provide an accounting to the client.⁵ As such, some clients complain to the State Bar because the attorney failed to provide an accounting. Other misappropriations are detected as a result of a bank’s report, which under statutory obligation, must notify the Bar of dishonored instruments drawn against a client trust account.⁶ Whether the client or the bank alerts the State Bar of a potential misappropriation, the investigator obtains the

⁵ Business & Professions Code section 6091. See also rule 4-100(B)(3)[attorney required to maintain complete records of client trust account and render appropriate accounts to the client.]

⁶ Business & Professions Code section 6091.1.

bank records, which either supports or disproves misappropriation of client funds. If fund activity suggests misappropriation, the investigator contacts the respondent for a reply.

In his or her response, the attorney may provide an explanation to show that there was bank error, negligent oversight, or admit culpability but offer mitigation. A review of bank records and evaluation of the evidence and the respondent's reply are set forth in a statement of the case and forwarded to OCTC counsel in the Trials Unit to determine whether the case may be settled or resolved informally, dismissed, or proceed to notice filing of disciplinary charges.

Any such complaint is investigated, including an evaluation of the respondent's reply and review of bank records, before any filing of charges takes place. A client's colloquial reference to "theft" when he or she believes that a refund of fees is owed because the attorney failed to perform promised work, does not constitute a misappropriation in violation of rule 4-100(a), Rules of Professional Conduct, or Business and Professions Code section 6106 [moral turpitude]. For purposes of this Consumer Alert proposal, such claims would not trigger a consumer alert.

In addition, the rules of procedure require that a notice of charges may be filed only if there is "reasonable cause to believe that a member has committed a violation and the member has received a fair, adequate and reasonable opportunity to deny or explain the matters...." (Rule 2604 Rules of Proc. of State Bar.)

In sum, ample due process safeguards against the potential for abuse of unfair or unproven complaints. First, the Consumer Alert would not be posted until after: 1) a completed investigation and written summary of the case are provided to the OCTC trial attorney; 2) several opportunities for the attorney to reply are provided; 3) the matter is not resolved pre-notice; a determination is made that reasonable cause exists; and 4) the attorney has been invited to resolve the matters with or without a settlement judge before a notice is filed.

b. In the Past Six Years, Nearly Every Filed Charge of Misappropriation Has Resulted in a Finding of Culpability.

Following the filing of a misappropriation charge in the State Bar Court, a filed charge may be resolved in several ways; 1) stipulate to an admission of culpability and/or level of discipline; 2) resign from the practice of law with charges pending; or 3) file a reply to the notice of charges and proceed with a formal disciplinary hearing before the State Bar Court. In other words, some misappropriations are never filed because the attorney either stipulates to culpability or resigns with charges pending (and avoids a finding of culpability).

The offense of taking client entrusted funds, for the most part, is a strict liability offense in violation of rule 4-100(a), Rules of Professional Conduct (i.e., a balance dip establishes the offense.) These offenses are straightforward to ascertain upon review of the bank statements of the client trust account. Absent circumstances that may be

explained by the respondent, the offense of failure to maintain client funds in trust has occurred.

However, to prove misappropriation of client funds, the evidence must show that the attorney dishonestly took the client's funds for personal use or acted with gross negligence by failing to maintain the client's funds. *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 585-586; *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26. Thus, a necessary element of proof for any misappropriation includes evidence of moral turpitude, a violation of Business and Professions Code section 6106.

One of the comments received (No. 24) opined that the author would be inclined to support the proposal if data exists showing that every misappropriation charged results in culpability (and, presumably, resignation with charges pending, which avoids finding of culpability). In response to this and other comments expressing similar concerns, OCTC surveyed the past six years of filed misappropriation charges to test its presumption that nearly all filed misappropriation charges result in culpability or resignation with charges pending.

From 2005 through 2010, 132 notices of disciplinary charges alleging a Business and Professions Code section 6106 misappropriation were filed in the State Bar Court and resolved. The notices reviewed by OCTC charged the attorney with violating rule 4-100(a) coupled with a section 6106 misappropriation, or a section 6106-misappropriation alone. The charges reviewed in this survey involved any amount dollar amount of theft, not limited to serious misappropriations. Of the 132 notices filed during this time period, culpability was found for a section 6106 misappropriation in 129 of them, or 97.7% of the cases. Only three attorneys were exonerated of a filed misappropriation charge (however, all three were found culpable of other misconduct and, nonetheless, received discipline.)

c. The Dollar Threshold Limits the Consumer Alert to Warn the Public of the Relatively Small Number of Serious Misappropriation Offenders.

Four comments express the view that any dollar threshold of misappropriation used as criteria for posting an alert defeats the public protection purpose of the proposal. However, because every filed notice of disciplinary charge is already posted on the member's profile under current policy, misappropriation of any amount is already accessible to consumers online. While OCTC agrees with the argument that theft of any dollar amount is a material fact that clients would want to know about their current or future attorney, OCTC determined that only those charges against the most serious offenders who cause the most disproportionate amount of harm warrant a Consumer Alert at this time.

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 petition filed pursuant to Business and Professions Code section 6007(c) 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 strongly believes that current and prospective clients are entitled to be warned of those relatively few lawyers who are charged with misappropriating significant amounts from other clients. With the exception of members facing a filed Business and Professions Code section 6007(c) proceeding, the proposal adds no additional information not already accessible on the website. In addition, ample due process safeguards exist- a completed investigation is conducted, the member has several opportunities to reply or resolve the matter, the lawyer's reply to any filing is also posted. These combined factors provide adequate protection against unscrupulous complainants or unfounded accusations of theft. That nearly every filed charge of misappropriation over the past six years has resulted in culpability supports this conclusion.

If you agree to extend State Bar current website policy to 1) posting consumer alerts on the State Bar's website upon filing either a notice of disciplinary charges or a Business & Professions Code section 6007(c) petition based on a misappropriation of \$25,000, whether as a single charge or total of charges, and 2) posting such section 6007(c) petitions and any reply, your adoption of the following resolutions would be appropriate:

For the RAD Committee:

RESOLVED, that the Board Committee on Regulation, Admissions & Discipline hereby recommends that the Board of Governors approve the proposed policy set forth in Attachment A regarding 1) the online posting of a Consumer Alert and disclaimer on the member's State Bar profile page when a misappropriation of \$25,000 or more of client funds charge (as a single or total of charges) 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 charges, and any response, until the State Bar Court files a decision or order; and it is

FURTHER RESOLVED, that the Board Committee on Regulation, Admissions & Discipline recommends to the Board of Governors that the aforementioned policy shall be applicable to all notice of disciplinary charges and Business & Professions Code section 6007(c) petitions filed in the State Bar Court on or after the effective date of this policy.

For the Board of Governors:

RESOLVED, that upon the recommendation of the Board Committee on Regulation, Admissions & Discipline, the Board of Governors hereby approves the proposed policy set forth in Attachment A regarding 1) the online posting of a Consumer Alert and disclaimer on the member's State Bar profile page when a misappropriation of \$25,000 or more of client funds charge (as a single or total of charges) is filed in a notice of disciplinary charges or relied on in a 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 charges, and any response, until the State Bar Court files a decision or order; and it is

FURTHER RESOLVED, that the aforementioned policy shall be applicable to all notice of disciplinary charges and Business & Professions Code section 6007(c) petitions filed in the State Bar Court on or after the effective date of this policy.