

AGENDA ITEM

Date: July 7, 2011

To: Members, Regulation, Admissions and Discipline Committee

From: Starr Babcock, General Counsel
Richard J. Zanassi, Chief Assistant General Counsel
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Subject: Formation of a Staff Working Group to Assess: (1) the Implementation of Business and Professions Code section 6086.13 re: Monetary Sanctions in Disciplinary Matters; and (2) the Imposition of Filing Fees for Respondent's in State Bar Disciplinary Matters

Executive Summary

At its June 14, 2011 meeting, the Regulation, Admissions and Discipline Oversight Committee ("RAD") expressed an interest in assessing whether the provisions of Business and Professions Code Section 6086.13 [Imposition of Monetary Sanction in Disciplinary Matter] should be implemented by the State Bar. This statute provides that any order of the Supreme Court imposing suspension or disbarment, or accepting a resignation with charges pending, may include a monetary sanction not to exceed \$5,000 for each violation subject to a limit of \$50,000. The funds received from disciplined members would be deposited into the Client Security Fund. Although the statute was enacted into law in 1992, to date, the provisions of the statute have not been put into practice by the State Bar. In addition, some members of RAD raised the issue as to whether it would be appropriate for the State Bar to charge respondent attorneys in disciplinary matters filing fees.

If approved by RAD, it is recommended that a Staff Working Group comprised of those departments within the State Bar most likely to be involved with the statute's application and enforcement and issues related to filing fees (Office of the Chief Trial Counsel, State Bar Court, Member Billing, and the Office of General Counsel) be formed to address the feasibility of effectuating the provisions of the statute and the imposition of filing fees. Reporting directly to RAD, the Staff Working Group would explore any legal and practical issues regarding the application of the statutory provisions or filing fees, consult with the Supreme Court staff on issues pertinent to the Court in light of its ultimate authority over the discipline process, and, if deemed appropriate, draft rules setting forth guidelines for the imposition and collection of monetary sanctions against disciplined attorneys in conformity with Business and Professions Code section 6086.13(c). If further deemed warranted, the Working Group would also draft statutory language to authorize the collection of filing fees in State Bar disciplinary cases.

The Staff Working Group would be expected to report back to RAD periodically with status updates.

BACKGROUND

I. Text of Business and Professions Code Section 6086.13

Business and Professions Code section 6086.13 provides as follows:

- (a) Any order of the Supreme Court imposing suspension or disbarment of a member of the State Bar, or accepting a resignation with a disciplinary matter pending may include an order that the member pay a monetary sanction not to exceed five thousand dollars (\$5,000) for each violation, subject to a total limit of fifty thousand dollars (\$50,000).
- (b) Monetary sanctions collected under subdivision (a) shall be deposited into the Client Security Fund.
- (c) The State Bar shall, with the approval of the Supreme Court, adopt rules setting forth guidelines for the imposition and collection of monetary sanctions under this section.
- (d) The authority granted under this section is in addition to the provisions of Section 6086.10 and any other authority to impose costs or monetary sanctions.
- (e) Monetary sanctions imposed under this section shall not be collected to the extent that the collection would impair the collection of criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney. In the event monetary sanctions are collected under this section and criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney are otherwise uncollectible, those penalties or judgments may be reimbursed from the Client Security Fund to the extent of the monetary sanctions collected under this section.

II. History of Business and Professions Code Section 6086.13

Business and Professions Code Section 6086.13 was enacted into law in 1992 (AB 2300, Umberg) and authorized the imposition of monetary sanctions in attorney disciplinary matters in the amount of \$5,000 per violation of the Rules of Professional Conduct, not to exceed \$50,000 total. A review of the legislative history suggests that the actual amount of the sanction per violation of the Rules of Professional Conduct would be within the discretion of the State Bar Court, subject to approval by the Supreme Court, based on the severity of the violation and factors in mitigation and aggravation.

At the time the statute was enacted, the Client Security Fund (“CSF”) was nearly insolvent. To remedy this problem, the State Bar received approval to increase the annual fee by

members to support the CSF from \$25 to \$40. There was a concern, however, that the cost of the discipline system, as evidenced by the CSF increase, was almost entirely sustained by non-disciplined attorneys. To reduce or restrain the growth of costs imposed on attorneys who are never the subject of the discipline process, the Legislature enacted 6086.13 to provide additional funding to the CSF though monetary sanctions imposed on disciplined attorneys, with the collected sanctions going directly to the CSF.

The State Bar had expressed several concerns with the provisions of the statute, informing the Legislature that: (1) the cost of the administration of the Client Security Fund would increase significantly; (2) the provision of the statute failed to make clear what awards would take precedence if an attorney was indigent and was subject to costs, restitution order, and monetary sanctions; (3) a shifting of the burden of proof in disciplinary proceedings from clear and convincing to beyond a reasonable doubt would be required if the sanctions were deemed punitive; and (4) an increase in the State Bar Court's workload mandated by post-trial indigency hearings. Despite these concerns, AB 2300 was passed and signed into law.

III. State Bar Court Filing Fees

The State Bar Court has never imposed filing fees on respondent attorneys in State Bar disciplinary matters and would most likely require an amendment to the Business and Professions Code to effectuate such a practice. The approach will be slightly different than the approach taken with respect to monetary sanctions since there is not an existing enabling statute providing for the assessment of filing fees. The Staff Working Group would be charged with exploring any legal and practical issues to imposing such fees, including the drafting of an appropriate statute.

REPORTING TIMELINE

The Staff Working Group will submit its initial status report at the November RAD meeting and will follow-up with additional reports as review of the two subject areas progresses.

RECOMMENDATION

If the Regulation, Admissions and Discipline Oversight Committee decides that a Staff Working Group should be charged with reviewing issues related to the implementation of Business and Professions Code section 6086.13 and the imposition of filing fees in disciplinary matters before the State Bar Court and reporting its findings back to the Committee, it would be appropriate to adopt the resolutions appearing below.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Regulation, Admissions and Discipline Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Regulation, Admissions and Discipline Oversight Committee recommends that the Board approve the appointment of a Staff Working Group to report directly to the Committee its review and assessment regarding the implementation of Business and Professions Code section 6086.13 and the imposition of filing fees in disciplinary matters before the State Bar Court.