



THE STATE BAR
OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105

Office of General Counsel

TEL (415) 538-2388 • FAX (415) 538-2321

CONFIDENTIAL
Attorney-Client Privilege

TO: Dag MacLeod, Office of Research & Institutional Accountability
FROM: Suzanne Grandt, Office of General Counsel
CC: Vanessa Holton; Robert Retana, Office of General Counsel
DATE: November 14, 2016
RE: Disclosure of Criminal Arrest and Conviction History

I. ISSUE

What is the recommended method for obtaining members of the State Bar of California (“the Bar”) criminal offender record information (“CORI”)¹ for the purpose of verifying attorney self-reporting of certain criminal charges and convictions pursuant to Business and Professions Code § 6068?

II. SHORT ANSWER

Under the California Department of Justice (“DOJ”) guidelines, the Bar is required to submit fingerprint imaging of the individuals whose criminal information it seeks before that information is disseminated to the Bar. Although the Bar already submits the majority of Bar members’ fingerprints to the DOJ prior to Bar admission, the DOJ does not retain these records for future background checks. Thus, the Bar’s only option for receiving current members’ CORI is re-submitting fingerprints of members. To get an idea of how accurate self-reporting is, the Bar could submit a percentage of member fingerprints to the DOJ.

The Bar should also consider entering into a “Contract for Subsequent Arrest Notification” with the DOJ. This Contract will mandate that the DOJ retain all fingerprint records submitted by the Bar for licensing purposes in order to notify the Bar of subsequent California criminal arrests and convictions (or other dispositions of the arrest). However, this is not a perfect solution to obtaining members’ CORI. To be clear, this Contract only mandates arrest notification for individuals whose fingerprints are submitted after the date the Contract is signed. Thus, it will not impact the Bar’s current request for member CORI. Moreover, the Contract is limited to “California only” arrests and convictions, so it will not affect current or future requests for federal and out of state criminal records.

¹ "Criminal Offender Record Information" means records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release. Pen. Code, § 11075.

III. DISCUSSION

a. Background

i. Overview of the DOJ's Dissemination of CORI to Authorized Entities

Due to the sensitive and confidential nature of criminal records, nondisclosure of this information is the general rule, with the exceptions to the rule being narrowly construed. 42A Cal. Jur. 3d Law Enforcement § 45. The California Penal Code mandates that the Attorney General, as head of the DOJ, establish regulations to assure the security of CORI from unauthorized access and disclosures by individuals and public and private agencies and to assure that this information is disseminated “only in situations in which it is demonstrably required for the performance of an agency's or official's functions.” Pen. Code, § 11077, subs. (a), (b).

The Penal Code further states that certain categories of agencies and persons are authorized by law to receive criminal history information. Pen. Code § 11105. For instance, the DOJ must disclose state summary criminal information² to law enforcement agencies for law enforcement purposes only, to courts of the State, and to certain employers or regulatory agencies for purposes of “employment, licensing, or certification.” *Id.* Since the Bar acts as the California Supreme Court’s administrative arm for purposes of admission, discipline and regulation of attorneys, it falls into the category of “courts of the state.” Cal. Const., art VI, 9; Bus & Prof. Code § 6001. Further, the Bar is also statutorily authorized to receive CORI as part of its moral character determination, and in connection with Bar investigations and proceeding. See Bus. & Prof. Code § 6054.

The California Office of Attorney General (“OAG”), as head of the California DOJ, has guidelines available on its website for how authorized agencies or individuals may request CORI. However, the process for submitting requests differs depending on the intended use of the CORI. The OAG divides requests into two types: (1) requests for disclosure of CORI for employment, licensing and certification purposes; and (2) requests for disclosure of CORI for research and statistical purposes. Neither the OAG’s website nor any other public authority addresses a uniform process for requests by agencies and persons otherwise authorized by law to receive CORI if needed for any other stated purpose.

The OAG’s website lists specific steps for obtaining CORI for employment, licensing and certification purposes. Specifically, if an agency is duly authorized to receive CORI, it must submit fingerprint images of individuals to the OAG in order for the DOJ to run a background check. See <https://oag.ca.gov/fingerprints/agencies>. For security reasons, as a general policy, the DOJ does not retain these fingerprints for future background checks. However, an authorized agency or entity may request that the DOJ do so, for the limited purposes of updating an agency

² State summary criminal information” is substantively similar to CORI but does not refer to records and data compiled by criminal justice agencies other than the Attorney General. Pen. Code § 11105(2)(B).

on new criminal information pertaining to an individual whose fingerprints had previously been submitted for employment, licensing or certification purposes. This process is referred to as a “subsequent arrest notification” and is authorized by Penal Code 11105.2(a) as follows:

The Department of Justice may provide subsequent state or federal arrest or disposition notification to any entity authorized by state or federal law to receive state or federal summary criminal history information to assist in fulfilling employment, licensing, certification duties, or the duties of approving relative caregivers, nonrelative extended family members, and resource families upon the arrest or disposition of any person whose fingerprints are maintained on file at the Department of Justice or the Federal Bureau of Investigation as the result of an application for licensing, employment, certification, or approval.

To receive this information, the agency or entity must fill out a document entitled “Contract for Subsequent Arrest Notification.” See Penal Code 11105.2(c) (requiring entities to enter into a contract with the DOJ in order to receive subsequent state or federal arrests or dispositions). This Contract is available on the OAG’s website at <https://oag.ca.gov/sites/all/files/agweb/pdfs/fingerprints/forms/subarr.pdf>. Despite the fact Penal Code § 11105.2 permits notification of both state and federal arrests and dispositions, the Contract is limited to “California only” arrests and dispositions. Currently, there is no such Contract between the Bar and the DOJ.

On the other hand, the OAG does not require fingerprint submissions if the CORI is being requested for purported “research and statistical” purposes. Rather, there is a link on the website for the agency or research body to fill out a “CORI Research Request Package” (available at <https://oag.ca.gov/cori>).

ii. The Bar’s Current Process for Fingerprint Submission and Retention For Attorney Licensing Purposes

When an individual applies for Bar membership, he or she must be fingerprinted as part of the Bar’s moral character evaluation process. Business & Professional Code § 6054 provides, in pertinent part:

The State Bar of California shall require that an applicant for admission or reinstatement to the practice of law in California, or may require a member pursuant to subdivision (k) or (l) of Section 6068, be fingerprinted in order to establish the identity of the applicant and in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states. The information obtained as a result of the fingerprinting of an applicant or member shall be limited to the official use of the State Bar in establishing the identity of the applicant and in

determining the character and fitness of the applicant for admission or reinstatement, and in discovering prior and subsequent criminal arrests of an applicant, member, or applicant for reinstatement. All fingerprint records of applicants who are denied admission to the State Bar shall be destroyed within one year of the decision not to admit. All fingerprint records of applicants admitted or members reinstated, or provided pursuant to subdivision (k) or (l) of Section 6068, shall be retained thereafter for the limited purpose of criminal arrest notification.

Bar applicants who reside in California are required to submit fingerprints via Live Scan Technology. See California State Bar Instructions for Application for Determination of Moral Character (“Instructions”), at p. 4. This means that the applicant is fingerprinted at a Live Scan location and their records are sent directly to the DOJ for a background check. *Id.*, at p. 4-5. The DOJ also forwards the records to the FBI to perform an FBI criminal background check. All Live Scan fingerprint records are subsequently maintained in the Bar’s AS400 management system. There is currently no process or procedure for purging, destroying or deleting the fingerprint records of individuals who are current Bar members.

Bar applicants who reside outside of the State of California must submit their fingerprints via a physical fingerprint card since Live Scan Fingerprinting Agencies are only located in California. Instructions, at p. 7. Applicants send these cards to the Bar which then forwards a percentage of these cards to the DOJ and FBI for a background check.³ The Bar stores all hard copy fingerprint cards in the Los Angeles office for a period of three years.

b. Analysis

The Bar will not be able to request dissemination of current members’ CORI in order to validate the accuracy of attorney self-reporting of criminal convictions and felony charges pursuant to Business and Professions Code 6068, or for purposes otherwise related to ongoing moral character determinations, without submitting fingerprint imaging. This is because the information is needed for “licensing” and not “research” purposes, and the DOJ has authority to require fingerprint imaging for CORI dissemination for licensing purposes.

- i. Any Request by the Bar for CORI to Verify Attorney Self-Reporting is for “Licensing” and is Not a Research or Statistical Project or Report**

³ The Bar’s submission of only a percentage of fingerprint cards is problematic. Specifically, the Bar only submits fingerprint cards for those individuals who self-reported having a criminal history. This was purportedly done a number of years ago in order to save costs. In 2015, there were 7,986 total applicants who were fingerprinted: 6,233 via Live Scan, and 1,753 via fingerprint cards. Yet only 455 hard copy cards (26% of the cards) were sent to the DOJ. This means that 1,298 out of 7,986 total 2015 applicants (16%) did not have fingerprints submitted to the DOJ and/or FBI as part of the Bar’s Moral Character determination.

As explained above, the OAG does not require fingerprint submissions if the CORI is being requested for “research or statistical purposes.” Penal Code § 13202 states that:

every public agency or bona fide research body immediately concerned with the prevention or control of crime, the quality of criminal justice, or the custody or correction of offenders may be provided with such criminal offender record information as is required for the performance of its duties, provided that any material identifying individuals is not transferred, revealed, or used for other than research or statistical activities and reports or publications derived therefrom do not identify specific individuals, and provided that such agency or body pays the cost of the processing of such data as determined by the Attorney General.

It would be extremely difficult to convince a court that a request for CORI in order to verify attorney self-reporting or to determine member’s ongoing moral character should properly be categorized as a “research” request under Penal Code § 13202 for numerous reasons. First, the Bar is not “immediately concerned” with the prevention or control of crime, the quality of criminal justice, or the custody or correction of offenders. See Pen. Code § 13202. Unlike law enforcement officials and criminal justice agencies, the main purpose of the Bar is not protecting the public from criminals. Rather, the Bar is “immediately concerned” with the integrity of the legal profession. Although the Bar’s mission is “protecting the public,” the Bar accomplishes this by exercising its licensing, regulatory, and disciplinary functions, not by prosecuting criminals.

Second, Penal Code § 13202 mandates that any material identifying individuals cannot be used for “purposes other than research or statistical activities.” The fact the Bar intends to potentially discipline attorneys who did not accurately self-report charges or convictions demonstrates that it seeks the CORI for purposes other than research.

Third, the OAG has discretion to deny the request even if the Bar could demonstrate it otherwise met the requirements of the statute. Id. (stating that the specified agencies and research bodies *may* be provided with CORI under the enumerated circumstances). Although there is no legislative history specific to the OAG’s discretion under this statute, the OAG is given extremely broad discretion to establish regulations to assure the security of CORI. Pen. Code § 11077 (mandating that the Attorney General “establish regulations as he or she finds appropriate to carry out his or her functions under this article”).

Fourth, the ultimate intended use of the CORI is to ascertain compliance with California Business and Professions Code in order to determine appropriate character and fitness to continue practicing law. As good moral character is a requirement of all licensed attorneys, determining whether attorneys’ have self-reported charges and whether attorneys have been convicted or charged with certain crimes in part of the Bar’s ongoing regulation of its licensees.

ii. The DOJ Has Authority to Require Fingerprint Imaging For Purposes of License Regulation

As discussed above, the DOJ's website only instructs on finger print submissions to run initial background checks. Here, the Bar would be requesting CORI for individuals who are already licensed. Yet, the DOJ still refuses to provide this information without fingerprint identification, because it is for "licensing purposes."

There is no available legal or statutory authority differentiating processes for dissemination of CORI prior to licensing, employment, or certification versus dissemination of this information subsequently. However, numerous sections of the Penal Code discuss CORI dissemination for licensing or certification generally without distinguishing between the two. See e.g. Pen. Code § 11102.1 (discussing requests "related to" employment, licensing and certification background); § 11105 (discussing furnishing information to agencies in "fulfilling employment, certification, or licensing duties" and information "used for employment, licensing or certification purposes"); § 11105.7 (same).

Additionally, Penal Code § 11105.2 discusses providing subsequent arrest notification of persons "whose fingerprints are maintained on file at the Department of Justice or the Federal Bureau of Investigation as the result of an application for licensing, employment, certification, or approval." This implies that without appropriate fingerprint identification, the DOJ cannot provide CORI if used for ongoing regulation of professional licensing and certification. Of course, as a policy matter, it would make little sense to argue that there should be different processes governing information disclosure for license eligibility versus license regulation⁴.

IV. RECOMMENDATIONS

a. Submit All or a Percentage of Attorney Fingerprints to the DOJ

The only way for the Bar to receive CORI of current members is to resubmit member fingerprints to the DOJ to run a new background check. As the Bar currently maintains all Live Scan finger print reports, as well as hard copy fingerprint reports of attorneys admitted in the past three years, the Bar has access to most of these records. However, the Bar would need to pay to have these fingerprints resubmitted. It currently costs \$34 to submit fingerprints to the DOJ and additional \$17 if the fingerprints are also forwarded to the FBI. This would cost the Bar over one million dollars in additional expenses. Moreover, it may likely be incredibly time consuming for employees to pull and send all these records.

One solution is that the Bar could submit a percentage of these fingerprints to the DOJ. Upon receiving CORI for these attorneys, the Bar could conduct its own analysis of how accurate attorney self-reporting is. To save costs, the Bar could consider submitting a small percentage of attorney fingerprints to begin with. If it appears many attorneys have criminal records they are not reporting, the Bar could increase the sample size.

⁴ It would also be futile to argue that fingerprints should not be required in order to provide CORI for initial license eligibility, as it is a long standing DOJ practice, permitted by the DOJ's general authority to appropriately safeguard confidential criminal information.

b. Entering into a Contract for Subsequent Arrest Notification with the DOJ

The Bar should consider immediately entering into a Subsequent Arrest Notification Contract with the DOJ. As discussed above, this Contract mandates that the DOJ maintain all fingerprint records that are submitted by the Bar for licensing purposes after the date the Contract is signed. Practically, this means that, going forward, when an individual applies for Bar admission and the Bar submits that person's fingerprints to the DOJ, the DOJ will run a background check and then retain the fingerprints. The DOJ will then automatically notify the Bar when one of these individuals is arrested in the State of California. See Pen. Code § 11105.2. Subsequently, the Bar will be notified of the disposition of the arrest.

As this Contract only applies to fingerprints submitted after the date it is signed, it will not impact the current request for member's CORI, unless fingerprints are resubmitted, as discussed above. Additionally, since this Contract is limited to "California only" arrests, the Bar would still have to resubmit member fingerprints to check for subsequent federal and out of state arrests and dispositions.

There are a few things to consider prior to entering into this Contract. As an initial matter, this Contract would require the Bar to affirmatively notify the DOJ when an applicant whose fingerprints had been submitted to the DOJ is denied Bar admission, as well as when a member is disbarred or no longer licensed to practice law in California. See Pen. Code § 11105.2 (d)(f) (mandating that agencies submitting fingerprints of applicants for licensing, for the purpose of establishing a record of the applicant to receive notification of subsequent arrests must immediately notify the DOJ "if the applicant is denied licensing certification, or approval" or "when the applicant's license or certificate is revoked" or "when the applicant may no longer renew or reinstate the license"). The Bar will need to determine the best way to transmit this information, what department should be tasked with doing so, and how burdensome this would be for the Bar.

Second, there may be concerns that the DOJ's retention of member's fingerprint records implicates privacy concerns. Based on the current statutory scheme and well-established case law this should not be a legally viable concern. Applicants for admission to the Bar already have an expectation that their fingerprints will be used for a criminal background check and that they will be retained thereafter for the purpose of subsequent criminal record checks. See Business and Professions Code § 6054 ("All fingerprint records of applicants admitted or members reinstated, or provided pursuant to subdivision (k) or (l) of Section 6068, shall be retained thereafter for the limited purpose of criminal arrest notification"). Although, there is no statutory explanation of how applicant fingerprints will be retained, or who shall maintain them, the Penal Code permits the retention of such information by the DOJ and there is no law or regulation preventing the Bar from submitting fingerprints to the DOJ for this type of limited retention.

Thus, there is a low likelihood of success of any lawsuits alleging that this Contract violates an individual's constitutional privacy rights. As Business and Professions Code 6054

specifically permits the Bar to retain fingerprints for this very purpose, a person would have to allege that the law itself is unconstitutional. It is well-established that the right to pursue one's chosen profession is not a fundamental right. See Lupert v. California State Bar, 761 F.2d 1325, 1328 (9th Cir.1985). States also have broad power to establish standards for licensing practitioners and regulate the practice of professions. Goldbarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Thus, to state a plausible constitutional claim, a plaintiff would have to sufficiently allege that the Bar's fingerprinting and retention requirements for attorney applicants bears no relationship to any legitimate interest of the State of California. W. v. Bailey, No. 11CV1760-MMA POR, 2012 WL 993301, at *5 (S.D. Cal. Mar. 23, 2012) (analyzing the constitutionality of fingerprint requirements for state nursing licensing).

The Bar could easily demonstrate that it has a legitimate interest in allowing the DOJ to retain applicant and member fingerprints for purposes of protecting the public. California courts have routinely upheld fingerprinting requirements when there are overriding public protection concerns. Perkey v. Department of Motor Vehicles 42 Cal. 3d 185, 191 (1986) (fingerprinting as a condition for obtaining a driver's license); Sheyko v. Saenz, 112 Cal. App. 4th 675, 688 (2003) (fingerprinting of welfare applicants and recipients) Miller v. Murphy, 143 Cal. App. 3d 337, 343 (1983) (fingerprinting of pawnbrokers); People v. Stuller, 10 Cal. App. 3d 582, 595 (1970) (fingerprinting of bartenders).

Here, a requirement for being a licensed attorney in the state of California is good moral character. It is the policy of the Bar that persons are not of "good moral character" if they have been convicted of violent felonies, felonies involving moral turpitude and crimes involving a breach of fiduciary duty. This requirement is an embodiment Bar's obligation to regulate the legal profession in order to protect the public and to promote a fair and efficient administration of justice.⁵ Thus, the State of California has a clear and legitimate interest in retaining member

⁵ Courts throughout the country have consistently upheld statutes that required or allowed revocation of professional licenses after a licensee has been convicted of a crime. See Bailey, 2012 WL 993301, at *5 ("California's interest in regulating the healthcare profession and protecting the public from healthcare workers who have been convicted of felonies cannot seriously be questioned"). Hawker v. New York, 170 U.S. 18 (1898) (upholding statute forbidding felons from practicing medicine after discussing general power of states to regulate professions, including requiring good character and determining what evidences a lack of good character); Weiss v. N.M. Bd. of Dentistry, 110 N.M. 574 (1990) (noting that permitting revocation of license on basis of criminal conviction "also reflects a legislative policy that public confidence in practitioners of a profession should not be undermined by the licensing of convicted felons" and that "it is within the legislative prerogative, in defining 'the qualifications one shall possess in order to engage in the practice of dentistry' [] to prescribe the conditions under which the privilege [] or the 'property right' [] of so practicing shall be enjoyed") (internal citations omitted); Warmouth v. Del. State Bd. of Examiners in Optometry, 514 A.2d 1119 (Del. Super. 1985) (affirming statute under which "conviction of a crime may be the sole basis for revocation of a license").

fingerprints such that they can appropriately evaluate the member's moral character for public protection purposes.

In sum, there are no legal hurdles to entering into this Contract. The Bar is already authorized by law to receive CORI, all licensed attorneys have the reasonable expectation that their criminal history is subject to disclosure to the Bar, the State of California has a legitimate interest in appropriately regulating the legal profession, and there are no other readily ascertainable concerns. However, the Bar should consider how burdensome it would be to timely notify the DOJ when an individual is not admitted, or is no longer a member, of the Bar. The Bar should also consider any cost associated with the options presented above. Moreover, if done prospectively only, without a resubmission of fingerprints of current members, it would treat new applicants' fingerprint records differently than those of current members. If the Bar decides to pursue this option, it should be vetted by the Board of Trustees and it should be determined whether any State Bar Rules need to be created or amended, e.g., to reflect notification to the DOJ regarding inability to renew license. See State Bar Rule of Procedure 5.11 (records of resignations must be public and available for inspection). Rules of Procedure may need to be created to address DOJ notification and to place members on notice of this change going forward.