



THE STATE BAR OF CALIFORNIA

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FROM: Elizabeth Parker

TO: Governance in the Public Interest Task Force
Board of Trustees

RE: Questions for 2016 Governance in the Public Interest Task Force Work Plan

Anticipating the December 9, 2015 meeting of the Task Force on Governance in the Public Interest, President Pasternak, as chair of the Task Force, has asked staff to develop an outline of questions to assist the Task Force in designing a 2016 agenda. The outline below is not intended to be exclusive, but is offered to help Task Force members meet an ambitious 2016 schedule, which anticipates at least two Task Force meetings and two public hearing meetings (in Los Angeles and San Francisco), followed by full report to the full Board of Trustees by mid-2016. The adopted report will then be sent to the Supreme Court, the Governor and the Legislature. The following questions should be considered as a starting point for discussion on December 9, when the Task Force will work to design an agenda for the remaining meetings. Staff will also assist in this process by providing an historical review of comprehensive reports of the State Bar done in 1995 and 2011. These earlier studies will be updated to provide the necessary background for consideration of the topics identified for discussion.

A. Selection and Composition of the State Bar Board of Trustees

Recent statutory changes in the means of selecting Trustees has altered the composition of the Board, changing both size, means of selection and balance between lawyer (i.e. 'active market participants') and public members. State Bar members now elect only six Trustees, with the remaining thirteen Trustees named by one of three branches of State government. This latter group of appointed Trustees, however, includes only six public members who are not 'non market participants'. Are there additional changes which should be considered in the selection and composition of the Board to achieve:

1. Greater geographic diversity among *all* Trustees;
2. A reduction in the number of Trustees who can be defined as 'active market participants' under recent case law or FTC guidelines, whether or not they are 'public members', appointed, rather than elected by the members of the State Bar;
3. Elimination of elections for *both* individual Trustees and officers of the Board of Trustees (President, Vice President and Treasurer);
4. Different terms of office for both Trustees and officers.

B. Organizational Structure and Functions of the State Bar of California

Since its inception in 1927, the State Bar of California, like over thirty sister organizations in the U.S. (and all in the Western states except Colorado), has operated with a 'unified bar' structure, combining two roles: protection of the public and advancing the legal profession. The remaining jurisdictions require membership in a bar and dues paid to support a discipline system under their State Supreme Courts, but place traditional associational activities (education, outreach, support for the legal system and legal services) in 'voluntary' bar associations.

Often complementary, these two roles can on occasion create either the reality, or the appearance, of conflict, when member interests have the potential for opposing those of the public in protection and economic freedom. As a result, nationally, a debate has begun on whether state bar organizations should be 'de-unified', to avoid such real or perceived conflicts, to simplify structures, and to make funding of the discipline system more transparent. At the same time, some continue to question whether requiring membership is Constitutionally suspect under First Amendment principles of freedom of association.

In contrast, many others argue that unified bar organizations best serve the public interest by enabling programs which improve the quality of the legal profession, support the Bar's efforts to achieve an accessible and responsive legal system, and contain anti-competitive responses to market forces seen in some 'voluntary' bar associations. In addition, is a statewide voluntary bar feasible in California, which has a multitude of successful local bar associations (geographic, subject matter, and based on heritage) throughout the State? This debate raises a variety of questions.

1. What is the experience among other U.S. states in choosing either a unified or voluntary structure for bar discipline and membership responsibilities?
2. What are the advantages and disadvantages of both forms of bar organization?
3. What impact would a change from unified to voluntary bar organization have on the State Bar of California and what would the resulting structures look like?
4. What can be learned from the experience of other professions, where regulatory and membership functions have been separated?

C. The Impact of a Recent U.S. Supreme Court Decision on State Bar Supervision

The Recent case of North Carolina State Board of Dental Examiners v. Federal Trade Commission, 574 U.S. ___, 135 S.Ct. 1101 (2015) held that if a state delegates licensing and regulatory authority to a state agency controlled by a board of majority dentists, the actions taken by such a self-regulating agency risk being found anticompetitive. If state government 'sovereign immunity' is to be allowed as an exception to the antitrust laws for the actions of such bodies, the 'active supervision' of a governmental body is required, even when the action is taken under a clearly articulated state law. The decision thus raises questions for all regulatory organizations composed of a majority of 'market participants', i.e. members of the

professions being regulated, such as the State Bar of California. In the case of the State Bar, as part of the judicial branch overseen by the Supreme Court of California, the North Carolina State Board raises several governance questions.

1. What changes to the State Bar Board of Trustees currently composed of a majority of practicing lawyers could or should be considered in its governance structure to avoid the characterization that the regulatory activities of the State Bar are controlled by active market participants? What might these changes involve?
2. What is required to achieve 'active supervision' of a state regulatory agency by a governmental body, in this case the Supreme Court of California?
3. Are all regulatory responsibilities of the State Bar 'actively supervised' as currently operated and if not, what changes should be considered?
4. To what extent does the Supreme Court now have, and should the Supreme Court have, exclusive authority over the State Bar?