



THE STATE BAR OF CALIFORNIA

OFFICE OF THE EXECUTIVE DIRECTOR

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To: Members, Board of Trustees

From: Elizabeth Parker, Executive Director

Re: State Bar Task Force on Governance in the Public Interest: Issues Summary

This memorandum describes the complex responsibilities and functions of the State Bar of California. Its objective is to inform the public about the State Bar as an important institution dedicated to public protection, and also to assist the State Bar's Task Force on Governance in the Public Interest, now beginning its 2017 triennial review of the State Bar's governance structures.

As background, California has long been considered a leader in achieving public protection through the regulation and discipline of lawyers and its work to support and improve the functioning and accessibility of a legal system to serve all citizens. Yet its size as the nation's largest state-wide organization of lawyers, and the large number of activities supported under the umbrella of the California State Bar, set it apart and make comparisons with all other sister bar organizations difficult. Indeed, in the last three decades California's size and diversity have so outstripped its counterparts that it may have become an example of a difference in degree that is also a difference in kind. If so, prescriptions for its ideal organization in the future may require approaches that are *sui generis*. Nonetheless, understanding the State Bar's past contributions and current challenges in a national historical context may be a useful starting point for looking to the future. This Summary thus briefly reviews the State Bar's structure, functions and questions against such a backdrop, with reference to the current status of bar organizations across the nation. Hopefully comparisons to the challenges and choices of other state bar organizations will help to inform the recommendations of the State Bar Task Force and also foster deeper understanding of the descriptions and discussion that follow.

Modern organizations of lawyers, two hundred eighty of which are present today in California alone, are relatively recent creations.¹ They first appeared as voluntary professional associations at the end of the nineteenth century with the founding of The New York City Bar Association in 1870. These early bar associations were voluntary in nature, often designed to address a perceived crisis in the profession, which at the time had a poor

¹ See, Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, American Bar Foundation Research Journal, Vol. 8, No. 1 (Winter, 1983), pp. 1-108, for an authoritative historical review of bar organizations in the United States.

reputation and lack of respect as a result of an absence of regulation, quality control and discipline. These problems were also seen as relevant to the profession's financial problems. Voluntary associations of lawyers were formed to confront these problems by creating structures to support discipline and professionalism, thereby improving professional reputation, increasing respect and the possibility of greater financial success.

In the early part of the twentieth century the unified bar structure (sometimes called a mandatory or integrated bar) was introduced from Canada where professional association activities of lawyers had been combined with those focused more directly on regulation and discipline. The thinking behind this design, still present in Canada, was that lawyers were critical players in a democracy. Like the courts, their independence was key to their effectiveness and so their regulation and support should also be independent of the political branches of government, placed under the supervision of the courts. For the first half of the twentieth century the American Judicature Society and the American Bar Association promoted the unified bar as the best way to improve professional quality through self-regulation and discipline. In 1927 California became an early adopter of this approach. It did so, however, not through court rule, but rather by passing legislation which required bar membership for all lawyers licensed to practice. By requiring lawyers to participate in the new organizations, California and its sister unified bar organizations also embraced the goal of supporting the legal system as a whole. The idea's popularity increased overtime and unified bars became the dominant model for American state bar organizations. Today, unified bar associations exist in thirty-three states.

Even so, the structural variations among unified state bars are numerous. There is great variety in the activities that have been combined under the umbrella of state bar organizations, whether they are unified or voluntary. A broad continuum exists from activities that are clearly regulatory/disciplinary at one end, and those focused on the well-being of lawyers on the other, such as support for professional advancement or discounted insurance opportunities. The consequence of this diversity is that there is no single organizational model—no 'gold standard' for the best structure of a state bar organization. Making comparisons between California and other unified bar states is thus a difficult process. Nonetheless, one fundamental feature is present in all state bars. Whether a state bar is a voluntary association or a mandated unified governmental organization, responsibility for the regulation and discipline of lawyers is universally placed within the judicial branch of government. This approach, widely discussed in state court precedent, reflects a consensus that such an arrangement is constitutionally required to protect separation of government powers. To this end, the State Bar of California was added to the California Constitution as a judicial branch entity in 1960. Even so, an unusual feature in California is the continuing involvement of the legislature in the State Bar's structure, authorities and oversight, including the approval of an annual membership fee. In many

states, such active legislative involvement has been criticized, or rejected outright, as a violation of the separation of powers doctrine.²

Among other features, California's size also sets it apart. With 254,455 lawyers, the State Bar of California is more than double the size of Texas, the second largest unified bar with 112,270 lawyers. Another unique feature is the fact that authority to collect and fix the maximum amount of the annual fees for membership in the California State Bar is set annually by the State Legislature, rather than the Supreme Court (although the California Supreme Court has, on one occasion, used its plenary authority to set fees to support the discipline system when the State Legislature failed to act).

Like all its unified bar counterparts, the State Bar of California functions as the administrative arm of the California Supreme Court, acting on behalf of the Court for all regulatory and disciplinary functions related to the practice of law. While the State Bar's associational activities may be the most obvious of its activities to its membership, in fact, by statute, the State Bar's most important functions are its numerous regulatory and disciplinary activities. These are designed to protect the public and enhance the administration of justice and are managed by the State Bar with the Supreme Court's direction and oversight. Nonetheless, all of the unusually large number of programs and services which the California State Bar offers its members are 'fully integrated' into one organization. Here once again California is unusual. In most states, a state bar's public protection activities are both smaller in number and more distributed among the state supreme court, the voluntary and mandatory bar organizations, or other separately created governmental organizations controlled by the judicial branch, rather than operated by one umbrella organization.

California is unusual in other respects as well. It is one of only four states that do not use non-lawyers in discipline proceedings³ and the only state to use a fully professionalized discipline system. Since 1989 all discipline proceedings have been handled by an independent prosecutor's office, the Office of Chief Trial Counsel (OCTC), and adjudicated by a special jurisdiction state court, The State Bar Court, which includes hearing and review departments, is composed of judges variously appointed by the legislative, judicial and executive branches, and is subject to the same standards of practice and discipline as all judges of the state courts. Both OCTC and the State Bar Court are widely admired, frequently cited to support the view that California's discipline system is the nation's best. The State Bar's discipline system also includes a probation department, an attorney diversion program, a statewide fee arbitration program, and a Client Security Fund to compensate victims of attorney theft, using funds specially assessed as part of the annual

² The California Supreme Court has not been unmindful of the delicate balance between the branches where oversight of the State Bar of California is concerned. The fundamental principles governing this relationship is authoritatively set forth by the Supreme Court in *In re Attorney Discipline System* (1998) 19 Cal.4th 582, where the primacy of the court's regulatory oversight of the State Bar and the corresponding limitations of legislative oversight are set forth. See also *Obrien v. Jones* (2000) 23 Cal.4th 40.

³ This represents a change which occurred in 2000 when legislation was enacted to remove participation by a non-lawyer judge from the Review Department of the State Bar Court in disciplinary proceedings.

licensing fees paid by California lawyers. The State Bar also monitors compliance with Minimum Continuing Legal Education requirements.

The State Bar's regulation of attorney admissions to practice focuses on managing three separate bar examinations (two for those seeking to enter practice, respectively the general bar exam for recent law graduates and the exam for already licensed attorneys, and a third to test the first year competence of law school students studying outside the law school accreditation system of the American Bar Association). The State Bar also administers special admissions programs for foreign practitioners, out-of-state lawyers, those with multi-jurisdictional practices, law students and certification for legal specialists in eleven areas of practice. The State Bar is also charged with accreditation and registration of law schools in California that are not a part of the accreditation system of the American Bar Association. Here, once again, California is unusual as one of only a few states that allows those who have not graduated from an ABA accredited law school to sit for the bar exam and that also oversees the independent accreditation of its own system of state law schools.

Although the State Bar is part of the Supreme Court, it is the Legislature, by statute, which has traditionally set the annual required membership fee for attorneys admitted to practice in California. Here again, California is an exception. The licensing fees in most states are set by the state's highest court or the bar organization itself. As in all states, the licensing or regulatory fees which a lawyer must pay in California may only be used for non-political, non-ideological activities germane to the core functions of the bar organization under *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228 (1990). Thus, they are limited to regulating the profession and improving the quality of legal services available to people in California. Additional voluntary fees and donations allow members to contribute to specific other activities by opting in or out of the suggested activities.

Opt-out fees or deductions from the basic licensing fee are allocated to the following activities: lobbying; Bar Relations and Elimination of Bias Programs; and Legal Services Assistance.

The State Bar also supports some non-regulatory activities funded with voluntary or opt-in fees. These activities include support for the membership and activities of sixteen subject specific law sections and the Office of Access & Fairness Programs, which includes the Council on Access & Fairness that serves as the State Bar's diversity think tank. Some State Bar Sections identify and track legislation specifically relevant to the State Bar and provide expertise on proposed legislation to the Legislature and the Governor, as requested. The State Bar also sponsors revenue generating programs designed to serve the needs of State Bar members. These programs include approximately thirty different offerings from ten - twelve different partners. Services offered are roughly split between personal and professional goods and services. The categories of programs cover insurance, financial services, consumer products and professional software. As part of its public protection mission, the State Bar's Office of Legal Services administers grants to non-profit legal aid organizations. These grants are funded by voluntary donations, Interest on Lawyers' Trust Accounts and state funding sources such as the Equal Access Fund.

The Office also works on a range of other programs to expand support for, and the improvement of, the delivery of legal services to low and moderate income Californians and to promote access to justice.

The Bar also has a statutorily required unfunded mandate, the Judicial Nominees Evaluation Commission (JNE). JNE assists the administration of justice by independently evaluating all candidates selected for judicial appointment by the Governor. JNE is funded with State Bar general fund monies.

For all bar organizations, including the California State Bar, an operational tension results from combining regulatory/disciplinary functions with associational duties in a single unified bar structure. Regulation and discipline are typical functions of any state government regulatory agency. In contrast, membership service activities are more consistent with the role of a voluntary bar, operating as a non-profit private association led by practicing members of the bar. In most unified state bar states, this tension has begun to shift in favor of adopting the operational requirements and limitations of a state regulatory agency. This change is also evident in California. In recent years, the State Bar's governance structure has changed significantly, initially driven by legislation reinforcing public protection as the Bar's highest priority. For instance, the composition of the Board of Trustees has evolved to place greater emphasis on unelected trustees. Thus, appointments to the Board of Trustees made by the Supreme Court, the Legislature and the Governor now predominate, with a corresponding reduction in the number of elected attorney members. Another significant example of this evolution occurred in the State Bar's 2016 Fee Bill. There the State legislature imposed the open meeting requirements of the Bagley-Keene Act and the provisions of the California Public Records Act on all State Bar components. For most states, such requirements would have been imposed by court rule, allowing a more tailored process for adapting such requirements for openness to the responsibilities of a judicial branch agency like a state bar. The goal of these changes was to increase public and stakeholder confidence in the Bar's work to support public protection in attorney licensing, regulation and discipline. Yet one unintended consequence may be to damage significantly the State Bar's relationship with its subject specialty sections. Were this to lead to the de-unification of the State Bar, possible damage to the State Bar's efforts to support an effective legal system might be the outcome.

Thus, the history of unified bar organizations continues to be written. The recent decision by the U.S. Supreme Court in *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. No. 13-534. Argued October 14, 2014—Decided February 25, 2015, has raised additional questions about the requirements for oversight of potential anticompetitive decisions by governing bodies composed of a majority of 'market participants.' Other litigation, too, can be expected to challenge aspects of unified bar organizational structures and activities that combine both governmental and associational functions. Meanwhile the legal profession confronts challenges from external forces brought about by the information revolution. The introduction of new corporate players into the traditional legal services sector landscape raises the question of whether entities offering legal products, not only individual lawyers, should be the subject of regulation and if so, by whom?

The time for considering the effectiveness of the State Bar's current governance structures is right, but the questions necessary for consideration are both numerous and complex. In the end, a deliberate approach and one which 'does no harm' will be best in light of the significant challenges, important questions, and unclear answers which confront the Task Force on Governance in the Public Interest as it prepares its 2017 triennial report.