



THE STATE BAR OF CALIFORNIA

OFFICE OF THE EXECUTIVE DIRECTOR

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Date: May 25, 2016

To: Members, Governance in the Public Interest Task Force

From: Elizabeth Parker, Chief Executive Officer
Leah Wilson, Chief Operating Officer

Re: Governance in the Public Interest Task Force

Adopted in 2011 and amended in 2012, Business and Professions Code 6001.2 required the State Bar of California to create a seven member Governance in the Public Interest Task Force (“Task Force”). The Task Force is charged as follows:

“On or before May 15, 2014, and every three years thereafter...[to] prepare and submit a report to the Supreme Court, the Governor, and the Assembly and Senate Committees on Judiciary that includes its recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys, to be reviewed by the Assembly and Senate Committees on Judiciary in their regular consideration of the annual State Bar dues measure.”¹

Prior to establishing the current three year requirement, an initial larger Governance in the Public Interest Task Force submitted its report in 2011, leading to statutory changes in the State Bar governance structure which continue in effect.

Although the initial triennial Task Force report was due in May 2014, that report was not begun until 2015. With the arrival of a new Board and senior management, the Task Force was re-constituted in October 2015 and began its work in earnest by identifying the questions it would address at the first meeting of the Task Force in December 2015. The Task Force organized its efforts around a series of questions which focused on three aspects of the State Bar’s governance structure:

- (a) Selection and Composition of the State Bar Board of Trustees;
- (b) Organizational Structure and Functions of the State Bar of California;
- (c) The Impact of a Recent U.S. Supreme Court Decision on State Bar Supervision. ²

¹ See Appendix A for the full text of Business and Professions Code 6001.2.

² The original December 2015 list of Task Force questions is attached at Appendix B.

As a result, in its subsequent three meetings the Task Force devoted significant attention to governance issues that continue to be relevant in analyzing how the Bar can best achieve its public protection mission. It received a variety of suggestions in both written and oral testimony, along with a specific proposal from three Trustees.

In the meantime, additional developments have occurred in parallel with the Task Force's activities. While not directly related to governance, these issues have a direct impact on public protection and are thus highly relevant to the work of the Task Force.

In mid-May, the State Bar's new senior leadership team completed a timely set of four statutorily required studies. These four studies respond in part to concerns initially noted in the 2015 State Audit and reflect the need for significant reorganization of several discipline-system Departments. Even more importantly, they make clear the State Bar's need to develop meaningful performance measures for many aspects of the Bar's public protection work including, most importantly, the Office of the Chief Trial Counsel (OCTC). Finally, they point to the need for an infusion of additional resources to support adequate staffing levels in OCTC, ranging from \$1.5 to \$10 million.³ In addition to these four studies, the 2016 California State Auditor report includes findings which indicate the need for investment in the Bar's financial reporting capabilities, as well as the need to address underfunding of the statutorily mandated Client Security Fund.

These recent reports and their recommendations, along with proposals stemming from the work of the Task Force, describe the current organizational challenges which the State Bar faces, many of which are long standing. A review of various prior proposals for governance and structural reform of the Bar suggests that the underlying issues and concerns now being identified and addressed are not new; they have been the subject of many earlier reviews. Impatient with the rate of response to decades of critical reports, or motivated by other unique factors which arguably support the need for structural change, some have called for the deunification of the Bar. Strong champions of this proposition include three current members of the Board of Trustees.

Perhaps because of the inherent difficulty in tackling major organizational and operational change, previous reform efforts have largely centered on Bar governance. To date, this has also been true of the current Task Force work, like that of others before it. Moreover, as has been true with prior reports and the 2011 Task Force, the idea of de-unifying the State Bar, an easily

³ Business and Professional Code 6140.16 required the State Bar to complete: a Workforce Planning and Compensation Analysis; a Spending Plan; and a Recommended Backlog Standard Assessment, by May 15, 2016.

described solution, has often been presented as a way to fix all identified problems.

Now, however, the need for the State Bar to complete the work described in the recently released reports, which mandate significant internal reform, must also be considered. Decoupling the Bar's regulatory and associational functions would represent a dramatic organizational change. To evaluate such an idea, staff believes that it will be important for the Task Force to consider the interplay of recommended governance changes with the required internal reforms. In doing so, the Task Force will need to analyze comprehensively the costs and benefits of the various deunification proposals that have been presented for discussion. Only by doing so can the Task Force be certain that changes will benefit, rather than limit, public protection, particularly in the operation of the State Bar's discipline system.

Before making recommendations in favor of any single approach, we thus recommend that the Task Force scrutinize proposed solutions closely by returning methodically to a discussion of the following questions:

- What problem are we trying to solve?
- How does any given proposed intervention solve the problem?
- What are the cost and operational implications of the proposed interventions?
- How will we define and measure success?

As an example, the need to address these questions becomes obvious when separation of the State Bar Sections is considered. The cost of such a structural reform will likely have an estimated \$4.3 million negative impact on the Bar's annual operating budget. Including the "Affinity Insurance Programs," which are a part of the Sections' associational side, will increase this figure by \$2M. In addition, the process of planning and implementing de-unification could impose substantial human capital costs. Questions regarding which functions might ultimately reside in a regulatory versus associational organization, how revenues and fund balances will be decoupled and intellectual property issues resolved, are only a few of the issues that will need to be resolved as part of that effort.

At a time when the Bar is tasked with advancing the recommendations of workforce planning and compensation study analyses, addressing longstanding issues with its case processing and defining a backlog standard, and is striving to quickly realize the fiscal transparency and accountability measures articulated as needed by the California State Auditor, it is important to comprehensively evaluate both *why* we would undertake another major initiative, de-unification, whether it is *necessary* to achieve needed improvements, and *what it will cost* to implement.

With these concerns in mind, staff has prepared the attached *Matrix of Actions Advocated and Other Issues for Consideration*, designed to assist the Task Force in its discussion and analysis of the various ideas and specific proposals which have been presented, as it proceeds to discuss and develop its own recommendations.

APPENDIX A

6001.2.

(a) On or before February 1, 2013, there shall be created within the State Bar a Governance in the Public Interest Task Force comprised of 7 members, including 6 members appointed as provided herein and the President of the State Bar. Two members shall be elected attorney members of the board of trustees who are selected by the elected attorney members, two members shall be attorney members of the board of trustees appointed by the Supreme Court who are selected by the Supreme Court appointees, and two members shall be public members of the board of trustees selected by the public members. The president shall preside over its meetings, all of which shall be held consistent with Section 6026.5.

(b) On or before May 15, 2014, and every three years thereafter, the task force shall prepare and submit a report to the Supreme Court, the Governor, and the Assembly and Senate Committees on Judiciary that includes its recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys, to be reviewed by the Assembly and Senate Committees on Judiciary in their regular consideration of the annual State Bar dues measure. If the task force does not reach a consensus on all of the recommendations in its report, the dissenting members of the task force may prepare and submit a dissenting report to the same entities described in this subdivision, to be reviewed by the committees in the same manner.

(c) The task force shall make suggestions to the board of trustees regarding possible additions to, or revisions of, the strategic plan required by Section 6140.12. In addition, the task force shall also make suggestions to the board of trustees regarding other issues requested from time to time by the Legislature.

(d) This section shall become operative on January 1, 2013.

(Repealed (Jan. 1, 2012) and added by Stats. 2011, Ch. 417, Sec. 2.5. Effective January 1, 2012. Added section operative January 1, 2013, by its own provisions.)

APPENDIX B



THE STATE BAR OF CALIFORNIA

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Tel: (415) 538-2000
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DATE: December 5, 2015

FROM: Elizabeth Parker

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

RE: Revised - 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 or limited terms of office for Trustees and/or officers;
5. Appointment of 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?
5. Supervision and Oversight (committee structure).
6. Impact of Bagley-Keene Act.

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 operational oversight and authority over the State Bar?
5. Immunity vs. indemnification; what are the remedies?
6. Expansion of State Bar regulatory authority to include the ancillary providers of legal services by non-lawyer entities.