

FINAL REPORT
TASK FORCE ON GOVERNANCE IN THE PUBLIC INTEREST
STATE BAR OF CALIFORNIA

I. EXECUTIVE SUMMARY

It is universally acknowledged that significant changes are needed at the State Bar of California. The problems at the State Bar are not recent in origin: indeed, decades of studies, reports and statutory provisions reflect efforts to reform the State Bar, but with only modest impact. Even as this Task Force concluded its work, the Judicial and Legislative Branches were engaged in serious discussion about additional statutory reforms as part of the State Bar's annual licensing fee re-authorization process.

Against this backdrop, Task Force members are mindful that their work should contribute to, not substitute for, on-going discussions by the Judicial and Legislative Branches. *Therefore, rather than argue specific positions, the Task Force has chosen to identify and analyze problems and describe possible solutions.* Many changes to the governance and organizational structure of the State Bar will require statutory action, and so are appropriately left to the State Bar's oversight authorities in the Judicial, Legislative and Executive Branches of government.

The work of the Task Force extended over seven months, from December 2015 to July 2016, and proceeded in stages. Assisted by a new leadership team, the Task Force first identified a series of governance questions focused on three areas: the selection and composition of the State Bar Board of Trustees, the organization and function of the State Bar itself, and the significance of a recent antitrust decision of the U.S. Supreme Court.

Next, hoping to find useful models to answer the questions identified, like many past studies, the Task Force looked for comparisons with other state bar organizations and California professional regulatory bodies. From testimony and research, the Task Force learned that the California State Bar presents a unique situation. It is distinct for its remarkable size, comprehensive control of an exceptionally broad range of activities, unique professional discipline system, and unusual shared oversight arrangement between Judicial and Legislative Branches. Comparisons with other state bar organizations thus offered alternative ways to structure the responsibilities of the State Bar, but a "best practices" model did not emerge. The difference in functional role of the State Bar, a judicial branch agency governing lawyers who serve as "officers of the court"—the consistent model in all states—made comparisons with most other professional regulatory agencies less helpful. Such comparisons may thus overlook an important distinction between law and other professions and the reason that the State Bar is part of the Judicial Branch: the role of lawyers in ensuring public access to a Constitutionally mandated judicial system.

The Task Force next held public hearings, seeking input from those knowledgeable about the State Bar and its challenges. Importantly, as this phase began, several Task Force members, impatient at the slow rate of State Bar reform over many years, proposed their own solution to the perceived problems faced by the State Bar: de-unification of the Bar's regulatory and discipline functions from those resembling traditional trade

associational activities. To facilitate discussion of this proposal for de-unification, as well as other ideas suggested, an evaluation framework was designed, centered around three questions:

1. How does any given proposed intervention solve the problem as defined and enhance public protection?
2. What are the cost and operational implications of the proposed interventions?
3. How will success be defined and measured?

The final stage of the Task Force work coincided with the May 2016 completion of several statutorily required reports and the 2016 Bureau of State Auditors report. Together, these reviews examine a variety of operational issues facing the State Bar, and implementation of their extensive recommendations is now underway. Discussion of these reports was useful in highlighting a fundamental issue for the Task Force: transformational change requires identifying the interactions between governance, organizational structure and operations. Considering any one of these in isolation may make more difficult, if not impossible, achieving lasting reform. Thus, the Task Force agreed that the State Bar must consider these three components together to guarantee its ability to successfully address the needed deep and wide-ranging reforms it must have.

Recognizing this relationship between governance, organizational structure and operations as critical to achieving the statutory mandate to make “recommendations for enhancing protection of the public,” Business and Professions Code 6001.2, the Task Force then asked the State Bar’s new leadership team for its own assessment of the operational problems identified over their first nine months as they worked to implement the Board of Trustees’ reform mandate. In response, eight fundamental operational problems were identified, each with important implications for the governance and structural issues being addressed by the Task Force:

1. The Perception of An Ineffectively Managed Discipline System
2. Inadequate Definitions of Mission and “Public Protection”
3. Proliferation of Activities: Mission Creep and Poor Organizational Coherence
4. A Conflicting Hybrid Governance Structure
5. Confused Reporting Relationships Hindering Accountability
6. Proliferation of Committees and Over Reliance on Volunteers
7. Distinct and Restricted Funding Sources Creating Cultural and Procedural Obstacles to Financial and Organizational Management
8. Inadequate Development and Support for Human Resources

Many of these problems will directly impact the ability of the State Bar to ensure public protection and limit the success of any proposed governance reform. They may also raise an existential question: has the State Bar become unmanageable because of structural conflicts, diversity of mission, and over-reliance on a large number of volunteers lacking accountability? Completion of the staff’s internal review and implementation of mandated reforms, along with further study, will be essential before a reliable conclusion is possible.

The Task Force concluded its work by identifying a number of possible solutions and interventions to address the problems described. These fell into two broad categories: (A) governance reform (creation of an officer slate; extended term for the presidency; increase in public Board members; elimination of Board elections; appointment of an enforcement monitor; and assessment of trustee conduct and performance) and

(B) de-unification of the State Bar. In addition, the Task Force also recommended other areas of possible solution for further study (definition of public protection mission; review of committee framework and structure; board size; the silo impact of various funding sources).

The Task Force awaits the results of discussions now underway among the Judicial Branch and both houses of the Legislature. It joins in their shared view that the time for serious study and reform of State Bar governance is overdue and can no longer be postponed. The Task Force adds the recommendation that such a governance analysis be framed to include careful consideration of the State Bar's organizational structure and operations, in light of the impact they can be expected to have on the success of governance choices. Although transformational change will require legislative intervention in the State Bar's governance model and organizational structure, the Task Force also believes that while awaiting such action, staff should be encouraged to continue identifying and correcting operational issues identified in the course of its work to review all State Bar programs.

The role of this Report has thus been to identify issues and provide factual analysis and recommendations, recognizing that many decisions can only be made by the leaders of the three branches of government where ultimate responsibility for transformational changes lies. The Task Force, State Bar Board of Trustees, and State Bar management look forward to doing their part in implementing their decisions.

II. BACKGROUND AND OVERVIEW OF TASK FORCE CHARGE

Adopted in 2011 and amended in 2012, Business and Professions Code 6001.2 required the State Bar of California¹ to create a seven member Governance in the Public Interest Task Force (“Task Force”). The Task Force charge requires:

“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.” See **Appendix A** for the full text of Business and Professions Code 6001.2.

Before establishing the current three year Task Force requirement, an initial Governance in the Public Interest Task Force submitted a report in 2011. Time restrictions faced by that 2011 Task Force limited its focus to the ‘governance structure’ and resulted in several statutory changes, selected from the majority and minority reports of the Task Force and now embodied in SB 163.² These continue today and include a smaller Board (from 23 to 19 members); with attorney members reduced by two to 13; and with elected members selected from only six districts; adding five Supreme Court appointees; and eliminating both a representative of the California Young Lawyers’ Association and the fourth year presidency. Finally the Board was re-named as the Board of Trustees.

The first triennial Task Force report was due in May 2014. Nonetheless, work was not begun until mid-2015. The arrival of a new Board of Trustees in fall 2015 required reconstitution of the Task Force to meet statutory requirements for its composition. This revamped Task Force held its first meeting in December 2015, three months after the arrival of a new executive leadership team. The membership of the reconstituted seven member Task Force, as defined by Business and Professions Code section 6001.2(a), is provided in **Appendix B**.

¹ The State Bar of California, created in 1927 by the Legislature and adopted into the California Constitution in 1960, is a public corporation, placed in the Judicial Branch of state government. Its structure is that of a unified or mandatory bar, rather than a voluntary association of lawyers. It thus combines all the legal profession’s functions, both regulatory and representational, in one organization. Membership and the payment of an annual licensing fee is required of all attorneys licensed to practice law in California.

² Relevant to current discussions, the Majority Report noted that much of the 2011 Task Force debate focused on the question of whether the State Bar is a regulatory agency “with a mission...narrowly focused on attorney discipline...and...those who see the State Bar as a policy-making body, an adjunct to the Supreme Court, with a mission that includes a variety of important priorities, including not just discipline but also such things as helping to promote access to justice for all,” at p. 45.. The Majority espoused the view that there is “no conflict or tension between the core regulatory goal of public protection and the closely related non-regulatory goal of promoting the fair administration of justice,” at p. 46. In contrast, the Minority Report foreshadowed recent statutory changes and current discussion by urging that the regulation of lawyers be treated in the same way as all other professionals and recommended study of de-unifying the State Bar with concrete steps over two years to separate the Bar into a regulatory agency supported by mandatory dues and a voluntary trade association. It also made specific suggestions: a smaller, all Supreme Court appointed 15 member Board; a member merit screening committee; greater governance continuity through multi-term appointment; an appointed, as opposed to elected, presidency; the application of Bagley-Keene Open Meeting Act; and 25 hours of free MCLE ethics education.

In California, the need to change the unified state bar model has been a subject of increasingly focused discussion over several decades. Central to this discussion has been the question of which governance model will best promote the State Bar’s core mission of public protection. Over the last three decades, numerous reports have discussed this structural question, most importantly the 1980 *Monterey Committee on The Structure of the State Bar of California*, 1995 *The Final Report of the Commission on the Future of the Legal Profession and the State Bar of California* (“Futures Commission Report”), and the 2011 *Report and Recommendations of the State Bar of California Governance in the Public Interest Task Force*. These efforts are an important component of the background for the current Governance in the Public Interest Task Force statutory scheme. Summaries of many of these reports are provided in **Appendix C**.

A. QUESTIONS IDENTIFIED FOR CONSIDERATION

At its first meeting on December 9, 2015, to guide its work, the current Task Force adopted a series of questions, organized around three aspects of the State Bar’s governance structure:

1. SELECTION AND COMPOSITION OF THE STATE BAR BOARD OF TRUSTEES

- (a) Should there be greater geographic diversity among all Trustees?
- (b) Should there be a reduction in the number of Trustees who can be defined as “active market participants” under recent case law or Federal Trade Commission guidelines, whether or not they are “public members,” appointed, rather than elected by the members of the State Bar?
- (c) Should elections be eliminated for both individual Trustees and officers of the Board of Trustees (President, Vice President and Treasurer)?
- (d) Should there be different terms of office for both Trustees and officers?

2. ORGANIZATIONAL STRUCTURE AND FUNCTIONS OF THE STATE BAR OF CALIFORNIA

- (a) What is the experience among other U.S. states in choosing either a unified or voluntary structure for bar discipline and membership responsibilities?
- (b) What impact would a change from a unified to voluntary bar organization have on the State Bar and what would the resulting structures look like?
- (c) What can be learned from the experience of other professions, where regulatory and membership functions have been separated?

3. THE IMPACT OF A RECENT U.S. SUPREME COURT DECISION ON THE STATE BAR³

- (a) What changes to the 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?
- (b) What is required to achieve “active supervision” of a state regulatory agency by a governmental body, in this case the Supreme Court of California?
- (c) Are all regulatory responsibilities of the State Bar “actively supervised” as currently operated and, if not, what changes should be considered?

³ *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. ____ (2015). A full analysis of the anti-trust issues raised by this case and related application to the State Bar is provided as Appendix D.

- (d) To what extent does the Supreme Court have and should the Supreme Court have exclusive authority over the State Bar?

Over the course of its subsequent meetings the Task Force increasingly centered its work around organizational and structural questions, particularly whether or not the State Bar should be de-unified. In total, seven Task Force meetings took place, with approximately 30 individuals providing oral testimony,⁴ and eight written submissions received; **Appendices E and F** set forth testimony and written comment. In addition, the Task Force considered a de-unification proposal authored by two of its members with one current and past member of the Board of Trustees; that proposal is provided as **Appendix G**.

B. CONFLICTING THEMES UNDERLYING RESPONSE TO REFORM

As the Task Force work progressed, a lack of agreement among Task Force members about the definition of “public protection” emerged. Some argued for a narrow view: public protection should be limited to the regulatory and disciplinary functions of the State Bar. Others saw public protection more broadly: it has an important *proactive* function to prevent discipline problems and contribute to the good functioning of a broadly inclusive and accessible judicial system. As the Task Force discussions proceeded, these differences emerged in several major recurring and contradictory themes:

- (a) a belief based on a narrow definition of public protection that the Bar’s ability to effectuate its public protection mission is irreparably hindered by activities similar to those of many voluntary bar organizations which support lawyers but appear inconsistent for a body principally charged with public protection through the regulation and discipline of lawyers;
- (b) a view that a structure which combines two different organizational paradigms – a private professional association and a governmental regulatory body – creates structural confusion which is the source of the State Bar’s historic dysfunction and insufficient attention to regulatory and disciplinary matters;
- (c) a contrasting belief that the Bar’s unified structure is essential to public protection through its support for access to justice and educational activities, which are not strictly correlated to discipline but essential to the overall healthy functioning of the judicial system; and
- (d) a skepticism that de-unification will produce improvements in the Bar’s regulatory and disciplinary functions, along with concern that it will reduce lawyers’ support for critical public protection programs, such as access to justice and elimination of bias.

III. DEVELOPING THE TASK FORCE REPORT: DEFINING THE CORE UNDERLYING PROBLEMS

The Task Force was unanimous in finding that systemic organizational reform and improvement of the State Bar is needed. While there was less consensus on the specific initiatives to be undertaken, there was clear agreement about the fact that for reforms to be effective, problems must be identified before solutions can be adopted. Thus the first step in designing an effective remedy for an identified problem is developing an accurate diagnosis of its root cause. *A nexus must be found between problems, solutions, and enhancement of the Bar’s ability to prioritize and enhance the protection of the public.* This is a difficult process because

⁴ Witnesses included California Insurance Commissioner Dave Jones, Los Angeles City Attorney Mike Feuer, and Court of Appeal Justices Ron Robie and Laurie Zelon.

issues of governance, organizational structure and operational effectiveness interrelate. The Task Force struggled with the challenge of understanding how these three areas impact one another.

In its deliberations the Task Force came to appreciate that among the many challenges facing the Bar is the need to establish a commitment to ongoing comprehensive and objective evaluation of the efficiency, effectiveness and quality of its programs and functions. Thus, while ideas for reform have abounded, historically there has been only limited analysis to ensure that these initiatives actually address underlying needs and deficiencies, i.e. the root causes of recurring problems. Compounding this challenge, there has been only limited follow-up evaluation and assessment of any given solution, once implemented.

To ensure that the solutions considered by this Task Force are carefully tailored to address the identified needs of the Bar, this report has been designed to evaluate all proposed options for reform against the three questions noted above:

1. How does any given proposed intervention solve the problem as defined and enhance public protection?
2. What are the cost and operational implications of the proposed interventions?
3. How will success be defined and measured?

This analytic framework was applied to three sets of questions: those originally considered by the Task Force, those subsequently identified during the course of its work, and those resulting from activity conducted concurrently with the work of the Task Force, as several legislatively mandated analyses concluded (i.e. the May 15 reports on Workforce Planning, Classification and Compensation, Backlog and Spending Plan⁵) and 2017 Fee Bill discussions. As a result eight additional fundamental challenges facing the Bar were identified:

1. The Perception of An Ineffectively Managed Discipline System
2. Inadequate Definitions of Mission and “Public Protection”
3. Proliferation of Activities: Mission Creep and Poor Organizational Coherence
4. A Conflicting Hybrid Governance Structure
5. Confused Reporting Relationships Hindering Accountability
6. Proliferation of Committees and Over Reliance on Volunteers
7. Distinct and Restricted Funding Sources Creating Cultural and Procedural Obstacles to Financial and Organizational Management
8. Inadequate Development and Support for Human Resources

The Task Force believes that addressing these fundamental problems—the root cause of many of the outward symptoms of the State Bar’s apparent dysfunction—offers the best and most immediate opportunity for achieving necessary and transformative change. The discussion below of these core problems is followed by an analysis of possible interventions to address them.

⁵ Add link to all of these reports as well as cite statute mandating same.

A. THE PERCEPTION OF AN INEFFECTIVELY MANAGED DISCIPLINE SYSTEM

For many years, the State Bar's disciplinary system operated primarily with the assistance of volunteers, who acted as referees and made recommendations to the Board. The Board, in turn, made recommendations to the Supreme Court regarding the discipline of attorneys. In the mid-1980s, this system changed when the Legislature enacted various reforms to the State Bar Act in response to a substantial backlog of complaints against attorneys, a series of newspaper articles about major inadequacies in the existing disciplinary system, and the reports and recommendations made by the Attorney General-appointed Discipline Monitor, Robert C. Fellmeth. (See *In re Attorney Discipline System*, *supra*, 19 Cal.4th at p. 611.) These legislative reforms included:

- The establishment of a professional State Bar Court, with judges appointed by the Supreme Court and later by the Governor and Legislature, to replace the volunteer system and the Board's involvement with disciplinary functions. (Bus. & Prof. Code, § 6086.5; see *In re Attorney Discipline System*, *supra*, 19 Cal.4th at p. 611; *Obrien v. Jones*, *supra*, 23 Cal.4th at p. 50)
- The appointment of the Chief Trial Counsel, subject to confirmation by the Legislature, with a four-year term and a two-term limit, under the general oversight of the Board's Committee on Regulation and Discipline. (Bus. & Prof. Code, § 6079.5)

Despite these reforms, concerns about the State Bar's discipline system continue. The bill authorizing the Bar to collect mandatory 2017 licensing fees from its members, Assembly Bill (AB) 2878, cites concerns raised in the 2015 State Auditor's report,⁶ noting that:

*The audit uncovered significant, questionable decisions made by the State Bar...including that the State Bar had not fully or consistently reported its backlog of discipline cases and that, in order to reduce its backlog of discipline cases, the State Bar made questionable choices, potentially causing 'significant risk to the public.'*⁷

The report further states:

In response to the escalating backlog, the former executive director issued a zero-backlog goal in mid-2011. Although the State Bar decreased its backlog by 66 percent over that same year, the severity of the discipline it imposed on attorneys declined and the number of settlements it reached increased. It appears that rather than settling some cases for lower-levels of discipline, the State Bar should have sought more severe forms of discipline. ...Thus, in its efforts to reduce its backlog, the State Bar may have been too lenient on attorneys deserving of greater discipline, or even disbarment, potentially at significant risk to the public.

The analysis of AB 2878 provided to the Assembly Committee on Judiciary on April 26, 2016, cited still additional concerns about the failure of the State Bar to fulfill its public protection mandate:

First, the media reported that the Bar had failed to investigate over 300 complaints about the unauthorized practice of law, some awaiting assignment to an investigator for years before any action was taken. According to the Bar, many of those complaints

⁶ California State Auditor. *Report 2015-30, The State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability*. Sacramento: June 2015.

⁷ Assem. Bill No. 2878 (2015-2016 Reg. Sess.)

*were filed by immigrants seeking legal assistance with, among other things, their legal status in this country. It goes without saying that failure to immediately investigate and, when appropriate, take action to stop the unauthorized practice of law puts the public at substantial risk and the longer the delays are, the more the public is put at risk.*⁸

This analysis referenced articles in the *Daily Journal*, which reported in January 2016 that,

The State Bar has identified 59 complaints it received alleging potential unauthorized practice of law by non-attorneys that were left uninvestigated by the agency for years.”⁹ A subsequent article reported that, “The State Bar’s failure to promptly address all complaints alleging unauthorized practice of law by non-attorneys was more widespread than the nearly 60 uninvestigated claims the agency said it recently learned about...About 300 unauthorized practice of law complaints were listed as sitting unassigned in a drawer as of April 10, 2015.”¹⁰

As demonstrated by the ongoing attention by the State Auditor, the press, and the Legislature, there continues to be a tremendous amount of frustration about the State Bar’s fulfillment of its legislatively directed public protection mandate; though opinions vary regarding the merit of these criticisms, the negative impact of a sustained lack of confidence in the operations of the Bar’s discipline system is irrefutable. In the end, notwithstanding a highly regarded, all professional discipline system, a perception of ineffective management has obscured accomplishments and has become the reality which now must be addressed.

B. INADEQUATE DEFINITIONS OF MISSION AND PUBLIC PROTECTION

Effective organizations have well-defined missions, adopted by their governing bodies, which are implemented in policy; staff implementation of such overarching policy is then monitored through an oversight process conducted by the governing body. This paradigm is lacking at the State Bar. In addition, while the Bar’s legislatively mandated mission has been articulated in statute, it lacks a clear practical definition as applied to the operations of the organization:

*Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*¹¹

As a result, debate continues as to the correct scope of “public protection.”

Further complicating this problem, the statute which initially created the State Bar in 1927 contains a separate statutory provision which suggests a far more expansive role:

The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may

⁸ Assem. Com. On Judiciary, Analysis of Sen. Bill No. 2878 (2015-2016 Reg. Sess.) as amended April 18, 2016. Hearing date April 26, 2016.

⁹ Moran, Lyle. “State Bar admits ignoring dozens of complaints of people practicing law without a license.” *Daily Journal*, January 28, 2016.

¹⁰ Moran, Lyle. “State Bar let hundreds of complaints against non-attorneys sit idle.” *Daily Journal*, March 4, 2016.

¹¹ Business and Professions Code section 6001.1.

*advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public.*¹²

Pursuant to this statute, the State Bar has historically engaged in various professional association activities. (See *Keller v. State Bar of California*, *supra*, 496 U.S. at p. 5.) Beginning in 1990, however, the courts and Legislature began to place restrictions on the scope of some of these non-regulatory activities.

- In *Keller*, the United States Supreme Court prohibited the State Bar from funding activities under Business and Professions Code section 6031, unless activities were germane to the State Bar's purpose of regulating attorneys or improving legal services.
- Non-regulatory functions were further constrained by *Brosterhous v. State Bar of California*, (Sept. 24, 1999, 95AS03901 [nonpub. opn.]), where the trial court narrowed the chargeability test, finding that in order to be germane, an activity must have a simple, direct connection between the activity and the core purposes of the integrated bar, i.e., regulation of the profession or improvement of the quality of legal services available to the people of California.¹³
- In 1997, then-Governor Pete Wilson vetoed the bill authorizing the State Bar to continue to collect its mandatory membership fees. Governor Wilson's veto message cited arguments that the State Bar cannot "function effectively as both a regulatory and disciplinary agency as well as a trade organization" and concluded, "It is time for the Bar to get back to basics: admissions, discipline and educational standards."¹⁴

As a result, the State Bar separated from the then Conference of Delegates (now the Conference of California Bar Associations) and many other functions were limited to voluntary funding. Today the State Bar supports many fewer activities which strictly resemble professional association work, although some examples of such work do continue. Examples here might be the State Bar's Annual Meeting, some professional development activities of the Sections, awards activities, and the insurance affinity programs, which the State Bar continues to sponsor.

Nonetheless different views as to the appropriate role of the State Bar continue and find some support in both statute and history. Easy solutions do not appear to exist. While it might be most logical to define the public protection mission as synonymous with the definition of the discipline system, no established definition of what constitutes the discipline system exists. Nor can it be assumed that the discipline system alone, however defined, is necessarily identical to "public protection." This lack of clarity has allowed

¹²Business and Professions Code section 6031(a).

¹³ Since 1991, after *Keller*, the State Bar has provided for a deduction to the annual membership fee, varying between one and five dollars, for activities deemed outside of *Keller* by the Board. Beginning in 2000, the California Legislature preempted the Board and imposed a \$5 deduction for activities outside of the parameters of *Keller*. (Bus. & Prof. Code §6140.05). In addition, the Legislature prohibiting use of mandatory dues to fund any of the activities of the Conference of Delegates (which has been reconstituted as a wholly independent organization) or Bar Sections, which must be funded separately by their own respective voluntary fees or donations. (Bus. & Prof. Code §6031.5). Following the Legislature's example, the Board adopted a similar procedure in response to the 1999 trial court judgment in *Brosterhous v. State Bar of California*, which held that certain other bar activities were outside of *Keller*. These activities included those related to eliminating bias in the legal profession provided by the State Bar's standing committees, the bar leaders conference and mid-year meeting, various services to local bars, and other activities to maintain relations with other bar associations.

¹⁴ Veto Message, Cal. Sen. Bill No. 1145, Oct. 11, 1997

some to argue that to be effective, more than discipline and regulation of the profession alone is required to achieve “public protection.” This broad view of public protection would have it include three core elements: reactive and proactive public protection, along with activities that contribute to the good functioning of the legal system. For example, under this concept of public protection, the various functional components of the State Bar might be distributed as follows:

| Reactive | Proactive | Healthy Legal System |
|-----------------------------------|--|------------------------------|
| Office of the Chief Trial Counsel | Professional Competence | Access to Justice Activity |
| State Bar Court | MCLE Audit Function | Diversity of the Profession |
| Lawyer Assistance Program | Admissions Activity | Office of Legal Services |
| Probation | Mandatory Fee Arbitration | Judicial Nominees Evaluation |
| Client Security Fund | Lawyer Assistance Program | Legislative Activities |
| Member Records and Compliance | Attorney Mentoring Programs | Legal Specialization |
| Admissions | Public Outreach and Education Programs | |

Challenges abound with this construct, however, as, ultimately the difficult task of assigning each of the Bar’s operational areas and functions, along with their funding sources, to one of these categories must be undertaken, and many of the activities fall under more than one element.

Early Task Force efforts to articulate and define the Bar’s public protection mission have been explored in a Continuum of Activity Matrix provided as **Appendix H**. While the functions and programs in the far-right and left columns might appear to be unequivocally associational or regulatory respectively, there are those who argue that even the Bar’s most associational-type of activity, the work of its “Sections,” also supports the discipline system because of the educational and mentoring support they provide to affiliated attorneys, thereby improving their competence. Other public protection functions described as part of the work of the Sections include public education and support to the Legislature in the form of legislative proposal impact analysis and technical assistance. Others assert that while the work of the Sections should not be included under the auspices of a public protection agency, all else that the Bar undertakes, including access to justice and diversity work, should.

C. PROLIFERATION OF ACTIVITIES: MISSION CREEP AND POOR ORGANIZATIONAL COHERENCE

A necessary by-product of the lack of a clearly defined mission is the fact that the State Bar’s growth over time has not been easily controlled. “Mission creep” has been the result, often driven by the laudable commitments of individual State Bar leaders to improving the good functioning of the legal system, as broadly defined. Thus, the Bar has served as an opportunity for the well-intentioned interests of many – legislators, staff, committed volunteers, and Bar Presidents themselves. Too often these interests have not been subject to fiscal and operational assessment before being approved for implementation; as a result, their risks to the organization go beyond dilution of mission to core institutional financial health.

The manner in which these activities have been added to the menu of State Bar responsibilities over time has lacked central coordination and coherent planning. Rather, new tasks have been added periodically, responding to concerns of the moment, and often supported predominantly by volunteers. This haphazard accretion of duties, together with the prior lack of solid organizational management, contributes to the

frequently mentioned problem of “siloed” activities at the State Bar. A loose confederation of programs, rather than a centrally managed organization has been the result.

It is also worth noting that when compared to other state bar organizations, California is not only the largest, but also the most inclusive in the number and variety of activities it supports. The size and scope of activities controlled under the State Bar “umbrella” is itself another management challenge. Accordingly both operational control and oversight are continuing challenges for management, governance structures and oversight bodies.

D. A CONFLICTING HYBRID GOVERNANCE STRUCTURE

Successful mission execution depends on clarity of structure, function and governance; unless these three are well-aligned, routine business operations, let alone organizational reform efforts, are difficult if not impossible to achieve. Historically the State Bar has been an uncomfortable blend of two very different business models: an independent government regulatory body and a professional membership association. There is an inherent tension manifested in this duality which can be seen in a number of ways, including the typical associational pattern of an annual rotation of Board Presidents and committee chairs, limited length of trustee terms of office, a reliance on a large core of volunteers to conduct Bar work, and an historic difference in the operational controls governing activities under the two models.

Pervasive governance problems exist beyond those related to the Board of Trustees itself. For example, the statutory framework governing the State Bar is complex, overlapping and sometimes out-of-date; it thus becomes a challenge for effective management. Sometimes the problems addressed by statutory provisions, which inherently lack flexibility, would be better managed by more flexible internal rules and regulations, calibrated so that they can adjust to changing circumstances. The Fee Bill process, an annual event, might function more effectively if it were combined with an on-going oversight process to keep the Legislature more fully and currently informed on continuous basis. Yet, as currently structured, the Fee Bill offers the Legislature relatively little time for understanding the on-going work of the State Bar and creates a short term crisis management situation which functions poorly for all concerned. An on-going partnership relationship between the Legislature and the State Bar thus becomes difficult to create and effective oversight suffers as a result. Greater co-ordination in all of the State Bar’s reporting requirements, those with the Supreme Court, the Legislature, and presumably the State Auditor as well, would improve the way in which priorities are set and avoid the problem of myriad parallel, sometimes conflicting, feedback and direction, not well coordinated or prioritized.

E. CONFUSED REPORTING RELATIONSHIPS HINDER ACCOUNTABILITY

A significant management problem is posed by a division of control, multiple dual reporting relationships, and lack of responsibility and oversight as related most significantly to the Chief Trial Counsel position. This position, appointed by the Board of Trustees, confirmed by the Senate, and reporting to the Board’s Regulation and Discipline Committee, oversees what is arguably the Bar’s most critical function, comprising nearly 50 percent of its personnel. The question of how and whether a volunteer Board, or its dedicated subcommittee, can effectively supervise personnel must be addressed. Similarly, although with a less direct public protection impact, is the relationship of the General Counsel to the Board and the Executive Director. What does a structure which contemplates the General Counsel “reporting to the Board” imply about the day-to-day management of this position?

F. PROLIFERATION OF COMMITTEES AND OVER RELIANCE ON VOLUNTEERS

The State Bar's 47 committees, boards and commissions populated by the organization's large number of volunteers (currently 740 as compared to 550 employees), serve as an invaluable resource to the Bar, extending its level of expertise and reach in ways unlikely to be realized by staff alone, and certainly not without adding significant additional personnel costs.

To be sure, volunteers provide vitally important services to the Bar. One recent impressive example is the work of the Rules Revision Commission. And, needless to say, the Standing Committee on Bar Examiners has been a key component to the State Bar's process of bar admissions since the beginning. There are many other examples of such important work, as well.

Still, the contributions of these numerous sub-entities are not without significant operational impact. There are significant costs for supporting this virtual army of volunteers and their large number complicates the work and accountability of the State Bar Board of Trustees. The State Bar's unwieldy committee structure strains personnel resources throughout the organization and oversight of their voluminous activities by the Board of Trustees is a continuing challenge. More importantly, committees, often comprised of long-time volunteers with a high degree of competence in their respective areas, can contribute to the Bar's silo culture, with members and staff identifying more with the committees themselves, than with the State Bar as a whole.

Although committees develop work plans and strategic agendas, too often they do so without meaningful Board of Trustee input and oversight – oversight which is impractical given the number and complex structure of the committees. The danger is that the committees take on “lives of their own” without a clear and direct nexus to the Board's overarching strategic or operational objectives. Making needed changes in one area can easily be forestalled if they run counter to the strongly held goals in another. Thus choices based on overall organizational needs can easily be stymied if they undercut area-specific interests.

G. DISTINCT AND RESTRICTED FUNDING SOURCES CREATE CULTURAL AND PROCEDURAL OBSTACLES TO FINANCIAL AND ORGANIZATIONAL MANAGEMENT

Recent reports by the California State Auditor have noted concerns about the State Bar's use of its resources, and the lack of adequate control and accountability for expenditures. The Auditor's 2015 report stated, “Rather than using its financial resources to improve its attorney discipline system, the State Bar dedicated a significant portion of its funds to purchase and renovate a building in Los Angeles in 2012.”¹⁵ The report found that this purchase was made without a thorough cost-benefit analysis, that board-restricted funds that were designated for other projects were used, that the Board was not provided with adequate information to make a decision regarding the purchase, and that the Board failed to fully inform the Legislature of its decision.

The California State Auditor's 2016 report contained similar criticisms, including the State Bar's failure to clearly communicate its financial situation in its financial reports; the 2013 creation, with little or no Board oversight, of an unnecessary nonprofit organization and subsequent use of State Bar funds to cover that organization's financial losses; violation of Board policies for inter-fund loans and expenses; and high executive salaries.

¹⁵ At Supra 5.

There is a related critically important point which can sometimes be missed: many of the Bar's functions and programs are supported by dedicated revenue streams, including optional member fees, examination and testing fees, and grants. This fact, in conjunction with legal decisions such as *Keller* and *Brosterhous* which significantly limit the ability to spend mandatory fee revenues, has caused the Bar to resemble a loose affiliation of separately funded programs and offices, rather than one unified organization. This problem manifests itself in a number of ways, including the decentralization of functions that are more typically centrally administered (e.g., information technology support and meeting and event planning services, and, to a lesser extent, human resources and finance functions), the maintenance of separate programmatic websites, some not even hosted by the State Bar, the proliferation of unique program logos, seals and "branding," and inconsistent operational practices, some even relating to core functions such as how resources are tracked and utilized.

Further, the majority of State Bar funding, authorized by annual Fee Bill legislation, is controlled by traditional government spending regulations. But other smaller sources of funding (e.g. Sections dues, proceeds from affinity programs or other "fee for service" funding) are arguably not dependent on legislative authorization. Thus, they have historically been treated as being governed by more flexible spending rules, similar to those of a trade association. This "two systems" approach has created internal confusion and tension among staff, volunteers and the Board of Trustees. It has fostered an external perception of entitled, even lavish, spending at the State Bar when specific examples of spending from funds which historically have not been considered subject to governmental limitations, come to light.

H. INADEQUATE DEVELOPMENT AND SUPPORT FOR ITS PERSONNEL RESOURCES

The initial phase of the on-going Classification and Compensation review, comprising the Office of the Chief Trial Counsel staff alone, was completed in May, 2016; Phase II, encompassing all other State Bar personnel, will be completed in October, 2016. Even in its first phase, however, it has become clear that the State Bar has work to do to ensure that its classification and compensation structures are appropriately calibrated to support the most cost efficient system for the acquisition, management and development of the staff talent needed to run so important an agency of public protection.

Phase I identified a number of needed changes to the Bar's classification and compensation structure, including a revision of the role and responsibility of staff designated as "supervisors," a reduction in the overall number of classifications, and both downward and upward adjustments of pay ranges:

- Currently, staff classified as supervisors are members of the same bargaining unit as those whom they supervise. Traditional responsibilities of performance management and discipline are reserved for management staff, with supervisors effectively acting as leads. As a result, the Bar, has a top-heavy management structure.
- The Bar's classification structure is untenable with more than 150 unique positions occupied by fewer than 600 employees.
- Compared to other, comparable public sector entities, the Bar compensates attorneys at a lower rate and compensates its non-attorneys at a higher rate.

The State Auditor issued its 2016 financial audit of the State Bar concurrent with the Phase I analysis. That audit raised concerns regarding executive compensation at the Bar, suggesting that many executive-level staff are over-compensated as compared to their counterparts in state government. This problem, too, must be addressed, if resources are to be properly allocated to staff requirements.

Together, these observations strike at the heart of the Bar's ability to effectively carry out its mission, and suggest unfavorable answers to such questions as: does the organization have the right talent, does it compensate that talent appropriately, and does it use and support it correctly?

IV. POSSIBLE INTERVENTIONS AND SOLUTIONS

A host of possible solutions have been considered by the Task Force in response to the eight identified fundamental problems described above. These solutions fall into two broad categories: Governance Reform and De-Unification.

A. GOVERNANCE REFORM

1. ESTABLISH AN OFFICER SLATE

California may be unique among state bar organizations in not electing a slate of officers; moving in this direction would add greater stability and consistency in the follow-through needed to manage a complex organization. Virtually all states except California elect a three person "slate" of officers for their Board of Governors with a term of office for each person typically set at one year.

In addition, nearly all other states provide that the junior officer is a President-Elect who automatically ascends to the Presidency. California is an outlier, and does not enable a President to have a full year to adapt to and plan for a leadership year. The Task Force unanimously agrees that California should change this exception to the national norm.

2. EXTEND TERM OF PRESIDENCY

California, like most states, has a limited one term presidency. Other models are available in other professional organizations and might be considered to enhance stability and expertise. This idea did not receive support from many Task Force members who raised concerns that extending terms of office would be burdensome and limit the number of those who would be interested in the position.

3. INCREASE NUMBER OF PUBLIC MEMBERS OF THE BOARD

At the onset of the work of the current Task Force, the recent decision in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015) ("*North Carolina Dental*") created a concern that the current composition of the Bar's Board of Trustees might preclude the Bar from invoking state action antitrust immunity, known as *Parker* immunity. In *North Carolina Dental*, the Supreme Court held that a state board on which a controlling number of decision makers are active market participants in the occupation being regulated must satisfy the active supervision requirement set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S., 97 (1980) ("*Midcal*") in order to invoke state

antitrust immunity.¹⁶ Now, however, these concerns have largely been resolved as a result of recent legal analyses by the State Bar's Office of General Counsel, the Attorney General and Legislative Counsel. These analyses explain that the case has uncertain relevance to the California State Bar.

(a) Acts of the California Supreme Court Do Not Implicate Antitrust Laws.

The analysis of those who raised this issue did not address the important distinction that the State Bar's core regulatory functions (admissions, attorney discipline, and rules of professional conduct) fall under the 'sovereign immunity' exception to antitrust liability because the California Supreme Court is the "ultimate decision maker" over these functions. *See Parker v. Brown*, 317 U.S. 341 (1943) (Sherman Act is not intended to prohibit a state from imposing a restraint as an act of government); *Hoover v. Ronwin*, 466 U.S. 558, 568-569 (1984) (where the conduct at issue is that of the state, legislature or Supreme Court, we need not address the issues of clear articulation and active supervision). Thus, for example, in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the U.S. Supreme Court held that a state Supreme Court's restriction on advertising was not subject to attack under the Sherman Act because the rule reflected an activity of the State acting as sovereign. *Id.* at 360-363. However, it struck down the advertising restrictions on First Amendment grounds. *Id.* at 383. Moreover, the State Bar is *sui generis* and is not in the same class as those state agencies that have been placed within the Executive Branch to which final decisions in licensing matters may be vested. *In re Attorney Discipline System*, 19 Cal. 4th 582, 599-600 (1998). In disciplinary matters, any decision or determination of the State Bar "is merely recommendatory in character and has no other or further finality in effecting the disbarment, suspension or discipline." *Id.* at 600.

(b) Changing the Composition of the Board Does Not Guarantee that Parker Immunity Will Apply.

The issue of what defines a "controlling" number of market-participant members was not resolved by *North Carolina Dental*. Thus, changing the composition of the Board does not guarantee that *Parker* immunity will apply, given that a small but vocal number of active market participants on the Board could arguably be considered "controlling." As the California Attorney General has opined:

In the wake of *North Carolina Dental*, many observers' first impulse was to assume that reforming the composition of professional boards would be the best resolution, both for state actors and for consumer interests. Upon reflection, however, it is not obvious that sweeping changes to board composition would be the most effective solution. Even if the Legislature were inclined to decrease the number of market-participant board members, the current state of the law does not allow us to project accurately how many market-participant members is too many. This is a question that was not resolved by the *North Carolina Dental* decision. . .

Opn. Cal. Atty. Gen.15-402 (Sept. 10, 2015), at p. 10.

¹⁶ State agencies regulating professionals may rely on *Parker* immunity only if they satisfy the two-part test set forth in *Midcal*: "First, that the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy," and second, that 'the policy . . . be actively supervised by the State.'" *North Carolina Dental*, 135 S. Ct. at 1112.

(c) Areas Where the State Bar is the Actor are Necessarily Market Sensitive for Purposes of Antitrust Laws.

As for other Bar functions over which the Supreme Court does not exercise ultimate decision making authority, guidance has been provided by the California Attorney General -- who has opined generally with respect to measures that may be taken to guard against antitrust liability for state licensing board members -- as follows: "There are two important things to keep in mind: (1) the loss of immunity, if it is lost, does not mean that an antitrust violation has been committed, and (2) even when board members participate in regulating the markets they compete in, many - if not most - of their actions do not implicate the federal antitrust laws." Opn. Cal. Atty. Gen. 15-402, *supra*, at p. 8.

The FTC has also provided guidance which reinforces these ideas. Specifically, the FTC has advised that: (1) reasonable restraints on competition do not violate antitrust laws, even where the economic interests of a competitor may be injured (e.g., suspending the license of one persons for substandard work); (2) ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive regime does not give rise to antitrust liability (e.g., declining to issue a license unless certain requirements are met); and (3) initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the "sham exception" (e.g. actions against unlicensed individuals). Fed. Trade Comm'n, FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (Oct. 15, 2015) at p. 6.

Further, as stated in the Legislative Counsel Opinion, "[h]aving a majority public member controlled Board would not ensure anti-trust immunity with respect to every single decision or action taken by the Bard. The key for a State to receive antitrust immunity is for a Board to receive active supervision by the State when it is engaging in decision regarding market participation...Accordingly, it is unclear as to why the very fact specific decision in the North Carolina case should have any impact on how California decides the best composition of its State Bar Board."

Nonetheless, problems of perception created by a group of professionals regulating themselves remain. Some argue that such perception considerations can only be resolved by an increase in the number of public members of the Board. It should be noted that the State Bar currently has the most public members of any similar state bar board, whether unified or voluntary in structure, and that no state has a majority public member governing body. In contrast, the Commission on Judicial Performance and several other professional regulatory bodies do have public member majorities and might be looked to as models. Even so, there is no experience with the public member veto provision discussed by some; its operational impact would require considerable study, to avoid unnecessarily complicating action by the Board of Trustees.

4. ELIMINATE BOARD ELECTIONS

Elections of lawyer members of the Board of Trustees can create the appearance of conflicting loyalties, i.e. to the profession or the public. In addition, the election of six trustees may create the appearance of a trade association capable of exerting significant control over the State Bar's discipline activities. Replacing elections with appointed positions would address this concern. Given the modest level of interest among State Bar members in the elections, such a change is not anticipated to reduce member engagement in the work of the State Bar.

5. APPOINT AN ENFORCEMENT MONITOR

In the past (1987-1992), a Discipline Monitor, appointed by the California Attorney General, provided valuable assistance in making recommendations to improve the functioning of the State Bar's attorney discipline system. Such an independent and expert reviewer might be a timely addition to the oversight structures under which the State Bar now operates, particularly if the position were focused on assessing the Bar's efficacy in implementing the significant reforms contemplated by the Workforce Planning initiative. For maximum benefit, however, such an appointment should be time limited, with a clearly defined mandate, free of political or other bias and draw upon recognized legal expertise and familiarity with the State Bar's disciplinary functions.

6. ASSESSMENT OF TRUSTEE QUALIFICATIONS AND PERFORMANCE

There have been periodic comments by the State Auditor and others about the need to improve the orientation and training of Trustees of the State Bar Board. Moreover, Assembly Bill 2878 has proposed adding specific qualifications for appointed trustees. Additionally, some have suggested that the fiduciary obligation to the organization which all Trustees have, irrespective of their means of selection (elected or appointed), should be the subject of a "trustee code of conduct," with the further suggestion that such a code might limit inappropriate conduct among and between Trustees which has historically presented a problem for the State Bar. Although not discussed in the course of the Task Force work, examination of the responsibilities and performance of State Bar Trustees may be appropriate for further study.

7. ASSESSMENT OF KEY REPORTING RELATIONSHIPS

The State Bar should assess whether recommendations should be made to the Legislature regarding the appointment and reporting framework for the Chief Trial Counsel. Similarly, the Board should reassess the established reporting structure of the General Counsel position. By separating responsibility from State Bar management, both decisions result in a perhaps desired independence without, however, a clear mechanism for accountability.

B. DE-UNIFICATION OF THE BAR

A growing body of thought posits that coupling regulatory and trade associational functions in one organization weakens both and serves neither the public nor the legal profession well. The Task Force was fortunate in being able to draw upon comparisons to earlier prepared information about the function and governance models of other state bar organizations. The update of this work appears in the charts attached at **Appendix I**. In addition, the Task Force received testimony from the Executive Directors of the State Bars of Washington, Wisconsin, and Nebraska, selected because of the recent experiences of their organizations.

At the beginning of this comparative work, staff hoped to identify lessons learned in other jurisdictions that might serve as useful recommendations for California to adopt. The hope was to identify national "best practices." Instead, California's size, the number and complexity of functions supported by the State Bar under one unified "umbrella," and the unusual shared oversight role of the Supreme Court and Legislature, make California incontrovertibly unique. While much could be learned, simply grafting the approaches of other states onto the California structure without careful consideration seemed unwise. Moreover, despite obvious problems in management and funding which have been noted in recent Audits, some experts

continue to characterize the organization and structure of the State Bar discipline system as “the best in the nation.” Whether there is agreement or not about that characterization, it suggests care in the exercise of broad scale borrowing from other jurisdictions. The most useful points of comparison follow:

- Size: California is the largest mandatory bar in the U.S., twice that of the next largest state.
- Structure: 33 States have a unified bar structure. In others which operate with a voluntary bar and mandatory licensing, the explanation is often historical-- choices influenced by early opposition of powerful local voluntary bars (e.g., New York City and Chicago) to later efforts to create competing mandatory unified state-wide bar organizations.
- Organization and Supervision of Functions: States organize their functions in support of membership, discipline, the profession and the legal system in highly individual ways, whether they operate as unified or voluntary bars; although most states offer the same functions, they are not managed in the same way.
- Scope of Activities: California has the largest number of activities managed under a single unified governance structure. In other jurisdictions, similar functions are variously divided among organizations housed in or operated directly by the state supreme court, separately managed by non-profit organizations, or by the state bar organization (whether mandatory or voluntary) itself.
- Responsibility for Setting Annual Fee: California is one of only two states where the Legislature sets the annual licensing fee for attorneys and engages in significant oversight activity. All other states have fees set either by the highest state court or the bar organization itself and function with minimal, if any, legislative involvement. Thus the level of legislative oversight and political involvement in its activities is a distinguishing, some would argue necessary, feature of the State Bar of California.
- Evolution of Structural Model: The majority of state bars in the United States continue to employ the mandatory unified bar model, although there appears to be a trend to re-distribute activities between the bar, court and other separately organized entities.
- Relationship of Model to Introduction of New Technology: While many states are debating whether or not the mandatory unified bar model should be continued, some evidence suggests that states with voluntary bars are more resistant to the entrance of new technology-based providers of legal services.
- Experience with De-Unification: Only three states, Wisconsin, Puerto Rico and Nebraska, have experience with “de-unification,” providing little to draw upon in assessing the impact of abandoning the unified paradigm. In fact, currently only Nebraska has permanently implemented de-unification;¹⁷ its Executive Director provided the Task Force with “lessons learned,” which suggested that such a change could shift the State Bar’s emphasis from support for access to justice in the legal system to operating an effective voluntary membership organization, from public protection to member satisfaction.¹⁸

¹⁷ Wisconsin has shifted between unification and de-unification; currently it remains unified. Puerto Rico appears to attach its structure to that of the current political party in power. Thus neither offer useful in-depth experience on which to draw.

¹⁸ Arizona is actively debating de-unification and the topic is being debated nationally. Internationally, the United Kingdom, Australia and many other nations have de-unified their bar organizations, often as a result of parliamentary action, but their lawyer regulation systems are distinct, with limited court involvement.

For the California State Bar, de-unification raises a host of questions, particularly as related to identifying those programs and functions that would remain within a purely regulatory organization.

Further, there is both a practical financial and personnel cost to de-unification which must be considered. Loss of the Sections, for example, has an estimated \$4.3 million negative impact on the Bar's annual operating budget, not to mention the potentially negative financial impact on the Sections themselves. Including the "Affinity Insurance Programs," which are arguably aligned with the Sections' associational activities, would increase this reduction by approximately \$2 million. In addition, the process of planning and implementing de-unification could impose substantial human capital costs. The number of jobs lost would require careful analysis as it is unclear how many positions could be assimilated into other parts of the State Bar.

C. OTHER SOLUTIONS AND RECOMMENDATIONS FOR FURTHER STUDY

1. DEFINE THE PUBLIC PROTECTION MISSION

Although ultimately a matter for decision by the three branches of government, the State Bar, in conjunction with its key stakeholders, must initiate the difficult task of defining its public protection mission.

2. REVIEW THE COMMITTEE FRAMEWORK AND STRUCTURE

The State Bar must assess the benefits and burdens of a possible overreliance on volunteers to accomplish major components of its mission, and whether the use of volunteers, typical of an association, has inadvertently resulted in the State Bar expanding its mission into areas that are only tenuously related to "core" public protection activities.

3. CHANGE BOARD SIZE

A smaller board (e.g. 13 as opposed to the current 19-20) might arguably result in a more effective governance model; such a decision should, however, await the realignment/possible reduction of State Bar activities so that a smaller board would be calibrated to handle the reduced amount of work which could result were structural changes to be made. Simply changing the size of the Board without a corresponding reduction in responsibilities and Board work-load would appear to 'put the cart before the horse' and invite unnecessary problems in governance and oversight of a large and complex organization.

4. ADDRESS THE IMPACTS OF SILO FUNDING

Difference in funding sources has created a duality in fiscal policy. There is a need to unify all fiscal policies under one system. The Board has addressed these differences in its own expense reimbursement policy, setting out a rigorous expense oversight control system so that, after review, all Trustee expenses are governed by the State Bar's standard government reimbursement procedures and also set forth on the State Bar's Public website. The Board must now decide whether it will apply the same set of policies to all funds received by the State Bar, irrespective of source, and to apply consistent reimbursement policies to all who work for the State Bar, particularly the Sections and related volunteer activity.

More broadly, there is a need for the Bar to operate as a coherent, consistent, organization. This means that, irrespective of funding sources, core administrative functions including human resources, finance, and information technology, should be performed by the centralized departments of the Bar responsible for these activities. Further, there must be consistent oversight of all activities and standardization of key drivers of institutional identity, including branding and web presence.

V. RELATIONSHIP OF PROPOSED SOLUTIONS TO IDENTIFIED PROBLEMS AND PUBLIC PROTECTION CHARGE

In order to determine the relevance and relative merit of proposed solutions and interventions, each must be vetted against the key questions identified by the Task Force:

- 1) How does any given proposed intervention solve the problem and enhance public protection?
- 2) What are the cost and operational implications of the proposed interventions?
- 3) How will success be defined and measured?

The following tables reflect the preliminary results of such an analysis:

DOES THE SOLUTION ADDRESS THE PROBLEM?

| PROBLEMS SOLUTIONS | PERCEPTIONS OF AN INEFFECTIVE DISCIPLINE SYSTEM | UNCLEAR MISSION | PROLIFERATION OF ACTIVITIES | HYBRID GOVERNANCE STRUCTURE | COMMITTEES AND VOLUNTEERS | SILO FUNDING SOURCES | CLASSIFICATION AND COMPENSATION |
|---|---|--------------------|--------------------------------|-----------------------------------|---------------------------------|----------------------------|---------------------------------------|
| GOVERNANCE REFORM | Unknown | No | Possibly | Yes | No | No | No |
| DE- UNIFICATION | Possibly | Likely | Possibly | Yes | Possibly | Unknown | Possibly |
| ENFORCEMENT MONITOR | Likely | No | No | No | No | No | No |
| SPECIFICALLY DEFINE THE PUBLIC PROTECTION MISSION | Unknown | Yes | Yes | Possibly | Possibly | Unlikely | Unlikely |
| REVIEW COMMITTEE FRAMEWORK AND STRUCTURE | Unlikely | Possibly | Yes | Possibly | Yes | No | No |
| ADDRESS IMPACTS OF SILO FUNDING | Unlikely | No | No | No | No | Yes | No |

WILL THE PROPOSED INTERVENTION ENHANCE PUBLIC PROTECTION?

| SOLUTIONS | GOVERNANCE REFORM | DE- UNIFICATION | ENFORCEMENT MONITOR | SPECIFICALLY DEFINE THE PUBLIC PROTECTION MISSION | REVIEW COMMITTEE FRAMEWORK AND STRUCTURE | ADDRESS IMPACTS OF SILO FUNDING |
|----------------------------------|----------------------|--------------------|------------------------|---|---|--|
| ENHANCE PUBLIC PROTECTION? | Possibly | Possibly | Yes | Yes | Unclear | Unclear |

WHAT ARE THE COSTS OF THE PROPOSED INTERVENTIONS?

| SOLUTIONS | GOVERNANCE REFORM | DE-UNIFICATION | ENFORCEMENT MONITOR | SPECIFICALLY DEFINE THE PUBLIC PROTECTION MISSION | REVIEW COMMITTEE FRAMEWORK AND STRUCTURE | ADDRESS IMPACTS OF SILO FUNDING |
|--------------|--|--|---|---|--|--|
| COSTS | Elimination of elections will result in cost savings to the Bar. In addition, reduced number of Board members would result in operational savings. | Significant. Loss of Sections alone results in a negative funding impact of approximately \$4.3 million. | Monitor salary and benefits or contract amount estimated at \$400,000 annually. | None. | Savings may result from reduced Committee operational costs, and corresponding reductions in staff support; however, staff may need to assume responsibility for certain activities now performed by Committees, resulting in additional personnel costs.. | Unknown; centralization of currently decentralized functions may result in cost savings. Application of uniform fiscal policy may result in savings as well. |

HOW WILL SUCCESS BE MEASURED?

| SOLUTIONS | GOVERNANCE REFORM | DE-UNIFICATION | ENFORCEMENT MONITOR | SPECIFICALLY DEFINE THE PUBLIC PROTECTION MISSION | REVIEW COMMITTEE FRAMEWORK AND STRUCTURE | ADDRESS IMPACTS OF SILO FUNDING |
|----------------------------------|---|--|---------------------------|---|---|--|
| MEASUREMENT/ SUCCESS | Assessment of Action Steps is a two-step process: (a) confirmation of implementation and (b) subsequent independent assessment and determination of whether the activities have addressed the problems they were intended to solve. | | | | | |
| MEASUREMENT/ ACTION STEPS | Implement identified governance reforms. | Identify components of associational versus regulatory organizations and effectuate split. | Hire Enforcement Monitor. | Develop clear and detailed definition of which Bar activities and functions constitute public protection. | Make recommendations regarding each State Bar Committee: retain as is, eliminate, modify. | Identify functions and policies that should be centralized and standardized and carry out that work. |

The present report, as the above tables reflect, outlines important topics for consideration as the Legislature, the Supreme Court, and the State Bar prepare for a period of unprecedented change. A tremendous amount of work has been done to identify foundational challenges facing the organization. Solutions to these challenges have been posited, some of which – appointment of an Enforcement Monitor and development of a definition of public protection for example – directly address the Task Force charge to develop recommendations that enhance public protection. Other solutions, while not immediately tied to the charge, may have both merit and broad-based support, including eliminating trustee elections and implementing ‘slate’ elections. These are likely worthy of implementation on that basis alone. Key institutional assessments and corresponding reforms, including a review of the committee structure and the impact of silo funding sources, may appear even more attenuated from the explicit public protection charge, but are in fact likely to strike at the heart of the fractures and divides that make effective reform of the State Bar so very difficult to achieve. Also, a more coherent and unified operational structure offers the strong possibility that economies will be realized which could enhance support of the State Bar’s discipline functions.

VI. CONCLUSION

Over its nearly 90 year history the State Bar of California has been the subject of continuing criticism. Oft-repeated refrains raise understandable concerns about past problems in a poorly managed discipline system, lax financial management, and an improper diversion of both human and monetary resources from the State Bar's regulatory to its associational functions. These issues appear in audits and reports dating back many years. It is in fact the repeated, sustained, and seemingly immutable aspect of these concerns, not to mention recent assessments expressed by both the Supreme Court and the Legislature, which motivates the current interest in de-unifying the Bar. But whether or not a decision to de-unify the State Bar is made, the Task Force recognizes that significant change is needed. While choices about the future governance model and organizational structure of the State Bar must result from a collaboration among leaders of the three branches of government, there is an immediate role for the State Bar itself to begin the process of change at once. In providing this report, the Task Force hopes to contribute to all parts of this vitally important reform process.

The Task Force has received much thoughtful input as it proceeded with its work. In parallel, new staff leadership has also had the opportunity to contribute fresh perspectives about the problems faced by the State Bar, along with their possible solutions. Many views of Task Force members and others, deeply committed to the success of the State Bar of California, are strongly held but in sharp contrast. Nonetheless, all share a commitment to identifying a structure that will best support the comprehensive public protection mission of the State Bar of California at a time of transformational change in the legal profession. There is also agreement that no matter the choice made, important benefits are likely to be both gained and lost. Most importantly, there is consensus that for a state bar organization of the size and importance of California's, the world's largest mandatory bar organization, great care is needed to carefully consider and balance these considerations, to insure that the changes which must be adopted will at last achieve the long-over-due reform needed at the State Bar of California.