

AGENDA ITEM

706 DECEMBER 2016

DATE: December 8, 2016

TO: Members, Board of Trustees

FROM: Danette Meyers, Chair, Committee on Regulation and Discipline

SUBJECT: Reporting Relationship of the Chief Trial Counsel

EXECUTIVE SUMMARY

In its August, 2016 Report, the Governance in the Public Interest Task Force (GPITF) recommended that the State Bar study whether recommendations should be made to the Legislature regarding the appointment and reporting framework for the Chief Trial Counsel. This issue was assigned to the Committee on Regulation and Discipline which has begun discussion of the topic and plans to bring related recommendations to the full Board of Trustees at its January planning meeting. This agenda item is intended to present the issues that are under consideration regarding the reporting relationship of the Chief Trial Counsel and solicit input from the full Board to inform both the continued evaluation of this issue and the recruitment of the next Chief Trial Counsel.

BACKGROUND

The Report of the GPITF (Report) noted that some of the management problems of the State Bar may stem from fragmented control over the organization, “multiple dual reporting relationships, and lack of responsibility and oversight as related, most significantly to the Chief Trial Counsel position.”¹ The Report went on to recommend with only one dissent that the State Bar should study:

Whether recommendations should be made to the Legislature regarding the appointment and reporting framework for the Chief Trial Counsel. As discussed above at Section III E, by separating responsibility from State Bar management, this structure may produce a desired independence, but in doing so, compromise accountability.²

The challenge presented by the reporting structure of the Chief Trial Counsel is exacerbated by apparent contradictions between the Business and Professions Code 6079.5 and the Board of Trustees Policy Manual. Business and Professions Code 6079.5(a) (Attachment A) defines the reporting relationship of the Chief Trial Counsel and places oversight for this position squarely outside of the State Bar’s management structure stating that:

¹ Governance in the Public Interest Task Force Report, August, 2016, p. 16.

² *Ibid.*, p. 25

He or she shall report to and serve under the Regulation, Admissions, and Discipline Oversight Committee of the Board of Trustees of the State Bar or its successor committee on attorney discipline, and shall not serve under the direction of the chief executive officer.

The Board of Trustees Policy Manual (Attachment B), however, appears to narrow the scope of Business & Professions Code Section 6079.5 stating that:

The Chief Trial Counsel shall report to the Board of Trustees discipline system oversight committee consistent with Business & Professions Code Section 6079.5 *on substantive issues* pertaining to the discipline enforcement system. The Chief Trial Counsel and the Office of the Chief Trial Counsel *shall otherwise be subject to the executive and administrative authority of the Executive Director* in like manner as other executive staff (emphasis added).³

DISCUSSION

For a number of reasons it will be useful to begin the discussion among members of the Board generally; in doing so, it would be particularly helpful for the Board to:

- Consider whether there is any research, evaluation or data collection Bar staff should be directed to conduct and make available for the Board's further consideration of this issue in 2017;
- Articulate the policy direction that they envision taking this issue in the coming year. This will be especially helpful for answering questions from prospective candidates for the Chief Trial Counsel position about how these issues might be resolved.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None.

BOARD GOALS & OBJECTIVES

³ Board of Trustees Policy Manual, Article 3.

Attachment A

State of California

BUSINESS AND PROFESSIONS CODE

Section 6079.5

6079.5. (a) The board shall appoint a lawyer admitted to practice in California to serve as chief trial counsel. He or she shall be appointed for a term of four years and may be reappointed for additional four-year periods. He or she shall serve at the pleasure of the board. He or she shall not engage in private practice. The State Bar shall notify the Senate Committee on Rules and the Senate and Assembly Committees on Judiciary within seven days of the dismissal or hiring of a chief trial counsel.

The appointment of the chief trial counsel is subject to confirmation by the Senate, and the time limits prescribed in Section 1774 of the Government Code for Senate confirmation and for service in office are applicable to the appointment.

He or she shall report to and serve under the Regulation, Admissions, and Discipline Oversight Committee of the Board of Trustees of the State Bar or its successor committee on attorney discipline, and shall not serve under the direction of the chief executive officer.

(b) The chief trial counsel shall have the following qualifications:

(1) Be an attorney licensed to practice in the State of California, be in good standing and shall not have committed any disciplinary offenses in California or any other jurisdiction.

(2) Have a minimum of five years of experience in the practice of law, including trial experience, with law practice in broad areas of the law.

(3) Have a minimum of two years of prosecutorial experience or similar experience in administrative agency proceedings or disciplinary agencies.

(4) Have a minimum of two years of experience in an administrative role, overseeing staff functions.

The board may except an appointee from any of the above qualifications for good cause upon a determination of necessity to obtain the most qualified person.

On or after July 1, 1987, the chief trial counsel may, as prescribed by the Supreme Court, petition the court for a different disposition of a matter than the recommendations of the review department or the board to the court.

(Amended by Stats. 2011, Ch. 417, Sec. 39. (SB 163) Effective January 1, 2012.)

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BOARD BOOK

State Bar of California
Board of Trustees Policy Manual
Adopted September 2004
Revised October 20, 2016

Attachment B

Article 3 CHIEF TRIAL COUNSEL

Section 1 Relationship with the Executive Director

The Executive Director shall bring his or her choice for Chief Trial Counsel (subject to Senate confirmation) to the board for approval. The Chief Trial Counsel shall report to the Board of Trustees discipline system oversight committee consistent with Business & Professions Code Section 6079.5 on substantive issues pertaining to the discipline enforcement system. The Chief Trial Counsel and the Office of the Chief Trial Counsel shall otherwise be subject to the executive and administrative authority of the Executive Director in like manner as other executive staff.

(Source: Board of Governors' Resolution, May 20, 1997, March 2002, March 2003, March 2004, Business and Professions Code § 6079.5.)

Section 2 Appointment, Term, Qualifications

The rules governing the appointment, the term, and the qualifications of the chief trial counsel are described in Business & Professions Code section 6079.5 (a), (b).

(Source: Bus. & Prof. Code, § 6079.5 (a) and (b).)

Section 3 The Chief Trial Counsel's Annual Performance Evaluation

Under Board policy, the Executive Director is responsible for evaluating the performance of all State Bar staff. The Chief Trial Counsel position is unique. Under Business & Professions Code Section 6079.5, the Board appoints the Chief Trial Counsel who serves for a term of four years. The Board has delegated to the Executive Director the selection of the Chief Trial Counsel which is then acted upon by the Board. The appointment is subject to the confirmation of the State Senate. The Chief Trial Counsel, by statute, reports to the discipline system oversight committee of the Board and, in connection with the exercise of prosecutorial discretion, does not report to the Executive Director¹.

At the recommendation of the Executive Director, because of the uniqueness of the Chief Trial Counsel position, the Board, through its Regulation and Discipline and Board Executive Committees, has undertaken the responsibility for conducting the Chief Trial Counsel's evaluation. Recognizing the Executive Director's institutional role in selecting the Chief Trial Counsel, the Chief Trial Counsel's role as a senior member of the Executive Director's management team, and the responsibility of the Executive Director for institutional oversight and administration of personnel, budget, and facilities support

¹ Consistent with statutory authority, the Chief Trial Counsel reports to the discipline system oversight committee and is independent of the Executive Director with respect to the exercise of the Chief Trial Counsel's prosecutorial discretion. The Chief Trial Counsel is subject to the Executive Director's administration of personnel, budget, and facilities support functions which the Executive Director executes in conformity with Board policy.

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functions of the State Bar as a whole, including the Office of the Chief Trial Counsel, the Executive Director sits as a non-voting member of the Board Executive Committee in connection with the Chief Trial Counsel's review. The Chair of the Board Committee on Regulation and Discipline chairs the review committee.

(a) Evaluation Criteria

The Chief Trial Counsel's evaluation is conducted based on performance criteria and competencies and on goals and objectives set by the designated Board Committee. The designated Board Committee annually sets the Chief Trial Counsel's performance targets and annually evaluates progress in achieving these targets. The performance criteria and competencies for evaluation include: job skills, technological proficiency, quality performance, quantity of work, leadership, teamwork and collaboration, public protection commitment, communication, fiscal accountability, compliance with policies and procedures, strategic perspective/planning, managing change, managing and developing period, interpersonal/conflict resolution skills, valuing diversity.

I. Performance Criteria I: OCTC Backlog Management

- A. Progress reducing Notice Open inventory (2011 Goal TBD).
- B. Progress reducing investigative backlog (2011 Goal TBD).
- C. Progress sustaining or improving OCTC productivity in
 - 1. Resolution of matters in Intake.
 - 2. Resolution of Investigations.
 - 3. Resolution of Notice Open matters.
- D. Progress in reducing average time from date of NDC filing to resolution.

II. Performance Criteria II: Overall Indicators of OCTC Efficiency and Effectiveness

- A. Success in meeting annual budget targets (2011 Goal TBD).
- B. Achievement of cost savings (2011 Goal TBD).
- C. Litigation results and effectiveness, as shown by
 - 1. Effective use of settlement as a tool of resolution
 - a. Number of settlements²
 - b. Number of settlements in which discipline sought was substantially obtained.
 - 2. Success rate at trial
 - a. Number of trials³

² To be used as a baseline, not a standalone positive indicator

³ To be used as a baseline, not a standalone positive indicator

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- b. Number of trials in which none of the charges in the NDC were sustained
 - c. Number of trials in which the charges in the NDC were substantially sustained
- 3. Positive year-to-year “dashboard” trends in overall case-processing statistics and case cycle times, taking into account on an annual basis at least the following
 - a. Number of Complaints received⁴
 - b. Year-end number of open Investigations
 - c. Number of cases resolved upon completion of Investigation, with no NDC filed
 - d. Year-end number of Notice Open matters
 - e. Number of NDCs filed
 - f. Number of cases resolved following filing of NDC
 - g. Within cases resolved following filing of NDC,
 - (i) Number of cases withdrawn or dismissed
 - (ii) Number of cases resolved by settlement
 - (iii) Number of cases resolved by pretrial adjudication
 - (iv) Number of cases tried
 - h. Total number of cases resolved at any point following filing of Complaint
 - i. Speed of resolution
 - (i) Average investigation time (time from filing of Complaint to completion of Investigation)
 - (ii) Average Notice Open time (time from completion of Investigation to filing of NDC)
 - (iii) Average prosecution time (time from filing of NDC to resolution)
 - (iv) Average total case cycle time (time from filing of Complaint to resolution)
 - j. Year-end inventory of unresolved cases (i.e. open matters)
 - k. Average costs per case
 - (i) Average costs per case from date of filing of Complaint to Notice Open date
 - (ii) Average costs per case from Notice Open date to resolution.
 - (iii) Total average costs per case
- 4. Case administration: Affected Party Notification Practices
 - a. Complainants appropriately advised of the status of their matters.
 - b. Respondent attorneys timely notified of the status of the charges against them.

⁴ To be used as a baseline, not a standalone positive indicator

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5. Number and nature of orders from the Supreme Court directing that OCTC's resolution of a case be re-opened, re-examined or reconsidered
6. Number and nature of cases in which the State Bar Court declined to accept a resignation with charges pending that was recommended by OCTC
7. Number and nature of complaints received against the discipline system from dissatisfied participants in the system.

III. Performance Criteria III: Leadership and Management Skills

- A. Quality of judgment shown in exercise of prosecutorial discretion.
- B. Success in establishing reputation for integrity, highest standards of ethics, and strong commitment to public protection.
- C. Timeliness, clarity and effectiveness of reporting to RAD and BOT.
- D. Quality of reputation with and ability to inspire confidence in key external stakeholders (i.e. the Legislature, the Supreme Court, the State Bar Court).
- E. Development, maintenance and administration of written policies designed to ensure just and uniform handling and resolution of all cases (e.g. charging guidelines, guidelines for settlement).
- F. Quality of relationship with ADDC (Association of Disciplinary Defense Counsel).
- G. Timeliness and thoroughness of response to issues raised in audits of OCTC.
- H. Clarity and utility of OCTC written communications (e.g. Discipline Report).
- I. Willingness and ability to adopt innovative approaches to management of OCTC (e.g. new approaches to cutting case backlog and expediting preparation NDCs).
- J. Outreach and education efforts directed to the legal community.
- K. Effectiveness as a manager
 1. Establishing and communicating office priorities and core values.
 2. Efficiency and effectiveness in balancing time spent in Los Angeles office vs. San Francisco office.
 3. Delegation to others.
 4. Supervising, evaluating and motivating assigned subordinates.
 5. Obtaining maximum productivity and cooperation from and among staff.
 6. Team-building and promoting good office morale.
 7. Planning and effectuating change within the office.
 8. Teamwork and collaboration in relations with Senior Staff peers.

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9. Commitment to appropriate level of transparency in decision-making.
10. Training and mentoring.
11. Personal organization and temperament.

IV. Performance Criteria IV: Public Communications

- A. OCTC Messaging effectiveness (i.e. publicly communicating OCTC successes).
- B. Level of skill as chief spokesman for the Bar on disciplinary matters.
- C. Willingness and ability to use different types of media outlets (including traditional as well as new media) in OCTC messaging.

EVALUATION PROCEDURE

The Regulation and Discipline Committee is chaired by the RAD Chair in conducting the Chief Trial Counsel's Evaluation. The Executive Director sits as a full member of the evaluation committee during the CTC evaluation process. The Office of Human Resources, has staffed and provided administrative assistance in conducting the Chief Trial Counsel's reviews in the past, subject to strict confidentiality requirements. The Office of Human Resources is available to the RAD Committees for this purpose in connection with this review process as well.

(b) Confidentiality

The meetings of the designated Board Committee and all information obtained in the course of the evaluation shall be confidential and shall not be disclosed except as otherwise provided in this article. Sufficient disclosure shall be made to the Chief Trial Counsel to assure a full opportunity to respond to evaluation material. The identity of the persons providing evaluation material shall not be disclosed.

(c) Timetable and Procedures

Each year, the Board sets the timetable and procedures for conducting the Chief Trial Counsel's annual performance evaluation. The committee shall meet with the Executive Director as soon as practical in the board year to discuss the performance standards, goals, procedures and timetable. The Board Committee shall set the procedures and meetings during the board year to assure a full and fair evaluation, and shall present its report to the Board in executive session at the July meeting.

(Source: Board of Governors' Resolution, March 2002, March 2003, March 2004, May 2011.)