

AGENDA ITEM

702 DECEMBER 12, 2016

DATE: December 7, 2016

TO: Members, Board Executive Committee
Members, Board of Trustees

FROM: Elizabeth R. Parker, Executive Director

SUBJECT: Council of State Bar Sections: Consideration of Options for Separation

EXECUTIVE SUMMARY

The sixteen Sections of the State Bar are voluntary organizations, each focused on a specific area of legal practice. The Sections are integral parts of the State Bar, originally created by the Board of Governors, and whose membership is not required by law. The Sections focus on providing educational programs, many granting MCLE credit, and offering technical assistance to the California Legislature, either self-initiated or on request. There are over 51,000 members of the State Bar of California who are members of at least one Section; in addition, including affiliate members (who are not California-licensed attorneys) and attorneys who participate in more than one section, the total number of Section memberships exceeds 70,000. Although subject to Board control, the Sections enjoy considerable independence in their decisions about programming and activities and are supported by twenty-two employees in the State Bar Office of Education (currently only nineteen positions are filled), all funded by Section membership fees. The Sections also contribute to the State Bar's indirect costs, paying approximately \$1.5M annually.

Over the last eighteen months, the sixteen State Bar Sections have found changes in their administration by the State Bar a growing operational challenge. An increase in indirect charges at the recommendation of an outside consultant, imposition of the requirements of the Bagley-Keene Act, limitation of funding support from non-Sections dues, and elimination of event sponsorships to support alcohol and resort-style hotels, have been troublesome for traditional Section operations and activities. Reduction in staff support when standardization of employment arrangements are imposed on a Bar-wide basis will add to this list of concerns. In response, since early October 2016 the twenty-three member Council of Sections (composed of one voting representative from each of the sixteen Sections plus one member of the California Young Lawyer Association and six officers), has been studying three options: remaining with the Bar, forming a private non-profit entity, and seeking legislation to create a new governmental entity, separate from the State Bar, exempt from the noted concerns, but jointly overseen by the Supreme Court and the Legislature. As the conversations have progressed, a consensus has developed that separation is likely to be in the best interest of the Sections, but a divergence of view has arisen as to whether a new private or governmental entity, both independent of the State Bar, would be the better choice. Unpersuaded by State Bar staff that an independent governmental entity would likely be impracticable, the Council of Sections has requested the opportunity to meet directly with appropriate staff of the Supreme Court and Legislature to

explore both options, which would require prior Board approval under Board Book policy. Staff recommends that the Board expressly approve allowing the Sections to explore these and other options as part of a combined State Bar-Sections delegation during discussions about the 2017 Fee Bill legislation which, this year, originates in the Senate Judiciary Committee. A 'clean' Fee Bill was introduced on December 5, 2016 and awaits future discussions in the Legislature.

BACKGROUND

A number of changes in State Bar management practices have impacted the sixteen Sections of the State Bar in recent years. In 2015 the Board of Trustees requested review by an outside consultant of various financial processes, including the formula for assessing indirect charges against sub-entities, such as the sixteen State Bar Sections. This review generated a report in July 2015 recommending that the State Bar's annual indirect charges be more comprehensively and consistently calculated. The result was a recommendation in January 2016 (implemented by Board resolution in March 2016), to increase indirect charges imposed on the Sections and all other sub-entities.

Meanwhile, the new senior executive team undertook a review of expenditures made on behalf of the Sections from non-membership dues revenue. This review documented substantial reimbursement from non-membership dues for alcohol and entertainment, as well as the subsidization of various programs for the benefit of the Sections, including several events at the Annual Meeting and the California Solo and Small Firm Summit. These funds, derived from sources outside normal Section membership revenues, might nonetheless have been used to support the State Bar's discipline programs, identified as underfunded in the 2015 Report of the California Bureau of State Audits.

Next, along with all other Bar functional areas, the Sections became subject to the provisions of the Bagley-Keene Act on April 1, 2016. The Act's open meeting and notice requirements have created a difficult operating environment for developing the educational programs which are the Sections' primary activity.

Finally, the 2016 Governance in the Public Interest Task Force identified the 'hybrid governance' system under which the State Bar had long operated, allowing different reimbursement and administrative rules depending on the source of funds used, as a significant management problem for the State Bar. To avoid confusion and the opportunity for abuse, staff proposed that a 'one system/one agency' approach be adopted. The Board's agreement to do so at its September 2016 meeting will eliminate the flexibility which the Sections have enjoyed, allowing them to operate outside the rules normally applicable to government entities. In particular, sponsorship opportunities to support receptions with alcohol will be eliminated, as will contracting with resort style meeting venues.

Many of the Sections believe that together these changes will reduce the appeal and success of their educational programs, designed to foster professional competence and satisfy MCLE requirements. Finally, as the State Bar's new executive staff reviews agency-wide staffing patterns, it appears likely that the level of support for the Sections will decline.

DISCUSSION

Confronting the changes noted, the Council of State Bar Sections (a body with one elected representative from each of the sixteen Sections, plus six Officers and a member of the California Young Lawyers Association) decided to consider the advisability of staying or separating from the State Bar. They formed three working groups to consider their options (stay, separate into a private non-profit entity, or seek legislation to create a separate governmental entity, initially called a 'hybrid structure'). Meeting weekly as a full body in public sessions and separately as the officers alone in closed sessions, sometimes with State Bar executives attending, they have explored these options. Throughout these discussions, State Bar staff have expressed their strong support for the continued vitality of the Sections and indicated the State Bar's intention to maintain a close partnership with the Sections under any approach.

Initially the Council of Sections committed to reaching a separation decision by the end of November. Although they have not voted formally to separate, a consensus appears to be developing in favor of separation. Their meetings have thus evolved to focus on examining the advantages of separating into a stand-alone private entity versus creating a new public entity, independent of the State Bar and its administrative requirements, exempt from the Bagley-Keene Act, but as a judicial branch agency, with direct oversight by the Supreme Court and Legislature. They understand that legislation would be required to achieve either approach.

To assist the process, eight topics relevant to implementing separation have been identified.¹ Conversations with the leaders of the private separation group initially suggested that separation would require creation of a 501(c)(6) or similar not-for-profit entity. Later, one member of the Environmental Law Committee presented an alternative proposal to create a new governmental entity (originally referred to as the 'hybrid approach'). This proposal initially appeared unrealistic and State Bar staff urged the group to pursue the not-for-profit approach, lest valuable time be lost in an effort that would prove unworkable, both legislatively complex and unwelcome to the Supreme Court. As the conversations proceeded, it became apparent that the governmental approach was the preferred approach for many Sections. They were not persuaded that both the Supreme Court and the Legislature would reject such an approach. To test the viability of the governmental approach, they asked to be allowed to pursue this option directly with the Supreme Court and the Legislature.

Given the relevant State Bar Rules and Board Book provisions concerning such independent action,² such an approach would require prior express Board approval. The value in creating a

¹ These topics were identified as: name, use of the State Bar seal, governance model, staffing and administrative support, location, transfer of existing assets (intellectual property and Sections reserves) and other sources of revenue (insurance and affinity program revenue), collection of annual Section dues, and establishing a special relationship with the State Bar for MCLE and other purposes.

² OGC has consistently advised that the Sections, like all sub-entities, are subject to the authority of the Board and may not act independently. See, e.g., State Bar Rule 6.20 ("All State Bar officers, agents, committees, commissions, and other entities have only the powers, duties, and authority delegated by the board and are subject to its supervision and control."); Board Book, Tab 5.4, Article 2, Section 3, ("The executive committee of a section shall not purport to speak publicly, before a legislative committee or otherwise, on behalf of the State Bar without prior approval of the Board of Trustees.") (Source: Board of Governors' Resolutions, May 1976 and March 1977.); see also *Criminal Courts Bar Assn. v. State Bar*, 22

combined delegation of State Bar and Section leadership to explore the two options with both the Supreme Court and the Legislature appeared to recommend this action. To facilitate this, it was suggested that the idea might be discussed at the Executive Committee's December 6 meeting, with a recommendation that the Board act at its December 12, 2016 meeting to expressly authorize a joint delegation to consider separation options for the Sections with the Supreme Court and the Legislature.

The Executive Committee has now considered this approach and has interposed no objection to moving the matter forward for decision by the full Board at its December 12 meeting.

FISCAL/PERSONNEL AND OTHER IMPACT

As entities under the authority of the State Bar Board of Trustees, the Sections lack their own legal personality and the ability to execute contracts and do other things necessary to their day-to-day functioning. There is recognition that an independent structure would allow the Sections to manage their assets, including their reserves and the intellectual property generated by their programming, directly. Currently all are legally controlled by the State Bar and managed at the Board's discretion.

While discussion alone of models for separation of the Sections from the State Bar with the Supreme Court and Legislature would have no fiscal/personnel or other impact, a subsequent decision to permit the departure of the Sections would have important ramifications for the State Bar in all areas and would require careful consideration. Practical considerations for an orderly transition may also require providing the Sections with State Bar support for a limited period to facilitate an orderly separation and the continuation of their various programming and other activities.

Loss of the Sections' annual indirect contribution, estimated at \$1.5M, and of revenue from the insurance and affinity programs, if the Sections were able to assume them as has been discussed, would be significant and together could result in over a \$2M annual reduction in State Bar revenue. This might be off-set in the initial year of separation by reducing the amount of reserve funds which the Sections are expected to request taking with them.³ On the other hand, the State Bar might also realize a benefit if the Sections were to vacate the one-third office floor space they now occupy as this space could provide room needed to expand other State Bar programs.

Finally, separation of the Sections from the State Bar would impact personnel. The Office of Education supports the Sections with a staff of twenty-two (although only nineteen FTE's are

Cal. App. 3d 681, 683 (1972) ("Under State Bar rules all committees, conferences, agencies and officers are subject to the Board's Supervision and control and have only such powers, duties and authority as may be conferred to them by the Board.")

³ Business and Professional Code section 6031.5 authorizes the State Bar to collect the Sections' annual membership fees, independently set at approximately \$95 per year. The State Bar is prohibited from either subsidizing or benefitting financially from the Sections membership fees which have produced current reserves of approximately \$6.5M. However, uncollected amounts revealed by recent review of these accounts reflects unbilled amounts of almost \$1M, which the Board would also need to consider. In addition, the Sections benefit from on-line marketing of their in-person MCLE course offerings; the benefits of these programs are under review by outside auditors, but are expected to be of modest benefit to the Sections.

now filled). Relocating these staff members to other State Bar positions will need to be explored and could have additional fiscal impact, as yet unknown in light of the just offered Reduction in Force (RIF) program. Staff are studying these and other concerns now. None of the possible decisions on these matters are prescribed by law, but rather the Board of Trustees retains the sole discretion as to how these matters should be resolved and the impacted revenues allocated. Even so, consultation with the Supreme Court and the Legislature will be appropriate before final decisions are taken, should an agreement be reached on the advisability of the Sections departure from the State Bar.

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None

BOARD COMMITTEE RECOMMENDATIONS

The Executive Committee of the Board of Trustees recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees hereby authorizes the President of the State Bar (and/or his designees) and the officers of the Council of Sections (and/or their designees) to engage jointly in discussions with staff of the Legislature and California Supreme Court regarding options for the separation of the Sections from the State Bar.

FURTHER RESOLVED, that upon his consideration, the President will advise the Board of his designees.

ATTACHMENT(S) LIST

None