



THE STATE BAR OF CALIFORNIA

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MEMORANDUM

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TO: Governance in the Public Interest Task Force

FROM: Sarah Cohen, Assistant General Counsel

SUBJECT: 2017 Governance Task Force Topic B: Governance

Introduction

The first Governance in the Public Interest Task Force (2011 Task Force) was tasked with producing a report within a short timeframe, and therefore focused strictly on the governance structure of the State Bar, the subject of Topic B. As a prelude to the discussion of Topic B, this memorandum includes a review of the work of the 2011 Task Force and subsequent legislation that sought to implement a number of the recommendations of both the majority and minority reports. Next, the memorandum reviews the 2016 Task Force Report as it concerns governance issues, and notes subsequent administrative and Board actions that have been taken to begin to implement the recommendations made therein. Last, the memorandum enumerates the possible governance issues to be taken up by the 2017 Task Force in Topic B discussions.

Background

The 2011 Task Force

The 2011 Task Force considered the following issues: size of governing board; composition and terms of its members; selection process for members and the president; qualifications of members; transparency of Board meetings; overall purpose of the State Bar in making public protection the governing board's highest priority. Consensus could not be reached on all the recommendations, specifically those relating to size, composition and manner of selection of the governing board, and therefore the 2011 Task Force Report included both majority and minority proposals. Consensus was reached on the following changes: (1) renaming the Board of Governors to Board of Trustees; (2) including Supreme Court appointments on the governing board; (3) creating a Merit Screening Committee for Supreme Court appointments; and (4) allowing a mechanism for reappointment. Both the majority and the minority supported retaining majority attorney membership. Both sides also agreed on 3-year staggered terms, with eligibility for reappointment (in parity with public members).

In addition to the consensus items described above, the majority supported retaining the 23-member size of the governing board, without change to the number of attorney members, as necessary to adequately populate the committees. The majority also supported retaining elections as one mode of filling attorney member seats, but agreed that there should be appointed attorney members as well. Under the majority proposal, the 23-member governing board would be composed of 12 attorney members elected from five reconfigured districts; 3 attorney members appointed by the Supreme Court; 1 member appointed by the California Young Lawyers Association; 6 public members appointed pursuant to existing law; and a president. The 5 new electoral districts for the 12 elected attorney members would be based on existing appellate court district boundary lines. The majority proposed adoption of minimum qualifications for members including a new conflict of interest rule.

In addition, the majority proposed the following two internal governance changes: (1) inclusion in the Regulation, Admission and Discipline Committee and the Member Oversight Committee of at least 40 percent public members and at least one Supreme Court appointee; and (2) revision of the Board Book for “improved strategic continuity and improved communication and responsiveness to the public, the Legislature, the Governor and the Supreme Court.”¹

In addition to the consensus items described above, the minority² proposed a smaller 15-member (including the president), all appointed governance model where the 9 attorney members would be appointed by the Supreme Court and the 6 public members would continue to be appointed pursuant to existing law. The minority proposed that the president be selected by the Supreme Court upon application by an interested member who has served at least 2 years. Under the minority proposal, the president would serve for 1 year subject to reappointment by the Supreme Court. The minority also proposed a statutory revision that would make public protection paramount.

Senate Bill 163

Subsequent legislation in 2011 implemented a number of recommendations from the 2011 Task Force, including:

¹ A governance subcommittee of the Board’s Planning Committee had already implemented a number of the changes addressing the majority’s concerns including: (1) improvements to external messaging; (2) improvements to year-to-year continuity; and (3) re-examination of the role and mode of selection of the president.

² The minority made proposals covering a variety of other topics such as an oath requirement, free ethics MCLE, etc., but for brevity purposes, only the main governance proposals are included in the body of the memorandum. It is noted purely for historical purposes that the minority proposed adoption of Bagley-Keene, which occurred with passage of legislation in 2015. Also for historical purposes it is noted that there were strong views expressed about whether the State Bar should remain “unified.” The minority proposed that the Task Force report back in 2013 on whether the unified bar advances public protection. The majority rejected the minority’s rationale for de-unification, arguing that the creation of the State Bar Court eliminated any remnant of “self-regulation” and the United States Supreme Court decision in *Keller* eliminated any concern about the politicization of the State Bar.

- Added language making public protection the highest priority for the State Bar. See, Business & Professions Code section 6001.1.³
- Change from Board of Governors to Board of Trustees.
- Termination of existing State Bar districts for election of attorney members and replacement with new districts based on the boundary lines of the 6 appellate court districts. See, section 6012.
- Appointment of 5 attorney members by the Supreme Court. See, section 6013.1.
 - 3-year terms with eligibility for reappointment for one additional term.
 - Supreme Court to fill vacancies in the term of any appointed attorney member.
 - Criteria for appointment includes type of practice (legal services, small firm or solo practice); membership in historically underrepresented and diverse groups; legal academics; geographic distribution; years of practice (within first five years of practice or 36 years of age and under); participation in voluntary local or State Bar activities.⁴
- Election of 6 attorney members from the newly created districts. See, section 6013.2.
 - 3-year terms.
 - Subject to re-election for 1 additional term.
- Appointment of 1 attorney member by Senate Rules Committee and 1 by Speaker of the Assembly. See, section 6013.3.
 - 3-year terms.
 - Subject to reappointment.
- 1-year term for president subject to re-election for additional 1-year term. See, section 6021, subd. (b).⁵

While the 2011 Task Force recommendations were not adopted wholesale by the Legislature, with enactment of Senate Bill 163, many of the 2011 Task Force's main ideas for reform from both the majority and the minority became law, i.e., addition of appointed attorney members, decrease in size of the Board, replacement of districts with new ones based on appellate court district boundary lines. A question is raised whether to re-litigate governance structure proposals of the 2011 Task Force by the 2017 Task Force given that the 2011 Task Force report was before the Legislature when it enacted Senate Bill 163. Proposals may have

³ All subsequent references to code sections are to the Business & Professions Code, unless otherwise indicated.

⁴ In 2013, the Supreme Court adopted Rule 9.90 of the California Rules of Court, which established the State Bar Trustees Nominating Committee to serve at the pleasure of the court and screen and evaluate prospective appointees. Rule 9.90 requires the committee to determine whether the applicant possesses not only the statutorily enumerated qualifications, but also any other qualifications that may be required to carry out the duties of a trustee. This committee appears to be what the 2011 Task Force had in mind when making the recommendation to establish a Merit Screening Committee for Supreme Court appointments.

⁵ Senate Bill 163 eliminated the ability of the president to serve an additional 4th year when elected in the third and final year of office, but subsequent legislation reinstated that provision. (See, section 6021, subd. (c).)

been rejected or modified by the Legislature for a reason, which is something to keep in mind when determining an appropriate and reasonable scope for Topic B discussions.

The 2016 Task Force – Governance Reform

Proposals contained in the 2016 Task Force Majority Report break down into two categories, Governance Reform and Other Solutions and Recommendations. Proposals under the latter category fall into all three 2017 Task Force subject areas, Topic A, B and C; those proposals falling under Topic B are consolidated for purposes of this memorandum with Governance Reform proposals. Those falling under Topic A and Topic C are noted for your reference.

2016 Task Force Governance Reform proposals from the majority include:⁶

- Creation of 3 person ladder of officers – President, President-elect and Treasurer
 - This proposal had full support, but on advice from OGC that it could not be implemented without a change in the statute, it was held for consideration as part of the 2017 Fee Bill.⁷
 - The minority criticized this proposal as only accelerating “the election to July of the first year of service of Trustees who would-be [sic] Presidents.” According to the minority, leadership elections are held before trustees have had the opportunity to demonstrate leadership skills. The minority would rather the President be renamed Chair and be a non-attorney.
 - President-elect to serve as RAD Chair.
 - The minority did not appear to support this proposal, seeing the RAD Chair as a platform from which to run for President rather than opportunity to lead.
 - ACTION TAKEN: At the September 12, 2016, meeting, the Board:
 - Voted to have the Vice-president chair RAD.
 - Voted to have the Vice-president and Treasurer be responsible for the annual strategic planning session.
 - Note: The minority criticized the annual planning session as a “de facto campaign event” with topic selections and

⁶ The minority proposed de-unification. Only 2 members of the majority supported de-unification. With full majority support, the 2016 Task Force called for clarification of “public protection.” These two proposals, de-unification and clarification of public protection, fall under 2017 Task Force Topic A. Also with full majority support, the 2016 Task Force called for a review of committee framework and structure. This proposal falls under 2017 Task Force Topic C.

⁷ Under the current statutory scheme, within a 90 day period preceding the annual meeting, the board, at a meeting called for that purpose, shall elect the president, vice-president and treasurer for the ensuing year. These officers shall be elected from among all members of the board and shall assume the duties of their respective offices at the conclusion of the annual meeting following their election. See, section 6021, subd. (a).

moderator assignments used to build factions and groom candidates.

- RAD to be restructured as committee of the whole.
 - ACTION TAKEN: At July 21, 2016, meeting, the Board:
 - Voted to confirm the President's appointment of all Board members to RAD, except for the 2 members who are appointed to and serve on the Supreme Court's Applicant Evaluation and Nomination committee (AENC).
 - Directed staff to initiate dialogue with Supreme Court to provide that the 2 members of AENC from the Board be former (rather than current) members. The Supreme Court indicated that it did not want to change its rule regarding composition of AENC.
 - The reconfigured RAD composed of all trustees minus the 2 AENC members continues in place.
- The Planning and Budget committee should merge with the Audit committee to form the Planning, Budget and Audit committee; and the Treasurer should serve head of the merged committee.
 - ACTION TAKEN: At the September 12, 2016, meeting, the Board:
 - Voted to have the Treasurer chair the Planning and Budget committee.
 - Voted to have the Vice-president and Treasurer be responsible for the annual strategic work session.
 - Voted not to merge the 2 committees, believing it to be important to retain a separate Audit committee.
- Extended term for president
 - This proposal had **no** support.
 - It was thought that the needed continuity would be provided instead by creation of an officer ladder.
- Increase in public members while maintaining majority attorney membership
 - This proposal had full support.
 - The minority advocated for majority public membership.
 - The Legislature in Senate Bill 163 retained majority attorney membership.
 - ACTION TAKEN:
 - The Office of General Counsel analyzed the anti-trust concerns raised by Task Force members and made no recommendation for changes in Board composition in terms of numbers of public members versus attorney members based on legal analysis of the issues presented.
 - The September 8, 2016, letter from the Chief Justice inviting the State Bar to submit a fee petition encouraged the State Bar to formulate a policy, to be presented to the Supreme Court for approval, that the Bar must follow

in identifying, analyzing and bringing to the court any proposed Board action that implicates antitrust concerns.

- The Office of General Counsel is working on developing such a policy.
- Elimination of elections and replacement with appointed attorney member paradigm that ensures geographic and demographic diversity
 - This proposal had majority support.
 - The proposal was accompanied by a related proposal to create a mechanism for the Chief Justice to fill a vacancy for a seat that has not been filled within a certain period of time.⁸
 - The minority had recommended that all attorney members be appointed, but the Legislature in Senate Bill 163 retained a modified version of the electoral component of the existing system for filling Board seats, changing electoral boundary lines and reducing the number of electoral districts from 12 to 6.
- Appointment of an enforcement monitor⁹
 - This proposal had full support minus one.
 - The September 8, 2016, Chief Justice letter directing the State Bar to file the fee petition encouraged State Bar to request that the Attorney General appoint a qualified individual for a defined term to monitor and report on the State Bar's progress in reforming its discipline system.
 - The November 17, 2016, Supreme Court regulatory fee assessment order, however, denied funding for a discipline monitor given the significant amount of change the discipline system was about to experience in 2017 because of workforce planning.
- Enhanced trustee training/orientation
 - This proposal had full support.
 - ACTION TAKEN:
 - At the September 12, 2016, meeting, the Board voted to establish enhanced orientation and training for trustees.
 - At the November 16, 2016, meeting, enhanced orientation/training was introduced for all trustees. More work is required to fully implement this recommendation. Some Trustees have recommended special training to understand the State Bar's unusually complex and idiosyncratic financial system.

⁸ Under the statutory scheme, the Supreme Court shall fill any vacancy in the term of, and make any reappointment of, any appointed attorney member. See section 6013.1, subd. (c).

⁹ The 2016 Task Force recommendation to appoint an enforcement monitor does not fall neatly under Topic A, B or C; we include it here for tracking purposes only. Given the Supreme Court's denial of funding for an enforcement monitor and expressed opinion that appointment of a monitor would not be appropriate given the changes occurring as a result of workforce planning, staff recommends that the 2017 Task Force report on the subsequent history of the issue, but decline to make any further recommendations in deference to the paramount authority of the Supreme Court.

- Assessment of key reporting relationships, specifically those of the Chief Trial Counsel
 - This proposal had full support minus one.
 - ACTION TAKEN: At the September 12, 2016, meeting, the Board voted to refer the Chief Trial Counsel oversight issue to RAD for a report back to the Board at the January 26, 2017, meeting.
 - The Office of General Counsel prepared an options memorandum for RAD's consideration and proposed, upon request, language to address instances where there might be a question whether a particular matter is substantive and therefore subject to RAD oversight or administrative and therefore within the overall managerial control of the Executive Director.
 - At the January 26, 2017, meeting, the Board discussed the issue. No statutory or Board Book change was recommended.
- Reduction in board size – *for further study*
 - This proposal had full support minus two.
 - The 2011 Task Force minority had recommended reducing Board size to 15.
 - The Legislature in Senate Bill 163 reduced Board size from 23 only to 19.
- Address the impacts of silo funding.¹⁰
 - This proposal had full support.
 - The focus was on whether to apply the same fiscal policies to all funds received by the State Bar regardless of source.¹¹
 - ACTION TAKEN:
 - At the September 12, 2016, meeting, the Board moved to create consistent policies across all functional areas; the Board:
 - Voted to prohibit State Bar spending on alcohol.
 - Voted to refer development of additional policies addressing meals, awards purchases, entertainment, lodging and sponsorship to Stakeholders, Access to Justice and Appointments committee for report back to the Board at the January 2017 meeting.
 - At the October 2, 2016, meeting, the Board voted to cancel the 2017 Disneyland hotel contract, the 2018 Marriot hotel contract and the 2019 Portola hotel contract.

¹⁰ The 2016 Task Force recommendation to address the impacts of silo funding does not fall neatly under Topic A, B or C; we include it here for tracking purposes only. Given that the implementation of comprehensive and uniform fiscal policies is already in progress, staff recommends that the 2017 Task Force report back on the successful completion of this item, and decline to make any further recommendations.

¹¹ A separate, broader funding issue regarding program areas that receive restricted funding like the Lawyer Assistance Program and the Client Security Fund is encompassed under 2017 Task Force Topic C. The issue is whether the restricted funding sources and the presence of statutorily-prescribed oversight boards, which inherently limit the Board's own oversight role, make problematic the integration of these programs into the overall structure of the State Bar.

- The Board has implemented rigorous expense oversight control system for trustees.
- At the January 26, 2017, meeting, Board updated the Executive Rules to revise State Bar’s policy for housing allowances and relocation expenses to align with state law requirements for managerial employees.
- Measures implemented by administrative action:
 - Adoption of state reimbursement rates for lodging.
 - Executive Director approval for any off-site meetings.
 - On-site catering costs capped, with caps on off-site catering costs to be developed.
- Determination of funding adequacy for discipline function – *for further study*¹²
 - ACTION TAKEN:
 - At the September 12, 2016, meeting, the Board voted to refer this to the Planning and Budget committee with progress reports to be provided to the Board at each of its meetings.
 - At the January 16, 2017, meeting of the Executive Committee, the 2017 budget was approved; at the January 26, 2017, Board meeting, the budget was brought to the Board for consideration and amendment. The new budget includes an increase in funding for the discipline function in the amount of \$3.4 million, more than double that directed by the 2017 court-assessed level. This increase is seen as critical to the success of workforce planning redesign and backlog reduction efforts.

The 2017 Task Force

Topic B is described as follows:

Changes in Board composition, size and term of office (e.g., public members, elected attorney members, extended officer terms) for better functioning; and consideration of how new senior management positions, created in 2015, may impact Board functioning (taking a look at a change in the role of the chief executive officer, the creation of a new chief operating officer and

¹² The 2016 Task Force recommendation to further study the adequacy of discipline system funding does not fall neatly under Topic A, B or C; we include it here for tracking purposes only. Steps have been taken to identify additional discipline system funding needs as reflected in the 2016 Spending Plan. In addition to identifying resource needs, the Bar has advocated for additional funding to address these needs, as reflected most recently in its 2017 Supreme Court fee assessment process. Last, the 2017 State Bar budget includes increased discipline system funding resulting from internal resource redistribution. Given that this subject does not fall within the parameters of Topic A, B or C, and in light of the work being done to advance the objectives of adequately funding the discipline system, staff recommends that the 2017 Task Force report back on the progress that has been made, and decline to make any further recommendations in this area.

adjustments in role of the general counsel that require direct reporting to the Board).

To the extent the 2017 Task Force report is viewed as building on the work already done by the 2016 Task Force, the following key issues are up for possible inclusion in Topic B discussions. Where an item is marked “revisit,” please refer back to history of that item outlined above.

- Revisit: Creation of an officer ladder.
- Revisit: Elimination of elections/elected attorney members.
- Revisit: Reduction in Board size.
 - Note: Elimination of elected attorney members without replacing them with appointed attorney members would reduce Board size from 19 to 13, leaving a bare majority (7) of attorney members.
- Revisit: Increase in public members while maintaining a majority of attorney members.
- Revisit: Expand trustees’ terms of office, particularly that of the president.
- Revisit: Experience requirements for trustees.
 - This was first proposed by the 2011 Task Force.
 - Included in failed 2016 fee bills.¹³
- Revisit: Enhanced Trustee training/orientation.
- Revisit and New: Assess key reporting relationships
 - Revisit: 2016 Task Force focused on the reporting relationship of the Chief Trial Counsel
 - New: Impact of newly created senior management positions on Board functioning:
 - New role for chief executive officer.
 - New chief operating officer position.
 - New reporting relationship of the general counsel directly to the Board.¹⁴
- New: Prescribe Executive Committee structure.
 - September 8, 2016, Chief Justice letter directing the State Bar to file the fee petition remarked that some of the provisions of the failed 2016 fee bills require no enabling legislation including providing for an executive committee with all appointing authorities represented.

¹³ The failed statutory language required each appointing body to consider appointing members with education or experience, or both, in at least 1 of the following areas: public finance; public administration; business or financial management; state government, particularly regulatory experience; legal ethics; immigration law. (Assembly Bill 2878 and Senate Bill 846 from 2015-2016 legislative session.)

¹⁴ The Board Book states that the general counsel is subject to the direction of the Board and the Executive Committee, or the committee designated by the Board to review legal matters. The Board Book also states that the performance review of the general counsel is by the executive director and the Board and that the general counsel is subject to the executive/administrative authority of the executive director to the same extent as other executive staff.

- President Fox implemented this reform through his recommendation of membership on the 2016-2017 Executive Committee. In addition, this Executive Committee includes the chair of each standing Board committee, totaling seven members.