

OPEN SESSION AGENDA ITEM

EX COMM ITEM III.D. 111 JAN 2018

DATE: January 10, 2018

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

FROM: Donna Hershkowitz, Chief of Mission Advancement and Accountability

SUBJECT: Criteria for Taking Positions on Legislation and Advancing Legislative Proposals

EXECUTIVE SUMMARY

The activities of the State Bar, in large part, are governed by the Bar's mission, as well as the strategic plan, which acts as a roadmap for carrying out the Bar's mission. Those important governing principles should also govern the Bar's legislative program. This agenda item seeks the Board of Trustees' confirmation of the purpose of the Bar's legislative program, and the guiding principles for legislation sponsored by the Bar, and legislation on which the Bar may choose to take a position.

BACKGROUND

In recent years, the focus of the State Bar in the legislative arena has largely been in relation to the annual fee bill. This is especially true with regard to the Bar's regulatory and disciplinary functions. As such, the Bar has not recently adopted criteria or guidelines identifying the types of legislation on which it might be appropriate for the Bar to weigh in – whether in the form of Bar-initiated legislation or taking positions on pending legislation.

DISCUSSION

The State Bar's legislative program should be driven by the mission of the State Bar. The State Bar's mission statement defines at a high level the key focus of the Bar. The mission of the State Bar of California is to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and support of efforts for greater access to, and inclusion in, the legal system. The strategic plan is the roadmap for carrying out that mission.

Establishing guiding principles for the operation of the Bar's legislative program will help ensure that the Bar remains focused on its mission, and will also help the public understand the types of legislation on which the Bar may take positions, and the types of legislation which may be outside the scope of the State Bar's legislative program.

Attachment A proposes a statement of the purpose of the Bar's legislative program, as well as guiding principles, and includes the following:

The purpose of the legislative program is to monitor legislative activity and represent and advocate for the State Bar on legislative, policy and budget matters before the Legislature and Governor. The State Bar seeks to ensure that laws are in place that enhance the ethical and competent practice of law, the ability to effectively license and regulate lawyers, and provide fair, just, and appropriate discipline of attorneys. The State Bar seeks to ensure that laws enhance access to the profession and the justice system. The State Bar seeks to promote laws that identify effective new tools for, or eliminate unnecessary obstacles to, the carrying out of the Bar's public protection mission. The State Bar generally takes no position on bills involving substantive law. However, it may take a position on an apparent issue of substantive law if issues of procedure and substance are so inextricably intertwined that they directly affect the Bar's core mission.

The document also enumerates the strategic plan goals and states that the legislative program seeks to advance those goals.

In running the legislative program, staff will rely on these guidelines in developing recommendations for Board approval for sponsorship of, and positions on, legislation, and for communications with the Legislature.

Changes will need to be made to the Board Book to align Tab 3.5 with these guidelines, strike references to the sections, and update procedures to ensure Board of Trustees leadership on the Bar's legislative agenda. In the meantime, to avoid any conflict, the

FISCAL/PERSONNEL IMPACT

The adoption of this statement of purpose and guiding principles in and of itself has no fiscal impact. As part of future agenda items seeking Board adoption of a legislative proposal or a position on pending legislation, staff will include, to the best of our ability, an analysis of fiscal and personnel impact for the Board's consideration.

RULE AMENDMENTS

None

BOARD BOOK IMPACT

Eliminate Section 3, Legal and Legislative Policies and Procedures, Tab 3.5.

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 1. Successfully transition to the “new State Bar”— an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Goal: 3. Improve the fiscal and operational management of the State Bar, emphasizing integrity, transparency, accountability, and excellence.

Goal: 4. Support access to justice for all California residents and improvements to the state’s justice system.

Goal: 5. Proactively inform and educate all stakeholders, but particularly the public, about the State Bar’s responsibilities, initiatives, and resources.

RECOMMENDATION

It is recommended that the Executive Committee and the Board of Trustees approve the following resolution:

RESOLVED, that the Legislative Program Purpose and Guiding Principles document, set forth as Attachment A, is adopted and shall be used as a guide to assist in determining appropriate legislation to pursue and on which to take formal positions; and it is

FURTHER RESOLVED, that Tab 3.5 of Section 3 of the Board Book be eliminated pending revision to more properly align with the legislative guiding principles document, and Bar and Board of Trustee policies and procedures.

ATTACHMENT(S) LIST

- A.** State Bar Legislative Program: Purpose and Guiding Principles
- B.** Board Book Section 3, Tab 3.5

State Bar Legislative Program: Purpose and Guiding Principles

The State Bar's legislative program is guided by the mission of the State Bar. As set forth in the Strategic Plan for 2017-2022, the State Bar of California's mission is to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and support of efforts for greater access to, and inclusion in, the legal system.

Guiding Principles:

The purpose of the legislative program is to monitor legislative activity and represent and advocate for the State Bar on legislative, policy and budget matters before the Legislature and Governor. The State Bar seeks to ensure that laws are in place that enhance the ethical and competent practice of law, the ability to effectively license and regulate lawyers, and provide fair, just, and appropriate discipline of attorneys. The State Bar seeks to ensure that laws enhance access to the profession and the justice system. The State Bar seeks to promote laws that identify effective new tools for, or eliminate unnecessary obstacles to, the carrying out of the Bar's public protection mission.

The State Bar's legislative program seeks to advance the following the five goals of the Bar's Strategic Plan:

Goal 1: Successfully transition to the "new State Bar" – an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Goal 2: Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Goal 3: Improve the fiscal and operational management of the State Bar, emphasizing integrity, transparency, accountability, and excellence.

Goal 4: Support access to justice for all California residents and improvements to the state's justice system.

Goal 5: Proactively inform and educate all stakeholders, but particularly the public, about the State Bar's responsibilities, initiatives, and resources.

**SECTION 3
LEGAL AND LEGISLATIVE POLICIES AND PROCEDURES**

Adopted May 13, 2016

- TAB 3.1 Conflicts of Interest**
- TAB 3.2 Claims Against the State Bar**
- TAB 3.3 Collection Policy for Court-Ordered Discipline Costs and CSF Obligations**
- TAB 3.4 Amicus Curiae Participation**
- ~~**TAB 3.5 Legislative Policies and Procedures**~~
- TAB 3.6 Public Comment**
- TAB 3.7 Public Communications**

~~TAB 3.5~~

~~LEGISLATIVE POLICIES AND PROCEDURES~~

~~Article 1 — LEGISLATIVE POLICIES AND PROCEDURES FOR LEGISLATIVE POSITIONS OF BOARD OF TRUSTEES~~

- ~~Section 1 — Vote on Legislative Positions~~
- ~~Section 2 — Keller Parameters~~
- ~~Section 3 — Funding~~

~~Article 2 — LEGISLATIVE POLICIES AND PROCEDURES FOR SECTIONS AND COMMITTEES~~

- ~~Section 1 — Review of Sections and Committees Affirmative Legislation Proposals~~
- ~~Section 2 — Time for Board Review of Section Affirmative Legislative Proposals~~
- ~~Section 3 — Germaneness Standard for Sections~~
- ~~Section 4 — Review of Proposed Positions on Bills of Others~~
- ~~Section 5 — Disclaimers~~
- ~~Section 6 — Funding of Legislative Activities of Committees and Certain Other State Bar Entities~~
- ~~Section 7 — Standards and Guidelines for Legislative Activities of Committees and Certain Other State Bar Entities Funded from the Lobbying Deduction Fund~~
- ~~Section 8 — Evaluation of Interim Policies~~

Article 1
~~LEGISLATIVE POLICIES AND PROCEDURES FOR~~
~~LEGISLATIVE POSITIONS OF BOARD OF TRUSTEES~~

~~Section 1 — Vote on Legislative Positions~~

- ~~(a) — Consideration of a legislative position by the Board of Trustees proposed for funding from the general fund shall proceed in the following order:~~
- ~~(1) — An affirmative vote by a 2/3 majority of those present concerning whether the proposed legislative position is within the parameters established by the United States Supreme Court in Keller v. State Bar of California;~~
 - ~~(2) — If the vote is affirmative, a second affirmative vote by 2/3 of those present that the specific legislative political position is adopted.~~

~~(Source: Board of Governors' Resolutions, December 1999, April 2000, June 2001.)~~

- ~~(b) — A legislative position by the Board of Trustees proposed for funding from the lobbying deduction fund must be adopted by an affirmative vote by 2/3 of those present.~~

~~(Source: Board of Governors' Resolution, June 2001.)~~

~~Section 2 — Keller Parameters~~

~~All legislative positions taken by the Board of Trustees funded from State Bar general funds shall be within the parameters established by Keller v. State Bar, 496 U.S. 1 (1990).~~

~~(Source: Board of Governors' Resolutions, December 1999, April 2000, June 2001.)~~

~~Section 3 — Funding~~

- ~~(a) — Legislative lobbying funded by the mandatory portion of the annual membership fee is restricted to bills pertaining only to legislation fixing the annual membership fee, the State Bar's functions in professional regulation and ethics, or the State Bar's administration and operations.~~
- ~~(b) — Legislative positions taken onto the Board of Trustees' legislative program are funded solely from State Bar funds. This subdivision cannot be amended or repealed without notice to the Executive Committee of the Conference of Delegates.~~

~~(Source: Board of Governors' Resolutions, February 2000, August 2000.)~~

Article 2

LEGISLATIVE POLICIES AND PROCEDURES FOR SECTIONS AND COMMITTEES

Section 1 — Review of Sections and Committees Affirmative Legislation Proposals

- (a) — Each affirmative legislative proposal of sections and committees shall be delivered to staff designated by the Executive Director, either:
- (1) — Sixty (60) days before the meeting of the Board Committee on Stakeholder Relations, or successor committee, at which it will be submitted if it will be submitted other than at the first board meeting of the board year following the organization meeting.
 - (2) — On or before August 1, if it is to be submitted at the first board meeting of the board year following the organization meeting to the Board Committee on Stakeholder Relations, or successor committee.

The proponent shall identify a permanent contact person to whom sections and committees may direct comment. The proposal shall identify the date of the board committee meeting at which it will be submitted.

- (b) — Staff designated by the Executive Director shall circulate the proposal to all sections, all committees, the Executive Committee of the Conference of Delegates, and the Office of Governmental Affairs. Any section or committee may request copies of all proposed amendments.
- (c) — The only exception to this rule is legislation regarding which true urgency exists, and in case of urgency, the proponent shall, when the proposal is delivered to the Board Committee on Stakeholder Relations, or successor committee, also deliver it to the Office of Governmental Affairs, the Executive Committee of the Conference of Delegates, all sections and those committees within the purview of which the proposal may fall.

(Source: Board of Governors' Resolutions, August 1986, October 1988, December 1989, June 1999, June 2001.)

Section 2 — Time for Board Review of Section Affirmative Legislative Proposals

The board shall schedule a meeting of the board as soon as practical following the State Bar's Annual Meeting to consider section legislative program issues for the forthcoming year, with the goal of final approval by the board on or before October 31.

(Source: Board of Governors' Resolutions, June 1999.)

Section 3 — Germaneness Standard for Sections

A section may use voluntary dues to take positions on bills of others or make affirmative legislative proposals that are germane to the designated practice area of the section,

and pursuant to the authority granted under Business and Professions Code section 6031, under the following germaneness standard:

- (a) ~~The matter is necessarily or reasonably related to the regulation of the legal profession or improvement of the quality of legal services available to the people of the state, or~~
- (b) ~~The matter requires the special knowledge, training, experience or technical expertise of the section, or~~
- (c) ~~The position advocated, while not specifically related to the regulation of the legal profession or improvement of the quality of legal services, would promote clarity, consistency or comprehensiveness in the law.~~

(Source: Board of Governors' Resolutions, Original source unknown, reaffirmed June 2001.)

Section 4 — Review of Proposed Positions on Bills of Others

- (a) ~~A copy of a proposed position of a section/committee must be sent to General Counsel, in addition to the current recipients of proposed positions [Office of Government Affairs, and the liaison from the Board Committee on Legislative and Court Relations, or successor committee]; no proposed position shall be transmitted to a legislative body or official or government agency or official unless, at a minimum, it is approved by the Office of General Counsel and the Office of Governmental Affairs; this review should occur within five (5) business days; reviewers shall have the authority not to transmit proposed positions based upon a judgment that the State Bar should not take a position on a particular bill.~~
- (b) ~~The above procedure applies to a proposed position of a section/ committee on a state or federal bill of others or on a public agency rule, regulation or guideline. It also applies to a section/committee response to a request of a legislator or agency official for comment on a specific bills, rule, regulation or guideline. The text or outline of section/committee testimony on a bill of others or a proposed agency rule, regulation or guideline shall also be approved pursuant to these procedures, if a section/committee proposed written position on the same subject has not been previously approved pursuant to these procedures.~~
- (c) ~~Sections may attend meetings of the California Law Revision Commission and comment verbally and in writing upon drafts of proposed legislation prepared by the Commission without being required to submit to the five day review by General Counsel, or other reviewers, generally required for positions on bills of others.~~
- (d) ~~Proposed letters regarding bills of others on which a section or committee takes no position, but offers technical comments only, may be transmitted to~~

~~the Legislature if none of the required reviewers (Liaison from the Board Committee Legislative and Court Relation, or successor committee; Office of Governmental Affairs; General Counsel) objects to its transmittal within five (5) business days.~~

~~(Source: Board of Governors' Resolutions, December 1990, August 1991; Board Committee on Legislative and Court Relations charter, June 2001.)~~

~~Section 5 — Disclaimers~~

~~Legislative positions taken by State Bar entities must include the following disclaimers, in boldface type:~~

~~(a) — For sections:~~

~~The position is only that of the _____ SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees and is not to be construed as representing the position of the State Bar of California.~~

~~Membership in _____ Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.~~

~~(b) — For legislative positions resulting from legislative activities of committees and other State Bar entities that are paid for from the general fund:~~

~~This position is only that of the State Bar of California's [STANDING COMMITTEE ON _____]. This position has not been adopted by the State Bar's Board of Trustees and is not to be construed as representing the position of the State Bar of California.~~

~~(c) — For legislative positions resulting from legislative activities of committees and other State Bar entities that are paid for from the lobbying deduction fund:~~

~~This position is only that of the State Bar of California's [Standing Committee on _____]. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.~~

~~(d) — For positions resulting from Board of Trustees' legislative activities paid for from the lobbying deduction fund:~~

~~Board of Trustees' activities relating to this position are funded from voluntary sources.~~

~~(Source: Board of Governors' Resolutions, December 1999, February 2000, April 2000, April 2001, May 2017.)~~

~~**Section 6 — Funding of Legislative Activities of Committees and Certain Other State Bar Entities**~~

- ~~(a) — The legislative activities of committees and other State Bar entities that receive funding from the general fund, other than legislative activities pertaining to fixing the annual membership fee, the State Bar's functions in professional regulation and ethics, or the State Bar's administration and operations, shall be paid for out of the fund created by calculating the product of the number of members who choose not to take the lobbying deduction, multiplied by \$5 ("lobbying deduction fund");~~
- ~~(b) — To the extent funds are available in the lobbying deduction fund, all legislative activities of committees and other State Bar entities that receive funding from the general fund shall be paid for out of the lobbying deduction fund.~~

~~(Source: Board of Governors' Resolution, April 2001, June 2001.)~~

~~**Section 7 — Standards and Guidelines for Legislative Activities of Committees and Certain Other State Bar Entities Funded from the Lobbying Deduction Fund**~~

- ~~(a) — Legislative activities paid for out of the lobbying deduction fund of committees and other State Bar entities that receive funding from the general fund must be germane to the charge of the committee or other entity and meet the following germaneness standard:
 - ~~(1) The matter is necessarily or reasonably related to the improvement of the quality of legal services available to the people of the state; or~~
 - ~~(2) The matter is related to the improvement of the functioning of the courts, judicial efficacy and efficiency;~~~~
- ~~(b) — In interpreting this germaneness standard, the following guidelines should be applied:
 - ~~(1) Legislative comments should reflect the special knowledge, training, experience or technical expertise of the State Bar entity;~~
 - ~~(A) — Involvement in or comments on legislative matters that are ideological or highly controversial or divisive within the bar or the society are disfavored;~~~~

~~(B) — The potential impact of comments and other legislative activities of the State Bar entity on the State Bar and the rest of the bar's legislative program should be considered.~~

~~(Source: Board of Governors' Resolution, April 2001.)~~

~~**Section 8 — Evaluation of Interim Policies**~~

~~The interim policies set out in sections 6 and 7 shall be evaluated upon completion of the current legislative session.~~

~~(Source: Board of Governors' Resolution, April 2001.)~~