

OPEN SESSION AGENDA ITEM

701 JULY 2018

DATE: July 19, 2018

TO: **Members, Board of Trustees**

FROM: Richard Schauffler, Principal Analyst, Office of Research & Institutional Accountability

SUBJECT: Appendix I Review: Framework for Board Committee Discussions

EXECUTIVE SUMMARY

As directed by the Board of Trustees, Bar staff have been working to evaluate various committees, commissions, board and councils that work under the umbrella of the Bar: the subentities. The review of the work of the subentities is guided by Appendix I of the 2017 Governance in the Public Interest Task Force Report. This agenda item provides a conceptual framework for discussion by the Board with the goal of providing guidance for the Board when it engages in the detailed discussions of specific subentities.

BACKGROUND

In its 2017 Report, the State Bar's Governance in the Public Interest Task Force began a review of the various committees, commissions, boards, and councils that operate under the organizational umbrella of the Bar "to assess whether the structure of the subentities aligns with assigned tasks and appropriate oversight mechanisms are in place."¹ That review, contained in Appendix I of the Report, posed a number of additional questions related to each of the individual subentities.

At its November 2017 meeting, the Board of Trustees directed Bar staff and a number of Board Committees "to complete the subentity review pursuant to Appendix I" by August 31, 2018. Bar staff then identified a list of common elements regarding each of the subentities to be considered in the review including the following questions:

- What is the legal foundation for the subentity?
- How does the Board exercise oversight of the subentity?
- What is the subentity's organizational structure?
- What is the division of labor between the subentity and Bar staff?
- How does the subentity compare to like entities in other states or other sectors?

¹ Governance in the Public Interest Task Force Report, 2017, p. 31.

While the answers to these questions will necessarily be different for each subentity, it is important to recall that the broader inquiry into the subentities was animated by the organizational changes underway at the Bar, specifically, the separation of the Bar's two conflicting and confusing functions, regulatory body and professional trade association. Related to the co-mingling of these functions was another issue identified by the Task Force: the reliance of the Bar on volunteer attorneys and members of the public to staff the State Bar's many committees, commissions and boards.

While the use of volunteers is not uncommon in a regulatory agency, the manner in which volunteers are used varies considerably and appears to have serious implications for the effective governance of the agency. As the California State Bar continues to reengineer its operations to function primarily as a regulatory body, it is natural that the question arises of whether and how volunteer attorneys who are licensed by the Bar should remain engaged in the work of Bar. This question emerges not as a mundane exercise in downsizing or budget-cutting, but rather as part of an effort to clarify and focus on the Bar's core mission: the licensing, regulation, and discipline of attorneys to ensure professional standards and ethics guide the practice of law. As part of that mission, the Bar also seeks to improve access to justice and inclusion in the legal system, thereby safeguarding the public interest.

The discussion below is devoted to exploring this topic and providing conceptual clarification for the issues under consideration. The first section that follows looks at the key elements of successful governance generally. After that, this discussion identifies a number of different dimensions along which subentities may differ, such as the scope of work they perform, their organizational structure, the formality and specificity of their charge, and their number and size. These differences are identified, in part, through a comparison with other regulatory agencies in California.

The final section then looks at the impact of the current organizational structure of the State Bar's subentities on the elements of successful governance introduced below. Although there is no single solution to the question of how best to organize the functions performed by the various subentities, these introductory comments are intended to provide the lens through which this work can be scrutinized and organized in the most effective manner possible to achieve the strategic goals of the State Bar.

DISCUSSION

Elements of Successful Governance

Governance consists of the processes by which an organization coordinates its work internally and with its external partners. Successful governance in a regulatory agency rests on several key features:

- 1) Role definition: The purpose and objectives of regulation are clear to the regulator, the regulated, and the public;
- 2) Accountability and transparency: The process and outcome of the work of the regulator is reported to the public and governmental partners on a timely basis and consistently. Reports include meaningful outcome measures to measure the effectiveness of the regulator's work;
- 3) Clear lines of authority: For each function performed by the regulator, a shared understanding about who makes decisions and how must exist within the regulatory agency itself as well as among the regulatory agency, those regulated, and the regulatory agency's partners in government;

- 4) Impartial, consistent, and fair decision-making: The policies and decision-making rules of the regulatory agency are explicit and those who make decisions are protected from undue influence from bureaucratic, political, or fiscal pressures; and
- 5) Engagement: Those regulated along with members of the public are consistently active in improving current and future operations and outcomes of the regulator's work in a process free of conflicts of interest.²

A regulatory agency is constantly in the process of making, managing, and evaluating its regulatory policies. At each stage, the principles outlined above are relevant to ensuring that the agency is achieving its public policy objectives. These principles provide a framework that can be used to evaluate whether and how the regulatory agency should make use of volunteers, including licensees regulated by that agency, in its work.

The Use of Volunteers by California Regulatory Agencies

The use of volunteers—members of the public, licensees, and members of related professions—to perform the functions of regulatory agencies is common. The reasons for this are essentially twofold: 1) to ensure that regulation is conducted in the public interest for the purpose of public protection and does not become a shield protecting professions from accountability; and 2) to make use of the expertise and practical experience of licensees so that the content and mode of regulation makes sense in the contemporary world.

The ways in which volunteers are used in California regulatory agencies, however, varies considerably across different agencies as summarized in Table 1, below (the additional federal example of the Securities and Exchange Commission (SEC) is offered for comparison). The first and most obvious dimension along which the use of volunteer subentities varies is in the scope of functions that they perform. The State Bar makes much more extensive use of volunteers than any other state regulatory body in California or the SEC.

The most common function in which volunteers are used is Licensing, followed by Policy Advisory. No other major California regulatory agency besides the State Bar uses volunteers for Adjudication, Arbitration, or Grant-making, even though their mandates may include these functions. Very few regulatory agencies use volunteers for Education, Accreditation, Wellness, or Certification.

Table 1. The scope of functions performed by State Bar subentities is much larger than that of other regulatory agencies

| Function | State Bar | Dental Board | Architects Board | Veterinary Board | Medical Board | Board of Accountancy | Board of Registered Nursing | Board of Optometry | SEC (federal) |
|-----------------|-----------|--------------|------------------|------------------|---------------|----------------------|-----------------------------|--------------------|---------------|
| Licensing | X | X | X | X | X | X | X | X | |
| Regulation | | X | X | X | | X | | | |
| Policy Advisory | X | | | | X | X | X | X | X |
| Certification | X | | | X | X | | | | |
| Wellness | X | | | X | | | | | |
| Education | X | X | X | | | | | | |
| Accreditation | X | X | | | | | | | |
| Adjudication | X | | | | | | | | |
| Arbitration | X | | | | | | | | |
| Grantmaking | X | | | | | | | | |

Another key dimension on which the use of volunteer subentities varies across the agencies shown in Table 1 is in their *organizational structure*. The organizational structure may include

² Adapted from OECD (2014), *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy. Accessed July 9, 2018, at <http://www.oecd.org/gov/regulatory-policy/the-governance-of-regulators-9789264209015-en.htm>

the form that the volunteer subentity takes – for example, an alternative model to the Bar’s use of standing committees is the formation of task forces or working groups to address specific regulatory or policy issues – and the duration of the subentities’ charge – frequently taskforces and working group are established for a limited term and renewed only if necessary. This is the model used in many federal agencies, including the SEC, which typically convenes policy advisory committees for two-year periods, subject to renewal if need be.

Yet another dimension along which the use of volunteer subentities varies across agencies is in the *formality and specificity* of their charge. Volunteer advisory committees in other agencies often engage in a much more formal process of selecting and utilizing volunteers than appears to be the case with many Bar volunteers. Many agencies provide policy manuals and explicitly defined standards for participating as a volunteer, and some even include evaluation of volunteer members with respect to interpersonal skills, communication, leadership, preparedness, and participation.³ The California Department of Consumer Affairs provides a Board Member resource center for all appointed members of boards under its authority,⁴ including information on completing the mandatory orientation training required by Business & Professions Code Section 453. This comprehensive training covers the regulatory process, the legislative process, ethics training, conflict of interest regulations, sexual harassment prevention training, and more, all designed to ensure the effective participation of public members.

The formality of the employment of volunteers may also be matched by a more detailed and specific process of defining the scope of the subentity’s charge. For example, in other regulatory agencies, subentities are often convened with a detailed charter, including authority, objectives and scope, meeting frequency, reporting requirements, structure and size of the committee, and required resources to support its work.⁵

Finally, the differences in the utilization of subentities across different regulatory agencies can be compared in terms of the *number* of subentities and their *size*. While it was already noted the *scope* of work performed by subentities to the State Bar is much greater than what is found in other regulatory agencies, the actual number of subentities performing that work is also greater.

Figure 1 below shows the number of subentities and the number of volunteers working in those subentities in those California regulatory agencies shown in Table 1. In Figure 1, each rectangle represents a subentity and its size is proportional to the number of volunteers who serve on it. The total number of volunteers working in State Bar subentities exceeds the total of the second largest regulatory body by a factor of five. And the size of individual subentities ranges from a high of 114 on the State Bar’s California Board of Legal Specialization⁶ to a low of 3 on the Dental Board’s Dental Assisting Council. The insight from this additional figure is that the State Bar not only uses volunteers in more functions than other regulatory agencies, it typically uses more subentities, and more volunteers.

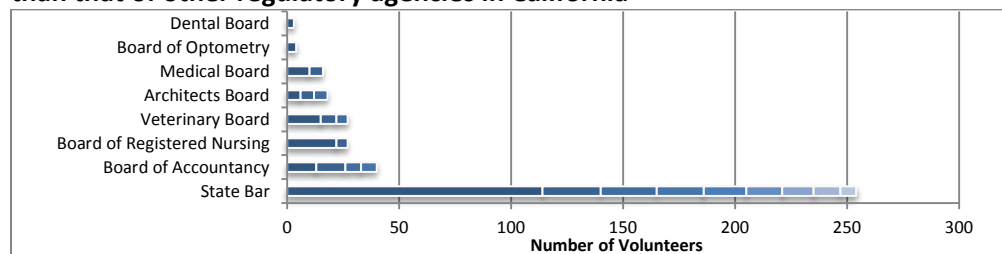
³ See for example the Committee Member Resource Guide of the California Board of Accountancy, accessed at http://www.dca.ca.gov/cba/about-cba/cm_resource_guide.pdf June 7, 2018.

⁴ Accessed at <http://www.dcaboardmembers.ca.gov/> June 7, 2018.

⁵ These Federal advisory committees are governed by Federal Advisory Committee Act (FACA) (Pub.L. 92-463, 86 Stat. 770, enacted October 6, 1972).

⁶ The California Board of Legal Specialization comprises 15 members, and coordinates the work of an additional 99 volunteers; together, these total 114.

Figure 1. The number of volunteers and number of subentities used by the State Bar are much larger than that of other regulatory agencies in California



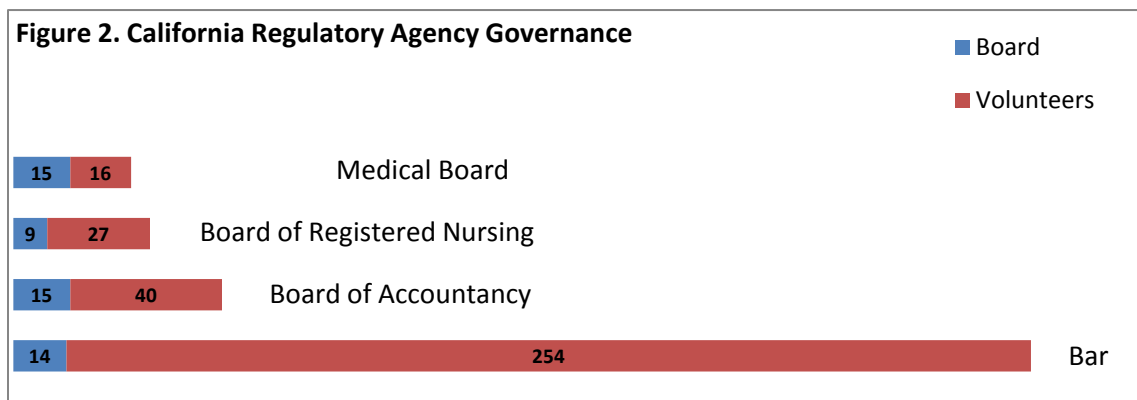
The Bar's Current Use of Volunteers

Why have licensees of the California State Bar and bar associations throughout the U.S. been so widely and actively engaged in the work of the bar itself? The most straightforward answer to this question lies in understanding the dual functions of a bar as both a regulatory agency and professional association. Professional associations are membership organizations, and such organizations typically rely on their members to provide member services aimed at career building (e.g., conferences, networking, continuing professional education) and direct services in support of their profession such as negotiated discounts for direct benefits provided by others (e.g., insurance, vendor discounts, notary services, legal research) as well as services that benefit all members (e.g., legislative lobbying, public relations campaigns). A membership organization is constantly seeking to engage its members in the work of the association as volunteers, and the level of that engagement serves as a barometer of the health of the organization.

A regulatory agency, on the other hand, seeks to make selective and focused use of volunteers to explore new issues arising in its field, to help ensure that proposed regulations in the public interest are informed by the real world experience and perspective of the regulated.

Implications of Bar's Current Use of Volunteers for Governance

The challenge for the Board of Trustees and the Bar executive management team is plainly illustrated in Figure 2 below. In this figure, the Bar has a board that is comparable in size to the other regulatory agencies shown (Board of Accountancy, Board of Registered Nursing, Medical Board) but only the Bar's Board is dwarfed by the number of volunteers.



The sheer number of volunteers (both lawyers and public members) makes governance more difficult. When so many are involved, it becomes increasingly difficult to focus effort, ensure alignment, and accomplish practical work based on shared goals and priorities. Thus, the Board's ability to achieve effective oversight is compromised.

In addition to the governance challenge, the staff workload of administering the participation of these volunteers is increased. Each additional volunteer is one more person who must be identified, recruited, ranked, nominated (or not), and voted upon by the Board. Once put in place, each volunteer's availability, travel, and participation must be administered by staff. The result has been that subentities of the Bar vary in the efficiency and effectiveness of their functioning. The larger the subentity, the more difficult it is to ensure consistent participation. When absenteeism from meetings runs 20-30 percent and when subentities fail to achieve a quorum for conducting official business, the work product is delayed.

Among the larger subentities, size is attributable to the nature of their charge and the extent to which external partners are involved. For example, size of the California Commission on Access to Justice (26 members) and the Council on Access and Fairness (25) can be attributed to the political process which led to their creation. For others, such as the Legal Services Trust Fund Commission (21 members) and Committee of Bar Examiners (19), the size evolved by a combination of the process by which they were established and the extent to which volunteers are engaged in a wide variety of roles within those subentities.

What is the right size for a subentity? There is no one correct size, but the principles that govern size need to be applied in rethinking the functioning of subentities that the Bar retains. These include the idea that form should follow function. If the role and scope of a committee or commission is well defined, then the size and composition of membership is determined defining the access to expertise and perspectives required for the purpose.⁷ A classic study of private sector organizations discovered that every member of a committee beyond 7 members reduced the decision-making effectiveness of that group by 10 percent;⁸ other studies place the ideal number as 5 to 7. Thinking only about size, it would appear that few of the Bar subentities are designed to be efficient and effective.⁹

The Challenges of Subentity Organization to Effective Governance

Returning to the key elements of successful governance discussed above and looking at these in light of information derived from the detailed examination of the subentities illustrates how this framework applies to the present-day Bar.

Role Definition

The Bar is well on its way to improving the shared understanding of its role as a regulatory agency, having made a number of symbolic and substantive changes in the last two years. The Bar's focus on its regulatory functions is sharper in its terminology (e.g., "licensees" rather than "members") and in the formal separation from the Bar of the sections (which focus on the networking and professional association functions of their members). The role of the subentities, their organizational structure, and relationship to the Board, however are open questions that remain to be answered.

⁷ See BoardSource, *Leading with Intent: 2017 National Index of Nonprofit Board Practices*, pp. 17, 19.

⁸ Marcia Blenko, Paul Rogers, and Michael Mankins, *Decide and Deliver: Five Steps to Breakthrough Performance in Your Organization*, Harvard University Press. 2010.

⁹ Note that the size of a Board of Directors is optimized at a higher number, since the purpose of that body is different. Currently, the national average for nonprofit organizations is 15 members. (BoardSource, op. cit.)

Accountability and Transparency

Among the subentities, in many cases the volunteers have been reluctant to implement measures to evaluate the effectiveness of their work. As a result, most programs managed through the subentities have never been subjected to a rigorous evaluation to determine the effectiveness of the program's work and whether it is achieving its intended outcomes. Evaluation requires knowing what questions to ask and creating the data required to answer those questions. Many subentities do not know what questions to ask and do not collect data that would provide answers. In some cases data exists but it has never been used to provide insight into program effectiveness.

Clear Lines of Authority

Related to the concept of Role Definition in the subentities, some subentities are genuinely confused about what authority the Board of Trustees has delegated to them and what approval they need from the Board for actions they wish to undertake. Others have assumed authority they do not have, for example the submission of amicus briefs or legislative advocacy without seeking Board approval. Some subentities believe they exercise management control over Bar staff, budget, or the allocation of non-General Fund revenues. This persistent lack of clarity has made it impossible for the Bar to speak with one voice to its judicial and governmental partners or for the Executive Director to maintain effective control over Bar resources.

Impartial, consistent, and fair decision-making

Some subentities have managed their decision-making function (e.g., awarding grants, adjudicating claims) using documented policies and precedents that ensure consistent decision-making, while others have not. This inconsistency exists among subentities as well as within subentities: in one subentity, one of its subcommittees uses formal scoring matrices and explicit criteria and documents its decisions, while another subcommittee doing similar work does not.

Engagement

The level of engagement of volunteer lawyers and public members varies widely among the subentities. Many subentities have no formal criteria in place to ensure that the subentity members encompass the relevant set of skills and experience needed for the purpose at hand. Too often, subentities engage in activities (e.g., education and training) for which they do not have professional training and which therefore fails to meet professional standards or take advantage of appropriate technologies and techniques for the work at hand.

In addition, for many subentities criteria are not formalized to best represent the various types of legal practice and populations in California to ensure appropriate statewide perspective. In addition, subentities have not always adhered to terms of service, allowing members to participate as ad hoc "emeritus" members and allowing stakeholders to participate in subentity policy-making without Board authorization.

Conclusion

Over the years the Bar has benefitted greatly from the thousands of hours of volunteer work contributed by public members and lawyers to maintain and improve the practice and law in California. To ensure effective governance in the public interest, the Board of Trustees is undertaking this review of the numerous subentities and their volunteers in order to ensure that the work undertaken is appropriate to the Bar's regulatory function and is being carried out in a manner that makes the best possible use of the experience and knowledge of practicing attorneys and the perspective and expertise of public members. It is incumbent on the Board to ensure that the subentities to which it has delegated specific responsibilities and authority act in concert and are aligned with the Bar's strategic direction.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

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.

Objective: 1c: Determine the appropriate role of, and Board responsibility for, State Bar Standing Committees, Special Committees, Boards, and Commissions in the new State Bar.