



The State Bar of California

OPEN SESSION

AGENDA ITEM

701 SEPTEMBER 2019

DATE: September 19, 2019

TO: Members, Board of Trustees

FROM: Brady Dewar, Assistant General Counsel, Office of General Counsel

SUBJECT: Approval of Staff Recommendations Related to the American Bar Association (ABA): (1) Transfer of ABA Delegates from the State Bar to the California Lawyers Association; (2) Appointment of Alternate Delegate; (3) Letter from State Bar to ABA Expressing Disapproval of ABA's Decision to Hold 2020 Mid-Year Meeting in Texas

EXECUTIVE SUMMARY

As discussed in detail below, staff makes three recommendations regarding the State Bar's relationship with the ABA House of Delegates (HOD).

First, to better align with the State Bar's status as a regulatory agency that has no membership or associational components, the State Bar should transfer five of its six HOD delegate appointments to the California Lawyers Association (CLA). With this change, these delegates—who are now restricted from full participation in the HOD due to spending restrictions under *Keller v. State Bar of California* and the State Bar's status as a regulatory agency—will be able to participate fully in the work of the HOD.

Second, staff recommends that the Board of Trustees appoint Elizabeth Meyers to fill a vacant position as an alternate delegate to the HOD for a one-year term.

Finally, under state law, the State Bar is prohibited from funding or sponsoring travel to Texas—the location of the ABA's 2020 Mid-Year meeting—due to Texas's enactment of a law permitting discrimination on the basis of sexual orientation; State Bar delegates may nonetheless choose to attend at their own expense. The ABA's decision to hold its meeting in Texas forces the State Bar's HOD delegates—as well as other delegates—into a difficult decision: either honor the anti-discrimination principles of California law (and those of the State Bar and the ABA itself) or attend the ABA meeting in Texas to participate in the HOD's

important work. Consistent with anti-discrimination policy set forth in California law, the State Bar should send the ABA a letter expressing the State Bar's disapproval of the decision to hold the 2020 Mid-Year Meeting in Texas.

BACKGROUND

Control and administration of the ABA is vested in its HOD. The HOD meets twice each year, during the ABA's Annual and Mid-Year meetings. Actions taken by the HOD on specific issues become official ABA policy.

The State Bar is one of the appointing authorities to the HOD. Its appointees become part of the 26-member California delegation, led by Ms. Laura Farber, the elected State Delegate.

Prior to the January 1, 2018, separation of the Sections from the State Bar and the formation of the CLA, the State Bar had 11 appointments to the HOD. After the separation of the Sections and the formation of the CLA, the State Bar determined that a number of its appointments should be transferred to CLA, to reflect that entity's role as a statewide association of attorneys and its critical role in the advancement and education of the profession. Accordingly, at the ABA's Mid-Year Meeting in January 2019, five of the State Bar's 11 appointments were transferred to CLA, leaving the State Bar with six appointments.

DISCUSSION

- 1. Staff recommends transferring five of the State Bar's six remaining HOD delegate appointments to CLA in order to better serve the State Bar's function as a regulatory agency and to allow these delegates to participate fully in the work of the HOD.**

The Legislature mandates that "[p]rotection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions." (California Business and Professions Code section 6001.1.) The State Bar's mission statement is, accordingly, tailored narrowly to its role as a regulatory agency: "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."

The ABA, by contrast, is a voluntary professional association with a broader mission: "*to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.*" (The American Bar Association, *available at* https://www.americanbar.org/about_the_aba/ (last visited Sept. 9, 2019) (emphasis added).) As a membership association with a focus on advancing the profession as well as serving the public, the ABA—through its HOD—takes positions on a number of issues that the State Bar, as a regulatory government agency, should not take a position on, including both

substantive legal issues of the type the State Bar's former Sections might have an interest in as well as controversial political issues such as gun control and abortion.

As discussed above, earlier this year, after the separation of the Sections from the State Bar and the establishment of the CLA, the State Bar transferred five of its 11 HOD appointments to the CLA. Given that all of the State Bar's remaining associational aspects were moved to the CLA as of January 1, 2018, the State Bar had initially sought to transfer *all* of its 11 HOD appointments to the CLA, but the ABA indicated that it would allow only five appointments to be transferred at that time.¹

Experience since the transfer of the first five delegates to the CLA has demonstrated, however, that additional delegates should be transferred to the CLA.

In advance of the ABA's 2019 Annual Meeting, the State Bar reviewed the 57 agenda items to be considered by the HOD at that meeting, and considered whether the State Bar's delegates could debate and vote on each agenda item: (1) without violating the spending restrictions set forth in *Keller v. State Bar of California*, given that the State Bar would be offering its HOD delegates reimbursement for their travel expenses to attend the meeting and potentially paying for staff time for its staff HOD delegate², and (2) consistent with the State Bar's status as a regulatory agency without members or other associational aspects. The State Bar made this very distinction between the State Bar as a regulatory agency and integrated bar associations with members and other associational features in its *amicus* brief in the *Fleck v. Wetch* litigation pending in the U.S. Court of Appeals for the Eighth Circuit, arguing that our structure makes us different than the State Bar Association of North Dakota and other integrated bar associations that have been challenged on First Amendment grounds in the aftermath of the Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).³

¹ Section 6.4(a) of the ABA's Constitution and Bylaws – Rules of Procedure of the House of Delegates provides, in relevant part: "A state bar association is entitled to at least one delegate in the House of Delegates, except that if there is more than one state bar association in a state the House shall determine which associations may select delegates."

² Under *Keller*, mandatory bar membership dues or fees may not be spent on activities of a political or ideological nature that are not germane to regulation of the profession or improving the quality of legal services. *Keller v. State Bar of California*, 1 U.S. 1, 14 (1990).

³ In its *amicus* brief, the State Bar argued:

If, however, this Court does find that *Janus* affects the legality of [the State Bar Association of North Dakota]'s compelled membership and dues, it should make clear that its decision is limited to integrated bars—i.e., associations of attorneys in which membership is required—and does not apply to attorney regulatory agencies without members or associational aspects, such as the State Bar of California. The First Amendment concerns at issue in *Janus*—compelled association and compelled subsidization of the private, political speech of a union—do not exist for regulatory agencies without members or associational aspects.

The State Bar concluded that 33 of the 57 HOD agenda items for the 2019 Annual Meeting—or nearly 60 percent of the agenda items—concerned political or ideological issues that were not germane to regulation of the legal profession or improving the quality of legal services (and, additionally, were not proper topics for consideration by the State Bar as a regulatory agency). Accordingly, the State Bar advised its HOD delegates that they should not debate or vote on these 33 items. The delegates expressed disappointment that the State Bar’s restrictions would not allow them to fully participate in the HOD’s work. The State Bar advised its delegates that they could vote on the remaining 24 agenda items, which included items concerning ABA governance, professional conduct and attorney discipline, and access and inclusion issues.

Given that, as illustrated by the 2019 Annual Meeting, such a high proportion of the HOD’s work is not germane under *Keller* or related to the State Bar’s regulatory and public protection mission, staff believes the State Bar should transfer five of its remaining HOD appointments to the CLA, which is not a government agency or subject to *Keller* restrictions and therefore may allow its delegates to vote on all items before the HOD.⁴

This will allow these delegate positions to fully participate in the HOD’s work, resulting in fuller representation of California attorneys in ABA decision-making, while allowing the State Bar, through its remaining seat, to continue to participate in the HOD as permissible under *Keller* and given the State Bar’s status as a regulatory agency with no remaining associational features. Accordingly, staff seeks approval by the Board of Trustees to work with the ABA and the CLA to effectuate the transfer of five of the State Bar’s six HOD appointments to CLA as soon as reasonably possible.

2. Staff recommends appointing Elizabeth Meyers to a one-year term as an alternate delegate to the HOD.

The State Bar currently appoints six delegates to the HOD. The State Bar may also appoint alternate members to the delegation, to serve at HOD meetings if a delegate cannot serve or resigns. Alternate members serve a one-year term.

This report recommends Ms. Elizabeth Meyers as an alternate member for a term to end at the conclusion of ABA’s 2020 Annual Meeting on August 4, 2020. Ms. Meyers is a former State Bar appointee to the HOD. Her term expired in August 2019. She has volunteered to serve as an alternate member for an additional year.

3. Staff recommends that the State Bar transmit a letter to the ABA expressing disapproval of the choice of Texas as the location for its 2020 Mid-Year Meeting.

In 2016, the Legislature passed and the Governor signed Assembly Bill 1887 (Stats. 2016, ch. 687, hereafter referred to as AB 1887), which added Government Code section 11139.8, prohibiting state-funded or state-sponsored travel to states that have enacted discriminatory

⁴ At its September 17 board meeting, CLA will consider formally supporting the transfer of five HOD appointments from the State Bar to CLA.

laws falling into a number of categories, including laws that permit discrimination on the basis of sexual orientation. Section 11139.8 provides, in relevant part:

A state agency ... shall not ... [a]pprove a request for state-funded or state-sponsored travel to a state that, after June 26, 2015, has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression, or has enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression.

(Gov. Code § 11139.8(b)(1).)

AB 1887's travel restrictions are prefaced by a statement of policy, including the following findings and declarations:

- (1) California is a leader in protecting civil rights and preventing discrimination.
- (2) California's robust nondiscrimination laws include protections on the basis of sexual orientation, gender identity, and gender expression, among other characteristics.
- (3) Religious freedom is a cornerstone of law and public policy in the United States, and the Legislature strongly supports and affirms this important freedom.
- (4) The exercise of religious freedom should not be a justification for discrimination.
- (5) California must take action to avoid supporting or financing discrimination against lesbian, gay, bisexual, and transgender people.
- (6) It is the policy of the State of California to promote fairness and equality and to combat discrimination.

(Gov. Code § 11139.8(a).)

AB 1887 further provides that the determination of which states are subject to its travel restrictions shall be made by the Attorney General, who shall develop, maintain, and post a list of states subject to the travel restrictions. (Gov. Code § 11139.8(e)(1).) The Attorney General has determined that ten states are subject to AB 1887's travel restrictions, including Texas (due to its enactment of a law permitting foster care agencies to discriminate against children in foster care and potentially disqualify LGBT families from the state's foster and adoption system). ("Attorney General Becerra: Alabama, Kentucky, South Dakota and Texas Added to List of Restricted State Travel," State of California Department of Justice, June 22, 2017, [available at https://oag.ca.gov/news/press-releases/attorney-general-becerra-alabama-kentucky-south-dakota-and-texas-added-list](https://oag.ca.gov/news/press-releases/attorney-general-becerra-alabama-kentucky-south-dakota-and-texas-added-list) (last visited Sept. 9, 2019).)

As a result of the Attorney General's determination that Texas is subject to AB 1887's travel restriction, the State Bar may not approve any requests for State Bar-funded travel to Texas (subject to exceptions not applicable to ABA meeting attendance; see Gov. Code § 11139.8(c)), which is the location of the ABA's 2020 Mid-Year meeting scheduled to be held in Austin in February 2020.

OGC has met with the State Bar's HOD delegates to explain that, pursuant to AB 1887, the State Bar will not be able to reimburse them for their travel expenses should they choose to travel to Texas to participate in the 2020 Mid-Year Meeting. While the State Bar's HOD delegates may choose to attend the meeting at their own expense without violating AB 1887, this puts the delegates in a difficult situation: if they attend the meeting in Texas, they will be violating the spirit of California policies of anti-discrimination as set forth in AB 1887. On the other hand, if they do not attend, the delegates will be foregoing the opportunity to represent California at one of the two HOD meetings in 2020.

In recognition of the difficult position in which the ABA's choice of Texas as a location for its 2020 Mid-Year Meeting puts the State Bar's delegates (and presumably other delegates as well), and to put the State Bar on record in support of the Legislature's non-discrimination policy (which is itself consistent with the inclusion portion of the State Bar's statutory mission), staff recommends that the State Bar transmit a letter to the ABA expressing the State Bar's disapproval of the choice of Texas as the location for the ABA's 2020 Mid-Year Meeting.

A proposed draft letter, to be signed by the Chair of the Board of Trustees⁵, is attached as Attachment A.

FISCAL/PERSONNEL IMPACT

The State Bar offers its delegates reimbursement for travel expenses related to their service as State Bar delegates to the HOD (i.e., for travel to the ABA Annual and Mid-Year meetings). Thus, a reduction of the size of the State Bar's HOD delegation should result in some savings from reduced travel expenses.

⁵ Pursuant to section 2.8 of the Board Book, the Board Chair acts as the key spokesperson for the State Bar.

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: b. Implement and pursue governance, composition and operations reforms needed to ensure that the Board’s structure and processes optimally align with the State Bar’s public protection mission.

RECOMMENDATIONS

It is recommended that the Board of Trustees approve the following resolutions:

RESOLVED, that staff is directed to work with the American Bar Association, the California Lawyers Association, and other stakeholders as appropriate to effectuate the transfer of five of the State Bar’s six appointments to the American Bar Association House of Delegates from the State Bar to the California Lawyers Association as soon as reasonably possible; and it is

FURTHER RESOLVED, that the Board of Trustees appoints Elizabeth Meyers to a one-year term (from today through August 4, 2020) to serve as an alternate member of the American Bar Association House of Delegates; and it is

FURTHER RESOLVED, that staff is directed to work with the Chair of the Board of Trustees to finalize and transmit a letter, in substantially the form set forth in Attachment A, to the American Bar Association expressing the State Bar’s disapproval of the choice of Texas as the location for the American Bar Association’s 2020 Mid-Year Meeting.

ATTACHMENT(S) LIST

- A. Draft letter from Board Chair to the ABA
- B. Current State Bar of California ABA House of Delegates Roster



The State Bar *of California*

[INSERT DATE]

[INSERT NAMES/TITLES OF APPROPRIATE ABA LEADERS]

American Bar Association
321 North Clark Street
Chicago, IL 60654

RE: Choice of Texas as the Location for the American Bar Association's 2020 Mid-Year Meeting

Dear [INSERT NAMES/TITLES]:

I write on behalf of the State Bar of California (State Bar) to express the State Bar's disapproval of the American Bar Association's (ABA) decision to hold its 2020 Mid-Year Meeting in Texas.

In 2016, California enacted legislation that prohibits state-funded or state-sponsored travel to states that have enacted discriminatory laws falling into a number of categories, including laws that permit discrimination on the basis of sexual orientation. (Cal. Gov. Code § 11139.8.) This statute is explicitly based on the state of California's policies of "promot[ing] fairness and equality" and "combat[ing] discrimination." (*Id.* at § 11139.8(a)(6).)

One of the states subject to the travel restrictions imposed by this law is Texas, which California's Attorney General has deemed subject to the prohibition due to Texas's enactment of HB 3859, which permits discrimination on the basis of sexual orientation by allowing foster care agencies to discriminate against children in foster care and potentially disqualify LGBT families from the state's foster and adoption system. (See "Attorney General Becerra: Alabama, Kentucky, South Dakota and Texas Added to List of Restricted State Travel," State of California Department of Justice, June 22, 2017, *available at* <https://oag.ca.gov/news/press-releases/attorney-general-becerra-alabama-kentucky-south-dakota-and-texas-added-list> (last visited Sept. 9, 2019).)

As a result of the ABA's choice to hold its 2020 Mid-Year Meeting in Texas despite Texas's discriminatory law, the State Bar is legally prohibited from offering its ABA House of Delegates delegates reimbursement for their travel should they choose to travel to Texas to participate in the 2020 Mid-Year Meeting.

[INSERT NAMES]

[INSERT DATE]

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Of greater concern to the State Bar, however, is that the ABA's choice of the Texas location will force the State Bar's delegates (and presumably many other delegates, both from California and elsewhere) to make a difficult and unfortunate choice. These delegates may choose to honor the non-discrimination policies set forth in the law—which are similar to non-discrimination and inclusion policies enshrined in the State Bar's own mission¹ and in statements made by the ABA itself²—by declining to attend the 2020 Mid-Year Meeting and foregoing the opportunity to participate in the important work of the House of Delegate on regulation of the profession, access to justice, inclusion, and other topics. Alternatively, they may choose to pay for their own attendance at the 2020 Mid-Year Meeting to participate in the work of the House of Delegates, at the expense of supporting Texas's discrimination and violating the spirit of California law and California's, the State Bar's, and the ABA's anti-discrimination policies.

Both of these choices will be problematic for many delegates. It is unfortunate that the ABA's choice of Texas as a meeting location will force delegates to make this decision. The State Bar hopes that, in the future, the ABA will locate its meetings in states whose laws do not force delegates to make such difficult decisions and that adhere to the anti-discrimination principles embraced by the ABA.

Sincerely,

[INSERT NAME]

Chair, Board of Trustees

¹ See, e.g., "Promoting Diversity," The State Bar of California, *available at* <http://www.calbar.ca.gov/About-Us/Our-Mission/Promoting-Diversity> (last visited Sept. 9, 2019) ("The State Bar advances diversity and inclusion in the legal profession by focusing in key areas of influence, specifically pipeline into the legal profession, retention and career advancement, and judicial diversity. The State Bar adopted as its diversity definition the reporting categories in Government Code section 12011.5(n): race, ethnicity, gender, gender identity, disability, sexual orientation, and veteran status.")

² See, e.g., "Commission on Sexual Orientation and Gender Identity," The American Bar Association, *available at* https://www.americanbar.org/groups/diversity/sexual_orientation/ (last visited Sept. 9, 2019) ("The American Bar Association's Commission on Sexual Orientation and Gender Identity (SOGI), as one of the four ABA Goal III Entities, leads the Association's commitment to diversity, inclusion and full and equal participation by lesbian, gay, bisexual and transgender persons in the Association, legal profession, and society.")

**State Bar of California Delegation Roster
American Bar Association (ABA) House of Delegates
2019-2020**

Term Expiration: Annual Meeting August 4, 2020

Anthony H. Barash

Donna Hershkowitz (Staff)

Sandra McCandless

John L. McDonnell, Jr.

Maureen C. Onyeagbako

Michelle A. Philo (Young Lawyer)

Roger Royse

Term Expiration: Annual Meeting August 20, 2021

Esther P. Lin

CALIFORNIA STATE DELEGATE

Laura Farber