



The State Bar of California

OPEN SESSION

AGENDA ITEM

701 MARCH 2023

DATE: March 24, 2023

TO: Members, Board of Trustees

FROM: Arnold Sowell, Chair, Ad Hoc Committee on Oversight & Accountability Reforms
Leah Wilson, Executive Director
Ellin Davtyan, General Counsel

SUBJECT: Discussion Regarding Ad Hoc Committee on Oversight & Accountability Reforms
Recommendations

EXECUTIVE SUMMARY

The Ad Hoc Committee on Oversight & Accountability Reforms was established by the Board of Trustees on December 3, 2022. This memorandum outlines some of the committee's preliminary recommendations for review and discussion by the Board of Trustees. Specifically, the committee presents to the Board for consideration the following important reforms which it believes will significantly strengthen governance and oversight over the State Bar's discipline system:

1. **Board Governance:** a two-year term for the Board chair and two-year, staggered terms for discipline liaisons; and
2. **Discipline System Oversight:** a new compliance and accountability position reporting directly to the Board that would support the Board's discipline liaisons in exercising their oversight responsibilities for the prosecutorial functions of the Office of the Chief Trial Counsel (OCTC), the Special Disciplinary Trial Counsel (2201 Program) and the Complaint Review Unit (CRU).

This agenda item also provides the Board with an update on the State Bar's enhanced whistleblower policy, specifically addressing complaints against the three direct reports to the Board—the executive director, chief trial counsel, and general counsel.

BACKGROUND

At its December 3, 2022, meeting, the Board of Trustees established the Ad Hoc Committee on Oversight & Accountability Reforms to:

1. Develop and recommend to the Board structural, operational, or other appropriate reforms to address and improve oversight of the State Bar's enforcement and prosecutorial functions of the disciplinary system and accountability of the State Bar to stakeholders and the public; and
2. Recommend to the Board necessary and appropriate actions in response to the findings in the report of the independent investigation by Halpern May Ybarra Gelberg LLP on whether the handling of any past discipline complaints against Thomas Girardi (Girardi) was affected by his connections to or influence at the State Bar.

The committee has considered important potential reforms in the areas of governance, oversight of the prosecutorial functions of the disciplinary system, and accountability, with a special focus on identifying appropriate actions and responses to the external investigation conducted by Aaron May of Halpern May Ybarra Gelberg LLP (May).

This memorandum outlines some of the reforms in these areas that have been considered by the committee to date, that are ripe for presentation to and discussion by the Board.

DISCUSSION

BOARD GOVERNANCE

In making its recommendations, the committee reviewed and discussed recent changes in the structure of the Board of Trustees as well as reforms recommended but not enacted. This historical material is summarized below.

A Brief History of Board Reform

2016 Governance in the Public Interest Task Force

On September 12, 2016, in response to the 2016 Governance in the Public Interest Task Force Report¹, the Board voted to make the following changes to its governance procedures:

- The Vice President to chair the Regulation and Discipline Committee (RAD);
- The Vice President and Treasurer to oversee the annual strategic planning session; and
- The Treasurer to chair the Planning and Budget Committee.

¹ Pursuant to now sunsetted Business and Professions Code section 6001.2, every three years, the State Bar Board of Trustees was required to appoint a Governance in the Public Interest Task Force. The statutory purpose of the Task Force was "to prepare and submit a report to the Supreme Court, the governor, and the Assembly and Senate Committees on Judiciary that includes its recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys."

2017 Governance in the Public Interest Task Force

On July 7, 2017, in response to the 2017 Governance in the Public Interest Task Force Report, the Board voted to make the following changes to its governance procedures:

- Eliminated the Admissions and Education Committee
- Eliminated the Planning and Budget Committee
- Eliminated the Stakeholders, Access to Justice and Appointments Committee
- Established the Finance and Planning Committee, and
- Established a (tentatively named) Program Committee for non-RAD related program oversight work

As reflected in the excerpt below, the 2017 Governance in the Public Interest Task Force also addressed the topic of leadership stability, discussing a leadership ladder structure:

“Originally, the Task Force had recommended that a two-year leadership ladder be established whereby the Chair and Vice Chair would be selected in the first year; in the second year, the Vice Chair would assume the position of Chair upon completion of the Chair’s term of office; each year thereafter, only a Vice Chair would be selected. Although a two-year leadership ladder had full Task Force support, the Task Force could not agree on a method of officer selection. Task Force members were split as to whether to recommend maintaining the status quo, i.e., self-nomination and election by the full Board of Trustees, or an appointment process by the Supreme Court or otherwise. Despite differences over the method of officer selection, all Task Force members agreed on the importance of leadership development and stability, which underlies their original recommendation for a two-year leadership ladder.”

2018 Fee Bill

Effective January 1, 2018, the 2018 Fee Bill (Senate Bill 36):

- Reduced the size of the Board from 19 to 13
 - Kept the number of public members at 6, thereby increasing proportional representation of public members
- Repealed trustee elections
- Increased trustee term from 3 to 4 years
- Changed officer titles from President/Vice President to Chair/Vice Chair
- Changed officer selection from vote to appointment by Supreme Court
- Required executive committee of the Board to include at least one board member from each appointing authority

The committee considered this history of governance reforms, as well as more recent changes, including the creation of Board discipline liaison positions. In recognition of factors including learning curve, relationship building and maintenance, and stability and consistency—many of

which were articulated as far back as the 2017 Governance in the Public Interest Task Force report, the committee recommends that the Board consider the following additional governance reforms:

1. Two-year terms for the chair of the Board of Trustees.
2. Two-year, staggered terms for the Board's discipline liaisons.

DISCIPLINE SYSTEM OVERSIGHT

With respect to the topic of effective oversight, the committee similarly reviewed the history of efforts in this regard at the State Bar, as well as parallel models in place in other jurisdictions. A summary of these models is provided as Attachment A. The committee's deliberations were also informed by the public meeting held on January 19, 2023, presentations by the Inspector General, California Department of Corrections, and the Senior Vice President, Chief Compliance and Audit Officer, University of California, Office of the President.

While the committee universally agreed on the need for increased support to enable the Board to effectively oversee the prosecutorial functions of the discipline system specifically, there was some concern regarding models that involved either the establishment of a new committee (reporting, for example, to the Supreme Court) or a large new office. The committee settled on a new compliance and accountability position that would provide relevant, timely, independent, and objective monitoring and advisory services to the Board of Trustees, assess identified risks and evaluate management's response to mitigating those risks, and support the development and implementation of processes, procedures, and systems that promote compliance and effectiveness. The position, which would report to the Board of Trustees, would focus on the OCTC, the 2201 Program, and CRU. A preliminary proposed outline of specific job responsibilities is provided as Attachment B.

The committee discussed a pilot concept in relation to the creation of this position, understanding that its role, scope, and resource needs, would need to be reassessed and refined over time.

ENHANCED WHISTLEBLOWER POLICY

The committee discussed the State Bar's current approach to whistleblower (WB) and whistleblower retaliation complaints and was updated on staff's planned improvements to status quo processes, namely, the intent to contract with the California Department of Justice (DOJ) for WB and WB retaliation investigation services. The committee provided direction regarding a needed interim measure to be implemented prior to the finalization of the contract with the DOJ, specifically as related to complaints of wrongdoing by the executive director, general counsel, or chief trial counsel.

As that interim step, complaints of wrongdoing by the executive director, general counsel, or chief trial counsel will be routed to the Board chair and chair of the Audit Committee. If the complaint is about the general counsel, the executive director can support an appropriate review of the complaint and wall off the general counsel and, if required, the Office of General

Counsel. If the complaint is against the chief trial counsel or executive director, the general counsel can support the review of the complaint. Any such complaints that raise attorney misconduct claims will be routed through the 2201 Program.

State Bar staff was notified of this interim measure, as well as the planned contract with DOJ, via email and Administrative Advisory, on March 16, 2023.

ATTACHMENTS

- A.** Overview of Selected Discipline Oversight Models
- B.** Draft Job Responsibilities

Discipline Oversight Models: Selected States and Department of Consumer Affairs Boards

State	Discipline Oversight Entity	Composition	Reporting Authority	Charge	Deliverables
Texas	Grievance Oversight Committee	9 members (6 attorneys; 3 non; all appointed by TXSC)	Texas Supreme Court	Review TX lawyer discipline system and report observations and recommendations to the Court. Separate from the attorney discipline process.	Biennial reports to TXSC
New Jersey	Disciplinary Oversight Committee	11 members (5 attorneys/sitting judges/retired judges; 1 designee of NJ Bar Association; 5 non; appointed by NJSC, except NJBA appointee)	New Jersey Supreme Court	Evaluate the efficiency and effectiveness of the attorney disciplinary system. Make recommendations to improve the quality and efficiency of the disciplinary system and strengthen adherence to high ethical standards.	Quarterly reports to NJSC
Illinois	Attorney Registration and Disciplinary Commission	7 members (4 attorneys; 3 non; all appointed by the ILSC); serve three-year terms	Illinois Supreme Court	Acts as a board of directors for the disciplinary agency. Make additional rules, to enter orders related to ARDC operations, and to establish policies for disciplinary proceedings subject to review and action by the Court.	Annual report to ILSC
Maryland	Attorney Grievance Commission (relevant statute)	12 members (9 attorneys; 3 non; all appointed by CAMD); serve staggered three-year terms	Court of Appeals of Maryland	The Commission meets monthly, receives reports on receipts and expenditures, disciplinary statistics, the flow of complaints at all stages within the disciplinary process and it reviews personnel performance.	Annual report to CAMD
Colorado	Supreme Court Advisory Committee on the	13 members (9 attorneys, at least; 2 non, at least; all	Colorado Supreme Court	Reviewing the productivity, effectiveness, efficiency, and resources of the legal regulation system.	Periodically reporting to the COSC on

State	Discipline Oversight Entity	Composition	Reporting Authority	Charge	Deliverables
	Practice of Law (relevant statute)	appointed by COSC); 2 SC members serve as non-voting liaisons; one term up to seven years		Report findings and recommendations to the supreme court.	the operation of the Advisory Committee
Arizona	Independent Bar Counsel (relevant judicial order; updated order) (The IBC lives within the Attorney Regulation Advisory Committee. The IBC and the IBCAP do not have a section on the Supreme Court's website.)	IBC Attorney Panel (IBCAP); Candidates for the IBCAP may be recruited, sought, or recommended by IBC and the Board's Appointments Committee may recommend members for the IBCAP. All members shall be appointed by and may be removed at the discretion of the Chief Justice	Attorney Discipline Probable Cause Committee; Arizona Supreme Court	Make any recommendations for improving Arizona's lawyer admission, discipline, disability and reinstatement procedures. Report on status of all matters pending and describe the nature of qualifying matters resolved during the preceding year.	Quarterly reports to ADPCC

Sunset Reviews, Department of Consumer Affairs

Each year, the Assembly Business and Professions Committee and the Senate Business, Professions, and Economic Development Committee (joint Sunset Review Committee) hold joint sunset review oversight hearings to review the boards and bureaus under the Department of Consumer Affairs (DCA). The DCA boards and bureaus are responsible for protecting consumers and the public and regulating the professionals they license. The sunset review process provides an opportunity for the DCA, the Legislature, the boards, and interested parties and stakeholders to discuss the performance of the boards, and make recommendations for improvements.

In addition, the Joint Sunset Review Committee is charged with identifying and eliminating waste, duplication, and inefficiency in government agencies. The purpose of this joint committee is to conduct a comprehensive analysis over 15 years, and on a periodic basis thereafter, of every eligible agency to determine if the agency is still necessary and cost effective. DCA board and bureau fees are set pursuant to this review process.

Each eligible agency scheduled for repeal must submit to the joint committee, on or before December 1 before the year it is set to be repealed, a complete agency report covering the entire period since last reviewed, including, but not limited to, the following:

- (1) The purpose and necessity of the agency.
- (2) A description of the agency budget, priorities, and job descriptions of employees of the agency.
- (3) Programs and projects under the direction of the agency.
- (4) Measures of the success or failures of the agency and justifications for the metrics used to evaluate successes and failures.
- (5) Recommendations of the agency for changes or reorganization in order to better fulfill its purpose.

The joint committee is required to take public testimony and evaluate the eligible agency before the date the agency is scheduled to be repealed. Thereafter, an eligible agency is eliminated unless the Legislature enacts a law to extend, consolidate, or reorganize the eligible agency. The joint committee may recommend that the Legislature extend the statutory sunset date for no more than one year to allow the joint committee more time to evaluate the eligible agency.

Section 9148.52 requires the Joint Sunset Review Committee to review all eligible agencies. The joint committee is required to make a report which is to be available to the public and the Legislature on whether an agency should be terminated, or continued, or whether its functions should be revised or consolidated with those of another agency, and include any other recommendations as necessary to improve the effectiveness and efficiency of the agency. If the joint committee deems it advisable, the report may include proposed legislative proposals that would carry out its recommendations.

DISCIPLINARY SYSTEM ACCOUNTABILITY AND OVERSIGHT

The Position

In relation to the handling of attorney discipline complaints, the position provides relevant, timely, independent, and objective monitoring and advisory services to the Board of Trustees, assesses identified risks and evaluates management's response to mitigating those risks, and supports the development and implementation of processes, procedures, and systems that promote compliance and effectiveness.

The position assists the board's discipline liaisons in carrying out their oversight responsibilities and reports to the Board of Trustees.

Essential Duties

The scope of the position extends to the Office of the Chief Trial Counsel, the 2201 Program, and the Complaint Review Unit. The duties outlined below relate to these specific functional areas of the State Bar.

- Develops an annual workplan regarding auditing and monitoring of the three programs for submission to the Board of Trustees based on an assessment of risk and operational performance;
- Effectuates and reports on the status of the annual workplan;
- Assesses the implementation of selected policies, procedures, and initiatives for effectiveness and impact;
- Manages the discipline case external audit process;
- Facilitates the California State Auditor's regular reviews of the attorney discipline system;
- Monitors and reports on the State Bar's compliance with statutes, rules, policies, and procedures as well as the status of implementation of audit recommendations;
- Regularly reviews performance and outcome data;
- Identifies and prioritizes areas or issues for discipline liaison focus;
- Meets regularly with discipline liaisons;
- Develops recommendations for corrective/remedial or other actions for the Board of Trustees;
- Supports the Board in ensuring that appropriate corrective and remedial measures are taken when problems are identified;
- Assists in developing internal controls that help reduce compliance risk; and
- Assists in developing policies and procedures and data collection and reporting requirements to improve operational effectiveness.