GOVERNANCE IN THE PUBLIC INTEREST TASK FORCE REPORT

THE STATE BAR OF CALIFORNIA
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FINAL 2016 REPORT
TASK FORCE ON GOVERNANCE IN THE PUBLIC INTEREST
STATE BAR OF CALIFORNIA

I. EXECUTIVE SUMMARY

It is universally acknowledged that significant changes are needed at the State Bar of California, an institution now approaching its ninth decade.[1] As both Majority and Minority Task Force Reports emphasize, the problems at the State Bar are not recent in origin: indeed, decades of studies, reports and statutory provisions reflect efforts to reform the State Bar, most with only modest impact. There are, of course, many recent accomplishments to which the State Bar can point: it has empowered its new leadership team to identify and change the operational and structural issues that impede its public protection mission; it has reformed its spending practices and initiated work on a new case management system; it has embraced a new openness, now webcasting its meetings; and it has successfully participated in and also led efforts to increase funding for legal services. Together these offer insight into the current very reform-minded spirit of the organization. Both Majority and Minority reports agree on this point. The work of the Task Force, however, is not intended to laud these accomplishments, but rather to offer a systemic analysis of where improvements are needed at the State Bar of California.

Even as this Task Force concluded its work, the Judicial and Legislative Branches were engaged in serious discussion about substantial statutory reforms as part of the State Bar's annual licensing fee re-authorization process. Against this backdrop, Task Force members are mindful that their work should add to, not substitute for, on-going discussions by the Judicial and Legislative Branches. *Therefore, rather than argue specific positions, the Task Force Majority Report, with some agreement by the Minority Report, has chosen to identify and analyze problems and describe possible solutions, also recommending several specific solutions which can—and should—be implemented immediately.* Some changes to the governance and organizational structure of the State Bar will require statutory action and others are appropriately within the purview of the Supreme Court's oversight role of the Bar. As such, there are many areas of reform that are appropriately left for decision by the Judicial, Legislative and Executive Branches of government.[2]

[1] To better understand the many important roles of the State Bar of California, a "White Paper" is attached at **Appendix A**. It describes the history and evolving functions of the State Bar of California, from its creation in 1927 to the present.

[2] In light of these activities, the Majority Report was of the view that the best approach to managing the Task Force statutory mandate for recommendations was to focus on decisions which could be implemented by the Board and staff now, while awaiting major structural decisions by leaders of the three branches. In contrast, the Minority argues that these on-going discussions ought not to limit the Report's recommendations for change.

The work of the Task Force extended over eight months, from December 2015 to July 2016, and proceeded in stages. Assisted by a new leadership team, the Task Force first identified a series of governance questions focused on three areas: the selection, structure and composition of the State Bar Board of Trustees, the organization and function of the State Bar itself, and the significance of a recent antitrust decision of the U.S. Supreme Court.

As a first step, hoping to find useful models to answer the questions identified, like many past studies, the Task Force looked for comparisons with other state bar organizations and California professional regulatory bodies. From testimony and research, the Task Force learned that the State Bar of California presents a unique situation. It is distinct for its remarkable size, comprehensive control of an exceptionally broad range of activities, unique professional discipline system, and unusual shared oversight arrangement between Judicial and Legislative Branches. Comparisons with other state bar organizations thus offered alternative ways to structure the different functional roles of the State Bar, which combines both regulatory and representational activities, but a "best practices" model did not emerge. Comparisons with other professional regulatory bodies raised a different problem. The State Bar is a creature of the judicial branch and, as is the universal case in all other states, it is the Supreme Court which has primary responsibility for its oversight. This arrangement reflects the role of lawyers as "officers of the court" with responsibility for ensuring public access to a constitutionally mandated judicial system.

The Task Force next held public hearings, seeking input from those knowledgeable about the State Bar, its functions and its challenges. Importantly, as this phase began, two Task Force members proposed their own solution to the perceived problems faced by the State Bar: de-unification of the Bar's regulatory and discipline functions from those resembling traditional trade associational activities. To facilitate discussion of this proposal for de-unification, as well as other ideas suggested, an evaluation framework was designed, centered around three questions:

1. How does any given proposed intervention solve the problem and enhance public protection?
2. What are the cost and operational implications of the proposed interventions?
3. How will success be defined and measured?

The final stage of the Task Force work coincided with the May 2016 completion of several statutorily required reports and the 2016 Bureau of State Auditors report. Together, these reviews examine a variety of operational issues facing the State Bar, and implementation of their extensive recommendations is now underway. Discussion of these reports was useful in highlighting a fundamental issue for the Task Force: transformational change requires identifying interactions between (i) governance, (ii) organizational structure and (iii) operations. Considering any one of these in isolation may make it more difficult, if not impossible, to achieve lasting reform. Thus, the Task Force unanimously agreed that the State Bar must consider these three components together to guarantee its ability to successfully address the deep and wide-ranging reforms it must have. There was, however, significant disagreement on the way in which to approach implementing these reforms, as reflected in the Minority Report.

Recognizing this relationship between governance, organizational structure and operations as critical to achieving the statutory mandate to make "recommendations for enhancing protection

of the public," Business and Professions Code section 6001.2, the Task Force then asked the State Bar's new leadership team for its own assessment of the operational problems identified over their first nine months as they worked to implement the Board of Trustees' reform mandate. In response, the new leadership team identified nine fundamental operational problems, each with important implications for the governance and structural issues being addressed by the Task Force:

1. The Perception and Reality of An Ineffectively Managed Discipline System
2. Inadequate Definitions of the Bar's "Public Protection" Mission
3. Proliferation of Activities: Lack of Organizational Coherence leading to "Mission Creep"
4. A Conflicting Hybrid Governance Structure
5. Confused Reporting Relationships Hindering Accountability
6. Proliferation of Committees, Boards and Commissions and Over Reliance on Volunteers
7. Restricted Separate Funding Sources, Creating Cultural and Procedural Obstacles to Financial and Organizational Management
8. Inadequate Development and Support for Human Resources
9. Inadequate Resources to Satisfy Statutory Backlog Definitions

Many of these problems will directly impact the ability of the State Bar to ensure public protection and limit the success of any proposed governance reform. They may also raise an existential question: has the State Bar become unmanageable because of structural conflicts, diversity of mission, and over-reliance on a large number of independently operating volunteers? Completion of the staff's internal review and implementation of mandated reforms, along with further study, will be essential before a reliable conclusion is possible.

The Task Force concluded its work by identifying possible solutions and interventions to address the problems described. These fell into two broad categories: (A) governance reform (creation of an officer ladder; extended term for the presidency; increase in public Board members; elimination of Board elections; appointment of an enforcement monitor; and enhanced trustee training and orientation; and (B) de-unification of the State Bar. In addition, the Task Force also recommended other areas for further study (definition of public protection mission; review of committee framework and structure; board size; the silo impact of various funding sources).

The Task Force is aware that discussions are now underway among the Judicial Branch and both houses of the Legislature. It joins in their shared view that the time for serious study and reform of State Bar governance is overdue and can no longer be postponed. The Task Force adds the recommendation that such a governance analysis be framed to include careful consideration of the State Bar's organizational structure and operations, in light of the impact they can be expected to have on the success of governance choices. The Task Force also believes that while other bodies are considering these issues, staff should continue to energetically identify and correct operational issues identified in the course of its work to review all State Bar programs.

The statutory mandate of the Task Force, however, is more than 'issue spotting' alone. It is charged with offering recommendations to improve public protection in the licensing, regulation and discipline of attorneys. In the past, such recommendations have concentrated on issues of

governance alone.[3] Yet as the Task Force work proceeded, structural and operational issues were identified as inextricably intertwined with governance. They, too, directly impact the effective implementation of the State Bar's public protection mission. As a result, this Report raises questions in all areas, but its recommendations concentrate on structural and operational changes, where improvements can be made without statutory intervention.

[3] By example, the 2011 Task Force Report focused its work on governance recommendations because of time constraints. See Report at p. 1.

II. BACKGROUND AND OVERVIEW OF TASK FORCE CHARGE

Adopted in 2011, Business and Professions Code section 6001.2 required the State Bar of California[4] to create a seven member Governance in the Public Interest Task Force ("Task Force"). The Task Force charge requires:

> On or before May 15, 2014, and every three years thereafter…[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, to be reviewed by the Assembly and Senate Committees on Judiciary in their regular consideration of the annual State Bar dues measure. See **Appendix B** for the full text of Business and Professions Code section 6001.2. [5]

Before the Task Force's statutory three-year report requirement, an initial Governance in the Public Interest Task Force submitted a report in 2011. Time restrictions faced by that 2011 Task Force limited its focus to the 'governance structure' and resulted in several statutory changes, selected from the majority and minority reports of the Task Force and embodied in SB 163.[6] These included a smaller Board (from 23 to 19 members), with attorney members reduced by two to 13, and elected members selected from only six districts; while adding five Supreme Court appointees and eliminating both a representative of the California Young Lawyers' Association and the fourth year presidency.[7] Finally the Board of Governors was re-named as the Board of Trustees. In 2014, Business and Professions Code section 6021 was amended by AB 2746 to provide that if the State Bar President is elected from among those members of the

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[4] The State Bar of California, created in 1927 by the Legislature and adopted into the California Constitution in 1960, is a public corporation, placed in the Judicial Branch of state government. Its structure is that of a unified or mandatory bar, rather than a voluntary association of lawyers. It thus combines all the legal profession's functions, both regulatory and representational, in one organization. Membership and the payment of an annual licensing fee is required of all attorneys licensed to practice law in California.

[5] This charge and the work of the Task Force is controlled and guided by the State Bar's statutory mission, as reflected in Business and Professions Code section 6001.1:

> *Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*

[6] Relevant to current discussions, the Majority Report noted that much of the 2011 Task Force debate focused on the question of whether the State Bar is a regulatory agency "with a mission…narrowly focused on attorney discipline…and…those who see the State Bar as a policy-making body, an adjunct to the Supreme Court, with a mission that includes a variety of important priorities, including not just discipline but also such things as helping to promote access to justice for all," at p. 45.. The Majority espoused the view that there is "no conflict or tension between the core regulatory goal of public protection and the closely related non-regulatory goal of promoting the fair administration of justice," at p. 46. In contrast, the Minority Report foreshadowed recent statutory changes and current discussion by urging that the regulation of lawyers be treated in the same way as all other professionals and recommended study of de-unifying the State Bar with concrete steps over two years to separate the Bar into a regulatory agency supported by mandatory dues and a voluntary trade association. It also made specific suggestions: a smaller, all Supreme Court appointed 15 member Board; a member merit screening committee; greater governance continuity through multi-term appointment; an appointed, as opposed to elected, presidency; the application of Bagley-Keene Open Meeting Act; and providing 25 hours of free MCLE ethics education.

[7] The possibility of a fourth year presidency was reinstituted in Business & Professions Code § 6021(c) in 2014.

Board whose terms expire that year, and the Board member has not been reelected or reappointed to another term, the President serves as the 20th member of the Board during an additional one year term. This is the structure of the current Board of Trustees.

Although the first triennial Task Force report was due in May 2014, work on this report did not begin until mid-2015. The arrival of a new Board of Trustees in fall 2015, along with a new management team, required reconstitution of the Task Force to meet statutory requirements for its composition. The Task Force then held its first meeting in December 2015, three months after the arrival of a new executive leadership team. The membership of the reconstituted seven member Task Force, as defined and required by Business and Professions Code section 6001.2(a), is provided in **Appendix C.**

As work of the Task Force began, a discussion about the State Bar's overall governance structure was raised by some Task Force members and soon became a focal point. This debate, held both within the confines of the Task Force meetings, and now reflected in the forcefully worded Minority Report, and in public discussions, as well, centered on dividing the State Bar as a way to promote its core mission of public protection. Would a unified structure, combining all functions under one organization, or a divided one, splitting functions between those viewed as mandatory and others more voluntary in nature, better serve public protection? This question has been considered frequently before, without agreement. See, for example, the 1980 *Monterey Committee on The Structure of the State Bar of California*, the 1995 *The Final Report of the Commission on the Future of the Legal Profession and the State Bar of California* ("Futures Commission Report"), and the 2011 *Report and Recommendations of the State Bar of California Governance in the Public Interest Task Force*. These efforts provide context for the current Task Force work. Summaries of many of these reports are provided in **Appendix D**.

These earlier reports raise a multitude of questions, few of them new. Together, they point to what may be the most important issue facing those who seek reform of the State Bar: what explains the inability over many years to resolve clearly identified on-going concerns? The Task Force Majority believes that some of the interventions proposed below offer solutions for this problem.

A. QUESTIONS IDENTIFIED FOR CONSIDERATION

At its first meeting on December 9, 2015, to guide its work, the current Task Force adopted a series of questions, organized around three aspects of the State Bar's governance structure:

1. SELECTION AND COMPOSITION OF THE STATE BAR BOARD OF TRUSTEES

(a) Should there be greater geographic diversity among all Trustees?
(b) Should there be a reduction in the number of Trustees who can be defined as "active market participants" under recent case law or Federal Trade Commission guidelines, whether or not they are "public members" appointed, rather than elected by the members of the State Bar?
(c) Should elections be eliminated for both individual Trustees and officers of the Board of Trustees (President, Vice President and Treasurer)?
(d) Should there be different terms of office for both Trustees and officers?

2. ORGANIZATIONAL STRUCTURE AND FUNCTIONS OF THE STATE BAR OF CALIFORNIA

(a) What is the experience among other U.S. states in choosing either a unified or voluntary structure for bar discipline and membership responsibilities?
(b) What impact would a change from a unified to voluntary bar organization have on the State Bar and what would the resulting structures look like?
(c) What can be learned from the experience of other professions, where regulatory and membership functions have been separated?

3. THE IMPACT OF A RECENT U.S. SUPREME COURT DECISION ON THE STATE BAR [8]

(a) What changes to the Board of Trustees, currently composed of a majority of practicing lawyers, could or should be considered in its governance structure to avoid the characterization that the regulatory activities of the State Bar are controlled by active market participants? What might these changes involve?
(b) What is required to achieve "active supervision" of a state regulatory agency by a governmental body, in this case the Supreme Court of California?
(c) Are all regulatory responsibilities of the State Bar "actively supervised" as currently operated and, if not, what changes should be considered?
(d) To what extent does the Supreme Court have and should the Supreme Court have exclusive authority over the State Bar?

Over the course of its subsequent meetings the Task Force increasingly centered its work around organizational and structural questions, particularly whether or not the State Bar should be de-unified. In total, eight Task Force meetings took place, with approximately 30 individuals providing oral testimony,[9] and eight written submissions received; **Appendices F and G** set forth testimony and written comment. In addition, the Task Force heard testimony reflecting differing views regarding a de-unification proposal authored by two of its members together with one current and one past member of the Board of Trustees; that proposal is provided as **Appendix H**.

B. BROAD THEMES UNDERLYING RESPONSE TO REFORM

As the Task Force work progressed, questions about the definition of "public protection" and the best structure for its implementation emerged. Initially some argued for a more precise definition: public protection should focus exclusively on the regulatory and disciplinary functions of the State Bar. Others countered that to be effective, the definition of public protection and its implementation strategies must be more broadly conceived to include the prevention of discipline problems and support for a healthy legal system. Eventually *all* members agreed that public protection must be more than the merely regulation and discipline of lawyers. It must also include a *proactive* function both to prevent discipline problems and to

[8] *North Carolina State Board of Dental Examiners v. FTC, 574 U.S. ___(2015).* A full analysis of the anti-trust issues raised by this case and related application to the State Bar is provided as **Appendix E**.
[9] Witnesses included California Insurance Commissioner Dave Jones, Los Angeles City Attorney Mike Feuer, Court of Appeal Justices Ron Robie and Laurie Zelon and Professor Robert Fellmeth, former Discipline Monitor.

contribute to the effective functioning of a legal system that is broadly inclusive and accessible. Nonetheless, as the Minority Report reflects, differences remained among Task Force members about the best approach for achieving public protection. Seven recurrent, sometimes contradictory, themes arose during the meetings of the Task Force, as summarized below:

(a) A shared belief that public protection must involve both proactive and reactive components; specifically, that the State Bar must do more than regulate and discipline lawyers; it must also deal proactively with the systemic problems that produce poor performance;

(b) A shared belief that public protection also involves ensuring a healthy legal system, one which guarantees public access to the judicial system, selection of qualified judicial officers and the elimination of bias;

(c) A difference in view as to the best way for achieving these goals; some argued that the Bar's ability to effectuate its public protection mission is irreparably hindered by activities similar to those of many voluntary bar organizations which support lawyers but appear inconsistent for a body principally charged with public protection and, as a result, they found an irreconcilable tension between regulation and representation activities;

(d) A related view that a structure which combines two different organizational paradigms – a private professional association and a governmental regulatory body – creates structural and operational confusion which contributes to the State Bar's historic dysfunction and distracts attention from regulatory and disciplinary matters so as to irreparably hinder the State Bar's public protection mission;

(e) A contrasting view regarding whether the Bar's unified structure is necessary to support broadly defined public protection programs, such as access to justice and elimination of bias, because it offers the only effective support for activities not strictly correlated to discipline yet essential to the overall healthy functioning of the legal system;

(f) A corresponding skepticism about the benefits of de-unification for improving the Bar's regulatory and disciplinary functions, coupled with concern that de-unification may actually reduce voluntary support by lawyers for critical public protection programs, such as elimination of bias and support for legal services, and uncertainty about the viability of a voluntary statewide bar in a state already saturated with voluntary local and special interest bar associations; and

(g) A concern that moving forward with a decision to make major structural changes and to de-unify the Bar at this time would undercut work being done now by the Bar's new management team to complete a large number of statutorily mandated operational reforms and audit recommendations.

III. DEVELOPING THE TASK FORCE REPORT: DEFINING THE CORE UNDERLYING PROBLEMS

The Task Force was unanimous that systemic organizational reform and improvement of the State Bar is needed. While there was less consensus about the specific initiatives to be undertaken, most Task Force members agreed that for reforms to be effective, problems must be identified before solutions can be adopted. Thus the first step in designing an effective remedy for an identified problem is developing an accurate diagnosis of its root cause. *Finally, a nexus must be found between problems, solutions, and enhancement of the Bar's ability to prioritize and enhance the protection of the public*. This is a difficult process because issues of governance, organizational structure and operational effectiveness interrelate. The Task Force struggled with the challenge of understanding how these three areas impact one another.

In its deliberations the Task Force came to appreciate that among the many challenges facing the Bar is the need to establish a commitment for ongoing comprehensive and objective evaluation of the efficiency, effectiveness and quality of its programs and functions. Thus, while ideas for reform have abounded, historically there has been only limited analysis to ensure that these initiatives actually address underlying needs and deficiencies, i.e. the root causes of recurring problems. Compounding this challenge, there has been only limited follow-up evaluation and assessment of any given solution, once implemented.

To ensure that the solutions considered by this Task Force are carefully tailored to address the identified needs of the Bar, this Report has been designed to evaluate all proposed options for reform against the three questions noted above:

1. What are the problems facing the State Bar, what are their real causes, and how does any given proposed intervention solve any of these problems and enhance 'public protection?'
2. What are the cost and operational implications of the proposed interventions?
3. How will success be defined and measured?

This analytic framework was applied to three sets of questions: those originally considered by the Task Force, those subsequently identified during the course of its work, and those resulting from activity on-going concurrently with the work of the Task Force, including the release of several legislatively mandated analyses (i.e. the May 15 reports on Workforce Planning, Classification and Compensation, and the Backlog and Spending Plan[10]) and discussions on the 2017 Fee Bill. As a result nine additional fundamental challenges facing the Bar were identified:

1. The Perception and Reality of An Ineffectively Managed Discipline System
2. Inadequate Definitions of Mission and "Public Protection"
3. Proliferation of Activities: Mission Creep and Poor Organizational Coherence
4. A Conflicting Hybrid Governance Structure
5. Confused Reporting Relationships Hindering Accountability
6. Proliferation of Committees, Boards and Commissions and Over-Reliance on Volunteers

[10] Work Force Planning; Classification Study; Backlog and Spending Plan – Pursuant to Business and Professions Code section 6140.16.

7. Distinct and Restricted Funding Sources Creating Cultural and Procedural Obstacles to Financial and Organizational Management
8. Inadequate Development and Support for Human Resources
9. Inadequate Resources to Satisfy Statutory Backlog Definitions

The Task Force believes that addressing these fundamental problems is an essential element of a process leading to necessary and transformative change. The Majority goes further and believes that these problems are likely to be the root causes of many of the outward symptoms of the State Bar's apparent dysfunction and so addressing them offers the best and most immediate opportunity for achieving necessary and transformative change. The discussion below of these core problems is followed by an analysis of possible interventions to address each of them.

A. THE PERCEPTION AND REALITY OF AN INEFFECTIVELY MANAGED DISCIPLINE SYSTEM

For many years, the State Bar's disciplinary system operated primarily with the assistance of volunteers, who acted as referees and made recommendations to the Board. The Board, in turn, made recommendations to the Supreme Court regarding the discipline of attorneys. In the mid-1980s, this system changed when the Legislature enacted various reforms to the State Bar Act in response to a substantial backlog of more than 4,000 uninvestigated disciplinary complaints against attorneys discovered in the disciplinary prosecutor's office, along with a series of newspaper articles about major inadequacies in the existing disciplinary system, and the reports and recommendations made by the Attorney General-appointed Discipline Monitor, Robert C. Fellmeth. (See *In re Attorney Discipline System*, *supra,* 19 Cal.4th at p. 611.) These legislative reforms included:

- The establishment of a professional State Bar Court, with judges appointed by the Supreme Court and later by the Governor and Legislature, to replace the volunteer system and the Board's involvement with disciplinary functions. (Bus. & Prof. Code, § 6086.5; see *In re Attorney Discipline System*, *supra,* 19 Cal.4th at p. 611; *Obrien v. Jones*, *supra,* 23 Cal.4th at p. 50)

- The appointment of the Chief Trial Counsel, subject to confirmation by the Legislature, with a four-year term and a two-term limit, under the general oversight of the Board's Committee on Regulation and Discipline. (Business and Professions Code section 6079.5)

Yet despite an impressive history of reform in the structure of the State Bar's discipline system, concerns about its operation continue; an overview of historical discipline-system concerns, and the reforms initiated in response, is provided in **Appendix A**. The bill authorizing the Bar to collect mandatory 2017 licensing fees from its members, Assembly Bill (AB) 2878, cites additional concerns raised in the 2015 State Auditor's report,[11] noting that:

> *The audit uncovered significant, questionable decisions made by the State Bar…including that the State Bar had not fully or consistently reported its backlog of*

[11] California State Auditor. *Report 2015-30, The State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability.*

> *discipline cases and that, in order to reduce its backlog of discipline cases, the State Bar made questionable choices, potentially causing 'significant risk to the public.'* [12]

The report further states:

> *In response to the escalating backlog, the former executive director issued a zero-backlog goal in mid-2011. Although the State Bar decreased its backlog by 66 percent over that same year, the severity of the discipline it imposed on attorneys declined and the number of settlements it reached increased. It appears that rather than settling some cases for lower-levels of discipline, the State Bar should have sought more severe forms of discipline. …Thus, in its efforts to reduce its backlog, the State Bar may have been too lenient on attorneys deserving of greater discipline, or even disbarment, potentially at significant risk to the public.*

The analysis of AB 2878 provided to the Assembly Committee on Judiciary on April 26, 2016, cited still additional concerns about the failure of the State Bar to fulfill its public protection mandate:

> *First, the media reported that the Bar had failed to investigate over 300 complaints about the unauthorized practice of law, some awaiting assignment to an investigator for years before any action was taken. According to the Bar, many of those complaints were filed by immigrants seeking legal assistance with, among other things, their legal status in this country. It goes without saying that failure to immediately investigate and, when appropriate, take action to stop the unauthorized practice of law puts the public at substantial risk and the longer the delays are, the more the public is put at risk.*[13]

This analysis, relying upon January 2016 articles in the legal press[14], the result of leaked information, led to a thorough investigation by two Trustees (the President-Elect and Treasurer-Elect respectively). Regardless of the reasons for the delayed attention to these cases, in the words of the State Bar's incoming president, the situation was "extremely embarrassing, completely unacceptable and should never have occurred." In response, review was also conducted of a new staff-created protocol for tracking and referring such cases, and efforts to ensure co-ordination with law enforcement authorities were developed.

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[12] Assem. Bill No. 2878 (2015-2016 Reg. Sess.).

[13] Assem. Com. On Judiciary, Analysis of Sen. Bill No. 2878 (2015-2016 Reg. Sess.) as amended April 18, 2016. Hearing date April 26, 2016.

[14] See Moran, Lyle, "State Bar let hundreds of complaints against non-attorneys sit idle." Daily Journal, March 4, 2016, where it was reported that "*The State Bar has identified 59 complaints it received alleging potential unauthorized practice of law by non-attorneys that were left uninvestigated by the agency for years."* A subsequent article reported that, "*The State Bar's failure to promptly address all complaints alleging unauthorized practice of law by non-attorneys was more widespread than the nearly 60 uninvestigated claims the agency said it recently learned about…About 300 unauthorized practice of law complaints were listed as sitting unassigned in a drawer as of April 10, 2015.*"

Notwithstanding a strong response by the Board of Trustees to this and other earlier situations, the damage done to the State Bar's reputation for effective management of its discipline process has been real. As demonstrated by the ongoing attention by the State Auditor, the press, and the Legislature, there continues to be a tremendous amount of frustration about the State Bar's fulfillment of its legislatively directed public protection mandate; though opinions vary about these criticisms, the negative impact of a perceived lack of confidence in the operations of the Bar's discipline system is irrefutable. In the end, notwithstanding a highly regarded, all professional discipline system, this perception of ineffective management has obscured accomplishments and has become the reality which now must be addressed.

B. INADEQUATE DEFINITIONS OF MISSION AND PUBLIC PROTECTION

Effective organizations have well-defined missions, adopted by their governing bodies, which are implemented in policy; staff implementation of such overarching policy is then monitored through an oversight process conducted by the governing body. This paradigm is lacking at the State Bar. In addition, while the Bar's legislatively mandated mission has been articulated in statute, it lacks a clear practical definition as applied to the operations of the organization:

> *Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*[15]

As a result, debate continues as to the correct definition of "public protection."

Further complicating this problem, the statute which initially created the State Bar in 1927 contains a separate statutory provision which suggests a far more expansive role:

> *The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public.*[16]

Pursuant to this statute, the State Bar has historically engaged in various professional association activities. (See *Keller v. State Bar of California, supra,* 496 U.S. at p. 5.) Beginning in 1990, however, the courts and Legislature began to place restrictions on the scope of some of these activities.

- In *Keller*, the United States Supreme Court prohibited the State Bar from funding activities under Business and Professions Code section 6031, unless activities were germane to the State Bar's purpose of regulating attorneys or improving legal services.

- These activities were further constrained by *Brosterhous v. State Bar of California*, (Sept. 24, 1999, 95AS03901 [nonpub. opn.]), where the trial court narrowed the chargeability test, finding that in order to be germane, an activity must have a simple, direct connection between the activity and the core purposes of the integrated bar, i.e., regulation of the

[15] Business and Professions Code section 6001.1.
[16] Business and Professions Code section 6031(a).

profession or improvement of the quality of legal services available to the people of California.[17]

- In 1997, then Governor Pete Wilson vetoed the bill authorizing the State Bar to continue to collect its mandatory membership fees. Governor Wilson's veto message cited arguments that the State Bar cannot "function effectively as both a regulatory and disciplinary agency as well as a trade organization" and concluded, "It is time for the Bar to get back to basics: admissions, discipline and educational standards."[18]

As a result, the State Bar separated from the then Conference of Delegates (now the Conference of California Bar Associations) and many other functions were limited to voluntary funding. Today the State Bar is involved in fewer activities which strictly resemble professional association work, although significant examples of such work do continue. Examples here might be the State Bar's Annual Meeting, some professional development activities of the Sections, awards activities, and the insurance affinity programs, which the State Bar continues to sponsor.

Nonetheless different views as to the appropriate role of the State Bar continue and find some support in both statute and history, not to mention member expectations. Easy solutions do not appear to exist. While it might be most logical to define the public protection mission as synonymous with the definition of the discipline system provided by the Legislature in Business and Professions section 6001.1 as "the licensing, regulatory, and disciplinary functions" of the State Bar of California, no established definition of what constitutes those functions exists. Nor can it be assumed that those functions, however defined, are necessarily identical to "public protection."

[17] Since 1991, after *Keller*, the State Bar has provided for a deduction to the annual membership fee, varying between one and five dollars, for activities deemed outside of *Keller* by the Board. Beginning in 2000, the California Legislature preempted the Board and imposed a $5 deduction for activities outside of the parameters of *Keller*. (Bus. & Prof. Code §6140.05). In addition, the Legislature prohibiting use of mandatory dues to fund any of the activities of the Conference of Delegates (which has been reconstituted as a wholly independent organization) or Bar Sections, which must be funded separately by their own respective voluntary fees or donations. (Bus. & Prof. Code §6031.5). Following the Legislature's example, the Board adopted a similar procedure in response to the 1999 trial court judgment in *Brosterhous v. State Bar of California*, which held that certain other bar activities were outside of *Keller*. These activities included those related to eliminating bias in the legal profession provided by the State Bar's standing committees, the bar leaders conference and mid-year meeting, various services to local bars, and other activities to maintain relations with other bar associations.

[18] Veto Message, Cal. Sen. Bill No. 1145, Oct. 11, 1997.

This lack of clarity has caused many to conclude that to be effective, more than discipline and regulation of the profession alone is required to achieve "public protection." This broad view of public protection would have it include three core elements: reactive and proactive public protection, along with activities that contribute to the effective functioning of the legal system and the diversity of the profession. For example, under this concept of public protection, the various functional components of the State Bar might be distributed as follows:

Reactive	Proactive	Healthy Legal System
Office of the Chief Trial Counsel	Professional Competence	Access to Justice Activity
State Bar Court	MCLE Audit Function	Diversity of the Profession
Lawyer Assistance Program	Admissions Activity	Office of Legal Services
Probation	Mandatory Fee Arbitration	Judicial Nominees Evaluation
Client Security Fund	Lawyer Assistance Program	Legislative Activities
Member Records and Compliance	Attorney Mentoring Programs	Legal Specialization
Admissions	Public Outreach and Education Programs	

Challenges abound with this construct, however, as, ultimately the difficult task of assigning each of the Bar's operational areas and functions, along with their funding sources, to one of these categories must be undertaken, and many of the activities fall under more than one element.

Early Task Force efforts to articulate and define the Bar's public protection mission have been explored in a Continuum of Activity Matrix provided as **Appendix I**. While the functions and programs in the far-right and left columns might appear to be unequivocally associational or regulatory respectively, there are those who argue that even the Bar's most associational-type of activity, the work of its "Sections," also supports the discipline system because of the educational and mentoring support they provide to affiliated attorneys, thereby improving their competence. Other public protection functions described as part of the work of the Sections include public education and support to the Legislature in the form of legislative proposal impact analysis and technical assistance. Others assert that while the work of the Sections should not be included under the auspices of a strictly defined public protection agency, all else that the Bar undertakes, including access to justice and diversity work, should.

C. PROLIFERATION OF ACTIVITIES: MISSION CREEP AND POOR ORGANIZATIONAL COHERENCE

A necessary by-product of the lack of a clearly defined mission is the fact that the State Bar's growth over time has not been easily controlled. "Mission creep" has been the result, often driven by the laudable commitments of individual State Bar leaders to improving the effective functioning of the legal system, as broadly defined. Thus, the Bar has served as an opportunity for the well-intentioned interests of many – legislators, staff, committed volunteers, and Bar Presidents themselves. Too often these interests have not been subject to fiscal and operational assessment before being approved for implementation. As a result, their risk to the organization goes beyond diluting the State Bar's focus on its primary mission and threatens to endanger its institutional financial health, as well.

The manner in which these activities have been added to the menu of State Bar responsibilities over time has lacked central coordination and coherent planning. Rather, new tasks have been added periodically, responding to concerns of the moment, and often supported predominantly by volunteers. This haphazard accretion of duties, together with the prior lack of solid organizational management, contributes to the frequently mentioned problem of "siloed" activities at the State Bar. A loose confederation of programs, rather than a centrally managed organization, has been the result.

It is also worth noting that when compared to other state bar organizations, California is not only the largest, but also the most inclusive in the number and variety of activities it supports.[19] While all of the various activities that the State Bar supports can be argued to further a broad definition of its mission of public protection, the size and scope of activities controlled under the State Bar "umbrella" are themselves another management challenge. Accordingly both operational control and oversight are continuing challenges for management, governance structures and oversight bodies.

D. A CONFLICTING HYBRID GOVERNANCE STRUCTURE

Successful mission execution depends on clarity of structure, function and governance; unless these three are well-aligned, routine business operations, let alone organizational reform efforts, are difficult if not impossible to achieve. Historically the State Bar has been a blend of two very different business models: an independent government regulatory body and a professional membership association. There is an inherent tension manifested in this duality which can be seen in a number of ways. With regard to governance, the State Bar relies on the typical associational pattern of an annual rotation of Board Presidents and committee chairs, limited length of trustee terms of office, and a reliance on a large core of volunteers to conduct Bar work. There is a corresponding historic difference in the operational controls governing activities under the two models. While the decision in *Keller v. The State Bar of California,* supra, ended most State Bar legislative activities; differences in spending limitations between the two models, the result of different funding sources, are only now being addressed. Applying Bagley-Keene open meeting requirements to the full range of State Bar volunteer activities, effective April 1, 2016, poses yet another challenge.

[19] **Appendix J** provides a graphic description of the numerous activities supported by the State Bar.

Problems exist beyond those resulting from a hybrid structure, however. For example, the statutory framework governing the State Bar is complex, overlapping and sometimes out-of-date; it is an additional challenge for effective management. Sometimes the problems addressed by statutory provisions, which by nature lack flexibility, might be better managed by more flexible internal rules and regulations, or the California Rules of Court, all of which could be calibrated to adjust, as needed, to changing circumstances in the future. Some, including the State Auditor, have suggested that the Fee Bill process, currently an annual event, might function more effectively if it were a bi-annual process, so as to allow more effective planning and the opportunity to fully operationalize statutorily mandated changes. To be effective, such a change could also be combined with an on-going oversight process to keep the Legislature more fully and currently informed on a continual basis. As currently structured, the annual Fee Bill procedure tends to create a short-term crisis management situation which poses a challenge for long-term planning.

In any event, and as forcefully articulated in the Minority Report, an on-going partnership relationship between the Legislature and the State Bar does not now exist. In fact, the State Bar has developed a reputation for being unresponsive and resistant to needed reform when issues are pointed out by the Legislature. New State Bar leadership has pledged to make changing this its highest priority. To establish the transparency required for trust and maximally effective oversight, an annual schedule of periodic meetings with legislative leaders and their staffs, overlaid by a bi-annual Fee bill process, might be a useful approach. In addition, greater co-ordination in all of the State Bar's reporting requirements, those with the Supreme Court, the Legislature, and presumably the State Auditor as well, would improve the way in which priorities are set and avoid the problem of myriad parallel, sometimes conflicting, feedback and direction, not well coordinated or prioritized.

E. CONFUSED REPORTING RELATIONSHIPS HINDER ACCOUNTABILITY

Some believe that management problems may arise as a result of a division of control, multiple dual reporting relationships, and lack of responsibility and oversight as related most significantly to the Chief Trial Counsel position. This position, appointed by the Board of Trustees, confirmed by the Senate, and reporting to the Board's Regulation and Discipline Committee, oversees what is arguably the Bar's most critical function, comprising nearly 50 percent of its personnel and easily two thirds of its operating budget. The question of how and whether a volunteer Board, or its dedicated subcommittee, can effectively supervise personnel should be considered and assessed. The original reasons for this structure and the problems it sought to resolve should be weighed against the challenges in managing the Office of Chief Trial Counsel which new leadership is now identifying.

F. PROLIFERATION OF COMMITTEES, BOARDS AND COMMISSIONS AND POORLY COORDINATED WORK

The State Bar's 56 committees, boards and commissions (not to mention huge numbers of sub-entities under many) are supported by the organization's large number of volunteers (currently 740 as compared to 550 employees). They serve as an invaluable resource to the Bar, extending its level of expertise and reach in ways unlikely to be realized by staff alone, and certainly not without adding significant additional personnel costs.

Without question, these volunteers provide vitally important services to the Bar. Without their expertise and practical knowledge, much of the work of the State Bar would be much more difficult, sometimes even impossible, to achieve. One recent impressive example is the work of the Rules Revision Commission. And, needless to say, the Standing Committee on Bar Examiners has been a key component to the State Bar's process of bar admissions since the beginning. Similarly, beginning in 2009 the statutorily mandated Commission on Judicial Nominees Evaluation also performs a very valuable public service. There are many other examples of such important work, as well.

Still, the contributions of these numerous sub-entities are not without significant operational impact. In its ongoing comprehensive review of all State Bar program areas, including those effectuated or implemented predominantly by volunteer entities, the new leadership team is identifying a variety of recurrent issues. There are significant costs for supporting this virtual army of volunteers and their large number complicates the work and accountability of the State Bar Board of Trustees. The State Bar's unwieldy committee structure strains personnel resources throughout the organization and oversight of their voluminous activities by the Board of Trustees is a continuing challenge. More importantly, these sub-entities, often comprised of long-time volunteers with a high degree of competence in their respective areas, can contribute to the Bar's silo culture, with members and staff identifying more with the committees themselves, than with the State Bar as a whole.

Although committees, boards and commissions develop work plans and strategic agendas, too often they do so without meaningful Board of Trustee input and oversight–which is impractical given the number and complex structure of the committees. The first response must be to assess the number of sub-entities and to reduce them to a manageable number. Unless this is done, there will continue to be a real danger that these groups take on "lives of their own" without a clear and direct nexus to the Board's overarching strategic or operational objectives. Making needed changes in one area can easily be forestalled if they run counter to the strongly held goals in another. Thus choices based on overall organizational needs can easily be stymied if they undercut area-specific interests.

G. DISTINCT AND RESTRICTED FUNDING SOURCES CREATE CULTURAL AND PROCEDURAL OBSTACLES TO FINANCIAL AND ORGANIZATIONAL MANAGEMENT

Recent reports by the California State Auditor have noted concerns about the State Bar's use of its resources, and the lack of adequate control and accountability for expenditures. The Auditor's 2015 report stated, "Rather than using its financial resources to improve its attorney discipline system, the State Bar dedicated a significant portion of its funds to purchase and renovate a building in Los Angeles in 2012."[20] The report found that this purchase was made without a thorough cost-benefit analysis, that board-restricted funds that were designated for other projects were used, that the Board was not provided with adequate information to make a decision regarding the purchase, and that the Board failed to fully inform the Legislature of its decision.

The California State Auditor's 2016 report contained similar criticisms, including the State Bar's failure to clearly communicate its financial situation in its financial reports; and, under prior

[20] At Supra 5.

leadership, the 2013 creation, with little or no Board oversight, of an unnecessary nonprofit organization and subsequent use of State Bar funds to cover that organization's financial losses; violation of Board policies for inter-fund loans and expenses; and high executive salaries.

There is a related critically important point which can sometimes be missed: many of the Bar's functions and programs are supported by dedicated revenue streams, including optional member fees, examination and testing fees, and grants for the support of legal services. This fact, in conjunction with legal decisions such as *Keller* and *Brosterhous* which significantly limit the ability to spend mandatory fee revenues, has caused the Bar to resemble a loose affiliation of separately funded programs and offices, rather than one unified organization. This problem manifests itself in a number of ways. The State Bar's organizational structure reflects a decentralization of functions that in most well-run organizations are typically centrally administered (e.g., information technology support and meeting and event planning services, and, to a lesser extent, human resources and finance functions). Separate programmatic websites have been created, some not even hosted by the State Bar, and there has been a proliferation of unique program logos, seals and "branding," along with inconsistent operational practices, some even relating to core functions such as how resources are tracked and utilized.

Further, the majority of State Bar funding, authorized by annual Fee Bill legislation, is controlled by traditional government spending regulations. But other smaller sources of funding (e.g. Sections dues, proceeds from affinity programs or other "fee for service" funding) are arguably not dependent on legislative authorization. Thus, they have historically been treated as being governed by more flexible spending rules, similar to those of a trade association. This "two systems" approach has created internal confusion and tension among staff, volunteers and the Board of Trustees. A single organizational culture has been difficult to develop. This two systems paradigm has also fostered an external perception of entitled, even lavish, spending at the Bar when specific examples of spending of those limited funds which historically have not been considered subject to governmental State limitations, come to light.

Now, however, the Board is encouraging the State Bar's new leadership to address these issues. The objective is to bring all State Bar functions under a single unified or 'enterprise' approach, governed centrally in a way appropriate for a government regulatory body. The resulting consistency in managing all activities will have several benefits. It will produce economies and efficiencies along with greater fiscal transparency. This will also clarify the fiscal needs of all State Bar functions. Staff has advised the Task Force that it will be particularly important to complete this work and resolve the issues which are being identified before a judgment can be accurately made about the need for additional funding to support the State Bar's discipline functions.

This work is now well underway. Staff completed a statutorily mandated Spending Plan which was submitted to the Supreme Court and the Legislature along with Workforce Planning and Classification and Compensation studies on May 13, 2016.[21] Nonetheless, more remains to be done. As Staff continues to review deeply all program areas, it is expected that more

[21] Business and Professions Code Section 6140.16 required the State Bar to conduct a thorough analysis of its priorities and necessary operating costs and to develop a spending plan. This spending plan was required to include fund balances and a determination of reasonable amounts for the annual membership fee which would reflect the State Bar's actual or known costs and those required to implement a workforce plan for its discipline system as well as a public sector compensation and benefits analysis, reports by outside consultants which were simultaneously submitted.

opportunities to achieve efficiencies and increase revenue will be identified. Only when these efforts have been accomplished will a complete picture of the State Bar's funding needs be clear.

H. INADEQUATE DEVELOPMENT AND SUPPORT FOR ITS PERSONNEL RESOURCES

The initial phase of the on-going Classification and Compensation review, comprising the Office of the Chief Trial Counsel staff alone, was completed in May, 2016; Phase II, encompassing all other State Bar personnel, will be completed in October, 2016. Even in its first phase, however, it has become clear that the State Bar has work to do to ensure that its classification and compensation structures are appropriately calibrated to support the most cost efficient system for the acquisition, management and development of the staff talent needed to run so important an agency of public protection.

Phase I identified a number of needed changes to the Bar's classification and compensation structure, including a revision of the role and responsibility of staff designated as "supervisors," a reduction in the overall number of classifications, and both downward and upward adjustments of pay ranges:

- Currently, staff classified as supervisors are members of the same bargaining unit as those whom they supervise. Traditional responsibilities of performance management and discipline are reserved for management staff, with supervisors effectively acting as leads. As a result, the Bar, has a top-heavy management structure.
- The Bar's classification structure is untenable with more than 150 unique positions occupied by fewer than 600 employees.
- Compared to other, comparable public sector entities, the Bar compensates attorneys at a lower rate and compensates its non-attorneys at a higher rate.

The State Auditor issued its 2016 financial audit of the State Bar concurrent with the Phase I analysis. That audit raised concerns regarding executive compensation at the Bar, suggesting that many executive-level staff are over-compensated as compared to their counterparts in state government. This problem, too, must be addressed, if resources are to be properly allocated to staff requirements.

Together, these observations strike at the heart of the Bar's ability to effectively carry out its mission, and suggest unfavorable answers to such questions as: does the organization have the right talent, does it compensate that talent appropriately, and does it use and support it correctly?

IV. POSSIBLE INTERVENTIONS, SOLUTIONS AND RECOMMENDATIONS

A host of possible solutions have been considered by the Task Force in response to the eight identified fundamental problems described above. These solutions fall into two broad categories: (A) Governance Reform and (B) De-Unification. A number of these solutions were recommended unanimously, while others received substantial support from a majority of Task Force members.

A. GOVERNANCE REFORM

1. ESTABLISH AN OFFICER LADDER

Recommendation: The Task Force was unanimous on this recommendation.[22]

California may be unique among state bar organizations in not electing a ladder of officers; moving in this direction would add greater stability and consistency in the follow-through needed to manage a complex organization. Virtually all states except California elect a three person ladder of officers for their Board of Governors with a term of office for each person typically set at one year.

In addition, nearly all other states provide that the junior officer is a President-Elect who automatically ascends to the Presidency. California is an outlier, and does not enable a President to have a full year to adapt to and plan for a leadership year. The Task Force unanimously agrees that California should change this exception to the national norm. A minority would also recommend that the leadership be renamed as Chair, Vice Chair and Treasurer.

The Task Force also recommends the following changes in the role of the officers of the Board of Trustees. The Vice President-Elect (or Chair-Elect) should head the Regulations and Discipline Committee and the RAD Committee should be restructured as a 'committee of the whole' to permit all Trustees to participate in its work. These changes are recommended because of the Task Force's recognition that discipline is the State Bar's most important responsibility, and the President should be thoroughly familiar with the operation of the discipline system before taking office. In addition, giving the President-Elect the responsibility of chairing this 'committee of the whole' will provide valuable experience for the future President to chair the Board in the following year. In addition, the Task Force recommends that the Treasurer should head the Planning and Budget Committee, to be combined with the Audit Committee (i.e. the 'Planning, Budget and Audit Committee'). All three Board officers should be responsible for the State Bar's statutorily required annual planning meeting.

[22] The Minority Report recommends that the offices of President and Vice-President be eliminated and replaced by a Chair and Vice-Chair, with the former reserved for a public member. The Minority Report also raises concerns about a leadership ladder that includes the Treasurer, often sought by Trustees who have only completed nine months of Board service. The Minority Report questions selecting a person for a guaranteed leadership position, who has served for so limited a time.

2. EXTEND THE LENGTH OF TERM OF THE PRESIDENCY

Recommendation: The Task Force had almost no support for this recommendation.

California, like most states, has a limited one-year presidency. Other models are available in other professional organizations and might be considered to enhance stability and expertise. This idea received almost no support from the Task Force members; they have concerns that extending terms of office would be burdensome and limit the number of those who would be interested in and able to fill the position. The Task Force believes that the agreed upon three person office ladder would provide sufficient continuity of leadership so as to make a longer term of office unnecessary.

3. INCREASE THE NUMBER OF PUBLIC MEMBERS OF THE BOARD

Recommendation: The Task force was unanimous on this recommendation.

All Task Force members agreed that problems of perception created by a group of professionals regulating themselves exist. To address this, the great majority of Task Force members agreed that the number of public members appointed should be increased, but also strongly favored retaining a majority of lawyers, no matter the resulting size of the Board.

It was noted that the State Bar already has the most public members of any similar state bar board, whether unified or voluntary in structure, and that no state has a majority public member governing body. Even so, some Task Force members asserted that such perception considerations could only be resolved by making public members a majority of the Board. In support of this view, they cited possible antitrust concerns if such action were not taken. The Task Force was also aware that some have proposed a public member veto provision as further protection against possible antitrust challenges. The Task Force believes that the operational impact of such a change would require considerable study, to avoid unnecessarily complicating the functioning of the Board of Trustees and that no additional antitrust 'immunity' would result from such a change.

Nonetheless, the frequency with which antitrust concerns were raised, and the potential importance of such possible anticompetitive challenges to Board composition, persuaded the Task Force to seek greater clarity on the issue. Eventually, the Majority concluded that the antitrust concerns raised were less serious than originally thought. Nonetheless, because antitrust concerns continue to be raised, additional discussion of this issue follows below.

(a) Antitrust Considerations

As the Task Force began its work, the recent decision in *North Carolina State Board of Dental Examiners v. FTC, 574 U.S. __, 135 S. Ct. 1101 (2015) ("North Carolina Dental")* raised a concern that the current composition of the Bar's Board of Trustees might preclude the Bar from invoking state action antitrust immunity, known as *Parker* immunity. In *North Carolina Dental*, the Supreme Court held that a state board on which a controlling number of decision makers are active market participants in the occupation being regulated must satisfy the active supervision requirement set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc*., 445 U.S., 97 (1980) ("*Midcal*") in order to invoke state antitrust immunity.[23] Now, however, although not all are persuaded,[24] the Task Force believes that these concerns have largely been resolved as a result of recent legal analyses by the State Bar's Office of General Counsel, the Attorney General and Legislative Counsel. These analyses explain that the *North Carolina Dental* case has uncertain relevance to the State Bar of California.

(b) Acts of the California Supreme Court Do Not Implicate Antitrust Laws.

The analysis of those who raised this issue did not address the important distinction that the State Bar's core regulatory functions (admissions, attorney discipline, and rules of professional conduct) fall under the 'sovereign immunity' exception to antitrust liability because the California Supreme Court is the "ultimate decision maker" over these functions. *See Parker v. Brown*, 317 U.S. 341 (1943) (Sherman Act is not intended to prohibit a state from imposing a restraint as an act of government); *Hoover v. Ronwin*, 466 U.S. 558, 568-569 (1984) (where the conduct at issue is that of the state legislature or Supreme Court, we need not address the issues of clear articulation and active supervision). Thus, for example, in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the U.S. Supreme Court held that a state Supreme Court's restriction on advertising was not subject to attack under the Sherman Act because the rule reflected an activity of the State acting as sovereign. *Id*. at 360-363. However, it struck down the advertising restrictions on First Amendment grounds. *Id*. at 383. Moreover, the State Bar is distinct from other state agencies placed within the Executive Branch and which have final decisions for licensing matters. *In re Attorney Discipline System*, 19 Cal. 4th 582, 599-600 (1998). Similarly, in disciplinary matters, any decision or determination of the State Bar "is merely recommendatory in character and has no other or further finality in effecting the disbarment, suspension or discipline." *Id*. at 600.

[23] State agencies regulating professionals may rely on *Parker* immunity only if they satisfy the two-part test set forth in *Midcal*: "First, that the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy," and second, that 'the policy . . . be actively supervised by the State." *North Carolina Dental*, 135 S. Ct. at 1112.

[24] The Task Force notes that submissions from the Center for Public Interest Law have consistently pointed to antitrust issues as a basis for changing the State Bar's governance model to one controlled by pubic members, rather than lawyers as is presently the case.

(c) Changing the Composition of the Board Does Not Guarantee that *Parker* Immunity Will Apply.

In any event, the issue of what defines a "controlling" number of market-participant members for board-generated decisions was not resolved by *North Carolina Dental*. Thus, changing the composition of the Board does not guarantee that *Parker* immunity will apply, given that a small but vocal number of active market participants on the Board could arguably be considered "controlling." As the California Attorney General has opined:

> In the wake of *North Carolina Dental*, many observers' first impulse was to assume that reforming the composition of professional boards would be the best resolution, both for state actors and for consumer interests. Upon reflection, however, it is not obvious that sweeping changes to board composition would be the most effective solution. Even if the Legislature were inclined to decrease the number of market-participant board members, the current state of the law does not allow us to project accurately how many market-participant members is too many. This is a question that was not resolved by the North Carolina Dental decision. . .

Opn. Cal. Atty. Gen.15-402 (Sept. 10, 2015), at p. 10.

(d) Areas Where the State Bar is the Actor are Necessarily Market Sensitive for Purposes of Antitrust Laws.

As for Bar functions over which the Supreme Court does not exercise ultimate decision making authority, guidance has been provided by the California Attorney General -- who has opined generally with respect to measures that may be taken to guard against antitrust liability for state licensing board members – as follows: "There are two important things to keep in mind: (1) the loss of immunity, if it is lost, does not mean that an antitrust violation has been committed, and (2) even when board members participate in regulating the markets they compete in, many - if not most - of their actions do not implicate the federal antitrust laws." Opn. Cal. Atty. Gen. 15-402, *supra*, at p. 8.

The FTC has also provided guidance which reinforces these ideas. Specifically, the FTC has advised that: (1) reasonable restraints on competition do not violate antitrust laws, even where the economic interests of a competitor may be injured (e.g., suspending the license of one persons for substandard work); (2) ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive regime does not give rise to antitrust liability (e.g., declining to issue a license unless certain requirements are met); and (3) initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the "sham exception" (e.g. actions against unlicensed individuals). Fed. Trade Comm'n, FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (Oct. 15, 2015) at p. 6.

Further, as stated in the Legislative Counsel Opinion, "[h]aving a majority public member controlled Board would not ensure anti-trust immunity with respect to every single decision or action taken by the Bard. The key for a State to receive antitrust immunity is for a Board to receive active supervision by the State when it is engaging in decision regarding market

participation…Accordingly, it is unclear as to why the very fact specific decision in the North Carolina case should have any impact on how California decides the best composition of its State Bar Board."

4. ELIMINATE ELECTIONS FOR MEMBERS OF THE BOARD OF TRUSTEES

Recommendation: The Task Force favored this recommendation by a majority of one.

Elections of lawyer members of the Board of Trustees can create the appearance of conflicting loyalties, i.e. to the profession or the public. In addition, the election of six trustees may create the appearance of a trade association capable of exerting significant control over the State Bar's discipline activities. Moreover, potential conflicts can arise when sitting Board members opt to run for reelection and may take position on issues before the Board as a way to enhance their likelihood of election. Replacing elections with appointed positions would address these concerns. Given the modest level of interest among State Bar members in the elections, some argued that such a change would be acceptable because it might not decrease member engagement in the work of the State Bar.

In contrast, several Trustees and Task Force members expressed a concern that eliminating elections could compromise all forms of diversity among Trustees on the Board (e.g. practice area and geography, as well as gender, ethnicity, race, background and sexual orientation and identity). The elimination of elections could also send an unfortunate signal about the importance of a democratic structure for State Bar governance. They urged that the level of participation in State Bar elections, not dissimilar from participation in other election activities, not be a decision factor.

Despite these concerns, a slight majority of Task Force members agreed that election of Trustees should be eliminated. The Task Force also recommended that a mechanism should be developed so that, if an appointment were not made in a specified period of time, the Chief Justice might take responsibility for filling such a vacancy. In addition they urged attention to ensure geographic and demographic diversity on the Board of Trustees under an appointed model paradigm, with the hope that such factors would be meaningfully taken into consideration by appointing entities.

5. APPOINT AN ENFORCEMENT MONITOR

Recommendation: The Task Force favored this recommendation, with only one dissent.

In the past (1987-1992), a Discipline Monitor, appointed by the California Attorney General, provided valuable assistance in making recommendations to improve the functioning of the State Bar's attorney discipline system. Such an independent and expert reviewer might be a timely addition to the oversight structures under which the State Bar now operates, particularly if the position were focused on assessing the Bar's efficacy in implementing the significant reforms contemplated by the Workforce Planning initiative. For maximum benefit, however, such an appointment should be time limited, with a clearly defined mandate, free of political or other bias and draw upon recognized legal expertise and familiarity with the State Bar's disciplinary functions.

Concerns about the role of such an Enforcement Monitor also included the possible hindrance of operational reforms now being planned; the need to avoid redundancy and provide clear role definition and the possibility of substituting the task of the Enforcement Monitor for an annual performance audit, was urged by several Task Force members. With these considerations in mind, a strong majority of the Task Force members recommend the appointment of a limited-term Enforcement Monitor.

6. ENHANCED TRUSTEE ORIENTATION AND TRAINING

Recommendation: The Task Force was unanimous on this recommendation.

There have been periodic comments by the State Auditor and others about the need to improve the orientation and training of Trustees of the State Bar Board. Moreover, Assembly Bill 2878 has proposed adding specific qualifications for appointed trustees. Additionally, some have suggested that the fiduciary obligation to the organization which all Trustees have, irrespective of their means of selection (elected or appointed), should be the subject of a "trustee code of conduct." Although not discussed at length during the Task Force work, all Task Force members agreed that enhanced orientation and training for State Bar Trustees would be advisable.

7. ASSESS KEY REPORTING RELATIONSHIPS

Recommendation: The Task Force favored this recommendation, with only one dissent.

A strong majority of Task Force members agreed that the State Bar should also study whether recommendations should be made to the Legislature regarding the appointment and reporting framework for the Chief Trial Counsel. As discussed above at Section III E, by separating responsibility from State Bar management, this structure may produce a desired independence, but in doing so, compromise accountability. It was also suggested that such an analysis might be an appropriate task for examination by the Enforcement Monitor.

B. DE-UNIFICATION OF THE BAR

Recommendation: The Task Force was not in favor of this recommendation, with support from only two members.

A growing body of thought posits that coupling regulatory and trade associational functions in one organization weakens both and serves neither the public nor the legal profession well. The Task Force was fortunate in being able to draw upon comparisons to earlier prepared information about the function and governance models of other state bar organizations. The update of this work appears in the charts attached at **Appendix K.** In addition, the Task Force received testimony from the Executive Directors of the State Bars of Washington, Wisconsin, and Nebraska, selected because of the recent experiences of their organizations.

At the beginning of this comparative work, staff hoped to identify lessons learned in other jurisdictions that might serve as useful recommendations for California to adopt. The hope was

to identify national "best practices."[25] Instead, California's size, the number and complexity of functions supported by the State Bar under one unified "umbrella," and the unusual shared oversight role of the Supreme Court and Legislature, make California incontrovertibly unique. While much could be learned, simply grafting the approaches of other states onto the California structure without careful consideration seemed unwise. Moreover, despite obvious problems in management and funding which have been noted in recent Audits, some experts continue to characterize the organization and structure of the State Bar discipline system as "the best in the nation." Whether there is agreement or not about that characterization, it suggests care in the exercise of broad scale borrowing from other jurisdictions. The most useful points of comparison follow:

- Size: California is the largest unified bar in the U.S., twice that of the next largest state.
- Structure: 33 States have a unified bar structure. In others which operate with a voluntary bar and mandatory licensing, the explanation is often historical-- choices influenced by early opposition of powerful local voluntary bars (e.g., New York City and Chicago) to later efforts to create competing mandatory unified state-wide bar organizations.
- Organization and Supervision of Functions: States organize their functions in support of membership, discipline, the profession and the legal system in highly individual ways, whether they operate as unified or voluntary bars; although most states offer the same functions, they are not managed in the same way.
- Scope of Activities: California has the largest number of activities managed under a single unified governance structure. In other jurisdictions, similar functions are variously divided among organizations housed in or operated directly by the state supreme court, separately managed by non-profit organizations, or by the state bar organization (whether mandatory or voluntary) itself.
- Responsibility for Setting Annual Fee: California is one of only two states where the Legislature sets the annual licensing fee for attorneys and engages in significant oversight activity. All other states have fees set either by the highest state court or the bar organization itself and function with minimal, if any, legislative involvement. Thus the level of legislative oversight and political involvement in its activities is a distinguishing, some would argue necessary, feature of the State Bar of California.
- Evolution of Structural Model: The majority of state bars in the United States continue to employ the mandatory unified bar model, although there appears to be a trend to re-distribute activities between the bar, court and other separately organized entities.
- Relationship of Model to Introduction of New Technology: While many states are debating whether or not the mandatory unified bar model should be continued, some evidence suggests that states with voluntary bars composed exclusively of lawyers are more resistant to the entrance of new technology-based providers of legal services; a unified bar, particularly with significant public member participation, could provide a better model.
- Experience with De-Unification: Only three states, Wisconsin, Puerto Rico and Nebraska, have experience with "de-unification," providing little to draw upon in assessing the impact of abandoning the unified paradigm. In fact, currently only

[25] Professor Robert Fellmeth has often referred to the State Bar's discipline system as "the best in the nation," an assessment he repeated in his April 25, 2016 testimony before the Task Force.

> Nebraska has permanently implemented de-unification;[26] its Executive Director provided the Task Force with "lessons learned," which suggested that such a change could shift the State Bar's emphasis from support for access to justice in the legal system to operating an effective voluntary membership organization, from public protection to member satisfaction.[27]

For the State Bar of California, de-unification raises a host of questions, particularly as related to identifying those programs and functions that would remain within a purely regulatory organization.

Further, there is both a practical financial and personnel cost to de-unification which must be considered. For example, staff has estimated that loss of the Sections would result in a $4.3 million negative impact on the Bar's annual operating budget, not to mention the potentially negative financial impact on the Sections themselves.[28] Including the "Affinity Insurance Programs," which are arguably aligned with associational activities, would increase this reduction by approximately $2 million. In addition, the process of planning and implementing de-unification could impose substantial human capital costs. The number of jobs lost would require careful analysis as it is unclear how many positions could be assimilated into other parts of the State Bar.

The question of whether to de-unify the State Bar of California thus occupied considerable time in the Task Force deliberations. Much was learned as the discussions proceeded and significant points of agreement were reached. Both sides were unanimous that there is much work to be done to improve the functioning of the State Bar. In the end, however, no agreement could be reached on the best approach for achieving such changes and the idea of de-unification of the State Bar was rejected by a strong majority. The attached Minority Report prepared by two Task Force members reflects strong support for de-unification. It does so, informed by an unhappy history of State Bar experience. In the view of the Majority, the Minority report fails to give adequate weight to the significant reforms now underway, thanks to Board leadership operating in partnership with a new management team. The Majority recognizes that this Minority view is not unique. At its essence, however, the difference in approach represented by the Majority and Minority report might be described as whether to give the new approaches now underway a chance to bear fruit first before deciding whether to embark on the large and uncertain change that de-unification would represent.

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[26] Wisconsin has shifted between unification and de-unification; currently it remains unified. Puerto Rico appears to attach its structure to that of the current political party in power. Thus neither offer useful in-depth experience on which to draw. Nebraska's experience was, of course, both unusual and highly problematic, in that it implemented de-unification in just 30 days by order of its Supreme Court.

[27] Arizona is actively debating de-unification and the topic is being debated nationally. Internationally, the United Kingdom, Australia and many other nations have de-unified their bar organizations, often as a result of parliamentary action, but their lawyer regulation systems are distinct, with limited court involvement.

[28] While these figures are preliminary and will require additional study, it is hard to dispute that separating a significant component from the State Bar will inevitably create a serious impact on both fiscal and personnel matters.

C. OTHER SOLUTIONS AND RECOMMENDATIONS FOR FURTHER STUDY

1. FURTHER CLARIFY THE STATE BAR'S PUBLIC PROTECTION MISSION

Recommendation: The Task Force was unanimous on this recommendation.

Although ultimately a matter for decision by the three branches of government, the Task Force unanimously recommends that the State Bar, in conjunction with its key stakeholders, initiate the difficult task of more clearly defining its public protection mission.

2. REVIEW THE COMMITTEE FRAMEWORK AND STRUCTURE

Recommendation: The Task Force was unanimous on this recommendation.

The Task Force agreed that the State Bar must assess the huge number of existing committees, boards and commissions and their siloed operations and whether this has inadvertently resulted in the State Bar expanding its mission into areas that are only tenuously related to "core" public protection activities. Additionally, as required by the State Bar's Board Book, its operational manual, the Board must satisfy the requirement of reviewing the operational plans of all such entities on an annual basis to ensure that they are operating consistently with the State Bar's strategic plan. The requirement for a five year 'sunset review' of all such bodies should also be implemented.

3. REDUCE BOARD SIZE

Recommendation: The Task Force favored this recommendation, with only two dissents.

A smaller board (e.g. 13 as opposed to the current 19-20) might arguably result in a more effective governance model. Some were concerned, however, that such a reduction in size could impact the diversity of the Board. To avoid disruption of reforms either underway or planned, such a decision should, however, await the realignment/possible reduction of State Bar activities so that a smaller board would be calibrated to handle the reduced amount of work which could result were structural changes to be made. Simply changing the size of the Board without a corresponding reduction in responsibilities and Board work-load would appear to 'put the cart before the horse' and invite unnecessary problems in governance and oversight of a large and complex organization. With these considerations in mind, a significant majority of the Task Force voted to recommend a smaller Board, while not delineating the timing of the change, the specific size of such a reduced Board, or the respective number of lawyer and public members, or their appointing authorities.

4. ADDRESS THE IMPACTS OF SILO FUNDING

Recommendation: The Task Force was unanimous on this recommendation.

Difference in funding sources has created a duality in fiscal policy. A majority of Task Force members agree that all fiscal policies must be unified under one system. The Board has addressed these differences in its own expense reimbursement policy, setting out a rigorous expense oversight control system so that, after review, all Trustee expenses are governed by the State Bar's standard government reimbursement procedures and which are now also reported on the State Bar's Public website. The Board must now decide whether it will apply the same set of policies to all funds received by the State Bar, irrespective of source, and to apply consistent reimbursement policies to all who work for or assist the State Bar, particularly the Sections and related volunteer activity.

More broadly, there is a need for the Bar to operate as a coherent, consistent organization. This means that, irrespective of funding sources, core administrative functions including human resources, finance, and information technology, should be performed by the centralized departments of the Bar responsible for these activities. Further, there must be consistent oversight of all activities and standardization of key drivers of institutional identity, including branding and web presence.

5. DETERMINE FUNDING ADEQUACY FOR STATE BAR DISCIPLINE FUNCTIONS

Recommendation: The Task Force recommended no action until further study is completed.

There was consensus on the Task Force that the current fiscal resources are inadequate to address statutorily mandated disciplinary functions. All members agreed that the need for such funding was inevitable in light of current statutory backlog definitions and reduction goals; this conclusion has been recently articulated in the Spending Plan. Nonetheless, as described in Section III G above, staff has made clear that additional review of both expenditures and potential revenue remains. Staff has urged that this work be completed before any recommendation on the need for additional funding is made. After careful discussion, the Task Force agreed that the State Bar should continue its efforts to create efficiencies within its organizational structure before a recommendation for additional funding is made. After careful discussion, the majority also concluded that this topic should be a high priority for the full Board to consider, once staff has completed its work to review and assess all State Bar programs. That effort is expected to realize economies that will impact the amount of increased funding needed. Only in this way can the case be effectively made to all concerned—State Bar members, the Supreme Court and the Legislature that the State Bar is operating efficiently and managing its resources effectively and the additional funding is required to effectuate the discipline program California requires. These are together the necessary pre-conditions essential for a request for additional funding through the mechanism of an increase in license fees.

V. RELATIONSHIP OF PROPOSED SOLUTIONS AND RECOMMENDATIONS TO IDENTIFIED PROBLEMS AND PUBLIC PROTECTION CHARGE

The Task Force recognized that the relevance and relative merit of each proposed solution and recommended intervention will depend on how each impacts the key questions posed by the Task Force:

1) How does any given proposed intervention solve the problem and enhance public protection?
2) What are the cost and operational implications of the proposed interventions?
3) How will success be defined and measured?

The following tables reflect the preliminary results of such an analysis:

DOES THE SOLUTION ADDRESS THE PROBLEM?

PROBLEMS / SOLUTIONS	PERCEPTIONS OF AN INEFFECTIVE DISCIPLINE SYSTEM	UNCLEAR MISSION	PROLIFERATION OF ACTIVITIES	HYBRID GOVERNANCE STRUCTURE	COMMITTEES AND VOLUNTEERS	SILO FUNDING SOURCES	CLASSIFICATION AND COMPENSATION
GOVERNANCE REFORM	Unknown	No	Possibly	Yes	No	No	No
DE-UNIFICATION	Possibly	Likely	Possibly	Yes	Possibly	Unknown	Possibly
ENFORCEMENT MONITOR	Likely	No	No	No	No	No	No
SPECIFICALLY DEFINE THE PUBLIC PROTECTION MISSION	Unknown	Yes	Yes	Possibly	Possibly	Unlikely	Unlikely
REVIEW COMMITTEE FRAMEWORK AND STRUCTURE	Unlikely	Possibly	Yes	Possibly	Yes	No	No
ADDRESS IMPACTS OF SILO FUNDING	Unlikely	No	No	No	No	Yes	No

WILL THE PROPOSED RECOMMENDED INTERVENTION ENHANCE PUBLIC PROTECTION?

SOLUTIONS	GOVERNANCE REFORM	DE-UNIFICATION	ENFORCEMENT MONITOR	SPECIFICALLY DEFINE THE PUBLIC PROTECTION MISSION	REVIEW COMMITTEE FRAMEWORK AND STRUCTURE	ADDRESS IMPACTS OF SILO FUNDING
ENHANCE PUBLIC PROTECTION?	Possibly	Possibly	Yes	Yes	Unclear	Unclear

WHAT ARE THE COSTS OF THE RECOMMENDED INTERVENTIONS?

SOLUTIONS	GOVERNANCE REFORM	DE-UNIFICATION	ENFORCEMENT MONITOR	SPECIFICALLY DEFINE THE PUBLIC PROTECTION MISSION	REVIEW COMMITTEE FRAMEWORK AND STRUCTURE	ADDRESS IMPACTS OF SILO FUNDING
COSTS	Elimination of elections will result in cost savings to the Bar. In addition, reduced number of Board members would result in operational savings.	Significant. Loss of Sections alone results in a negative funding impact of approximately $4.3 million.	Monitor salary and benefits or contract amount estimated at $400,000 annually.	None.	Savings may result from reduced Committee operational costs and corresponding reductions in staff support; however, staff may need to assume responsibility for certain activities now performed by Committees, resulting in additional personnel costs.	Unknown; centralization of currently decentralized functions may result in cost savings. Application of uniform fiscal policy may result in savings as well.

HOW WILL SUCCESS BE MEASURED?

SOLUTIONS	GOVERNANCE REFORM	DE-UNIFICATION	ENFORCEMENT MONITOR	SPECIFICALLY DEFINE THE PUBLIC PROTECTION MISSION	REVIEW COMMITTEE FRAMEWORK AND STRUCTURE	ADDRESS IMPACTS OF SILO FUNDING
MEASUREMENT/ SUCCESS	Assessment of Action Steps is a two-step process: (a) confirmation of implementation and (b) subsequent independent assessment and determination of whether the activities have addressed the problems they were intended to solve.					
MEASUREMENT/ ACTION STEPS	Implement identified governance reforms.	Identify components of associational versus regulatory organizations and effectuate split.	Hire Enforcement Monitor.	Develop clear and detailed definition of which Bar activities and functions constitute public protection.	Make recommendations regarding each State Bar Committee: retain as is, eliminate, modify.	Identify functions and policies that should be centralized and standardized and carry out that work.

The present report, as the above tables reflect, outlines important topics for consideration as the Legislature, the Supreme Court, and the State Bar prepare for a period of unprecedented change. A tremendous amount of work has been done to identify foundational challenges facing the organization. Solutions to these challenges have been recommended, some of which – appointment of an Enforcement Monitor and development of a definition of public protection for example – directly address the Task Force charge to develop recommendations that enhance public protection. Other recommended solutions, while not immediately tied to the charge, may have both merit and broad-based support, including eliminating trustee elections and implementing an officer leadership ladder. These are likely worthy of implementation on that basis alone. Key institutional assessments and corresponding reforms, including a review of the committee structure and the impact of silo funding sources, may appear even more attenuated from the explicit public protection charge, but are in fact likely to strike at the heart of the fractures and divides that make effective reform of the State Bar so very difficult to achieve.

Also, a more coherent and unified operational structure offers the strong possibility that economies will be realized which could enhance support of the State Bar's discipline functions.

VI. CONCLUSION

For many years, as the State Bar of California has evolved as an organization, it has seen many changes, designed to strengthen its role in achieving public protection both in the regulation and discipline of lawyers, and through support of a fair and inclusive legal system. Other similar organizations in the United States and abroad have almost universally considered the State Bar of California as a leader in the regulation and discipline of lawyers.

Since the mid 1970's, however, the State Bar has also been the subject of continuing criticism. Oft-repeated refrains raise understandable concerns about past problems in a poorly managed discipline system, lax financial management, and an improper diversion of both human and monetary resources from the State Bar's regulatory to its associational functions. These issues appear in audits and reports dating back many years. It is in fact the repeated, sustained, and seemingly immutable aspect of these concerns, not to mention recent assessments expressed by both the Supreme Court and the Legislature, which motivates the current interest in de-unifying the Bar. But whether or not a decision to de-unify the State Bar is made, the Task Force recognizes that significant change is needed. While choices about the future governance model and organizational structure of the State Bar must result from collaboration among leaders of the three branches of government, there is an immediate role for the State Bar itself to begin the process of change. In providing this report, the Task Force hopes to contribute to all parts of this vitally important reform process.

The Task Force has received much thoughtful input as it proceeded with its work. In parallel, new staff leadership has also had the opportunity to contribute fresh perspectives about the problems faced by the State Bar, along with their possible solutions. Many views of Task Force members and others, deeply committed to the success of the State Bar of California, are strongly held but in sharp contrast. Nonetheless, all share a commitment to identifying a structure that will best support the comprehensive public protection mission of the State Bar of California at a time of transformational change in the legal profession. There is also agreement that no matter the choice made, important benefits are likely to be both gained and lost. Most importantly, there is consensus that for a state bar organization of the size and importance of California's, the world's largest unified bar organization, great care is needed to carefully analyze and balance these considerations, to insure that the changes adopted will at last achieve the long-over-due reform needed at the State Bar of California to further its mission of public protection.

MINORITY REPORT - DENNIS MANGERS - TRUSTEE
SENATE APPOINTED, PUBLIC NON-ATTORNEY MEMBER & JOANNA R. MENDOZA, TRUSTEE ELECTED MEMBER, 3RD DISTRICT

GOVERNANCE IN THE PUBLIC INTEREST TASK FORCE REPORT

MINORITY REPORT

Dennis Mangers
Trustee
Senate Appointed, Public Non-Attorney Member

Joanna R. Mendoza
Trustee
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THE STATE BAR OF CALIFORNIA
AUGUST 1, 2016

Governance in the Public Interest Task Force Report

MINORITY REPORT

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INTRODUCTION

The State Bar's Governance in the Public Interest Task Force was charged pursuant to Business and Professions Code section 6001.2 (b) to submit the following:

> "[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 the protection of the public is the highest priority in the licensing, regulation and discipline of attorneys, to be reviewed by the Assembly and Senate Committees on Judiciary in their regular consideration of the annual State bar dues measure. *If the Task Force does not reach a consensus on all of the recommendations in its report, the dissenting members of the task Force may prepare and submit a dissenting report to the same entities described in this subdivision, to be reviewed by the committees in the same manner*." (emphasis added).

Because the Task Force did not reach consensus on all points and because it failed to make meaningful recommendations, we, the undersigned, respectfully file this Minority Report.

EXECUTIVE SUMMARY

The Task Force majority report[1] opens strongly, stating **"[i]t is universally acknowledged that significant changes are needed at the State Bar of California. …. The problems at the State Bar are not recent in origin: indeed decades of studies, reports and statutory provisions reflect efforts to reform the State Bar most with only modest impact."**

The Executive Summary then observes that "**nine fundamental operational problems** were identified, each with important implications for the governance and structural issues being addressed by the Task Force." These are:

1. The Perception and Reality of An Ineffectively Managed Discipline System
2. Inadequate Definitions of the Bar's "Public Protection" Mission
3. Proliferation of Activities: Mission Creep and Poor Organizational Coherence
4. A Conflicting Hybrid Governance Structure
5. Confused Reporting Relationships Hindering Accountability
6. Proliferation of Committees, Boards and Commissions and Over Reliance on Volunteers
7. Distinct and Restricted Funding Sources, Creating Cultural and Procedural Obstacles to Financial and Organizational Management
8. Inadequate Development and Support for Human Resources
9. Inadequate Resources to Satisfy Statutory Backlog Definitions

We applaud these refreshing acknowledgments of structural weaknesses of the Bar. However, after asserting the obvious (that "[**m]any of these problems will directly impact the ability of**

[1]/ References to the Task Force majority report are to the draft provided to the Task Force as of July 30, 2016.

the State Bar to ensure public protection and limit the success of any proposed governance reform") it raises – but does not address – a critical and obvious question: "**has the State Bar become unmanageable because of structural conflicts, diversity of mission and over-reliance on a large number of independently operating volunteers?" This is, undoubtedly, an "existential question."**

This task force was legislatively mandated effective January 1, 2012. The assignment given this task force was and is critical. However, the task force was not convened until 2015 and took many months to focus on its mission of public protection. After a year of lengthy meetings and volumes of testimony, one would expect the majority to attempt an answer to its important inquiry. One would expect the majority to fulfill its statutory mandate to make recommendations to aid legislation.

However, both the Executive Summary and the Conclusion of the majority report fail to meaningfully deliver on either count. In fact, abdicating its responsibility, the majority report amounts to yet another expensive waste of time and effort as it boldly declares:

> **"The Task Force is aware that discussions are now underway among the Judicial Branch and both houses of the Legislature. It joins in their shared view that the time for serious study and reform of State Bar governance is overdue and can no longer be postponed."**

This is nothing less than a concession — long overdue — that the Bar is grossly dysfunctional and demands reform. But the majority offers no meaningful solutions. It offers no structure for reform. It offers no significant ideas on how to overcome the monumental issues facing the organization. The reader is left with the impression that the task of proposing reform, and filling that void, is to be left to others outside the State Bar. As competent as the staff of the State Bar has been, there is little that can be done without an effective Board that is willing to truly focus on regulation, and lead in that regard.

Thus, we, the minority, attempt to provide the assistance from those familiar with the Bar and previous efforts at reform that the Legislature understandably invited.

As astounding as this "you tell us" attitude seems, there is worse. After years of incessant complaining about being micro-managed by the Legislature via annual fee bills, the majority declares that, "while other bodies are considering these issues, staff should continue to energetically identify and correct operational issues identified in the course of its work to review all State Bar programs." Again, the Bar has a strong management staff unsupported by a Board willing and able to lead and, as we have repeatedly seen in the past, attempts to change the organization by executive staff alone repeatedly ends in failure.

This institutional stasis demonstrates – yet again – the need for fundamental reform in Bar governance if undivided focus on its core mission of public protection is to be achieved. Unlike the majority, which is hesitant to make a meaningful recommendation for reform even after management staff makes a persuasive case for change, we do have advice to offer.

After years of observation and participation in the governance of the Bar and after careful consideration of testimony to and deliberations of the Task Force**, we conclude the only answer to the Bar's persistent dysfunction is to de-couple its regulatory and professional association functions**. We believe the majority report explains why when it acknowledges a "conflicting hybrid governance structure" of the Bar, stating, "[**h]istorically, the State Bar has been a blend of two very different business models: an independent government regulatory body and a professional membership organization." Indeed. The majority acknowledges "there is an inherent tension manifested in this duality" and admits that "the size and scope of activities controlled under the State Bar 'umbrella' are themselves another management challenge."**

Strong staff alone cannot fix what ails the Bar. Indeed, there is no guarantee strong staff will stay with the Bar long enough to make the needed changes. We have seen "new sheriffs in town" before, each with a promise to bring change. However, we have also repeatedly seen the disappointing outcome of that promise.

So, while ably describing its dysfunction and its causes, the majority's desire to protect the structural status quo it so effectively indicts makes its report nearly useless. Accordingly, the minority is left with no recourse but to urge the Legislature and the Supreme Court to stop the endless cycle of Task Forces, studies, audits, crisis and critical media coverage by gradually and deliberatively de-coupling the Bar's regulatory and advocacy roles over several years, as well as changing the Board governance structure.

THE CASE FOR STRUCTURAL AND GOVERNANCE REFORM

INTRODUCTION. As Bar Trustees with nearly two decades of State Bar service between us, we write to recommend **separation of the Bar's regulatory and professional association functions over a period of a few years to allow thoughtful, deliberative disentanglement of roles that have become antithetical.** The Bar is neither an effective regulator nor a potent professional Association. Those who care about the administration of justice in our State and the protection of the public from bad lawyering should yearn for the comparatively greater efficiency and effectiveness of other professions in California – like the medical profession – and other Bars around the common-law world that have separated these roles.

We further advocate for a **regulatory board made up of a majority of public members**. There are several reasons for this, not the least of which is to begin the slow process of rebuilding public confidence in the Bar's regulation and discipline system. There has been no case made that lawyers are somehow so special and unique that only they are sufficiently competent and qualified to oversee their profession. In fact, California's history suggests quite the opposite is true. While the California State Bar has been under the supervision of lawyers, many of whom strongly believe they are on the Board for the "right" reasons, the State Bar has remained a siloed, dysfunctional agency with an oft-divided Board steeped in internecine politics.
This dysfunctional and unworkable institution is hardly a regulatory agency befitting our State. Californians certainly deserve better. Yet, despite the age and persistence of this dysfunction, no State Bar oversight body – its own Board, the Supreme Court, the Legislature or the Governor – has yet to insist on the structural and governance changes necessary to meaningfully reform the

Bar. Changing its Board structure and separating antithetical missions of serving the public and lawyers will allow the Bar to focus on a single regulatory mission. We see no other option that will make meaningful change.

THE GOVERNANCE IN THE PUBLIC INTEREST TASK FORCE. The first Governance Task Force required by 2010 legislation was the Legislature's response to concerns that the Bar Board was not sufficiently attentive to protection of the public.[2] For example, the Board conceded to pressure from local bar associations to limit the "Find a Lawyer" feature of its website so as not to compete with local bars' money-making lawyer referral services. Similarly conduct included:

- Board opposition to two consumer protection bills in the Legislature;
- Failure to reappoint a Chief Trial Counsel who had advocated posting attorney disciplinary charges online; and
- Decisions regarding rules regarding malpractice insurance.[3]

The legislative history of that statute reflects the Legislature's concern that the Bar's "associational" focus impaired its ability to regulate lawyers to protect other Californians. Hence, this year's reform effort must be understood as a continuation of that earlier dialog and demonstration that still further reform is needed. Rather than impose reform on the Bar at the outset, however, 2012's SB 163 gave the Bar yet one more opportunity to reform itself. It has not. The time has come for the Legislature, the Court and the Governor to make the change the Bar so obviously needs and so plainly is unwilling or unable to undertake from within.

That first Task Force submitted its report in May 2011. As indicated in the current majority report, that Task Force focused primarily on the governance structure of the Bar Board due to the "expedited timeframe" for its report.[4]

The May 2011 Task Force "majority report" argued against deunification or any other meaningful change in Bar governance, urging the Legislature to "retain the existing unified structure of the Bar, **while improving it**." That majority then recommended that the State Bar retain its roles in **all areas**, rather than focusing on the regulatory functions of discipline, admissions and licensing as the 2011 minority report urged. In other words, the 2011 Task Force majority report, too, was a call for the status quo and a request that Bar be given yet another opportunity to reform itself – a mantra repeated over decades.[5]

Since 2011, however, very little appears to have been "improved." Instead, the Bar has been mired in ongoing scandal and controversy, embarrassing personnel issues, headline-grabbing litigation, unacceptable audit results, and internecine politics. The imposition of

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[2]/ *See*, Senate Judiciary Committee analysis for Assembly Bill 2764, dated August 24, 2010.
[3]/ *Id.*
[4]/ In 2011, the Task Force was able to meet 12 times from September 26, 2010, to May 5, 2011, yet considered this an "expedited timeframe" limiting its ability to explore issues beyond governance. With the new B&P Code §6001.2 enacted in 2012, the State Bar has now had **nearly 4 years** to prepare its second report (overdue since May 2014), and yet this Task Force convened for the first time on December 9, 2015, and only met six times thereafter..
[5]/ William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 2, 552 (1995);

Bagley-Keene and the California Public Records Act on the State Bar in 2015 followed yet another bad audit and years of questionable transparency. These new laws and the Bar's very high overhead costs have brought pressure to bear on the Sections, but the new transparency has also pulled aside the curtain to allow more media reports on the many problems challenges to the Bar's status quo from within and without.

Maintaining the status quo has not "improved" the State Bar as the 2011 majority report promised. It is not more likely to do so now. It is time to make meaningful changes that give the organization a fighting chance for successful regulation while also allowing California attorneys to create an effective professional association. The status quo does not protect the interests of either the public or the lawyers of this State not least because the Bar is in a constant state of conflict due to what the current majority report diplomatically describes as "**structural conflicts, diversity of mission and over-reliance on a large number of independently operating volunteers**." The Bar's Board of Trustees must focus their efforts on performing their regulatory functions well. Its effort to be all things to all people makes it incapable of do anything for anyone especially well.

THE NEED FOR REFORM. Reform of the State Bar is urgently needed for many reasons. Most fundamentally, the Bar has a long history of cyclical crisis, reform, neglect, and renewed crisis. The Legislature's many efforts to address Bar governance are evidenced in detailed oversight provisions in the State Bar Act and in the substantial energy legislative Committees have committed to the effort.

The current controversies concerning the 2014 termination of the Bar's Executive Director, the termination shortly thereafter of several other employees and the welter of lawsuits that followed are known to all. Headlines disclose his allegations against the Bar, the leak and then release of the Munger, Tolles & Olson investigation of whistleblower allegations. These controversies have leveled criticism at the Bar, its management, its Trustees and its past two Presidents. Controversies include a vote of no confidence in the former Chief Trial Counsel, critical audits by the State Auditor, and serial revelations about neglected complaints of unauthorized practice of law (UPL). Crises at the Bar are revealed nearly daily in the press.

These latest controversies are part of a larger pattern. Nearly every Executive Director of the State Bar over the past few decades has ended his or her service in controversy. Each is replaced by a new leader, charged to be "a new sheriff in town." A show of effort at change is made; the attention of the press, bar and public turn elsewhere; and the Bar slides back into mismanagement, failure to protect Californians, and general dysfunction until a new controversy soon restarts the cycle. This systemic dysfunction derives from the dual mission of the Bar and its short-term, diffuse, volunteer leadership attracted to the prestigious title of "Trustee" and, in particular, "President of the California State Bar" but ill-prepared (and disinterested) in the hard, detailed work of properly governing a government agency with more than 500 employees and a $130-plus-million budget. We have an extremely qualified and hard-working management team in place at the Bar. However, we are convinced it cannot succeed without both structural change and the support of a Board laser focused on the regulatory functions at all times and not just when the press and oversight bodies are giving them attention. We see neither interest nor ability in the Board as presently constructed in making and sustaining that effort. This Board has abandoned work programs developed by recent leaders to instead focus on external "signature"

projects of the current President, like funding legal services to the poor. Admirable, no doubt, but not the core mission of the Board of Trustees.

With respect, we conclude the time has come for a systemic solution to a systemic problem.

THE FAILED CASE FOR LAWYER SELF-REGULATION. Unlike every other profession in our State – and unlike an apparent trend in sister states of comparable size and diversity toward decoupling legal regulatory and professional organizations – California attorneys have the privilege of self-regulation. Two justifications are offered. First, that protection of lawyers from legislative over-reaching is necessary to ensure an independent judiciary, which can only resolve disputes that lawyers bring to it. We, of course, share our national commitment to a strong and independent judiciary. However, we fail to see how the changes we propose affect this principle. **Eliminating lawyers elected by lawyers from a multi-member board, in the Judicial Branch, with a greater percentage of judicial appointees than is now the case[6] enhances the judicial branch's partnership with the Legislature in overseeing the Bar.** That shared oversight, of course, dates from the adoption the State Bar Act in 1927 and court cases upholding the statute. Moreover, our proposal makes other enhancements to Supreme Court oversight of the Bar.[7] Still further, it can hardly be claimed that the rule of law is less respected in such states as New York, Pennsylvania and New Jersey which operate under the system we advocate, which requires that attorneys continue to pay a mandatory "licensing" fee to the regulatory agency while allowing them participate, if they wish, in a voluntary professional association.

The second justification for lawyer self-regulation has been that lawyers will be more demanding of lawyers and therefore more effective regulators than non-lawyers. Facts defeat the claim. **The Bar has never managed its discipline backlog well over sustained periods**. Every victory over the backlog is followed by backsliding and new controversy. When its past Executive Director and Chief Trial Counsel did manage to greatly reduce the backlog for a time, they abandoned reviews to ensure complaining witnesses that cases had been properly handled. That predictably led to a rise in *Walker* petitions to the Supreme Court and an unprecedented grant of dozens of those petitions, requiring the Bar to reopen disciplinary matters it had closed to ensure it gave careful thought to the complaints. **The Bar's current failures to credibly pursue complaints of unauthorized practice of law are painfully clear**. The Bar has not seriously addressed allegations that it more vigorously prosecutes attorneys with less money and influence than others. These tend to be solo practitioners, small-town lawyers, and lawyers of color. **The Bar can and should assure Californians that the justice it dispenses is even-handed as well as efficient.**

The fact remains that the Office of Chief Trial Counsel is an independent prosecuting authority over which the Board of Trustees or the Executive Director has a limited control to avoid politicizing the exercise of prosecutorial discretion. The State Bar Court is an independent judiciary such that the Board has an even more limited oversight role. There is no role for the Board to be "more demanding" with respect to the discipline of lawyers since there is no decisions for the Board to be making when it comes to the discipline of lawyers. Rather, the Board oversees management that has been the subject of repeated controversies as to adequacy

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[6]/ This is a reference to our reform proposal attached here as Appendix K in the forms of a two-page as well as bill language drafted by Legislative Counsel.
[7]/ *Id.*

of resources, supervision, reporting, etc. Law schools teach nothing of the skills required to manage a complex government. Nothing about government management requires a law degree. Indeed, the Bar deemed it appropriate to have a public member Chair its Regulation and Discipline Committee in 2014–2015.

Indeed, self-regulation by lawyers has been under attack in the United States for decades, and for good reason. In the 1960's the American Bar Association (ABA) established a panel of prominent attorneys under the chairmanship of retired United States Supreme Court Justice Tom Clark to "assemble and study information relevant to all aspects of professional discipline, including the effectiveness of present enforcement procedures" ("Clark Report").[8] The Clark Report found what it described as a "scandalous" situation in which, among other issues, attorneys fail to report violations of the Code of Professional Responsibility committed by other attorneys and where large and prominent firms were more likely to avoid discipline than others.[9] Reforms that followed the Clark Report were reviewed after 20 years by an ABA Commission on Evaluation of Disciplinary Enforcement. The resulting 1992 report struck at the core of self-regulation:

> Despite the many reforms made in the disciplinary process in the last twenty years, there is a significant distrust of the fairness and impartiality of self-regulation. The Commission finds an important distinction between judicial regulation and self-regulation in the area of lawyer discipline. Neither inherent powers doctrine nor the need for professional independence provides a rationale for disciplinary functions to be conducted by elected officers of bar associations.
>
> The Disciplinary system should be controlled and managed exclusively by the state's highest court and not by state or local bar associations. This is necessary for two primary reasons. First, the disciplinary process should be directed solely by the disciplinary policy of the Court and its appointees and not influenced by the internal politics of bar associations. Second, **the disciplinary system should be free from even the appearance of conflicts of interest or impropriety. When elected bar officials control all or parts of the disciplinary process, these appearances are created, regardless of the actual fairness or impartiality of the system.**[10]

While the majority concedes that the California State Bar is not a "bar association" in the literal sense of that word, many consider the California State Bar to be exactly that. Fully a third of its members are attorneys elected by other attorneys in very-low-turnout elections. The Bar is viewed by both the public at large and most lawyers as a state-wide bar *association* in charge of

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[8]/ American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement*, Final Draft, June 1970 (A.B.A. 1970) p. xiii.

[9]/ See Clark Report, supra, at 1–2. Complaints continue to be made by the attorney defense bar in California that solos and small firms are targeted for discipline more often than attorneys at large, prominent firms. On June 23, 2016, the Board of Trustees rejected a proposal to adopt ABA Model Rule 8.3 requiring lawyers to report violations of the Rules of Professional Conduct by other lawyers.

[10]/ ABA Comm. on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement*, 23 (1992) (emphasis added).

admitting, disciplining and serving its own kind — the fox guarding the henhouse. Its name, which sounds nothing like any other regulatory agency in this state, certainly does nothing to dispel this belief, nor does the fact that the State Bar Act refers to "members" who pay "dues." Its dual service to the public and to lawyers creates not just the "appearance of a conflict of interest and impropriety" but *actual* conflicts of interest.[11] Votes over the years by the Board, as referenced in bill analyses[12] reflect protectionism and show a Board inclined to prefer the interests of lawyers to those of the public. Even the Executive Director of the Washington State Bar testified before this Task Force to a similar experience with her Board: establishment of a Limited License Legal Technicians to fill the justice gap to serve people of modest means came by a decision of the state Supreme Court to overrule a contrary decision of the Bar there.

Furthermore, the Bar's discipline system is but one of many functions the Board oversees. State audits over at least 15 years demonstrate repeated failures of Bar oversight.[13] To insist "lawyers are special" and must be allowed the privilege of self-regulation is to ignore a painful truth: lawyers are neither special nor adept at oversight.[14] Lawyers recognize that most are not skilled at business — a common quip is that "I am not good at math, that's why I went to law school" — and, sadly, Bar leadership has too often proven the point.[15] The issues presented to the Board rarely if ever require special legal knowledge. In fact, the Board's oversight is explicitly restricted from interference with individual prosecutorial decisions. Instead, issues presented to the Board most often require oversight, business and policy acumen (and perhaps a solid grounding in common sense), drawing upon the various expertise and backgrounds of Trustees who come with unique qualifications. For example, Trustees with backgrounds in public service and finance can contribute greatly to its work. Moreover, the work of the Board is supported by Bar staff, who include leading experts on the law of attorney regulation. As to the recent review and update of the Rules of Professional Conduct, the Board's decisions on the advice of an expert commission of lawyers and judges has not required a law degree but an ability to make policy decisions as to how to most effectively regulate lawyers to protect the public. Moreover, that some lawyers can helpfully serve on the Board does not justify a Board dominated by lawyers, as has been the case since 1927. We conclude a Board comprised of a majority of public members would have not only the appearance of even-handed regulation of lawyers, but would be more skilled in doing so.

Despite adverse audit reports, cyclical dysfunction, repeated cries for reform and unfulfilled promises of change, some continue to argue lawyers must retain the ability to elect their own on the Bar's Board. This remains true even while election turnout for Board seats has averaged less than 15% over the past decade.[16] It seems the profession is less interested in self-regulation than its leaders claim. If lawyers are rationally indifferent to Bar elections, then it does not matter which lawyers serve on the Bar Board. Given the associational nature of the State Bar's

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[11]/ *See Recommendation of Senator Presley's Task Force on Bar Discipline: Before the Joint Meeting of the Senate and Assembly Judiciary Committees*, California Legislature, 1985–86 Regular Sess. (Sept. 30, 1985) (testimony of Stephen M. Bundy) (in author's files), 38–40 [hereinafter "Presley Task Force Recommendation"].
[12]/ *See*, for example, the Senate Judiciary Committee analysis for Assembly Bill 2764, dated August 24, 2010.
[13]/ Appendix L.
[14]/ *See Presley Task Force Recommendation*, *Id*., at 40–43. Attorneys' self-proclaimed expertise over self-regulation is largely rhetorical. See Richard L. Abel, AMERICAN LAWYERS (1989), p. 144.
[15]/ *Id*.
[16]/ Appendix M.

committee structure, its Board continues to attract those who seek titles rather than opportunities to serve California. The proliferation of awards and committee appointments and divisive distraction of officer elections underscores the Board's focus on professional association activities to the near exclusion of public protection.

In conclusion, given the professionalization and independence of the Office of Chief Trial Counsel and State Bar Court (all remaining under the authority of the California Supreme Court), the Board of Trustees has no direct impact on discipline. Similarly, admissions are governed by the Committee of Bar Examiners over which the Board of Trustees has essentially no control. **Thus, the lawyer-dominated Board of Trustees does not even deliver the lawyer-led discipline system which is the essential justified action for a "unified" bar.** For 90 years, California lawyers have attempted self-regulation while gradually losing the confidence of the public, the Legislature, the Supreme Court and Governors.

Scholars agree self-regulation is intended to stave off external regulation by the state and to allow the profession to monopolize the market for its services.[17] They explain that self-regulation plays a more important role for professions in their "formative" years rather than for an "established" and "mature" profession.[18] California's legal profession can hardly argue it is in its "formative" years or that monopolizing the legal services market serves access to justice or public protection. Indeed, a recent anti-trust decision of the U.S. Supreme Court suggests otherwise.[19] It is time for California's legal profession to relinquish self-regulation and act like a mature profession.

A DISTRACTED REGULATOR. Our years of service to the Bar has proven to us that the Board of Trustees is a distracted regulator. It spends much of its energy on professional association matters such as appointments of attorneys to positions of prestige, bestowing awards, participating as liaisons to the more than 50+ State Bar committees (many of which provide continuing legal education in competition with voluntary bars and for-profit providers while the Board is also charged with regulating those providers), conducting an annual conference that draws fewer attendees and requires a greater subsidy each year, selling insurance, etc. For example, one recent Board of Trustees meeting allowed its Regulation and Discipline Committee (RAD) just one and a half hours at the end of a very long day, while association business dominated much of the remaining time. RAD is just one committee of seven. Worse yet, after long overdue imposition of Bagley- Keene rules on the Board, the current President dismissed half the people's elected and appointed regulators to seats in the audience declaring they could not serve their regulatory function under the new rules. Not until the Senate's appointed non-attorney Trustee raised objection was any effort made to identify a legal path for **all** Trustees to resume their principal function. Many other committees of late have had essentially no agenda

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[17]/ Gallagher, *supra*, at 614-615; Abel, *supra*, at 37; Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981).

[18]/ Terence C. Halliday, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT, 350-353 (1987); Gallagher, *supra*, 615.

[19]/ While the majority report provides one view on the *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), without going into a lengthy analysis already presented by others, we do not agree that potential antitrust liability has "largely been resolved" as the majority report concludes. If the Legislature does not de-couple the Bar's regulation from its professional association activities and curtail lawyer control over the regulatory agency, litigation is promised. (*See* Testimony of Center for Public Interest Law dated April 25, 2016.)

items generated by Trustees — only routine items generated by staff. The Bar's most recent annual planning meeting, in the midst of the crises noted above, was rescheduled to allow social interactions with the Chief Justices of California and New York, and allowed for little meaningful planning. **Last year's ambitious (and mandated) strategic planning effort was largely abandoned this year. This institution simply cannot sustain a focus on regulation from year to year.** Over the past two years, the Board has spent far more time in closed session addressing personnel, litigation and real estate issues than it has devoted in open session to regulation.

It is true that under the force of our criticisms in the past year, the Board has made (over vocal dissent) some changes to allow greater participation in RAD meetings and to allow more time for RAD discussion. Yet nothing promises these changes will endure. Indeed, the agreement to allow all but two Trustees to participate in RAD meetings was expressly limited to the term of the current President, which ends in September. Our repeated requests that the Board discuss changes to its committee structure and meeting schedule to address the implications of Bagley-Keene and to better engage Trustees in their responsibilities have been met with silence. The current leadership seems content to leave this task to its successors and that successor leadership seems content to wait until October to address the issue. As a result of this neglect, the Board has had difficulty attaining a quorum at some meetings, has had perfect attendance at none (not even the July meeting at which officers were elected and which has been well-attended in the past). The Bar's most fundamental problem is that – despite an able staff management team – its Board is leaderless, disengaged, and adrift. Indeed, last fall the incoming Audit Committee chair jettisoned the work plan of her predecessor, announcing the committee's work would be driven by staff. While we are dismayed that any committee chair would look to staff to set the agenda, it was profoundly inappropriate for the Audit Committee, the very purpose of which is to ensure staff is held accountable for the handling of public funds. Indeed, recent and older State Audit reports suggest more Board engagement in Bar finances is appropriate, not less, no matter how strong the new management team.

Trustees serve three-year terms and just three lawyer members have sought re-election or reappointment since 2012's SB 163 allowed them to do so. Thus, nearly **a third of the Board turns over each year (six of 18 this September), always including the President and typically including all committee chairs.** When two effective committee chairs from last year tried to address this turn-over by detailing provisional work inventories for their successors this year, their inventories were quickly dismissed — one without public discussion.[20] Rather, the Board turned its focus to this year's President's signature project — an annual habit modeled on the work on voluntary Bars — an effort to persuade the Legislature to invest $50 million annually to fund legal services to poor Californians; a laudable goal, no doubt, but one that need not preclude attention to the Bar's regulatory mission.

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[20]/ One of these inventory items, an overdue 5-year review by the Board to assess State Bar committees to determine if they should continue, is a requirement set forth in the Board's own adopted policies. It was specifically reiterated as critical in a direct email to the 2015–2016 incoming Planning and Budget Committee Chair after it was already listed as an inventory item by the 2014–2015 Planning & Budget Committee Chair. However, it went ignored. This would perhaps be less critical if the Task Force did not itself unanimously recognize the need to perform this function. This is simply one more example of a failure by the Board and its leaders to perform meaningful oversight.

Moreover, **the aspirations of attorney Trustees to attain the coveted title of President of the California State Bar have very destructive consequences.** Would-be Presidents often identify themselves from the moment they are seated as Trustees and begin to compete for an election to be held three years later. **The election season is perpetual**, with a kick-off resolution in March, nominations in May, elections in July, and transition from one President to the next in the fall.

Presidents commonly try to influence the selection of the next and, for decades, the seat has typically been traded off between former presidents of the San Francisco and Los Angeles County Bar Associations. The last President from elsewhere left office a decade ago. The incoming President hails from San Mateo County and was elected with the support and cooperation of the entire "Los Angeles delegation." Indeed, the Los Angeles County Bar Association has regularly trumpeted its association with the Bar's elected leaders to market itself. Bar Presidents appoint all committee chairs, make committee assignments, approve committee agendas, and establish Board agendas. These decisions are often influenced by a desire to advance the prospects of would-be Presidents. Meeting time allotted to a committee reflects how much "air time" a President wishes to grant a would-be President rather than the actual needs of the Committee's work. Thus, the RAD chair becomes a platform from which to run for President rather than an opportunity to lead governance of the Bar's regulatory function. This is reflected in the Task Force recommendation that the Vice-President always chair RAD. The annual planning session, conducted by the Vice-President, is a de facto campaign event and topic selections and moderator assignments have been used to build and maintain a faction and to groom candidates.

The fate of an idea is as often determined by its proponent as by its merit — which may explain current leaders' abandonment of the 2015 strategic plan and the committee work plans from the previous Board year. **Presidential politics produce divisiveness and factionalism that not only distracts from the Bar's regulatory mission, but can work against it, by encouraging Trustees who aspire to leadership to conduct themselves so as to offend no lawyers**. While voluntary bar associations sometimes exhibit these behaviors, we do not think they are typical of other regulatory boards, which operate by consensus and seek to develop leaders and to ensure continuity of leadership. Factionalism reached a particularly high point last July when an outgoing President led a faction to win all three offices of the Board and his successor broke with precedent to exclude from committee leadership (and hence the Executive Committee) every trustee who had voted for his competitor. **This winner-takes-all ethos can only intensify factionalism on the Board.** While both candidates for President this year promised to forswear this behavior, there is no institutional means to enforce that promise in the coming year or as to future Bar leaders. Such Presidential conduct is without consequence – committee appointments can and will be used as a tool of policy rather than of regulatory oversight.

The majority proposes to impose a leadership ladder so that Treasurers necessarily become Vice Presidents and Vice Presidents necessarily become Presidents. We do not see this as a solution. It merely accelerates the election to July of the first year of service of Trustees who would-be Presidents. Thus, the only meaningful leadership election is to be held nine months after these Trustees are seated and before any can have demonstrated any leadership skill. It also gives the officers little incentive to earn their peers respect, as they are guaranteed what may the only thing

they want of Bar service – the title "President of the State Bar." Indeed, some critics argue that recent Presidents have had little desire to accomplish anything once the title "President" was theirs'.

Recently proposed Senate amendments to the fee bill would end elections by placing the choice of the Bar President in the hands of the Chief Justice. This may, indeed, be better than the status quo. However, we fear it will simply conceal Presidential politics in the judicial branch rather than eliminate them entirely. We prefer that the person leading the Board be given the title of "Chair" and be vested with essentially running the Board meetings and business of a regulatory Board – not traveling the State of California making speeches and giving out awards on behalf of what appears to be a state-wide bar association. In this regard, perhaps a better solution would be to require that the Chair be a non-lawyer. Eliminating the professional prize can end the contest for it and the distracting politics associated with it.

AN END TO LAWYER SELF-REGULATION IS INEVITABLE. Twenty-three states already have judicial branch regulation of attorneys (funded by mandatory license fees) separate from thriving voluntary State Bar Associations (funded by voluntary dues), including New York (166,000 attorneys in 2013, larger than California's 163,000), Illinois (62,000), Pennsylvania (50,000), New Jersey (41,000), and Ohio (34,000). Moreover, **there is now a developing trend away from lawyer self-regulation where it had previously existed.** This trend away from lawyer self-regulation has solidly taken hold internationally, including in such countries as Australia, the United Kingdom and virtually all European nations.

Even in States which couple regulation and professional association activities, lawyer self-regulation has come under attack. The Arizona Bar has faced legislation to end lawyer self-regulation in each of the last two years. The Nebraska Supreme Court recently separated regulation from professional association activities. While Nebraska's separation was hasty, poorly managed and caused temporary harm,[21] that is no reason to maintain a unified California State Bar first conceived in the very different world of 1927. Reasons for this trend include not only those noted above, but also antitrust concerns that arise from allowing active market participants to police admission to the marketplace. The recent U.S. Supreme Court ruling against the North Carolina Board of Dental Examiners' effort to preserve the teeth-whitening market for licensed dentists sparked voices in California who assert an end to lawyer self-regulation is required by antitrust laws. Whether or not they are right, **litigation can be expected if California does not voluntarily end lawyer self-regulation**. We see no reason to fight the trend and many reasons to join it.

A BETTER PROFESSIONAL ASSOCIATION. Nor is the Bar effective as a professional association, despite the attention its Board pays to those subjects. Its voluntary Sections — which produce valuable intellectual content to educate the profession and the public, to assist this Legislature, and to ennoble the profession — are in crisis. They are rapidly reaching the point where they can no longer afford the Bar's very high overhead and they are finding the demands of the Bagley-Keene Open Meeting Act an obstacle to volunteerism and efficient operations. The

[21]/ There is no reason access to justice will be harmed by deunification in California as Nebraska's Executive Director testified was the temporary outcome there. *See* Appendix N. Our recommendations do not interfere with continuation of Bar fee statement provisions for a voluntary donation of access to justice programs.

Bar's current leadership have asked the Sections to make a show of public protection efforts in their work as a tactic to defend the status quo, diverting the professional association from its own core mission and creating more overlap and conflict in the Bar's management structures. Indeed, the Bar's organization chart is more akin to an electron cloud than any coherent management structure. It is the product of myriad political battles past rather than concerted management leadership. Indeed, the Nebraska State Bar's Executive Director's testimony to the Task Force demonstrated that even that State's transition has benefited the professional association. It is already a stronger advocate and membership association for the profession even in the initial period following a traumatic, abrupt and unplanned transition.

We cannot support allowing a government agency to operate outside public view, but also see no need for a voluntary professional association to bear the burdens of Bagley-Keene and the Public Records Act. Legal restrictions on the Bar rooted in the First Amendment and expressed in the *Keller* and *Brosterhous* cases have emasculated the Bar as an advocate for the profession. To cite but one recent example, when the Legislature recently debated SB 8 to extend sales taxes to services, CPAs and other professionals came out in force to express their views, defend their professions and advocate for their clients. Lawyers were silent. **The existence of the Bar as a mandatory state-wide professional association silences other voices of the profession and the First Amendment silences the California State Bar**.

The lack of an effective state-wide professional association has consequences for California. It means less effective advocacy for a well-funded judiciary and legal services. It serves to undermine — not protect — judicial independence. **A private professional association would be a better champion of these values than a state agency hemmed in by the most conservative perspective on what and how it can advocate**. It is the California Teachers Association and other private education advocates, not any State agency, which most forcefully advocate for education in our State. The Bar is but a poor shadow of these. For example, workers compensation judges and lawyers associated with the Workers Compensation Section of the Bar do excellent work in identifying appellate decisions which should be published to guide future cases. They cannot file requests for publication in the name of the State Bar because the time required for Board review and approval (to ensure the decisions neither are, nor appear to be, pro-labor or pro-management) means they cannot meet short court deadlines for such requests. Thus, they must forego their official connection with the Bar to do their work.

Similarly, **Prop. 209's prohibition on state-funded affirmative action has hampered the Bar's ability to advocate for diversity in the profession and for full and fair access to justice for communities of color**. Indeed, the Bar recently ended its legal relationship with the California State Bar Foundation under a threat of suit for precisely this reason.

Still further, the Political Reform Act of 1974, Government Code section 1090 and other **conflict of interest laws silence important voices a professional association should empower**. For example, leaders of legal aid organizations like Public Counsel and Bet Tzedek who serve on the Bar Board are obliged to leave the room when issues affecting such organizations are discussed. A private association can give a seat at the table to such vital contributors to the legal profession.

Finally, the very dysfunction of the Bar undermines the important projects it should advance. Important funding for legal services to the poor are at risk if the Bar's fee bill does not timely

reach the Governor's desk next month because such funding is collected through the Bar dues statement. No one seriously suggests that vital funding should be impaired. But **tied to the Bar's problematic governance system, legal services are periodically at risk**. They need not be. Let go the dysfunctional status quo and seek a better future on the path other states have well trodden.

PROPOSAL FOR REFORM.[22] So, what specifically do we propose? In short, we propose change now, over a reasoned planning horizon rather than to further delay and study until the "heat is off." The time for the hard blacksmithing of government reform is when the fires are hot, not when the forge is cold.

First, we do not recommend haste or that the Legislature fail to solicit input from its partners in regulating the Bar — the Chief Justice and Supreme Court, and the Governor. **We recommend a three-year process, led by the Bar itself, with input from five Trustees appointed by the Supreme Court and as many as four appointed by the Governor, to design and achieve separation.** Which functions belong in government and which can more effectively be performed by a private entity are questions worthy of thorough discussion.[23] Let the Bar study this in 2017 and makes recommendations for legislation in 2018. Moreover, these ideas have been debated since before the 1927 adoption of the State Bar Act and legislation has been proposed repeatedly over the years, including a 1996 proposal of then-Senator (and subsequently Judge) Quentin Kopp from which our proposal draws. Thus, there is nothing hasty about these proposals.

The Legislature should mandate some points. First, the State Bar's proposal should ensure that **no job losses** result from separation of the Bar's two missions. Dysfunction at the Bar is not the fault of its line employees and they should not bear the burden of fixing it. While we expect decoupling to achieve efficiencies and to lower the cost of professional association activities, the Bar's regulatory functions are understaffed. Second, there should be **an explicit commitment to a larger role for the Supreme Court in Bar oversight**. This means a larger share of seats (4 of 13 as compared to the present 5 of 20), a separation plan prepared with involvement of the Court's five appointees, and more express obligations that the Bar report to the Supreme Court.

Our proposal invites **input from the Governor**, too. There is a role for his current appointees to the Board and for those he might appoint to two vacant seats.

We recommend changes to achieve a **more stable Board** with less turnover and more ability to sustain focus on regulation. We call for longer terms, opportunity for multiple terms, a smaller,[24] more collegial Board. The presidency would be eliminated and the office replaced by a chair and vice-chair together with an end to signature projects of each new President. We seek **a more**

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[22]/ Appendix K.

[23]/ The Center for Public Interest Law proposed a breakdown of functions to the Task Force by letter dated May 10, 2016 to Executive Director Elizabeth Parker. *See* Appendix O. We express no views on that proposal but instead suggest the division be studied with care and implemented with deliberation. The hasty division in Nebraska was unwise and need not be repeated in California.

[24]/ Best practices suggest boards of 10 to 15 members. *See e.g.*, Daniel Suhr, *Right Sizing Board Governance*, Hasting Law Journal (2012).

potent professional association on the model of the California Medical Association, which has thrived since the Legislature de-coupled regulation from advocacy for that profession. Our proposal requires the Bar to collect the private association's dues via its annual invoices from those who do not opt out; forbids the Bar to compete with the education functions of the Sections; transfers intellectual property, reserve funds, and other assets; and empowers the association to enhance the image of the profession. It allows the professional association to use the name "California State Bar Association" while having the regulatory functions fall under the "Legal Services Regulatory Board." Attorneys will pay an annual "license fee" rather than "dues." Our proposal also requires the Bar to establish a voluntarily funded loan forgiveness program to encourage new lawyers to practice in underserved communities.

RESISTANCE TO REFORM. We feel compelled to comment on what appears to be continuing political resistance to meaningful reform of the Bar even in the face of a management staff that has clearly identified the need for reform. **Because of the hybrid nature of the oversight of the Bar, responsibility and accountability for governance reform are diffuse.** Legislative leaders are reluctant to encroach too deeply into systemic change at the Bar if the Supreme Court appears to oppose – or even if its position on a proposal is ambiguous. The Supreme Court appears to resist calls such as ours for deunification or other, less ambitious legislative proposals for reform, citing separation of powers sensitivities. Yet, in any of our memories, the Court has never directed or even suggested that the Bar make a single change in its governance. As far as we know, the Court has never asked the Legislature to collaborate on an initiative for reform of any kind.

With respect, we call on the Court to step up its oversight of the Bar or plainly get out of the way so that others may do so more effectively. We understand the Court has important institutional limitations on its ability to oversee the Bar – it must maintain the substance and appearance of neutrality on matters which may well come before it – as a consistent percentage of Bar matters necessarily do. In our view, the institutional integrity of our highest Court is disserved by the status quo as it, too, is tarred by every controversy at the Bar. But the Court also has few effective means to prevent such controversies. Indeed, the Chief Justice herself was drawn into the latest employment controversy at the Bar and her comments to the investigative attorneys (a firm which itself appears in her Court) appear in their report and are discussed in the press. The Court will benefit from reduced controversy at the Bar and a better managed, more focused organization that does not have ample professional association obligations with which the Court should not be associated. The Court cannot comment on the application of sales taxes to lawyers' bills, but lawyers certainly have a right to be heard on that question. It is our desire to **remove our Supreme Court from the danger zone while maintaining appropriate judicial oversight** of regulation.

CONCLUSION

We respect the voices for the status quo. Change is always difficult and demands justification. However, failure to change will not help a Bar mired in crisis, the legal profession or Californians. Every other profession in California is regulated by a body separate from its professional association, and three have public-member majorities. We admire the work of the Bar's current management staff and acknowledge some helpful responses of current Board

leadership to our criticisms. However, we see no promise these changes will be maintained and many reasons to believe the Board will backslide when the pressure for reform abates. While current staff leaders commitment to a well-managed Bar is plain, no one should stake the future of an important government agency on the career plans of one able management team. History is the best lesson in that regard. Californians deserve a Bar structured for success, rather than a gamble on staffing arrangements that may change. Indeed, without better support for management from the Board, that gamble may be a poor one.

The only way to ensure that the distracted regulators at the Bar maintain attention to attorneys who abuse the public trust is to unburden them of their inordinate preoccupation with the internecine politics of their trade association. Put those functions in the private sector where they belong.

The shared responsibility of both the majority and minority in filing these reports is, ostensibly, to inform the deliberations around the annual fee bill. It is our view that the majority report raises important questions but fails to make meaningful recommendations for reform.

We have endeavored to present unequivocally the only path we believe will lead to systemic reform and permit the Bar to become an effective regulatory agency singularly focused on public protection as it should be narrowly defined to exclude professional association activities. In doing so, we reflect the opinions of many other long time observers of the Bar.

We are frustrated, however, to note that we release this report to oversight authorities during the last month of the legislative session in an environment that does not appear to bode well for our suggested remedy or perhaps for any other major substantive change.

In an article in The Recorder dated July 29, 2016, reporter Cheryl Miller describes the scene as follows:

> "Assembly members are pushing to give nonlawyers a greater role on the bar's board of trustees and for the creation of an enforcement monitor to oversee discipline. The Senate remains allied with the [C]hief [J]ustice and her desire to maintain Supreme Court oversight of the agency.
>
> Negotiators will have their hands full trying to reach an agreement that doesn't leave bad feelings between two branches of California's government."

While we do not pretend to be fully aware of the actual positions of these bodies or the status of any negotiations between or among them, we do strongly believe that the time has long since come for the Legislature and the Court to finally end the ambiguities of turf and responsibility the majority report so candidly describes and to collaborate on a systemic solution to a systemic problem. Of this we are certain. We do not need yet another study, be it by a commission, a special master or an auditor. The issues have been studied and pondered for years to no perceivable end.

What is needed now is leadership and action on behalf of the public.

We are not content with the status quo. We foresee a more effective regulator of legal services to Californians and a more potent and less costly professional association for lawyers – but only if forces resistant to change are led forcefully to prioritizing the public interest over all other preoccupations.

Respectfully,

/s/ Dennis Mangers

Dennis Mangers
Trustee
Senate Appointed, Public Non-Attorney Member

/s/ Joanna R. Mendoza

Joanna R. Mendoza
Trustee
Elected Member, 3rd District