

# Full Statement By Trustee Mendoza in Support of Reform Proposal – 4/4/16

President Pasternak, Fellow Members of the Task Force, Executive Director Parker, State Bar Staff, and Honored Guests:

## **I. Introduction**

Dennis Mangers and I do not come to this Task Force today presenting this proposal casually. There have been countless hours of research regarding other states, the history of our own State Bar and previous attempts at governance reform, multiple meetings, various drafts and concepts, and a lot of listening. In addition, brought to bear on this proposal is the experience of those who have served on the Board of Trustees and are aware of its weaknesses as an oversight Board.

## **II. 2011 Governance Task Force Majority – No De-Unification**

In May 2011 the majority report of the State Bar Governance Task Force argued against de-unification and against change in the governance of the State Bar, stating that we should “retain the existing unified structure of the Bar, while improving it.” The majority urged the continuing work of the State Bar in all areas rather than focusing on the regulatory functions as urged by the minority report.

While we witnessed legislative reform of *Board* governance in 2011, it was a compromise that relied upon the belief that improvement at the *organizational* level would follow. Since 2011, however, very little, if anything, appears to have been improved. Instead, the State Bar has been mired in ongoing scandal and controversy, embarrassing personnel matters and headline grabbing litigation. Presidential politics at the Board level provide the optics that the Board may not be putting public protection before personal interests. The Legislature imposed Bagley-Keene and the California Public Records Act upon the State Bar after yet another critical audit from the State Auditor and inadequate transparency efforts. Important questions remain whether the State Bar is adequately regulating discipline or handling claims that come in regarding the unauthorized practice of law.

## **III. The Time Has Come to Liberate the Sections From the State Bar**

Let me address specifically the issues facing the Sections.

### **A. De-Unification: Best Interest of the Sections**

As many of you know, I came to my position on this Board by way of the Sections. Over a ten-year period I served on a Section Executive Committee, as an officer and Chair of a Section, as a Section Advisor, and as an officer and Co-Chair on the Council of State Bar Sections. I know the Sections well, and I am more familiar than most with all the wonderful content they generate and the many volunteer activities in which they engage for the benefit of our profession and the public. The Sections generate the majority of the MCLE, publications, webinars, legislation and legislative commentary that comes from the State Bar.

I have a great interest in seeing the Sections not just survive, but to thrive. I have demonstrated my support of the Sections and urged others to appreciate what they do since I joined the Board

of Trustees in 2013. I have worked hard to familiarize the Board with the work of the Sections and to open up regular communications between the Board and the Sections, including the report by the Council of Sections. I have urged my fellow Board members to be active liaisons to their assigned Sections and have led by example for every liaison appointment I have been given. I hope, therefore, that when I take on a position with respect to the Sections, the Sections are confident that I do so because I firmly believe that it is in the best interest of the Sections.

## **B. The Overhead Allocation and Other On-Going Issues**

Never before has the ongoing survival of the Sections been so threatened. Since the *Keller* and *Brosterhous* cases, the overhead allocation charged to the Sections has grown from 25% of their budget to nearly 67% and sometimes more. Because we are a government agency, and since the Sections are a part of the agency, we are required to charge their share of the overhead of the entire agency. This charge includes such costs as the audit by the State Auditor which the State Bar must pay, which is roughly \$½ million each time there is an audit. By statute that audit happens every other year, although this year we are being audited in between the bi-annual audits. If the Sections were not affiliated with the regulatory agency they could be paying fair market rent instead of the much higher cost associated with a building they will never own. Such is the price the Sections pay for being affiliated with a regulatory agency. These charges are not overhead costs the Sections would ever have to pay if they were liberated and, instead, were part of a separate, voluntary trade association.

There have been other issues faced by the Sections over the years, all of which have been associated with being a part of a government agency. They have lost all access to staff services for months at a time. They suffered significant website issues and loss of access to content. There have been severe social media limitations. Sections do not have the ability to publish on Westlaw or Lexis due to contract issues. They are subject to government procurement rules and restrictions regarding their use of vendors and contracting, as well as strict government travel and expense reimbursement rules. The Bar has prohibited the Sections from emailing and mailing anyone who is not a member of that Section, making it inordinately difficult to grow membership in the Sections. These are just some examples that I know have plagued the Sections and prevent them from growing their membership and thriving as they should.

I do not want this to be viewed as anything but the most positive commentary upon the amazing staff that work for Sections and Education, with whom I have had a very long and wonderful relationship over the years. I have seen them work incredibly long hours and deal with some not so pleasant and demanding personalities. They are themselves limited by the State Bar organization and structure within which we all must operate and which rules we all must follow. They often bear the brunt of frustrations expressed by those in the Sections who do not understand that the Sections, all of which are operated with voluntary dues, are essentially a square peg being hammered into a round hole. It takes a long time and a great deal of patience for our Section volunteers to understand they are working within a government agency but it makes little sense.

### **C. Bagley-Keene Brings Transparency and the Catalyst for Reform**

The imposition of Bagley-Keene, effective as of April 1<sup>st</sup>, has a new and significant impact on the Sections. I welcome the combined application of Bagley-Keene and the Public Records Act, and the new transparency that I hope it brings to the State Bar. The State Bar, however, is essentially a regulatory agency and, unless specifically excepted, all parts associated with the State Bar are required to comply with the laws applicable to it. We cannot make an exception for one part of our agency because of inconvenience when the entire agency needs to adopt and embrace transparency. More importantly, the message has been made rather clear that we should expect no relief from the legislature in the form of Bagley-Keene exceptions.

The incompatibility lies with how Sections do their business. No one would dispute that Sections generate significant educational material and content such as in-person MCLE conferences, MCLE webinars, publications and treatises, e-news, legislation, opinion letters, and so forth. They are able to perform what can only be described as a herculean effort by way of multiple subcommittees, interest groups, editorial boards and similar groups that accomplish their business by way of numerous telephone calls and emails during the course of each year. The larger the Section, the larger the number of these affected bodies and the more difficult, and in many cases impossible, it will be to continue to generate content in affiliation with the regulatory agency.

I am fully aware that some affected bodies have decided to stop all work as a result of the imposition of Bagley-Keene. Some have created 2-person advisory committees that do not fall under Bagley-Keene in an effort to replace subcommittees and editorial boards. By doing this the Sections will be relying upon a whole new paradigm of volunteerism that prohibits individuals from listing any type of title or position beyond being a mere “member” of that Section. Frankly, the only thing of any value that the Sections could previously provide to their volunteers was a title to put on a resume to recognize their effort and an occasional free meal and limited travel reimbursement. I am also aware of no publication of significance published regularly by the Sections that can be done by only two editors who have no authority to delegate. It is difficult to imagine a multi-day conference put together by 2 people, but it is just as difficult to imagine it put together by way of only 10-day advance noticed meetings, when those attending by phone may only call in from an ADA compliant location, which they had to identify and include on the notice 10 days earlier.

I am also aware that a 501c(6) association has already been created for the purpose of allowing some Section work to continue outside of the organization since Bagley-Keene is totally incompatible with how certain tasks are performed. Unless there is full cooperation between the State Bar and the individuals working within that association, however, there is no guarantee that this will serve as an adequate substitute until reform can be adopted.

The application of Bagley-Keene has made the ability to do business for our largest and most productive Sections unworkable. If some Sections have not realized it fully yet, I expect it will not take long. Being on the Board of Trustees I have operated under open meeting rules for 3 years now, and I am fully aware of the restrictions imposed. Knowing how a large Section operates and listening over the last few months to the many concerns, I cannot see a meaningful

way forward for the Sections unless they separate themselves from the regulatory agency, assuming that they receive their reserves, their intellectual property and content, and preferably the right to continue to have dues collected on the State Bar annual invoice at least until the voluntary trade association is firmly established.

#### **IV. Conclusion**

When I think of the California State Bar, especially over the last several decades, I think of the famous quote often credited to Albert Einstein, “The definition of insanity is doing the same thing over and over again, but expecting different results.”

Are we really so insane that we think we can do better without real change?

Thus, I have come to these conclusions:

1. We need to change how the California State Bar operates in a meaningful way;
2. For public protection it is necessary to retain a regulatory agency and charge a mandatory licensing fee. This agency should remain under the Supreme Court’s oversight and should focus solely on regulatory functions;
3. That regulatory agency will need to be poised for regulating legal services and legal service providers beyond the limited world of lawyers and law firms in this new millennium;
4. Being aware of governing board attorneys taking positions which were protectionist of their profession or practice area rather than in the best interest of public protection as their fiduciary duty requires of them, I support having a majority non-attorney member governing Board;
5. The Sections need to be fairly liberated from the regulatory agency while they have the reserves to build a strong foundation for a state-wide professional association; and
6. Attorneys in this state expect to receive benefits and focus from the entity that regulates them because they do not understand what the State Bar is or what it does, and this reform not only makes this separation more clear, it will provide the attorneys and the public of the State with entities properly focused on their needs.

We are facing a time like no other, with newly imposed laws (Bagley-Keene and the Public Records Act), cases (*North Carolina State Board of Dental Examiners*), and circumstances (an ever-increasing overhead allocation) all threatening the very existence of the Sections like never before.

The status quo is no longer an acceptable position as was urged by the majority of the Governance Task Force in 2011. That position has not worked to improve the State Bar as was the plan of the majority in the 2011 report.

It is time to make meaningful changes that give the regulatory organization a fighting chance, and an opportunity to liberate the Sections and all other trade association functions so that they do not just survive, but to thrive and to build an effective statewide professional association for the future of the California legal profession.