

AGENDA ITEM

MARCH 126
Chief Trial Counsel
Appointment Process

DATE: February 23, 2009

TO: Members, Board Operations Committee
Members, Regulation, Admissions & Discipline Committee
Members, Board of Governors

FROM: Robert A. Hawley, Deputy Executive Director

SUBJECT: Chief Trial Counsel Appointment/Reappointment Process

EXECUTIVE SUMMARY

A timetable and procedure for conducting the Chief Trial Counsel's (CTC) request for reappointment are set forth below. By pre-existing Board action, the Regulation, Admissions & Discipline (RAD) Committee conducts the annual evaluation of the CTC in accordance with the criteria and process previously adopted and reports to the Board Operations Committee. This year, the evaluation process is converted into a consideration of the CTC's request for reappointment to another 4-year term. This item is before the Board to confirm the process for the CTC appointment process. If you have questions, please call Robert Hawley at 415-538-2277 or Robert.Hawley@calbar.ca.gov.

I. CHIEF TRIAL COUNSEL APPOINTMENT/REAPPOINTMENT PROCESS

A. The Authorities

Under Business & Professions Code Section 6079.5, the Board appoints the Chief Trial Counsel (CTC) who serves a term of four years. The Board has delegated to the Executive Director the selection of the CTC, which is then acted upon by the Board. The appointment is subject to the confirmation of the State Senate. The CTC, by statute, reports to the discipline system oversight committee of the Board and, in connection with the exercise of prosecutorial discretion, does not report to the Executive Director.¹ (See, Board Book, Tab 18 [Staffing], Article 2 [Chief Trial Counsel], Attachment 1 Business & Professions Code Section 6079.5, Attachment 2). The discipline system oversight committee is currently the Board Committee on Regulation, Admissions and Discipline (RAD).

¹ Consistent with statutory authority, the Chief Trial Counsel (CTC) reports to the discipline committee and is independent of the Executive Director with respect to the exercise of the CTC's prosecutorial discretion. The CTC is subject to the Executive Director's administration of personnel, budget, and facilities support functions, which the Executive Director executes in conformity with Board policy.

At the recommendation of the Executive Director, because of the uniqueness of the CTC position, the Board, through RAD and the Board Operations Committee (BOps), has undertaken the responsibility for conducting the CTC's evaluation. Recognizing the Executive Director's institutional role in selecting the CTC, the CTC's role as a senior member of the Executive Director's management team, and the responsibility of the Executive Director for institutional administration of personnel, budget, and facilities support functions of the State Bar as a whole, including the Office of the Chief Trial Counsel, the Executive Director sits as a member of the evaluation committee in connection with the CTC's review. (See, Board Book, Tab 18 [Staffing], Article 2 [Chief Trial Counsel], Attachment 1). The CTC's salary and salary adjustments are determined by the Executive Director. The Executive Director takes into consideration the performance evaluation conducted through this process in adjusting the CTC's salary in October when Executive Staff salary adjustments are made at the discretion of the Executive Director.

The CTC serves a four-year term, subject to reappointment. (Business & Professions Code Section 6079.5, Attachment 2). The incumbent CTC's first term expires in May 2009. The incumbent, Scott Drexel, has advised the Executive Director and RAD that he intends to seek reappointment for a second four-year term. Consistent with the Executive Director's role in the process (See, Board Book, Tab 18 [Staffing], Article 2 [Chief Trial Counsel], Attachment 1), the Executive Director is prepared to recommend to RAD and the Board that his reappointment be considered, subject to public input on reappointment.

Assuming that there is consensus that reappointment is appropriate, the State Bar will not engage in an active recruitment search for a successor. Thus, the process set forth here is the process for the Executive Director, RAD and the Board to determine whether or not the incumbent CTC will be reappointed or whether a recruitment process will be undertaken for the 2009-2013 term.

It is recommended that the criteria for evaluating the CTC's request for reappointment be the annual evaluation reports that have been made by RAD for the past three years. These reports are available to all RAD and Board members. The standard for reappointment that is recommended here is whether there is a material and substantive reason not to reappoint in light of the evaluations received by the CTC to date. Due to the public nature of the position and its accountability to the Legislature through the confirmation process, it is also appropriate for reappointment to be open to public input and comment and for this comment to be considered in determining reappointment. Thus, assuming consensus on this approach, following the March meeting, a public announcement will be made that reappointment is being considered, and public comment will be sought. This will be evaluated at the May Board meeting, at which reappointment will be finalized or another direction taken.

B. Timeline

The following timetable is proposed for evaluating reappointment:

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|-------------|--|
| March 5 – 6 | Board adopts timetable, standards and process governing the selection of the Chief Trial Counsel for the 2009 - 2013 term. |
| | The request of the incumbent CTC for reappointment is officially acknowledged. The Executive Director announces that she |

supports reappointment at this stage, based on past performance, subject to further input once reappointment is open for public comment.

March 9 –
April 13

The consideration being given reappointment is announced publicly and input sought from relevant constituencies.

April 14 –
April 30

RAD and the ED evaluate the public input and formulate a recommendation to the Board. RAD meetings are held as appropriate.

May 1 –
May 8

Due diligence is completed on reappointment including Legislative vetting.

May 8

A recommendation on reappointment is made by the ED and RAD and reported to the incumbent. A report is prepared for the Board.

May 14-15

Reappointment is approved by the Board of Governors and the incumbent is forwarded to the Legislature for confirmation

Or

A recruitment process is commenced by the ED in coordination with RAD. The ED appoints an interim CTC to act until a successor is selected.

II. PROCEDURE

All communications pertaining to the evaluation of the incumbent CTC for reappointment process are strictly confidential. The Board Book, Tab 18 [Staffing], Article 1 [Executive Director], Section 9 [The Executive Director's Annual Performance Evaluation], Article 2 [Chief Trial Counsel] provides in this regard:

“The meetings of the committee and all information obtained in the course of the evaluation proceedings shall be confidential, and shall not be disclosed except as otherwise provided herein. Sufficient disclosure shall be made to the evaluatee on request to assure a full and fair opportunity to respond to evaluation material, except that the identity of the persons providing evaluation material shall not be disclosed.”

The RAD and the Board should strictly adhere to this confidentiality requirement.

The Regulation, Admissions & Discipline Committee is chaired by the RAD Chair in conducting the CTC's reappointment process. The Executive Director sits as a full member of RAD during the CTC process, and is responsible for bringing the ED's selection to RAD for endorsement to the Board for the position.

The Office of Human Resources, under the Direction of the Deputy Executive Director, has staffed and provided administrative assistance in conducting the Executive Director's and CTC's reviews in the past, subject to strict confidentiality requirements. The Office of Human Resources is available to the BOps and RAD Committees for this purpose in connection with this year's process as well.

III. FISCAL AND/OR PERSONNEL IMPACT

Any fiscal or personnel impact is within existing budget and policy standards.

IV. BOARD BOOK ADMINISTRATIVE MANUAL IMPACT

The Resolution suspends any Board adopted rules that are inconsistent with the resolution.

V. RECOMMENDATION AND RESOLUTION

Assuming the above meets with the approval of the Board and its Operations and Regulation, Admissions & Discipline Committees, it will serve as the procedure for the appointment/reappointment process for the Chief Trial Counsel. Assuming this procedure is acceptable, the following resolution is recommended:

RESOLVED, that the Board Operations Committee and Board Regulation, Admissions & Discipline Committee recommend, and the Board of Governors approves, the appointment/reappointment process for the Chief Trial Counsel for the 2009-2013 term consistent with the item before the Board Committees and Board this date; and it is

FURTHER RESOLVED, that the Regulation, Admissions & Discipline Committee be chaired by the Regulation, Admissions & Discipline Chair in conducting the Chief Trial Counsel's appointment/reappointment process; and it is

FURTHER RESOLVED, any Board adopted procedures inconsistent with this resolution are suspended, pending further Board action.

Attachment 1

Board Book, Tab 18 [Staffing], Article 2 [Chief Trial Counsel]

CHIEF TRIAL COUNSEL

Section 1 Relationship with the Executive Director

The executive director shall bring his or her choice for Chief Trial Counsel (subject to Senate confirmation) to the board for approval. The Chief Trial Counsel shall report to the Board of Governors discipline system oversight committee consistent with Business & Professions Code Section 6079.5 on substantive issues pertaining to the discipline enforcement system. The Chief Trial Counsel and the Office of the Chief Trial Counsel shall otherwise be subject to the executive and administrative authority of the Executive Director in like manner as other executive staff.

(Source: Board of Governors' Resolution, May 20, 1997, March 2002, March 2003, March 2004, Business and Professions Code 6079.1)

Section 2 Appointment, Term, Qualifications

The rules governing the appointment, the term, and the qualifications of the chief trial counsel are described in Business & Professions Code section 6079.5(a)(b) (see State Bar Act, Appendix 3e).

(Source: Bus. & Prof. Code, §6079.5 (a) and (b).)

Section 3 The Chief Trial Counsel's Annual Performance Evaluation

Under Board policy, the Executive Director is responsible for evaluating the performance of all State Bar staff. The Chief Trial Counsel position is unique. Under Business & Professions Code Section 6079.5, the Board appoints the Chief Trial Counsel who serves for a term of four years. The Board has delegated to the Executive Director the selection of the Chief Trial Counsel which is then acted upon by the Board. The appointment is subject to the confirmation of the State Senate. The Chief Trial Counsel, by statute, reports to the discipline system oversight committee on the Board and, in connection with the exercise of prosecutorial discretion, does not report to the Executive Director.⁴

At the recommendation of the Executive Director, because of the uniqueness of the Chief Trial Counsel position, the Board, through its discipline oversight and Board Operations Committees, has undertaken the responsibilities for conducting the Chief Trial Counsel's evaluation. Recognizing the Executive Director's institutional role in selecting the Chief Trial Counsel, the Chief Trial Counsel's role as a senior member of the Executive Director's management team, and the

⁴ Consistent with statutory authority, the Chief Trial Counsel reports to the discipline system oversight committee and is independent of the Executive Director with respect to the exercise of the Chief Trial Counsel's prosecutorial discretion. The Chief Trial Counsel is subject to the Executive Director's administration of personnel, budget, and facilities support functions which the Executive Director executes in conformity with Board policy.

responsibility of the Executive Director for institutional oversight and administration of personnel, budget, and facilities support functions of the State Bar as a whole, including the Office of the Chief Trial Counsel, the Executive Director sits as a member of the Board Committee on Operations in connection with the Chief Trial Counsel's review. The Chair of the Board Committee on Regulation, Admissions & Discipline chairs the review committee.

(a) Evaluation Criteria

The Chief Trial Counsel's evaluation is conducted based on performance criteria and competencies and on goals and objectives set by the designated Board Committee. The Designate Board Committee annually sets the Chief Trial Counsel's performance targets and annually evaluates progress in achieving these targets. The performance criteria and competencies for evaluation include: job skills, technology proficiency, quality performance, quality of work, leadership, teamwork and collaboration, public protection commitment, communication, fiscal accountability, compliance with policies and procedures, strategic perspective/planning, managing change, managing and developing period, interpersonal/conflict resolution skills, valuing diversity;

(b) Confidentiality

The meetings of the designated Board Committee and all information obtained in the course of the evaluation shall be confidential and shall not be disclosed except as otherwise provided in this article. Sufficient disclosure shall be made to the Chief Trial Counsel to assure a full opportunity to respond to evaluation material. The identity of the persons providing evaluation material shall not be disclosed.

(c) Timetable and Procedures

Each year, the Board sets the timetable and procedures for conducting the Chief Trial Counsel's annual performance evaluation. The committee shall meet with the Executive Director as soon as practical in the board year to discuss the performance standards, goals, procedures and timetable. The Board Committee shall set the procedures and meetings during the board year to assure a full and fair evaluation, and shall present its report to the Board in executive session at the July meeting.

(Source: Board of Governor's Resolution, March 2002, March 2003, March 2004).

Attachment 2

§6079.5 Chief Trial Counsel; Appointment; Term; Qualifications

- (a) The board shall appoint a lawyer admitted to practice in California to serve as chief trial counsel. He or she shall be appointed for a term of four years and may be reappointed for additional four-year periods. He or she shall serve at the pleasure of the board. He or she shall not engage in private practice. The State Bar shall notify the Senate Rules Committee and the Senate and Assembly Judiciary Committees within seven days of the dismissal or hiring of a chief trial counsel.

The appointment of the Chief Trial Counsel is subject to confirmation by the Senate, and the time limits prescribed in Section 1774 of the Government Code for Senate confirmation and for service in office are applicable to the appointment.

He or she shall report to and serve under the Regulation, Admissions, and Discipline Oversight Committee of the Board of Governors of the State Bar or its successor committee on attorney discipline, and shall not serve under the direction of the chief executive officer.

- (b) The chief trial counsel shall have the following qualifications:

- (1) Be an attorney licensed to practice in the State of California, be in good standing and shall not have committed any disciplinary offenses in California or any other jurisdiction.
- (2) Have a minimum of five years of experience in the practice of law, including trial experience, with law practice in broad areas of the law.
- (3) Have a minimum of two years of prosecutorial experience or similar experience in administrative agency proceedings or disciplinary agencies.
- (4) Have a minimum of two years of experience in an administrative role, overseeing staff functions.

The board may except an appointee from any of the above qualifications for good cause upon a determination of necessity to obtain the most qualified person.

On or after July 1, 1987, the chief trial counsel may, as prescribed by the Supreme Court, petition the court for a different disposition of a matter than the recommendations of the review department or the board to the court. (Added by Stats. 1986, ch. 1114. Amended by Stats. 2002, ch. 415, effective September 9, 2002)