

***Governance in the Public Interest Task Force***

The Governance in the Public Interest Task Force (the “Task Force”) has heard testimony and received written submissions from a broad variety of witnesses.

The comments, and suggestions, fall into the following general categories:

***“Perception”***

There is a perception that the current composition of the Board does not put the public interest at the top of the list in the board’s governance of lawyers.

This is largely reflected in a sense, another perception, that the election of lawyers makes the elected Board members beholden to their “constituencies,” the lawyers as well as the local bar organizations that elected them.

These perceptions, outlined in the legislation establishing the Task Force, require greater thoughtful analysis and response than this brief discussion outline can give.

The record before the Task Force, however, does not substantiate any meaningful evidence, as opposed to anecdote and, again, “perception” that the method of selecting Board members does not serve the public interest.

There are those who believe, essentially on a doctrinal or philosophical basis, that (a) the integrated bar should be abolished and/or (b) the disciplinary function should be overseen by a board comprised largely, if not entirely, by non-lawyers. We respectfully submit that they offer no meaningful evidentiary support for why, or how, this would better protect the public or serve the public interest.

We also respectfully submit that the record, and reflection, indicate that there are ways that the Board structure, method of selection and method of operation might be improved to better serve the public interest.

The following is a proposed outline for discussion purposes.

***Serving the Public Interest***

The Bar’s primary, overarching method of serving the public interest is in regulating the 225,000 lawyers who are admitted to practice in California.

This falls into three main categories: (1) making sure that lawyers who are admitted to practice have the necessary basic competence to do so; (2) making sure that lawyers continue to have the competence to do so; and (3) disciplining (including disbarring) lawyers who do not have the necessary competence or fail to comply with their ethical and legal obligations to the detriment of their clients, the profession and the public at large.

There are three other major ways the Bar serves the public interest. First, by overseeing the Judicial Nominees Evaluation Commission (“JNE”) and other appointments related to the judiciary and the practice of law. Second, by fostering pro bono and public interest law to serve the under-served. Third, by advancing the profession and the interests of the public through continuing legal education and outreach to both lawyers and the public.

***Regulation of lawyers***

The regulation of lawyers is done through two principal mechanisms.

First, the Board of Bar Examiners measures the competence and ethical and moral characteristics of applicants for the bar.

Second, the office of the Chief Trial Counsel, along with the State Bar Court, oversees and administers the system of disciplinary oversight of lawyers.

***Advancing the profession and serving the public interest***

The State Bar serves as the umbrella organization for a large variety of sub-organizations that advance the profession and serve the public interest.

They include the JNE Commission and other State Bar commissions and organizations.

They include the numerous practice sections.

They also include providing numerous services to assist lawyers, including professional liability, health and other insurance programs.

And they include programs to provide legal services to people who otherwise might not be able to obtain them.

As one of the task force members has written, “[m]any of the state bar activities conducted for the benefit of the public are functioning because of the enthusiastic involvement of those attorneys who also care about public protection. Attorneys, in other words, feel a part of the State Bar. Should they be divested of any leadership selection then the potential for a future withdrawal of volunteer commitment may occur.”

***The State Bar’s Role as an Organ of the Judicial Branch***

In overseeing the admission and regulation of lawyers, the State Bar serves as an arm of the Supreme Court. As articulated in *In re Attorney Discipline Syst.*, 19 Cal.4<sup>th</sup> 582 (1998), the State Bar is organized in the judicial article of the California Constitution.

Lawyers who are admitted to practice through the Bar’s admissions process are sworn in as officers of the court. They are required to adhere to a disciplinary and ethical code that

is approved and sanctioned by the Supreme Court. Disciplinary actions of the State Bar Court are ultimately reviewed by the Supreme Court, which has the inherent power to discipline lawyers. *In re Attorney Discipline Syst.*, 19 Cal.4<sup>th</sup> at 592.

It is that key role as an organ of the Supreme Court that sets the State Bar apart from other administrative regulatory bodies in the State. It is also that key role that cautions against having less than a majority of the board's members be lawyers.

This key role includes, of necessity, the inherent authority of the Supreme Court to impose fees necessary to carry out the Court's responsibility. *In re Attorney Discipline Syst.*, 19 Cal.4<sup>th</sup> at 594.

The fundamental difference between the State Bar, as an arm of the Supreme Court, and other regulatory agencies and bodies was articulated in *In re Attorney Discipline Syst.*, 19 Cal.4<sup>th</sup> at 599-600:

The Legislature also made clear that the State Bar is not in the same class as those state agencies that have been placed within the executive branch: "No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in [Government Code sections pertaining to executive branch agencies and personnel,] shall be applicable to the State Bar, unless the Legislature expressly so declares." (§ 6001.)

Thus, although the State Bar originally was purely a legislative creation, its unique nature has been recognized by the Legislature throughout the existence of the bar. The State Bar's special character further was emphasized when it became a constitutional body, placed within the judicial article of the California Constitution, and thus expressly acknowledged as an integral part of the judicial function. The roles of the Legislature and the State Bar, and the relationship of those entities to this court's role in disciplining attorneys, have been characterized consistently by this court.

"We have described the bar as "a public corporation created ... as an administrative arm of this court for the purpose of assisting in matters of admission and discipline of attorneys." [Citation.] In those two areas, the bar's role has consistently been articulated as that of an administrative assistant to or adjunct of this court, which nonetheless retains its inherent judicial authority to disbar or suspend attorneys. [Citations.]" (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557 [216 Cal.Rptr. 367, 702 P.2d 525]; see also *Keller v. State Bar of California*[, *supra*,] 496 U.S. 1, [11-12] [110 L.Ed.2d 1, 13, 110 S.Ct. 2228].) Thus the judicial power in disciplinary matters remains with this court, and was not delegated to the State Bar." (*Lebbos v. State Bar, supra*, 53 Cal.3d 37, 47-48.)

"[The State Bar] is not an administrative board in the ordinary sense of the phrase. It is *sui generis*. In disciplinary matters (and in many of its other functions) it

proceeds as an arm of this court. If the Legislature had not recognized this fact, and made provision therefor, the constitutionality of those portions of the State Bar Act which provide for the admission, discipline and disbarment of attorneys could have been seriously challenged on the ground of legislative infringement on the judicial prerogative. Historically, the courts, alone, have controlled admission, discipline and disbarment of persons entitled to practice before them [citations]. In adopting the statutory system now existing in California, the Legislature did not attempt to alter this basic concept.... [¶] It follows that in matters of discipline and disbarment, the State Bar is but an arm of this court, and that this court retains its power to control any such disciplinary proceeding at any step. [Citation.]” (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301 [19 Cal.Rptr. 153, 368 P.2d 697, 94 A.L.R.2d 1310].)

It is therefore critical that lawyers, who are trained and versed in the legal ethical principles that differentiate the practice of law from other professions or occupations, continue to comprise a substantial part of the membership of the Board of Governors.

The Task Force does not operate in a vacuum. It has the benefit of the Final Report of the Commission on the Future of the Legal Profession and the State Bar of California (April 1995), the culmination of nearly two years of study and analysis of a commission of 30 diverse people brought together by four different appointing authorities who were charged with considering the future of the legal profession over the next 25 years.

The Commission’s report noted that its 94 recommendations came from extensive input from eight focus groups, four public hearings and a survey conducted in conjunction with the Rand Corporation. It also included additional research and studies, input from experts and a study of “a mountain of available literature,” as well as a review of the governing structures of the bar associations of the other 49 states and six other professions in California.

Among the Commission’s recommendations germane to governance are the following:

14. The discipline system – other than adjudication – should be handled by the mandatory bar.
15. Lawyers should continue to fund the discipline system.
17. The budget for the attorney discipline function should be approved by the Supreme Court rather than the Legislature.
18. The Chief Trial Counsel should be appointed by the Supreme Court without confirmation by the Senate.
92. To assure Judicial Branch oversight of the legal profession, the total fees attorneys pay to practice law should be determined by the California Supreme Court.
93. The unified (mandatory) bar should be retained in California for all current functions (other than the adjudication of attorney discipline cases in the State Bar Court).

***How Best to “Serve the Public Interest”***

The record before the Task Force confirms that the Board’s primary constitutional role, as an administrative arm of the Supreme Court, should continue to be the regulation of the legal profession. Nothing in the record appears to contradict or be contrary to the findings and conclusions in the 1995 Final Report, discussed above.

The following attributes have been identified as being essential to any board that represents the public interest:

A broad constituency of board members, reflecting differing backgrounds, geographical areas and practices.

A record of service to the profession and/or the public interest at large.

Some continuity in the board’s membership.

A rational, thoughtful method for selecting the board’s leaders, including its head.

A large enough membership to conduct the board’s business effectively, but not so large as to become unwieldy.

The present system of governance appears to have these attributes.

We propose, however, the following modifications, not only to address the “perception” problem – which is real – but also to try to improve how the Board and the State Bar serve the public and the public interest.

***Board membership (twenty-two, plus a board president)***

The current number of board members seems to be working well. It provides enough people to cohesively carry on the different important functions of the board of governors, but without being too large that it becomes unwieldy.

***Appointed public members (ten)***

Public members should have certain criteria for appointment. It should include a record of public service and an established interest in protecting the public and improving the practice of law. The appointed public members could be lawyers as well as non-lawyers. There is no rational reason for not allowing appointed members to be lawyers. The key is that these members would not be elected, so there would be no perception of their serving at the “will” or “beck and call” of any given constituency.

The terms of appointed public members should be three years, with the possibility of being re-appointed to a further three-year term.

The following number of these members would be appointed by the following offices:

- 4: the Governor
- 4: the Judicial Council
- 1: the Speaker of the Assembly
- 1: the President Pro Tempore of the Senate

***Lawyer members (twelve members)***

Lawyer members should continue to be elected by geographical region. As demonstrated by the present make-up of the board, this appears to provide a good cross-section of members from differing backgrounds, practice areas and organizations.

The current district make-up also seems to be working well. Discussion should, however, ask whether the following Davis-Streeter “redistricting” proposal would offer any improvements:

- 1st District: based on 2<sup>nd</sup> appellate District (includes Los Angeles, Ventura and Santa Barbara) -- 4 members
- 2nd District: based on 4<sup>th</sup> appellate District (includes Orange County, San Diego and Riverside) -- 3 members
- 3rd District: based on combined 1<sup>st</sup> and 6<sup>th</sup> appellate districts (includes Bay Area, Contra Costa, Monterey) -- 3 members
- 4th District: based on 3<sup>rd</sup> appellate district (includes Sacramento) --1 member
- 5th District: based on 5<sup>th</sup> appellate district (includes Fresno) -- 1 member

A lawyer member should have been admitted to practice (either in California or elsewhere) for no less than ten years.

As part of the election process, a printed statement should appear in the election materials to the following effect:

Members of the Board of Governors are elected by geographical region. They do not, however, “represent” either a geographical region or any particular constituency or interest group. They are expected to represent the public interest and to advance that interest in all their actions as Board members.

The terms of lawyer members should continue to be three years, but with the possibility that a lawyer member can run for one additional three-year term.

***Board committee appointments***

To respond to the “perception” that elected lawyer members are beholden to their “constituencies,” the board’s by-laws could be revised to require that a majority of the membership of the two committees that have direct oversight responsibility for the practice of law – the Regulation, Admissions and Discipline Committee (“RAD”) and the

Member Oversight Committee (“MOC”) – be comprised of appointed public members and that the chair of each of these committees also be an appointed public member.

The Board should revisit the present practice of having third-year members chair other Board committees. Board committee assignments should be done by the President and President-elect in consultation with other Board members.

***Transition measures***

The Davis-Streeter transition proposal would seem to make sense.

***Lawyer and non-lawyer members***

Incoming Board members should have a one-day orientation session where they are inculcated with a Board “ethic” of working together to advance the public interest and where they learn more about what it means to serve on the Board.<sup>1</sup>

The Board should establish clear metrics for its performance and measure them at least once a year.

***Bar President and President-elect.***

The President-elect of the State Bar should be elected by the Board from lawyer members (either elected or appointed) who have one year remaining in their term of office. Voting for the President-elect should be public, and transparent. The President-elect will hold that office, as well as the office of vice-chair of the Board, during the year following election. The following year, the President-elect will become the President of the State Bar and chair of the Board. The President and President-elect will consult on board committee appointments and matters that require longer-term planning.

There should be no “President’s agenda” or “platform.” Nor should there be a Board “agenda.” Planning and programs should be multi-year and be creatures of the Board as a whole.

***Bar dues***

The State Bar should continue to be funded solely by dues paid by its members.

The dues should, however, be broken out into two segments, one that funds the Bar’s disciplinary function (including the admission of lawyers to the Bar), and one that funds the Bar’s other functions.

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<sup>1</sup> The Davis-Streeter proposal suggests adding a new requirement that the oath of office for board members include an acknowledgement that the member represents the people of the State of California, not any particular constituency. The oath of office for all California officials is the same, and should not be modified for any particular office.

***Disciplinary function dues***

The disciplinary function dues should be approved by the Supreme Court. This is consistent with the 1995 Commission report and the Supreme Court's ruling in *In re Attorney Discipline Syst.*, 19 Cal.4<sup>th</sup> at 594. The State Bar's disciplinary function is too important to be part of a political process or held hostage to political pressures. Having it being subjected to legislative oversight also diminishes the ability of the Bar, the Chief Trial Counsel, the State Bar Court and ultimately the Supreme Court – which constitutionally oversees the disciplinary function – to apply the correct resources and priorities to regulating the legal profession.

***Non-disciplinary function dues***

Non-disciplinary function dues should continue to be approved by the Legislature.

***Public perception***

There are two components to “public perception.” First, the perception of the public at large, including lawyers themselves. Second, the perception of the Legislature (and at times the Governor). Both require attention.

The first order of business would be to amend the Board's by-laws to adopt the language proposed by current President Hebert that emphasizes that public protection is the State Bar's highest priority.

***The public at large***

Although anecdotal, the testimony at the Task Force's hearings indicates that at least some parts of the public are dissatisfied with how the Bar oversees and disciplines lawyers. This is the Bar's major, and overriding, function, at least as far as the public is concerned. Some believe that the Bar is too easy on lawyers. Some believe that it is not tough enough, and that the process itself is too complex and long.

The Chief Trial Counsel and the State Bar Court should be given the necessary funds and staffing to be able not only to effectively protect the public interest, but to publicize what they are doing to protect the public and to receive meaningful public input on their concerns.

The Chief Trial Counsel should hold “town meetings” at least four times a year throughout California. These meetings should essentially replicate the briefing sessions the Chief Trial Counsel gives to the Board. They should contain media kits (and ask the media to attend) that describe the work of the Chief Trial Counsel's office and the State Bar Court, and how their resources and priorities are allocated. These meetings should fully explain why it may take longer to resolve certain cases than others, as well as how due process is essential for all concerned.

The Chief Trial Counsel should also provide the full board with the same briefings at least two times a year. Once a year, he or she should provide a draft budget and set of priorities to the board for its review and approval.

And the Chief Trial Counsel should also provide the same briefing once a year to the Judicial Council.

To the maximum extent possible, the Board's meetings and the Chief Trial Counsel's "town meetings" and other briefing sessions should be webcast live and recorded so that they are available to the public at large on the Bar's website.

To make sure that the public is alerted to these meetings, ten days (as opposed to the present five days) advance notice of each meeting, its agenda and any meeting materials should be given. The notice should also be widely circulated to the media and other public organizations.

Because the Board's meetings are and will continue to be open, with full advance notice, the strictures of the Bagley-Keene Act are not necessary, particularly given (a) the need for some Board members to participate in Board or committee meetings by telephone conference and (b) the need for confidentiality in such matters as appointments to Bar organizations and dealing with sensitive personnel issues.

Every Board action should include an assessment and statement of how the action is in the public interest. Perhaps a "check list" of issues to consider in voting on items could also be prepared.

The Board and the State Bar staff should assess other ways to keep the public informed of what the Bar is doing to protect the public interest.

They should also examine ways to make the Board's and the Bar's activities more visible and transparent to the public.

### *The Legislature*

The Bar and the Legislature should establish, at least once each session, a "State Bar Day." On State Bar Day, the President, the President-elect, a selection group of Board members, the Chief Trial Counsel and other Bar personnel will meet with the Assembly and Senate committees and their staffs, preferably in joint session. They will review the past year's activities and accomplishments and outline their proposed agenda, priorities and activities for the coming year (and beyond, if appropriate).

The Chief Trial Counsel will provide a full briefing on the activities of his office and the State Bar Court and how their budgets are allocated to best serve the needs of the public.

State Bar Day should be an opportunity for a real dialogue between the State Bar and the Legislature on how the public can best be served by the State Bar.

Between these sessions, the President, President-elect and Executive Director should meet regularly with key legislators and their staffs. (They should also meet regularly with the Chief Justice and her staff. And they should meet at least twice a year in person with the Governor.)

***Other Matters***

The State Bar's charter and the Board's mission statement should be revised to reflect that the protection of the public and the public interest are its chief responsibilities.

The Board should conduct a thorough review of the 1995 Commission report to determine what recommendations have been implemented, and how well they are operating, as well as what recommendations have not been implemented, and whether they should be.

If appropriate, after due consideration, one recommendation (23) might be adopted immediately: "Professional liability insurance should be mandatory for all active members of the State Bar. If minimum levels of insurance are not maintained, a member should be suspended from practice."

So could another recommendation (18): "The Chief Trial Counsel should be appointed by the Supreme Court without confirmation by the Senate." This would ensure that the day to day overseer of the disciplinary system is accountable solely to the Supreme Court and not subject to any political or other outside pressure.

Respectfully submitted,



Loren Kieve

Task Force Member