

**Task Force on the Review of the Role and Governance Structure  
of the State Bar of Arizona**

**State Courts Building, Phoenix**

**Meeting Minutes: August 22, 2014**

**Members attending:** Hon. Rebecca White Berch (Chair), Paul Avelar, Betsey Bayless, Bennie Click, Amelia Craig Cramer, Whitney Cunningham, Dr. Christine Hall, Chris Herstam, Joseph Kanefield, Ed Novak, Gerald Richard, Martin Shultz, Hon. Sarah Simmons

**Members absent:** Dr. Lattie Coor, Jose de Jesus Rivera, Grant Woods

**Guests:** Tim Eigo, Heather Murphy, Mike Baumstark

**Staff consultant:** John Phelps

**Staff:** Mark Meltzer, Chris Manes, Sabrina Nash, Nick Olm

**1. Call to Order, Introductions, and Preliminary Matters.** The Chair called the initial meeting of the Task Force to order at 9:05 a.m. The Chair reviewed Administrative Order 2014-79, which establishes the Task Force. The Order requires the Task Force to examine Rules of the Supreme Court concerning the mission and governance structure of the State Bar of Arizona (“SBA”) and to make recommendations, if needed, for changes that would (1) clarify or modify the SBA’s mission, (2) improve the efficiency and effectiveness of SBA governance, and (3) promote the SBA’s primary mission of protecting the public. The Task Force must submit its report and recommendations to the Supreme Court by September 1, 2015. The Chair noted that there is no legislative pressure, citizen initiative, or SBA misstep that gave rise to establishment of the Task Force. Rather, it is simply a good business practice to periodically review the structure of the governing board of a non-profit organization, such as the SBA, and to reexamine its mission and duties.

The Chair observed that the title given to the Task Force under A.O. 2014-79 is lengthy, so, for brevity, we will call it the *State Bar Mission and Governance (M&G) Task Force*. She mentioned that the Task Force has a webpage on which meeting materials, background reading and reference materials, and other matters related to the Task Force will be posted. She anticipates that the Task Force will meet monthly. She introduced the SBA’s executive director, Mr. John Phelps, as consultant to the Task Force, and she introduced Task Force staff. She noted that each member of the Task Force has a very distinguished background, and she invited the members to introduce themselves.

The Chair reminded the members that this committee is subject to the open meeting requirements of the Arizona Code of Judicial Administration. She then referred the members to a page of proposed rules for conducting Task Force business that were included in the August 22 meeting packet. These rules establish policies for a quorum, decision-making, and proxies.

**MOTION:** A member moved to adopt the proposed rules, which was followed by a second and unanimously passed by the members. **M&G: 2014-01**

The Chair then asked Mr. Phelps to provide a history of the SBA, and to describe its governance structure.

**2. Overview of SBA history and governance.** Mr. Phelps began with a history of bar associations in the United States. He described the influence of the Inns of Court, physician associations, and the American Judicature Society on the development of bar associations. An *integrated* or *unified* bar integrates a disciplinary function with other member services, such as continuing legal education. The majority of state bars nationwide, including Arizona's bar, are integrated. An attorney who wishes to practice law in a state with an integrated bar must be a member of the bar. A minority of states have *voluntary* bars. In those states, regulation and discipline are separate from other functions, and membership in the bar is optional; however, attorneys must still pay dues to support the regulatory function. Legislation establishes some state bars. In other states, the legislature authorizes the court to regulate attorneys, and in the remainder of states, courts assume their inherent authority to regulate lawyers.

There was no licensing of attorneys in pre-territorial Arizona. Colleagues just vouched for an attorney's qualifications to practice before a judge. In 1895, 139 practicing attorneys formed the Arizona Bar Association, an organization primarily devoted to networking. The association was incorporated in 1906, six years before statehood. Arizona's 1933 State Bar Act created the State Bar of Arizona. It required practicing attorneys to be members. This Act expired in 1985, but the Arizona Supreme Court had taken the lead on regulating attorneys by then. Arizona Supreme Court Rules 31 and 32 codify the organization and the structure of the SBA. Other rules adopted by the court, judicial administrative orders, and goals of the Court's Strategic Agenda further establish the relationship between the SBA and the Court.

As of July 2014, the SBA had more than 23,000 members, almost 18,000 of whom were "active." The SBA has 107 staff and a budget of \$14.8 million. The bar's activities include the regulation and discipline of attorneys, as the bar prepares disciplinary cases and brings them to court. The SBA also fosters high ideals and standards of professional responsibility, provides a forum for changes in the law, including section membership, and provides input to the court on rule petitions and related issues. The crux of the bar's duty is protecting and serving the public. This primary duty encompasses the goal of improving the knowledge and skills of attorneys. The SBA's mission statement and strategic plan also promote these goals. The Board of Governors ("BOG") recently added "access to justice" as a component of its mission and strategic plan. Each SBA president focuses the BOG on particular aspects of the strategic plan.

The BOG has twenty-six voting members. This includes eighteen attorneys elected in eight statewide districts, one young lawyer, typically the elected president of the Young Lawyers Division ("YLD"), four public members appointed by the BOG, and three at-large members appointed by the Supreme Court. The elected members frequently view their role as representatives of their constituencies. There are also four

non-voting members of the BOG: three law school deans plus the bar's immediate past president. The newest justice of the Supreme Court attends BOG meetings as a court liaison. Rules establish the qualifications and terms of members of the BOG. Lawyer members serve a three-year term with no term limits, except for the YLD member, who can serve a single one-year term. Public members appointed by the BOG serve a limit of two three-year terms. Court-appointed members serve three-year terms with no term limit. Members have served as long as fifteen years on the BOG. Lawyers' interest in seeking election to the BOG ebbs and flows. For example, in the last election in District 6 (Maricopa County), thirty-four candidates vied for nine seats on the board; other districts, particularly in rural areas of Arizona, may have uncontested elections. Mr. Phelps noted that in Maricopa County, less than twenty percent of the members participate in BOG elections, but that percentage may double in outlying districts. The Court may use its three at-large appointments to promote balance on the BOG, including rural-urban and large firm-small firm balances, as well as to enhance other types of diversity.

The scope and operations committee of the BOG serves as an executive committee. The president, president-elect, first and second vice-presidents, and a secretary-treasurer compose this committee. The president and president-elect automatically assume their offices. The other officers are elected by the BOG, and while those positions are occasionally contested, they usually move ahead by acclamation. Officers can be removed by a two-thirds vote of the board, but members of the BOG cannot be removed. The executive director of the SBA was selected by the BOG following a national search. The Arizona Supreme Court approves the amount of member dues set by the BOG; fees are currently \$460 for an active member in practice for three years.

The members concluded Mr. Phelps' presentation by discussing the practice of law in multiple states, the portability of uniform bar examination scores, and admission on motion. Although admission on motion allows attorneys to have a more nationwide practice, admission on motion in Arizona has not had as large an impact on Arizona's legal economy as had been predicted, possibly because admission on motion does not require an attorney to reside in Arizona.

**3. California' Governance Task Force.** The Chair then welcomed Mr. Joseph Dunn, executive director of the State Bar of California ("SBC"), who appeared at the meeting by video-conference. The SBC is a mandatory bar with 250,000 members, about 80 percent of whom are active members. It has an annual budget of \$150M.

The California bar reviewed and revised its governance structure about four years ago. The crux of governance reform addressed the question of what the bar really is – is it a regulatory organization with powers of a trade association, or is it a trade association with regulatory powers? He noted that the California bar represents the people of California rather than California's attorneys. The primary mission of the SBC is to protect the public. The SBC performs all facets of attorney regulation, including admission, discipline, IOLTA administration, and section membership. The SBC established a state bar court in 1989 that includes five full-time judges who hear cases brought against attorneys by state bar prosecutors, and an appellate division with three full-time jurists.

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The SBC's existence has footing in both the legislative and judicial branches. California's legislature approves the annual bar fee, which is now \$375. Mr. Dunn noted that the SBC was a party to the *Keller* decision [*Keller v. State Bar of California*, 496 U.S. 1 (1996)], which held that a mandatory bar can charge compulsory fees only for its core functions of regulating the profession and improving the quality of legal services. The 2010 initiative to examine the SBC's governance came not from its own BOG, but from the court and the legislature. Those branches of government traditionally perceived the bar as a regulatory body, with trade association characteristics. More recently, however, the bar was seen as acting in the interests of its attorney members, sometimes in disregard of the public's interest. Mr. Dunn noted a few events that increased tensions between the bar and other branches of state government:

- Notwithstanding a decades-old statute capping medical malpractice awards, several years ago the SBC's BOG passed a resolution criticizing the cap. The governor viewed this resolution as exceeding the powers of the board; the governor's response was to veto funding for the bar, which resulted in substantial layoffs of the bar's staff.
- During the 2008 housing crisis, a small number of attorneys advertised loan modification services, and obtained "advance" fees from their clients. These fees were not placed in trust accounts, which gave rise to widespread fraudulent practices and significant harm to the public. The legislature asked the BOG to close the loophole that made this possible, but the BOG declined the request after it was lobbied by those attorneys.
- The legislature requested the BOG to support mandatory disclosure by attorneys of whether they had legal malpractice insurance coverage. The board yielded to constituency pressure from the bar and did not support disclosure.

Accordingly, the legislature in 2010 insisted on reform of bar governance. It established an eleven-member task force, and it gave the task force nine months to complete its work. Mr. Dunn noted that the task force consisted solely of attorney-members of the State Bar's BOG, and stakeholders quickly split into two opposing camps. A majority camp was almost exclusively lawyers, which was opposed by a minority camp of public advocates. Public hearings were contentious, and there was little communication between the two camps. The public advocates believed that attorneys elected by attorneys could not regulate attorneys without eroding public confidence in the organization. Lawyers maintained that there was no causal relationship between governance by elected attorneys and the board's disposition of high-profile issues. For example, they contended that the BOG's failure to support the disclosure of legal malpractice insurance was not a result of having a BOG with a majority of elected lawyers.

Mr. Dunn cautioned that a governance task force composed solely of attorneys caused California's task force to "defend its territory." He added that California has more than 200 specialty bar associations, but regrettably, those associations provided little input at public meetings. He stated that the most consistent voice at several public hearings was Professor Robert Fellmeth, an expert on regulatory law at the University

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of San Diego Law School and an advocate of governance reform. A survey of 20,000 members of the bar had marginal value. It was expensive, had a very low response rate (about 10 percent), and a survey by lawyers of other lawyers that did not include a survey of members of the public that the bar is charged with protecting was not thought to be meaningful. Mr. Dunn also noted that the California task force failed to realize that when the legislature directed it to review bar governance, it did not expect the task force to report that no reform was necessary, although by and large that was the conclusion of its task force.

The Task Force submitted separate majority and minority reports. The attorney majority recommended only minor changes to the existing governance structure. The reformer minority on the other hand recommended that board members not be elected; it contended that elected positions result in a dysfunctional board. The legislature adopted a compromise between these opposing positions. The legislature's new system of State Bar governance included the following features:

- It reduced the size of the board from twenty-six to nineteen members.
- While the board retained six public members, the overall reduction in the board's size had the effect of increasing the public members' proportionate representation on the board.
- The remaining thirteen members of the board are attorneys. One attorney is elected from each of the state's six appellate districts. (The appellate districts have roughly equal populations, but the boundaries of those districts have no relationship to the number of attorneys within each district. Preexisting bar districts were eliminated.) Of the remaining seven attorney members of the board, the Supreme Court now appoints five, and the Senate President and Assembly Speaker each appoint one.
- The young lawyers' dedicated seat was eliminated, although young lawyers are encouraged to serve on the board.
- The new governance structure was implemented in phases over a period of three years so that no elected member lost a seat. In the fall of 2014, the entirety of the board will be seated under the new system.
- Public members need no prerequisites. Lawyer members must have five years of practice and be in good standing.
- A process has been added for removal of governors.
- The old system had only the office of president. The new system includes a vice president and a treasurer, who serve as chairs for the executive and budget committees, respectively. These officers do not automatically ascend the leadership ladder. The immediate past president has been added as a non-voting member of the board to assure continuity in leadership.
- The board's new name is the "board of trustees," which clarifies its role.
- The state bar's seal bears its mission: "protect the public."

Mr. Dunn elaborated that an attorney seeking court appointment to the board must submit an application to the SBA. These applicants are screened, vetted, and interviewed by the bar, and the bar refers the top candidates to the Supreme Court for consideration. Whether appointed or elected, members of the new board are limited to

two terms. Sections and committees were largely unaffected by the reform process. The annual meeting of the bar is now focused on education. A “conference of delegates” was separated from the bar about five years ago and has its own election process; this conference was known for adopting some politically contentious resolutions.

One member asked if the SBC is still a “full service” bar. Mr. Dunn responded that as a result of governance reform, California is “about as close to a pure regulatory bar as there is in the country.” Although it still has some trade association functions, it no longer uses the term “member services.” The SBC still engages in continuing education, but it does not compete in this area with local bar associations, whose lifeblood is CLE. The SBC’s sections are self-funded and do not depend on mandatory dues. Education, sections, IOLTA administration, and other SBC functions are now seen through the lens of public protection. The boards’ discussions now are driven by what is in the best interests of the people of California rather than what is in the interests of the attorneys.

Mr. Dunn observed that the former board was opposed to reform legislation, and it actually asked him to work to defeat it. However, now that the reforms have been implemented, the board is less contentious. Reform crystalized the mission of the bar, unified its governing board, and made the organization more focused, professional, and collegial. The public and attorney members of the bar now are jointly engaged in the mission of protecting the public. Whereas formerly the bar was reactive to developments in the legal community that were inimical to the public, the bar now proactively deals with these issues and events, and it works to educate the public. Mr. Dunn concluded by saying that even some of the most vocal opponents of reform now say that reform was the best thing that’s ever happened to the bar.

The members applauded Mr. Dunn’s presentation. The Chair thanked Mr. Dunn for appearing, and Mr. Manes for facilitating the technical aspects of the video presentation.

**4. Roadmap.** The Chair indicated a preference for meetings on the third Friday of each month, beginning with a meeting on September 19. That meeting will focus on a discussion of today’s presentations. She asked staff to research implications of appointed versus elected non-profit governing boards. She invited input from the members about which subjects should, or should not, be the focus of the Task Force. The Arizona Bar Foundation and client protection fund were mentioned in this regard. The Chair also welcomes additional materials from the members. She would like the members to drive the agendas of future Task Force meetings.

**5. Call to the Public; Adjourn.** There was no response to a call to the public. The meeting adjourned at noon.