

Transparency Task Force
Status Report

June 8, 2018

Members

Mark Ticer - Chair

Bill Aleshire

Pamela Brown

Erin Copeland

Guy Choate

Joe Crews

Cynthia Figueroa

Gloria Leal

Trey Mendez

J. Bennett White

Katy Youker

Introduction

In response to the request of Tom Vick, President of the State Bar of Texas, ("SBOT") and Rehan Alimohammad, Chair of the SBOT Board of Directors, the Transparency Task Force ("TTF") is providing this status report.

This report is intended solely as a status report. The TTF has been afforded neither the opportunity nor the time to complete its work. The SBOT has not meaningfully and/or actually cooperated with the TTF in providing information and documents through various officers, representatives and employees. To date, the TTF has largely been denied access by the SBOT to basic and essential information to complete its task. In order to make substantive and credible recommendations regarding transparency in the SBOT, it is essential to gather information from various sources and individuals. This naturally includes talking to and interviewing individuals – officers, directors, the executive director, SBOT personnel and others inside and outside the SBOT. Nonetheless, the TTF intends to complete its work and will continue to request the cooperation

of the SBOT, its officers, directors, representatives, Bar leadership (past and present), and employees.

The TTF provides this status report in order to update the SBOT on its activities to date and provide interim recommendations regarding transparency in the SBOT.

Background

The TTF was announced in November 2017. The TTF held its initial meeting at the SBOT offices in Austin on January 19, 2018, lasting most of the day. Subsequent in person meetings have been held on February 23, 2018 and April 20, 2018 all at the SBOT offices. The TTF has held numerous telephone conferences and communicated extensively by email.

Activities

1. In its initial meeting, the TTF determined, consistent with its purpose, that all TTF meetings would be open to everyone (the SBOT, its members, the public, and anyone else). It has done so.¹ Such meetings are available and intended to be posted on the SBOT website.

¹ Because of a previously scheduled meeting, the TTF first met in a room where the meeting could not be orally recorded. However, the TTF expressed its plan and intent to record all of its future meetings, which are held at the SBOT offices. All in person meetings have been recorded beginning on February 23, 2018.

2. The TTF drafted and adopted a Statement of Premise as follows:

As a state agency under the judicial branch of the State of Texas, the State Bar of Texas is governed by the Texas Public Information Act and the Texas Open Meetings Act. The State Bar should act as an exemplary example of transparent government. Thus the State Bar should operate under the presumption that all of its meetings and records are open and subject to disclosure. Exceptions should be rare, since the State Bar's policy is to act with genuine and demonstrable openness and transparency in its governance and operations.

3. The TTF decided that it would focus on transparency in the following substantive areas: elections, continuing legal education ("CLE"), benefits to SBOT members, Bar governance, Bar meetings including Board of Directors meetings, the State Bar Policy Manual, compliance with the Public Information Act ("PIA") and records requests thereunder, administration, Bar employees, legislative activities, records retention, and budgetary issues distinct from the Budget Task Force and Sunset matters.

4. At the first meeting on January 19, 2018, the TTF was confronted with a pending policy manual change drafted by the Policy and Procedures Committee of the Board of Directors. The Board was

considering a change in the Board Policy Manual that would allow the Executive Director to refuse to provide an officer or director information or documents that the officer or director requested and then delegate the matter of disclosure to the entire Board of Directors for a vote on whether the officer or director should get the information. In simple terms, the Board would make a final determination on access to documents requested by a SBOT officer or director.

Because this proposed change was on the agenda for consideration at the next Directors' meeting, the TTF was compelled to take up this matter immediately. After discussion, the TTF determined this proposed policy change was materially counterproductive to the fiduciary duties owed by officers and directors of the SBOT. As a result, the TTF wrote to Messrs. Vick, Alimohammad, Longley and Furlow (Committee Chair) to request this proposed change be tabled or rejected pending further study, evaluation, and discussion. The proposal was subsequently dropped/tabled.

5. At the meeting held on February 23, 2018, the TTF voted to recommend to Messrs. Vick and Alimohammad that all Board meetings be

live streamed by audio and video. Since then, the Board of Directors began recording its meetings and making them available to the public via its website.

6. The TTF determined, in order to present genuine and substantive recommendations, it would be necessary to gather information from all available sources including officers and directors past and present, the executive director (past and present), Bar staff, Bar membership, and others outside the Bar. The TTF began taking steps to assemble information as promptly as possible, including inviting people to visit with the TTF concerning transparency issues.²

Guests at TTF meetings who have provided information included John Sirman, Don Jones, James Harrington, Kelly Shannon (Director of Freedom of Information Organization), and Ed Kelley (Department of Information), Lisa Blue, Tim Perkins, and Samuel Adjei Sarfo (SBOT member).

² This process was intended to be informal, with interviews and any such visits being recorded in conjunction with TTF meetings. Persons who did visit and/or interviewed with the TTF were advised that everything was being recorded and would be made available through the State Bar. The process was not adversarial. The process was primarily a simple question and answer format with full opportunity for discussion.

7. Beginning in May 2018, the TTF invited input from Bar membership as a whole. While it may be premature to determine Bar member involvement and what members may offer, initial input was significant, with a number of individual comments received by email and some Bar members seeking to attend a TFF meeting.³

The information provided by all of our guests who have appeared at a TTF meeting has been insightful, helpful, informative, historical, and substantive in considering transparency issues in the SBOT. Consequently, the TTF will continue to pursue more information from all available sources.

Challenges Because of Lack of Cooperation

The TTF has made concerted and repeated efforts to meet with SBOT representatives and personnel to tackle the various subject areas identified for evaluating transparency matters in the Bar. However, the TTF has been prevented from carrying out its purposeful and substantive process because of Bar's leadership, executives and personnel's express and demonstrable unwillingness to cooperate.

³ In fact, one member did appear and speak at the May meeting just a few days after the TTF sought membership input.

Numerous individuals have been asked by the TFF to provide information but have not done so because: the SBOT has instructed them not to meet with the TFF; the Executive Director has insisted that he be present when Bar employees are TFF guests; and/or invitees refuse to respond or claim they are unavailable in spite of being asked to provide a convenient time. These include the following people:

1. Tom Vick;
2. Rehan Alimohammad;
3. Frank Stevenson;
4. Trey Apffel;
5. Hedy Bower;
6. Spencer Walker;
7. Cory Squires;
8. Lowell Brown;
9. Brad Powell;
10. Cheryl Howell;
11. Paul Rogers;
12. Tracy Jarret;

13. Philip Mack Furlow;
14. Ray Cantu; and
15. Kalyn Laney.

The TFF has also invited all SBOT Board of Directors to visit with the TFF and provide their thoughts and insight regarding transparency in the Bar. No director has accepted this invitation.

The TFF further notes the recent April 27, 2018 Board of Directors meeting where the TFF was heavily criticized. While the TFF was not provided notice that a former TFF member intended to engage in a one sided, unprovoked, and dishonest attack, this unfortunate and unnecessary incident resulted in an express directive by Bar leadership to not cooperate with the TFF. This reaction has added to an additional lack of cooperation, forcing the TFF to make PIA requests to obtain basic information and limiting interviews to those outside the Bar.

The TFF has been provided information from James Harrington concerning the *Pardo* lawsuit dealing with PIA requests as well as recommendations from Mr. Harrington on transparency and PIA issues. Late Friday afternoon, on June 1, 2018, Adam T. Schramek, the SBOT's

counsel in the *Pardo* lawsuit, provided a memo at the behest of the SBOT attacking the observations and recommendations offered by Mr. Harrington. The Schramek memo makes several affirmative conclusions concerning the content of the documents at issue in the *Pardo* lawsuit. The TTF intends to review both sides' observations and arguments regarding SBOT transparency as well as request the documents Mr. Schramek refers to in his memo.

Recommendations and Proposals Being Considered to Date

In spite of the Bar leadership's refusal to cooperate, the TTF has received important and helpful information in the area of handling of and responding to PIA requests and related matters including efficiency and costs related thereto. For example, from the review of the *Pardo* lawsuit materials provided by both sides, it is apparent there is no process, policy, approach, or plan regarding how the SBOT gathers public information in order to respond to PIA requests. The *Pardo* lawsuit materials also reveal no policy, approach or procedure for obtaining public information that is located on an individual's personal (non-SBOT) email account and/or electronic device such as a cell phone or laptop computer. As such, the

SBOT cannot insure compliance with a PIA request when information is not within the control or possession of the Bar, but in the hands of individuals who are conducting Bar business on their own personal electronic devices.

Other questions arise in these circumstances. Just how does the Bar go about obtaining this information when there is no system for gathering such items? Where does the inquiry begin and why? What procedures, systems, and/or otherwise exist for the Bar to employ that will result in a full and accurate response to any PIA request? How can the Bar be sure it is accurately and fully responsive? There are no substantive and demonstrable policies, much less any policy to mandate compliance with PIA.

Given these various questions and issues, are there ways to streamline both the receipt of a PIA request and a response thereto? Significantly, the TTF has conducted an initial visit with the Office of State Information who has provided some helpful ideas. Specifically, this State agency has procedures, programs and/or methods to respond to many types of PIA requests, minimizing both time and cost, but also at the same

time, responding fully and accurately to a request. In the coming months, the TTF will be able to craft some substantive, productive, honest, and comprehensive recommendations for dealing with responses to PIA requests both economically and efficiently through assistance and ideas from the Office of Public Information.

The TTF intends to provide recommendations that are intended to minimize PIA requests to the SBOT through a persistent, persuasive, and demonstrable attitude of transparency both in word and deed. The TTF's suggestions will include making certain information and data readily available on the Bar's website, updated near or in real time thereby minimizing PIA requests because of its ready availability on the SBOT website.

The TTF is also addressing, evaluating and considering the following proposals, principles, ideas and procedures:

PUBLIC INFORMATION

1. The Bar should seek to meet the standards of the Texas Comptroller "Transparency Stars" program. *See* <https://comptroller.texas.gov/transparency/local/stars/>

Transparency Stars “Open their books not only in their traditional finances, but also in the areas of contracts and procurement, economic development, public pensions and debt obligations; and Provide clear and meaningful financial information not only by posting financial documents, but also through summaries, visualizations, downloadable data and other relevant information.”

2. The Bar should join the Texas Department of Information Services (DIS) “Open Data” Portal Document Library to help make Bar information easier to locate. See <https://dir.texas.gov/View-Resources/Document-Library.aspx>. Regardless of whether made available on the DIS website or its own website, the Bar should develop a consolidated database of records likely to be subject to a public information request (PIR), such as correspondence (emails), reports, expenditures, contracts, etc., so that searching can occur into that database for responsive records, without, for each PIR, having to contact staff to see if responsive records are maintained in disparate locations, or personal files. By making lots of

information, that might be subject to a PIR, more easily available and locatable on the Bar website, the Bar can save personnel costs of processing PIRs.

3. The Bar should give a Bar email address to every Bar Board member, official, and employee and require them to use that email account exclusively for all Bar business. The Bar should adopt a personnel policy (akin to the Federal Records Act) making it a disciplinary offense for Bar employees to retain official business correspondence or records solely on their personal accounts without *timely* submitting that to Bar computer systems where they can be located when searching for responsive records to a PIR. *See e.g.*, 44 U.S.C.A. § 2911 (a) (*see id.* § 2209(a) discussing similar provisions on the records of the President, Vice President, and staff). It should be made clear that this applies to emails, texts, or other apps for communication.
4. The Bar should not permit individual employees to make record retention decisions about substantive correspondence or records. Only personnel who are trained in the State Library &

Archives rules and Bar Records Retention Schedules should be permitted to delete or destroy Bar public records.

5. The Bar should add a provision to all of its contracts that the vendor agrees not to make any objection to the entire content of the contract being subject to public disclosure without the necessity of notifying the vendor that a public information request for the contract was received. An exception might be made, but only by mutual agreement of the Bar and vendor at the time the contract is made, for certain specific information that the Bar agrees would be trade secret or confidential business information, that, if disclosed would give advantage to a competitor of the vendor. Only under such an exceptional circumstance would a PIR for a copy of a Bar contract have to be submitted to the Attorney General for a ruling prior to releasing it.
6. The Bar should not use the TPIA deliberative process exception to disclosure (Tex. Gov't Code section 552.111) in such a way that it conceals from the public/Bar members what ideas for policy development were considered and accepted or rejected.

7. The Bar should adopt a policy that it supports the right of every Bar Board member and officer the unfettered right to access any information that member or officer believes they need in order to perform their jobs. This long-standing principle was articulated in Tex. Att’y. Gen. Op. KP-0021 (2015). In the rare circumstance where a limitation on such access might be considered, the decision on such a limitation should be made solely by record vote of the Bar Board.

OPEN MEETINGS

8. To facilitate communication among Bar Board members about Bar business but promote transparency at the same time, the Bar Board should establish an online “bulletin board” pursuant to the Texas Open Meetings Act (Tex. Gov’t Code) section 551.006. *See e.g., City of Austin Council Message Board* <http://austincouncilforum.org/>.
9. The Bar Board should immediately stop listing “Reports” as agenda items on its Meeting Notices without listing the specific

subject/topics each report will involve. *See* Tex. Att’y Gen. Op. 668 (2008).

10. The Bar Board should immediately start listing on the specific subject of each “Consent” Item on its Meeting Notices.
11. The Bar Board Notebook should be posted on the Bar website in advance of the meeting, so the public/Bar members can see the material provided to the Board members (of course, other than legitimately confidential information). Many state agencies and local governments follow this practice.
12. The Bar Board should ensure that any discussion in a closed meeting, particularly under the attorney-client exception of TOMA (Tex. Gov’t Code) section 551.071, is limited to getting attorney advice and not for purposes of concealing controversial discussion among Board members that should occur in open meetings.

The TTF, in the next few months, will further analyze and provide ideas, additional proposals and suggested procedures and solutions for other areas of the Bar and transparency including member benefits and vendor relations, CLE programming and pricing, self-governance,

elections, Sunset matters, Board meetings, lawsuits, budget processes and matters (distinct from the Budget Task Force), and other previously identified matters. But in order to meaningfully do so, the TTF must be permitted to gather information which includes genuine and demonstratable cooperation from the SBOT.

TFF Makes Sense

The TTF has been made aware that the SBOT is considering hiring lawyers to do what the TTF has been doing: having lawyers to purportedly evaluate Bar transparency. Hiring lawyers is a significant cost to the Bar and is imprudent, premature at best, and unnecessary. Doing so would obviously place any analysis under the attorney client and work product privileges, directly contrary to the notion of transparency. Instead, it would make logical and practical sense to first let the TTF complete its work, provide recommendations and analysis, and then use that information to evaluate whether the Bar should hire outside counsel. The use and costs of outside counsel directly contravene principles and attitudes of Bar transparency. The TTF should be permitted to carry out its work as it was appointed to do with the full cooperation of the Bar.

Finally, the costs associated with the TTF is virtually nothing except payment of TTF members' travel expenses for meetings. The Bar's lack of cooperation with the TTF has prevented the TTF from carrying out its charge and mission efficiently and substantively, costing valuable time and effort. The costs to the Bar in terms of the TTF pales in comparison to any expenses, costs, and perceptions concerning transparency issues and matters, including hiring outside counsel.

Conclusions and Planning

The TTF will continue to carry out its charge and work whether Bar leadership and Bar employees intend to cooperate or not. Since the TTF was appointed to investigate, analyze, and consider transparency in the Bar, it speaks poorly of the Bar to refuse to cooperate, particularly given the TTF is a SBOT task force not even six (6) months old. Objectively, the Bar has stood in the way of the TTF, its work, and information gathering.

The Bar should allow the TTF to complete its work without interference and obstruction so that the TTF may, substantively, practically, and honestly carry out its charge and work. The Bar may then consider what the TTF provides for any next steps including implementation.

Furthermore, the financial costs to the Bar are de minimis and prudent at this stage particularly when compared to paying outside counsel and fastening an attitude of anti-transparency.

The TTF has made itself, its work and process, its meetings, etc. open and subject to complete and open scrutiny under the PIA with no intention of invoking any exemption for nondisclosure. The TTF will continue to keep itself open, subject to complete disclosure, not hide behind PIA exemptions, and most importantly seek input from all available sources.

Bar leadership, and staff as well as Bar membership and the public are encouraged to attend and participate in TTF meetings and its processes.

The TTF will provide a comprehensive overview and analysis of transparency and an update at the Bar annual meeting on June 20, 2018.