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GOVERNANCE IN THE PUBLIC INTEREST TASK FORCE
APRIL 25, 2016
LOS ANGELES, CALIFORNIA

Reported by: Jenny Craig
CSR No. 11094

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TRUSTEES IN ATTENDANCE: Miriam Krinsky
Jason Lee
Dennis Mangers
Joanna Mendoza
Danette Meyers
Gween Moore
David Pasternak
ALSO IN ATTENDANCE: Francisco Gomez
Elizabeth Parker, CEO
Leah Wilson, COO
Vanessa Holton, GC

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1 MR. PASTERNAK: We're going to get started.
2 I am David Pasternak, chair of the Task Force on
3 Governance in the Public Interest. I welcome all of you.
4 I'm going to turn it over to our executive
5 director, Elizabeth Parker, who is going to introduce our
6 first speaker today.
7 And incidentally, if there is anybody on the
8 phone or here who wants to make public comment beyond our
9 speakers who have signed up, I'll give you an opportunity
10 at the end of the meeting to the extent that we have time,
11 but the purpose of this meeting is public comment. And
12 we've asked for people to sign up in advance so we can try
13 and just keep an orderly array of speakers this morning.

14 So Elizabeth.

15 MS. PARKER: Thank you, David.
16 We've been trying to assemble a group of
17 individuals who can address our governance issues from
18 broad perspectives, and this meeting may suggest that we
19 have overachieved.

20 But in introducing our first speaker, Professor
21 Ted Schneyer, I do just want to say a word. When I
22 started to read about governance and lawyer regulation
23 issues, I found a whole series of people referencing one
24 individual and that was Professor Schneyer.

25 And so finally I found his article written some

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1 time ago at the University of Wisconsin where he was then
2 on the faculty and I then set about trying to find him.
3 And I don't know why it was so difficult because everyone
4 was referencing Professor Schneyer, everyone was talking
5 about what he had written, and he had written a great
6 deal, but somehow identifying him proved to be elusive.

7 And so when I finally was able to speak with him

8 about two weeks ago, I was delighted. He is now emeritus
9 professor at the University of Arizona where he holds the
10 James -- pardon me, the Milton O. -- is it Riepe
11 professorship -- and has a fine academic background.

12 As I mentioned to you, he has written in this
13 area for many, many years, received his AB from Johns
14 Hopkins University with an LL.B. from Harvard and a
15 diploma of comparative law in Stockholm. Indeed, I hope
16 he will speak just a bit about some international
17 comparisons. And also a JSM from Stanford. So we can
18 almost claim him as a California native.

19 He has looked deeply at the issue of lawyer
20 regulation and I think from a very interesting set of
21 perspectives.

22 And so Professor Schneyer, we're delighted to
23 have you here and thank you so much for making the time to
24 join us.

25 PROFESSOR SCHNEYER: Thank you, Elizabeth, and thanks
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1 for inviting me.

2 MR. PASTERNAK: Professor, if you could lean into the
3 mic so the people on the phone can hear you.

4 MS. PARKER: Or bend it towards you is another option.

5 PROFESSOR SCHNEYER: How is that?

6 MR. PASTERNAK: Much better. Thank you.

7 PROFESSOR SCHNEYER: And I've tried to read a good bit
8 of it over the last few days. I'm very impressed with the
9 amount of information that's been gathered and the thought
10 that has gone into this. It's a fairly rare thing to
11 find, I think, in our studies.

12 I got interested in the issues of bar governance
13 and unified state bars when I moved to Wisconsin, which
14 was where I had my first teaching job. And very quickly
15 came upon all kinds of articles about problems brewing
16 within the state bar, issues of governance that seemed to
17 have a lot to do with the fact that the Wisconsin State
18 Bar was a unified bar rather than a voluntary membership
19 bar as was the case in neighboring Minnesota and Iowa and
20 Illinois.

21 And sometime after that, I was appointed to be a
22 reporter in a group that was incited by various problems
23 and had to make some recommendations. And I found the
24 problems likely to be almost impossible to cure and I'm
25 not surprised that they continue to this day.

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1 I know George Brown had testified a while back as

2 the executive director of the Wisconsin State Bar. And he
3 mentioned in particular Mr. Steve Levine who he says
4 drives him nuts because he has sued the bar several times
5 and he has insisted on arbitrations to try to get rebates
6 for a portion of his dues, et cetera, et cetera, and so it
7 goes on.

8 And I would say that the issues concerning the
9 unified bar and its future have really come to a head now.
10 And I think that has been driven in particular by the
11 decision of the United States Supreme Court and the dental
12 examiners case from North Carolina which, to the surprise
13 of many, found that the dental examiners did not enjoy an
14 immunity from antitrust liability even though they were a
15 state body. And there is this -- the action doctrine in
16 antitrust law.

17 And the point was that in any body that's going
18 to be making the decisions through an organ that has a
19 majority of people who are active market participants and
20 are therefore making policy decisions about the governance
21 of people in that -- in that market, that they have enough
22 potential conflict of interest to make it unwise to give
23 them carte blanche essentially by applying the immunity to
24 them.

25 This is a concern for many professions right now
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1 and it's shocking how much attention it's getting all over
2 the country with respect to the organized bar and the
3 regulation of lawyers.

4 My diagnosis of what was causing the problems
5 within the Wisconsin Bar and why I thought that the causes
6 were intractable was this -- and it will sound a little
7 professorial for me to say it, but bear with me.

8 I thought that there was a lot of confusion about
9 how to regard the unified bar as an institution. And you
10 see decisions being made that involved several different
11 conceptions of what the unified bar was. And those
12 conceptions clashed and it didn't seem that any stable
13 conclusions were being reached as to which of these
14 several kinds of institutions the bar was. And depending
15 on which one you thought it was at any given time, you
16 might feel one way about the bar or, at another time, you
17 might feel differently.

18 And the categories I have in mind are that --
19 sometimes thought of as a -- like a voluntary association,
20 sometimes thought of a closed shop which is why it's been
21 analogized often to unions where workers would be

22 obligated to belong to the union and pay dues and -- but
23 also it's thought of, obviously, as a public agency.

24 And insofar as you think of it as a public
25 agency, the thing that you will focus on is the need for
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1 public accountability. Insofar as you think of it as a
2 closed shop, you will think of it primarily in terms of
3 protecting dissident minorities within the organization
4 from being overborne by the government. Insofar as you
5 thought of it as a voluntary association or autonomy with
6 the foremost value.

7 And these things can be consistent. And if
8 you're not clear about -- if everybody's not on the same
9 page about how they're going to go on, there are going to
10 be problems and -- which I came to think were likely to be
11 intractable.

12 And as I -- for years I've been an inactive
13 member of the California State Bar and so I've had some
14 chance to sort of follow how things have gone in recent
15 years. And I'm not surprised that when it comes to the
16 structure -- and maybe the final straw was the dental
17 examiner's case.

18 A little bit of the history of unified bars.
19 Unification made a lot of sense when it first was
20 proposed. It made a lot of sense because the rate, the
21 membership rates of the voluntary state bar associations
22 that had come into being at the very end of the 19th
23 century and the earliest part of the 20th century had
24 miserable membership rates.

25 The Alabama Bar Association, state bar
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1 association had 19 percent of the lawyers in Alabama as
2 members right before it became a unified state bar when it
3 catapulted from 19 percent to 100 percent. And that meant
4 more resources and that meant the possibility of more
5 ambitious activity.

6 And supporters of the unified bar had a sense
7 that they had considerable advantages over voluntary state
8 bars, and they certainly did for a time. But what
9 happened, I would say by the end of World War II, was that
10 voluntary associations had wised up and learned that they
11 could attract substantial memberships by providing
12 benefits that you wouldn't be able to get except by being
13 a member. Anything from travel discounts to car rentals
14 to law magazines, et cetera, et cetera, would bring people
15 in.

16 And so the states that neighbor Wisconsin --
17 Minnesota, Iowa and, to a lesser extent, Illinois -- had
18 very respectable membership rates. At the time I was
19 looking at it, purported to have rates of 80 percent,
20 maybe a little less, a little more. But that meant that
21 they could act on the same footing as far as their
22 ambitions were concerned as the unified bars.

23 And a way to think about this and the problems,
24 the somewhat different problems that those two kinds of
25 institutions would have is this, is a famous book by

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1 Albert Hirschman, an economist, called "Exit, Voice and
2 Loyalty." And it was about the problems that plague
3 organizations and make them fail.

4 And with one type of organization, people who
5 were displeased with what it was doing, how it was doing
6 it, could vote with their feet and just leave and they
7 were exiting. And for Hirschman, he hoped that they
8 wouldn't necessarily leave and instead would exercise
9 voice and try to bring about the changes, reforms in the
10 organization.

11 In the unified bar, if you're upset about things,
12 you can't leave, but you sure can exercise your voice and
13 that meant that there were going to be a lot of hot
14 disagreements among the members of those organizations.

15 I found that by the time I was looking into it,
16 that there were not great programmatic differences between
17 what the voluntary state bars and the unified state bars
18 were doing or could accomplish.

19 It was widely thought that the unified bar could
20 have more resources because they have 100 percent, but
21 there was a lot of exercise of voice to try to compel the
22 unified bars to keep dues low and that meant that the
23 voluntary state bars often were able to raise more revenue
24 through dues and other means compared with the others.

25 So one problem, when people try to compare

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1 unified bars and voluntary bars with respect to their
2 advantages and disadvantages, is that people often talk
3 about it this way: Oh, we have a unified bar and we have
4 a lawyer assistance program that helps people who have
5 addiction problems, helps lawyers to try to get through
6 those problems. And we also have a law office management
7 program that provides lawyers, often solo practitioners or
8 small-firm lawyers, with advice about how to run their
9 office or their firm. And that will be stated as if it

10 was a demonstration on superiority of the unified bar.

11 But where was the comparison? There are plenty
12 of voluntary state bars that have just those same programs
13 and I haven't seen any evidence that those programs in the
14 unified bars are superior and constantly encounter that
15 sort of thing.

16 In the early to mid 20th century, the bars were
17 very interested in showing that they were engaged in law
18 reform which sometimes took the form of lobbying. But to
19 get to reform law in a technical way that we mean when we
20 speak of law reform on the part of bar associations, they
21 might try to streamline procedures or make law that was
22 clearer, make law that was simpler, et cetera.

23 And it was mostly law reform with respect to law
24 that had something to do with the practice of law and
25 administration of justice.

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1 Eventually, unified or voluntary became
2 interested in lobbying and not just on those matters that
3 would have been considered technical law reform
4 previously, but the unified bars were quite constrained by
5 the thought that since members had to be members and often
6 disagreed with the positions that were being taken by
7 their organization, that they had to be quite limited in
8 what they would press for.

9 And the Wisconsin State Bar, for a time, adopted
10 a policy that was called substantial unanimity. They
11 couldn't -- they felt that they could not propose any
12 reforms or changes in law that would not be approved by a,
13 quote, substantial unanimity within the bar. And you
14 know, once you get a bar with thousands of members,
15 that's, strictly speaking, a matter of -- not likely to be
16 possible. And there were no such restrictions on the
17 voluntary bar, although they might propose to press for
18 some reform that would make a number of people angry and
19 they would walk.

20 So slightly different problems for the two, but
21 nothing there that makes it clear that one sort of
22 organization is likely to be more effective more than the
23 other.

24 Now the -- you might think that the unified bar,
25 as closely overseen by the state supreme court, would be

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1 careful to try to make proposals that would widely be
2 regarded as in the public interest rather than simply in
3 an effort to aggrandize their own interests, the lawyers'

4 own interests. And perhaps there's something to that, but
5 I'm dubious that there is as much as one might suppose.

6 And state supreme courts are not necessarily all
7 that good if -- at separating the weak from the chaff of
8 self-interested proposals.

9 Here's an interesting example: The state supreme
10 court in Wisconsin unified the bar in 1956 and permanently
11 in 1958. And shortly after that, there was a challenge to
12 the constitutionality of the unified bar. And the court
13 upheld the constitutionality of its own product, of
14 course. And in doing so, it attached an index to its
15 opinion which highlighted what was regarded as some of the
16 significant activities of the state bar that demonstrated
17 its working in the public interest.

18 One of the activities that the court highlighted
19 was the promulgation of a minimum fee schedule, something
20 that this was later found to violate the Sherman Act. The
21 public interest served, according to the court, quote, The
22 present economic plight of the lawyers in this country,
23 the court wrote, is one which has to serve the bench and
24 bar. Able young men who otherwise might be attracted to
25 entering the legal profession are being discouraged
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1 because of this.

2 And listen to this, During the period of 1921 to
3 1951, the net income of lawyers in Wisconsin increased by
4 58 percent, while that of dentists rose 83 percent and
5 that of physicians 157 percent. Had there been no unified
6 bar in 1960, the court's unfortunate defense of a
7 questionable bar program would not have occurred.

8 In the 1970s, courts, and legislators especially,
9 began to infer from the unified bar's public status that
10 the public should have more of a role in governance, thus
11 the California legislature added public positions to the
12 state bar's board -- it was then the board of governors --
13 to be appointed by the governor.

14 And predictably, some California lawyers viewed
15 this new development with consternation, especially after
16 Governor Jerry Brown filled all of the positions with
17 individuals described by California legal newspaper as
18 literal democrats.

19 There's a history of tensions between public and
20 lawyer members of the board and block voting lawyers on
21 one side, public members on the other. And when some
22 liberal bar leader suggested that the conference of
23 delegates could serve as a model for a new voluntary

24 statewide bar association, which would take over some
25 state bar functions and provide, quote, aggressive
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1 representation of lawyers, public members of the board
2 were appalled.

3 As in this colloquy between Harriet Katz, a
4 public member, and local bar leader, Bert Tigerman.

5 Ms. Katz: "A lot of the lawyers think they
6 belong to an organization very much akin to a voluntary
7 association or club except they have to belong to the
8 state bar. That misconception should not be hindered to.
9 The state bar can be thought of as a regulatory agency
10 which lawyers do not belong to per se, but in which they
11 pay dues to continue to possess their license.

12 Mr. Tigerman: Is the state bar not equivalent to
13 a professional organization such as the California Medical
14 Association, the dental association, or any other
15 association representing all of the profession in the
16 state?

17 Ms. Katz: No, it is not. And if you want to go
18 and form a voluntary organization, feel free, but it
19 shouldn't be done because you think the state bar is
20 supposed to represent you, but doesn't do it adequately
21 and, therefore, you will take some of your organizational
22 energy elsewhere. You must leave with the state bar that
23 which is within its power to possess.

24 Sound familiar? In response to my reading of
25 that -- coming across that colloquy, I wrote the
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1 difference here seems to be fundamental. Katz sees the
2 state bar as a public regulatory agency and not really a
3 membership organization. Tigerman sees it very literally
4 the other way around. And I cannot imagine a state bar to
5 which they would both be reconciled.

6 There are always complaints about effective
7 regulatory programs or ineffective ones, especially
8 discipline. And that has led to a branch of government
9 like the legislature, separating regular functions from
10 the bar association activities, non-regulatory activities.

11 The supreme court took -- the Wisconsin Supreme
12 Court took discipline away from the state bar and set up a
13 regulatory agency under the court and yet it still
14 retained the unified bar. Just because you separate out
15 those regulatory functions does not necessarily mean you
16 are also going to go from having a unified bar to having a
17 voluntary state bar. But one begins to wonder just how

18 strong the justification would be for a unification in
19 that circumstance.

20 This is actually a global phenomena. The reforms
21 in Australia and the UK have done this. The act that was
22 passed in 2007, the Legal Services Act, with respect to
23 the law society, the solicitors organization separated out
24 a -- the SRA, the Solicitors Regulatory Authority, from
25 the law society itself.

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1 Now it didn't take discipline completely away
2 from the law society, but only serious, very serious
3 matters that might result in disbarment were sent to the
4 law society to process and decide. And lesser things were
5 not sent to them because it was thought that they had
6 great backlogs for years and that had to stop. And the
7 way it would be stopped would be to have the SRA take it
8 off.

9 Similar developments in Australia and soon to
10 come, I think, similar to develops in Canadian provinces.

11 And now there are new reasons to have the courts
12 take control, namely the dental examiner's decision which
13 is getting enormous attention, as I said. And it remains
14 to be seen if oversight by the state supreme court will be
15 active enough supervision under FTC guidelines to retain
16 immunity.

17 Even if the supreme court is actively overseeing,
18 it's possible under FTC guidelines that those justices
19 might be considered active market participants because
20 they might retire and go back into practice. Who knows?

21 Elizabeth reminded me that I had said in my
22 article that competition has never been a core value of
23 the legal profession, and I don't think that's an arguable
24 proposition. Far from being a core value, it's been
25 looked at with a great -- with great suspicion.

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1 And starting from Julius Henry Cohen, "Law
2 Business or Profession," written in 1916, Cohen felt that
3 there would -- to have an effective legal profession,
4 there would have to be a sense of brotherhood among
5 lawyers, and nothing could kill brotherhood faster than
6 fierce competition.

7 And that kind of thinking, rather than just let's
8 make sure we don't have any competition for economic
9 reasons, has been prominent in the bar ever since, but
10 there is less competition than there might be under other
11 circumstances, and that has implications for access to

12 legal services.

13 I see a big -- I don't know whether to call it
14 philosophic or pragmatic -- debate brewing, two different
15 images of where things are going to go from here.

16 One expressed by the executive director of the
17 Washington State Bar when she testified last month is
18 stepping towards expanding openings for non-lawyer legal
19 services providers such as their LLLTs versus a vision of
20 continued resistance to any liberalization in the field
21 that would bring people who weren't lawyers, but were
22 doing law related things, out into the sunshine.

23 And I think there's going to be a lot more of
24 this. The enforcement of laws against the unauthorized
25 practice of law has dwindled. There are a number of state
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1 supreme courts that have compiled rather substantial lists
2 of exemptions for various kinds of non-lawyer actions,
3 doing things that lawyers traditionally might have
4 regarded as the practice of law. And I think that's going
5 to continue to be the direction in which things are going
6 to go. What implication that has for whether there should
7 be unified state bars or voluntary state bars is another
8 question.

9 I just want to say that I read Professor
10 Fellmeth's submissions and I found them quite persuasive
11 on why I would balance the desirable not only to have an
12 independent regulator, but also to transition from a
13 unified bar to a voluntary state bar association.

14 Now there's reasons to worry. You know, would
15 lawyers join? How many would join? Even if the rate of
16 membership is not all that great, you have 185,000 people
17 who might potentially be members. And I would think you
18 would certainly have a critical mass when in that
19 little -- I call it an interregnum -- when the Wisconsin
20 State Bar stopped being a unified bar for four or
21 five years as George mentions this month, I guess, or
22 recently, they still retained 80 to -- 80 to 88 percent of
23 Wisconsin lawyers as members.

24 Now maybe that was just because people weren't
25 getting their act together fast enough to quit

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1 immediately. Who knows? But -- and we don't have that
2 much experience with deunifying and, therefore, seeing
3 what we can expect of lawyers. But I don't think there's
4 reason to feel confident that there would not be a
5 substantial voluntary state bar. I think -- state bar

6 association. I think the supreme court would certainly
7 want such an animal to exist and spend some time in
8 Sacramento. I could be wrong.

9 The sections. It's a very important issue and
10 very hard to see how it can be resolved. Sections have
11 two big problems.

12 MR. PASTERNAK: Why don't we wait for a minute. Let's
13 see if we can fix your mic.

14 PROFESSOR SCHNEYER: The problems are, one, being
15 subjected to the indignity of having to comply with the
16 open meetings law, which doesn't sound like something
17 that's really necessary and it sounds like something that,
18 frankly, would be a pain and not make the sections happy
19 about being sections in a unified bar.

20 And then the other problem is that the California
21 State Bar has felt the need or felt entitled to insist on
22 being reimbursed for overhead costs it has incurred and
23 provided for the sections to the point where something
24 like 67 percent of the revenues of at least the business
25 law section and maybe others are now being taken back, and
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1 that doesn't seem like it's going to be a sustainable
2 pattern.

3 They're important, the sections. And in fact,
4 the whole realm of lawyer specialization has become an
5 enormously important factor in thinking about the
6 profession. The sections -- and there also, of course,
7 are many specialty bar associations. So you could have a
8 family law section in the bar and you could have the
9 academy of matrimonial lawyers as well, and it seems that
10 they do and can coexist.

11 But one would want to try to come to some
12 judgment about what the fate of the sections would be if
13 there was deunification.

14 Thank you.

15 MR. PASTERNAK: Thank you, Professor.

16 Any questions?

17 MS. HOLTON: I have one.

18 MR. PASTERNAK: Vanessa.

19 MS. HOLTON: Good morning, Professor, Professor
20 Schneyer.

21 Other than the general comments that you made --
22 and you needn't repeat those -- I'm wondering if you've
23 analyzed the specific structure of the California State
24 Bar in relation to the North Carolina State Board of
25 Dental Examiners' decision starting with whether there is

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1 anticompetitive activity at all and the Sherman Act
2 elements, and if so, moving into the Parker immunity
3 element.

4 PROFESSOR SCHNEYER: I'm sorry. So the question is?

5 MS. PARKER: The question is, other than the general
6 comments you've made, I'm just wondering if you have done
7 any specific analysis of the California State Bar in
8 relation to the North Carolina Dental Board decision
9 beginning with whether there's anticompetitive activity to
10 start with and other Sherman Act elements to start with
11 and if so, Parker immunity issues.

12 PROFESSOR SCHNEYER: Well, any time -- no, I haven't
13 done that, but I think almost inevitably there's going to
14 be things that could be characterized as anticompetitive.
15 That doesn't necessarily mean that they're evil or they
16 should cease to exist forthwith.

17 But if the immunity is not there, then there's
18 very likely to be costly litigation, even if ultimately
19 the bar prevailed. And it's not certain that it would
20 always prevail. That's about as much as I can say about
21 it.

22 MS. PARKER: Thank you.

23 MR. PASTERNAK: Thank you very much, Professor -- oh,
24 I'm sorry.

25 MS. PARKER: Before we dismiss you, I do want you to

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1 just say a word, if you could, about your writings on
2 proactive management. I was struck by what I read where I
3 interpreted you saying that, really, the discipline
4 function that we think of is just a tiny part of the
5 bigger issue of having a bar that works for us.

6 PROFESSOR SCHNEYER: Yeah. This is something else
7 that I think has been in the air. And Australia developed
8 a scheme of what I call proactive management based
9 regulation just to supplement the disciplinary process.
10 That got picked up in England and Wales and it's now, I'm
11 pretty sure, going to be adopted in one form or another in
12 the Canadian provinces. And it's being discussed
13 considerably within the national organization of the bar
14 council.

15 The idea is this: It would be possible to take
16 steps to prevent misconduct rather than deal with it only
17 ex-post. That might be a desirable thing.

18 And in New South Wales, they thought of a way to
19 possibly do this and that was to require law firms or the

20 so-called incorporated law firms when they incorporated to
21 do a self-assessment of the systems that they had in place
22 to try to stave off certain kinds of misconduct that's
23 pretty frequent such as trust account violations and the
24 like and then to report to the Commissioner of Legal
25 Services, which is an executive branch position, on
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1 whether they felt that they were in compliance with
2 appropriate standards with respect to the systems that
3 they had in place or whether they were not in compliance
4 or whether they were on their way to be in compliance.

5 But the question of compliance wasn't there for
6 purposes of deciding whether the firm or the people
7 responsible for management of the firm ought to be
8 disciplined. It was there just to check themselves and be
9 thoughtful about this because it's become increasingly
10 clear -- especially as firms have gotten larger, but this
11 is also true of small firms -- that appropriate systems
12 and appropriate conflict detection system, for example,
13 can do as much to prevent misconduct as the character of
14 the lawyers in the firm and the ethical sensitivities of
15 the lawyers in the firm.

16 And this is recognized in the ABA motto of rules
17 of professional conduct in motto 5.1 and 5.3 that say that
18 lawyers should take reasonable measures to have programs
19 in place that will help to assure that lawyers will
20 practice in conformity with the rules of legal ethics.

21 So in New South Wales, when they set up this
22 program, a very careful study found that the number of
23 grievances filed against lawyers in particular firms was
24 cut by two-thirds after a firm had gone through this
25 self-assessment process.

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1 So that's the proactive aspect of it and it has
2 turned out to not be terribly expensive to do it as they
3 were doing it. And this is now something that's being
4 done as well in England. And Canadian provinces are just
5 embarking on it. The most advanced example is Nova
6 Scotia. If you want to check out the Nova Scotia Bar Law
7 Society, I guess. They call it bar. Some very
8 interesting material there on the subject.

9 MR. PASTERNAK: Thank you again, Professor. We
10 appreciate you coming and thank you for your comments.

11 PROFESSOR SCHNEYER: Thank you.

12 MR. PASTERNAK: Our next speaker is Justice Laurie
13 Zelon who is an Associate Justice on Division 7 of the

14 California Court of Appeal here in the Second District.
15 Justice Zelon is a former president of the Los Angeles
16 County Bar Association. She's known nationally for her
17 work on legal services and was the initial chair of the
18 California Commission on Access to Justice.

19 Justice Zelon.

20 JUSTICE ZELON: Thank you, David.

21 "Well, the first thing we do, let's kill all the
22 lawyers." Dick the butcher. Henry the VI. Now that's
23 been one of the most debated quotes in all of Shakespeare,
24 at least in the legal profession. And please, I am not
25 here to give a Shakespeare seminar.

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1 My point is that one of the points of view on
2 that speech and that line -- because Dick the butcher
3 after all was in the middle of a rebellion and coup to
4 overthrow the government -- is not as a criticism of
5 lawyers, but as a recognition that particularly in a
6 democracy, lawyers protect people against the violation of
7 their rights and against the losses of their freedoms.
8 And that is the spirit in which I come to talk to you
9 today.

10 And please let me make clear, I am not speaking
11 for the court in any way. I am here today solely as an
12 individual in expressing my individual views.

13 I've always seen the bar as having a dual
14 personality. On the one hand is public protection and on
15 the other hand is service to the profession, to the
16 members of the bar.

17 I want to talk mostly about the first today,
18 about public protection, because I think often we all
19 construe public protection too narrowly. Public
20 protection is much more than admission and discipline.
21 That's where we begin and end our careers -- hopefully not
22 end our careers. But we do more as a profession to
23 protect the public than merely regulate who can practice
24 law and under what circumstances.

25 I want to talk about the Keller case, Keller

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1 versus State Bar of California. I am sadly way too
2 familiar with that case because I spent about eight years
3 of my life litigating it on behalf of the bar. I'm sorry.

4 But the court, the US Supreme Court in Keller
5 talked about why it was necessary and why it was important
6 to have a unified bar. And the supreme court said, "The
7 compelled association and integrated bar are justified by

8 the state's interest in regulating the legal profession
9 and improving the quality of legal services."

10 And the court went on, "These principles are
11 useful guidelines for determining permissible
12 expenditures. The guiding standard must be whether the
13 challenged expenditures are necessarily or reasonably
14 incurred for the purpose of regulating the legal
15 profession or improving the quality of the legal service
16 available to the people of the state."

17 That was the line, if you will, that the supreme
18 court drew between what was mandatory and what was subject
19 to the political opt out provisions which were the outcome
20 of the decision.

21 Public protection, to be effective, requires a
22 certain stability and consistency of membership and a
23 stability of resources in order to make sure that programs
24 that are adopted for the protection of the public are able
25 to be continued and are not subject to the vicissitudes of
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1 the economy and the willingness of members to join.

2 Those of you who have read Bohling alone know
3 that membership in voluntary associations is not what it
4 used to be and that it cannot be reliable as a source of
5 resources particularly in challenging economic times. And
6 so the public protection aspects of the bar as the supreme
7 court recognized are part of the purpose of the unified
8 bar.

9 So what do I mean when I say the public
10 protection is broader than admissions and discipline? I
11 specifically include the bar's work in ensuring access to
12 the courts, in making sure that procedures are fair for
13 litigants, that adequate representation is provided to
14 those who are in need of representation, and that the
15 ability of people to solve their legal problems is
16 protected and preserved.

17 What aspects of the bar do that now? Let's start
18 with the trust fund program. The trust fund program
19 administers approximately \$30 million every year, money
20 that is critical to those organizations in California that
21 provide legal services to those among us with the least
22 access to legal services otherwise.

23 Nearly 100 non-profit legal aid organizations
24 receive these funds. They help low-income Californians
25 all across the state. They work to determine that quality
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1 is ensured and that the work is done.

2 The other things that get administered are the
3 state funding for legal services in the form of the Equal
4 Access Fund. That money is administered through the trust
5 fund program and it's vital, again, especially in these
6 times of very low interest rates when the IOLTA funds have
7 diminished substantially as interest goes down.

8 They also administer the Justice Gap Fund which
9 is voluntary contributions by lawyers for this, administer
10 cy-pres awards and other settlements.

11 Best example now is the \$50 million in new grants
12 that are going through the trust fund because of the
13 foreclosure suits that go for foreclosure prevention and
14 community legal assistance.

15 All of that came from other settlements, but my
16 point is that without that organizational structure to
17 administer those funds, the stability of the distribution
18 and, more importantly, the regulation of the quality of
19 the programs that receive them would be at great risk.

20 The Trust Fund Program also educates attorneys
21 and banks as to what IOLTA means and how the interest can
22 be calculated and distributed which is a very important
23 aspect.

24 Something a little closer to my heart is the
25 Access to Justice Commission. The Access to Justice
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1 Commission, which is one of the oldest Access Commissions
2 in the United States, was formed because there was a
3 committee of the state bar that said people need more than
4 they are getting. We are not doing enough for litigants
5 as lawyers and as courts, formed a study group which
6 recommended the creation of the commission.

7 I had the privilege to chair the commission in
8 its beginning years starting in 1997. And the commission
9 is unique. It brings together the lawyers, the judges and
10 the public because there are public members, politically
11 appointed members, members from religious organizations,
12 all of whom share the goal of making sure that
13 Californians have access.

14 So what has the commission looked at? Well,
15 first of all, it helped established the Legal Access Fund,
16 which I know is dear to the heart of your president, dear
17 to my heart as well. It is the first time California
18 publicly funded legal aid.

19 The commission worked on Language Access, which
20 is now a vibrant ongoing program in the courts. Worked on
21 the intractable issue of providing adequate assistance in

22 rural areas where there are few lawyers and very large
23 distances. And it has worked on a number of areas. Right
24 now it is involved in administering grants for incubator
25 programs. And the incubator programs train lawyers to
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1 serve those people who don't qualify for federally funded
2 legal aid, but cannot afford private counsel on their own.
3 And the incubators are teaching lawyers how to have a
4 practice which serves the need in the community, but also
5 allows them to feed their family and to provide resources.

6 So all of these initiatives are critical.
7 California is a leader nationally. And I would submit to
8 you, without the structure that is provided by the support
9 of the state bar, that those things which seriously keep
10 people protected, that protect their legal rights, that
11 preserve their ability to come to court, would be absent.

12 If you don't view public protection as covering
13 those areas, what you are then saying is if people choose
14 to join an organization and if that organization chooses
15 to suspend its resources to support Access to Justice,
16 then we will administer IOLTA and we will have Access to
17 Justice. But if people don't choose to join or if people
18 choose not to allocate their funds that way, we won't have
19 it.

20 And that is why I wanted to come to you today and
21 talk about defining public protection in such a way that
22 it includes the critical work that has been done and is
23 ongoing in the State of California through the auspices of
24 the state bar and with the support of the state bar as
25 part of the public protection aspects.

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1 I really think I'm going to stop there and answer
2 any questions you may have and not sound like Dick the
3 butcher.

4 MR. PASTERNAK: Thank you, Justice Zelon.

5 Any questions?

6 Miriam.

7 MS. KRINSKY: Thank you, Justice Zelon.

8 I appreciate your coming forward and sort of
9 capturing so well a thing that some of us have tried to
10 sort of grapple with, which is the notion that if we
11 really think about the mission of the bar and the notion
12 principles, what does it mean to protect the public, that
13 we shouldn't presume that Access to Justice, that even
14 raising the bar in trying to better educate the
15 profession, trying to enable the profession to be the best

16 that it can be is somehow in conflict with the notion of
17 protecting the public.

18 So I guess my first question is, should we even
19 presume that service to the profession or the bar, which
20 can include things like incubator, dealing with issues of
21 student debt so that a greater part of especially young
22 lawyers can attend to the needs of low and modest income
23 communities, trying to promote diversity of the profession
24 so that our profession can better reflect the public and
25 the community and do that much more to help service the
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1 needs of all communities in our society and in our state,
2 should we even presume that public protection doesn't
3 include those elements?

4 And do you believe that as we think about, you
5 know, the work that goes on around legal education,
6 around, you know, pipeline issues, around trying to raise
7 the bar of the profession is somehow inconsistent with a
8 mission of a bar that's focused on public protection.

9 JUSTICE ZELON: You know, that's an interesting
10 question. Of course, as you get to the edges of any
11 question, you begin to say, Well, where does this fall?

12 I would say this: That the work that both make
13 sure that lawyers understand how to do their job well so
14 that they are not harming their clients and that it
15 inculcates in the lawyers an understanding of the
16 obligation that we have because we have a privileged and
17 protected profession to make sure that the public is
18 served, clearly are part of public protection; making sure
19 that lawyers have the connections and the ability to serve
20 those who would remain unserved otherwise; the
21 partnerships that have been created, the pro bono programs
22 that have been created.

23 All of those, in my view of public protection,
24 are critical because as our system exists now, people who
25 come into the system without a lawyer are at a

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1 disadvantage. So anything we can do to make lawyers more
2 aware of their obligation to people and better able to
3 fulfill that obligation to people are part of public
4 protection.

5 MR. PASTERNAK: Thank you.

6 Any other questions?

7 Dennis.

8 This is Dennis Mangers. I don't believe you have
9 your name plate out there. I'm sorry, I didn't see it.

10 MR. MANGERS: I'm Dennis Mangers.

11 Justice --

12 MR. PASTERNAK: Denny, why don't you change mics.

13 MR. MANGERS: Justice, the speaker that preceded you

14 has studied this issue pretty carefully as you could tell

15 from --

16 MS. PARKER: Justice Zelon, perhaps you turn yours

17 off.

18 MR. MANGERS: Does that work?

19 So the speaker that preceded you who has studied

20 this issue and cited other countries and other large

21 states that have gone before with regard to deunifying

22 seemed to suggest that so far, he hadn't found any of the

23 problems that you have identified in your remarks.

24 So if -- I wonder if we were surgical in the way

25 in which we -- I was once in a singing performance where

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1 they had to change this about four times while I'm on

2 stage singing so I'm used to this.

3 -- seem to suggest that in those cases, they had

4 divided the functions surgically and carefully enough and

5 no doubt collaboratively -- at least I'm hoping -- so that

6 those things like Access to Justice, for instance in

7 New York where they spent about 20 times more than we have

8 allocated for that purpose here and seem to do fine --

9 that the voluntary associations, A, we're doing a pretty

10 good job of that, while those things that were absolutely

11 intrinsically related to regulation after it had decided

12 carefully were staying over on that side in which

13 mandatory dues were provided.

14 So I'm having trouble understanding why you think

15 one has to remain unified in order to accomplish what

16 you've described to us today, simply having structure when

17 alternative structures have been tried successfully around

18 the world and in our own country. It's just not jibing

19 with me.

20 I mean, have you looked at New York, for

21 instance? And is it derelict in its duty in terms of

22 public protection?

23 JUSTICE ZELON: In New York, the millions of dollars

24 that you are -- sorry. In New York, the money that you

25 are referring to came through the court budget.

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1 The court in New York and the legislature have a

2 very different relationship than the California courts and

3 the California legislature do. And the chief justice in

4 New York has a great deal more control over the Access to
5 Justice initiatives. It does not rely on the bar. It is
6 done through the court.

7 I am not -- I would not even pretend to be an
8 academic or to have studied this in the way that the
9 professor has. I am, however, very familiar with the
10 Access to Justice movement throughout the country and,
11 indeed, in other countries. I've spoken in Canada and
12 would say that in Canada, the large efforts that have gone
13 on are a combination between the law society and the
14 courts in which the courts directed the law society to do
15 the work.

16 But in looking at the Access to Justice work in
17 the United States, which I'm very familiar with, the
18 successful Access to Justice commissions rely on very
19 strong support from their bar associations. The Access to
20 Justice Commissions, which are having the greatest
21 difficulty getting their work done, are those which are
22 creatures solely of their courts and, as a result, do not
23 have stable funding, do not have stable staffing.

24 What I am saying is if you are serious about
25 public protection -- and I think everyone in this room is
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1 indeed very serious about public protection -- that if a
2 determination is made that the California Bar should not
3 be unified, on which I am not taking a position, what I am
4 saying is that we owe it to our public to find a way that
5 is most stable and most protected and not relying on
6 vicissitudes. And my work with other Access to Justice
7 Commissions has taught me that that stability is critical
8 to providing the Access to Justice piece.

9 That is why I differ with the professor where I
10 think that public protection must include Access to
11 Justice and must be part of the stable part of the bar
12 from which plans can be made and programs can be carried
13 out.

14 I hope that answers your question.

15 MR. MANGERS: Well, it does. But if I may, I have one
16 follow-up.

17 MR. PASTERNAK: Sure.

18 MR. MANGERS: It occurred to me since I've been here
19 that there's a certain percentage -- and this is the case
20 of almost every profession -- there's a certain percentage
21 of attorneys that seem to gravitate to serving the
22 industry by being involved in bar-related activities.

23 And what I've been reading lately suggests that

24 in bars that have deunified, about that same percentage of
25 people who gravitate to that level of service to the
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1 profession choose to voluntary continue serving in a
2 professional association and doing precisely what they
3 were doing before. Only in this case, without the onerous
4 burdens of Bagley-Keene and certainly without paying
5 67 percent of their revenue in overhead to their state
6 bar.

7 So what I wonder is why are you worried about the
8 vicissitudes of economy and other issues that might
9 deplete or minimize the professional association's ability
10 to continue doing whatever when that is not the experience
11 anywhere around the country?

12 JUSTICE ZELON: Well, I would differ with you. I was
13 on the Board of Governors of the American Bar Association
14 in the late part of the last decade. And when the economy
15 became much more challenging for lawyers, the membership
16 in the American Bar Association -- and lots of lawyers to
17 pull from for the American Bar Association -- the
18 membership declined at a very serious rate.

19 The fallout from that was that there were
20 proportionally less funds to be spent on the Access to
21 Justice activities of the association.

22 A voluntary association has to, in fairness and
23 because of its fiduciary duties to its members, cut its
24 budget in response to cuts in its revenue. It has to stay
25 afloat. And that's exactly what happened in the American
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1 Bar Association.

2 My experience at the local bar level indicates to
3 me as well that first of all in hard economic times, there
4 is a loss of membership and, secondly, that the generation
5 which has followed us has a different view of membership
6 in associations in general, not just professional
7 associations. That was my reference to
8 wholly alone. That past history about joining voluntary
9 associations I think is not necessarily a guide to people
10 who have very different priorities in how they manage
11 their professional and personal lives.

12 But as I said, as I began this, my experience is
13 specifically watching what happened in the American Bar
14 Association which had a very long history of work in
15 Access to Justice as part of public protection which was
16 diminished significantly when membership fell.

17 MR. MANGERS: Thank you.

18 MS. PARKER: If I could make a comment, it's sometimes
19 hard to orchestrate these panels exactly as one would
20 like, but, Justice Zelon, you will be interested, if you
21 are still here, to hear Director Liz Neeley from the
22 Nebraska State Bar Association which is perhaps the only
23 recent example we have of what happened exactly on the
24 topic you and Mr. Mangers are talking about when
25 deunification occurred abruptly there.

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1 MR. PASTERNAK: Danette.

2 MS. MEYERS: I just have one question.

3 Welcome, Justice Zelon. It's always a pleasure
4 to see you.

5 Do you think that it's more a function of the
6 lack of volunteers and by younger lawyers, more a function
7 of the fact that they are hit with the heavy student loans
8 as opposed to what we were all hit with way back when?

9 I know that when I finished law school, I think
10 my loans were about 30,000. The lawyers that I supervise
11 in the DA's office, their loans are over 100,000. And so
12 it's harder to get them to join voluntary associations and
13 to fill that field should we deunify because of the other
14 aspects in their lives that we didn't as lawyers have as
15 much.

16 So do you think it's more a function of a
17 monetary thing as opposed to I'm just not into the
18 voluntary associations? Could you comment on that.

19 JUSTICE ZELON: I'm not a sociologist. I can tell you
20 what I've observed. I think it begins at home with me. I
21 have a son who is a lawyer and who has very heavy student
22 loan debt and it constrains his choices. And I think
23 that's true a lot. And when we had the task force that
24 Miriam Krinsky was part of and some others, there was a
25 lot of work done on student loans, and that is a huge

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1 constraint on the ability of young lawyers to make
2 choices. And I would say I would include this one.

3 But I do think there also is something going on
4 that we see at least in the popular past that the
5 work/life balance that younger people, recent graduates
6 and people in their 30s are trying to strike is a little
7 more heavily balanced towards family than I think a lot of
8 us were able to make, and that that's an important balance
9 to them and it's a meaningful balance to them.

10 And that if they have to choose between working
11 until 8:00 at night and then going to a meeting or working

12 until 8:00 at night and going home to see their family, I
13 suspect they're more likely to go home and see their
14 families. And I think that's an aspect of why numbers in
15 voluntary associations have gone down as well.

16 That's just a, I read in the public press and I
17 make assumptions guess and talking to my own children, but
18 I think the student loans can't be discounted, but I think
19 there's something else going on as well.

20 MS. MEYERS: Thank you.

21 MR. PASTERNAK: Thank you. Very much, Justice Zelon.

22 Unfortunately, this is becoming a too common
23 refrain at these proceedings, but we all have heard
24 recently about the loss of one of the justices from your
25 court in the second district, Justice Mosk. And I hope on

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1 behalf of the state bar and all of us, you'll express our
2 condolences to the other justices on your court.

3 JUSTICE ZELON: Thank you.

4 MR. PASTERNAK: I realized when I heard the news last
5 week that in the almost four decades now I've been
6 practicing law, this, unfortunately, is the first time we
7 don't have Justice Mosk on one of our appellate courts.

8 JUSTICE ZELON: It's a great loss and thank you.

9 MR. PASTERNAK: Thank you again, Justice.

10 We're going to take just a five-minute break
11 while they try and fix the mics. It will be a short break
12 and then we're going to reconvene.

13 (Recess taken)

14 MR. PASTERNAK: We're going to move on to our next
15 speakers who I've advised we're likely to take a break in
16 a couple minutes. We're expecting Los Angeles City
17 Attorney, Mike Feuer, to attend any moment.

18 But our next two speakers are Professor Robert
19 Fellmeth who is the Executive Director of the Center for
20 Public Interest Law at the University of San Diego Law
21 School. He is well-known to us as a common -- a frequent
22 commentator at our meetings and a former discipline
23 monitor. And Bridget Gramme -- I hope I pronounced your
24 last name correctly.

25 MS. GRAMME: Gramme.

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1 MR. PASTERNAK: Gramme.

2 MR. GRAMME: Thank you.

3 MR. PASTERNAK: -- who is Assistant Administrative
4 Director of USD's Center for Public Interest Law.

5 Welcome to both of you.

6 MR. FELLMETH: Thank you. May it please the Task
7 Force, Robert Fellmeth. My testimony will cover points 2
8 and 4 of our written testimony, North Carolina dental
9 compliance and the bar monitor proposal we have. And
10 Bridget Gramme will present the other two parts,
11 deunification and the appointment by public officials of
12 members of the governing attorney body, not each other --
13 by each other.

14 First, background. Some of you know this, but
15 just to be sure, CPIL has monitored -- CPIL stands for the
16 Center for Public Interest Law which we founded 35 years
17 ago at the University of San Diego School of Law. We've
18 been monitoring the state bar and other California
19 regulatory agencies for those 35 years, the Department of
20 Consumer Affairs agencies including, obviously, the
21 veterinarian board and the doctor board and the dental
22 board, as well as agencies outside of DCA such as the PUC,
23 the insurance commissioner and the state bar.

24 We have been going to their meetings, sending
25 students to their meetings, studying them, writing updates
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1 about them, advocating before them for this period.

2 We've been a sponsor and an author of over 30
3 statutes to date and over 100 rules in the area of
4 regulatory law. We chaired a state agency, myself, four
5 years within DCA.

6 A sidenote about this need for the -- this
7 breadth of experience which we have and which is important
8 to share with you, I understand that there is this
9 sensitivity about the relationship of the bar to the
10 courts.

11 On the one hand, most lawyers are solicitors, not
12 barristers if we had the British model of doing contract
13 negotiations and so forth dealing with consumers. And we
14 are all involved in enforcing laws enacted by the
15 legislature and we all have the taxation authority of the
16 legislature before us and we have other regulatory
17 agencies to look at for various purposes and we all have
18 the same sunshine statutes now applicable to us.

19 On the other hand, I fully recognize the
20 attachment of the bar to the courts that is different than
21 other agencies. Very different. And that's why, as I'll
22 discuss in a moment, we have urged not devolution of the
23 bar into the DCA or into legislative control, but into the
24 increase of the court control, supreme court control. Why
25 we have done that and how we have done that, I'll explain

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1 in a moment.
2 I want to go on -- by the way, I just want to
3 make a comment really for Miriam and others who are
4 working so hard on these issues of the commission and on
5 Access to Justice and the trust fund and so forth. We're
6 familiar with what those agencies do in this area that are
7 not integrated as the bar is and they do a lot, a lot more
8 than we do. And it's not a problem. In fact, it will be
9 an enhancement to those purposes if in fact there's
10 deunification. And I can explain how and why, and Bridget
11 will be discussing that as well.

12 So there's a non sequitur here to we need, we
13 need, we need. Yes, I agree, we need. I'm on board. I'm
14 totally on board, trust me. But you get there, the state
15 agency, much better and it can do it -- and I'm going
16 to -- we'll talk about that in a moment.

17 But first, I want to go on with our background.
18 We've been an investigative arm of the state legislature
19 in the area of regulatory law. We were the enforcement
20 monitor of the California Medical Board. We've been the
21 staff of the monitor of the Contractors State Licensing
22 Board. And as David mentioned, I'm a former state bar
23 discipline monitor appointed by John Van de Kamp, the
24 attorney general.

25 I reported to the Chief Justice, making

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1 suggestions to the legislature, writing 11 reports,
2 sponsoring over 30 changes to the State Bar Act and to the
3 procedures of the bar including the creation of an
4 independent state bar court, the first in the nation,
5 separate totally from the bar and controlled by courts and
6 they perform a court function.

7 And I do want to say that many of these reforms,
8 I did not lead. I followed your predecessors, Anderlini,
9 Rothenberg, Colin Reid, Kevin Culhane, Pat Phillips and
10 many more. Not only were they with me, they were ahead of
11 me. So you should know that I have enormous respect for
12 what you do and who you are. And your predecessors have
13 formed that respect in my heart.

14 Personally, my related background includes
15 teaching, writing and practice in relevant subjects for
16 40 years, especially in antitrust and regulatory law which
17 the North Carolina case involves. One of my books is
18 "California Antitrust Regulatory Law." Another is
19 "California White Collar Crime and Business Litigation"

20 with Papageorge. Entire publications available on Amazon,
21 Amazon.com. For any of you who need to cure your
22 insomnia, I have a source for you.

23 I litigated antitrust matters. Nine years as a
24 public prosecutor, US attorney, and deputy DA. I started
25 the first antitrust -- dedicated antitrust unit in the
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1 DA's office in the country in 1974. Won 21 judgments.

2 Won appellate cases.

3 CPIL, Center for Public Interest in Law does it
4 also. We brought the CTCC case just three years ago, the
5 Ninth Circuit, involving a state agency. And the defense
6 was state action, state agency. We can do it. They lost.
7 We won.

8 So I want to talk about North Carolina
9 compliance.

10 MR. PASTERNAK: If I can, this might be a good
11 opportunity for a break. We do have City Attorney Feuer
12 behind you. Is that okay?

13 PROFESSOR FELLMETH: That's fine. I certainly want to
14 accommodate a public official.

15 MR. PASTERNAK: I appreciate it. Thank you.

16 As I stated a moment ago, I'm going to recess
17 briefly just to turn it over to our next speaker, Mike
18 Feuer who is a Los Angeles City Attorney since July 2013.
19 Previously he was Executive Director of Bet Tzedek Legal
20 Services. He served as a member of the Los Angeles City
21 Council. He served in the legislature where he chaired
22 the judiciary committee.

23 Mr. Feuer, it's yours.

24 MR. FEUER: Thank you very much, Mr. President,
25 members of the commission. Very nice to see some old
0049

1 friends as well as potentially to make new ones or perhaps
2 alienate some of them. We'll see how the conversation
3 goes.

4 I wanted to be here precisely because of the
5 background that Mr. Pasternak just went through and how
6 that background relates to the mission of the bar
7 association.

8 I did spend eight years directing one of the
9 nations leading public interest law firms and at Bet
10 Tzedek, we relied very heavily on our interaction with the
11 bar association. We were, and I think remain, an IOLTA
12 recipient, so I had a lot of very direct contact with the
13 bar association through that means in addition to my

14 contact with the bar as we were trying mutually to build
15 support for legal services and pro bono work related, but
16 not the same issues.

17 I served on the LA City Council after that and
18 had less contact with bar-related functions. But then as
19 a state legislator, I did chair the judiciary committee.
20 Your funding bills came through my committee. But more
21 than that, a number of very specific issues relating to
22 Access to Justice came through the committee I chaired.
23 And some of those issues arose from matters I initiated,
24 not the least of which was the Sargent Shriver Civil
25 Counsel Act, which I was very proud to author as a member
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1 of the state legislature and a chair of the judiciary
2 committee.

3 That act, as you know, is designed to test the
4 efficacy of a version of a civil Gideon model. The idea
5 that Access to Justice in a civil case should not be a
6 function of how much money you have, but rather the merits
7 of your case. And I'm very pleased to know that that act
8 has become a topic of discussion around the country when
9 it comes to not only legislators, but justices of state
10 supreme courts and others seeking to find a way to
11 replicate the vision that we have here in California for
12 what Access to Justice really means.

13 So having said all of that, the question that
14 brings me here today is what is it about a bar association
15 that matters the most. And what does that say for whether
16 the bar should be unified or broken apart?

17 And it's in the context of my background in
18 Access to Justice issues that I wanted to speak briefly to
19 you today.

20 The idea that somehow there is something extra
21 about Access to Justice and pro bono work that is not
22 intrinsic to what it is to be a member of the bar is
23 deeply disconcerting to me. And I think there's no way as
24 you engage in this discussion about whether to break
25 portions of the bar's role into pieces or keep it
0051

1 together, there is no way to separate that question from
2 the question of what it means to be a lawyer.

3 And I wanted very much to be here to say that
4 both symbolically and intrinsically the idea that there is
5 something that isn't at the core function of what it is to
6 be a lawyer and therefore what the organization of lawyers
7 ought to stand for is something less than core about the

8 pro bono and legal services commitment and Access to
9 Justice that has been such a deep, profound aspect of my
10 career is very troubling to me. They are the same thing.

11 To be a member of the bar is to promote Access to
12 Justice, otherwise we are being inadequate in our roles as
13 leaders of the bar association, even members of it,
14 participants in it.

15 To fail to actively promote Access to Justice as
16 a central role of the state bar association is to advocate
17 responsibility for the central issue in our society today
18 when it comes to the justice system. And I would very
19 much oppose the idea that this bar associate itself with
20 that advocacy of responsibility, with that devolution of
21 authority to somebody else.

22 Look, it may be that there are other entities
23 that could replicate this role that the bar plays on
24 Access to Justice issues. I can certainly manage it.
25 Someone want to make me in charge of that? It would be a
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1 hard-working organization, a lot of horsepower associated
2 with it.

3 But to separate it from the bar is to convey to
4 the public that the idea that that's not part of the basic
5 day-to-day bread and butter of what it is to be a lawyer
6 and a bar association. And that message is corrosive to
7 the very foundations of who we are not only as lawyers,
8 but as a part of a democracy.

9 That's why I wanted to be here today. You know,
10 I could redelineate what, as I'm sure already has been
11 said many times, are all the various specific aspects of
12 bar association work on these issues.

13 You know, I -- the Office of Legal Services does
14 a lot of stuff. It administers the funding of all kinds
15 of different programs to organizations like Bet Tzedek and
16 others.

17 You know that already. You know about the bar
18 association's leadership on the center for Access to
19 Justice. I don't sit here -- I don't need to sit here and
20 tell you about that, but I do need to tell you about how
21 important those roles have been and will continue I hope
22 to be to lawyers and clients around the state, not as
23 something separate from the bar association.

24 You know, it's been a real concern of mine since
25 I became the director of Bet Tzedek. 30 years ago this
0053

1 year I became the director of Bet Tzedek. And it has been

2 from that point forward deeply disconcerting to me to see
3 lawyers and leaders of key public entities suggest that
4 being a lawyer doesn't require being deeply embedded in
5 these issues. It sure as heck does.

6 I am eager, if you have it in mind, to answer any
7 questions that you have. I don't have a lot more to say,
8 but I'm saying it with a lot of passion for a reason
9 because this is not -- these are not issues that I think
10 of as an economic exercise. I have sat across the table
11 from someone's grandmother who was about to lose her
12 health care. These are not academic discussions to me. I
13 have dealt with the rough and tumble of the state
14 legislature trying desperately to get through the
15 legislature the Shriver Act and dealt with the New York
16 Times editorial board as we focused on how to elevate this
17 discussion to a national level.

18 These are part and parcel of the best of what it
19 means to be a lawyer and, therefore, the best of what it
20 means to be a leader of the bar and to be an association
21 comprised of those leaders.

22 Is there any questions, Mr. Chair, otherwise, I'm
23 going to get back to messing around in the city that I
24 have some authority in.

25 MR. PASTERNAK: Thank you, City Attorney Feuer.

0054

1 Any questions? I do not see any.

2 Thank you for your continued passion and for
3 joining us today.

4 MR. FEUER: Thank you, Mr. Chair. I'm going to walk
5 away feeling underutilized and a little lonely, but that's
6 okay. Good to see you. A lot of old friends.

7 MR. PASTERNAK: We'll come back to Professor Fellmeth
8 and to Ms. Gramme. Thank you for indulging us for the
9 interruption.

10 PROFESSOR FELLMETH: No problem.

11 MR. PASTERNAK: I do want to add that we're a little
12 bit behind schedule and I'm hoping that we'll be able to
13 conclude this portion by 12:30 when we have our next
14 speaker scheduled who is coming in the midst of a trial
15 during his lunch break and we do need to put him on at
16 12:30 sharp.

17 PROFESSOR FELLMETH: Easily done. I also don't mind
18 being interrupted with someone with whom I agree.

19 North Carolina compliance. Historically, groups
20 such as those of us in this room have been protected by
21 what's called state action status. That's absolutely

22 critical. North Carolina was enacted -- I'm sorry, was
23 decided 14 months ago. 6 of the current sitting justices
24 joined in it. It cites Goldfarb, a very important case
25 applying the Virginia state bar. 8 to nothing vote there.
0055

1 It cites Mikel. Mikel has to do with a state
2 agency that was not robust in its state supervision and
3 its active state supervision, not robust enough to qualify
4 as active state supervision, a California agency. 8 to
5 nothing. No state action.

6 Active participant control means you are not
7 sovereign. That's what North Carolina says. It's not a
8 narrow decision. It's broad, general, declarative. And
9 this group is a walking antitrust violation. You are
10 private parties, no different than if you were meeting in
11 a hotel in Switzerland or Poland, despite the PUC
12 situation, or anyplace else.

13 Now your general counsel asked, Well, does the
14 bar engage in restraints of trade. As someone who's
15 practiced in the area for 30 years, the answer is yes.
16 It's not close. Yes, you can argue that reasonable
17 restraints of trade are lawful and they are. And you can
18 argue that every restraint of trade the bar has is
19 reasonable.

20 The trouble is that there are categories of
21 antitrust violations called per se offenses. And per se
22 offenses do not brook the defense of reasonableness. They
23 are, as a matter of law, unlawful.

24 So what are per se offenses? Horizontal group
25 boycotts, price fixing -- what's price fixing? Price
0056

1 fixing is any joint action that artificially reflects --
2 artificially affects prices.

3 What is supply control? Supply control is price
4 fixing. There's no dispute about that. Does the bar
5 engage in supply control? Yes, of course you do. It's
6 called the bar exam. You take 54 percent of the people
7 who want to be lawyers after seven years of higher
8 education and say no to most of them constricting supply,
9 affecting prices. That is a per se antitrust defense.

10 If you are state actors, if you are sovereign,
11 you can do it. Not only that, as I'll discuss in a
12 moment, we want you to do that. We want you to do
13 restraints of trade. We just want you to do it in a
14 posture that's lawful and where you're protected.

15 Now the possible out is active state supervision.

16 And I know when I spoke about this before, Chair Pasternak
17 said, Well, I think it's really okay because the state
18 supreme court is the active supervisor. You should read
19 Justice Kennedy's description of what active state
20 supervision is. You should read the Mikel case. Do some
21 reading.

22 We made a PRA request to the state bar for every
23 document that reflects, embodies active state supervision
24 or any state supervision by anybody outside of the bar
25 that is outside of the persons who have a profit stake in
0057

1 the process, the so-called active participants.

2 We received a lot of documents. I reviewed them.
3 I can't find any indication, does anyone examine the
4 supply control of the bar and correlate it to a
5 justification in terms of actual provision of competence
6 in areas where they're relied upon? Does it examine
7 consequences on prices and needed supply?

8 This is what active supervision involves. You
9 look at the restraints and you measure them and you gauge
10 them and you apply public criteria. You apply the
11 criteria of public officials, not part of the profession
12 or trade, to see whether or not the line should be here or
13 there or someplace else. Does the supreme court do that?
14 I can't find it anywhere.

15 It's not appropriate to have a posture of a court
16 that is relatively passive that may shoot back rules of
17 professional conduct and does certainly review those.
18 Does it review them for restraints of trade? Does it
19 amend them? Does it actually say, This is what you're
20 going to do? Or does it say, as it usually does, We're
21 passive. We're used to a system of adversary of
22 eclecticism, we're used to that and we'll kind of remand or
23 we'll whatever.

24 This is not -- active state supervision is not
25 that kind of exercise. It is an active inquiry, proactive
0058

1 inquiry into the effects of a restraint.

2 Now how are you going to provide that? How are
3 you going to bring yourself into legality? And you
4 definitely want to bring yourselves into legality. You
5 know that there is not only felony criminal sanctions
6 here, which I don't think are going to happen, but there
7 are treble damages that will happen.

8 And as friendly counsel, the AG has issued an
9 opinion that because treble damages are not punitive, you

10 will be indemnified. Well, there are a lot of people who
11 think treble damages are punitive and that has not been
12 settled yet. And if they are considered punitive, you
13 will not be indemnified. Just be aware of that. Serious
14 business for you personally as well as for the bar as a
15 whole.

16 And I'm not speaking here politically. I'm
17 talking as an attorney very familiar with antitrust law
18 and very familiar with this area of antitrust law. You
19 are in jeopardy. You need to get out of jeopardy.

20 How are you going to do that? Well, there are a
21 number of ways you can do it. One is the Mangers/Mendoza/
22 Corcoran/Rosen proposal. That will create a board
23 controlled by nonactive participants. There are some
24 caveats there. You're going to have to have a situation
25 where if a vote occurs -- because you've got a 7/6
0059

1 arrangement with a one vote margin for public members. If
2 you're going to have a vote that's -- with a quorum of 9,
3 and 5 of votes and they're all attorneys, you're going to
4 have a problem. So you're going to have to have a caveat
5 there. But the idea of having a public controlled board
6 is a good one and I endorse it.

7 And I know it's hard to give up authority, but we
8 did so with the state bar court and ideally we would do it
9 here as well.

10 Now there's a wrinkle to this because even if you
11 do that, if you're going to have a separate committee of
12 bar examiners and a separate commission on the
13 professional rules of conduct, if you're going to have
14 those kinds of bodies controlled by active participants as
15 they are, you are going to have to do active state
16 supervision if you're a public body. So either you're
17 going to have to do it or the supreme court is going to
18 have to do it if you do not change.

19 Either way, how do you do it? Either way you do
20 it by creating a mechanism to accomplish it. You form a
21 body, staff, commission, whatever you want to call it,
22 authority, whatever you want to call it, of experts in
23 economics, in antitrust who can hire consultants on
24 specific issues.

25 Then you have a filtering system. The filtering
0060

1 system is important because I do not think that everything
2 you do restrains trade. Some things do, some things do
3 not. I don't think if someone's disciplined, they ought

4 to be able to invoke active state supervision. I think it
5 should be a realistic system that works but passes muster.

6 So how do you balance that? How do you reconcile
7 that? You have a filtering system that identifies
8 decisions you make that have momentous restraint of trade
9 implications such as the pass point for your bar exam.

10 That's an example of one that does.

11 And then you have a system to elevate disputes or
12 allegations of restraint of trade for at least quick
13 cursory review to see if they have a large impact. If
14 they do, you do the inquiry. If they don't, you don't.
15 And that filtering system allows you to avoid all sorts of
16 unnecessary work that you don't have to do and shouldn't
17 have to do.

18 This is the kind of system that is being
19 considered right now in the legislature for DCA agencies.
20 It's a bill now through the first committee, going to a
21 second committee and it does just what I'm discussing, and
22 we're one of the cosponsors of it. And it accomplishes
23 the task with a minimum of disruption, with a minimum of
24 inconvenience or cost. It narrowly says, Okay. We have
25 to have active state supervision. What do we do to

0061

1 accomplish that? Who can help us?

2 You should be ideally, I believe, suggesting to
3 the court if you're not going to change with the Mangers
4 model, you should suggest to the court that it do that;
5 that what you do -- it's very principal for someone to
6 say, By the way, we are not the legitimate decision makers
7 here under the law if there's restraint of trade impact so
8 we want you to review us. We want you to review the
9 things where there is a big impact. We want you to do it
10 in a way that qualifies for active state supervision.

11 That's what I'm suggesting. I'm not suggesting
12 radical change at all. I'm suggesting that you perform as
13 competent counsel and protect your client and protect the
14 court and protect yourselves. That's what you do.

15 Now if you adopt the Mangers proposal -- which I
16 think is wonderful -- you may have to do the same thing
17 anyhow for your own offices if you're going to keep active
18 participant control of these other entities. If not, you
19 change them all to public members, fine, we've solved it.

20 Now what else? I want to mention a few things
21 about the bar monitor proposal, if I might.

22 We've done this three times. And every time we
23 come up with a report, the boards we are doing it for or

24 about say, Thank you. I didn't know this. Staff didn't
25 tell me this. I've been here five years and I don't know
0062

1 anything about any of this.

2 Because as an independent monitor, in the case of
3 the bar, just the monitor, I was able to get access to
4 everything. I had total cart blanche. I could intercept
5 phone calls. I was listening to the phone calls coming in
6 from the public. I was looking in people's file cabinets.
7 I was interviewing everybody. I was finding out what the
8 heck was going on. You benefit from that. That's in your
9 favor to do that. You know more about what's going on.
10 Maybe the monitor is in error. Fine. Staff will point it
11 out.

12 In my case, when I issued reports, I gave it to
13 staff and said, Critique it first. Give me the critique
14 first before I go public with this. I always like to do
15 that. Maybe you could have the same thing happen with
16 you. But it's to your benefit to have that service.
17 You've got a discipline system.

18 And when I was bar discipline monitor and
19 thereafter, the dues feeding the discipline system were 8
20 percent higher than they are now forgetting about
21 inflation. They're actually almost double back then than
22 they are now. We've gone down, what, 80 percent in actual
23 market value contribution in terms of money feeding the
24 discipline system.

25 I don't know what that's created. Supposedly
0063

1 some people say it's created lighter sentences, lighter
2 penalties. That may have been cured. I trust it's been
3 cured. I think Jayne Kim is very competent. I think
4 maybe she's cured it. Fine.

5 But what about entry? You've got an audit review
6 system that has been part of OTC. I know it's been moved
7 over to general counsel. I'm not much comforted by
8 General Counsel Holton saying, We don't want it there.
9 We'd rather have it stay at OTC. That's not a check. You
10 want a check, put it in the AG's office. Put it in the
11 AG's office. That's where it should be. Have a real
12 check on refusal to file things because that's where I
13 think the choke hold may be now in terms of backlog
14 reduction, and I'm worried about it.

15 I have some indication that's the case. I
16 haven't studied it. I don't feel confident -- by the way,
17 I don't want to be the bar discipline monitor. Don't

18 think I'm arguing for myself at all. I'll give a no, no,
19 no, no. Who is the speaker of the house, Ryan? He was
20 saying no, no, no, no, no, no, no. It's a Ryan denial. I
21 don't want to do it, but someone should and you will
22 benefit from it.

23 Now I'll turn it over to Attorney Gramme.

24 MR. PASTERNAK: Can I ask you one question, Professor,
25 before you do. I think that ties into what you just said.

0064

1 I recall that you appeared before us -- and I
2 don't recall if it was this body or it was the board of
3 trustees -- around last September. I think it was this
4 body when Craig Holden chaired one of the task force
5 meetings toward the end of his year.

6 PROFESSOR FELLMETH: Yes.

7 MR. PASTERNAK: And I recall you saying at that time
8 that you believe that California has the best disciplinary
9 system in the country.

10 Is that still your belief today?

11 PROFESSOR FELLMETH: Yes. I think it is; although,
12 I'm not -- it can be improved.

13 MR. PASTERNAK: There's always room for improvement.

14 I wanted to know if my recollection was correct
15 that you still hold that belief.

16 PROFESSOR FELLMETH: Yes, I do. The rest of the
17 country is terrible.

18 MR. PASTERNAK: Thank you.

19 MS. GRAMME: Good morning. I'm Bridget Gramme from
20 Center for Public Interest Law.

21 And I -- before I begin, I just wanted to thank
22 everyone, President Pasternak and Ms. Parker, Mr. Gomez
23 for putting together really such a great panel over the
24 last few months on this really important topic. We've
25 heard from many different viewpoints and I really

0065

1 appreciate that. And I've also personally listened to
2 them all so I have a few comments based on all the things
3 that I've heard.

4 You know, in listening to the testimony, I feel
5 like there's been some, perhaps, fear of the unknown as to
6 what would happen particularly with the deunification
7 issue, and that's something that I'm going to focus my
8 remarks on today.

9 As you know from our written testimony -- and I
10 won't go into detail -- but CPIL does advocate for
11 deunification of the bar. And we've always believed that

12 it is an inherent conflict of interest to have
13 competing -- as we've heard from the prior speakers today,
14 competing functions of advocating for the profession and
15 advocating for the public. And we really believe those
16 belong in separate categories.

17 And especially with North Carolina, as you've
18 heard today, this has to happen. You have to separate
19 these two functions and -- in order to allow public
20 protection to truly be your core mission.

21 And so some of the observations I've heard today
22 and throughout, I think the biggest one is this concern
23 about Access to Justice. And I'm glad we've been able to
24 go when we have because we wholeheartedly agree with
25 Justice Zelon and also with the City Attorney that Access

0066

1 to Justice is really important to your core mission of
2 public protection.

3 And we think based on the Keller case, that is
4 something that can be funded with mandatory bar dues and
5 should remain within the regulatory entity when you
6 deunify the bar. We see no reason that that would have to
7 go away.

8 And so I think a lot of this fear that Access to
9 Justice would suffer is really unfounded. You're really
10 in a position right now to be able to recommend to the
11 legislature whatever you think -- you're in a good
12 position. You can say, Look, this is what we think should
13 happen. We think we should deunify. These are the things
14 that we want to maintain within our regulatory function
15 and our public protection mission and these are the things
16 that can go off to the side as things that are better for
17 the profession.

18 And I think you should ask the legislature to
19 specifically write it into your statute that you believe
20 Access to Justice is something that is part of your core
21 mission as part of the bar. And that's something that
22 other regulatory agencies do already and they do it very
23 well, as Bob mentioned.

24 So one example that we've put into our written
25 testimony is the Medical Board of California. It's

0067

1 specifically written in their mission statement that
2 serving underserved communities is part of their mission
3 of the medical board. So in addition to enforcement to
4 taking away licenses for doctors that are hurting people,
5 they also are focused on providing access to medical care

6 for the poor communities.

7 And they've been able to do that in a really
8 successful way. And one way they've done it is through a
9 mandatory assessment as part of their licensing fees.
10 Each physician, every time they renew their licensing
11 fees, pays \$25. And it goes to a very specific fund that
12 provides scholarships for doctors who serve in underserved
13 communities for three years.

14 And these grants average about \$105,000, I
15 believe, per doctor. And we've heard that those doctors,
16 based on the survey, end up actually staying in those
17 opportunities, living and working in those communities.
18 And I think that's a real benefit that the medical board
19 provides to underserved populations. And that's something
20 that can definitely happen here with the bar.

21 We think you've done a great job. You're working
22 on these issues and, obviously, we've heard a lot of
23 passion that you all care about this very much. And I
24 think with a deunified bar, you're really narrowing down
25 the focus of what you are functioning on and focusing on

0068

1 as part of a regulatory agency. You are really getting
2 rid of the distractions and allowing yourself to enhance
3 Access to Justice and to really focus your issue, your
4 work on these important issues.

5 So that's -- I just want to get rid of the fear
6 that Access to Justice would go away because it really
7 doesn't have to go away with deunification.

8 Another thing that I want to focus on, we've
9 heard some concerns about not rushing into this
10 deunification issue and that it's something that should be
11 thoughtfully considered. And we agree with that, but
12 having had the benefit of monitoring the bar for
13 35 years -- and I know all of you have term limits so
14 you've come and gone -- we've taken the time in our
15 written testimony in the appendix to set forth the history
16 of this deunification issue.

17 And it's something that has been considered for
18 the last 25 years. It's been -- the legislature has been
19 considering this, the bar has been considering this and
20 we -- there's been two vetoes of the bar dues bill over
21 the last 25 years. And we've gone through, you know,
22 really methodically and laid that all out. And I won't do
23 that for you now, but I just want to assure you that this
24 is not a new idea that hasn't been considered before.

25 And we really believe, especially in light of

0069

1 North Carolina, the time has come. We really need to
2 deunify. The time is now and we've had the history behind
3 it and you are at a really unique position to be able to
4 recommend this to the legislature moving forward.

5 And the final thing I just want to say about the
6 sections is that Bob and I really agree. You know, we
7 read the antitrust positions, concerns about this
8 deunification. And we agree that they provide a very
9 valuable resource to the legal community.

10 And Bob has contributed many times over the years
11 to their publications. Both Bob and I have been a member
12 of that section for many years and we believe that they
13 play an important role, but we don't think that it's tied,
14 that their legitimacy is really tied to being part of the
15 bar as a regulatory agency. I think it can be spun off
16 into a separate association.

17 Just like you heard from Yvonne Chung from the
18 California Medical Association, talking about the way they
19 function. They have sections and they provide a lot of
20 resources for their doctors from all different kinds of
21 areas. And I think that's something that can still
22 maintain a real legitimacy from a statewide bar
23 association agency.

24 So I just -- and my last comment has to do with
25 the elections. It's our number 3 recommendation.

0070

1 It really just makes no sense, and we don't think
2 it ever has, but especially now in light of North
3 Carolina, that you continue to have elections of your
4 board of trustees members. It's a real conflict of
5 interest to be having allegiance to your peers who have
6 elected you and then also having a public protection
7 mission of taking licenses away from attorneys who are not
8 performing.

9 And so we believe that this -- at a minimum, the
10 elections must be converted to appointed positions that
11 are appointed by public officials.

12 And with that, I will conclude my comments.

13 MR. PASTERNAK: Thank you.

14 Professor, are you concluded as well?

15 PROFESSOR FELLMETH: Yes. Sure.

16 MR. PASTERNAK: Questions?

17 Vanessa.

18 MS. HOLTON: Good morning, Professor Fellmeth.

19 And just indulge me if I respond to what was an

20 inaccurate recollection by you of a comment I made about
21 what's known as the second look or review work in the
22 office of chief trial counsel. I never said I did not
23 want it in the office of general counsel. I've always
24 been willing to take it.

25 What I said in the meeting you're referring to
0071

1 which was a RAD -- a special RAD meeting about a week or
2 so ago was that I didn't think it needed to come out of
3 OCTC because the chief trial counsel was never disagreeing
4 with the recommendation of the second look attorneys and
5 that I had so argued with the state auditor that it didn't
6 need to come out of there, but that we're happy to take it
7 now that they think it does.

8 Regarding your expertise as an antitrust lawyer,
9 do you think there are antitrust issues of concern with
10 respect to a voluntary bar association?

11 PROFESSOR FELLMETH: Sure.

12 MS. HOLTON: So in supporting deunification, how would
13 you deal with the antitrust issues of a deunified
14 organization?

15 PROFESSOR FELLMETH: Well, they are -- the sections
16 then would become trade associations. They wouldn't enjoy
17 state action protection, but you know, they don't anyhow.
18 That's the irony. In other words, one of the reasons if
19 I'm a section, if I'm a trade association, I want to be
20 part of the bar, I'd be a section, is because I might
21 enjoy -- and pre North Carolina -- state action immunity.
22 That's not the case anymore.

23 So I can see why some of them want to get out.
24 That and Bagley-Keene and public records. Those two
25 motivations.

0072

1 MS. HOLTON: Maybe I wasn't clear on my question of
2 you.

3 When I'm trying to grapple with these issues and
4 advise the board on the issue of unification/
5 deunification, and I start playing out the string and I
6 think of where different subentities might land, then I
7 start thinking about North Carolina Dental Board decision,
8 antitrust issues and Parker immunity, I come to a place
9 where -- of concern that a voluntary bar association would
10 have antitrust liabilities.

11 And I'm asking you, because you support the
12 deunification, what you think about that and how you would
13 reckon with that.

14 PROFESSOR FELLMETH: Well, I think they are
15 potentially vulnerable if they engage in horizontal
16 restraints or restraint of trade or unreasonable
17 restraints of trade. They are combinations of competitors
18 and, therefore, they are on that -- naturally at risk just
19 being in that format.

20 But what they need, of course, is competent
21 counsel to tell them when they are or not engaging in
22 restraints of trade. If they're saying that all the
23 immigration attorneys should be charging at least \$150 an
24 hour and they so agree and they all start doing it,
25 they've got a problem.

0073

1 But that's the case with every trade association.
2 They would be in the same boat the CNA is in or the dental
3 association or the -- all the other private associations.
4 There are hundreds of them now. They're all in that same
5 position. They can't commit antitrust law. They can do
6 North Pennington (phonetic) advocacy as a group in front
7 of the legislature. They will actually be more powerful
8 in California. I'm not enormously happy about that, but
9 they will be much more powerful. That's the truth of it.

10 MS. HOLTON: Back to the antitrust issue that I asked
11 you, here's my quandary, what's the difference in
12 antitrust liability between a unified bar and a deunified
13 bar in that respect if anticompetitive activities engaged
14 in, say, by the trade associations spinoff?

15 PROFESSOR FELLMETH: Well, the main advantage to you
16 is if they do engage in restraints of trade, you're not
17 going to be held liable as the entity in charge who
18 appoints the section's governance. You appoint the
19 section governors. They then engage in restraints of
20 trade. You do not engage in the -- nor can you because
21 you consist of active participants in the trade or
22 profession and therefore you are liable.

23 So you are in a very dangerous position having
24 the sections under you unless you're going to deliver
25 active state supervision of their activities, which I

0074

1 don't think is a good idea. I think they should be on
2 their own like every other association in the country.

3 MS. HOLTON: So it sounds like we would agree that
4 deunification does not solve the antitrust problem, the
5 North Carolina dental problem, at least in terms of the
6 trade associations.

7 PROFESSOR FELLMETH: No, it does not solve it. What

8 it does is it removes it from your liability.

9 MS. HOLTON: Do you think it removes it from our
10 regulation though to prevent anticompetitive activities
11 within a unified bar? I mean, these all are things
12 I'm sort of swirling and thinking about.

13 PROFESSOR FELLMETH: With any unified bar -- the
14 trouble is, with any unified bar, unless you're public
15 member controlled, you can't control it. You're the
16 problem. You're part of the problem. You're part of the
17 conspiracy. You're contaminated. I don't know if I can
18 explain it any more clearly.

19 MS. HOLTON: It's probably a longer discussion than I
20 should take up time here, but I did have one more question
21 about --

22 MR. PASTERNAK: You actually sound like my children,
23 but that's fine. My children tell me I'm contaminated,
24 I'm part of the problem. I don't mean to --

25 PROFESSOR FELLMETH: Your older children, yes.

0075

1 MS. HOLTON: So I had one question just about the bar
2 exam. I have been following your writings on this. I
3 heard you talk about, as an example of anticompetitive
4 activity, the pass point for the bar, the 1440, and that
5 we only admit half -- about half of the candidates
6 depending.

7 But then I read something you wrote a week or so
8 ago that said our problem is that we're letting any old
9 body take the bar and be admitted when you were referring
10 to the unaccredited schools.

11 Could you square those two comments of yours for
12 me.

13 PROFESSOR FELLMETH: Sure. Sure. I mean, I'm saying,
14 first of all, that some restraints are good. I want you
15 to engage in some restraints. You've got schools with
16 5 percent bar pass rates. 21 percent of those you
17 accredit, for crying out loud. Sometimes I wonder, How do
18 these people look in the mirror in the morning. I mean,
19 they are sitting here accrediting schools that are
20 flunking out 80 percent of their students. And then the
21 20 percent who pass, 21 percent of them, or 4 percent of
22 the people enrolled, are passing the bar. And you're
23 leading them down the primrose path to the bar.

24 That is a restraint you should be engaging in.
25 Absolutely. That is a positive restraint. I want you to

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1 do that. And I want you to engage in restraints on

2 qualifying people to be competent so -- but -- so I want
3 you to be qualified to do restraints. I want you to
4 comply with North Carolina so you can do restraints you
5 need to do. So it's perfectly consistent.

6 MS. HOLTON: But the 15 percent pass rate or the
7 1440 is not --

8 PROFESSOR FELLMETH: The problem with a 15 percent
9 pass rate is if you have a restraint, yes, we need
10 restraints, but the restraint should be related to the
11 rationale, the raison d'etra.

12 If you have a system of restraining or filtering
13 practitioners -- because rationale is always the same for
14 almost every agency because incompetence or dishonesty
15 causes irreparable harm, then your system should be
16 directed to that end. A single bar examination at the age
17 of 25 which then eliminates, what, more than 50 percent of
18 applicants after all that investment that does not relate
19 to actual competence in the area of practice relied upon
20 is not the kind of restraint that you should be proposing,
21 you should be implementing.

22 You should say, Okay. What are the areas of law
23 where incompetence is most a problem, where people rely on
24 it, whether it be a single proceeding, a single
25 transaction, not a lawyer you're dealing with day after
0077

1 day, but a criminal defense case, an immigration case or
2 an area of law where you really need that competence
3 protection.

4 Your regulatory duty, in my thinking, is to
5 engage in a restraint of trade that is keyed and directed
6 at that rationale. So you say, Okay. Not continuing
7 education. You're going to take any course you want
8 because it's in Tahoe or whatever, but you're going to be
9 tested every ten years in your area of expertise if it's
10 an area where is this kind of reliance. And you'll pass
11 the test because a single -- the supreme court can very
12 well change your opinion from right to wrong. And then we
13 will relicense you. And if you flunk it, give you six
14 months to study and take it again and pass it. If you
15 can't pass it twice, get out of that area of law.

16 That's what you would be doing if you were
17 actually performing your function of assuring competence
18 to prevent irreparable harm. You are not doing that. So
19 instead, you're limiting a lot of people -- a lot of
20 people after leading them down that primrose path based on
21 a criterion that does not meet your justification for it.

22 That's my critique.

23 MR. PASTERNAK: Can I ask you a question, Professor.

24 What I just heard you promote is the concept of
25 periodic testing of lawyers for continued competence;

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1 correct?

2 PROFESSOR FELLMETH: Yes.

3 MR. PASTERNAK: Is there any profession in California
4 that imposes that requirement currently for their
5 professionals?

6 PROFESSOR FELLMETH: Well, as a matter of practice,
7 the medical profession certainly has a system of
8 specialized entry barriers.

9 MR. PASTERNAK: I'm talking about periodic testing
10 after you're admitted. That's what I just heard you
11 promote.

12 Is there any profession in California that
13 requires that currently?

14 PROFESSOR FELLMETH: No. Most professions are
15 narrower in their licensure system. Most professions
16 you're -- for example, you're licensed as a petroleum
17 engineer or you're licensed as -- in a very specific area
18 in most cases.

19 If you look at the DCA agencies, you'll see
20 they're pretty darn narrow. We're not. We're more like
21 the medical board where you have -- you're a doctor or
22 you're a lawyer, but you're actually practicing in a
23 specific area similar to the kind of licensure we have
24 in -- more specialized licensure we have in other areas.

25 If you don't have periodic licensing, I want to

0079

1 say, Look, we're back to immigration law. We're not going
2 to do it every ten years. We'll just do it initially.

3 We'll just have an initial immigration law. That's fine.

4 That's fine. I think it ought to be periodic because the
5 law changes a lot, quickly. I think there's a unique
6 justification for it with the law. But at least the exam
7 and entry system ought to relate to what you're trying to
8 accomplish with it, which we're not.

9 MR. PASTERNAK: Thank you.

10 I think Elizabeth had a question or a comment.

11 MS. PARKER: I did.

12 This has been very helpful to me. I talked with
13 both of you earlier and I did have some confusion.

14 Can I summarize the recommendation, Bridget, that
15 you've given us by saying that -- and I'm looking, by the

16 way, at a chart that is posted. It's my kind of simple
17 reader's guide to understanding the structure -- that you
18 would recommend that we recommend to the legislature that
19 we separate out the sections, but leave all the other
20 activities that we now do, most of which -- indeed maybe
21 all of which, with the exception of legal services, are
22 mandated by statute -- in this subsequent evolving entity,
23 whatever we call it, and that the other change you'd
24 recommend is that we change the way in which we select the
25 governing body for that resulting entity?

0080

1 MS. GRAMME: Yes. I think you -- I don't know if I
2 misspoke, but I do appreciate the question.

3 We believe that deunification means separating
4 off all trade association functions. And I don't have an
5 exhaustive list of what that means.

6 MS. PARKER: Therein lies, I think, the dilemma.

7 MS. GRAMME: Yes.

8 MS. PARKER: And if I could put a question to you or
9 an assignment, we've had trouble getting our arms around
10 what are these trade association activities that seem to
11 fall to the representational rather than, if you want to
12 say, regulatory side. And I think it would help knowing
13 what you see them as being would be useful.

14 MS. GRAMME: Sure. A few off the top of my head, for
15 sure the insurance services and the type of things we were
16 discussing earlier. I think the legal referral service is
17 another example. And we can definitely go back. I don't
18 remember them off the top of my head.

19 But we really advocate -- I think another thing
20 that's a little challenging is there are a lot different
21 terms for what we are talking about. So there's a
22 voluntary bar, there's a mandatory bar, there's unified,
23 integrated. They all -- and it's kind of hard to know
24 what everyone's talking about.

25 So to answer your question earlier, Vanessa,

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1 about the voluntary bar, we still recommend a, quote,
2 mandatory bar. That would be the regulatory agency that
3 we're all talking about. So it just would be very
4 narrowed in its function.

5 Right now you have -- I can't even keep track of
6 all the committees and task forces and so many different
7 things, some of which, you know, are very important. And
8 like we say, Access to Justice is something we think
9 should stay within the regulatory agency. But there are

10 other functions like the sections, like the insurance and
11 lawyer referral services, those types of things that we
12 think should be separated off.

13 MS. PARKER: Well, I appreciate your trying to make my
14 job easier.

15 MS. GRAMME: Yes.

16 MS. PARKER: Very much so.

17 But if you could look particularly at that chart
18 and give --

19 MS. GRAMME: Sure.

20 MS. PARKER: -- us your thoughts, it would be useful.

21 MS. GRAMME: I'm sorry. And the chart is posted, is
22 that --

23 MS. PARKER: It looks like this.

24 MS. GRAMME: Okay.

25 MS. PARKER: In fact, I'll give you a handy paper
0082

1 copy.

2 MS. GRAMME: Sure. We'd be happy to do that.

3 MR. PASTERNAK: Jason.

4 MR. LEE: Thank you for your comments.

5 I think until today, I had in my own mind a
6 certain sort of opaqueness to what was being proposed
7 relating to deunification or the division of the bar.

8 And I'm happy to hear this idea that Access to
9 Justice and the work related to that would stay within I
10 think what you've described as sort of the regulatory
11 function of the bar.

12 And I think Elizabeth's suggestion, I would just
13 second that because you used a term of focusing on the
14 narrow function of regulation, but I think I personally
15 view Access to Justice's work as being expansive and I'm
16 just still having a hard time understanding how a narrow
17 function of regulation can be tied to what I feel should
18 be an expansive function of our profession and belongs in
19 this regulatory function that you're describing, both of
20 you are describing.

21 I'm also interested in hearing where you think
22 the work the bar is doing related to the diversity not
23 only of the profession but also on the bench, how that
24 relates to our function. It's an area that I'm very
25 concerned about, should we deunify.

0083

1 Thank you.

2 MR. PASTERNAK: First, do you want to respond to any
3 of that now? I do want to give you an opportunity if you

4 want to. You don't need to, but I want to give you the
5 opportunity if you want to.

6 MS. GRAMME: I think the answer to that, I don't think
7 we have all the answers at this moment as far as where
8 things fall. And you know, part of this is you have the
9 opportunity to ask the legislature, you know, how -- to
10 recommend to the legislature how you would like to go
11 forward.

12 So in one sense, if that is something that is
13 particularly important to you, you could suggest that
14 would be something that would be maintained in the
15 regulatory function of the bar.

16 PROFESSOR FELLMETH: I would support it. I mean, I
17 would support expansive view of the regulatory function.
18 And there are agencies -- again, we examined 30 agencies.
19 There are agencies that have a narrower and there are
20 agencies that have a broader one.

21 I think the medical board is a good model for you
22 to use in terms of many of these areas. I think
23 diversity, absolutely, of course. That's a function --
24 that's, my goodness, a 14th Amendment. That's a function.
25 That's a state function. So is reaching out and getting

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1 services to people that don't have it, that's a state
2 function. It ought to be a central function, for crying
3 out loud.

4 You're not going to be doing trade association
5 promotion stuff. You're not going to be having
6 conferences.

7 I've been a part of two sections for many years
8 and I love them and I like to go to Tahoe when they have
9 the meetings in Tahoe. And the antitrust section is one
10 of them, by the way. And they promote my work. I love
11 them dearly. But they're not a state agency and you can
12 separate that out and have a state agency do the state
13 agency work. You're less distracted. You're focused in
14 on what you need to be focused on. You'll then do a
15 better job. And Miriam, you're going to do a better a job
16 of what you're concerned about, is this a state agency.

17 MR. PASTERNAK: Miriam and then Danette. And we do
18 have to break with these speakers at 12:30.

19 MS. KRINSKY: I appreciate the thoughtfulness. And
20 Bob and I have worked together for years on a variety of
21 issues and I've always seen the thinking that goes into
22 the work that you all do. And Bridget, your thinking has
23 been very helpful as well.

24 I kind of wanted to add to the questions that you
25 asked with a little bit of what I think is sort of --

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1 because Elizabeth was in a law school environment, she can
2 give out homework assignments so maybe to add to that
3 list.

4 MS. PARKER: You misperceive the role of a dean.

5 MS. KRINSKY: Or herd cats or something.

6 But the problem I have -- I mean, I think it's
7 going to be important for us to grapple with the legal
8 issues, North Carolina dental, and I know that there's
9 going to be some further thinking around that. And I
10 would encourage your continued engagement, Bob, because I
11 know there are open questions about what is active state
12 oversight, how many members do you need, does it need to
13 be a majority, does it need to be a super majority.

14 You know, it seems like that was an open
15 question. I think even the dissent said it's not clear it
16 even needs to be a majority. Even if it needs to be a
17 majority, who should appoint them? I mean, are there
18 reasons why we should not have the supreme court, you
19 know, appoint more bodies or even a majority of the total
20 members of the board given the function of this board of
21 trustees.

22 I think very valid issues raised and I think that
23 we need to explore around the election issue. Is that a
24 good thing? Is it a bad thing? Should there be term
25 limited board terms? And that's not something you all

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1 discussed. I'd be interested to get your thoughts on.

2 PROFESSOR FELLMETH: Those are all critical issues.

3 I think the term limit should be higher. I think
4 there should be two term possibilities. I think you need
5 more institutional memory. No question about that. I
6 think -- I think that -- I think that your questions are
7 good ones. I mean, they're questions that we should be
8 answering.

9 MS. KRINSKY: And I don't know that in a week or two
10 we will formulate thoughts, but I think we have to grapple
11 with those questions.

12 But Bridget, addressing to your, you know, areas
13 of thinking, the problem I've had and the reason why I'm
14 struggling a little bit is when we throw out the notion of
15 deunification, at times I wonder, you know, are we all
16 talking about the same thing? It's easy to throw out the
17 suggestion of deunification, but I've heard very different

18 conceptualizations around what is a trade association
19 function and what isn't.

20 I subscribe more to it as I expect Bob does and
21 you do than Laurie Zelon viewed it. When we think of
22 public protection, we think of a lot that some may say,
23 that's just a trade association function. I know the
24 comment was made that this board spends very little of its
25 time on public protection and so much on trade

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1 associations.

2 Well, I, even as chair of RAD, don't think that
3 RAD's work alone is the work of us as regulators. I think
4 a lot of the work of our stakeholders, our admissions and,
5 you know, a host of other work of this board, including
6 trying to promote access to legal services and support for
7 access to legal services and more funding in that regard
8 is part of what it means to be a body that's seeking to
9 advance protection of the public.

10 So I think you probably share that broader
11 conceptualization than I have that some do. But again,
12 you know, I kind of wonder what is the problem and
13 objective that we're trying to accomplish and what gets us
14 there or have we crafted solutions that are in search of a
15 problem rather than really identifying our problems that I
16 think you all have tried more to do, and what do we
17 conceptualize once we know what we're trying to solve as
18 the solution.

19 So I want to add to -- I think your list on page
20 3 of your submission was a very helpful starting point in
21 my mind, but what do we mean regulatory function and even
22 statutorily including within the notice of public
23 protection, Access to Justice, where I think it needs to
24 be, and what is truly a trade association function.

25 And so I would be interested in where would you

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1 put the lawyer assistance program? Which, you know, I
2 think helps prevent wrong and misconduct and harm to the
3 public. You know, where would you put JNE? Where would
4 you put the incubator's work? Where would you put access
5 to the court, you know, including language access work?

6 And do you really -- and I saw your footnote
7 which suggests to me maybe you really don't need it -- do
8 you really mean that mandatory continuing legal education
9 is solely a regulatory function or are there aspects of
10 education and even conferences if we're bringing people
11 together to talk about legal services and how we educate

12 and train people to provide legal services, is that really
13 a trade association function or are there aspects of that
14 that you would include?

15 So I'm kind of looking for where you draw the
16 line because at our last meeting, you know, the suggestion
17 was made that maybe the line includes on the voluntary
18 side all the work of the office of legal services, which I
19 really think is at the heart of much of what we do to
20 protect the public so -- and diversity, you know, and
21 elimination of bias work and pipeline work, which I think
22 is at the heart of public protection.

23 So I'm kind of looking for where you all would
24 draw that line and, you know, what the problem is that
25 we're trying to solve by drawing that line, which I think

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1 I can anticipate, but I'm just looking for a little bit
2 more of your best thinking around that.

3 MR. PASTERNAK: I'm going to ask you to hold that.
4 We're taking --

5 MS. KRINSKY: Not now. It's their homework.

6 MR. PASTERNAK: -- written submissions through at
7 least the end of the month. But unfortunately, we are
8 running out of time.

9 Danette, if you can briefly ask your question or
10 make your comment.

11 MS. MEYERS: Sure. I'll make my comment and maybe
12 answer this question: You indicated that in terms of the
13 elections, that elected members had allegiance to their
14 peers. And I wanted to know where you drew that from
15 because I was an elected member and I don't have
16 allegiance to my peers. I have an allegiance to the
17 mission of the bar which is public protection which I've
18 done for 30 years in the DA's office. So I think I really
19 know what public protection is as I stand before the
20 public every day trying to protect the public.

21 And second of all, what would make you think that
22 an appointed member wouldn't have allegiance to that
23 political entity that appointed them as we all see and
24 hear that political appointments are just that, political
25 appointments.

0090

1 So I believe that Jason, who is an appointment,
2 has the same ideas and vision that I do in terms of public
3 protection. So I just wanted to have you address that for
4 a moment and speak to the point about allegiance to peers
5 and where you derive that from.

6 PROFESSOR FELLMETH: I think we all think that we're
7 trying to advance the public interest. Every person in
8 this room, as I believe, is trying to advance the public
9 interest and views their role as such. But I think if you
10 back away from it from 30,000 feet and look down and say
11 here is someone who was selected by this grouping, to the
12 extent that grouping are active practitioners in the field
13 that are supposed to be regulated in the interest of the
14 public, that's a problem.

15 Now it may be you're appointed by someone and
16 have an allegiance to them, well, but they're public
17 officials. They're selected by all of us. So that's the
18 difference and it's a big difference. I actually think
19 that the supreme court ought to be the appointee,
20 appointor of most of these people in this room. I think
21 the court is -- I think you ought to have allegiance to
22 the supreme court. That's where I think your allegiance
23 should be.

24 MS. MEYERS: Well, in fact you're not appointed by the
25 people because in terms of the appointment by certain
0091

1 individuals, whether they're democrats or republicans,
2 that person, that assembly person or that -- the assembly
3 person comes from a particular district that is only a
4 very small area of the state of California.

5 PROFESSOR FELLMETH: No.

6 MS. MEYERS: So I don't believe that the appointed
7 members -- just so you know, that the appointed members
8 and the elected members feel any differently about our
9 allegiance to the mission of public protection. And I
10 think that having not even spoken to public -- to
11 appointed members and elected members to draw on what
12 their opinions are, you make a real -- you stereotype.

13 And I take exception to that because I don't
14 believe just because lawyers appoint you or elect you,
15 that you come with a particular opinion about how you
16 should do your work on this board. So I would -- I take
17 exception to that. And I would like to hear though what
18 the basis of it is. What is the basis of that opinion
19 that because lawyers elect lawyers, that that particular
20 elected lawyer comes to this board with a set opinion to
21 protect lawyers who are doing bad things?

22 PROFESSOR FELLMETH: I think, first of all, that
23 assembly persons do not individually appoint anybody.
24 It's the entire assembly to the entire senate in
25 leadership that makes the appointment so you're not tied

0092

1 to any particular geographic area at all. You're
2 appointed by someone representing the people who were
3 selected by the people statewide. That's number one.

4 Number two, yes, you feel that way. Of course
5 you feel that you're making decisions in the public
6 interest. Everybody does. And I, by the way, was the
7 deputy DA for nine years also and did that. And I felt I
8 spoke for the people every day in court and I feel I do
9 now and I feel I am now. But I'm also a faculty member
10 and I'm also a lawyer and I have biases on the part of
11 that tribe. And I recognize that. I recognize that's how
12 it looks from the outside and I may not even be aware of
13 my biases.

14 But if a group -- a particular group selected me,
15 there is somewhat of an influence from the group that
16 selected me that chose me to be there. Now to say, Oh,
17 I'm beyond that, fine, you're beyond that. We'll accept
18 that, but that is not a general rule of human behavior.
19 You tend to be somewhat more responsive to the people who
20 selected you to the position you're at.

21 MR. PASTERNAK: I've got to stop you because we have
22 to move on. We have somebody who's in the middle of a
23 trial who needs to leave soon.

24 But I do want to raise one issue I'd like you to
25 address in hopefully a written submission. One thing I

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1 haven't heard anybody consider in any speakers, and I
2 think probably the two of you and your organization are
3 the most adept to consider this issue, and that is -- and
4 I now understand better what your proposal is.

5 And if you split off the sections and you
6 eliminate the annual meeting, from my perspective, that's
7 where you have most of the active participants in the
8 state bar. They're the people who participate in the
9 committees. They're the people who attend the meetings.

10 The people who serve on our commissions, on our
11 board are, I think, a small minority of the active
12 participants in the state bar. And I'd like to know what
13 consideration, if any, you've given to what will be the
14 effect on the support in the state and among the legal
15 profession for the activities of this shrunken state bar,
16 mandatory state bar, that you're proposing where we will
17 have far fewer active participants and the ones who tend
18 to be the active participants at that point will be the
19 regulators and, now as I understand, the legal services

20 community and perhaps a few other small, narrow
21 communities.

22 So that's an issue I'd like you to think about
23 and I welcome your response later. I had hoped to be able
24 to ask more today but, unfortunately, we need to turn to
25 our next speaker. So thank you very much.

0094

1 And I apologize for delaying the lunch break, but
2 our next speaker, Paul Kiesel -- Paul come forward -- is a
3 prominent plaintiffs' tort attorney. Paul is in the midst
4 of trial downtown at Mosk. And I thank you for coming
5 during your lunch break.

6 Paul's been a leader on court funding since 2011.
7 He's a founder and co-chairman of the statewide Open
8 Courts Coalition, and he, of course, also is president
9 this year of the Los Angeles County Bar Association.

10 Paul.

11 MR. KIESEL: President Pasternak, I thank you.

12 The good news is I will be brief. My
13 appreciation to Judge Chavez for letting me depart
14 somewhat early, but my jury will be back at 1:30.

15 So here's the deal, I'm in a jury trial. And I'm
16 in a jury trial because we have access to courts despite
17 significant cutbacks statewide on resources with our
18 judicial budget. It's been the state bar and your
19 leadership and the commitment of your members that have
20 spoken very loudly in Sacramento to the governor so that
21 Access to Justice is more than just legal services, though
22 that's important. It's also about being able to get into
23 court.

24 And the state bar, going back many years, has
25 been a very important component of the Open Courts

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1 Coalition commitment to fully funding the court adequately
2 and in driving home the message for Access to Justice.

3 So I am concerned if there's going to be an
4 attempt for deunification, that the bar itself begins to
5 lose its effectiveness in the voice that it has in
6 Sacramento. Arguably, the trade associations could ban
7 together as we've got a lot of trade associations that do
8 work together within the Open Courts Coalition. But the
9 fact that there is one voice, that's the state bar, that
10 speaks for everybody and we get the engagement of
11 everybody is very powerful as a resource for individuals
12 to ensure adequate funding for our courts.

13 I am happy to respond to any questions that you

14 have, but I say this: I'm really honored to have an
15 opportunity to share these brief words. I think that
16 these sorts of discussions are very healthy because this
17 kind of internal examination, whether it's at the section
18 level or it's at the regulatory level, helps strengthen an
19 organization going forward. And so I think the process
20 you're going through, the questions you're asking, the
21 speakers you're listening to will create, in my view, a
22 stronger state bar at the end of this discussion.

23 I'm happy to respond to any questions you have;
24 otherwise, I'm happy to let you take your lunch break.

25 MR. PASTERNAK: Thank you, Paul.

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1 Denny.

2 MR. MANGERS: I too appreciate your taking time to
3 come over and talk to us.

4 Have you noted at all the -- or had time to note
5 the proposal for a deunified bar that's been put forward
6 by myself and several colleagues?

7 MR. KIESEL: I'm disappointed to say that I've not
8 examined the proposal for deunification so I can't speak
9 to the specific terms that are being proposed.

10 MR. MANGERS: I'm not particularly disappointed.
11 However, I would like to ask you this: Since just about
12 everybody who has testified here has supported the notion
13 that Access to Justice and perhaps several other items
14 that are integrally related to the regulatory side, have
15 suggested that they would just as soon see them remain
16 there, would you still have an objection to deunification
17 if that were to be the case? Access to Justice, those
18 elements that you identify as most related remain with the
19 regulatory function, and if so, what?

20 MR. KIESEL: I would answer, I think -- and President
21 Pasternak raised this issue just a few moments ago. I
22 think the engagement you have from the legal community in
23 the state bar is not engagement because it's a regulatory
24 agency, but it's an engagement because it is in fact the
25 place that lawyers can go to to get educated, can deal

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1 with from a disciplinary perspective and can work for
2 Access to Justice. Because it's such a multiform group, I
3 think it provides a lot more power organizationally than
4 if you were to try to strip it down.

5 Now, admittedly, this is done without having the
6 context of the breadth of the proposal sort of being made,
7 so it's more my stream of consciousness, but I subscribe

8 to the idea that what makes the state bar so powerful is
9 its constituent elements. And when you start breaking
10 that up, you run a risk. That would be my short answer to
11 that.

12 MR. MANGERS: Did you also note when you observed that
13 proposal that it calls upon -- it calls for a very
14 deliberate three-year process in which initially the
15 legislature charges the state bar itself to propose to the
16 legislature and the chief the manner in which it would be
17 deunified?

18 MR. KIESEL: I would expect that if there was going to
19 be a process of deunification, it will be a very careful
20 measured approach that would be taken. But I would
21 significantly caution against the idea of deunification
22 just for the sake of limiting it to its more regulatory
23 function and not maintain the expansive nature of the
24 state bar that I've grown up with.

25 MR. MANGERS: Have you seen the chart that our -- that
0098

1 Elizabeth Parker has been holding up?

2 MR. KIESEL: No. My eyesight is not that good, but I
3 heard reference to it.

4 MR. MANGERS: I didn't mean have you measured it, but
5 it poses the issue I think that is of interest to all of
6 us and was related to the line of questioning that you
7 just heard, that no one suggested it's simple taking an
8 80-year-old institution and ordering all of its functions,
9 be they trade or regulatory, and then somehow divide it.

10 No one suggests it's a simple matter, but if it
11 can be laid out in that manner and the bar has time within
12 its constituency to propose to the satisfaction of the
13 chief, two chairs of the judiciary committees and the
14 legislature and themselves that they've come up with a
15 product, it solves some of the other problems you've heard
16 about today vis-a-vis North Carolina and other issues that
17 have been raised and gives the bar the prerogative to
18 solve the problem.

19 But you're still concerned that somehow in that
20 process something gets lost, but I never really hear
21 anybody articulate what it is that gets lost.

22 MR. KIESEL: So I would say if I had an extra
23 15 minutes, perhaps I could articulate a more specific
24 reason why I think it would get lost. But it's enough to
25 say intrinsically, I think there's a great risk in
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1 deunifying the bar from what it has been for 80 years.

2 And that's not to suggest that there can't be
3 good constructive discussions and maybe some change needs
4 to happen. I think change is good and I think discussion
5 is important for the health of an organization. But I --
6 my own views of it is that currently, it comes to mind
7 that if it ain't broke, don't break it. And because I've
8 seen what happens when you start to reconstruct something
9 and it's not so simple. And not to suggest that what you
10 have is perfect, but reconstruction can be dangerous.

11 MR. PASTERNAK: Jason.

12 MR. LEE: Thanks, Paul. Good seeing you again and
13 thank you for taking the time to talk with us today.

14 You hit on an element that I think the sections
15 are dealing with in weighing whether they want to still be
16 a part of the unified bar, that is the credibility and
17 weight of being part of a statewide organization versus
18 having a separate trade association.

19 And I heard in your remarks that in your work
20 with the Open Courts Coalition, there have been times when
21 trade associations have band together. Could you give us
22 some more flesh on that, examples of how effective has
23 that been when trade associations have band together to do
24 what and how is that received?

25 MR. KIESEL: So to that end, if we're talking about,
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1 say, the consumer attorneys of Los Angeles who are
2 California or So. California defense, as a trade
3 association, if you take it in that context, their voices
4 are very powerful voices in Sacramento. Not only are they
5 engaged in the Sacramento process, their lawyers are
6 familiar with the dynamics of Sacramento. They are trial
7 lawyers so they are involved with Access to Justice.

8 So having those constituent elements as a part of
9 the Open Courts Coalition is an important part of our
10 coalition. It is a coalition. And so --

11 But you have the litigation section of the LA
12 County bar, and that's a really unique section. It's not
13 like any other trade association. Because I'm not sure I
14 would join as a trade association a litigation section,
15 but what I love about the litigation section is I have
16 bankruptcy attorneys, I have real estate lawyers, I have
17 family lawyers. I've got an amalgamation of
18 practitioners, not the least of which are judicial
19 officers. The opportunity to have federal judges,
20 magistrates, superior court judges engaging in a dynamic
21 as a part of the bar. They can do it if it's a part of a

22 bar organization. They can never do it if it's a part of
23 a trade association.

24 I think one of the hallmarks of the bar is the
25 fact that it is a bipartisan entity which doesn't speak

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1 with any bias necessarily and provides an opening where
2 other trade organizations are much more narrow. So I
3 think trade associations are important and sort of a
4 valuable role, but I think the bipartisan nature of the
5 bar associations, at least from my perspective, has been
6 critical.

7 I go into offices of legislatures who if I were
8 talking about issues as a plaintiff, they'd Katy bar the
9 door. But when I come in and say, We need courtrooms to
10 open up in your district, they're welcoming that dialogue
11 and I can speak with that voice because I'm speaking on
12 behalf of the bar, a unified bar, not a unique trade
13 organization, if that answers your question.

14 MR. LEE: It does. Thank you.

15 MR. PASTERNAK: Mariam.

16 MS. KRINSKY: Paul, thank you. And please thank the
17 judge for releasing you.

18 MR. KIESEL: I think he's going to want a copy of the
19 transcript just to be safe.

20 MS. KRINSKY: We're willing to swear to the fact that
21 you really were here and you didn't go out for just simply
22 a nice lunch.

23 I want to return to one of your comments and ask
24 you a little bit more about that, but I also want -- and
25 maybe since Bridget and Bob are still here, to ask them to

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1 think about this as well.

2 I wonder whether we're not oversimplifying and in
3 many ways diminishing the scope and work of our sections
4 by suggesting that they are simply trade associations --
5 on the trade association side of the ledger sheet.

6 And I think in particular, if you look at the
7 work of the California Young Lawyers Association, they do
8 tremendous things when it comes to public protection,
9 raising the bar, opening doors of opportunity,
10 et cetera, that I think, you know, necessarily falls on
11 hopefully what most would agree was a regulatory and
12 public protection side of the ledger.

13 So I kind of think that we marginalize the impact
14 of the sections by assuming that we can readily just
15 categorize them as nonpublic protection in mission and

16 focus on the nature of their work.

17 But the question I want to ask you is, you said
18 in passing that you've seen the dangers of reconstruction.
19 And one thing that I wondered about is if we moved down a
20 path, that I think we need to look at and think long and
21 hard about, of severing off the sections -- and I
22 appreciate the model that Bridget came forward with
23 because I think it's the best one we've heard so far --
24 and I want to know more details as to what we would sever
25 and what we would keep.

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1 But I do worry that it then creates a little bit
2 of antagonism between us versus them. And I know that the
3 LA County Bar has been struggling with, you know, a
4 contentious relationship with its sections, and wonder if
5 you have any thoughts around, you know, kind of how have
6 the sections responded as that relationship has become a
7 little bit more heated to furthering the needs of Access
8 to Justice, support for legal services, or whether that
9 creating of a more divisive relationship has hurt, you
10 know, what I think all of us around the table want to be
11 sure that we don't harm in any way.

12 MR. KIESEL: So to respond to your question directly,
13 I think that there would be a concern if you try to
14 marginalize the sections and call them trade associations
15 and really not bar functions. And I think it's important
16 they remain bar functions because, as I said earlier, sort
17 of the bipartisan nature of it. Even if it's just defense
18 attorney and plaintiff attorney, it creates an opportunity
19 for dialogue that I think would be lost if you tried to
20 deunify.

21 But with regard to the LA County Bar, we have
22 24,000 members. We are one of the largest bar
23 associations in the country. I think we're larger than 31
24 states. And yet it only takes a few people to be unhappy,
25 to create a dynamic that overshadows the vast majority of

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1 the members who are happy, educated, engaged and have no
2 complaints.

3 And so while it's my responsibility as
4 president -- as I know for President Pasternak it's the
5 same -- it's to be the president for everybody. I
6 honestly think that certainly the LA County Bar is a good,
7 solid, well-run organization that is continuing to refine
8 itself and will continue to improve, but I think the
9 message is the bar is really working effectively and the

10 vast majority of members get value with their membership
11 with the LA County Bar.

12 MR. PASTERNAK: Elizabeth and then Danette, and then
13 we'll let Paul go back to Judge Chavez.

14 MR. KIESEL: Thank you.

15 MS. PARKER: Thank you very much. This is extremely
16 helpful.

17 I'm going to have trouble forming this question,
18 but stay with me. You were not here to listen to
19 Professor Ted Schneyer speak, but what I hoped he might
20 speak to is how bar organizations around the country have
21 developed in different contexts.

22 And one comment he made to me in a conversation
23 recently was that when you look at some of the older
24 states, New York, New Jersey, Illinois, voluntary bar
25 associations, what you see there is a tension between the
0105

1 local city bars, powerful before the state bar, a unified
2 state bar became a powerful idea, and they resisted that.

3 And so I think my question to you is, were we to
4 go through this devolution, might we see the same thing
5 happen again where these very powerful, very large city
6 bars that we have in California, Los Angeles being simply
7 one, might -- there might be a dynamic setup where they
8 would actually actively seek to weaken the state bar if it
9 was no longer mandatory?

10 Is my question clear?

11 MR. KIESEL: I think I'll restate your question.

12 I guess number one is would the LA County Bar, a
13 voluntary bar association, be concerned if the state bar
14 were to be deunified and the sections themselves became
15 independent trade associations.

16 MS. PARKER: Maybe not so much be concerned, but
17 simply see that as an advantage.

18 MR. KIESEL: An advantage to the LA County Bar.

19 MS. PARKER: Yeah. And so suddenly we find they
20 became then opponents to the idea of state bar activity.

21 MR. KIESEL: It would be hard for me to comment. I
22 think there might be the inverse. In other words, I think
23 there might be some concern that individuals that are
24 members of the LA County Bar might feel that if they can
25 join an employment section, not that's LA based, but

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1 statewide employment section that's now a part of the
2 deunified state bar, that they might join that larger
3 organization and take away membership from the LA County

4 Bar because they now belong to a statewide organization,
5 not just local.

6 But it's hard for me to really prognosticate and
7 I don't want to suggest that there is any of those issues
8 that are suggesting my testimony today.

9 MR. PASTERNAK: Danette.

10 MS. MEYERS: I think I wanted to hit on that point,
11 Paul, because I know when I was president in 2008 of the
12 LA County Bar Association, we struggled a lot with
13 membership, keeping membership because there were so many
14 other specialty bars that we were competing with.

15 So given that lay of the land -- and I'm not
16 quite sure, although I'm continuing to keep my membership
17 up with the LA County Bar. I'm not so politically
18 inclined to know what all the issues are, but with that
19 framework, what do you think the viability is of a
20 statewide -- yet another statewide organization to take up
21 some of the issues that a deunified bar simply would not
22 be able to take up, what's the liability and the
23 practicality of that, of a lawyer who pays -- they
24 continue to pay state bar dues, they pay LA County Bar
25 dues, they pay their specialty section dues like Black
0107

1 Women Lawyers, Lanston, and then yet another voluntary bar
2 association.

3 Do you have a comment on that?

4 MR. KIESEL: Well, I think that you would inevitably
5 reach sort of bar fatigue and there would be a point where
6 you simply stop joining. If it's voluntary, you're not
7 going to do it. So I think that you would be -- but
8 again, that's not for me a reason to suggest that
9 deunification's a bad idea, but I do think that one of the
10 unintended consequences of that might be a whole shifting
11 of dynamics between local bars, trade association bars and
12 then this new separated section membership statewide for
13 the state bar.

14 So I'll end where I began, if it ain't broke,
15 don't fix it.

16 MR. PASTERNAK: Thank you again for taking time out of
17 your lunch recess. We'll get you a copy of the transcript
18 to give you Judge Chavez to prove you were here. And feel
19 free to grab some lunch before you leave.

20 MR. KIESEL: My thanks to the panel.

21 MR. PASTERNAK: We're going to take a brief lunch
22 break until 1:20. We have a court reporter here and she
23 does need a break. And we're going to offer her lunch.

24 We will reconvene at 1:20 sharp. We're a little
25 bit behind schedule, but I'm hopeful that we won't fall
0108

1 farther behind this afternoon. Thank you.

2 (Lunch recess)

3 MR. PASTERNAK: Let's try to get started again because
4 we do have a busy afternoon scheduled.

5 Our next speaker is Mark S. Britton who
6 co-founded Avvo, Inc., in 2006. He is its chief executive
7 officer, president and chairman, and he's got an
8 impressive resume. He previously was at Expedia. He was
9 in the office of Preston, Gates & Ellis in Seattle and a
10 partner there. Senior counsel of the Division of
11 Corporation Finance at USCC. But I think the most
12 impressive part of your resume is he was an adjunct
13 professor of finance at Gonzaga University in Florence,
14 Italy. We all envy you for that.

15 MR. BRITTON: And I'm happy to spend the rest of the
16 afternoon just talking about Florence. If you'd like to,
17 we can do that. Thank you.

18 MR. PASTERNAK: Welcome.

19 MR. BRITTON: Thank you. Did you want me to just
20 roll?

21 MR. PASTERNAK: Absolutely.

22 MR. BRITTON: Because I do have about an
23 hour-and-a-half of comments if that's okay with you.

24 MR. PASTERNAK: We have you scheduled for three hours.

25 MR. BRITTON: So I have my computer up here because I
0109

1 do have some loose notes.

2 And by the way, Elizabeth, it's a pleasure to
3 meet you in person. All of this comes from a little bit
4 from Francisco and a long conversation with Elizabeth in
5 talking about the future of the profession. And Dan Lear,
6 who is not able to join me who is our head of industry
7 relations, we've had a number of conversations with
8 Elizabeth around who we are as lawyers, who we are as an
9 industry and where we're going.

10 And I think Elizabeth's great because she comes
11 out of an academic background and has all sorts of
12 academic and deep questions. And the more that we've
13 chatted, she said, It might be interesting for you to come
14 and chat with this group.

15 So really, one of the main reasons for me being
16 here is I don't have a dog in this hunt. I hear a lot of
17 people, when I came in, were talking about voluntary,

18 involuntary. I really don't care. What I do care about
19 deeply is how we act as lawyers and how we interact with
20 the communities around us.

21 And there are a number of things that we see from
22 a corporate standpoint, that I see from a personal
23 standpoint that are very alarming as it relates to the
24 profession. And so part of coming down -- by the way,
25 we're based in Seattle; although, our number one market
0110

1 hands down is LA and Orange County, so I spend a lot of
2 time down here -- but to be as a resource or to act as a
3 resource for all of you and continue the conversation and
4 just help in any way that we can.

5 One of the things that we get consistently when
6 we're talking about the future of the legal profession, it
7 kind of falls into a couple of buckets, but one is just
8 consistently that lawyers are struggling. That is the
9 mantra over and over and over. And kind of the backup
10 mantra to that is that there are too many lawyers.

11 I'll start off by saying that's bullpucky. And
12 that is not a legal term, but it's a term that most people
13 understand because when we start talking about some of the
14 lawyer utilization issues, how much people actually spend
15 on lawyers and interact with lawyers, you'll find that
16 consumers more and more are actually ignoring lawyers.
17 It's one of the very big issues here.

18 You also have a lot of lawyers that simply just
19 don't like paying the bar money. They kind of sit back
20 and say, If I'm going to cut you a check for hundreds of
21 dollars, what are you doing for me and how do you make my
22 life better?

23 And then there's another evolving issue which I'm
24 going to put into a big basket and we can -- by the way,
25 interrupt me as much as you'd like and I'm happy to take
0111

1 the conversation in the direction that you would like it
2 to go.

3 But the basket that I see around the evolution of
4 the future of the legal profession is this big technology
5 basket where when we look at how technology is influencing
6 the practice of law and we start looking at things like
7 contract review automation or we look at new types of
8 marketplaces in advertising or we look at -- you have
9 paralegals who are relying on software to process
10 documents for companies like LegalZoom, or in Washington
11 you have the triple LT, the limited legal license -- let's

12 see, the limited legal license technician.

13 And there's a big discussion that evolves around
14 that with a lot of lawyers being concerned that this is
15 going to undermine the practice of law both ethically and
16 how -- whether it's going to hurt lawyers in the
17 pocketbook. So those are kind of some big areas, and
18 Elizabeth and I touched on a number of those.

19 Thank you, David, for talking a little bit about
20 my background. I will say that I have been now -- for
21 15 years, I have been involved in working with consumers
22 in marketplaces both in the travel business, but now
23 specifically law, the last ten with Avvo.

24 And at Avvo, we have built the world's largest
25 marketplace as it relates to lawyers and consumers. So
0112

1 many don't appreciate the size of this marketplace. We
2 get over 100 million consumers that come to Avvo every
3 year and we have over 260,000 lawyers that use Avvo as a
4 marketing platform. So you're talking about numbers that
5 the legal profession has never really seen.

6 MR. PASTERNAK: Can I interrupt you because you did
7 offer interruptions. Let me just ask you a question.

8 MR. BRITTON: Sure.

9 MR. PASTERNAK: Those numbers, are those in the United
10 States or do they include overseas?

11 MR. BRITTON: Solely in the United States. They do
12 have a lot of international people that are looking at US
13 legal issues. So we do have visits come from outside of
14 the country, but it's all pertaining to US law, US
15 lawyers.

16 MR. PASTERNAK: Thank you.

17 MR. BRITTON: So every five seconds, somebody is
18 getting legal help on Avvo. And I would encourage every
19 one of you, if you really want to feel the power of Avvo,
20 go online for free, ask a question and watch how quickly
21 you get an answer. Again, 260,000 lawyers, it happens
22 pretty quickly.

23 So specific to California, one-third of the
24 lawyers in California participate in Avvo. And we drive
25 those lawyers about \$745 million in revenue a year,
0113

1 roughly. You had 3 percent of the California population
2 visit us in January and that's just over a million people.
3 It's more concentrated in the urban areas, around 6
4 percent for LA and 11 percent for San Francisco.

5 So I set that up. And I'm just warning you right

6 now, I'm setting all that up to let you know that few
7 people represent the consumer as well as I do. That legal
8 consumer, that person that is not a big corporation that
9 does not have a general counsel, but is really the bread
10 and butter of most of the lawyers in this state and how
11 they make a living.

12 So let's talk about the consumer and whether
13 they're happy with us. And so to the extent that we talk
14 about whether we should have a mandatory bar or a
15 voluntary bar or you mentioned -- I don't know who brought
16 up the word "trade association," but I heard a lot of
17 people talking about afterward. It was one of those words
18 that a lot of people just -- they go crazy when they hear
19 the word "trade association" because they feel that it's
20 pejorative.

21 So for everyone who feels like it's pejorative,
22 you're going to hate me when I tell you that whether it's
23 mandatory or voluntary, we're just running trade
24 associations. That's it. That's what we do. And a lot
25 of people go, No. Now that is not appropriate because we
0114

1 have all sorts of consumer protection built into our
2 system, we have enforcement, et cetera.

3 I agree with that. The bars, for the most part,
4 do a great job in hunting down those people that I think
5 are undermining the profession through the enforcement
6 efforts.

7 The issue, however, is if we're not a trade
8 association, I would ask you how many of the conversations
9 that you've had this morning or that you've had this month
10 or maybe that you have in a year really focus on needs of
11 consumers in California.

12 In fact, I'd like to ask how many pieces of data
13 have you reviewed this morning that relate to what
14 consumers want from lawyers in California. I'll bet you
15 the answer is --

16 MR. PASTERNAK: We're getting some noise from somebody
17 on the phone. If you can please make sure that your
18 phones are muted. Thank you.

19 Sorry to interrupt.

20 MR. BRITTON: I think it's possibly that that comment
21 was so mind blowing, David, that it just kind of echoed
22 through the phone lines.

23 But this is a common issue that we run into over
24 and over when we hear lawyers talking about the future of
25 the profession. They sit back and they say, We have a

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1 problem in that we have too many lawyers, that we don't
2 have enough business. We need help. But it's all about
3 me. It's all about the lawyers. It's all about the bar
4 and the bar helping the lawyers.

5 And one of the concerns I have in general -- and
6 I'm happy to dig into this deeper. So I said I don't
7 really care whether it's a voluntary or involuntary bar --
8 I don't -- but I do get concerned when a voluntary bar
9 does not have a strong focus or a strong purpose in
10 investigating what the consumer need is. We're the worst
11 as lawyers -- lawyers, we're the worst at actually
12 understanding what consumers, those people that we're
13 trying to reach, what they want and need.

14 And as a consequence, just to give you some data
15 here -- this comes out of the World Justice Project, but
16 it also comes from Rebecca Sandefur's work with the
17 American Bar Foundation, it comes out of Avvo's data. And
18 by the way, so Avvo, we do -- we talk to over 25,000
19 consumers personally a year. And then you have those 100
20 million that come through, but we pluck a lot of them out
21 and we do research with them on our products.

22 The number one thing that they tell us is that
23 they don't really know what lawyers do, but they know one
24 thing and that's that lawyers are way too expensive. And
25 so as a consequence, the utilization rates in the United

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1 States -- let's start with people with money because when
2 we start talking about the access issue, all the lawyers
3 throw up their hands and just say we're talking about the
4 poor people and they just turn it off. And that's the
5 saddest part of all of this, so I'm going to start with
6 the money part.

7 If you take people of substantial means, \$84,000
8 and up, less than half of them, right around 54 percent
9 don't use lawyers. They don't use lawyers. If you add on
10 low income, it's 82 percent. 82 percent of the US
11 population is not using lawyers. And they're either going
12 down the pro se path themselves -- and any of you that
13 spend a lot of time in the court, our courts are bursting
14 from a pro se perspective. Last year was the largest
15 number of pro se bankruptcy filings ever.

16 Then you look at companies like LA's own
17 LegalZoom. LegalZoom is a do-it-yourself or
18 do-it-without-a-lawyer company. Through their document
19 processors, they -- I don't -- they're trying to bring

20 more lawyers into the system to where they refer business
21 to them, but for the most part, LegalZoom has a process
22 where they say, Come to us and for entry level legal
23 services, we will do it with one of our document
24 processors at a highly discounted rate.
25 LegalZoom makes somewhere between 250 and \$300
0117

1 million a year on this activity. That's do it without a
2 lawyer. They're going around the legal profession.
3 Now some of you immediately, your response is
4 like, Well, then we're going after LegalZoom for the
5 unauthorized practice of law. And I would say, you're
6 nuts because it's not about you. It's about the consumer.
7 And I go back to -- I love the Sam Walton quote, Sam
8 Walton -- Sam Walton, the founder of Walmart. Pretty big
9 company. But here's what Sam said, "There's only one
10 boss, the customer, and he can fire everybody in the
11 company from the chairman on down simply by spending his
12 money somewhere else."

13 Think about in other industries where the
14 consumer has fired the old guard. Zillow in real estate,
15 Uber in transportation, Airbnb in hotels, Glassdoor in
16 jobs, Waze in maps, Netflix in movies. The consumer has
17 karate chopped so many industries. And we're right in the
18 middle to where they're starting to pull back the hand and
19 karate chop into legal and yet we're paralyzed as an
20 industry and still just sitting back and constantly asking
21 about us, how does it affect us as lawyers when over half
22 the people of substantial means, they're not hiring us.
23 They're avoiding us.

24 And so where do we go with that and what do we
25 do? And so I would just ask for this commission, I
0118

1 would -- I don't know every element that you're exploring,
2 but as far as the future goes, I would step back and ask
3 the question whether it's around the bar, what type of bar
4 we have or what type of technology we allow or how much
5 the bar charges or marketing regulation or unauthorized
6 practice of law, what does the consumer in California,
7 what do they want, what do they need and what are they
8 asking for.

9 And I'll give you just one really simple thing
10 that they're looking for. I guess by putting simple in
11 it, I give it away in that they're looking for simplicity.

12 So one of the things that we do as lawyers is we
13 make things so unbelievably complicated. But when you go

14 to the consumer and ask them, Well, okay. You say that
15 lawyers are expensive and then beyond that, you don't
16 really know what they do, well, tell me what you do know
17 about the legal industry.

18 So there's actually out of the California Courts
19 Commission, there's some pretty interesting data, also the
20 American Bar Foundation. Rebecca Sandefur from the
21 American Bar Foundation did a broad-based survey, I think
22 it was two years ago in 2014, where she asked people in
23 civil justice situations to describe their situation and
24 help them understand -- or help her understand their
25 perception of how lawyers and the courts can help them.

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1 In her research, 9 percent of people with a civil
2 justice situation described their situation as legal.
3 56 percent of them described their situation as bad luck
4 or part of God's plan. 24 percent of them said that
5 hiring a lawyer wouldn't matter. And then in
6 California -- and this comes out of the California Court
7 Commission study, when people take things into their own
8 hands, 60 percent of pro se litigants, when they failed to
9 actually complete their pro se task and the California
10 Courts Commission followed up with them, they didn't
11 realize that they had anything left to do. So they knew
12 that they wanted to do it themselves because they weren't
13 sure a lawyer could help them, but then they just weren't
14 even able to accomplish the simplest tasks.

15 So whatever we do as an industry, as a state, we
16 need to get on one knee and start talking to the consumer
17 and asking them what they need of this profession and we
18 need to start building products and regulations that serve
19 them.

20 And if we have one more hearing about lawyers and
21 what they want before doing that, I think we're wasting a
22 lot of time or we're just leaning into being a trade
23 association more than we'd ever like to admit.

24 Those are my preliminary thoughts and I'm happy
25 to dig into things like ABS, UPL marketing, regs. I do

0120

1 these things all over the country. I can talk at length,
2 whatever you'd like to discuss.

3 MR. PASTERNAK: Thank you very much.

4 I think Jason has a question.

5 MR. LEE: Thanks for your remarks.

6 MR. BRITTON: Sure.

7 MR. LEE: I think the folks in the room are very

8 keenly aware of sort of the gap between utilization of
9 legal services, the fact that they're used by the
10 wealthiest and corporations versus the folks that truly
11 really need it.

12 And something that I've been tackling is a lot of
13 the things that you discussed which is how technology sort
14 of relates to the evolution of our profession. We had
15 someone from Rocket Lawyer come in, I think that was last
16 meeting. We talked about his experiences, company's
17 experience with the ABA's pilot project relating to Rocket
18 Lawyer and the resistance that Rocket Lawyer received and
19 the ABA had to cut that pilot short.

20 So when you say you don't care, paraphrasing,
21 whether it's a mandatory bar or non-mandatory, I guess the
22 question I have is what structure do you think is best
23 prepared for what I think is going to be a rapid
24 acceleration of our profession as sort of the intersection
25 between technology and legal services meet?

0121

1 MR. BRITTON: It's a good question, and I'm going to
2 give you an answer that says I don't know. I would want
3 to actually ask the legal consumer.

4 So here's what I would do. I would start with
5 what are the objectives of a mandatory bar and how does a
6 voluntary bar, how does that alter those objectives. And
7 then I would ask our end user that happens to be our
8 potential clients, which of those objectives are better
9 for you. And if they were -- and now there's a bit of
10 bias that I have and that's just a little bit.

11 And then voluntary bars, in order to make money,
12 to stay in business, they tend to be much more of a trade
13 association and they tend to focus much more on the
14 interests of the supply side of the lawyers. That's just
15 inherent in it because they're not -- you have a little
16 bit more latitude -- and Elizabeth may disagree with
17 this -- but a little bit more latitude to be aggressive
18 with the lawyers, to listen to the consumer even though
19 the lawyers may not love what the consumer's saying if
20 it's mandatory that they be part of the organization
21 because then they can't threaten to walk with their feet.

22 And as we talked about the Sam Walton and who's
23 the customer, we're just so lost in the legal profession
24 with understanding that that end user is our customer, the
25 lawyer. We are not the customer.

0122

1 And so in voluntary bars, I do feel you see a bit

2 of drift. But I was on the phone with a representative
3 from the Nebraska Bar yesterday and -- or I don't know.
4 Sometime in the last week, let me put it that way -- and
5 they're a voluntary bar and nothing has exploded. You
6 have a lot of voluntary bars that are very efficient, but
7 I think it comes from strong leadership, understanding
8 that end user and keeping in mind that we can't drift so
9 far over that we're just simply ignoring the interests of
10 those that we ultimately serve in the end.

11 MR. PASTERNAK: Any other questions or comments?

12 MR. BRITTON: Can I offer one last closing comment?

13 MR. PASTERNAK: Absolutely.

14 MR. BRITTON: I don't know if the Rocket Lawyer crew
15 brought this up. The Rocket Lawyer group does -- I think
16 they were bold and did a great job at trying to forge new
17 ground with the ABA. And I think under William Hubbard,
18 everything the ABA has been doing with their futures
19 commission over the last couple years has been really
20 impressive.

21 Sadly, too few bars they just immediately brush
22 them off and say, Oh, that's the ABA. We don't listen to
23 the ABA. But one thing that they are discussing at length
24 is the unauthorized practice of law rules and alternative
25 business structures.

0123

1 I've spoken in front the ABA house of delegates,
2 I've keynoted different ABA functions in talking about how
3 we get over this hump of being lawyer-focused and helping
4 the consumer. The biggest concern that I have for us
5 moving quickly and moving in the right direction, even as
6 you say which should it be, doing a little bit of market
7 research, being a little responsive to our customers, that
8 are not part of lawyer muscle memory whatsoever. I mean,
9 most people went to law school not because they were sure
10 that they were going to be the next Sam Walton or the next
11 Carly Fiorina or whoever it may have been. They are much
12 more attracted to regulation.

13 And quite frankly, in law school, we teach people
14 how to be issue spotters rather than business and
15 opportunity starters. And we can argue that in law school
16 we should require people to take business courses. But if
17 we continue down that path, we're creating a situation as
18 a bar, as a state, or beyond, where the lawyers must be,
19 one, the innovators, two, the business people that run
20 great business operations and become experts in business
21 operations, three, the technicians that actually practice

22 law and do it ethically and, three [sic], the whole
23 support system for -- think of, you know, in every other
24 world, you have venture capitalists and think tanks,
25 et cetera. We as a profession need to be all of that.

0124

1 That's what's required currently under the UPL rules.
2 Who is our industry's Bill Gates? Anybody, who
3 is it? Who's our Thomas Edison? Who's our Steve Jobs?
4 It doesn't exist. It doesn't exist. And so to the extent
5 that we're struggling and there are too many lawyers and
6 we don't want to pay the bar money and we're worried about
7 technology and we're going to solve all this as lawyers,
8 guys, we're in a heap of trouble.

9 So the other common retort that I hear is, Well,
10 there are lots of consultants. Well, sure. And how many
11 consultants have made companies great? I know you've got
12 a lot of fantastic consultants out there, but they're not
13 invested. They don't own these companies. Mark
14 Zuckerberg did not become a consultant in the legal
15 profession because that's not where you can actually
16 explore the limits of US capitalism.

17 So I'll just finish with this idea if this is
18 interesting to you at all, in that for us to succeed in
19 any of this, for us truly to step into the 21st century to
20 where we're not getting karate chopped, to where we're not
21 going the way of the major television networks in the face
22 of Netflix or the major hotel chains, in the face of
23 Airbnb, et cetera, is that giving lawyers a fighting
24 chance both to push the profession forward and also focus
25 on being the ethical technicians that they should and want

0125

1 to be, having a structure where businesses can invest in
2 and partner with -- invest in law firms, invest in legal
3 entities with lawyers, partner with lawyers to ask these
4 questions and drive this stuff forward.

5 It's happened in England. It's happened in
6 Australia. Nobody's caught fire. And yet you talk to the
7 regulators, which I have personally out of both of those
8 countries, and Canada is only about five years behind. I
9 talked to all these regulators personally as part of a
10 commission out of Washington state and the ABA, it's
11 working.

12 And so as part of the collective conversation, I
13 would ask all of you to consider in California whether
14 this is something that we can push from this very
15 innovative state to help give lawyers an entrepreneurial

16 shot at serving all of those wonderful customers, the
17 80 percent who need our services.

18 MR. PASTERNAK: Thank you.

19 I think Elizabeth has a brief comment.

20 MS. PARKER: I want to thank you first of all for
21 joining us and breaking into your day to do so.

22 MR. BRITTON: Sure.

23 MS. PARKER: I think what I'm hearing you say, and I
24 think you said this in our phone conversation, is that
25 we're asking lawyers as generalists to do more than what
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1 is humanly possible. And therein lies one of our
2 regulatory challenges because we find that they do run
3 afoul of rules and so on; that a better solution would be
4 to look seriously at some of the limitations and allow
5 them to practice in different kind of settings. And
6 that's the regulatory challenge we confront so that they
7 would be able to partner with those who are accountants
8 and business people and so on even as though perform in an
9 ethical way.

10 Did I get that --

11 MR. BRITTON: I think it's close. I think it's one
12 flavor.

13 What you're seeing in England and Australia is
14 that they're peeling back the definition of the practice
15 of law and they're opening the -- they are allowing
16 lawyers to partner with business entities in many more
17 situations.

18 The quid pro quo in that is something called
19 "entity regulation." And entity regulation is where the
20 entire entity that has the lawyers employed as part of the
21 delivery of legal services have the same ethical
22 obligations as the individual lawyers themselves.

23 MS. PARKER: So that, of course, leads to my next
24 question and it's a structural one.

25 What would the best structure be, not necessarily
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1 limiting ourselves to just unified or voluntary bar
2 associations -- to enable that kind of an approach?

3 MR. BRITTON: I don't think it is a -- here's what's
4 funny about England and here's what you guys should all be
5 worried about as well. What happened in England is the
6 legislature -- the parliament, actually, got fed up with
7 lawyers because of very low utilization rates like we're
8 seeing here and enough consumers complaining, saying, I'm
9 just not represented by the legal profession. I don't

10 know what solicitors or barristers do for me except wear
11 white wigs and black robes.

12 So the legislature stepped in and said this whole
13 bar thing is bullpucky, to use that very legal word again.
14 And we are going to move regulation over to a legislative
15 arm and you just handle the discipline.

16 And I think that's a very real risk in a lot of
17 states here in the United States. And so if we wait long
18 enough and legislature does move in, then whatever we
19 choose, it doesn't matter because it's out of our hands.

20 Should we decide to be proactive, I absolutely
21 think that a mandatory bar has a better shot of pushing
22 that through in the short-term for all the reasons that I
23 talked about before in that if you're required as part of
24 the legal regulatory structure to listen to you or anybody
25 else, then you can force a lot of issues that would take a
0128

1 lot longer than an organization that is worried about
2 losing their members because they can walk with their
3 feet.

4 MR. PASTERNAK: Thank you.

5 Miriam.

6 MS. KRINSKY: Thank you for your comments, Mark. I
7 actually thought that many of the issues that you raised
8 were issues that some of us a couple of years ago as part
9 of the Civil Justice Strategies Task Force had the
10 opportunity to spend the year thinking about, hearing
11 about and really trying to be visionary in redefining what
12 can or should the practice look like.

13 And I heard you say most significantly that as we
14 think about all of these issues and try to be visionary,
15 our lens really shouldn't be, nor do I think it has been,
16 what is best for our profession but rather what is best
17 for our consumers, what is best for those who need access
18 to these kinds of services, but in the vast majority of
19 cases don't have it or don't get what they need.

20 And that was very much what the work of our Civil
21 Justice Strategies Task Force tried to grapple with. And
22 I think there is more thought as a result of the good work
23 of that task force that still warrants further reflection,
24 comeback, evaluation. But I do worry that if this board
25 and this association's bar association were very narrow in
0129

1 its purview and its scope, that kind of visionary thinking
2 wouldn't be likely to be happening. And I also think that
3 our sections are trying to be visionary in that regard.

4 So I think the issues you raise are exactly the
5 kinds of issues we should be challenging ourselves to
6 address, but that the structure we have has enabled us to
7 start doing that thinking and hopefully will contain to
8 enable us to do it.

9 MR. BRITTON: Great. And I will say California tends
10 to be a bit more forward thinking than a lot of -- I mean,
11 I deal with all 50 states, all bars all the time. And so
12 if you feel like I'm being a little hard on you guys, I
13 actually commend you, but don't stop at that because
14 there's just a ton of work to do.

15 MR. PASTERNAK: Thank you again, Mark, for spending
16 your time with us today. We appreciate your comments and
17 your incites.

18 MR. BRITTON: You're welcome. Can you not put this on
19 record.

20 (Discussion off record)

21 MR. PASTERNAK: Our next speaker is Vanessa Kirker
22 Wright who is the chair of the State Bar Family Law
23 Section. She's here in from Santa Barbara where she
24 previously chaired the Santa Barbara County Family Law
25 Section, and is a member of three voluntary local bars,
0130

1 the Ventura County Bar and the San Luis Obispo County Bar.

2 Welcome, Vanessa.

3 MS. KIRKER WRIGHT: Thank you. I guess I'm the first
4 voice from the sections today. People have asked where
5 are the sections. One of them's here.

6 I have a few things to address. We supplied you
7 with a letter signed by three of the section heads, but I
8 won't dwell on those issues. I want to talk about -- it's
9 been an interesting day for me so far. I chair my little
10 section. I started out my career 25 or -6 years ago as a
11 legal aid attorney. So my background is of a service
12 oriented place.

13 Last year the sections were confronted with a
14 couple of things, the Bagley-Keene act was amended into a
15 fibo (phonetic) at the last minute. It came as a shock to
16 us. And at the same time, our allocation has increased.
17 We've all heard a lot about that in these hearings. But
18 the sections didn't run around with our hair on fire, we
19 just began implementing rules.

20 For the most part we have successfully
21 implemented Bagley-Keene. The family law section, in
22 particular, has adjusted completely. And in some ways
23 it's better for us. In some ways it's a challenge, but

24 we're still doing all the functions -- I'll get to that in
25 a minute -- that we were doing before.

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1 So now we're hit with a proposal to separate the
2 trade association functions from the regulatory functions
3 of the state bar. The sections -- and in our last
4 meeting, last couple of meetings, we worked very hard to
5 understand what that proposal is and to respond to it.

6 I want to make it clear, we're all volunteers.
7 Most of us are working stiffs. We don't have a lot of
8 time to dwell on political intrigue or the functioning of
9 the verified level of reorganizing state bars. We just
10 want to follow the rules and do our work.

11 There are a number of us who object to the use of
12 the words trade association. We're professionals. We
13 look at ourselves as professionals. But that's not so
14 much my beef. The family law section at our last meeting
15 voted unanimously, the advisors, past presidents, all the
16 section members, all the hangers-on, voted unanimously
17 against the plan we were given, the outline -- it looked
18 like an outline to us -- of the plan we were given to
19 deunify the bar, essentially to separate the sections.

20 We believe the plan is at once incomplete and,
21 frankly, ignores the section's role in the context of
22 public protection. To illustrate why we object, I'll talk
23 about my section because I know it best, but I believe
24 it's representative of all the sections.

25 We're pragmatists. We have a job to do. We

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1 endeavor to elevate the practice of the law and protect
2 the public by educating family law attorneys and providing
3 our expertise to the legislature when they embark on
4 amending the family code, and they embark on that every
5 year. Most of them are not lawyers. Almost none of them
6 have ever practiced family law.

7 We do our work well. For example, the family law
8 section alone has provided thousands of hours of
9 affordable webinars and online and in-person training. We
10 attend most of the new admittee ceremonies personally.
11 Throughout the state, we introduce new lawyers to the
12 educational and mentoring opportunities available to them
13 through the state bars and the sections specifically.

14 We publish a scholarly journal that offers
15 articles and MCLE credits on various issues that arise in
16 the practice of family law and we spend countless hours
17 lending our expertise and practical perspectives to

18 legislators, again, who are not generally lawyers, who
19 have never practiced family law or tried to interpret the
20 law for self-represented clients. Most of the
21 self-represented clients in the courts in the state of
22 California are family law clients.

23 We do all of this with the support of the
24 infrastructure of the state bar. We completely understand
25 on a daily basis that the state bar is a regulatory

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1 disciplinary agency for lawyers. That's what the
2 fundamental role is.

3 We understand there's an inherent tension in
4 having the sections as part of the state bar as a public
5 corporation whose mission is to protect the public. The
6 sections are an integral part of that mission. It's not
7 always an easy relationship. This governmental entity
8 defines what the sections can do, what we can say and what
9 we cannot say, positions we can take, positions we cannot
10 take. It limits our communications and it tells us what
11 to do with our funds. We work within those parameters.

12 All of that said, we looked at the proposal
13 alternative and found it wanting. If the sections were
14 severed from the state bar, the public would lose our
15 services and we would lose the infrastructure that we have
16 come to rely on in order to supply those services. We
17 would be forced to reinvent the wheel, hire employees,
18 provide human services, negotiate logistics; catering
19 contracts, hotel contracts. We would be starting from
20 scratch with only volunteers to create and implement an
21 entirely new structure. That will detract from our
22 mission to educate our members and to lend our expertise
23 to the legislature.

24 The misunderstanding I see is the idea that we
25 move from a mandatory to a voluntary bar. And we've had a

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1 lot of talk about language, what that means, unification,
2 deunification. The sections are a voluntary bar.
3 Nobody's forced to sign up for a section. All 65,000 of
4 us are volunteers. Our service to the mission of the
5 state bar allows us to function.

6 The sections will not survive separation and
7 particularly the smaller sections. Family law has 4,000
8 members. There are a number of sections with far fewer
9 than that. The educational services we provide will not
10 survive separation.

11 How is the state bar going to meet its mandate to

12 give inexpensive education to its members if you don't
13 have the sections? The testimony before that the
14 conference of delegates is down about 250 participants, I
15 don't know that that's true, but that's the testimony
16 we've heard, from a high of about 750. Other statewide
17 family law organizations, voluntary, have combined
18 statewide about 1,000 members. Again, family law section
19 has 4,000 members.

20 We have no confidence that lawyers will flock to
21 a private voluntary statewide bar. I disregard the county
22 bar associations because those who join them will continue
23 to join them. Those who don't will continue not to
24 regardless of whether we have a unified bar. Even if
25 there was a huge influx of members, there's no doubt that

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1 the large urban areas will dominate a statewide voluntary
2 bar in California. I have no doubt about that. The
3 outlying areas, the rural areas, the central coast --
4 close to my heart -- Fresno, those will go unrepresented
5 or underrepresented.

6 MR. PASTERNAK: Let's not forget Bakersfield. We have
7 a former board member from there.

8 MS. KIRKER WRIGHT: It's not close to my heart, but
9 you're right.

10 The geographical diversity of sections isn't
11 something that we can retain in a voluntary structure.
12 The sections separate -- as one of our advisors has said,
13 if the sections separate from the bar, we only have three
14 things to lose: Membership, money and impact.

15 I'm here for questions.

16 MR. PASTERNAK: Thank you. Any questions?

17 Jason.

18 MR. LEE: Thank you for your remarks.

19 Your description of family law brought me back to
20 my time on JNE when we had some very strong voices from
21 that field of practice related to how many folks appear
22 before our courts on issues of family law. And I have
23 been waiting for the moment when the sections have spoken
24 about their sort of vision and opinion about where they
25 fall within our bar structure. So thank you.

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1 What do you think was the most, I guess,
2 important factor in the decision that appears to be, I
3 think you said a unanimous decision, to stay within the
4 unified bar structure? You mentioned a number of
5 different elements that was considered by your section.

6 MS. KIRKER WRIGHT: I don't think that those --
7 various people have various priorities. The three
8 priorities were, again, members, money and impact. Let me
9 just tell you, the family law section in particular has
10 worked very hard to forge a relationship with the
11 legislature. They come to us when they want an objective,
12 non-policy, non-advocacy position on amendments to the
13 family code.

14 We have a wide variety of members on the section,
15 on the committee. For example, we have one member who is
16 a family court facilitator, deals only with
17 self-represented people in the structure of the court
18 system. We have dependency counsel. We don't have any
19 delinquency counsel. We have adoption attorneys. We have
20 assisted reproduction attorneys, adoption. So we come
21 from a very wide background.

22 And when I looked at the plan, I think the
23 biggest objection was that we would lose the statewide
24 impact that we have now and ability to hear from family
25 law attorneys all over the state. I remind the task force
0137

1 that it was family law -- speaking to the last speaker, it
2 was family law who began the limited scope of
3 representation dividing an action up into pieces so that
4 it was more affordable, more -- you can represent a client
5 for a piece of it so they can have a lawyer in court for
6 the important parts.

7 So to answer your question, I think it was the
8 connection -- the historic connections that we have made
9 using the support of the bar's infrastructure and our
10 ability to advocate for an elevated standard of practice
11 in our particular area.

12 MR. PASTERNAK: Any other questions?

13 Denny.

14 MR. MANGERS: You do realize, no doubt, that no one is
15 suggesting depriving sections of infrastructure. The only
16 suggestion that's been made is that like other major
17 states, they develop a professional association
18 infrastructure which does exactly for the sections what
19 the current state bar infrastructure does; right?

20 And you've put yourself out there to the point
21 where you're telling us essentially that if the bar were
22 to deunify, your section would cease to exist yet that is
23 not the case in any other state in the union which has
24 deunified. There are still family law sections.

25 I happen to have a high personal affinity for

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1 practitioners in your particular section. And I'd be
2 dismayed if anything you're suggesting occurred, but I
3 don't think your testimony is very convincing in that
4 regard since the alternatives are working on behalf of
5 family law section in other states. And I just -- it
6 almost sounds a little hyperbolic to me, quite frankly,
7 and simply fearful or speculative about what might occur.

8 So I haven't really seen or heard an insight here
9 that leads me to the same conclusion which you've come.

10 Do you want to comment on that to any extent?

11 MS. KIRKER WRIGHT: I think that having practiced in
12 the area for 26 years and been a member of many voluntary
13 organizations, that perhaps my expertise lends itself to a
14 different perspective than a theoretical one.

15 We haven't had the sections severed in
16 California. California is a unique bar. And I understand
17 that the proposal is that a new structure is developed,
18 but I haven't seen any detail on how that structure will
19 be developed, who's going to put the hours into developing
20 it and what kind of effort will be made to make sure that
21 we are not stuck at board meetings talking about the cost
22 of coffee pots for members.

23 So while you might want to characterize my
24 testimony as hyperbolic, it comes from a long history of
25 being associated with family law, family law practitioners

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1 and voluntary family law associations.

2 MR. PASTERNAK: Any other questions or comments?

3 Gwen, did you have your hand up?

4 MS. MOORE: I guess my question is just a simple one.

5 It sounds to me as though you're saying you don't
6 see where it's broken so what are we trying to fix?

7 MS. KIRKER WRIGHT: I don't see a broken system, I
8 agree with that. I believe that we are -- our section
9 would love to continue to work within this structure and
10 make it better. And we've done that so far, for example,
11 with the allocation. I believe we're successfully working
12 through that. I'm very proud of our sections for doing
13 that. It's very hard work.

14 MR. PASTERNAK: Any other questions?

15 Thank you, Vanessa. We appreciate your input.

16 MS. KIRKER WRIGHT: Thank you.

17 MR. PASTERNAK: Our next speaker is Rob Harris who's a
18 partner at Binder & Malter, LLP. He's the current chair
19 of the State Bar Business Law Section Executive Committee.

20 Rob, welcome.

21 MR. HARRIS: Thank you, President Pasternak. Thank
22 you to the members of the board, to you, Director Parker,
23 for allowing me to speak today on behalf of the business
24 law section.

25 I want to make clear that I am speaking on behalf
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1 of the voting members of the business law section, not the
2 ad hoc task force which has previously addressed this
3 group. I think you'll find that the voting members of the
4 business law section have a more moderated position which
5 I will outline as I go through my testimony.

6 As you said, I'm the chair of business law
7 section. I have been a volunteer with the sections for
8 about 15 years. I've twice chaired the standing committee
9 on insolvency law. I have been through two terms on the
10 executive committee as well. I am a vice chair -- I have
11 been a vice chair in charge of member services. I am a
12 trusted poster on the counsel social media task force. So
13 I have a fairly long experience with the sections and the
14 bar and a perspective that I hope I can lend you here.

15 First, a little background on the sections
16 because I think some of you aren't fully familiar with
17 what it is we do and, particularly, the business law does.
18 The sections exist to educate lawyers and the public and
19 to improve the practice of law. We believe in the
20 business law section that the sections generally serve
21 primarily smaller and midsize firms that don't have their
22 own in-house training programs.

23 We feel that the need is greater for these
24 smaller firms with large numbers of law students that have
25 heavy debt burdens to resort to the state bar to
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1 provide -- to get the services they need to become
2 competent attorneys.

3 The BLS, the business law section, is one of just
4 15 of the voluntary sections, but very probably has the
5 greatest differences amongst its members because we have
6 so many discrete areas of law under our umbrella. We have
7 more than 8,000 active dues-paying members in the business
8 law section.

9 Our work is done by standing committees that are
10 dedicated to advancing the practice of law in areas
11 essential to the California economy. Our standing
12 committees have more than 300 hundred volunteer members
13 who individually may spend hundreds of hours a year

14 providing services to the bar.

15 Our standing committees are agribusiness,
16 consumer financial services, corporations, Internet and
17 privacy law, financial institutions, franchise, health,
18 insolvency, insurance nonprofit opinions, partnerships,
19 commercial transactions, UCC, and we have a 15 standing
20 committee -- oh, excuse me, business litigation -- and we
21 have a 15 standing committee that publishes The Business
22 Law News which is a scholarly publication that comes out
23 quarterly and also is accompanied by annual review, all
24 the business law developments in the state.

25 Now the section has historically delivered

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1 significant products and services to the members through
2 publications. We have MCLE programs. We provide detailed
3 assistance to the legislature. I heard a lot of what we
4 do in what Vanessa was saying. And in a lot of ways, I
5 think what I have to say is similar, but it comes from a
6 different perspective.

7 Last year the business law section had four
8 affirmative legislative proposals go into law. And some
9 of them are so complex that I'd bore you to death if I
10 described them here, but they're essential going forward
11 for the legislators, for example, working in the franchise
12 area who really have no expertise. And there are two
13 proposals that franchise is working on that have been
14 going five and eight years respectively.

15 The business law section produces authoritative
16 guides. It produces blue sky guides, securities guide on
17 California law, guides on the assignment for the benefit
18 of creditors, opinions reports of tremendous magnitude
19 that are viewed nationwide with great respect.

20 The BLS sponsors major public events at law
21 schools in subject areas. The BLS provides in-meetings,
22 free in-meetings CLE, not only to its members, but to
23 those of the public who want to attend, so it provides
24 public education as well.

25 The business law section is a leader in

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1 electronic outreach. We've published and transmitted 498
2 electronic bulletins on legislative, legal and statutory
3 developments in the last year. In recognition of our core
4 principle and ensuring growth amongst the membership of
5 the bar in diverse areas, we have commissioned a diversity
6 initiative which we believe is very shortly going to bear
7 fruit.

8 The work of the sections, in short, is essential
9 and it can't cease. But for the volunteers of the
10 sections and the standing committees, the legislators and
11 their staff would be deprived of expert assistance that
12 they must have to put together the kinds of laws
13 California needs.

14 Without the good work of the business law section
15 and other sections, California lawyers would be deprived
16 of the topnotch education that we provide which is
17 mandated by the legislature.

18 And looking at how the sections work from the
19 opposite angle, the legislature would no longer have a way
20 to reach out as directly to the state's lawyers to educate
21 them in a way that they want initiatives put forth.
22 Lawyers from all parts of the state finally would lose
23 their voice if the sections were to go away.

24 I heard Vanessa talk about the risk that small
25 bar associations would be drowned out. Well, we think to
0144

1 a degree that's right. The sections have stayed around so
2 that everyone can be heard.

3 But make no mistake, the sections are in peril at
4 this point. There are huge problems facing us. This is
5 not for me about politics. This is not for me about a
6 particular form of organization. This is about the
7 survival of the sections. That's why I'm here today.

8 I'm going to give you a few of the reasons why we
9 think the sections are in peril. The first and biggest
10 problem we think is the revenue and expense problem. The
11 sections require by law to be self-sustaining and they
12 must not take public money. But what we have seen in
13 recent years is the assessment has gone from \$37 a year
14 per member in 2007 and 2008 to \$64 in 2016. At the same
15 time, annual dues have only risen from 75 to \$95, so a
16 much larger bite is being taken out.

17 We in the business law section see \$100 a year as
18 the psychological barrier beyond which dues-paying lawyers
19 are going to be very reticent to pay for a voluntary
20 organization with all of the other obligations that they
21 have.

22 We acknowledge the efforts of Leah Wilson and the
23 council task force, including Mr. Perry Segal, who is here
24 today, to reduce the costs available, but unfortunately,
25 to a large degree, it may be that that effort is a
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1 Band-Aid on a much larger problem. Within only a few

2 years, we feel it's inevitable that one by one the
3 sections are going to cease doing business because they
4 can't afford to stay.

5 Some smaller sections are already facing this.
6 One of our most senior staff members recently said it's
7 very unfortunate, but sections do go out of business.
8 Well, we don't really think that that's acceptable.

9 And this, of course, assumes that membership
10 remains constant. You have to understand that membership
11 doesn't remain constant. In bad times it goes down. When
12 there are shocks and buffets to the system, membership
13 goes down. And that's what we're dealing with and that's
14 the next point I'd like to turn to.

15 We have faced an accumulation of roadblocks and
16 restrictions that may end the sections. I want to just
17 throw one very obvious thing our way, the website. Four
18 years ago, our website was taken down by the former
19 executive director without any prior consultation to the
20 ABA compliance. Four years. To this day, the heart of
21 what any monitored organization needs to survive and reach
22 out to the public, a website, is essentially
23 nonfunctional.

24 The legislature, I understand, has ordered the
25 bar to come up with a functional website, and still
0146

1 nothing. And has there been any consultation with the
2 sections whose work would be portrayed on the sections on
3 the website? No, there has not been.

4 We have intentional interference by outside
5 forces with the ability of the sections to do our work.
6 Bagley-Keene is what I'm specifically referring to.

7 I might be the eye of the storm when it comes to
8 Bagley-Keene in the business law section. I have spent
9 hundreds of hours -- in fact, I'd go so far as to say the
10 bar, all this work, has been my biggest client for the
11 last six weeks.

12 Bagley-Keene compliance is a compromise. This
13 board knows the burdens of Bagley-Keene. You can't
14 communicate by e-mail. You can't get anything done
15 outside of a public meeting. The AG's office describes
16 Bagley-Keene this way -- this is from its handy guide
17 that's online -- "Operating under the requirements of the
18 act can sometimes be frustrating for both the board
19 members and staff. This results from the lack of
20 efficiency built into the act and unnatural communications
21 patterns brought about by compliance with its rules."

22 Efficiency is not the goal, yet we are talking
23 about sections whose primary purpose, one of who -- the
24 primarily purpose of which is to get instantaneous word of
25 legal developments out and to be able to work from moment
0147

1 to moment on legal developments -- excuse me, on
2 continuing legislation where legislators meet back and
3 forth.

4 We have another ongoing problem that may well
5 drive us out and it is the historical and ingrained lack
6 of control of the sections phase. Sections have no
7 control over staff, over how they're deployed, over who
8 does work for which section, over how many hours are
9 spent. This is tremendously difficult and this is
10 accepted within the bar as something that the sections
11 just have to deal with.

12 In any kind of a voluntary organization, you
13 would see some aspect of control because, to a degree, the
14 volunteers are the customers who are served by staff. And
15 I think the problem -- the final problem is that there are
16 forces outside the bar and the sections that may well
17 force deunification.

18 President Pasternak, you've spoken before on the
19 North Carolina case about the tooth whiteners who are
20 potentially being regulated. I feel certain that these
21 same legal issues will come up in California. Obviously,
22 we know that the Mangers/Mendoza proposal is out there.

23 We believe, at the BLA, that the time is right
24 while an opportunity remains to study what options there
25 are to follow the lead of the chief justice and the
0148

1 executive director to suggest study in a deliberative,
2 open and transparent manner of the impacts of the shocks
3 on the section and the manner in which the sections might
4 be able to continue existing in the current system if
5 appropriate changes were made.

6 And so with that, three days ago, the business
7 law section voting members passed a resolution and the
8 resolution will lay out exactly what our position is. And
9 I'll just read it now. I'll provide it later in writing.

10 "The business law section supports the
11 deunification of the sections and other appropriate
12 non-regulatory functions from the regulatory part of the
13 bar. The business law section supports the following
14 general principles in connection with deunification: That
15 all sections be included in the deunification, that we not

16 have, in effect, two wounded entities that can't survive
17 without each other; that all sections' surpluses be
18 transferred to the new entity to implement the successful
19 standup of a new entity; that the bar cooperate and assist
20 with the transition in good faith; that all IP and other
21 property attributable to the sections be transferred to
22 the new entity; that a dues checkoff remain on attorneys'
23 fees statements for as long as the sections wish; that the
24 new entity be allowed to use the state bar logos and marks
25 in its name in official communications so it would

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1 effectively be a transparent transition; that the new
2 entity be given access to existing e-mail and contact
3 information for the members who exist now and new
4 admittees; and the bar would be required to provide
5 services to the new entity for a period of not less than
6 three years at the option of the new entity so we wouldn't
7 find ourselves on day one arguing about, I think as
8 Vanessa put it, coffee pots and who was going to make it.

9 The BLS is committed to do what it can to keep
10 the sections functioning pending the passing of
11 legislation, if any passes, but any deunification would be
12 subject to the passage of legislature.

13 I and the business law section voting members are
14 strongly against any immediate or rash action. We insist
15 that study be undertaken to see what lies on the other
16 side of the gap.

17 And finally, because the sections were asked to
18 take a position, the business law section does support the
19 proposal for deunification by Trustees Mangers and
20 Mendoza.

21 Thank you.

22 MR. PASTERNAK: Thank you, Mr. Harris.

23 Any questions?

24 Jason.

25 MR. LEE: Thanks you for your remarks.

0150

1 I want to focus on the first component of the
2 language you just read --

3 MR. HARRIS: Okay.

4 MR. LEE: -- which is the separation supporting
5 deunification, and you drew a line between regulation and
6 what you spent a great length discussing about the
7 functions of the section and the importance of the work to
8 the overall profession and to the organizations.

9 In your mind, if you can capture what exactly is

10 being -- what is the regulation aspect of what's being
11 separated? Clearly, the BLS is saying the section's work
12 falls outside of that regulation.

13 MR. HARRIS: That's right. I'm referring primarily to
14 discipline and admissions.

15 MR. PASTERNAK: Let me ask you a question.

16 One of the elements that BLS is asking for in
17 this severing or deunification, I understood you to say,
18 is that the bar continue to provide the support for the
19 sections that it has for a period of three years.

20 Is it your understanding that the sections would
21 pay for those services?

22 MR. HARRIS: Absolutely.

23 MR. PASTERNAK: Thank you.

24 Danette.

25 MS. MEYERS: In your proposal, you said that all
0151

1 sections should be included in the deunification.

2 MR. HARRIS: That's correct.

3 MS. MEYERS: Have you spoken with other sections who
4 are not in agreement with you? And in particular, we just
5 heard from the family law section, and that member
6 indicated that their section wouldn't survive.

7 So have you talked to the smaller sections? Your
8 section is obviously a larger section, probably has a lot
9 of revenues where the other sections are not and perhaps
10 couldn't survive outside of your structure that you
11 provided to us. So have you done that?

12 MR. HARRIS: I have. I've spoken to virtually all of
13 them.

14 MS. MEYERS: And they all support the notion that even
15 though they oppose separating from the bar, that all
16 sections should separate if in fact deunification
17 occurred?

18 MR. HARRIS: You know, I think the sections' views are
19 all over the place. I know Mr. Segal, who will speak
20 after me, is going to probably give some description of
21 the straw pull that he took. And I really wasn't trying
22 to take a straw pull, but in context of discussions about
23 Bagley-Keene, these things came up.

24 There are definitely concerns by some of the
25 smaller sections that they'd be, in effect, swallowed up
0152

1 by the desires of the larger sections of the business law
2 sections, and that's an issue. It's not an issue in my
3 mind for some of the more profitable smaller sections, but

4 some of the less profitable ones. You know, if you send
5 this organization out into the world on its own and you
6 have a number of members that don't pay a lot and they
7 don't make money, well, how do you deal with that?

8 I think this is one of the reasons why we really
9 need to study it because you have to figure out how to
10 treat a section like that fairly. And I want to repeat, I
11 really don't think that you can have two separate bar
12 associations where, you know, business and litigation and
13 IP maybe go one way and the rest go the other way. I
14 think that's a guarantee that one or both of those
15 organizations will ultimately fail.

16 So in answer to your question what do the other
17 sections think, I'd say five, maybe six at the most, have
18 decided that they think they want to stay. At least our
19 section has said it probably wants to go. But what I'm
20 doing is I'm putting a flag in the ground here around
21 which discussion can occur. I'm trying to create a point
22 at which we can say, Okay. These issues we need to study
23 because one of the most critical things is, I'm not sure
24 we even know what all the problems are yet before we can
25 make a decision.

0153

1 MS. MEYERS: I think my question was more not what
2 issue the sections think, but on your proposal, my
3 question was really, do all of the sections that you spoke
4 with -- and you said you spoke with most of them --
5 support the notion that if there is deunification, that
6 all the sections must be included in that deunification
7 proposal --

8 MR. HARRIS: I didn't ask --

9 MS. MEYERS: -- even the ones that support
10 unification?

11 MR. HARRIS: I didn't ask them that question. Sorry.

12 MS. MEYERS: Oh, that's all right.

13 MR. PASTERNAK: Denny.

14 MR. MANGERS: Mr. Harris, thanks for your testimony
15 today.

16 The deunification proposal to which you referred
17 sets out a three-year process, as you know. What I'd like
18 you to put a finer point on, because I've been getting
19 e-mails from section people that validate what you've said
20 and that is that they're all over the map as opposed to
21 being unified in their view at this time, but the
22 universal sense I get from e-mail is that many of them are
23 not sure they'll last long enough under the current cost,

24 Bagley-Keene and other things you've identified as perhaps
25 section killers for that process to take place.

0154

1 So the problem my colleagues and -- some of my
2 colleagues and I are having is that we want to answer your
3 suggestion, certainly that of the chief and my other
4 colleagues, that to move to a deunified posture needs to
5 be deliberate. You've used the word like, Needs to be
6 studied, or, There needs to be a study. So let's just get
7 down to the fine point.

8 If the proposal calls for the bar to be given a
9 year to develop a plan, the plan calls for the
10 legislature, in concert with the chief and the bar, to
11 spend another year developing the legislation that would
12 be required to lead ultimately to deunification in 2019,
13 where is the -- you can see the dissidence here. We want
14 to be deliberate. We want to study. We want sections to
15 still be alive when we finish or don't.

16 So how do you see it? Is the three years
17 deliberate? Is it too long? What are we talking about?

18 MR. HARRIS: Well, I'm a bankruptcy lawyer by trade
19 and I think that President Pasternak has a bit of
20 experience in the field being a receiver. And what I'm
21 really afraid of is we're seeing a cost curve -- sometimes
22 we call it the death curve in bankruptcy -- where you just
23 get to the edge of that Cliff and the organization fails.

24 I don't know where the bar is in that. I think
25 that the questions of finance are very deep. And I

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1 certainly think that the sections can survive for two
2 years. Beyond that, I can't make a prediction.

3 But you asked a different question, which is, how
4 long should this process take. I wonder if three years
5 isn't too long. Were I in your chairs, I might commission
6 a reorganization executive, someone to give an exact
7 report on what a spinoff would like look, to answer
8 questions and come back with something rather than just
9 leave this to the legislature.

10 There are a lot of people who feel like if it
11 just goes to the legislature, the whole effort will die
12 and there are other people who feel that if it goes there,
13 it's good that it's dead.

14 MR. MANGERS: Well, I understand that there's one
15 state where the supreme court simply said, Do this and do
16 it in 30 days. What I'm trying to do is be extremely
17 respectful of the fact that California is large. It is

18 different in some respects, although some of the
19 differences, it seems to me, are being blown totally out
20 of proportion.

21 So I'm trying to get enough time; on the other
22 hand, we don't want to kill the participants in the
23 process. So that's -- I'm trying to get at this. This
24 would give a whole year for the bar to respond, a year for
25 they and the legislature to work on the actual statutory
0156

1 outcome. And then at the end actually of two years, one
2 would commence this bold new plan.

3 So you think that that probably works for your
4 people?

5 MR. HARRIS: As long as there's the financial ability
6 to survive, the answer would be yes. I also think the
7 process can be moved forward faster.

8 MR. MANGERS: Thank you.

9 MR. PASTERNAK: Let me ask you a question that I think
10 is probably most appropriate to ask business lawyers.

11 One of the elements that you identified in your
12 wish list is the ability to continue using the state bar
13 seal as long as you want to.

14 I've handled some Lanham Act cases in the past
15 and my concern would be if you have two separate, entirely
16 separate organizations, one that's mandatory bar, one
17 that's voluntary bar, using the same identification, a
18 seal, logo, whatever it might be, don't you have a risk of
19 confusion and don't you have a real risk that the two
20 organizations at some point might take diverse positions
21 on some issue?

22 I mean, I don't see how you can have two
23 organizations using the same identification without any
24 ties to one another.

25 MR. HARRIS: Well, I think that the underlying
0157

1 assumption in your question is that you would continue to
2 have, for example, business law functions in the remaining
3 mandatory organization. And I think I outlined --

4 MR. PASTERNAK: No, no, no. That's not my question at
5 all.

6 MR. HARRIS: Okay.

7 MR. PASTERNAK: I'm talking about your specification
8 that the business law section can continue to use the
9 state bar seal once you're a voluntary organization.
10 That's the question.

11 MR. HARRIS: I was taking the second part of the

12 question first, but I'll take the first part of the
13 question first.

14 I don't think there's a risk of confusion if the
15 new organization is called the California State Bar
16 Association and the state bar continues as the State Bar
17 of California.

18 Remember, this is a question of functionality.
19 So if you have the State Bar of California performing
20 admissions and discipline and you have the California Bar
21 Association providing, for example, legal opinions on
22 business issues, I don't think the two will ever cross.

23 MR. PASTERNAK: And if they're both using the same
24 seal, you don't believe the public will ever be confused
25 by their identities?

0158

1 MR. HARRIS: I think the public can be confused by all
2 kinds of things much less -- I'm not sure what the word
3 is -- similar than two seals that look alike.

4 MR. MANGERS: Mr. Chair, in all fairness, we should
5 point out there is no proposal for the two entities to
6 share the same name or the same seal. The professional
7 association under the proposal Mr. Harris is referring to
8 would retain the title. State bar would have access to
9 the seal. It would meet all of the criteria he listed in
10 his e-mail. And it is the regulatory agency that would
11 have a new name and would not continue to use the seal.

12 MR. PASTERNAK: I may have misunderstood Mr. Harris,
13 but I understood him to say that he wanted the ability to
14 continue to use the state bar logo, seal, whatever, but I
15 may have misunderstood that.

16 MS. MEYERS: That's exactly what he said.

17 MR. PASTERNAK: He did say that, Denny.

18 Gwen, you're next. And we are going to have to
19 cut this off. We have a speaker we're going to need to
20 take out of order who's on the telephone.

21 Gwen.

22 MS. MOORE: My question goes to, it seems that much of
23 your testimony and the support from your sections comes
24 from the fear of not being able to survive under the new
25 financial burdens that have been placed on the sections.

0159

1 Is that an accurate assessment?

2 MR. HARRIS: Oh, I wouldn't call it fear. I think
3 it's a certainty that the costs of institutions go up, not
4 down over the long-term. And we have a ceiling on how
5 high our dues can be.

6 MS. MOORE: Well, I got that. But you also implied
7 that you felt that you would not survive -- you've given a
8 date about such time when you felt that you would no
9 longer be able to survive under the current term.

10 MR. HARRIS: I think that's correct. I personally do
11 not believe that the business law section will be here in
12 six years. It might just have to go out of existence.

13 MS. MOORE: So much of your support for the
14 deunification is based upon the fact that you can't
15 survive under the current rules that are going on with the
16 state bar?

17 MR. HARRIS: My personal opinion is that's always been
18 the primary objective driver.

19 MS. MEYERS: I do have one other question.

20 MR. PASTERNAK: Hold on one second. Miriam was next
21 and then Danette.

22 MS. KRINSKY: So my question actually was intended to
23 be one step beyond Gwen's which is, I know you, on the one
24 hand, said there's a lot of value and need to study this.
25 And you know, my guess is, nobody disagrees with that;

0160

1 that, you know, there are important issues here, there are
2 very good questions and that we need to be thoughtful. We
3 can't close off options and we need to be doing it
4 thoughtfully.

5 What I'm having a little bit of trouble with is
6 if we want to study something and take a close look at how
7 would it play out, what do the finances look like, what do
8 staffing issues look like, what would peel off, what would
9 stay, what would be the problem that we're trying to
10 solve, you know, as opposed to the solution that we're
11 trying to search and attach a problem to.

12 If we're trying to be thoughtful and study it,
13 does it make sense to study it with the conclusion having
14 already been defined, which is, let's study it, but we're
15 ending in some kind of deunification.

16 So my question to you is, if what drives you and
17 your colleagues in the view that we should study it, but
18 study it in a way that starts with the conclusion that we
19 should deunify, how do you know what the finances are that
20 will enable you to survive post deunification? I mean, it
21 may be you'll be looking at a worst state of fiscal
22 affairs.

23 So it seems to me the devil's in the details.
24 And until we know what revenue a voluntary bar could
25 generate and, based on that, what revenue sections would

0161

1 have, how can we possibly know whether you'd be better or
2 worse off under a deunified structure?

3 MR. HARRIS: I agree. I think that there is --
4 there's a huge unknown in what a voluntary bar association
5 would be able to bring in, what could it charge and the
6 maximum, how many members would it retain, would it have
7 fewer, would it have more. My best guess is it probably
8 would have fewer, at least for the short-term. But there
9 are -- and this is why I talked about a study. There are
10 a lot of examples out there about other state bar
11 associations that are deunified that do very, very well.

12 So if we're one of the most innovative legal
13 communities in the country, why is it we couldn't do that?
14 I'm not saying jump off the ship and hope for land, by no
15 means. I'm saying let's study the problem.

16 But your question was a really good one and it's,
17 why are you saying we have to deunify before we have done
18 the study. And I think the answer lies in the structure
19 of how I came to be here today. Initially, my proposal
20 only -- it ended before we got to support for the Mangers/
21 Mendoza proposal. And we were asked by the counsel of
22 sections to provide a position on that, if we had a
23 ten-day Bagley-Keene noticed meeting in time to present it
24 today. We happen to have one set on Friday, so we have
25 provided that.

0162

1 But I absolutely take your point that we do need
2 to know the answer.

3 MR. PASTERNAK: Danette.

4 MS. MEYERS: Actually, Miriam's question was my
5 question, but to add on to that, everybody keeps saying
6 their examples about other bar associations that have
7 deunified.

8 And I guess my question is, are those bar
9 associations that you and others have talked about, I've
10 always wondered are they similar to California? Because
11 there are a lot of states out there who have done it, but
12 those states aren't as diverse. Those states don't have
13 as many other specialty bar associations existing within
14 those states.

15 Just as a member of the bar now, I mean, I have
16 six bar associations that I -- over the period of my
17 tenure with the bar over 30 years, I've paid dues to.

18 So are those states similar, and that's what I'd
19 like to see. If they're not and their states only exist

20 three or four statewide bar associations, you may be
21 accurate in your assessment. But California, there are so
22 many, it is unbelievable.

23 So just in terms of that, are the states that
24 you're looking at, are they similar in structure to
25 California in terms of diversity, bar association and
0163

1 numbers?

2 MR. HARRIS: They're all over the place. I actually
3 attend the ABA Bar Leadership Conference every year and
4 there are some states -- I think it was North Dakota where
5 people drive 200 miles to go to a bar meeting. And there
6 are only a few hundred lawyers in the whole state. And
7 then there are other bar associations like New York where
8 they're actually far more intricate and detailed than
9 California.

10 So the question is to find a model that works --

11 MR. PASTERNAK: Excuse me. We're getting some noise
12 from somebody on the phone. If you can please make sure
13 your lines are muted. Thank you.

14 MR. HARRIS: The question is to find a model that
15 works and create something that we can line up against
16 what we have. Because I think, as President Pasternak
17 noted, there are over 240 local bar associations that you
18 address in your quarterly calls. And I hear their
19 questions and we are very sensitive to the notion that a
20 state bar that weaves them all together is critically
21 important. And we would insist that any new organization
22 undertake that same responsibility.

23 MR. PASTERNAK: I feel a need to point out that to
24 drive those 200 miles in North Dakota takes as long as to
25 drive from west LA to downtown Los Angeles.

0164

1 I think Elizabeth had a comment.

2 MS. PARKER: Well, actually, in a minute, we're going
3 to hear from Liz Neeley who is the executive director of
4 the Nebraska State Bar and indeed they did -- as Denny
5 mentioned, I think -- a rather abrupt reunification. And
6 I think she'll have some useful things for us to hear
7 from.

8 However, I would say there is nothing quite like
9 California. We are twice as large as any other mandatory
10 bar. And you might distinguish places like Illinois, New
11 Jersey and New York, as I have a few minutes ago because
12 of their history, which is different than ours. Indeed,
13 in looking at this -- and by the way, much of this is on

14 our website so there are a lot of comparisons that are
15 drawn.

16 I think an early person testifying, Ted Schneyer
17 or someone, mentioned England. It may actually ironically
18 be more similar in terms of size. And in that instance
19 when they deunified, they did see a devolution towards
20 individual bars. I think when you hear Liz Neeley speak,
21 you may hear something different.

22 And so I think what we're confronting here is an
23 unknown and an unknowable and therein lies the dilemma.

24 MR. PASTERNAK: Thank you very much, Rob.

25 MR. HARRIS: Thank you.

0165

1 MR. PASTERNAK: Appreciate your comments.

2 We are going to go next out of order to Liz
3 Neeley who is on the telephone. She became Executive
4 Director of the Nebraska Bar Association in 2014 at a time
5 when the Nebraska State Bar Association was transitioning
6 from a mandatory association where lawyers were required
7 to be members to a voluntary association.

8 Ms. Neeley.

9 MS. NEELEY: Thank you. Good afternoon.

10 My background is in the social sciences. I have
11 a Ph.D. in sociology from the University of Nebraska, but
12 prior to my role with the NSBA, I worked for the
13 University of Public Policy Center and my own company
14 doing evaluation, research and grant writing and strategic
15 planning for state courts and county justice initiatives
16 and bar associations and indigent defense systems in
17 Nebraska and nationally. And so I kind of come at this at
18 a very different perspective, kind of more of an
19 evaluation of research than the lawyer perspective, and
20 hopefully some of that is helpful to you.

21 By way of background, in December of 2013, the
22 Nebraska Supreme Court issued an opinion and the court
23 stated that mandatory dues can only be used for purposes
24 of regulating the legal profession and all other
25 functions, programs and services of the Nebraska State Bar

0166

1 Association are then -- are now voluntary.

2 And so to accomplish this, the Nebraska Supreme
3 Court created its own attorneys services division and all
4 of the regulatory functions were moved from the NSBA to
5 the court. And the court, in their opinion, defined
6 regulatory functions to include five things: Bar
7 admissions, council for discipline, the commission on the

8 unauthorized practice of law, regulating mandatory
9 continuing legal education and annual licensure or the
10 roster of licensed attorneys.

11 The lawyers in Nebraska now pay a mandatory fee
12 of \$98 directly to the Nebraska Supreme Court for
13 regulation. And dues to the Nebraska State Bar
14 Association are now voluntary.

15 This had a dramatic impact on our budget and the
16 services we provide. Nationally, the membership rate for
17 voluntary state bar associations is 65 percent. Bar
18 associations present their membership numbers very
19 differently. Some include attorneys with inactive law
20 licenses, others do not. But based on Nebraska's
21 experience, if you make the California State Bar
22 voluntary, you can expect to lose anywhere from 25 to 35
23 percent of the dues revenues from attorneys with active
24 law licenses.

25 Nebraska's rate of retention for attorneys with
0167

1 active law licenses is currently 75 percent. We'd like it
2 to be higher, but we're pretty thrilled with that. Our
3 biggest loss of membership is from government practice
4 attorneys. Some government agencies cut voluntary dues as
5 a cost savings measure, others cut payment of voluntary
6 dues because they felt that they could not use --
7 politically that they couldn't use tax payer money for
8 something, quote, voluntary. And when government
9 attorneys are forced to decide for themselves whether or
10 not to pay voluntary dues, results are mixed.

11 The benefits the bar associations offer tend to
12 be focused on the private practitioner, and many of the
13 benefits that bars offer like lawyer referral, malpractice
14 insurance, those don't apply to government lawyers.

15 You can also expect to lose membership from
16 attorneys with inactive law licenses. Rather than lose an
17 inactive in one fell swoop, however, in Nebraska, we have
18 seen a significant -- we lose a significant chunk every
19 year. The majority of attorneys with inactive law
20 licenses lives out of state and so they have an active law
21 license in another state and they don't need our benefits.
22 To date, we have lost 40 percent of our inactive members
23 and we expect this trend to continue.

24 To be honest with you, they're not paying
25 attention to what's going on in Nebraska and I think, you
0168

1 know, the majority of them continue to pay dues for

2 several years and are now figuring out that it's
3 involuntary.

4 I've asked the ABA for specifics on how many
5 inactive members voluntary bar associations have.
6 Apparently and unfortunately, it's so low that most
7 voluntary bars don't track it.

8 I came into the call where there was considerable
9 discussion about section membership. Initially our
10 section membership declined by 25 percent the first year,
11 which was what we lost -- comparable to what we lost in
12 membership.

13 The following year, however, we went back up to
14 83 percent of where we were. And this year, we're at over
15 90 percent of where we were. So our section membership
16 has actually been growing and, hopefully, we'll get back
17 and surpass where we were when we were a mandatory bar.
18 And I think that's because we're now more focused on
19 providing values through our sections.

20 In Nebraska you have to pay voluntary --

21 MR. PASTERNAK: Excuse me. Somebody is not muting
22 their call on the line. If you can please mute your call
23 whoever's talking to your daughter or whatever. Thank
24 you.

25 MS. NEELEY: In Nebraska you have to pay voluntary
0169

1 dues in order to join a section. And so our philosophy,
2 the stronger the section, the stronger our bar association
3 is.

4 MR. PASTERNAK: Excuse me. Whoever is monitoring our
5 call, if you can please mute your line. Thank you again.

6 MS. NEELEY: Thanks.

7 I guess in a nutshell, what I'd like to say is
8 the beauty of a mandatory bar association is that it can
9 look outside itself. It can serve its membership, but it
10 can also serve the public and it can serve the court
11 system.

12 Voluntary bar associations for their own survival
13 must be inward looking. They must focus primarily on the
14 value to their membership so that dues revenue will
15 continue to come in and service to the courts and the
16 public becomes secondary.

17 I think it's unrealistic to think that you can
18 take a revenue reduction like this and maintain the same
19 level of service and functions. In making cuts, voluntary
20 bar associations will look at all they currently do and
21 ask themselves which of these provides value to our

22 membership? How can we strengthen our value proposition?

23 And when you go through this process, there are
24 no secret counts. And unfortunately, the programs most
25 likely to be cut are those that serve the courts and serve

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1 the public.

2 In Nebraska, our minority justice committee -- I
3 know you guys have a comparable racial justice commission.
4 And our volunteer lawyers bore the brunt of our budget
5 cuts.

6 So just kind of going in eyes wide open, your
7 regulatory functions will be covered by mandatory dues.
8 What's left in the voluntary bar will face budget cuts.

9 What advice would I give you if you're looking at
10 deunification? Obviously, California needs to determine
11 what's most appropriate for itself. I guess I would share
12 that if you ultimately decide to deunify, you need to give
13 time to make a successful transition.

14 The State Bar of California needs to redefine its
15 scope and its purpose and build its value proposition so
16 that it can successfully sustain itself once it goes
17 voluntary.

18 I'd also encourage you to not limit yourself to
19 Nebraska's definition of regulatory function. I think
20 there's a lot of other areas that bear consideration like
21 your client security fund which should be supported and
22 funded by all licensed attorneys, your lawyers assistance
23 program which is fundamental to preventing ethics
24 complaints and is a service that should be made available
25 to all licensed attorneys whether they pay dues or not.

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1 And I'd also encourage you to explore your
2 options. Mandatory unified bars are structured in
3 numerous ways and there's likely things that could be done
4 under a mandatory structure to strengthen your regulatory
5 system. For example, prior to becoming deunified,
6 Nebraska's regulatory functions like bar admissions and
7 our commission on unauthorized practice of law, they were
8 staffed and administered by the state bar, but
9 appointments to those commissions were made by the supreme
10 court. And those commissions reported directly to our
11 supreme court, not our state bar.

12 You can have the separate budgets and audits and
13 I think that kind of strengthened the regulatory framework
14 for us under that model.

15 And then I heard this comment made before, I

16 think you need to go in eyes wide open, that making the
17 state voluntary may have unintended consequence of
18 increasing competition with your local bars. So that's
19 something to think about.

20 Whatever course of action is taken, I hope you
21 see this as an opportunity to reinvent yourselves. I
22 think we often become so engrained in protecting the
23 status quo that we don't see these exercises as a
24 tremendous opportunity and it can be that.

25 So happy to answer any questions about Nebraska's
0172

1 experience and appreciate the thoughtful consideration
2 that you're giving this process in California.

3 MR. PASTERNAK: Thank you very much, Liz.

4 Any questions here from any of the members of the
5 task force?

6 Danette. And turn on your mic, please.

7 MS. MEYERS: Thank you.

8 Thank you, Ms. Neeley, for your presentation.

9 I just have a quick question: How many members
10 do you have in the Nebraska State Bar? And what are the
11 dues? You indicated 98 for the regulatory dues for the
12 mandatory bar, but how much are your dues? And did you
13 find that over -- did you find that you have to increase
14 those dues?

15 MS. NEELEY: Okay. So prior to being deunified,
16 mandatory dues in Nebraska were \$340. And the supreme
17 court came out with their opinion and said that the
18 mandatory assessment would be \$98. They did that in the
19 middle of our dues cycle and so we didn't feel like we
20 could recontact people that had already paid and ask them
21 to pay more.

22 So what we ended up doing is setting --
23 subtracting \$98 from the 340. And so our regular active
24 dues are \$240.

25 MS. MEYERS: And do you see an increase in time of the
0173

1 \$240?

2 MS. NEELEY: You know, we have not yet had to raise
3 dues, but I think the new budget reality for us is this
4 substantial and fast loss of inactive members that we were
5 not anticipating. So if you continue to lose -- you know,
6 in Nebraska, it's \$60 annually for people with inactive
7 licenses. And I don't know what the rate is in
8 California, but if you take that amount of revenue from
9 your inactive members, you know, and drop it by 20 percent

10 of your -- that's kind of a scary proposition.

11 So you know, voluntary bars have to kind of
12 diversify their revenue streams and focus on non-dues
13 revenue. And you also have to cut your services back so
14 you're living within means.

15 MR. PASTERNAK: Liz, this is Dave Pasternak. If I can
16 ask you a question.

17 Can you tell us how many employees the state bar
18 had before it deunified and whether any employees lost
19 their jobs as a result to deunification.

20 MS. NEELEY: Absolutely. So we had 20 employees when
21 we started. We're a much smaller bar than you. And when
22 we were deunified, we went down to 13, to currently we're
23 back up to 14 so --

24 MR. PASTERNAK: When you say you're back up to 14, is
25 that the combination of the two bars or did the other six
0174

1 or seven go to the voluntary association?

2 MS. NEELEY: For the positions that were regulatory,
3 the supreme court hired our staff and so those people
4 transitioned over to the court. And that's actually just
5 one position that transferred over to the court. And the
6 rest, we had to let go.

7 MR. PASTERNAK: Thank you.

8 Any other questions or comments?

9 Mariam Krinsky.

10 MS. KRINSKY: Thank you, Liz, for taking the time.
11 This is very helpful for us to hear somebody who's gone
12 down that path.

13 I think it's easy to think about these issues in
14 isolation if you're starting with a clean slate what you
15 might want to do, but moving from where we are, you know,
16 I think it becomes more difficult to think through what
17 would be the consequences of changes.

18 And I'm curious whether there were other bars or
19 states that had recently gone through a deunification
20 process that you looked to, to get the kind of helpful
21 thoughts or words of wisdom that you are giving to us.

22 MS. NEELEY: You know, the only state that really was
23 able to offer much perspective was Wisconsin, which had
24 gone voluntary -- I can't give you the dates of how
25 recently.

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1 But in speaking with George Brown, their
2 executive director, they had a very similar experience.
3 They lost about a third of their membership, I think it

4 was, and that's who they lost, government practice
5 attorneys and inactive attorneys. And so their experience
6 was very similar to ours.

7 MR. PASTERNAK: Any additional questions?

8 Liz, I don't see any additional questions. Thank
9 you very much.

10 Oh, I'm sorry. Elizabeth does.

11 MS. PARKER: Well, not to make light of your
12 situation, you were new to the bar when all this happened,
13 is that not right?

14 MS. NEELEY: Yes. I started a month before we were
15 deunified.

16 MS. PARKER: And you were deunified in three weeks?

17 MS. NEELEY: Yes.

18 MS. PARKER: Well, unfortunately, we're not looking at
19 that. Thank you very much for your --

20 MS. NEELEY: You should be so thankful for that. No
21 problem.

22 MS. PARKER: Thank you again.

23 MR. PASTERNAK: Thank you again, Liz. We appreciate
24 that.

25 And let's take about a 15-minute break for our
0176

1 court reporter and then we'll try and conclude this
2 session.

3 (Recess taken)

4 MR. PASTERNAK: I think we have all the task force
5 members here. Let's try and get started again. We have
6 our court reporter ready.

7 Our next speaker is Charles L. Crouch, the third.
8 He's a member of the state bar law section and he is also
9 a board member and treasurer of the California Lawyers
10 Guild.

11 I understand you sell those positions for as long
12 as the organization has existed.

13 MR. CROUCH: We'll give you a business card, the whole
14 works.

15 MR. PASTERNAK: There's no logo on it; right?

16 MR. CROUCH: I see it right there.

17 Last time I addressed you all, it was as a member
18 of the Business Law Section Task Force on, I don't know,
19 voluntary bar or what have you. I've taken that hat off.
20 We've disbanded that task force because of Bagley-Keene
21 and I'm now here as a founding member of what we call the
22 California Lawyers Guild. And I'm virtually certain that
23 that name will be changed before too long, but it's good

24 enough for now.

25 I want to describe to you how and why a number of
0177

1 us created this organization and the functions that it can
2 serve. And I think that Rob, in his presentation, he
3 described my former group, the task force, as being less
4 moderate than he and the Business Law Executive Committee.

5 I don't think that is true. We may have some
6 people who are a little more militant than others, but we
7 do endorse or I endorse the executive committee's
8 resolution.

9 As to the why, and that -- as Rob noted, while
10 Bagley-Keene will have a detrimental impact on the
11 efficiency of operations in the work product sections, it
12 will have a disproportionate negative impact on the
13 business law section. And that's where I'm basically
14 coming from, but I think most of my comments apply to all
15 the sections.

16 The business law section's operations have
17 traditionally been market-driven. It's traditionally been
18 managed in many respects like a multi-practice law firm.
19 It's been extremely responsive to recent developments in
20 the law requiring it to be nimble, efficient and
21 collaborative both within and among its various standing
22 committees.

23 It expects work product involving a wide range of
24 disciplines to be world class and in many cases having to
25 be produced under aggressive timelines. The obstacles
0178

1 presented by Bagley-Keene, to say nothing of the
2 increasing financial burdens that the sections are
3 facing -- which Rob so eloquently described. I feel and I
4 think that the other members of the Guild and as well as
5 the executive committee of the business law section will
6 make continued performance to previously held standards
7 unsustainable.

8 You know, the business law section has met crises
9 before. I have every confidence that it can limp along
10 under almost any circumstances, but I believe that its
11 work product will be deeply affected by Bagley-Keene in
12 particular.

13 Again, it can achieve workarounds to this kind of
14 Byzantine structure, but its work product will be
15 adequate. It won't be excellent.

16 I'd like to be clear, volunteers have day jobs.
17 Section projects are often performed after 8:00 p.m. and

12 come forth, they're sound and so we're able to attract
13 other groups.

14 But you're quite right. That's an important part
15 of it.

16 MR. PASTERNAK: Thank you, Jack. We welcome your
17 comments and thank you for coming

18 MR. OSBORN: Thank you.

19 MR. PASTERNAK: Our next speaker is Perry Segal who is
20 well-known to all of us. Co-chair of the California State
21 Bar Council of Sections. And Perry, I've got a list of
22 all of your various practice areas including civil
23 litigation, class actions, criminal defense, et cetera.
24 But I know that you also deal with disaster recovery so
25 it's probably appropriate that you deal with the issues

0204

1 we're talking about today.

2 MR. SEGAL: It really is, and thank you for having me.

3 MR. PASTERNAK: I'm sorry. I couldn't resist.

4 MR. SEGAL: This really does fold into it though
5 because it's advanced planning for things like this.

6 I wanted to apologize. I wanted to be with you
7 on the 4th, but I was in trial and I didn't have as
8 cooperative a judge as Mr. Kiesel had, so I was not able
9 to get out to speak to you on the phone.

10 So I hate to go there. I don't want to go
11 through my resume, but just a couple of things so you
12 understand who I'm speaking for.

13 I am the chair -- I'm the immediate past chair of
14 the counsel of sections, but I am also chair of three task
15 forces that I was appointed to by the other five officers.
16 Bagley-Keene, the overhead allocation issues and, of
17 course, the deunification. So I speak for the sections as
18 a whole. It's important that you understand that in my
19 comments.

20 And so I'm here to speak to you practically about
21 what you're talking about. I'm hearing a lot of theory.
22 I'm hearing a lot of information from 20 to 30 years being
23 applied now, which is not necessarily going to be
24 instructive. I want to talk to you about what it takes to
25 actually do what is being proposed because I've done it

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1 before.

2 And many of you may have noticed I have not been
3 making that many comments, which is not usually my thing,
4 but when you represent the whole group, the idea is to
5 listen more and talk less because I'm a neutral arbiter to

6 the chair to do what the sections want, not to influence
7 them one way or the other.

8 And just as an example, I represent Mr. Harris,
9 who I guess stepped out, and Ms. Kirker Wright and 14 more
10 sections, so I represent them all. So it's important for
11 me to understand what the sections want and their view
12 towards what we're talking about.

13 So let me start there and say that it's 15 to 1,
14 the sections are not in favor of deunification. It's not
15 a theory. It's not a guess. And the one benefit of
16 coming to you today versus the 4th that the sections met
17 on the 19th, so we were able to solidify where the
18 sections stand.

19 And as you know, Ben Ginsberg and I addressed the
20 entire board I believe about five weeks ago, somewhere
21 around March 11th, related to the overhead allocation.
22 And I can tell you that on a vote of that area that we
23 were supposed to come back to you next month -- and we
24 will -- this is a good example of Bagley-Keene where two
25 sections, due to difficulties with Bagley-Keene, could not
0206

1 be on the call, 2 abstained, and 12 yes votes to work with
2 the proposal that the board made for the sections related
3 to the overhead allocation. That's a very strong
4 indication as well of the cooperation that the sections
5 have and want to have with the board.

6 I would also like to point out some of the things
7 I heard earlier. If I just may say for the record, I
8 graduated from an un- -- what do you call it --
9 unaccredited law school and I passed the same bar exam
10 everybody else takes. And I had to pass two of them
11 because you also have to take the first-year bar exam
12 which has an average pass rate of 22 percent, which makes
13 the big bar seem like a party. So I can just say, you
14 know, it's the person, not the school that you really
15 should pay attention to at times. Still managed to be
16 chair of the counsel. Anyway, so just as an example, you
17 know, it's the person.

18 And I would like to point out, getting into the
19 various votes we've had, there's been different levels of
20 people who don't wish to deunify. Some have been very
21 militant about not wanting to. Some have been a little
22 more subtle, but that's where we stand on the vote.

23 But just as a point for some of the things we've
24 heard, the antitrust section did vote not to deunify.
25 They do not wish to deunify based on -- we heard a lot of

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1 antitrust arguments this morning. I just thought I'd
2 point that out.

3 Now let's talk about where we started to get to
4 here. The original issue that really started all this
5 was, of course, the overhead allocation which has been
6 climbing and Bagley-Keene. That's really what was the
7 catalyst for these issues. And so I want to talk about
8 both of those.

9 And I want to be very clear, as of April 1st, the
10 sections are complying with Bagley-Keene. It's simply a
11 fact. It's not a theory. We're not facing this, we're
12 facing that. We have found a way to comply. Is it all
13 perfect, no. Are there difficulties, yes. And I believe
14 I testified to that the last time I was here, that there
15 would, but we are complying. That's where we are.

16 The sections solve problems. We think -- a lot
17 of us think that these kind of problems simply make us
18 better because we are under a higher standard than a lot
19 of the associations we're talking about. We have to
20 comply with the ADA. We have to deal with limited First
21 Amendment protections. We have to have very careful use
22 of our social media.

23 So for us, a lot of us take it as a challenge to
24 comply because the lawyers who pay dues that are members
25 of our sections need this help. So for example, the LPMT

0208

1 section of which I am a part, or the technology section,
2 our view was, so let's see if we can help the other
3 sections comply with that because we had no intention. We
4 also voted not to deunify and we're not going anywhere.
5 So that's a lot of our views. We're trying to be better
6 and this makes us better.

7 So just moving on to the issues that were talked
8 about. I feel like -- and by the way, it's nothing
9 personal. Joanna Mendoza is a personal friend of mine.
10 We talk all the time. We fundamentally disagree, but we
11 talk all the time.

12 Business law, Rob Harris is a close friend of
13 mine as well. We don't necessarily agree or disagree.
14 It's not the point. It's, you know, we have 16 sections
15 and the CYLA to think about. And a plan is not an
16 implementation. A plan is an idea. That's the easy part.
17 We want to deunify, okay. But then they hand the paper to
18 somebody like me and say, Okay. Make it happen. That's
19 where the difficulty is. The devil's in the details, not

20 in the fact they want to do something.

21 And to me, we need to turn it around the other
22 way. If I was to make my suggestion, the timing isn't the
23 issue, it's the order. It shouldn't be, We're going to
24 deunify, send us a plan. It should be, We need to study
25 that first, determine yea or nay, can it be even be done,
0209

1 should it be done. If it can be done or should be done,
2 then there should be a vote one way or the other.

3 I feel like it's going a little backwards because
4 you don't decide to do something you're not sure you can
5 do. We don't know that. And that's the kind of stuff
6 when you talk about disaster recovery, that's exactly the
7 kind of thing that somebody like me does is try to think
8 ahead what happens because things go wrong. The best
9 plan -- they always say the best laid plans. Things go
10 wrong and they will.

11 And the key is, that little gap where things go
12 wrong where you start losing members. And that's what I
13 worry about the most because we can set in motion
14 something that damages the sections if we lose members,
15 lose revenue. See, we could survive, but if those kind of
16 things happen, we could kill ourselves. So it can be an
17 unintended consequence.

18 So I sort of look at it a little differently. My
19 job is to see all the sides for the sections. So that's
20 what I throw out there.

21 I just want to give you a couple of other points.
22 The way I would do it again is I would do a study first.
23 I would make a deunification decision as a result of that
24 study because what this is to me is what I call
25 conclusion-based planning. Concluding first and then
0210

1 trying to make the plan fit. That's not really the way it
2 should be done.

3 So I didn't want to take up too much of your
4 time. Since it's after 4:00, people probably do not want
5 to hear too much more. But if I can offer anything, I'd
6 be happy to answer some questions.

7 MR. PASTERNAK: Thank you, Perry.

8 Any questions?

9 Denny.

10 MR. MANGERS: I take seriously your suggestion with
11 regard to what should come first, chicken or the egg, but
12 can you conceive of any circumstances under which a plan
13 with regard to deunification as an alternative might have

14 occurred had the factors you've identified not occurred
15 and there had been no leadership on that issue with regard
16 to that alternative?

17 MR. SEGAL: Are we speaking in some sort of theory --

18 MR. MANGERS: Actually, we're asking a direct question
19 for which there is a direct answer.

20 MR. SEGAL: Well, I'm not hearing where I've
21 experienced that.

22 MR. MANGERS: The direct question is, would you have
23 instigated a plan to look at deunification had there not
24 been a proposal already on the boards? Because that's
25 what you're proposing, a plan should have come first.

0211

1 MR. PASTERNAK: Denny, that's one of the issues that
2 we're dealing with here.

3 MR. MANGERS: It's just a question.

4 MR. PASTERNAK: Okay. Well, I think there's an
5 answer. That's our agenda of items.

6 MR. MANGERS: I'm kind of waiting for his answer
7 though.

8 MR. SEGAL: My answer is, that's pretty much how we
9 got here is an expression of sections that we wanted to
10 discuss deunification. We've been working on this for
11 months. It's been hand in glove with what the board is
12 doing. That's the answer I can give you.

13 MR. MANGERS: So you -- in other words, the answer is
14 you, as sections, have been looking at the issue of
15 deunification and developing, what, a scenario under which
16 it could occur and benefit as opposed to harm the
17 sections?

18 MR. SEGAL: I would say the opposite. We looked at
19 it. And our conclusion as the sections as a whole is that
20 we do not find it feasible. We find being with the bar
21 and what that represents more beneficial to us than not
22 being with the bar. We see the risks. We're very
23 concerned about those, and that's how we got to the vote
24 that we got to.

25 And so to me the idea is, if it's to be studied,

0212

1 which is what we're doing, there should not be a decision
2 that it's deunification, now study it. It should be study
3 it and then see if it should be done or shouldn't be done.

4 MR. MANGERS: But you've come to the conclusion on
5 your part that it's infeasible and we shouldn't do it.

6 MR. SEGAL: Certainly not in the way I'm seeing it
7 presented.

8 MR. MANGERS: I see. Thank you.

9 MR. PASTERNAK: Danette.

10 MS. MEYERS: Thank you Perry.

11 MR. SEGAL: Sure.

12 MS. MEYERS: The vote seemed to me to be way
13 one-sided, 15 to 1. So in making that vote, could you
14 just articulate the fears the sections had in coming to
15 that conclusion, their viability because I'm assuming that
16 was one the issues is could they sustain themselves
17 outside of the bar.

18 So in essence what I'm asking is, the advantages
19 and disadvantages of deunification, if you could
20 articulate that, which led the sections to come to a 15 to
21 1 vote. And I'm assuming -- and I hate to assume because
22 we know what happens, but I'm assuming the one vote was
23 business law section.

24 MR. SEGAL: Oh, yeah. I should have made it clear,
25 but I think we pretty much are clear.

0213

1 MS. MEYERS: Okay.

2 MR. SEGAL: And you know, it's a free country. I
3 support whatever --

4 MS. MEYERS: Exactly.

5 MR. SEGAL: But I represent all 16 so -- and again,
6 the issue is just numbers. I don't know if fear is the
7 right idea. I did not make a point of meeting too much
8 with the sections directly because I did not want to exert
9 my influence as the chair. I'm supposed to be a neutral
10 arbiter. But for those who wished to speak me, I did
11 speak to those sections. Others got together. They
12 looked at all the different issues.

13 We just don't really understand this idea that we
14 don't belong in the framework of the bar. We are with
15 hand in glove to the regulatory and discipline, we're what
16 keeps more attorneys out of discipline. So we don't
17 really see ourselves the way that a lot of others see us.
18 And you know, that's fine, but we're the ones in there
19 doing it and we see ourselves as really being a very
20 important component.

21 And we are not like other MCLE providers, for
22 example, in the state because of that. We work very
23 closely. We work with the disciplinary and statistics and
24 understanding where the weakness points are and developing
25 programs. I mean, this is what we do. Our whole charter

0214

1 is to make better lawyers. We feel that we do that better

2 as a part of the bar.

3 The financial issues are real. I don't want to
4 downplay those, but we have nine months to go in our plan
5 to audit our accounts to see where we're going to end up.
6 Our initial work -- and I'm sorry Leah Wilson has already
7 left. She's been incredibly forthcoming. We've already
8 recovered \$150,000 through the sections. That came out of
9 a meeting about five, six weeks ago. We believe we'll
10 recover more, but, you know, this is a complicated
11 financial plan and we estimated in our last meeting with
12 Leah that it will be at least nine more months. The whole
13 point was, can we at least finish our work first and
14 figure out if we really have a problem because if we can
15 recover the money, a lot of these issues don't really
16 exist. We don't know yet.

17 So it's -- you know my view is we should be doing
18 certain things first before we start moving from A to B.
19 And I think we're in the examination phase.

20 MR. PASTERNAK: We have a fee bill hearing tomorrow
21 morning in Sacramento so Leah had to leave to catch her
22 plane.

23 MR. SEGAL: I'm actually going there myself.

24 MR. PASTERNAK: And we're actually behind schedule
25 right now, but Miriam go ahead.

0215

1 MS. KRINSKY: I have one question that's maybe more
2 directed, David, to you and Elizabeth, and then I do have
3 a question for you, Perry.

4 So I know at our last meeting, we talked about
5 the value of being able to ascertain where the sections
6 came out and also where commissions or other entities, you
7 know, within the bar, skittles (phonetic), et cetera,
8 whether we know -- have any views for them. And if not --
9 it sounds like we don't -- it might be useful. And in
10 your 15 to 1, was CYLA counted or did they have --

11 MR. SEGAL: That's an excellent question. CYLA is not
12 officially part of the council because they're funded
13 elsewhere, but we always give them a seat at the table and
14 they don't vote. So it's the other 15 sections. CYLA
15 does not vote.

16 MS. KRINSKY: Did they have a view, do you know?

17 MR. SEGAL: You know, I don't know specifically what
18 their view has been. They're pretty much going along with
19 the council.

20 MS. KRINSKY: This was really helpful. To the extent
21 we can see what the pulse -- you know, the temperature

22 looks like among those other groups, it might be useful if
23 we're able to.

24 But the second question I had for you, I -- you
25 know, my sole objective in all of this in thinking about
0216

1 it is what pathway and what set of decisions is best going
2 to promote public protection.

3 MR. SEGAL: Correct.

4 MS. KRINSKY: And I think that's what unifies every
5 member of this board in terms of what they're focused on
6 and what their driver is. And I appreciate, Perry, your
7 observation that it's maybe not the right conclusion to
8 assume that if you had a ledger sheet and you put public
9 protection activities on this side and what is simply, you
10 know, in the interest of lawyers on the other side, that
11 the sections fall there as opposed to public protection.

12 And I guess my question then for you stems off of
13 a comment that was made by I think her name was Liz
14 Neeley. When she talked about how when deunification
15 happened, the work of those that ended up in the voluntary
16 bar had to, by necessity for survival, to become more
17 member focused and less public protection and interest of
18 the public focused.

19 And I'm curious whether you have views or whether
20 you all have talked about if there were deunification, do
21 you think that you would be able to continue to the same
22 extent that you do now those sorts of activities that are
23 public protection focused or do you think you would have
24 to be more bottom line member services focused?

25 MR. SEGAL: I'm going to answer it this way and then
0217

1 you'll tell me if it gets you where you need to go.

2 Here's where the concern is, I've done this many
3 times. You've listened to some of the testimony. In
4 almost every case, members are lost. According to -- and
5 I've been looking at the practical applications, not the
6 theoretical. My worst case scenario is losing somewhere
7 between a third to a half of the members. There is this
8 window that happens when this change is made and these
9 kind of changes. The confidence is lost by a lot of
10 people. People who have wanted to be in the bar
11 organization, they won't there be anymore. And we will
12 lose members.

13 The problem is, then the domino effect is we lose
14 revenue. And so if our entire focus is public protection,
15 I don't want to lose a third to a half of the members that

16 we're protecting because then we've completely lost our
17 charter. What's the point of -- it's like the operation
18 is a success, but the patient dies. We can move you. I
19 can move you, but then when you get there, we're missing
20 half the members and they may never come back. It can
21 take years to recover that. And the problem is, then who
22 are we serving? We have lost the people we're serving.
23 That's our concern as sections and we fear that's what is
24 likely to happen.

25 MR. PASTERNAK: Any other questions?

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1 Perry, thank you very much.

2 MR. SEGAL: Thank you very much for having me.

3 MR. PASTERNAK: We have two add-ons, however, so I ask
4 you bear with me.

5 Our next speaker Tore Dahlin is a former attorney
6 who is the founder of Californians for Attorney Regulation
7 Reform, CFARR, not to be confused with TFARR. The stated
8 purpose of CFARR is to provide an informal network for
9 people who see a need to fix California's attorney
10 regulation system.

11 Mr. Dahlin, and hopefully you can be somewhat
12 brief. I apologize for the lateness of the hour.

13 MR. DAHLIN: I appreciate that you're all sitting here
14 willing to listen to me after this time.

15 Let me just quickly say that --

16 MR. PASTERNAK: That's okay. Be brief, but don't
17 speak quickly. We have a court reporter.

18 MR. DAHLIN: Oh. Feel free to speak up and slow me
19 down. I can become a real motor mouth at times.

20 Yeah. As part of my advocacy, I -- as you
21 probably know, I produced a documentary called "Scandal of
22 the State Bar," which I released about three, four years
23 ago. During that time I -- Quentin Cobb who was behind
24 the plebiscite and who tried to deunify the bar very
25 graciously agreed to be interview by me.

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1 And so we sat for about half a day. I got about
2 two hours of interview tape with him. I also then spent
3 another half a day with his associate, Peter Keane, who
4 was professor of law here in San Francisco -- not here in
5 San Francisco, but north in San Francisco. He's a very
6 respected ethicist. He was also instrumental in pushing
7 for the deunification of the bar, that whole program.

8 So from that, I feel like I got some good
9 insights and would like to share them with you because I

10 couldn't put everything into the documentary. It's
11 already a three-hour long program. It started off in the
12 rough cut as an eight-hour program and I said nobody's
13 going to watch that, so I cut it down.

14 Anyway, what happened here, let me just give you
15 a little bit of a background. As Professor Fellmeth had
16 mentioned, there was already a movement to deunify the
17 bar. And when that was all happening back there in the
18 late '80s and 1990s, California Lawyer Magazine conducted
19 a survey of its readers and it said, Should the state bar
20 be abolished.

21 They got 651 lawyers to respond, and the
22 overwhelming majority reported by California Lawyer -- I'm
23 going to slow down so I can be coherent here, okay.

24 The -- two-thirds of those who responded said
25 that they disliked the bar. The two main complaints was
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1 that the bar was too political and bureaucratic. The pole
2 then broke down the question into a what form should the
3 bar take. By a two to one margin, the most popular form
4 was exactly what you're discussing now, the regulatory
5 agency for those matters and then a separate voluntary
6 bar.

7 That was part of what inspired Quentin Cobb and
8 others to move forward with this, okay. So that came out
9 in 1992. The debate was raging, so Quentin Cobb then got
10 the legislation in to do a plebiscite of all the members.

11 Now this is going to go to -- the ballot was
12 going to go to every single member of the bar and the same
13 basic question, should the state bar be abolished. About
14 51 percent of the lawyers replied and of those, two-thirds
15 voted to retain the unified bar.

16 And so I asked Senator Cobb during my interview
17 with him just a few years ago, we were kind of reflecting
18 back on this like, What happened? Here you had this pole
19 from California Lawyer Magazine -- certainly a much
20 smaller sample -- and there's a lot of movement towards
21 this. Why do you think you lost the plebiscite?

22 What he told me was that the main reason he
23 thinks was they didn't articulate something clear enough;
24 that what he heard back from people was that, yeah, it
25 articulated the question closely enough to say should we

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1 have the regulatory agency and the voluntary bar,
2 basically what you're articulating here, but people would
3 come to him later and say, Well, the reason I didn't vote

4 is because I didn't know exactly what you're going to
5 replace this with, with enough specificity. That was his
6 rationale.

7 And so -- and he pointed out that only half of
8 the people voted, even though this was a huge deal, there
9 was a lot -- it was in the legal press, ballots to every
10 lawyer. And then they said -- and so he pointed out that
11 even though 65 percent, only -- it only amounted to
12 one-third of the active lawyers actually coming to the
13 defense of the bar, saying, Yeah, we want -- we care
14 enough to save this unified bar that we're going to
15 actually mark our little ballot, put a stamp on it and
16 throw it in the mail.

17 And so that meant that basically only one-third
18 of the membership cared enough or passionate enough to
19 save the bar which now reflected more of the California
20 Lawyer poll, which also showed only about one-third of the
21 people who responded really cared enough.

22 So his point was that there was never -- there's
23 never been a great love of the general membership for the
24 bar. And he pointed out to, yeah, the -- you know, for
25 you folks who are part of it, you have warm fuzzies about
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1 the bar. The bar does some good things. The sections do
2 some things. And frankly, there are good things the bar
3 does. That warm fuzzy feeling though doesn't extend that
4 far beyond those walls. And that's the lesson he took
5 from that.

6 And so what happened was -- and then he had --
7 the plebiscite was barely over. In fact, James Towery who
8 had a fight against the plebiscite now had to deal -- he
9 was president of the bar at the time, he now had to deal
10 with the fact that Governor Wilson all of a sudden came in
11 with this veto. Now the bar was shut down in a real way.

12 And so the fact of a lack of member support, of
13 wide member support came from the fact that nobody really
14 rose up to defend the bar. And James Towery -- that's
15 when Pete Wilson vetoed it. And James Towery was saying,
16 quote, The predominant reaction of most lawyers to the
17 dues impasse is one of apathy. The reality is that most
18 lawyers are unconcerned about the bar's demise, unquote.

19 California Lawyer then reported, quote, Many of
20 its own members rejoiced, worse yet, many others didn't
21 care.

22 So the point here that I'm making is that be
23 careful that you don't think that there's a lot of love

24 out there. There's more tolerance or apathy. People are
25 going to send in their checks, most of them. Some of them
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1 are going to participate in the sections, but you're not
2 going to get a lot of people coming and singing kumbaya
3 with you. They will pay their dues and they will follow
4 the rules.

5 Okay. So the idea here is that by dividing the
6 bar, as Mr. Mangers was suggesting, you might get more of
7 that good feeling back for some of the things that the bar
8 does because a lot of the loyalty that people feel is
9 often towards their local county bar and being involved
10 with that; that these local organizations are the ones
11 that maybe have some more loyalty.

12 Okay. Anyway, let's just move on. What happened
13 prior to that, we assume now that we are advocating moving
14 the state bar court over to the superior court, and that's
15 not a new idea. The futures commission which had been
16 founded just before the plebiscite, you know, it met for a
17 couple years and then it -- no, I'm sorry. It was
18 after the plebiscite. It met in 1992. And then in 1995,
19 it came out with its report.

20 The futures commission basically recommended
21 keeping the unified bar, but then except for one very
22 important thing, it praised the newly created professional
23 state bar court that Professor Fellmeth here had helped to
24 create in 1989 while all of this tumult was going on and
25 it analyzed and it praised Lise Pearlman who was the first
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1 presiding --

2 MR. PASTERNAK: If I can, I apologize for interrupting
3 only because we are running short of time.

4 MR. DAHLIN: Yeah, okay.

5 MR. PASTERNAK: And there's no question to some extent
6 we're interested in history, we've asked historical
7 questions. But it's really as they relate to the issues
8 we're dealing with today which deal with public protection
9 as opposed to what lawyers want.

10 So if you can address those issues very briefly,
11 thank you.

12 MR. DAHLIN: I'll do my best.

13 Okay. Public protection, you think of discipline
14 typically. That's usually what people out in the -- you
15 probably think of it, most people think about the
16 discipline system when they think about public protection.
17 That's what the professional state bar court was designed

18 to do. There were problems with the volunteer system.

19 Okay. So then it operated under Lise Pearlman
20 for about four or five years before the futures commission
21 came out with its report praising it, but they had one
22 caveat. They said, Even though we think this is the
23 greatest thing since sliced bread as a model for the
24 nation, they said you still can't operate the state bar
25 court. You need to move it. And their rationale was they
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1 felt that there was a conflict of interest, maybe a
2 perception of the fox guarding the hen house.

3 And so people were getting ready to move. And
4 one thing people don't remember about Quentin Cobb is that
5 he came around to that too. It wasn't part of the
6 plebiscite, but Senator Cobb was also in favor of moving
7 the bar court.

8 The reason it didn't happen was simply because
9 the bar court -- the suggestion was to move it more
10 directly under the California Supreme Court, put it under
11 their noses.

12 Chief justice at the time says, We don't have
13 time for that. It fell off the books. There was no
14 further discussion about moving the bar court so -- and
15 one year later the bar court collapsed. It collapsed
16 because Lise Pearlman and four of the other judges were
17 all fired from their jobs.

18 MR. PASTERNAK: Mr. Dahlin, I'm going to have to ask
19 you to please bring this to a conclusion in the next two
20 minutes. We're running out of time.

21 MR. DAHLIN: Okay. What I'm saying to you when I say
22 she was fired, their contracts were not renewed because of
23 conflicts with the board. She said that -- she wrote an
24 article for California Lawyer saying, Our conflicts with
25 the board were the reason we were not rehired, and it
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1 never recovered.

2 The legislatures had to repeatedly step in --
3 sorry, I don't have time to give you the history because I
4 can give you each time the legislature has had to step in
5 where the bar judges should have kept some wall, where the
6 bar judges should have made sure that the rights of the
7 accused lawyers were being followed weren't being followed
8 and then you have legislatures introducing legislation to
9 make up for that lack. And then this was about a
10 two-decade process that showed that the bar court was not
11 functioning well after that.

12 And so as you know, we are still advocating that
13 as part of this divorce process -- if that's where it's
14 going to go -- you have a -- you know, you have the two
15 parties who are going to break up. You decide who's going
16 to get custody of the kids, which means all the little
17 parts of the bar. The bar court is -- we're suggesting
18 should go over to the superior court to meet the objection
19 of the supreme court at the time that we're too busy to
20 have it. Of course the -- making them into departments of
21 the superior court will overcome that problem.

22 Senator Fellmeth had --

23 MR. PASTERNAK: Mr. Dahlin, I apologize, but your time
24 is up.

25 Do we have any questions?

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1 Thank you. I understand you have submitted
2 written comments and those have been or will be circulated
3 to --

4 MR. DAHLIN: Okay. I'll go ahead and write some
5 comments up and send them in to you.

6 MR. PASTERNAK: Thank you.

7 We have two more speakers scheduled, then we'll
8 ask if there's anybody else that wants to speak briefly.

9 We have Lenore Albert, a former member of the
10 Antitrust Unfair Competition Section of the California
11 State Bar.

12 And again, due to the lateness of the hour, I'm
13 going to ask you to be brief and to please limit your
14 comments to the subject that we're considering which is
15 possible restructuring of the state bar to serve the
16 public interest and public protection.

17 MS. ALBERT: I will, and thank you for adding me on
18 today.

19 Yes. My name is Lenore Albert. I am a former
20 member of the Antitrust Unfair Competition Section of the
21 California State Bar. Unlike the current members of
22 the -- that section, I fully disagree. I believe that
23 there is definitely an antitrust violation and that this
24 bar would be better served if it is deunified.

25 I want to get us back to what the central

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1 section, Section 2 of the Sherman Act which provides
2 "Every person who shall monopolize or attempt to
3 monopolize or combine or conspire with any other person or
4 persons to monopolize any part of the trade or commerce
5 among several states shall be deemed guilty of an offense

6 against the antitrust laws of the United States." That's
7 15 UCS section 2.

8 Justice Burger has already ruled and the majority
9 of the US Supreme Court in a case called Goldfarb -- it
10 was versus the Virgin State Bar -- that in fact there is
11 no state action. If you have seen analysis saying
12 otherwise, it is because they failed to find this US
13 Supreme Court opinion that is still good law today, and
14 it's from the 1970s.

15 This state bar is currently in real trouble. And
16 by having part of a mandatory section and a voluntary
17 section, in that case they looked at the county state
18 bars, which are like ours which were voluntary, and the
19 state bar itself was mandatory. And with regard to both,
20 it found because it was not within the constitution,
21 whatever the state bar was attempting to employ, it could
22 not be considered a state action; therefore, there was no
23 immunity.

24 Because there was absolutely nothing in the
25 constitution -- so as far example here, we would have to
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1 have under California State Constitution a section saying,
2 We provide a mechanism if there's any type of a
3 monopolization with regard to the state bar.

4 Now if we had that in our constitution, then it
5 would be perfectly appropriate and you wouldn't have to
6 worry. You would have immunity and there would be state
7 action; however, you don't.

8 And the reason why I left the state bar section
9 is not over this issue, but because I was becoming
10 disenfranchised. I'm a consumer advocate and I have been
11 for 15 years. What I do is try to protect the public.

12 And the regulatory side of this state bar is not
13 working. It does not work synergistically with consumer
14 advocates or the people who are out there attempting to
15 protect the public. There is evidence that there is
16 intentional lack of prosecutorial efforts to proactively
17 investigate and prosecute attorneys working at defense
18 firms. There is an intentional lack of referring out
19 prosecutions of defense firm lawyer conduct or for
20 unauthorized practice of law.

21 The state bar has a conflict of interest with the
22 members between consumer attorneys and the defense bar.
23 It's just there. If you do deunify and if you use the
24 model like Nebraska was talking about where the regulatory
25 side just goes into the California court system, you can

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1 avoid these things because the California court system is
2 already set up.

3 Going -- my undergrad is in economics, so let's
4 talk about supply and demand. You're worried about people
5 who are already employed here at the state bar and what
6 are they going to do if you do that. According to
7 Nebraska, the way they did it, they just shifted them over
8 to the judiciary, shifted them over probably to an
9 equivalent of the DA's office.

10 We would still have that same supply and demand
11 here in California. The ratio would be the same. There
12 has been no evidence -- and I looked at all the papers.
13 No one's done any economic analysis here at all.

14 California is the eighth largest economy, according to
15 Betty Yee when she talked last Friday, in the world. Not
16 the country, the world. We have a very large economy.

17 Studies have already shown time and time again,
18 especially when you're talking about monopolizations and
19 anticompetitive behavior that are going to hurt the
20 consumer, the larger you are, the more you have to be
21 split up into smaller units if you want to be represented.
22 And that would be both for the members and that would be
23 for the public.

24 The reason why the members have become
25 disenfranchised is because they don't feel like they're

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1 getting any benefits. They feel as if they're paying
2 their yearly dues without getting anything in return.
3 I've had many members ask me that, What do you think we
4 get other than a letter saying that there's a discount of
5 insurance or maybe we get some kind of benefit from a
6 financial institution. They do not look at the sections
7 as being a benefit.

8 And as far as the sections being able to sink or
9 swim, that should depend on the quality of the education
10 that they provide. I'm a member of CAOC. We have the
11 largest PAC with regard to providing legislation and we go
12 every year. We go again in May. And we have the largest
13 PAC that actually does provide consumer based legislation
14 in the state of California.

15 MR. PASTERNAK: Ms. Albert, only because we are
16 running out of time, I'm going to have to ask you to try
17 and wrap up your remarks.

18 MS. ALBERT: Okay. When I was a legal research fellow
19 at McGeorge School of Law, I had the opportunity to help

20 restructure a small company called Turkmenistan under
21 Professor Yupala (phonetic). And restructuring isn't
22 always a bad thing and you can do it. And it can be
23 become -- because it's going to be better. You don't have
24 to look at it as something that's a punishment to the
25 state bar. And it isn't an either/or. It's not a seesaw.

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1 You can make membership better. You can increase
2 it. You can increase the activity and you can increase
3 the benefits to the members and you can also increase
4 consumer protection at the same time through
5 deunification.

6 Thank you.

7 MR. PASTERNAK: Thank you.

8 Any questions?

9 Thank you, Ms. Albert.

10 Our last scheduled speaker is James Blune, I
11 believe it is. B-l-u-n-e, is that --

12 MR. BLUNE: I yield due to the time constraints and
13 I'm fatigued.

14 MR. PASTERNAK: Any other members of the public care
15 to make any comment?

16 I thank everybody who's out there, everybody on
17 the phone and the remaining members of our task force for
18 your time today, your patience. And I especially thank
19 our court reporter, so thank you all.

20 (Meeting ended at 4:40 p.m.)

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