

Statement to the Task Force on Governance in the Public Interest

Los Angeles: April 25, 2016

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Dear Task Force Members:

Please allow me to commend the Task Force for bringing in an interesting array of speakers during the Task Force meetings of April 4 and 25.

During my scheduled time to speak on April 25, the meeting had already gone past it's scheduled 4:00 p.m. close, and President Pasternak asked me to shorten and hurry my comments along. Having to mentally truncate my prepared comments on the spot (and also being tired from having driven to Los Angeles from Arizona the night before), I was not as articulate as I had hoped to be. I trust that these written comments will rectify that shortcoming.

Re: Deunification

The primary focus of the Task Force is on the issue of deunification of the Bar by creating a strict regulatory body for attorney admissions, standards, and discipline; and a voluntary Bar for all other purposes. Under consideration is the "Mangers-Mendoza Plan" for deunification set forth by Task Force Members Dennis Mangers, Joanna Mendoza, Glenda Corcoran and Heather Rosing in their letter of April 18, 2016 to the Assembly Judiciary Committee. The authors of that plan cite as inspiration the deunification concept that had been proposed by former state senator Quentin Kopp who introduced legislation in 1995 requiring a plebiscite of the Bar members to determine if they supported deunification. Two-thirds of those members who submitted ballots voted *against* it.

Did that mean that most lawyers in California want a unified Bar?

Not exactly.

The results of the Plebiscite were mentioned by Judge Judy Johnson in her comments to this Task Force on April 4. Judge Johnson was one of the longest-serving individuals in the Bar in a variety of capacities, including as Executive Director before she resigned after a major embezzlement scandal erupted involving a high level Bar employee. Judge Johnson had been active at the Bar at the time of the Plebiscite, and her comments to this Task Force about the results seemed to imply that a majority of lawyer members support a unified bar and would be opposed to breaking it up.

My comments to this Task Force today are intended to rebut this implication. To do so, I must present a little history:

During the making of my documentary *Scandal of the State Bar* a few years ago, I was honored that Senator Kopp consented to sit for a video interview with me. I was also honored to have his colleague in that effort, Peter Keane (now a professor of law at Golden Gate University), also spend time with me. I spent several hours with each of them as they looked back on the Plebiscite and gave me the benefit of their hindsight.

I also dug further into the events that led to the Plebiscite by reading contemporary articles in such publications as *California Lawyer*, *The Daily Journal*, *The Recorder*, and others. A good summary of this history was prepared by Professor Robert Fellmeth in Appendix A to his comments to this Task Force. Professor Richard Zitrin of the Golden Gate University School of Law has also presented some of this history in his recent op-ed piece to *The Recorder* titled "Bar Flunks History Test" (April 29, 2016). I encourage all interested parties to read these.

Just a few years prior to Senator Kopp's Plebiscite bill, Assembly Speaker Brown had already introduced legislation in 1992 to abolish the unified Bar. This was sidetracked when the Bar established a group to look into the issue: the Commission on the Future of the Legal Profession ("The Futures Commission"). This, in turn, inspired *California Lawyer* magazine to conduct a fax survey of its readers on the question, "Should the State Bar Be Abolished?" 651 lawyers responded, and the overwhelming majority expressed dislike for the Bar feeling that it was too political and bureaucratic. By a 2-to-1 margin, the respondents believed that the Bar should be divided into a state regulatory body for admissions and discipline, and a separate voluntary organization for all other activities...the very concept that is currently being proposed in the Mangers-Mendoza Plan.

As this debate was raging, Senator Kopp introduced his Plebiscite legislation in 1995. Plebiscite ballots were mailed to all of California's lawyers. 51% returned ballots. Of those who voted, 65% opted to retain the unified bar, dealing an apparent defeat to Senator Kopp and everyone who supported the break-up. It also seemed to contradict the results of the *California Lawyer* poll just a few years earlier in which the respondents in an equal proportion had SUPPORTED a break-up. Had the *California Lawyer* poll been that unreliable?

As pointed out by Professor Zitrin in his recent op-ed, and as Senator Kopp expressed to me during his interview, only half the lawyers in California bothered to mail in their ballots. This was in spite of the fact that an intense debate was raging about the Plebiscite that had reached the lawyer membership in legal publications and direct mailings. Then-Bar President James Towery, who opposed deunification, made it clear that the Plebiscite meant nothing less than whether or not lawyers would be allowed to continue regulating themselves. The anti-deunification arguments made the issue seem nearly apocalyptic. Many local Bar associations, and even the California Supreme Court Chief justice, chimed in with their opinions, mostly opposing deunification.

Despite this, the 51% voter turnout meant that *only one-third* of California's lawyer population cared enough to save the unified Bar by taking the time to return their ballots. By implication, *two-thirds* of the lawyers of California either did not want a unified Bar (and voted

that way) or did not care enough one way or the other...this seemed to be in closer accord with the results of the *California Lawyer* poll. When I asked Senator Kopp why he thought that more deunification supporters did not bother voting, he felt that the pro-Plebiscite debaters had not offered a sufficiently concrete proposal about what would replace the current unified Bar. (The current Mangers-Mendoza proposal solves much of this problem.)

It was clear from this history that the majority of California's lawyers are not passionately in love with the Bar. The "warm fuzzies" about the Bar that some members of the Board, committees, and Foundation might feel about the organization do not appear to be widespread throughout the general membership. This fact would hit home very soon after the Plebiscite when, in 1998 Governor Wilson, vetoed the annual dues bill. Among the reasons he cited:

"...as disgruntled members have leveled charges that the bar is bloated, arrogant, oblivious, and unresponsive, the bar has done its best to verify each indictment."

The dissatisfaction of many members had clearly reached the governor's ears, and that dissatisfaction reflected comments that had been received years earlier in the *California Lawyer* poll.

Governor Wilson's veto shut down nearly the entire Bar for a year with a loss of about 500 jobs. California's attorney population did not rise up en masse to save the Bar. James Towery was still Bar president at the time and said:

"The predominant reaction of most lawyers to the dues impasse is one of apathy. ...the reality is that most lawyers are unconcerned about the [Bar's] demise."

When *California Lawyer* reported on the Bar's near-death from the Wilson veto, it wrote:

"Many of its own members rejoiced; worse yet, many others didn't care."

The point of repeating this history to the Task Force is simply that deunification of the Bar is unlikely to cause a widespread uproar within California's lawyer population. As Mr. Mangers pointed out in his comments, there seems to be a growing trend in this country toward deunification. Whereas California might have once been "a model for the nation" when it came to unified Bars, perhaps it is now becoming a model of what *not* do.

Re: Governance of the Discipline System

Although the focus of this Task Force is on the subject of broad deunification, which is a vital issue, when we think of the public interest and public protection, we also think of discipline as a major component. Discipline consumes about three-quarters of the Bar's budget, and it will likely consume a similar portion of the budget of any regulatory agency that might emerge from deunification.

The Futures Commission addressed governance of the discipline system in its 1995 report when it discussed deunification, and in a very pointed way. But first, some more history...

Intense controversy about the Bar's discipline system had arisen in the mid-to-late 1980's after *The Daily Journal* published an expose about the slowness or lack of adequate discipline in a variety of egregious cases involving serious lawyer misconduct. *The San Francisco Examiner*, then a major daily newspaper, published an extraordinary set of articles in the same vein; lurid illustrations were commissioned showing evil lawyers dealing drugs, gleefully squeezing money, and hiding as sinister shadow people behind blank facades. (Some of those illustrations can be seen in part 1 of *Scandal of the State Bar*.) The Bar discipline system was then using volunteer lawyers to hear and make recommendations in discipline cases (as a number of other states still do today), and the results were uneven. California's lawyer population had become too large, and the volunteer system was not keeping up which led to backlogs and unevenness.

The *Examiner* articles created a public uproar that reached the Legislature. Professor Robert Fellmeth (who also addressed this Task Force today) was appointed by the Legislature to be its independent Bar discipline monitor. Prof. Fellmeth issued reports and recommendations that led to abandonment of the volunteer system and the creation of the fully professional State Bar Court. The new professional Bar Court began operations in September 1989 under newly-appointed Presiding Judge Lise Perlman. At the same time, new and sometimes draconian rules started being implemented to deal with errant lawyers. Anti-lawyer sentiment was running very high at the time, and many people were demanding an increase in the number of lawyers being hanged.

But there was something that everyone was missing.

California Lawyer published a variety of discipline statistics from the Bar. One showed the growth of the state's lawyer population, and another the number of complaints and referrals received by the Bar about lawyers over that growth period, including the number of complaints on a per capita basis. The percentage of the lawyer population being complained about was actually *declining* before this new wave of discipline frenzy. Yes, the discipline backlog had become too large, cases were falling through the cracks that were as serious as reported by *The Daily Journal* and *The Examiner*, and as observed by Prof. Fellmeth during his monitoring, but the behavior of the lawyer population *generally* was improving as shown by the declining complaint/referral statistics on a per capita basis. (See *Scandal of the State Bar*, part 1, for the graphs and further discussion.) The new draconian rules were unnecessary--the Bar just needed to get caught up on its backlog and deal more evenly with that diminishing proportion of lawyers who were committing misconduct. Most lawyers, it turns out, are actually honest, conscientious and hard-working people.

At the April 25 meeting of this Task Force, President Pasternak bluntly asked Prof. Fellmeth if California's discipline system was the best in the nation. This was an amusing question because, of course, how does one judge which discipline system is "best"? Today's discipline system was partly birthed by Prof. Fellmeth himself when he was discipline monitor, so

President Pasternak's question was somewhat like asking parents if their baby is the most beautiful baby in the country. Prof. Fellmeth answered "yes" to the question, but there was a note of amusement in his voice during his banter with President Pasternak over this question.

Is California's discipline system really the "best"? Or is thinking so merely a hold-over from earlier times?

The professional Bar Court did indeed get off to a rip-roaring start under Judge Pearlman. Two independent studies that looked at the discipline system in the early 1990's, namely the Alarcon Report and the Futures Commission, highly praised Judge Pearlman and her court for maintaining a high level of independence and doing quality legal work. The Bar Court was indeed "a model for the nation" in its first few years....until it was gutted and came crashing down.

Lise Pearlman and four other founding judges were fired. By fired, I mean that their 6-year contracts were not renewed.

According to the legal press, the Bar Court was dismissing about a quarter of the cases brought to it by the prosecutors, and this was making the prosecutor's office unhappy. This reached the ears of the Board of Governors which became antagonistic to the Bar Court for doing exactly what the Legislature and Prof. Fellmeth had intended it to do: to act in a completely independent manner. The prosecutors were being required to present proper cases to the Bar Court before a lawyer's livelihood was taken away. There were disbarments and suspensions being recommended by the Pearlman court, just not as many as the prosecutors and Board were pushing for.

Judge Pearlman wrote an article in the April 1996 issue of *California Lawyer* magazine describing her experience. She made the ironic statement, "So much for the appearance of judicial independence," and she expressed an opinion that true judicial independence is not possible for the Bar Court while it is under the roof of the Bar. She recommended a change in the governance of the discipline system by moving the Bar Court away from the Bar and over to another arm of the California Supreme Court. This is exactly the governance recommendation that had been made a year earlier by the Futures Commission.

The Futures Commission was not around long enough to witness the destruction of the Pearlman court, but it had still cited concerns that leaving the Court under the Bar's organizational umbrella created a real or perceived conflict-of-interest. *The Commission saw moving the Bar Court as being more important than deunifying the Bar.* This was the only governance change that the Commission recommended even though the question of deunification was also addressed.

The Future's Commission's reasoning was that having the Bar Court within the Bar created a public perception of "the fox guarding the henhouse"--a legitimate concern. Had the Commission been in operation another year, it would have witnessed the gutting of the

Pearlman court, and it is a good guess that the Commission would have seen the other side of the conflict coin: putting judges who try to be independent on the payroll of a prosecution-oriented organization does not work. This probably would have been cited as further proof that the Bar Court needed to be moved.

The idea of moving the State Bar Court to another arm of the Supreme Court had also been proposed by Senator Quentin Kopp along the way. Many people forget this, perhaps because it was not specifically included in the Plebiscite. But this is important to note, especially for those who would use Senator Kopp's model for change today.

Despite all of this, the Bar Court stayed where it was. Why? All of the proposals at the time would have placed the Bar Court more directly under the Supreme Court's nose, and Chief Justice Malcolm Lucas objected because it meant more supervision and work for the already-overburdened justices. The concept of moving the Bar Court therefore died on the vine, not because it was the wrong idea, but only because people were proposing to send it to the wrong place.

The Bar today still pretends that the Bar Court is independent. This is because Bar judges are not direct hires of the Bar, but they are chosen through an outside nominating process. However, once appointed, the judges become the paid employees of the Bar just like the prosecutors, subject to many of the same pressures. Just look at the organization chart of the Bar published in the State Auditor's report last year. The Bar Court is one little unit within the Bar's larger corporate structure. It does not sit independently outside the Bar by any stretch of the imagination.

As Ms. Pearlman stated in her article, pressures and erosion of the professional Bar Court began a few years into the first term. It was about then that the Legislature found itself trying to fix the problem. In 1993, barely four years after the Pearlman court was launched, Speaker Brown introduced legislation to establish new rules to remedy abuses that were becoming increasingly common in the discipline system. The legislative analysis reveals that Sacramento was receiving complaints that new discipline rules, enacted as part of a broader "get tough" program, had gone overboard in their bias against accused attorneys:

"The Bar is driven to produce ever-increasing discipline numbers and statistics at the expense of justice and fair play."

It would seem that the pressures to produce higher discipline statistics had become too much even for the Pearlman court, or maybe the handful of survivors of the Bar Court purge were those mostly responsible for the problems by trying too hard to give the prosecutors and Board what they wanted. Speaker Brown's bill was passed almost unanimously in the Legislature, but a veto by governor Wilson brought it to an end as the Speaker moved on to other pursuits.

Erosion of the Bar Court accelerated. In 1999, State Senator Burton felt compelled to introduce a bill to ensure that lawyers enjoy their full constitutional rights in disciplinary matters. The legislative analysis cited:

"...numerous complaints from attorneys who have asserted that the State Bar's process and procedures run roughshod over the constitutional and statutory rights of those being investigated for possible discipline."

This sounds very similar to the legislative analysis that had come with Speaker Brown's bill six years earlier. Things were clearly not improving. I have not done a survey of other states, but it is probably safe to assume that Senator Burton's bill was a rather extraordinary piece of legislation that few other states have felt a need to enact. For the Legislature to even take such a step is evidence of how broken the Bar Court (and the Supreme Court's supervision of it) had become.

Where were the Bar judges at that time? Judges are supposed to safeguard the rights of the accused, and clearly the Bar judges were not adequately doing so. The lesson of what happened to Judge Pearlman seems to have sunk in on future Bar judges: follow the prosecution lead no matter how bad the cases they bring to you might be; otherwise, when your six-year term is up, the Bar Board may not recommend you for renewal.

The problem continued unabated. In 2004, a confidential Bar report revealed that the prosecutors were continuing to seriously overcharge in discipline cases. Even the bar judges were quietly complaining, but still no systemic changes were made.

Finally, just a few years ago, I produced *Scandal of the State Bar* which included interviews and case studies of lawyers who had experienced the Bar's discipline system more recently. It was clear that the problems cited by the Legislature were still there, as strong as ever.

As long as the discipline judges remain within the Bar and face the same pressures that Lisa Pearlman and her colleagues had faced, and as long as we continue to ignore the recommendations of the Futures Commission, Senator Kopp, and others to move the Bar Court away from the Bar, California can never have anything but a roughshod hit-and-miss lawyer discipline system that will be a constant headache to the Legislature, a frequent nightmare for lawyer members, and dissatisfying to the public.

And then something happened. In a newspaper feature story last year that highlighted my personal efforts to reform the Bar, the reporter interviewed a long-time and well-known attorney discipline defense lawyer who said that as of about two or three years ago, the Bar judges stopped rubber-stamping the prosecutor's cases. (And yes, he used the word "rubber stamp.") In other words, the judges had started acting more like the Pearlman court for the first time in nearly two decades.

I like to think that maybe I had a little bit to do with that, although one would, of course, need to ask the Bar judges. The change happened about the time that I released my documentary. DVD copies had been made and sent to many people, including to all of the Bar judges. *Scandal of the State Bar* explores the problems that I have just discussed with you today, and calls out the role that Bar judges have played in perpetuating those problems. However, I will confess that when I recently spoke with that discipline defense attorney, I learned that the change in the judges' behavior also occurred about the time that the Office of Chief Trial Counsel under Jayne Kim had instituted its rigid settlement policies that the prosecutor's union complained about earlier this year when the matter of Ms. Kim's contract was being discussed. I was told that the cases being presented to the Bar judges under the harsh new rules were too much even for normally compliant Bar judges to take.

Does this mean that the issue of Bar Court independence is now resolved?

No. History is a valuable teacher. The story of Lise Pearlman reveals that this refreshing change in the present Bar Court will be temporary. The same pressures on the Bar judges remain, and it is safe to predict that there will be another erosion and possible collapse of the Bar Court's independence. The State Auditor's report of last year calling for more lawyer hangings will only intensify that pressure on the Bar and its employees.

Some people may think that it is good for Bar judges to be under pressure so that they do not become soft on lawyer misconduct. That is not the role of a judge. A judge is there to make a disinterested and neutral assessment of the evidence, and apply a remedy or punishment that is appropriate to what actually happened. A vital role of all judges is to act as buffers against episodes of public or regulatory blood lust against disliked groups of people, and to ensure that justice continues to be done on a case-by-case base.

Why should we care about any of this? As one of the speakers said today, lawyers are looked to as people who advance important social causes. There are legitimate stories of lawyers who have done harm, and such lawyers need to be dealt with promptly and appropriately by their licensing agency, but we have even more stories of lawyers that have done great good. It is therefore in the public interest that lawyers receive high grade justice in their discipline cases so that the public does not keep losing good lawyers because of repeatedly inflamed passions driving a crude hit-and-miss system. The only way to achieve this goal is through a change in governance of the discipline system.

This is why we strongly advocate moving the Bar Court hearing departments over to the Superior Court, and the Review Department to the Appellate Court. We are reviving an important governance recommendation that had been made in the past, but we are doing so in a way that overcomes the previous objection of the California Supreme Court. The major benefits of the plan are:

* It will impose no financial burden on the taxpayer or court system. The costs of running the discipline departments are reimbursed to the state annually from Bar dues.

* It will make the Bar judges answerable directly to the public through ballot when their terms expire. This is our favorite reason for making the change: judges that hear attorney discipline cases will have the same accountability to the public as all other state judges because now they *are* regular state judges.

* It will bring attorney discipline in California into closer alignment with federal discipline. Although the federal discipline system does not have a "Bar Court" *per se*, when an attorney discipline matter needs to be heard, a regular sitting federal judge is appointed to hear it. By placing attorney discipline in the hands of our Superior and Appellate courts, California will once again be an innovator and a model for the nation.

* It will bring California into closer alignment with some other states that also use full-fledged judges for attorney discipline, although those judges are typically in the appellate courts. Our plan is an easier fit because the Bar Court already has two levels (hearing and review) that will transfer neatly over to the two levels of our regular court system (Superior and Appellate). It does not require any readjustment of our appellate courts.

* It will bring California into closer alignment with other professional boards of this state that organizationally separate discipline prosecutors from the hearing officers.

* Former Senator Quentin Kopp, who served as a Superior Court judge after his tenure in the Senate, responded favorably during my interview with him when asked if he thought our proposal would work.

CONCLUSION

As the lyrics of a famous song declare, "Breaking up is hard to do." As one speaker today suggested, this Task Force is deliberating whether the Bar should get a divorce between its regulatory and voluntary functions. A question in many divorces is, "who gets custody of the kids?", here meaning the many groups and subgroups of the Bar. In most cases, that will be easy to determine. Sometimes, however, neither party should be awarded custody; instead, the child should go to a relative. By this analogy we propose that the Bar Court should be placed in the custody of California's regular court system as part of any Bar divorce, or even if there is no deunification. It will lead to a happier and more harmonious family.