THE STATE BAR OF CALIFORNIA

INTER-OFFICE COMMUNICATION

DATE: November 13, 2008

TO: Members of the Board Committee on Regulation, Admissions and Discipline Oversight

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Response to Proposed Modifications to Alternative Discipline Program

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In March 2008, State Bar member Nancy W. Keough provided the Board of Governors with a five-page document entitled "Proposal for Modifications to the California State Bar Alternative Discipline Program (ADP)." Ms. Keough's proposal was submitted in conjunction with the public comment period relating to proposed modifications to the Alternative Discipline Program ("ADP") that had been developed by a State Bar staff working group consisting of representatives of the Office of the Chief Trial Counsel, State Bar Court and the Office of General Counsel. The staff proposal was made following a series of meetings with representatives of the Association of Discipline Defense Counsel ("ADDC"), an association of attorneys who regularly represent State Bar members in attorney disciplinary investigations and proceedings. Ms. Keough also addressed the Board of Governors with respect to her proposals at the Board's May 2008 meeting, at the time this Committee and the Board considered the proposed modifications to the ADP.

The modifications to the ADP, which became effective July 1, 2008, were also approved by the RAD Committee and the Board of Governors in light of the Board's consideration of issues and concerns raised about the ADP process during a meeting in October 2007 between senior Supreme Court staff, former State Bar President Jeff Bleich, current President Holly Fujie (then chair of the RAD Committee), State Bar Court JoAnn M. Remke, Executive Director Judy Johnson and select members of the Senior Executive Team. The modifications ultimately adopted by the Board of Governors at its May 2008 meeting were carefully crafted to address the Court's expressed concerns.

Ms. Keough apparently now seeks to have this Committee further consider her proposed modifications to the ADP and to the attorney discipline system. This memorandum is in response to the modifications and suggestions contained in Ms. Keough's proposal.

Part One -- Restrictions Upon Admission to the ADP

Ms. Keough suggests four grounds upon which a respondent attorney should be precluded from admission to the ADP: (1) if the respondent is charged with a violation of a prior disciplinary order; (2) if the respondent is charged with the commission of an act of moral turpitude; (3) if the respondent is charged with obstructing a client from have access to the discipline system or with taking retaliatory action against a client for have filed a disciplinary complaint against the respondent; and (4) if the respondent has a record of prior discipline in two or more matters.

The amendments to rule 802 of the Rules of Procedure of the State Bar of California ("Rules of Procedure") that were adopted by the Board of Governors established a variety of criteria for, and limitations upon, a respondent attorney's eligibility for acceptance into the ADP. For instance, rule 802(a) provides that a respondent's acceptance for participation in the ADP is contingent upon (a) his or her acceptance into the Lawyer Assistance Program; (b) the Court's approval of a stipulation as to facts and conclusions of law executed by the parties; and (c) evidence that there is a nexus between the respondent's substance abuse or mental health issue and the admitted misconduct. Moreover, rule 802(b) provides that if the parties fail to execute and submit to the Court a stipulation as to facts and conclusions of law within 120 days of the date the respondent was referred to the Program for a determination of eligibility, the assigned judge may return the proceeding for processing as a standard discipline proceeding.

Additionally, rule 802(c) provides a number of significant limitations upon a respondent attorney's eligibility to accepted for participation in the ADP, including (1) the stipulation as to facts and conclusions of law, including factors in aggravation, demonstrate that the respondent's disbarment is warranted irrespective of mitigating circumstances; (2) the respondent was convicted of a crime that subjects him or her to summary disbarment under Business and Professions Code section 6102, subdivision (c); (3) the respondent's current misconduct involves acts of moral turpitude, dishonesty or corruption that resulted in significant harm to one or more clients or to the administration of justice; (4) there is a finding, based upon expert testimony, that the respondent will not substantially benefit from treatment for his or her substance abuse or mental health problem or that the problem cannot be overcome or controlled to the extent that t is unlikely to cause further misconduct; and (5) the respondent attorney previously participated in the ADP and either successfully completed the Program or was terminated from the Program.

Finally, a respondent is not permitted to participate in the ADP if he or she seeks a referral to the Program less than 45 days prior to the first scheduled trial date in the proceeding. (See rule 801(a), Rules Proc. of State Bar.)

While Ms. Keough's proposed limitations are motivated by the particular circumstances of her clients' current complaint against a State Bar member, the limitations adopted by the Board of Governors and reflected in rules 801 and 802 of the Rules of Procedure are broader and more comprehensive. Moreover, had they been in effect at the time of Ms. Keough's clients' State Bar complaint, the attorney against whom they complained would not have been eligible for the ADP.

Part Two -- Immediate and Continuing Relief to Prevent Violations During ADP Rehabilitation

Ms. Keough proposes that the respondent attorneys in ADP matters should be immediately suspended from practice until a State Bar Court judge determines, "based on well nigh irrefutable evidence," that the disability does not remain sufficiently operative as to constitute a significant risk of further misconduct during the rehabilitation period. In addition, Ms. Keough suggests that the respondent attorney's practice of law, during any rehabilitation period, should be under "auspices and responsibility" of another licensed attorney.

Business and Professions Code section 6233 permits, but does not require, a respondent attorney entering the LAP or ADP to be enrolled as an inactive member of the State Bar. Moreover, rule 803(c) of the Rules of Procedure, which was a part of the modifications to the ADP that became effective on July 1, 2008, provides that, if the minimum discipline to be imposed upon the respondent in the ADP involves an actual suspension of 90 days or more, there is a presumption that the respondent should be placed on inactive enrollment for the protection of the public. In those cases, the assigned judge must immediately place the respondent on inactive enrollment unless the judge finds, in writing, that such inactive enrollment is not necessary for the protection of the public or the respondent's clients.

Additionally, Business and Professions Code section 6007, subdivision (h) permits the State Bar Court, in appropriate cases, to appoint "monitors" to supervise an attorney's practice as an alternative to inactive enrollment, provided that there has been a sufficient showing under section 6007, subdivision (c) has been made.[1]

While a number of ADP participants have been placed on inactive enrollment during their participation in the ADP, it is neither necessary nor appropriate in every case. In my view, the current protections provided by Business and Professions Code section 6233 and rule 802 of the Rules of Procedure is sufficient to protect the public and the respondent's clients.

Part Three – Victim's Right to Testify at ADP Proceedings

Ms. Keough recommends that victims be allowed to testify at ADP proceedings as to issues of culpability, nexus and amenability of the offender to rehabilitation and other issues, including the appropriate discipline to be imposed. She also proposes that victims/complainants have access to all matters that the attorney has introduced into evidence as to culpability, nexus, amenability to rehabilitation, aggravation, mitigation and proposed sanctions.

ADP proceedings do not include evidentiary hearings and testimony. The respondent attorney's acceptance for participation in the ADP is contingent upon the State Bar Court's approval of a stipulation as to facts and conclusions of law executed by the parties. Thus, the facts and violations are established by the agreement of the parties (i.e., the respondent and the Office of the Chief Trial Counsel) and not as the result of a contested trial. The stipulation includes the parties' agreement regarding mitigating and aggravating circumstances. Both findings of fact and findings regarding mitigating and aggravating circumstances must be supported by clear and convincing evidence. Without minimizing the importance of the complainants' views regarding the respondent attorney's culpability, the facts and potentially aggravating circumstances are determined by the Office of the Chief Trial

[1] Section 6007, subdivision (c) provides that an attorney may be involuntarily enrolled as an inactive member upon a finding (by the State Bar Court) that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public. In order to find that the attorney's conduct poses a substantial threat of harm, the State Bar Court must find, by clear and convincing evidence, that (1) the attorney has caused or is causing substantial harm to the attorney's clients or the public; (2) the attorney's clients or the public are likely to suffer greater injury from the denial of the inactive enrollment than the attorney will suffer if it is granted, or there is a reasonable likelihood that the harm will reoccur or continue; and (3) there is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter.

Counsel through its independent investigation, including the consideration of information received from both the complainants and from other sources. The Office of the Chief Trial Counsel must make the determination of whether there is clear and convincing evidence to support the facts and conclusions of law that are ultimately included in the stipulation.

The issue with respect to "nexus" is whether there is clear and convincing evidence that the respondent attorney's substance abuse or mental health issue causally contributed to the respondent's misconduct. (See rule 802(d), Rules Proc. of State Bar.) To the extent the nexus issue is challenged by the Office of the Chief Trial Counsel, it must be challenged through the introduction of expert testimony, not by the testimony of the complainant. (See rule 802(c)(4), Rules Proc. of State Bar; see also, Std. 1.2(e)(iv), Stds. for Atty. Sanctions for Prof. Misconduct [extreme emotional difficulties or physical disabilities suffered by the member at the time of the misconduct may be mitigating if *expert testimony* establishes that it was directly responsible for the misconduct].)

Additionally, the appropriate discipline to be imposed is a legal determination that is based upon application of the Standards for Attorney Sanctions for Professional Misconduct adopted by the Board of Governors and upon applicable Supreme Court and State Bar Court Review Department case law. The purpose of attorney discipline is not to punish the attorney but, rather, to protect the public, to maintain high professional standards and to preserve public confidence in the legal profession. (See *In re Silverton* (2005) 36 Cal.4th 81, 91; *In re Kreamer* (1975) 14 Cal.3d 524, 532.) Understandably, the typical complainant is unaware of the Sanction Standards and the applicable case law. His or her view of the appropriate discipline is often based upon the degree of his or her anger with the respondent in light of the harm or inconvenience that the client has suffered. While harm to the client is an aggravating factor that is considered in determining the appropriate discipline, the client's view regarding the appropriate discipline to be imposed may be inconsistent with the Standards and applicable case law.

With respect to the availability of information relating to the ADP proceeding to the complainant, the amendments to the ADP rules that became effective on July 1, 2008 makes the stipulation as to facts and conclusions of law public at the time it is approved by the State Bar Court. (See rule 803(b), Rules Proc. of State Bar.)

However, Business and Professions Code section 6234 provides that information provided to or obtained by the Lawyer Assistance Program is confidential and that the confidentiality is absolute unless waived by the attorney. The State Bar has interpreted this confidentiality to apply to information received by LAP relating to both the nature of the respondent's substance abuse or mental health problem and to the treatment provided by LAP to the respondent for that problem. (See also, rule 806(b), Rules Proc. of State Bar.) While the State Bar Court requires the respondent attorney to make a limited waiver of confidentiality to allow the Court, the Office of the Chief Trial Counsel and the State Bar's Office of Probation to have access to this information, it is not made available to the complainant and the general public. While the Board of Governors could make a policy decision that this information should be available to the public, the Board may wish to seek legal advice from the Office of the General Counsel regarding whether the disclosure of that information would violate Business and

Professions Code section 6234. Additionally, the general disclosure of that information to the public might significantly discourage respondents from seeking admission to either LAP or the ADP.[2]

Part Four – Transparency

Ms. Keough proposes that confidentiality and denial of public access to information should be removed "at the time a charged is filed." Additionally, Ms. Keough asserts that former employees of the Office of the Chief Trial Counsel and the State Bar Court should not be allowed to appear in cases for a period of five years following their departure from the State Bar.

It is not entirely clear what Ms. Keough means by "at the time a charge is filed." If she is referring to the filing of the notice of disciplinary charges in the State Bar Court, that is already the case. Business and Professions Code section 6086.1, subdivision (a) provides that the hearings and records of all original disciplinary proceedings in the State Bar Court shall be public following a notice to show cause.[3] The public nature of State Bar Court proceedings has also been extended to other types of disciplinary proceedings, including conviction referral proceedings, rule 9.20 proceedings, probation revocation proceedings and proceedings based upon discipline imposed in another jurisdiction. (See rules 20, 21, Rules Proc. of State Bar.) Additionally, at its July 2008 meeting, the Board of Governors approved the posting of filed notices of disciplinary charges on the respondent attorney's profile page on the State Bar's website. Thus, when this posting is implemented, it will make significantly more information available to the public, including the respondent attorney's current and potential future clients.

However, to the extent that Ms. Keough seeks to make State Bar inquiries and investigations public at the time an initial complaint is received from a client or other person, such a change would require a legislation change. Business and Professions Code section 6086.1, subdivision (b) provides that all disciplinary investigations are confidential until the time that formal charges are filed. That confidentiality is required to be maintained unless it is waived by the respondent attorney or by either the State Bar President or the Chief Trial Counsel "when warranted for protection of the public." To my knowledge, only Oregon and West Virginia make complaints public at the time of filing. The reason that most jurisdictions have declined to make these bare complaints public is that the vast majority of those complaints are dismissed because, for instance, (1) the complaint, even if factually true, did not state an offense for which discipline can be imposed; (2) after inquiry or investigation, the disciplinary agency concludes that the facts alleged by the complainant are not true; or (3) after inquiry or investigation, the disciplinary agency concludes that the evidence is insufficient to support culpability by the applicable standard of proof (i.e., by clear and convincing evidence in California). The policy determination that has been made in California and most other jurisdictions is that disciplinary complaints and proceedings should not become public unless and until there has been a determination

[2] Even if the Board of Governors were to conclude that the complainant, but not the general public, should have access to that information, the State Bar could not prevent the complainant from disseminating that information to the general public through the Internet or by other means.

[3] At the time section 6086.1 was enacted by the Legislature in 1990, the initial charging document filed by the Office of the Chief Trial Counsel was known as a "notice to show cause." It is now called a "notice of disciplinary charges."

that there is reasonable cause to believe that a disciplinable violation of the Rules of Professional Conduct or the State Bar Act has occurred. In California, that determination is made through the filing of a notice of disciplinary charges.[4]

In terms of Ms. Keough's proposed five-year prohibition upon former State Bar employees or judges representing respondents in disciplinary proceedings, rule 3101 of the Rules of Procedure essentially provides for a disqualification period of six months and permanently precludes a former judge of the State Bar Court or employee of the Office of the Chief Trial Counsel from representing a respondent, petitioner or applicant in any proceeding in which he or she personally or materially participated during State Bar service or which involves material confidential information of the State Bar to which they had access as a result of their State Bar service. This disqualification provision has been in place since at least 1989 and there has not, to my knowledge, been a single allegation that a former State Bar Court judge or employee exerted undue influence on either the Office of the Chief Trial Counsel or the State Bar Court.

Part Five – Timeliness

Ms. Keough proposes that all State Bar investigations be completed with sixty (60) days of receipt of the complaint and that formal disciplinary charges be filed within ten (10) days of completion of the investigation. She further proposes that all non-ADP cases should be "completed through decision" within six months from the date of filing of the notice of disciplinary charges in the State Bar Court. With respect to ADP cases, Ms. Keough essentially proposes that such cases must be completed within six (6) months of filing of the ADP application, except for the continuing monitoring of the respondent attorney's conduct during "the rehabilitation period." Finally, Ms. Keough would require the Office of the Chief Trial Counsel and each State Bar Court judge to certify to the Supreme Court and the Legislature their compliance with these time guidelines.

We share Ms. Keough's desire in ensuring that disciplinary investigations and proceedings are processed within acceptable time limits. However, Ms. Keough's suggested timelines are literally impossible to meet with the Office of the Chief Trial Counsel and the State Bar Court's current staffing limitations.

In 2007, the State Bar's Intake Unit (which includes five attorneys and 18 complaint analysts) received 73,259 telephone calls, opened 11,739 inquiries based upon written complaints and received 2,929 "reportable actions" from courts, financial institutions and insurance companies. On average, that amounts, on a monthly basis to 6,105 telephone calls, 978 written inquiries and 244 reportable actions.[5]

[4] It should be noted that, in a significant minority of jurisdictions, the proceeding against an attorney does not become public until the respondent has actually been found culpable of misconduct by an adjudicative tribunal.

[5] Every one of the written inquiries and reportable actions must be reviewed by an attorney in the Intake Unit. The attorney determines whether the matter should be immediately closed, immediately forwarded for investigation or that further information is necessary to determine whether or not the matter should be closed or forwarded. The complaint analysts answer the telephone calls on the State Bar's 1-800 line, send closure letters in accordance with instructions received from the attorneys and obtain additional information necessary to make the decision as to whether to close or forward the matter. The source of the additional information may be from the complainant, the respondent attorney or third parties. The numbers of inquiries received by the Intake Unit mandates that each attorney must read, analyze and give directions to complaint

The written inquiries can range from a single page to boxes of files and documents amounting to thousands of pages. The Intake Unit essentially acts as a "triage unit" has a period of approximately 60 days within which to determine whether a matter should be closed or forwarded for investigation. The 60-day limitation is necessary because Business and Professions Code section 6094.5, subdivision (a) establishes a goal and policy that investigations should be completed within six (6) months of receipt of the written complaint and matters designated by the Chief Trial Counsel as complex should be completed within twelve (12) months. The Intake Unit's 60-day period is part of the six-month investigation period. Thus, if the Intake Unit takes 60 days or more to make its decision to forward the case for investigation, the assigned investigator and deputy trial counsel then have four (4) months or less within which to conduct the investigation.

While State Bar members have a duty to cooperate with the State Bar's disciplinary investigations, Business and Professions Code section 6068, subdivision (i) provides that the duty to cooperate cannot be construed to require members to comply with a request for information or other matters "within an unreasonable period of time in light of the time constraints of the attorney's practice." Additionally, in order to conduct an adequate investigation, the Office of the Chief Trial Counsel is often required to subpoena the respondent's client trust account and other financial records, subpoena court records, take depositions and interview witnesses. Moreover, once the investigation is completed and before the notice of disciplinary charges is filed, the Office of the Chief Trial Counsel must provide the respondent with a 20-day conference, at which the respondent is provided with a draft of the notice of disciplinary charges or a summary of the factual basis of the intended charges and an opportunity to discuss those charges and to provide any additional evidence that the State Bar should consider. (See rule 2409(a), Rules Proc. of State Bar.) In addition, before a notice of disciplinary charges can be filed, the respondent attorney may request that the State Bar Court conduct an Early Neutral Evaluation Conference ("ENEC"). (Rule 75, Rules Proc. of State Bar.)

Deputy Trial Counsel assigned to the State Bar's investigative activities supervise three investigators, each of whom carry caseloads ranging from approximately 40 to 60 cases. Thus, investigative DTCs are responsible for the supervision of 120 to 180 investigations. The investigative DTCs' duties include (a) developing investigation plans on each investigation; (b) supervising and directing the investigations being conducted by the investigators; (c) drafting the notice of disciplinary charges following completion of the investigation; and (d) conducting the 20-day conference and the ENEC.

The State Bar Court Performance Standards establish a goal of scheduling the trial of a State Bar Court proceeding within six (6) months of the date the proceeding was filed. The time between the filing of the proceeding and the scheduled trial date includes the time within which the respondent must file a response to the NDC (i.e., within 20 days following service of the NDC [see rule 103, Rules Proc. of State Bar]), conduct and completion of discovery (i.e., within 120 days following service of the NDC [see rule 181(a), Rules Proc. of State Bar]) and the conduct of any settlement conferences and pretrial

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analysts on a minimum of 10-15 written inquiries per day. The attorneys also review the closure letters and other written communications prepared by the complaint analysts.

conferences. Once the matter is tried and taken under submission, the Court has 90 days within which to issue its written decision. (See rule 220(b), Rules Proc. of State Bar.)

Unless there is a dramatic increase in the number of State Bar Court judges and deputy trial counsel, the time frames proposed by Ms. Keough are simply impossible to achieve.

Part Six – Indemnification

Ms. Keough proposes that the State Bar should be required to indemnify any victim of "financial or emotional or physical or other abuse" where the attorney has been allowed to continue to practice because of the State Bar's failure or inability to meet the time guidelines suggested by Ms. Keough. She also asserts that the State Bar's fee level should be increased to provide a fund to ensure its ability to pay for these losses.

Even if the Office of the Chief Trial Counsel and the State Bar Court were able to meet the impossible time frames suggested by Ms. Keough, that would not prevent possible further misconduct by the attorney prior to the time the disciplinary proceeding becomes final. Except in those limited cases in which an inactive enrollment proceeding under Business and Professions Code section 6007 is viable, respondent attorneys against whom disciplinary investigations or proceedings are pending have a right to continue to engage in the practice of law. That is because the right to practice law is a valuable property right that cannot be taken away without due process of law. (*Conway* v. *State Bar* (1989) 47 Cal.3d 1107, 1113.) While Business and Professions Code section 6007, subdivision (c)(4) authorizes the immediate inactive enrollment of an attorney against whom a disbarment recommendation has been made by the State Bar Court, in non-disbarment cases, the attorney is allowed to continue to practice until a Supreme Court order has been filed and the Court's order becomes final. Thus, despite the State Bar Court hearing judge's recommendation of a lengthy period of actual suspension, the attorney can continue to practice law while during any appeal to the State Bar Court Review Department and to the Supreme Court and until the Supreme Court's final disciplinary order is filed and becomes final. During that time, of course, it is possible that the respondent attorney could engage in additional acts of misconduct. That is beyond the control of the State Bar. However, by posting filed notices of disciplinary charges and State Bar Court decisions on the State Bar's website, the State Bar is taking reasonable steps to provide information to the public and potential clients regarding the alleged incompetence and/or dishonesty of the respondent attorney.

However, the State Bar is not, and cannot, be the guarantor of attorney conduct and should not be held financially responsible for an attorney's independent acts of misconduct or dishonesty.[6] Ms. Keough's suggestion is analogous to making the county or state financially responsible for a crime committed by a defendant following the law enforcement and prosecution agency's failure or inability to investigate an earlier crime and to arrest and try the defendant for that crime within a specified period of time.

[6] Of course, as a public corporation in the judicial branch of state government, the State Bar is afforded the protections of the California Tort Claims Act. Additionally, in the performance of its duties in the area of attorney discipline and regulation, the State Bar judges and prosecutors enjoy, respectively, judicial and quasi-prosecutorial immunity.

Part Seven – Fail Safe Enforcement Proceedings and Supervision Through the Department of Consumer Affairs

Ms. Keough proposes that the Director of the Department of Consumer Affairs should be authorized and required to institute disciplinary actions against an attorney directly in the California Supreme Court if the Director of DCA believes that the State Bar's investigation or prosecution of the attorney has been "ineffective" or "dilatory" or otherwise insufficient to protect consumers, clients and others. Ms. Keough would also require the State Bar to pay for the cost of these proceedings by the Department of Consumer Affairs and require a fee increase sufficient to establish a fund for those payments.

The Legislature has recognized that the power to discipline licensed attorneys in California is an expressly reserved, primary and inherent power of the Supreme Court. (*Obrien* v. *Jones* (2000) 23 Cal.4th 40, 48; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592-593.) As the Supreme Court stated in *Hustedt* v. *Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337:

> "In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts. Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. [Citation.] 'This is necessarily so. *An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question.*'" (Italics added.)

While the Supreme Court acknowledged that the State Bar originally was purely a legislative creation, its unique nature was recognized by the Legislature throughout its existence. That special character was emphasized when it became a constitutional body, placed in the judicial article of the California Constitution and expressly acknowledged as an integral part of the judicial function.(See Art. VI, § 9, Cal. Const.; *In re Attorney Discipline*, *supra*, 19 Cal.4th at p. 599.) The Supreme Court has recognized and emphasized that the State Bar was created as an administrative arm of the Supreme Court for the purpose of assisting in matters of the admission and discipline of attorneys. (*Saleeby* v. *State Bar* (1985) 39 Cal.3d 547, 557.)

By contrast, the Department of Consumer Affairs is in the executive branch of state government. Granting authority to the Department of Consumer Affairs to investigate and prosecute attorney disciplinary proceedings in addition or in lieu of the State Bar's disciplinary process would violate governmental separation of powers principles. (*In re Attorney Discipline System*, *supra*, 19 Cal.4th at pp. 595-596; see also, *Hustedt* v. *Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d at pp. 339-341 [invalidating, as a violation of separation of powers, a statute allowing the Workers' Compensation Appeals Board to discipline attorneys who appear before the Board]; *Merco* v. *Constr. Engineers, Inc.* (1978) 21 Cal.3d 724, 727-733 [invalidating a statute permitting a corporation to appear in an action through an individual who is not an attorney]; and *In re Lavine* (1935) 2 Cal.2d 324, 329 [invalidating a statute requiring the readmission of attorneys who are pardoned after disbarment for felony convictions].)

Finally, the Supreme Court has already provided a mechanism in cases where the State Bar has purportedly arbitrarily failed or refused to act on a complaint of attorney misconduct. In *In re Walker* (1948) 32 Cal.2d 488, 490, the Supreme Court acknowledged that it had independent authority to entertain disciplinary proceedings against an attorney but explained that "we are of the view that as a matter of policy this court should not exercise those powers unless and until the accuser has followed the normal procedure by first invoking the disciplinary power of [t]he State Bar."

Thus, the Supreme Court, with inherent power over the admission and discipline of attorneys, has held that complaints against members must be initially considered by the State Bar and that, if the State Bar arbitrarily fails to act, the appropriate recourse is directly in the Supreme Court.

Part Eight – Sexual Relations By Paralegals and Other Law Firm Employees

Ms. Keough proposes that paralegals and other employees of a State Bar member should be subject to the same requirements as attorneys with respect to sexual relations with clients of the attorney or law firm and that the attorney's failure to enforce those requirements should be a disciplinable offense.

This is a matter that should be studied. I propose to refer this suggestion to the Commission for the Revision of the Rules of Professional Conduct for study and for such action it may deem appropriate.

Part Nine – Obstruction of Administrative Justice

Ms. Keough proposes that there should be a civil remedy, including general and special damages, for obstructing a complainant (either physically, by threats or by litigation) from making a complaint to the State Bar, providing evidence to the State Bar or seeking advice or assistance from the State Bar.

The intimidation of witnesses and victims to prevent or dissuade them from attending or giving testimony at any trial, proceeding or inquiry authorized by law is a felony punishable for imprisonment for a period of two, three or four years where it is accompanied by force or threat of force, as part of a conspiracy or is committed for pecuniary gain. (Pen. Code, § 136.1.)

Additionally, Business and Professions Code section 6094, subdivision (a) provides that all communications with the State Bar relating to an attorney disciplinary investigation or proceeding are privileged and no lawsuit predicated on those communications may be instituted against the person.[7]

The willful failure of a member of the State Bar to support and obey the Constitution or laws of the United States or the State of California constitutes grounds for discipline. (Bus. & Prof. Code, §

[7] It is also grounds for discipline for an attorney to agree to seek agreement to not report a disciplinary violation, to withdraw a complaint or to refuse to cooperate with a disciplinary investigation or proceeding. (Bus. & Prof. Code, § 6090.5.)

6068, subd. (a).) Thus, the attorney's violation of either Penal Code section 136.1 or 6094, subdivision (a) (or other statutory provision) would constitute grounds for professional discipline.

Whether such threats should also constitute a cause of action for damages is a policy question. However, to my knowledge, reported instances of such threats, intimidation or retaliation have been rare.

SJD:dim