HISTORY OF HOW THE STATE BAR BECAME AN INTEGRATED BAR

The State Bar of California ("State Bar") is a constitutional agency within the judicial branch of state government created to assist the Supreme Court in regulating the legal profession and in improving the administration of justice. The State Bar serves as the administrative arm of the Supreme Court in matters related to attorney admission and discipline. (Cal. Const., art. VI, § 9; Bus. & Prof. Code, § 6001 et seq.; *Keller v. State Bar of California* (1990) 496 U.S. 1, 4-5, 110 S.Ct. 2228, 110 L.Ed.2d 1.)

The California Legislature created the State Bar in the 1927 State Bar Act. (Cal. Bus. & Prof. (hereafter "B & P") § 6000 et seq; Stats. 1927, ch. 34, p. 38; *Greene v. Zank* (1984) 158 Cal.App.3d 497, 505; 2 State Bar Journal 92 (1927.) The Act created a public corporation known as the State Bar of California, which was to be organized by the Chief Justice of the California Supreme Court and others appointed by him. (Stats. 1927, ch. 34, §§ 2, 12, and 13.) It authorized the State Bar, with the approval of the Supreme Court, to fix the qualifications for the admission to practice, adopt Rules of Professional Conduct, and conduct disciplinary proceedings. (Stats. 1927, ch. 34, §§ 24-26.) The Act also gave the State Bar the authority to aid in the administration of justice. (Stats. 1927, ch. 34, § 23.) Since 1927, both the Legislature and the Court have added to the regulatory matters that the State Bar must administer.

The California Legislature established the Board of Governors of the State Bar (hereinafter the "Board") when it created the State Bar in 1927. (Bus. & Prof. Code, § 6010 et seq.) Originally, the Board consisted of fifteen members, eleven of whom were elected from congressional districts, and four of whom were elected at-large. The Board, as the governing body of the State Bar, has only those powers and duties conferred by the Legislature or the

Supreme Court. (Bus. & Prof. Code, § 6010; see also Cal. R. Ct. 950 et seq.) Although certain of the Board's functions are quasi-judicial or quasi-legislative in nature, they do not constitute the exercise of judicial or governmental powers. (*In re Attorney Discipline* (1998) 19 Cal. 4th 582, 600 ("the Board of Bar Governors ... not invested with any power which can be said to possess the finality and effect of judicial orders"); see *Hirsh v. Justices of the Supreme Court of California,* 67 F.3d 708, 715 (9th Cir. 1995); *Levanti v. Tippen*, 585 F. Supp. 499, 504-05 (S.D. Cal. 1984).)

One of the key features of the State Bar Act was that the State Bar would be a "self-governing" organization. This type of organization, which distinguishes it from a mere bar association, is that all practicing attorneys in the state are required to be members of the state bar, are subject to the rules of the bar, including a provision for payment of an annual fee, are required to adhere to a code of ethics and are subject to disciplinary proceedings for infractions of the code. (*Greene v. Zank, supra*,158 Cal.App.3d at 504.) Separation of powers, however, limited the authority that could be delegated to the State Bar. For example, the State Bar's "power" to discipline or disbar members is subject to ultimate approval by the California Supreme Court. (Bus. & Prof. Code, § 6087.) Similarly, the State Bar has no power to promulgate rules of professional conduct; it can only propose rules to the California Supreme Court. (Bus. & Prof. Code, § 6076.)

In 1960, the voters of California added the State Bar to the state constitution. (Cal. Const., art. VI, § 1c, as adopted November 8, 1960.) In 1966, articles III, IV, V, and VI of the California Constitution were revised to present a more orderly and coherent treatment of the constitutional provisions defining the separation of powers between the legislative, executive,

and judicial branches. (Stats. 1966, First Ex. Sess. 1966, ch.139, p. 960.) At that time, Article VI, section 1c was repealed and its language amended and reenacted by the voters as Article VI, section 9. (Cal. Const., art. VI, § 9, adopted November 8, 1966.)

In implementing the ballot measure, it was recognized that the State Bar would still be subject to regulation by the legislature.[1] While attorneys are allowed to "self-govern" to some degree, the State Bar's powers are circumscribed by the need for legislative or judicial approval. Although the State Bar, as an administrative adjunct, performs quasi-judicial and quasi-legislative functions, it does not exercise traditional governmental powers. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct. California law reserves all of those functions for the California Supreme Court. (Bus. & Prof. Code, § 6064 (admissions); § 6076 (rules of professional conduct); § 6100 (disbarment or suspension).) In the words of the United States Supreme Court, "the State Bar performs important and valuable services for the State by way of governance of the profession, but those services are essentially advisory in nature." *Keller v. State Bar, supra,* 496 U.S. 1.)

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[1] Language in the ballot pamphlet stated: "The Legislature . . . would continue to have power to regulate the administration of the State Bar by statute as it now does." See In re Attorney Discipline, 19 Cal. 4th 582, 598 (1999). Consequently, Cal. Const. Art. VI, § 9 is not self-executing. Cf. Cal. Const. Art. 9, § 9§§ (providing that the University of California shall have powers of government).

The historical reasons underlying the creation of the State Bar as an integrated bar have been set forth in various law review articles and studies. A 1995 law review article that relied primarily on a 1956 case study of the State Bar of California, provided an historical insight into the creation of the integrated bar:

> The central theme of the bar's campaign in 1925 was to reform the profession - "kick the rascals out"[2] - by means of creating a unified and self-regulating bar. (Corinne L. Gilb, Self-Regulating Professions and the Public Welfare: A Case Study of the California State Bar (1956) (unpublished Ph.D thesis, Radcliffe College, at p.53.) The campaign also attempted to obtain the support of local bar associations, district attorneys, real estate boards, chambers of commerce, and even the bar's traditional enemies. (Id. at p. 54.) Members of the banking community were also persuaded not to oppose the State Ba bill, in return for which the bar promised similar lack of opposition to the banks' attempts to raise executor's fees. (Id. at pp. 54-55.)
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> This broad-based support facilitated passage of the State Bar bill. The Senate approved the bill unanimously and the Assembly passed it by a vote of sixty-five to eleven. (Id. at p. 55.) Despite this, the Governor, Friend W. Richardson, vetoed the bill. (Id. at pp. 55-56.) Richardson's main objection was that the proposed self-regulating bar would not be subject to state control. (Id. at p. 57.) Richardson wanted, for instance, to add a provision to this legislation that would grant the Governor power to appoint the bar's Board of Governors, a move that would transform a self-regulating bar into one regulated "through an administrative commission." (Id. at p. 57.)
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> In response, the bar once again mobilized support. (Id. at p. 58.) The Bar bill was reintroduced into the 1927 legislative session, where it passed the Senate on a vote of twenty-five to fourteen and the Assembly by a margin of fifty-one to fifteen. (Id. at pp. 68-71.) This time the newly-elected Governor C.C. Young- who had been elected in large part due to the support and influence of a leading unified bar advocate - signed the bill into law. (Id. at p. 74.) The legislation created the State Bar as a public corporation subject to supervision by the California Supreme Court. (Id. at pp. 71-74.)
>
> The statute, as ultimately passed, was largely drawn from the American Judicature Society's model bar unification bill. (Id. at pp. 44-45.) However, it also contained an important change derived from the American Bar Association's model Bar Unification Act, subsequently approved by the ABA in 1920. (Id. at p. 46.) The change was not only a strategic move but was also symbolically important. Whereas the earlier version of the legislation proposed to create a statewide bar organization incorporating then-existing bar associations, the new version was based on the premise that the "bar was already a body-politic." Lawyers were officers of the Court. Creating the State Bar on this premise meant

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[2]Essentially, "[t]he courts were too busy to do the work of discipline; sometimes only mild reproof was necessary and disbarment proceedings were too inflexible; the bar, it was contended, could best discipline itself." (*Glib, supra,* at p. 60.)

> that the supreme court retained ultimate control over the profession and had delegated its powers to regulate lawyers to the bar itself. (Id. at pp. 45-47.)

(22 Pepp. L. Rev. 485, 524-525 [Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar, 1995 Pepperdine University School of Law, William T. Gallagher].)

A 1997 law review article further elaborated upon the purpose of the integrated bar:

> In considering the establishment of a State Bar, the California Legislature saw the unified bar structure as a means of helping the legal profession to better meet its responsibilities to society. (Fn.)[3] The California Legislature believed that a unified Bar would permit the legal profession to protect the public from unethical or incompetent lawyers by improving lawyer admissions and discipline. (Fn.) In addition, a unified Bar could provide legal services and accessibility to justice to those with limited finances. (Fn.)

(27 Golden Gate L. Rev. 601 (1997) [Senate Bill 1413: The Answer to SB 60 Plebiscite and Its Constitutionality Under the Inherent Powers Doctrine].)

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[3]All footnotes referenced *The Future of the California Bar Final Report, Legal Profession and the State Bar of California* 147 (1995). Particular reference was made to comments by Joseph Webb, the first president of the State Bar, who commented on the purpose of the State Bar: "...the purpose of the State Bar is to place full responsibility upon the Bar, both as to qualifications for admission to practice and conduct after admission, to see that every lawyer recognizes that one who practices law holds a position of public trust. An attorney's primary duty is to be faithful to that trust, and to organize the Bar upon an efficient and businesslike basis." (*The Future of the California Bar Final Report, note 24, at 147-148.)*

Definition Of An "Integrated Bar."

An "integrated bar" is an association of attorneys in which membership and dues are required as a condition of practicing law in a State. *Keller v. State Bar of California*, 496 U.S. 1, 5 (1990). The term "integrated bar" is used interchangeably with "unified bar" or "mandatory bar." *See Morrow v. State Bar of California*, 188 F.3d 1174, 1175 (9th Cir. 1999). In an integrated bar, regulatory functions (such as admission, continuing education, and attorney discipline) *may* be combined with non-regulatory activities (such as arranging social functions, obtaining rental car discounts for members, and political lobbying). *See id.*; *Lathrop v. Donohue*, 367 U.S. 820, 832-34 (1961). However, the only essential elements of an integrated bar are the requirements of membership and the payment of fees. *Lathrop*, at 843; *Keller*, 496 U.S. at 4, 8. Courts have construed the requirement of compulsory enrollment itself to impose only the duty to pay dues. *Lathrop*, at 827; *Keller*, at 9; *see Morrow*, 188 F.3d at 1177.

HISTORY OF FEE SETTING FOR THE STATE BAR OF CALIFORNIA

The State Bar's primary source of revenue is the annual membership fees paid by attorneys admitted to practice in California. The membership fees are regulatory exactions (*Carpenter v. State Bar* (1931) 211 Cal.358; *Herron v. State Bar* (1944) 24 Cal.2d 53, 65; *Hill v. State Bar of California* (1939) 14 Cal.2d 732, 735) and, like other revenues received by the State Bar, are "held for essential public and governmental purposes in the judicial branch of government." (Bus. & Prof. Code, §§ 6008, 6144.)

The Legislature has historically set the amount of fees paid by attorneys to fund the State Bar's disciplinary system. (See Bus. & Prof. Code §§ 6140-6145, specifically §§ 6140, 6140.1, 6140.3, 6140.4, 6140.6, 6140.9.)[1] The original 1927 State Bar Act set the amount of annual State Bar membership fees and authorized the State Bar Board of Governors t increase this fee up to a set maximum. (Stats. 1927, ch. 34, § 43.) This statutory structure, requiring legislative approval only when an increase in the cap on membership fees was sought, remained in effect for more than fifty years. In 1979, a "sunset" provision was added by statute, repealing the statute as of that specific date. (Stats. 1979, ch. 1041, § 2.) Since that time, periodic legislative re-authorization of the State Bar's basic membership fee has been required.[2]

The re-authorization process has been a time consuming task and has been met with varied degrees of difficulty. In 1985, the State Bar's efforts to have it's fee bill approved was

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[1]A copy of the relevant statutes is included herein as **Attachment A.**

[2]Since 1927, several special fees have been added to the basic membership fees charged by the State Bar. In 1958, a special building fund was added. (Stats. 1958, First Ex. Sess., ch 49; Bus. & Prof. Code, § 6140.3.) In 1971, a fee for the client security fund was added. (Stats. 1971, ch. 1338; Bus. & Prof. Code, § 6140.55.) In the late 1980's, several new fees were added to support statutorily required reforms to the State Bar's attorney discipline system, including the establishment of a State Bar Court with full-time, professional judges and increases in the number of staff investigators and prosecutors. (Stats. 1986, ch. 1510; Stats. 1988, ch. 1149; Bus. & Prof. Code, §§ 6140.4, 6140.6 and 6140.9.)

met with resistance by factions within the Legislature. Separate challenges led by Senator Robert Presley and Assembly Minority leader Pat Nolan shared the same goal of reducing the State Bar's power and resulted in the State Bar inability to get its fee bill passed in a timely manner. Consequently, the State Bar was forced to ask for voluntary contributions from its membership and file a petition to the Supreme Court, which proved unsuccessful. The fee bill was eventually approved, with greater legislative oversight of the State Bar.[3] In 1997, the Governor vetoed a fee bill that would have set State Bar membership active membership fees for 1998 and 1999 at an annual maximum of $458. As a result of this action, the State Bar had the authority under existing statutory provisions to collect only $77 from each member. Consequently, the State Bar was almost completely shut down the following year. (See *In re Attorney Discipline System,* (1998) 19 Cal.4th 582.)

The Court has also authorized the State Bar to assess various regulatory fees related to the practice of law, in the absence of any statute permitting the imposition of such fees. (See California Rules of Court, rules 983(c) [applicants for admission to appear as counsel *pro hac vice* to pay reasonable fee not exceeding $50], 983.2(f) [authority of the State Bar to set and collect appropriate fees and penalties for the certified law student program], 983.5(e) [authority of the State Bar to set and collect appropriate fees and penalties for certifying legal specialists], and 988(f) [authority to set and collect appropriate fees and penalties for registering foreign legal consultants].[4]

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[3]A chronology of the 1985-1986 fee bill crises, as summarized in *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar,* (1995) 22 Pepp. L. Rev. 485, is included herein as **Attachment B**.

[4]The Court has upheld the imposition of fees or dues "to enforce the State Bar Act, recognizing that licensed attorneys properly may be required to pay the reasonable expenses of a disciplinary system. We subsequently reiterated this conclusion: "[I]t has been held that the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues." (*Herron v. State Bar* (1944) 24 Cal.2d 53, 64 [147 P.2d 543.) (*In re Attorney Discipline System, supra,* 19

As such, the Board of Governors may fix and collect only such reasonable amounts of membership fees as authorized by the Legislature or the Supreme Court. (See *Carpenter v. State Bar, supra,* 211 Cal. at 360 [assessment of membership fees is a regulatory measure fixed by the Legislature]; *In re Attorney Discipline, supra,* 19 Cal. 4th at 619-20 [where Legislature has not acted, Supreme Court has power to impose fee].) The amount of the fees and the State Bar's expenditures are subject to oversight of the State. (Bus. & Prof. Code §§ 6140.1, 6145 [requiring annual budget reviews by the Legislature, annual audits, and bi-annual performance audits by the State Auditor]; see also *In re Attorney Discipline, supra,* 19 Cal. 4th at 595, 620 [requiring oversight over expenditure of fees authorized by the Supreme Court]; *Hersh v. State Bar* (1972) 7 Cal. 3d 241 [although annual membership fees are authorized by statute, the Supreme Court reviews challenges to them in original petitions].).

The attached charts provide a membership fee history from 1927 through the present. A copy of the Active Membership Fee Penalty History is included herein as **Attachment C**; a copy of the Membership Fee History as **Attachment D**. In summary, in 1927, the active membership fee was $3.00. The highest fee amount was during the years 1991-1996, when the active fees were $478. For the year 2002, membership active fees are set at $390. The Governor's veto of the 1997 fee bill resulted in a fiscal/fee anomaly where the State Bar was only able to assess a $77 fee in 1998 and 1999. In December 1998, the Court adopted rule 963, California Rules of Court which provided for an interim special regulatory fee for attorney discipline in the amount of $173 in addition to the $77 fee. This brought the 1999 active fee to $250 (See *In Re Attorney Discipline System, supra,* 19 Cal.4th 582.) The largest increase in membership fees came after the concerns over a substantial backlog of disciplinary cases and the creation of a professional State Bar Court. The change in the system that gave rise to this increase was discussed by the Court in *In Re Attorney Discipline System, supra,* 19 Cal.4th at 611-612:

Cal.4th at 594.)

For most of the bar's history, its discipline system was operated primarily with the assistance of volunteers from local bar associations, although some professional and permanent staff were retained by the State Bar. By the mid-1980's, a substantial backlog of complaints against attorneys had developed, and a series of newspaper articles revealed major inadequacies in the existing disciplinary system. In 1986, the Legislature appointed a special State Bar Discipline Monitor, Robert C. Fellmeth, to report on the bar's backlog and recommend solutions. Discussions between Mr. Fellmeth, the State Bar, and the Legislature resulted in the eventual adoption of Senate Bill 1498 during the 1987-1988 legislative session. By that time, the backlog of cases pending before the bar had been reduced from nearly 4,000 to approximately 1,500, (footnote omitted) and analysis of the pending legislation contained in various reports on the bill suggests that lack of resources threatened this progress and the ability of the State Bar to sustain its level of functioning. (Citation.) The bill provided for the creation of the State Bar Court, increased the reporting requirements of the court and insurers regarding misconduct by attorneys, created a process for involuntary inactive enrollment of attorneys, and made numerous additional revisions to disciplinary and other related statutes.

ATTACTMENT A: ACTIVE MEMBERSHIP FEE PENALTY HISTORY

{Reference the State Bar Act, Article 8, section 6140}

YEAR	ACTIVE FEE	PENALTY	PCT.
2002	390.00	a)39.00 b)58.50	a)10% b)10%

Revised 10/24/01

ATTACTMENT A: ACTIVE MEMBERSHIP FEE PENALTY HISTORY
{Reference the State Bar Act, Article 8, section 6140}

YEAR	ACTIVE FEE	PENALTY	PENALTY PCT.
1927	$3.00	$3	100%
1928-29	5.00	2	40%
1930-40	7.50	3	33%
1941	9.00	3	33%
1942-49	10.00	3	30%
1950	12.50	3	24%
1951-55	15.00	3	20%
1956-57	17.50	3	17%
1958	20.00	3	15%
1959	25.00	3	12%
1960	25.00	10	40%
1961-63	37.00	10	27%
1964	40.00	10	25%
1965	50.00	10	20%
1966	50.00	10	20%
1967-68	55.00	20	36%
1969-71	50.00	20	40%
1972	60.00	20	33%
1973	85.00	20	24%
1974	100.00	20	20%
1975	100.00	25	25%
1976	110.00	25	23%
1977	140.00	25	18%
1978	130.00	25	19%
1979	150.00	75	50%
1980	135.00	68	50%
1981	140.00	70	50%
1982	175.00	88	50%
1983	185.00	93	50%
1984	190.00	95	50%
1985	195.00	98	50%
1986	208.00	104	50%
1987	260.00	130	50%
1988	276.00	138	50%
1989	417.00	209	50%
1990	440.00	220	50%
1991-96	478.00	239	50%
1997	458.00	229	50%
1998	77.00 ①	38.50	50%
1999	250.00 ②	125	50%
2000	395.00	197.50	50%
2001	345.00	a) 34.50 b) 51.75	a) 10% b) 15%

① Voluntary SSJ

Membership Fee & Penalty History
Bill Year 2003 thru 2011

Bill Year	Active Membership Fee	Penalty Percentage	Penalty Fixed Amount
2003-2005	390.00	25.00%	[redacted]
2006	395.00	25.00%	
2007	400.00	[redacted]	100.00
2008	400.00		100.00
2009	410.00		100.00
2010	410.00		100.00
2011	410.00		100.00

Bill Year	Inactive Membership Fee	Penalty Percentage	Penalty Fixed Amount
2003-2005	50.00	25.00%	[redacted]
2006	115.00	25.00%	
2007	125.00	[redacted]	30.00
2008	115.00		30.00
2009	125.00		30.00
2010	125.00		30.00
2011	125.00		30.00

IN RE ATTORNEY DISCIPLINE SYSTEM; REQUESTS OF THE GOVERNOR AND THE STATE BAR OF CALIFORNIA

No. S073756.

Supreme Court of California

Dec. 3, 1998.

SUMMARY

The California State Bar requested that the California Supreme Court order a special regulatory assessment requiring active members of the State Bar to pay a fee of $171.44 in addition to $77 already authorized by existing statutes, for the purpose of funding the bar's disciplinary activities. The Governor submitted a letter to the court acknowledging that a problem with public protection had arisen because the bar's disciplinary system was no longer operating effectively. This problem was due to the adjournment of the legislative session without the enactment of a measure to provide for the usual funding of the state attorney disciplinary process.

The Supreme Court adopted a rule imposing a special regulatory assessment of $173 on attorneys actively engaged in the practice of law, to be used exclusively for attorney disciplinary purposes, and it appointed a special master charged with oversight of the funds collected pursuant to the rule, to ensure that the money was utilized by the bar solely to fund disciplinary functions. The court held that it has authority to impose a regulatory fee upon attorneys for the purpose of supporting an attorney discipline system pursuant to the court's inherent constitutional power to regulate the legal profession. Bar membership fees used to fund attorney discipline are not taxes or appropriations, and thus the court's assessment of these regulatory fees would not invade the legislative prerogative (Cal. Const., art. III, § 3). Also, the bar is not an entity created solely by the Legislature or within the Legislature's exclusive control, but rather is a constitutional entity subject to the court's primary, inherent authority over admission and discipline. The court further held that it was appropriate to impose this fee at the time of the bar's request, because the lack of a functioning attorney disciplinary system placed at grave risk the public, the integrity of the legal profession, and the interests of the courts. The court also held that the amount requested by the bar ($171.44) was reasonably calculated to provide at least minimally adequate support for the disciplinary functions, and adopted a rule requiring attorneys in active practice to remit $173, which included $1.56 imposed to pay for the fees and expenses related to the special master and his activities. (Opinion by George, C. J., expressing the unanimous view of the court.) ***583**

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e, 1f, 1g) Attorneys at Law § 3--State Bar Act, State Bar Association, and Bar Fees--Authority of Supreme Court to Impose Special Fee Assessment to Fund Disciplinary System.
The California Supreme Court has authority to impose a special fee assessment upon all active members of the California State Bar, to be used to fund the bar's existing disciplinary system pursuant to the court's inherent power to regulate the legal profession. Bar membership fees used to fund attorney discipline are not taxes or appropriations, and thus the court's assessment would not invade the legislative prerogative (Cal. Const., art. III, § 3). Also, even though the policy determination regarding the amount of membership fees necessary to fund a disciplinary system is one that properly could be made by the Legislature, that circumstance alone does not render the court's assessment of this fee unconstitutional under the separation of powers doctrine. The State Bar is not an entity created solely by the Legislature or within the Legislature's exclusive control, but rather is a constitutional entity subject to the court's primary, inherent authority over admission and disciplinine. Hence, the court's inherent constitutional authority over attorney discipline includes the power to assess fees upon attorneys to fund the bar's existing discipline system.

(2) Courts § 27--Jurisdiction of Supreme Court--To Review State Bar Court Decisions and State Bar Fee Issues--Conflict of Interest:Attorneys at Law § 3--State Bar Act, State Bar Association, and Bar Fees.
The appointment of the judges of the California State Bar Court by the California Supreme Court does not preclude the Supreme Court from impartially reviewing those judges' decisions. A fortiori, that

appointment created no conflict of interest in the Supreme Court's considering a State Bar request for assessment of a special fee upon all active members of the State Bar, to be used to fund the bar's existing disciplinary system.

(3) Attorneys at Law § 1--Power to Admit and Discipline Attorneys--Court's Inherent and Primary Power.
The power to regulate the practice of law, including the power to admit and to discipline attorneys, is among the inherent powers of the courts (Cal. Const., art. VI, § 1). Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. This is necessarily so. An attorney is an officer of the court, and whether a person shall be admitted or disciplined is a judicial, not a legislative, question. The important difference between regulation of the legal ***584** profession and regulation of other professions is that admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and primary regulatory power.

[See 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 356.]

(4a, 4b) Constitutional Law § 36--Doctrine of Separation of Powers-- Collection of Revenue--Collection of Regulatory Fees.
The power to collect and appropriate the revenue of the state is peculiarly within the Legislature's discretion (Cal. Const., art. III, § 3). Constitutional principles of separation of powers limit judicial authority over appropriations. However, fees charged for a regulatory activity that do not exceed the reasonable cost of providing services necessary to that activity, and that are not levied for unrelated revenue purposes, are regulatory fees rather than taxes.

(5) Constitutional Law § 36--Doctrine of Separation of Powers--Exercise of Quasi-legislative Authority by Executive and Judicial Officials.
Although Cal. Const., art. III, § 3, defines a system of government in which the powers of the three branches are to be kept largely separate, it also comprehends the existence of common boundaries between the legislative, judicial, and executive zones of power thus created. Its mandate is to protect any one branch against the overreaching of any other branch. The primary purpose of the separation of powers doctrine is to prevent the combination in the hands of a single person or group of the fundamental powers of government. The doctrine has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of the government, it can never be used thereafter by another. Both executive and judicial officials routinely exercise quasi-legislative authority in establishing general policies and promulgating general rules for the governing of affairs within their respective spheres. The exercise of such quasi-legislative authority, even when the policy decision that is made by the executive or judicial entity or official is one that could have been made by the Legislature, has never been thought to violate the separation of powers doctrine.

(6) Attorneys at Law § 3--State Bar Act, State Bar Association, and Bar Fees--Authority of Supreme Court--Separation of Powers ***585** Doctrine:Constitutional Law § 36--Distribution of Governmental Powers.
The California State Bar was originally designated a public corporation by statute (Bus. & Prof. Code, § 6001). In 1960, the electorate amended Cal. Const., art. VI, of the California Constitution to declare the State Bar a constitutional body. However, in adopting the State Bar Act, the Legislature expressly recognized that the California Supreme Court retained all disciplinary authority over attorneys that the court had prior to passage of the act, including the power to disbar or discipline members of the bar (Bus. & Prof. Code, § § 6087, 6100, 6076). The bar's role has consistently been articulated as that of an administrative assistant to the Supreme Court. Thus the judicial power in disciplinary and admission matters remains with the court and was not delegated to the bar. Furthermore, the express legislative recognition of reserved judicial power over admission and discipline is critical to the constitutionality of the State Bar Act, by which the Legislature avoided violation of the doctrine of separation of powers (Cal. Const., art. III, § 3).

[See 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 358.]

(7) Attorneys at Law § 1--Legislative Regulation--Power of Judiciary.
The California Supreme Court has respected the exercise by the Legislature, under the police power, of a reasonable degree of regulation of the legal

profession and practice of law in this state. This pragmatic approach is grounded in the Supreme Court's recognition that the separation of powers principle does not command a hermetic sealing off of the three branches of government from one another. In the field of attorney-client conduct, the judiciary and the Legislature are in some sense partners in regulation. Legislative regulation of matters related to the admission and discipline of attorneys is neither exclusive nor final, however. Legislative regulations regarding the qualifications of attorneys are, at best, but minimum standards unless the courts themselves are satisfied that such qualifications are sufficient. In other words, the courts in the exercise of their inherent power may demand more than the Legislature has required. It is the court and not the Legislature that is the final policymaker.

(8a, 8b) Attorneys at Law § 3--State Bar Act, State Bar Association, and Bar Fees--Timeliness of State Bar's Request That Supreme Court Assess Fee for Disciplinary Activities.
In response to the California State Bar's request that the California Supreme Court impose a special fee assessment upon all active members of the State Bar ***586** to fund the bar's existing disciplinary system, the Supreme Court found it was appropriate to impose such a fee at the time of the bar's request, because the lack of a functioning attorney disciplinary system placed at grave risk the public, the integrity of the legal profession, and the interests of the courts. Because there was no functioning disciplinary system, attorneys deserving of discipline were left to continue their practice and to harm additional clients. At the same time, unfounded complaints could not be disposed of in timely fashion. An entire year had passed without a legislative fee bill being in effect. Furthermore, deferring the request would delay the start of any restoration of a disciplinary system in the state. Also, using the bar's legislatively created disciplinary system was less intrusive on the legislative function than creating of a new system.

(9) Attorneys at Law § 46--Disciplinary Proceedings--Necessity of Proceedings Separate From Court Action.
An attorney discipline system that is separate from court action is necessary to protect the public. Many complaints that properly lead to discipline are not necessarily susceptible to relief through a court action. Moreover, the objective of the discipline system is not to punish the attorney, but to protect the public from the objectionable activities of persons unfit to practice law. A disciplinary proceeding is not a criminal action. Also, the absence of a separate discipline system would impose an additional burden would be imposed on the courts. Civil and criminal court actions also would not protect future clients adequately from potentially damaging conduct by attorneys. Many attorneys who are disciplined do not have the funds to pay judgments against them. Further, leaving civil proceedings as the only recourse against such attorneys would not protect future clients from harm. Society has found that licensing and its related disciplinary system are an essential component of the regulation of various professions.

[See 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 623.]

(10) Attorneys at Law § 3--State Bar Act, State Bar Association, and Bar Fees--Timeliness of State Bar's Request That Supreme Court Assess Fee for Disciplinary Activities.
In response to the California State Bar's request that the California Supreme Court impose a special fee assessment of $171.44 upon all active members of the State Bar to be used to fund the bar's existing disciplinary system, the court held that the amount requested was reasonably calculated to provide at least minimally adequate support for the disciplinary functions, but set the ***587** fee at $173. To include $171.44 for the purposes requested by the bar, and $1.56 to pay for the fees and expenses related to a special master that the court appointed to act on its behalf in overseeing the collection and disbursement of the fees imposed under the new rule.

COUNSEL

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GEORGE, C. J.

On October 14, 1998, this court issued an order soliciting public comment in response to a letter submitted to the court by Governor Pete Wilson and a "Request for a Special Regulatory Assessment" submitted by the State Bar of California. ***588**

In his letter, the Governor acknowledged that a problem with public protection had arisen because the State Bar's disciplinary system no longer was operating effectively, observed that "[c]learly, the Court has inherent power over the discipline of attorneys," and requested that this court assume responsibility over the attorney discipline system pending a legislative solution. At the same time, however, the Governor asserted that this court's imposition of additional fees on members of the State Bar would invade the legislative prerogative, and argued that "[t]he Court could direct that at least a portion of the existing Bar membership fees be used to fund a discipline system that ferrets out the most egregious offenders."

In its request, the State Bar asked that the court issue an order requiring active members of the State Bar to pay a fee of $171.44 in addition to $77 already authorized by existing statutes, for the purpose of funding the bar's disciplinary activities. The State Bar asserted that the court had the power to assess this fee under its inherent authority to regulate the admission and discipline of attorneys practicing in the state.

Citing the circumstance that "the legislative session has adjourned without the enactment of a measure to provide for the usual funding of the attorney disciplinary process in California and that there may be a substantial risk to the public resulting from the absence of an adequately functioning attorney disciplinary system," the court set a hearing on the requests submitted by the Governor and the State Bar for November 9, 1998, at its courtroom in Sacramento. In addition, the court solicited comments and briefs presenting legal analysis and supporting points and authorities on three specific questions, [FN1] and invited interested individuals and organizations to submit requests to address the court. More than 50 written submissions were filed ***589** with the court, which granted the requests of 15 individuals to make an oral presentation at the hearing. [FN2]

FN1 The court posed the following three questions in its order:
"1. What authority does the Supreme Court of California have to impose a fee requirement on licensed attorneys for the limited purpose of funding an attorney disciplinary system? What weight should be given to the numerous out-of-state decisions cited in the State Bar's request (and its earlier submission on June 22, 1998) that have upheld the authority of a state supreme court to impose a license fee on attorneys for such purpose, and what other authority should the court consider?
"2. If the Supreme Court has authority to impose such a fee upon attorneys to fund an attorney disciplinary system, should the court exercise such authority at this time; if so, in what manner and in what amount should a fee be set?
"3. Are there available alternatives to the imposition of a license fee on attorneys for disciplinary purposes that would provide adequate protection of the public, and, if so, what are they? Given that the use of $50 of the $77 fee presently imposed on attorneys by statute is restricted to the Client Security Fund and the Building Fund (see Bus. & Prof. Code, § § 6140.3, subd. (a)[,] 6140.55 [further undesignated statutory references are to this code]), leaving only $27 for disciplinary purposes, are there other funds

available for these purposes?"

FN2 The following individuals addressed the court: Daniel M. Kolkey, Esq., Legal Affairs Secretary, on behalf of Governor Pete Wilson; Raymond C. Marshall, President of the State Bar of California, and Lawrence C. Yee, Chief Assistant General Counsel, for the State Bar of California; Senator Quentin L. Kopp; Professor Stephen R. Barnett, Boalt Hall School of Law; Jerome B. Falk, Jr., Esq., on behalf of numerous local and specialty bar associations; J. Anthony Vittal, Esq., President, California Association of Local Bars; James V. de la Vergne, Esq., Chair, Client-Attorney Relations Committee, Sacramento County Bar Association; Anthony T. Caso, Esq., Pacific Legal Foundation, on behalf of Raymond Brosterhous; Presiding Judge James W. O'Brien, State Bar Court; Lise A. Pearlman, Esq., former Presiding Judge, State Bar Court; Michael J. Oths, Esq., President, National Organization of Bar Counsel; Mark L. Tuft, Esq., former Chair, State Bar Committee on Professional Responsibility and Conduct; John T. Philipsborn, Esq., Chair, Amicus Curiae Committee, California Attorneys for Criminal Justice; Professor John Cary Sims, McGeorge School of Law.

For the reasons explained below, we conclude that this court has authority to impose a regulatory fee upon attorneys for the purpose of supporting an attorney discipline system, and that it is incumbent upon this court to do so at this time, because the lack of a functioning attorney disciplinary system places at grave risk the public, the integrity of the legal profession, and the interests of the courts. The Legislature adjourned in September 1998 without authorizing an annual State Bar membership fee for either 1998 or 1999, leaving the State Bar with only a skeletal discipline system incapable of providing adequate public protection. The backlog of complaints is mounting, and the adverse effects of a nonfunctioning attorney disciplinary system are becoming more and more evident. Although the newly elected Legislature will be convening in December 1998 for organizational purposes, and Governor-elect Gray Davis will assume office early in January 1999, there are no assurances that a legislative solution to the impasse in Sacramento will be found in the near future, or, even if found, will become effective before January 1, 2000.

Furthermore, we conclude that this court has the authority to provide that the funds generated by its imposition of a regulatory fee on attorneys be used, under the supervision of a special master appointed by this court, to support the existing State Bar attorney discipline system. Such an approach represents the least intrusive means of providing protection for the public pending a legislative resolution of the outstanding issues regarding the bar's functions, and best preserves the status quo until agreement can be reached. As we shall explain, this court's actions in this regard do not violate the separation of powers doctrine, but rather reflect our inherent and primary constitutional authority in the area of attorney discipline, and the well-established role of the State Bar as an administrative arm of this court with regard to attorney discipline. ***590**

Accordingly, upon the filing of this opinion, we adopt a rule imposing a special regulatory assessment on attorneys actively engaged in the practice of law, to be used exclusively for attorney disciplinary purposes. Concurrently, we shall appoint a special master charged with oversight of the funds collected pursuant to the rule, in order to ensure that they are utilized by the State Bar solely to fund disciplinary functions.

In taking this action, we are mindful of the Legislature's traditional role in setting dues for members of the State Bar, as well as this court's ultimate and inherent authority over and responsibility for the discipline of attorneys licensed to practice before the courts of California. We emphasize that the rule we adopt is interim in nature, narrow in scope, and directed solely at providing necessary disciplinary functions. Our intention is to provide protection to the public, the courts, and the legal profession pending further action by our sister branches. At such time as the legislative and executive branches authorize funding for an adequately functioning attorney discipline system, we shall resume this court's traditional role in this area.

I

The State Bar of California was created by the State Bar Act of 1927. (§ 6000 et seq.) In 1966, the electorate adopted a provision placing the State Bar in the *judicial article* of the state Constitution. Article

VI, section 9 of the California Constitution states: "The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record." [FN3] Traditionally, the functions of the bar have been funded through fee assessments imposed by the Legislature.

> FN3 The unique role of the State Bar is further illustrated by article VI, section 6 of the California Constitution, which describes the membership of the Judicial Council, and by the former version of section 8, subdivision (a), which described the composition of the Commission on Judicial Performance until the commission's structure was revised, effective in 1995, by Proposition 190. These provisions gave the State Bar of California express authority-along with the Supreme Court or the Chief Justice, the houses of the Legislature, and the Governor-to appoint a specified number of members of each respective body.

On October 11, 1997, Governor Wilson vetoed Senate Bill No. 1145 (1997-1998 Reg. Sess.), which would have authorized the State Bar to collect a total of $458 per year from each attorney in 1998 and 1999. [FN4] After the Governor's veto, the bar remained authorized by statute to collect $77 in annual bar dues in 1998, of which $40 expressly is reserved for the Client Security Fund and the costs of its administration (§ 6140.55), and $10 ***591** expressly is reserved for costs relating to providing facilities for staff or major capital improvement projects (§ 6140.3). The remaining $27 may be used for the costs of the disciplinary system. (§ § 6140.6, 6140.9.)

> FN4 Attorneys in practice for fewer than three years would have been assessed a lower fee, consistent with previous practice. (See former § 6140.)

Negotiations among the bar, the Governor, legislators, and other interested individuals and entities ensued over the next several months. On June 22, 1998, the State Bar filed with this court a "Letter Requesting Rule Of Court Or Order Setting Annual State Bar Membership Fee To Provide Emergency Interim Funding." The letter stated that lack of available funding due to the absence of a dues bill would result in the layoff of approximately 500 State Bar employees on June 26, 1998. The letter requested that the court issue a rule or order setting the active membership fee at $287, to be paid by all active members of the State Bar, in order to permit the State Bar to perform its mandated disciplinary and regulatory functions and services, pending further action by the Legislature.

The court considered the request and entered the following order: "The court recognizes the importance of the core functions relating to the admission and discipline of attorneys carried out by the State Bar and encourages the other two branches of government and the State Bar to resolve this matter as quickly as possible in light of the interest of the public and the potential impact on the operations of the court of the Bar's inability to carry out its disciplinary functions. In view of the importance of the issue and the apparent impasse among the various interested parties, the court has requested that the Chief Justice make himself available,upon the request of the parties, to offer assistance in the resolution of this matter. The request that this court issue an order or adopt a rule requiring payment of membership fees by active members of the State Bar of California is denied." The projected layoffs of employees became effective on June 26, 1998.

With the exception of the State Bar, the parties did not request the assistance of the Chief Justice proffered by the court, and the Legislature adjourned without having enacted a fee bill for either 1998 or 1999. In order to adopt a bill that will require attorneys to pay fees in 1999 beyond the already authorized $77, the newly reconvened Legislature will be required to act by a two-thirds majority vote. If a fee bill is enacted by a simple majority vote, it will not be effective until January 1, 2000. (Cal. Const., art. IV, § 8, subds. (c), (d).)

We consider the Governor's and the State Bar's pending requests in light of these circumstances.

II

(1a) The State Bar requests that this court impose a special fee assessment upon all active members of the bar, to be used to fund the State Bar's ***592** existing disciplinary system, pursuant to our inherent power to regulate the legal profession. The Governor

acknowledges that this court "may create a new disciplinary system in accordance with its inherent powers" and requests that we do so, but contends that "funding a legislatively crafted organization [like the State Bar] ... beyond its statutorily authorized amounts" would violate the constitutional separation of powers and circumvent the legislative process. In other words, the Governor maintains that this court may create a disciplinary scheme separate from the State Bar, but that we may not assess a fee upon attorneys to fund the existing disciplinary structure within the State Bar.

(2) (See fn. 5.) In evaluating the respective positions of the State Bar and the Governor, we shall examine the following matters: (1) our inherent authority over attorney discipline; (2) whether that authority extends to imposing fees upon attorneys to fund a disciplinary system; (3) if so, whether a decision by this court to fund the State Bar's disciplinary system would violate the separation of powers doctrine; and (4) if we constitutionally may assess fees for this purpose, whether we should do so at this time. [FN5]

FN5 At the outset, we reject as meritless the assertion by some that the members of this court are not impartial in this matter, and that the proceeding should be transferred to the Court of Appeal, simply because this court appoints the judges of the State Bar Court. We previously have rejected a similar assertion. (See *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 41, fn. 1 [278 Cal.Rptr. 845, 806 P.2d 317].) Our appointment of the judges of the State Bar Court never has been viewed as precluding this court from impartially reviewing those judges' decisions; a fortiori, such appointment creates no conflict of interest in the present matter.

A. *This Court's Inherent Power Over Attorney Discipline*

(3) Our inherent authority over the discipline of licensed attorneys in this state is well established. Article VI, section 1 of the California Constitution vests the judicial power in the Supreme Court, Courts of Appeal, superior courts, and municipal courts. "Since the 'courts are set up by the Constitution without any special limitations' on their power, they 'have ... all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. [Citations.]' [Citations.] [¶] 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.' [Citations.]" (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337 [178 Cal.Rptr. 801, 636 P.2d 1139], fns. omitted.) "This principle, ***593** which was first recognized in California in 1850 [citation], has been reaffirmed on numerous occasions. [Citations.]" (*Id.* at p. 336, fn. 5; see also *In re Shannon* (1994) 179 Ariz. 52 [876 P.2d 548, 571] ["The judiciary's authority to regulate and control the practice of law is universally accepted and dates back to the year 1292."]; Martineau, *The Supreme Court and State Regulation of the Legal Profession* (1980-1981) 8 Hastings Const.L.Q. 199, 202 ["In each state it is the supreme court, with or without the legislative approval, that dictates the standards for education, admission and discipline of attorneys." (Fn. omitted.)].) [FN6] Our more recent decisions have continued to recognize this power. (E.g., *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 542-544 [28 Cal.Rptr.2d 617, 869 P.2d 1142]; *Howard v. Babcock* (1993) 6 Cal.4th 409, 418 [25 Cal.Rptr.2d 80, 863 P.2d 150, 28 A.L.R.5th 811].)

FN6 The North Carolina Supreme Court appears to have recognized a partial exception to this general rule. In a closely divided decision, it held that establishing qualifications for admission to the practice of law is exclusively a legislative function. (*In re Applicants for License* (N.C. 1906) 55 S.E. 635, 636-637; see also *In re Smith* (1981) 301 N.C. 621 [272 S.E.2d 834, 840] [reiterating this principle].) That court also has held, however, that it retains inherent judicial authority to disbar attorneys, notwithstanding a separate legislative scheme for attorney discipline. (*In re West* (N.C. 1937) 193 S.E. 134, 135; *Brummitt v. Winburn* (N.C. 1934) 175 S.E. 498, 500.)

Witkin has described our authority in this area as follows: "The important difference between regulation of the legal profession and regulation of other professions is this: Admission to the bar is a *judicial function*, and members of the bar are *officers of the court*, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and *primary regulatory power*. [Citations.]" (1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 356, p. 438, original italics.)

(1b) Generally, those opposing the State Bar's request for a special fee assessment do not contest our inherent regulatory authority over the discipline of attorneys. Indeed, as we have shown, there are no substantial grounds on which to assert such a claim. Some of them, however, do argue that this authority does not encompass funding a disciplinary system through the imposition of membership fees upon licensed attorneys. We next consider that argument.

B. *This Court's Authority to Impose Fees to Fund an Attorney Disciplinary System*

Until now, we have had no occasion to consider whether our inherent authority over the discipline of attorneys includes the power to impose fees upon licensed attorneys to fund a disciplinary system. In ***594***Carpenter v. The State Bar* (1931) 211 Cal. 358, 360 [295 P. 23], however, we upheld the imposition of fees or dues to enforce the State Bar Act, recognizing that licensed attorneys properly may be required to pay the reasonable expenses of a disciplinary system. We subsequently reiterated this conclusion: "[I]t has been held that the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues." (*Herron v. State Bar* (1944) 24 Cal.2d 53, 64 [147 P.2d 543].)

Sister-state courts considering the question *uniformly* have concluded that the inherent power of the judiciary to regulate the practice of law includes the authority to impose fees necessary to carry out the court's responsibilities in this area. (E.g., *Petition of Florida State Bar Ass'n* (Fla. 1949) 40 So.2d 902, 906 ["If the judiciary has inherent power to regulate the bar, it follows that as an incident to regulation it may impose a membership fee for that purpose."]; *In re Integration of Bar of Hawaii* (1967) 50 Hawaii 107 [432 P.2d 887, 888] [The court has the inherent power to require attorneys to pay reasonable membership fees to fund a compulsory bar association.]; *Ex parte Auditor of Public Accounts* (Ky. 1980) 609 S.W.2d 682, 686 [Bar dues properly are imposed pursuant to the court's constitutional authority to administer the bar.]; *Board of Overseers of Bar v. Lee* (Me. 1980) 422 A.2d 998, 1003 [Although the police power generally is considered to be vested in the legislative department, it may on occasion be exercised by the courts, and the promulgation of a court rule imposing fees to fund an attorney disciplinary board is such an occasion.]; *Application of President of Montana Bar Ass'n* (1974) 163 Mont. 523 [518 P.2d 32, 33-34] [The court may impose fees pursuant to its power to regulate the practice of law.]; *In re Unification of New Hampshire Bar* (1968) 109 N.H. 260 [248 A.2d 709, 713-714] ["Because the legal profession by its very nature comes under the supervision of the judiciary, we do not feel that if a court, on a balance of interests, finds it in the public welfare to provide that lawyers ... must be members of a unified bar and pay reasonable dues for its support, this would constitute a nefarious guild."]; *Calhoun v. Supreme Court of Ohio* (1978) 61 Ohio App.2d 1 [15 Ohio Op.3d 13, 399 N.E.2d 559, 565] ["[T]he ... power of a court over matters relating to the practice of law, inclusive of ... disciplinary actions ..., includes, by reasonable necessity, the authority ... to impose a membership fee for the support of such related activities."]; *Ford v. Board of Tax-roll Corrections* (Okla. 1967) 431 P.2d 423, 431 [The court's imposition of dues or fees to fund a state bar is an exercise of the police power vested in the court.]; *Petition of Tennessee Bar Ass'n* (Tenn. 1975) 532 S.W.2d 224, 229 [The court has inherent authority to require annual registration and license fees as a condition of the continued practice of law.]; *Banales v. Jackson* (Tex.Civ.App. 1980) 601 S.W.2d 508, 510- 512 ***595** [The Supreme Court's inherent authority over the regulation of the practice of law includes the power to assess fees.]; *Matter of Washington State Bar Association* (1976) 86 Wn.2d 624 [548 P.2d 310, 314] ["Annual dues are collected under the authority of this court, and the existence of a separate statute authorizing the bar to collect the fees does not diminish this court's basic authority to authorize the collection of such dues."]; *In re Integration of the Bar* (1946) 249 Wis. 523 [25 N.W.2d 500, 501-502], overruled on another point by *In re Integration of the Bar* (1958) 5 Wis.2d 618 [93 N.W.2d 601, 605] ["[F]ees are the life blood of the integrated bar," and the court's "inherent power to control and regulate its bar ... may be implemented

by dues from the members ...."].)

Some opponents of the State Bar's request maintain that we have no available means to assess additional fees, because such an assessment would be in the nature of a tax or appropriation and the California Constitution's separation of powers provision (art. III, § 3) [FN7] reserves to the Legislature the power to levy taxes and appropriate funds. (4a) We agree, of course, that "the power to collect and appropriate the revenue of the State is one peculiarly within the discretion of the Legislature." (*Myers v. English* (1858) 9 Cal. 341, 349; see also *Butt v. State of California* (1992) 4 Cal.4th 668, 698 [15 Cal.Rptr.2d 480, 842 P.2d 1240] ["It has long been clear that ... separation-of-powers principles limit judicial authority over appropriations."]; *City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 399 [231 Cal.Rptr. 686] ["A ruling that orders the Legislature to enact an appropriation necessarily implicates the independence and integrity of the Legislature and its ability to fulfill its mission in checking its coequal branches."].)

> FN7 Article III, section 3 of the California Constitution states: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

(1c) Bar membership fees used to fund attorney discipline are not taxes or appropriations, however. (4b) " ' "[F]ees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes" ' " are regulatory fees, not taxes. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 876 [64 Cal.Rptr.2d 447, 937 P.2d 1350].) (1d) The State Bar's "principal funding comes, *not from appropriations made to it by the legislature*, but from dues levied on its members ...." (*Keller v. State Bar of California* (1990) 496 U.S. 1, 11 [110 S.Ct. 2228, 2234, 110 L.Ed.2d 1], italics added.)

Our assessment of such regulatory fees would not invade the legislative prerogative. (5) Although article III, section 3 of the California Constitution "defines a system of government in which the powers of the three ***596** branches are to be kept largely separate, it also comprehends the existence of common boundaries between the legislative, judicial, and executive zones of power thus created. [Citation.] Its mandate is 'to protect any one branch against the overreaching of any other branch. [Citations.]' [Citations.]" (*Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d 329, 338.)

"As this court explained nearly a half century ago: 'The courts have long recognized that [the] primary purpose [of the separation-of-powers doctrine] is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government. [Citations.] *The doctrine has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of the government, it can never be used thereafter by another....*' (Italics added.) [Citation.] Indeed, as a leading commentator on the separation-of-powers doctrine has noted: 'From the beginning, each branchhas exercised all three kinds of powers.' [Citation.] [¶] It is commonplace to observe that both executive and judicial officials routinely exercise quasi-legislative authority in establishing general policies and promulgating general rules for the governing of affairs within their respective spheres. [Citation.] The exercise of such quasi- legislative authority, even when the policy decision that is made by the executive or judicial entity or official is one that could have been made by the Legislature, has never been thought to violate the separation-of-powers doctrine. [Citations.]" (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76- 77 [249 Cal.Rptr. 300, 757 P.2d 11].)

(1e) Therefore, the circumstance that the policy determination regarding the amount of membership fees necessary to fund a disciplinary system is one that properly could be made by the Legislature would not alone render our own assessment of such fees unconstitutional under the separation of powers doctrine. Out-of-state decisions are in accord. (*Petition of Florida State Bar Ass'n, supra*, 40 So.2d 902, 906-907 [Bar association membership fee is an exaction for regulation only, and is not a tax within the exclusive power of the legislature.]; *Board of Overseers of Bar v. Lee, supra*, 422 A.2d 998, 1004 [A state bar rule imposing fees "is not a bill for imposing a tax or for raising a revenue. It imposes upon attorneys a registration fee .... [¶] ... When the exactions ... are imposed in the exercise of a police

power and as part of a program for the regulation of a particular business, occupation or profession, the levies are license fees and not taxes."]; *Sharood v. Hatfield* (1973) 296 Minn. 416 [210 N.W.2d 275, 277] [Money raised from "registration of attorneys to regulate the practice of law ... is not tax money. It is held in trust by the supreme court for the purposes for which it has been contributed by attorneys."]; ***597***Washington State Bar Ass'n v. State* (1995) 125 Wn.2d 901 [890 P.2d 1047, 1050] ["It is important to keep in mind ... that the Bar Association does not receive any appropriation from the Legislature or any other public body. It is funded entirely by mandatory membership licensing fees and various user fees ...."].)

Moreover, we previously have authorized the State Bar to assess various regulatory fees related to the practice of law, in the absence of any statute expressly permitting the imposition of such fees. (E.g., Cal. Rules of Court, rules 983(c) [applicants for permission to appear as counsel *pro hac vice* must pay a reasonable fee not exceeding $50 to the State Bar], 983.2(f) [the State Bar has the authority to set and collect appropriate fees and penalties for the certified law student program], 983.5(e) [the State Bar has the authority to set and collect appropriate fees and penalties for certifying legal specialists], 988(f) [the State Bar has the authority to set and collect appropriate fees and penalties for registering foreign legal consultants].) To our knowledge, this court's power to authorize the bar to impose and collect such fees has not been challenged on constitutional or other grounds.

License fees imposed by this court to fund an attorney disciplinary system would be imposed solely upon licensed attorneys, would not be imposed for general revenue purposes, would not become part of the state's General Fund, and would not be appropriated by the Legislature. Instead, they would be charged in connection with regulatory activities that do not exceed the reasonable cost of disciplining attorneys. Therefore, the imposition of such fees would not invade the Legislature's exclusive power over taxation and appropriation. [FN8] We agree with the unanimous view of the other state courts that have considered the issue that our inherent authority over the practice of law, including the discipline of attorneys, encompasses the power to assess membership fees to fund an attorney disciplinary system. The question whether this power includes the authority to impose fees to fund the existing *State Bar* disciplinary system is addressed below.

FN8 Nor does the imposition of a membership fee constitute the entry of a money judgment against an attorney, requiring individual notice and a hearing. As observed previously, we have held that attorneys constitutionally may be required to pay membership fees to fund the State Bar (*Carpenter v. The State Bar*, *supra*, 211 Cal. 358, 360), and individual notices and hearings never have been required since passage of the State Bar Act more than 70 years ago. The identity of the particular regulatory entity that is assessing otherwise valid fees does not alter their nature or require heightened procedural protections.

C. *This Court's Authority to Impose Fees to Fund the State Bar's Existing Disciplinary System*

The Governor and others contend that, despite our inherent authority over attorney discipline, we have no power to fund the existing disciplinary ***598** system within the structure of the State Bar, which was legislatively created and has been funded since its inception pursuant to legislative enactments regarding the amount of bar membership fees. They observe that the integrated bars of other states in which courts have assessed membership fees are subject to much less legislative control than California's State Bar, and they therefore contend that the out-of-state decisions cited above offer little, if any, support for the State Bar's position. We begin the analysis of this contention with a review of the historical background of the State Bar and the provisions regarding its status and relationship to this court, including our authority over its disciplinary functions.

(6) As explained previously, the State Bar originally was designated a public corporation by statute. (§ 6001.) In 1960, however, the electorate amended article VI of the California Constitution-the article in the California Constitution that concerns the judicial branch-to declare the State Bar a constitutional body. Article VI, section 9, states: "The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record." This amendment was part of a revision of article VI that,

among other things, designated the membership of the Commission on Judicial Qualifications (presently known as the Commission on Judicial Performance) and the Judicial Council. The ballot argument in favor of the proposed constitutional amendment stated: "Inasmuch as the measure provides that the State Bar shall appoint the four lawyer members of the Judicial Council and the two lawyer members of the Commission on Judicial Qualifications, both of which are created by the State Constitution, it is thought advisable to include a provision giving the State Bar, which is now a statutory entity, the status of a constitutional body too. The Legislature, however, will continue to have power to regulate the administration of the State Bar by statute as it now does." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 8, 1960), argument in favor of Sen. Const. Amend. No. 14, p. 15; see 1 Witkin, Cal. Procedure, *supra*, Attorneys, § 358, p. 442 [The 1960 amendment to the California Constitution gave the State Bar constitutional status.].)

In adopting the State Bar Act, the Legislature expressly recognized that this court retained all disciplinary authority the court had prior to the passage of the act. Thus, section 6087 provides in part: "Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of [the State Bar Act]." In 1988, the Legislature added the following paragraph to section 6087: "Notwithstanding any other provision ***599** of law, the Supreme Court may by rule authorize the State Bar to take any action otherwise reserved to the Supreme Court in any matter arising under this chapter or initiated by the Supreme Court; provided, that any action by the State Bar shall be reviewable by the Supreme Court pursuant to such rules as the Supreme Court may prescribe."

The State Bar Act contains other provisions confirming the reservation of our inherent authority over the practice of law. Thus, section 6075 provides: "In their relation to the provisions of [the State Bar Act], concerning the disciplinary authority of the courts, the provisions of this article provide a complete *alternative and cumulative* method of hearing and determining accusations against members of the State Bar." (Italics added; see *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224 [113 Cal.Rptr. 175, 520 P.2d 991] [State Bar's assistance in matters of admission and discipline of attorneys is a method that is alternative and cumulative to the inherent power of this court in such matters.].) Similarly, section 6100 provides in part: "Nothing in this article limits the inherent power of the Supreme Court to discipline, including to summarily disbar, any attorney." In addition, section 6076 conditions the State Bar's formulation and enforcement of rules of professional conduct upon the approval of this court.

The Legislature also made clear that the State Bar is not in the same class as those state agencies that have been placed within the executive branch: "No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in [Government Code sections pertaining to executive branch agencies and personnel, [FN9]] shall be applicable to the State Bar, unless the Legislature expressly so declares." (§ 6001.)

> FN9 "[P]rovisions contained in Division 3 (commencing with Section 11000), Division 4 (commencing with Section 16100), and Part 1 (commencing with Section 18000) and Part 2 (commencing with Section 18500) of Division 5, of Title 2 of the Government Code ...." (§ 6001.)

Thus, although the State Bar originally was purely a legislative creation, its unique nature has been recognized by the Legislature throughout the existence of the bar. The State Bar's special character further was emphasized when it became a constitutional body, placed within the judicial article of the California Constitution, and thus expressly acknowledged as an integral part of the judicial function. The roles of the Legislature and the State Bar, and the relationship of those entities to this court's role in disciplining attorneys, have been characterized consistently by this court.

" 'We have described the bar as "a public corporation created ... as an administrative arm of this court for the purpose of assisting in matters of ***600** admission and discipline of attorneys." [Citation.] In those two areas, the bar's role has consistently been articulated as that of an administrative assistant to or adjunct of this court, which nonetheless retains its inherent judicial authority to disbar or suspend attorneys. [Citations.]' (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557 [216 Cal.Rptr. 367, 702 P.2d 525]; see also

Keller v. State Bar of California[, *supra*,] 496 U.S. 1, [11-12] [110 L.Ed.2d 1, 13, 110 S.Ct. 2228].) Thus the judicial power in disciplinary matters remains with this court, and was not delegated to the State Bar." (*Lebbos v. State Bar, supra,* 53 Cal.3d 37, 47-48.)

"[The State Bar] is not an administrative board in the ordinary sense of the phrase. It is *sui generis*. In disciplinary matters (and in many of its other functions) it proceeds as an arm of this court. If the Legislature had not recognized this fact, and made provision therefor, the constitutionality of those portions of the State Bar Act which provide for the admission, discipline and disbarment of attorneys could have been seriously challenged on the ground of legislative infringement on the judicial prerogative. Historically, the courts, alone, have controlled admission, discipline and disbarment of persons entitled to practice before them [citations]. In adopting the statutory system now existing in California, the Legislature did not attempt to alter this basic concept.... [¶] It follows that in matters of discipline and disbarment, the State Bar is but an arm of this court, and that this court retains its power to control any such disciplinary proceeding at any step. [Citation.]" (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301 [19 Cal.Rptr. 153, 368 P.2d 697, 94 A.L.R.2d 1310].)

As the foregoing passage indicates, section 6087's express legislative recognition of reserved judicial power over admission and discipline is critical to the constitutionality of the State Bar Act. Soon after its passage, the act was challenged as an unconstitutional investment of the State Bar Board of Governors with judicial powers. Emphasizing provisions in the act permitting review by this court and reserving our power, as it existed before the act, to disbar or discipline attorneys, we upheld the statutory scheme: "[A]ny decision which the Board of Bar Governors may be empowered or minded to make in a proceeding pending before it is merely recommendatory in character and has no other or further finality in effecting the disbarment, suspension or discipline .... If the foregoing is to be held, as we clearly think it is, to express the full measure of the legislative intent in the formulation of said section, it follows necessarily that the Board of Bar Governors created under the provisions of the act have not thereby been invested with any powers which can be said to possess the finality and effect of judicial orders, and that in that respect, at least, the legislature in the passing of the act cannot be held to have in any degree violated the ***601** inhibition of [former] section 1 [now section 3] of article III of the state Constitution relative to the distribution of governmental powers." (*In re Shattuck* (1929) 208 Cal. 6, 12 [279 P. 998].)

Confronting a related issue a few months later in *Brydonjack v. State Bar* (1929) 208 Cal. 439 [281 P. 1018, 66 A.L.R. 1507], we considered whether the State Bar Act deprived this court of authority to admit an applicant over the contrary recommendation of the State Bar's Committee of Bar Examiners. While acknowledging the Legislature's power to place restrictions upon the practice of law, we observed: "[*T*]he legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions. This power has been described as follows: '... the mere procedure by which jurisdiction is to be exercised may be prescribed by the Legislature, unless, indeed, such regulations should be found to substantially impair the constitutional powers of the courts, or practically defeat their exercise.' [Citations.]" (*Id.* at p. 444, italics added.) The court in *Brydonjack* concluded that the statute investing the committee with the authority to fix and determine the qualifications for admission and to recommend admission of applicants who fulfill those requirements, did not confer any judicial powers upon the committee. We stated: "In all fairness to the legislative intent, said section under consideration does not in the least purport to give finality to any act of the board of bar examiners respecting admissions. The qualifications to be met are not fixed except with the consent of this court, which is but an indirect way of saying that in effect the qualifications for admission are fixed by the authority having power to make orders of admission. The making of orders of admission is, as already observed, clearly a judicial act of this court.... [¶] *Our conclusion, then, is that the legislature in its wisdom has placed at the disposal of this court a competent and effective body to aid it in the important function of admissions to the bar....* [T]he power in this court is plenary to admit those who have in our opinion met the prescribed test, whether the investigators do or do not agree with this conclusion." (*Id.* at pp. 445-446, italics added.)

(1f) The premise of the argument that our imposition of a fee upon attorneys to fund the State Bar's existing disciplinary system would violate the separation of powers doctrine is that the State Bar is a legislatively created entity that may be funded solely

by the Legislature. As we have seen, however, the State Bar is a *constitutional* entity subject to our expressly reserved power over admission and discipline. The State Bar Act did not delegate to the State Bar, the Legislature, the executive branch, or any other entity our inherent judicial authority over the discipline of attorneys. Because that inherent authority includes the power to require attorneys to pay ***602** fees in support of a disciplinary system, we would not be exercising an exclusive legislative function or usurping any legislative power by imposing such fees and utilizing the State Bar's existing disciplinary structure to process disciplinary matters.

(7) The circumstance that the Legislature historically has set the amount of dues paid by attorneys to fund the State Bar's disciplinary system (e.g., § § 6140, 6140.1, 6140.3, 6140.4, 6140.6, 6140.9) does not alter our conclusion that we have independent authority to impose such fees. We long have recognized the Legislature's authority to adopt measures regarding the practice of law. "[T]he power of the legislature to impose reasonable regulations upon the practice of the law has been recognized in this state almost from the inception of statehood." (*Brydonjack v. State Bar*, *supra*, 208 Cal. 439, 443.) "[T]his court has respected the exercise by the Legislature, under the police power, of 'a reasonable degree of regulation and control over the profession and practice of law ...' in this state. [Citations.] This pragmatic approach is grounded in this court's recognition that the separation of powers principle does not command 'a hermetic sealing off of the three branches of Government from one another.' [Citation.]" (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d 329, 337-338, fn. omitted; see also *Santa Clara County Counsel Attys. Assn. v. Woodside*, *supra*, 7 Cal.4th 525, 543 ["In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation."].)

Such legislative regulation of matters related to the admission and discipline of attorneys is neither exclusive nor final, however. "[L]egislative regulations [regarding the qualifications of attorneys] are, at best, but minimum standards unless the courts themselves are satisfied that such qualifications as are prescribed by legislative enactment are sufficient.... *In other words, the courts in the exercise of their inherent power may demand more than the legislature has required.* [Citations.]" (*In re Lavine* (1935) 2 Cal.2d 324, 328, italics added.) Moreover, "[w]e deem it established without serious challenge that legislative enactments relating to admission to practice law are valid only to the extent they do not conflict with rules for admission adopted or approved by the judiciary. When conflict exists, the legislative enactment must give way." (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 728-729 [147 Cal.Rptr. 631, 581 P.2d 636].) "We are not authorized, of course, to reject in the usual course of our judicial function a legislative enactment merely because we deem it serves no desirable purpose. But when the matter at issue involves minimum standards for engaging in the practice of law, *it is this court and not the Legislature which is* [*the*] *final policy maker.*" (*Id.* at p. 731, italics added.)

"This court must ... heed its primary policy-making role and its responsibility in matters concerning the practice of law. [Citation.] In this regard, ***603** the most authoritative study done to date on disciplinary structures and procedures concluded that it is not sound policy to fragment the authority to discipline lawyers. [¶] ... [¶] ... [T]he ' "ideal" disciplinary structure' is one in which 'exclusive disciplinary jurisdiction' is vested in ' the state's highest court,' with a single, specialized disciplinary agency responsible for the preliminary investigation, hearing, and determination of complaints." (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d 329, 340-341, quoting ABA, Problems & Recommendations in Disciplinary Enforcement (Final Draft 1970) pp. xiv-xv.)

Although we consistently have recognized and valued the role of legislative regulation of the practice of law and appropriately deferred to the Legislature's judgment on many subjects, on rare occasions we have invalidated legislative enactments that materially impaired our inherent power over admission and discipline. Thus, in *Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d 329, 339-341, we held that the Legislature overreached its authority when it permitted the Workers' Compensation Appeals Board to discipline an attorney by prohibiting him or her from practicing before that board, thus undermining our unlimited, original jurisdiction over disciplinary proceedings. Similarly, in *Merco Constr. Engineers, Inc. v. Municipal Court*, *supra*, 21 Cal.3d 724, 727-733, we determined that the Legislature encroached upon our authority over admission to the practice of law, and thereby violated the separation of powers doctrine, when it provided that a corporation could appear in a

civil action through a corporate officer who is not an attorney. (See also *In re Lavine*, *supra*, 2 Cal.2d 324, 329 [invalidating a statute requiring readmission of attorneys who were pardoned after disbarment for felony convictions]; cf. *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 60-61 [51 Cal.Rptr.2d 837, 913 P.2d 1046] [upholding facial validity of a statutory designation of one or more unpaid furlough days on which trial courts shall not be in session, because the statute would not *necessarily* defeat or materially impair a court's fulfillment of its constitutional duties].)

Therefore, our traditional respect for legislative regulation of the practice of law, based upon principles of comity and pragmatism, is not to be viewed as an abdication of our inherent responsibility and authority over the core functions of admission and discipline of attorneys. As another state's highest court has observed: "The claim of inherent judicial power is no novelty. There are many cases in which it has been invoked over the membership of the bar. It has been invoked in the admission, suspension, discipline and disbarment of attorneys and in these no legislative permission is considered requisite, and, *if a statute exists, it is regarded as declaratory of the inherent power of the judiciary and not exclusive in its provisions.*" (***604***In re Integration of Nebraska State Bar Ass'n* (1937) 133 Neb. 283 [275 N.W. 265, 267, 114 A.L.R. 151], italics added; accord, *People v. Goodman* (1937) 366 Ill. 346 [8 N.E.2d 941, 944, 111 A.L.R. 1] ["The power to regulate and define the practice of law is a prerogative of the judicial department .... The legislative department may pass acts declaring the unauthorized practice of law illegal and punishable. Such statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law."]; *People v. Culkin* (1928) 248 N.Y. 465 [162 N.E. 487, 492, 60 A.L.R. 851] [state constitutional and statutory provisions authorizing the court to regulate attorneys were "declaratory of a jurisdiction that would have been implied, if not expressed"]; *Banales v. Jackson*, *supra*, 601 S.W.2d 508, 511 ["The original act creating the integrated bar was simply legislative recognition of the inherent power of the judicial department to regulate the practice of law."]; *Washington State Bar Ass'n v. State*, *supra*, 890 P.2d 1047, 1051 [" '[T]he state has a substantial interest in maintaining a competent bar, and the legislature, under the police power, may act to protect the public interest, but in so doing, it acts in aid of the judiciary and does not supersede or detract from the power of the courts.' " (Italics omitted.)]; [FN10] *West Virginia State Bar v. Earley* (1959) 144 W.Va. 504 [109 S.E.2d 420, 438] ["A statute which provides that the supreme court shall, by general or special rules, regulate admission of attorneys to practice in state courts is declaratory of power inherent in the supreme court to supervise, regulate and control generally the practice of law."].)

FN10 (Quoting 7 Am.Jur.2d (1980) Attorneys at Law, § 2, pp. 55-56; see 7 Am.Jur.2d (2d ed. 1997) Attorneys at Law, § 2, pp. 66-67.)

Decisions in other states have considered the inherent power of the courts to impose fees notwithstanding legislative enactments specifying the amount of dues paid by attorneys to fund a disciplinary system. For example, the Mississippi State Bar petitioned that state's highest court seeking, among other things, imposition of a special annual assessment upon each member of the bar "for purposes of financing the disciplinary activities and agencies" described in the statutes creating the bar's various entities responsible for discipline of attorneys. (*Matter of Mississippi State Bar* (Miss. 1978) 361 So.2d 503, 504.) The court observed that it has exclusive and inherent disciplinary jurisdiction over attorneys in the state, and that the legislature had established various agencies for purposes of assisting the court in the administration of its disciplinary jurisdiction. It further noted that the bar's governing board, although created by statute, "is an agency of [the] Court for disciplinary purposes, and when it acts within that agency, it acts for [the] Court in a function separate and distinct from that of the governing body of the Bar." (*Id.* at p. 505.) Because of an increasing number of complaints against attorneys and rising costs, the board could not discharge its disciplinary functions "on the funds made available by the collection of dues ***605** without grave and imminent danger to both the discharge of that disciplinary agency and the other good and proper duties and functions of the Bar which the dues were also intended to support." (*Id.* at p. 506.) In deciding to grant the bar's petition, the court explained its reasoning as follows: "This Court's duty to protect itself, the judiciary, and the citizens of this State from persons unfit to practice law [citation] should not be hampered by the absence of adequate financing to do the job, and the ability to secure such financing should not be dependent upon the will of a department or entity other than the entity

upon which the ultimate burden rests, namely, this Court. [¶] ... It is the duty of this Court to assure such financing so its agencies can properly and meaningfully discharge the 'jurisdiction and lawful powers as are necessary to conduct a proper and speedy disposition of any complaint' ... [citation]." (*Ibid.*) The court permitted the bar to impose a special annual assessment of $25, in addition to the dues set by statute, upon all dues-paying attorneys. (*Ibid.*; see also *Banales v. Jackson, supra*, 601 S.W.2d 508, 512 ["[W]hen a provision of the State Bar Act conflicts with orders of the Supreme Court regarding attorney conduct *as to fees or other related matters*, the statutory provisions must yield to the Court's rules ...." (Italics added.)].)

The Governor acknowledges the Mississippi Supreme Court's action in the case described above, but he dismisses the opinion as an "aberration" that did not analyze whether that court could exercise its inherent power in the face of existing legislation on the subject. We disagree with this characterization of the decision. Although the opinion does not engage in a lengthy discussion of the separation of powers doctrine, it acknowledges the doctrine, recognizes the legislative scheme, relies upon its well-established inherent powers, and concludes that the court's duty to protect the judiciary and the public from persons unfit to practice law should not be hampered by the will of other branches of government. The Mississippi court's analysis and conclusion are consistent with the unanimous view of courts throughout the nation, including this court, that the inherent power over discipline of attorneys rests in the judiciary, and that legislative action (or inaction) may not defeat that power. To the extent the opinion holds that a state's highest court may assess fees upon attorneys to ensure the existence of a functioning disciplinary system that was created by statute, we find the Mississippi decision instructive.

(1g) Opponents of the State Bar's request argue that this court's imposition of additional fees upon attorneys for the purpose of attorney discipline would violate the separation of powers doctrine because such action would substitute our own policy decision for that of the Legislature, thereby constituting a legislative enactment, amendment, or repeal. They rely, for ***606** example, upon decisions holding that a court may reform a statute to preserve its constitutionality only if "doing so closely effectuates policy judgments clearly articulated by the enacting body, and ... the enacting body would have preferred such a reformed version of the statute over the invalid and unenforceable statute" (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 626 [47 Cal.Rptr.2d 108, 905 P.2d 1248] (lead opn.)), and that "the Courts have no means, and no power, to avoid the effects of [legislative] *non-action*[;] ... [t]herefore, when the Legislature fails to make an appropriation, [the courts] cannot remedy that evil" (*Myers v. English, supra*, 9 Cal. 341, 349).

Such decisions are inapposite. As we have explained, statutes specifying the amount of bar dues designated for the State Bar's disciplinary system are declaratory of and in aid of this court's inherent authority to assess independently such dues. In exercising our disciplinary powers over attorneys, we "may demand more than the legislature has required" in its regulation of the same area. (*In re Lavine, supra*, 2 Cal.2d 324, 328.)

Furthermore, nothing in the existing statutory provisions suggests that the Legislature intended to preclude this court from acting in this realm. Although a variety of statutes authorize the State Bar to impose fees upon its members, no statute purports to preclude this court from imposing fees upon attorneys if we conclude that such funds are required to maintain an adequate attorney disciplinary system. [FN11] As in *In re Shattuck, supra*, 208 Cal. 6, and *Brydonjack v. State Bar, supra*, 208 Cal. 439, there is no reason to interpret the existing statutes in a manner that would raise serious constitutional questions. Of course, we traditionally have deferred to the Legislature's determination of the precise amount of fees necessary to fund an effective disciplinary process. Where the Legislature has not made that determination or assessed such fees, however, we appropriately may decide to take action to avert a shutdown of the disciplinary system.

FN11 At present, the bar is authorized by statute to collect $27 per year from each attorney to fund a disciplinary system. (§ § 6140.6, 6140.9.) These statutes, however, expressly indicate that the $27 fee was intended to be imposed *in addition to* the basic annual membership fee ordinarily authorized by section 6140. There is no indication the Legislature contemplated that the supplemental $27 fee, by itself, would be sufficient to fund an effective disciplinary system.

Finally, contrary to the suggestion of the Governor and others responding to the State Bar's request, we believe there is nothing in the general separation of powers principle of comity that suggests that this court should establish its own, separate disciplinary system rather than utilize the disciplinary structure and mechanisms already in place in the State Bar. The statutes underlying the State Bar's disciplinary process have not been repealed, but continue to exist and to impose obligations upon the State Bar ***607** with regard to the investigation and prosecution of disciplinary complaints filed against members of the bar. The Governor does not suggest that this court has no authority to make use of the existing statutory State Bar structure. Thus, he argues we could redirect funding that is collected pursuant to existing statutes, and that we could use other State Bar resources pursuant to section 6008, which declares all property of the State Bar "to be held for essential public and governmental purposes in the judicial branch of the government." Similarly, other commentators who recommend placing the disciplinary structure under the control of this court or the Administrative Office of the Courts do not argue that the entire existing statutory framework would be of no force and effect. It is difficult to understand why it would be more respectful of the Legislature for this court to establish its own distinct disciplinary structure than to utilize, with appropriate oversight, the existing statutorily created disciplinary structure of the State Bar. [FN12]

> FN12 We observe that at the hearing of this matter, the Governor's legal affairs secretary modified the position set forth in the Governor's brief, and stated that it would be appropriate for this court to appoint a special master to determine which of the State Bar's disciplinary functions should be funded, and the extent of such funding.

In sum, we determine that the State Bar is not an entity created solely by the Legislature or within the Legislature's exclusive control, but rather is a constitutional entity subject to this court's expressly reserved, primary, inherent authority over admission and discipline. The State Bar Act did not divest this court of any of its preexisting powers related to discipline, including the power to create and fund a disciplinary system through the assessment of fees upon attorneys. Statutes providing for the assessment of dues to fund a disciplinary system are not exclusive-but are supplementary to, and in aid of, our inherent authority in this area.

Accordingly, we conclude that our inherent constitutional authority over attorney discipline includes the power to assess fees upon attorneys to fund the State Bar's existing discipline system. We note that this same conclusion also has been reached in submissions filed in this matter by the Attorney General, the chair of the Senate Committee on Judiciary, the American Bar Association, the California Association of Local Bars, as well as individual local bar associations and specialty bar associations representing approximately 100,000 California attorneys. This court has the power as well as the responsibility to ensure that the public, the courts, and the legal profession are protected by an adequate, functioning attorney disciplinary system.

III

(8a) Having determined that this court has the authority to impose a regulatory fee on attorneys to support an attorney disciplinary system, we ***608** must further consider whether this court should act at this time, and, if so, in what manner.

In deciding whether the court should take action now, several factors are relevant. First and foremost is the public impact of the absence of an effective disciplinary system. Many of the submissions that the court has received, as well as numerous recent editorials and articles, have emphasized the potential dangers to the public, the legal profession, and the courts. [FN13] Both the Governor and the State Bar agreed in their written and oral submissions that there is a significant risk to the public as the result of an inadequately funded disciplinary system. Their argument has not been about whether the public deserves protection, but about what form that protection should take.

> FN13 Several speakers at the November 9th hearing emphasized the increasing difficulties and frustrations encountered by clients and other consumers who have nowhere to turn to bring complaints against attorneys as a result of the virtual closure of the State Bar's disciplinary system. For example, Mr. de la Vergne, from the Sacramento Bar Association, described increased complaints, and the inability of his organization to respond, due to inadequate resources and limited jurisdiction. A letter

submitted by President Philip S. Anderson of the American Bar Association observed that its Center for Professional Responsibility had "received numerous inquiries" from individuals in California seeking guidance on possible recourse now that there was no functioning discipline system. State Bar President Raymond C. Marshall, and Attorney Jerome B. Falk, Jr., representing numerous local and specialty bars, also commented on the increasing impact of the funding impasse on the public. Professor Sims stressed that delay in answering complaints magnifies their gravity from the perspective of a complainant.

A. *Need for an Attorney Discipline System*
1. *Public protection*

(9) Some of those submitting comments have suggested that there is no real need for a discipline system, and, instead, that attorney misconduct should be dealt with exclusively through criminal complaints and civil law suits brought by injured clients. [FN14] That would place attorneys in a unique position: every other licensed profession in the state of which we are aware is regulated by a board that has the power to suspend or revoke the license of an errant practitioner-and practitioners pay a fee for licensure. Moreover, many complaints that properly lead to discipline are not necessarily susceptible to relief through a court action. The amount of money involved may not be sufficient to justify the considerable expense of litigation. The conduct at ***609** issue may be ripe for discipline only after it has been repeated. The criminal violation involved may be one that most district attorneys do not have the resources to pursue (as is evidenced by the fact that many violations of the professional rules of conduct that potentially might be pursued as criminal matters presently are left to the disciplinary system). More generally, the objective of the discipline system is not punishment of the attorney, but protection of the public. [FN15] "The basic purpose [of disciplinary proceedings] is to protect the public and the profession from the objectionable activities of persons unfit to practice law, and a disciplinary proceeding is not a criminal action. [Citations.]" (1 Witkin, Cal. Procedure, *supra*, Attorneys, § 623, p. 737.) Finally, an added consequence of encouraging litigation would be to impose an additional burden on the courts.

FN14 See comments submitted by Fred J. Hiestand on behalf of Senators Ray Haynes and Ken Maddy, Assemblymembers Dick Ackerman and Bill Morrow, former state Senator Barry Keene, and San Diego City Councilman J. Bruce Henderson. Senator Ross Johnson has joined in Mr. Hiestand's comments, and Attorneys Branford Henschel and Ronald Silverton have submitted similar suggestions.

FN15 As Michael J. Oths, President of the National Organization of Bar Counsel, observed in his oral presentation to the court, standards governing professional conduct and responsibility are set forth in a code separate from the criminal and general civil codes.

Civil and criminal court actions also would not protect future clients adequately from potentially damaging conduct by attorneys. Many attorneys who are disciplined do not have the funds to pay judgments against them (which is why the Legislature created the Client Security Fund). Thus, leaving civil proceedings as the only recourse against such attorneys not only would not result in recovery for the injured client, but also would not protect future clients from harm. Licensing serves a separate function from enforcement through court action. Licensing ensures that only those qualified to practice a profession are entitled to serve the public. If litigation alone were sufficient to protect the public from harm, and the free market capable of taking care of those who are not qualified or who engage in malpractice, the need for an effective licensing system for any profession would be undercut. [FN16] To the contrary, however, the inadequacy of this remedy for regulating not only attorneys, but many other professionals and practitioners, has been made patently clear by the consistent and widespread reliance our society places on licensing systems to provide public protection and enforce a basic standard of conduct for those providing a host of services. We find it highly significant that no other jurisdiction relies solely upon legal malpractice actions and criminal prosecutions to protect the public from lawyers who commit misconduct, and there was no suggestion during the legislative process to eliminate the attorney disciplinary system entirely.

In fact, the disciplinary system itself was not the focus of criticism by those who sought to reform the bar's structure or governance.

> FN16 Thus, were we to conclude that a discipline system is unnecessary for the reasons asserted, doubt would be cast upon the necessity of admitting individuals to practice before the courts. Indeed, the same would be true for any profession: anyone asserting expertise could offer services.

Society has found that the regulation of various professionsthrough licensing is an essential companion to the relief available through civil and ***610** criminal litigation. One needs only to consider the implications of a system under which the oversight of physicians or building contractors were left solely to negligence, medical malpractice, and criminal complaints, in order to appreciate the complementary and important role played by a licensing and related disciplinary system. As we have discussed, the role of the courts in regulating attorney conduct recognizes the role of attorneys as officers of the court. We conclude that leaving the regulation of attorney misconduct solely to the civil and criminal litigation system would not be sufficient to protect the public or to discharge our responsibilities in this regard.

(8b) At the present time, because there is no functioning disciplinary system capable of investigating and adjudicating attorney misconduct, attorneys deserving of discipline are left to continue their practice and to harm additional clients. At the same time, unfounded complaints cannot be disposed of in timely fashion. Aggrieved individuals with claims unsuitable for litigation are unable to obtain relief. Even if errant attorneys eventually will be dealt with through whatever disciplinary system emerges through legislative action in the future, the number of clients who may be injured will increase the longer the delay. The profession, clients, and the courts all suffer when the practices of unscrupulous attorneys distort outcomes, create difficulties and expense for opposing counsel and litigants, and generally raise the level of distrust within and about the legal profession. Every attorney suffers if the public believes that errant attorneys will not be subjected to appropriate discipline and can practice unchecked and unregulated.

In recent years, there has been a great deal of discussion about professionalism and the practice of law. An unregulated profession soon may lose its right to call itself a profession, as public doubts about the fairness of the practice of law and of the courts increase. The courts suffer not only as such doubts in the integrity of the profession and the legal system grow, but suffer also because the courts rightfully may be considered responsible when they fail to act to protect the public despite their authority to do so. Thus, the interests of the public, the legal system, and the courts all benefit from the existence of a functioning and effective attorney disciplinary system.

2. Impact on the court's oversight of attorney discipline

This court has an additional direct interest in the existence of a strong disciplinary system. Our active role in overseeing the attorney disciplinary system has been continuous and, in years past, required a considerable portion of our resources. Since the implementation of reforms affecting the State Bar disciplinary process in the late 1980's, however, this court has ***611** been able to reduce considerably its resources devoted to overseeing the process, and instead has relied upon the professionalism and consistency generated by the revised process, particularly that achieved by the newly created State Bar Court. This court's continued ability to place substantial reliance on a reliable and professional administrative arm with regard to attorney discipline serves the public's interest by enabling the court to dedicate more of its finite resources to deciding issues of statewide importance in all areas of the law.

From the enactment of the State Bar Act in 1927, this court has made use of the assistance afforded by the State Bar to enable it more effectively to process disciplinary matters-and to handle its additional workload as well. In *In re Walker* (1948) 32 Cal.2d 488 [196 P.2d 882], we acknowledged that "this court obviously has the same powers which it previously possessed independently to entertain disciplinary proceedings despite possible duplication between such proceedings and others instituted before [t]he State Bar." (*Id.* at p. 490.) Nevertheless, relying on the existence of the bar's disciplinary system, we 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." (*Ibid.*)

For most of the bar's history, its disciplinary system was operated primarily with the assistance of volunteers from local bar associations, although some professional and permanent staff were retained by the State Bar. By the mid- 1980's, a substantial backlog of complaints against attorneys had developed, and a series of newspaper articles revealed major inadequacies in the existing disciplinary system. In 1986, the Legislature appointed a special State Bar Discipline Monitor, Robert C. Fellmeth, to report on the bar's backlog and recommend solutions. Discussions between Mr. Fellmeth, the State Bar, and the Legislature resulted in the eventual adoption of Senate Bill No. 1498 during the 1987-1988 legislative session. By that time, the backlog of cases pending before the bar had been reduced from nearly 4,000 to approximately 1,500, [FN17] and analysis of the pending legislation contained in various reports on the bill suggests that lack of resources threatened this ***612** progress and the ability of the State Bar to sustain its level of functioning. (See, e.g., Sen., 3d reading analysis of Sen. Bill No. 1498 (1987-1988 Reg. Sess.) as amended Aug. 1, 1988, p. 4.) The bill provided for the creation of the State Bar Court, increased the reporting requirements of courts and insurers regarding misconduct by attorneys, created a process for involuntary inactive enrollment of attorneys, and made numerous additional revisions to disciplinary and other related statutes.

FN17 In his brief, Anthony T. Caso of the Pacific Legal Foundation on behalf of Raymond Brosterhous asserted that the public is better protected today than it was in 1986, and further suggested at oral argument that this is because the backlog of complaints that is now growing includes complaints of varying degrees of merit, while the backlog in 1986 included more serious matters that already had been subject to some investigation and evaluation. We do not, of course, know the composition of the present backlog, but it is not unreasonable to assume that because complainants must make extra efforts to file a written complaint and submit it to the bar, in fact the present backlog contains a larger percentage of serious allegations than the mix of complaints normally processed by the bar discipline system.

In order to ensure consistency and the orderly development of the law relating to discipline of attorneys, this court kept careful control of attorney discipline through a comprehensive internal review process. Each discipline recommendation was reviewed, whether or not a petition was filed, to determine the appropriateness of the disciplinary sanction recommended to the court by the bar. If a petition was filed by the attorney, the court routinely granted review and issued a written opinion following briefing and oral argument. The court also on its own motion would grant review in matters in which no petition had been filed if it appeared that the bar's recommendation required closer consideration.

As the State Bar's disciplinary system resolved more complaints, the number of Supreme Court opinions on State Bar disciplinary proceedings increased. Between 1980 and 1987, the court issued opinions in between 7 and 20 State Bar matters each year, and averaged 13 cases per year. In 1988, the number climbed to 29, and in the next 2 years rose to 48 and 43. In 1992, however, the number dropped to 22, as a direct result of the establishment of the State Bar Court. For three years thereafter, until 1994, the court's opinion count included no State Bar matters.

The creation of the State Bar Court was accompanied by the adoption of a rule of finality, rule 954 of the California Rules of Court, that changed the court's practice of granting review of every petition filed by an attorney against whom sanctions had been recommended. Instead, subdivision (a) of the rule provides that review will be granted "when it appears (1) necessary to settle important questions of law; (2) the State Bar Court has acted without or in excess of jurisdiction; (3) petitioner did not receive a fair hearing; (4) the decision is not supported by the weight of the evidence; or (5) the recommended discipline is not appropriate in light of the record as a whole." Denial of review constitutes a final judicial determination "on the merits," and the recommendation of the State Bar Court is filed by this court as its order. (*Id.*, subd. (b).) Thus, the creation of the State Bar Court and the adoption of rule 954 signaled an extension of the court's reliance on the State Bar process as originally announced in *In re Walker, supra*, 32 Cal.2d 488. The existence of an increasingly reliable State Bar disciplinary system ***613** has been an important factor in this court's ability to handle an ever-burgeoning workload. [FN18] The continuing severe disruption or diminution of this system will have a

concomitantly deleterious impact on the court.

FN18 All this has occurred against a backdrop of a rapidly increasing number of practicing attorneys. In 1970, 33,788 attorneys were licensed to practice in California. Over the ensuing decades, the numbers rose to 68,538 in 1980, 108,531 in 1990, and 130,659 today. In short, the population governed by the attorney discipline system has almost quadrupled over the past three decades-at the same time the number of petitions for review in non-attorney-discipline matters in this court has more than doubled.

B. *Need for Court Action at This Time*

As we have concluded, the court has the authority to impose a fee upon attorneys in order to fund a disciplinary system. The need for public protection and the mounting backlog of cases certainly weigh in favor of taking some action to provide relief. Nevertheless, some of those submitting comments to the court have urged us to await forthcoming legislative action even if we are authorized to proceed at this time. For example, the Governor argued in his written submissions that respect for our sister branches would militate against the exercise of our authority at this time. He urged us to defer until the newly elected Governor and Legislature are in place, and to permit the Legislature to provide appropriate restrictions on the use of any moneys provided to the bar. [FN19]

FN19 As mentioned previously, at the hearing on this matter the Governor's legal affairs secretary expressed the view that this court's appointment of a special master would be consistent with the Governor's position if the special master were charged with determining which discipline-related functions should be funded, and the extent to which they should be funded with money from the court's assessment of a special fee on attorneys.

At present, the Legislature is in recess and will reconvene, with its newly elected members, in early December. Typically, during its initial brief organizational session at that time, the Legislature does not deal with substantive issues. Governor Wilson could call a special session (see Cal. Const., art. IV, § 3, subd. (b)), but at the hearing, counsel for the Governor confirmed that it is extremely unlikely that he would do so, and that he instead would defer to the next Governor. Moreover, given the timing of the start of the legislative session, and the swearing-in of the new Governor in early January, it is difficult to ascertain which entities could craft a compromise that would be enacted before January 1999.

It has been suggested by some that the court wait to take action until after the Legislature reconvenes for business in January and the new Governor has been sworn in. Deferring action pending the reconvening of the Legislature and the new Governor's assumption of office might appear superficially similar to the action taken by the court in 1986 when, following adjournment ***614** of the Legislature without adoption of a dues bill, the State Bar requested that this court assess fees upon attorneys for 1987 in the same amount as imposed by statute for 1986. The current situation, however, is significantly distinct.

The first critical difference is that an entire year now has passed without a fee bill being in effect. In 1986, the court's deferral occurred at the end of a year in which fees already had been collected, and no layoffs or other restrictions on the bar's ability to perform its disciplinary and other responsibilities had occurred. Second, in 1986 the State Bar sought the full amount of dues previously imposed; in contrast, the amount now requested is only that necessary to support the basic disciplinary functions of the bar.

Furthermore, deferral would delay for substantial additional time-at a minimum one month, but likely far longer-the start of any restoration of a disciplinary system in the state. Should the Legislature and the Governor decide to establish a totally new system or to make major adjustments in the existing but largely nonfunctional one, the start-up time before the system would be able to handle complaints expeditiously will increase. Additional uncertainty and delays will mean further dispersal of the State Bar's disciplinary staff and additional difficulties in assembling a staff of employees capable of performing the necessary functions. The backlog of complaints will continue to grow, making it more difficult for the disciplinary system once in operation to handle the task of processing the backlog, to start up a complex organization, and to respond successfully to new complaints. According to its

request filed on September 30, 1998, the layoffs in June 1998 resulting from the lack of a fee bill reduced the staff of the Office of the Chief Trial Counsel, which receives, investigates, and prosecutes disciplinary complaints, from 283 to 20 employees. Work was suspended on 4,459 open investigations. The bar closed its consumer complaint hotline, but, at this court's request, informed potential complainants that they could submit a written complaint that would be processed once the bar was able to process them. As of September 30, the bar had received 2,097 new written complaints. As the bar notes, this total of more than 6,000 pending complaints exceeds the 1985 backlog that generated widespread criticism. The State Bar Court similarly dismissed most of its employees and has suspended proceedings in all but a few pending or egregious matters. The State Bar judges, who are appointed by this court, have been working for less than full salary. Protection of the public would continue to suffer as further delays in processing matters might well surpass the time frames that led to the public outcry in the 1980's.

Nor do we believe, as some have suggested, that action by the court at the present time will "take the pressure off" the other two branches to find a ***615** solution. Our action-imposing a fee on attorneys to be used solely for the attorney discipline system-will not affect most of the critical issues that were the points of contention among the parties in Sacramento, including the State Bar's governance, the permissible scope of its lobbying activity, the role of the State Bar Conference of Delegates, or other functions of the bar beyond discipline. Moreover, as discussed below, the $171.44 figure requested, when added to the additional $77 available after January 1, 1999, under existing statutes, amounts to far less than the fee amounts that would have been imposed under any of the alternative proposals advanced during the legislative session. Thus, even with respect to discipline, the State Bar is likely to seek additional funding from the Legislature, and the bar's president confirmed this intention during his oral presentation. Accordingly, all of the issues concerning the future of the State Bar will remain to be resolved in Sacramento regardless of what action this court takes in the present proceeding.

In addition, although some new participants will be involved in Sacramento, recent history suggests that the outstanding questions concerning the bar's operations may not readily be susceptible to quick resolution. This court already demonstrated its deference to the legislative and executive branches by its action in June of this year, when it specifically declined to intervene while a legislative solution actively was being pursued. No such compromise or solution has been reached, however, and if the court were to continue to decline to act now, in the face of the continued and increasing risk to the public, it reasonably could be viewed as shirking its primary constitutional responsibility over attorney discipline.

Even if a bill is enacted soon after January 1, 1999, it may well not take effect until January 1, 2000, pursuant to article IV, section 8, subdivision (c)(1) of the California Constitution. Only an urgency statute, requiring a two-thirds vote, would take effect immediately upon enactment. (*Id.*, art. IV, § 8, subd. (c)(3).) Although it is possible that the Legislature and the Governor will arrive at a solution that will garner the necessary two-thirds vote, there is no guarantee of success in the near future, and it is equally likely that any compromise will receive no more than a simple majority vote.

As we have explained, the court has inherent authority and ultimate responsibility in this area. Our action in the face of an existing impasse of this magnitude would be neither improperly intrusive nor unprecedented. (Cf. *Wilson v. Eu* (1991) 54 Cal.3d 471, 473 [286 Cal.Rptr. 280, 816 P.2d 1306] [Reapportionment primarily is a matter for the legislative branch, and we urged the Legislature and the Governor to exercise their shared powers to enact a reapportionment plan. "But because the impasse may continue ***616** indefinitely, because ' "it is our duty to insure the electorate equal protection of the laws" [citation]' [citation], and because California is entitled to seven additional congressional seats based on the 1990 census, we must proceed forthwith to draft such plans."].) Given the public interests that are at grave risk, the now long-standing deadlock that has devastated the ability of the existing system to function, and the court's inherent power and authority in this area, we find that it is reasonable and necessary to discharge our primary responsibilities in this area. At the same time, we also shall seek to use the least intrusive means possible in effectuating our goals. [FN20]

FN20 Senator Kopp and Professor Barnett have urged the court to place the supervision of the attorney disciplinary system under the aegis of the Administrative Office of the Courts (the AOC). They apparently assume that the AOC is an administrative arm of the

Supreme Court, when in fact it is the staff arm of the Judicial Council and not part of this court. Although the AOC provides services to this court (as well as to all other courts in the state), it acts pursuant to its constitutional and statutory authority in service to the Judicial Council.
Any action taken by the court under the present circumstances should not be viewed as an indication that the court favors transfer of the disciplinary system (whether the State Bar Court alone, or the entire structure) to the supervision of the court, either directly or through the AOC.

C. *Should the Court Use the Existing State Bar Disciplinary System or Resources?*

In his written response, the Governor asserted that imposition of a fee by this court to fund the State Bar in effect would supplant the Legislature's determination not to provide additional fees for a legislatively established entity, violate the separation of powers, and upset the traditional deference this court has shown to the Legislature concerning the setting of fees. He urged instead that the court essentially create an entirely new disciplinary system directly under our control. Others similarly argue that the Legislature made a determination not to impose fees and that any action by the court- particularly one that makes use of the existing bar disciplinary structure- would amount to overruling that determination. We note first the impracticality and inefficiency of this court's creating a disciplinary system from whole cloth-especially as an interim solution. The Governor and others implicitly seem to recognize this difficulty when they also urge that the court use existing bar resources and special funds to support the discipline system. [FN21]

FN21 For example, Senator Kopp and Professor Barnett suggested that the court could use the State Bar's real property to support disciplinary functions. The Governor also argued that we could use money appropriated to Supreme Court operations to support the disciplinary system.

Their argument that we should use the *resources* of the bar but cannot use its *structure* seems inconsistent with the arguments of these proponents *617 concerning the appropriate demarcation of authority between the court and the Legislature. In our view, it would be far more intrusive for the court to exert authority over resources that the bar has available to it under previous legislative authorization that dedicates these resources to purposes other than discipline, than to impose additional fees to support the existing disciplinary system. For example, as noted earlier, only $27 of the $77 currently collected for dues may be used for discipline under the existing statutory scheme. The other $50 is collected by the bar, pursuant to statute, for express purposes other than discipline. [FN22] Tampering with the existing resources collected and allocated to the bar pursuant to valid existing legislation, particularly funds designated for uses other than discipline, would not be deferential to the Legislature's traditional and continuing role in this area.

FN22 At oral argument, Raymond C. Marshall, President of the State Bar, explained that money from the sale of the State Bar's property in San Francisco was earmarked by the Legislature for the bar's Building Fund, and any money arising out of the sale, loan, or interest relating to the building is so restricted. Generally, he observed, the Legislature has earmarked certain funds for restricted purposes, and the use of these funds is restricted to those uses, unless a surplus exists. (See, e.g., §§ 6140.3 [specified additional fee amount "may be used only for" transactions relating to facilities], 6140.5 [Client Security Fund], 6140.9 [$2 fee to be used first for discipline monitor and, after expiration of the contract term, applied to support discipline].)

The Governor's written submission also refers to section 6008, which states that "All property of the State Bar is hereby declared to be held for essential public and governmental purposes in the judicial branch of the government and such property is exempt from all [state or local] taxes," and suggests that this statute would authorize the court to determine how existing funds should be allocated. The contemporaneous reports in the Journal of the State Bar regarding the purpose of Senate Bill No. 201 (1957 Reg. Sess.) adopting this and other related provisions indicates that they were intended to permit

the Bar to finance construction of two office buildings, and to facilitate the bar's ability to borrow money and do all things necessary to undertake this task. (Legislation Reports (1957) 32 State Bar J. 25, 398.) These provisions, including section 6008, were not intended to suggest that all of the State Bar's funds were freely available to the Supreme Court for reallocation as the court might desire. In fact, this argument once again conflicts with the claim that the court's imposition of a fee improperly would invade the legislative prerogative, to the extent the argument is premised generally on the assumption that the court effectively has the power to appropriate funds that the Legislature has authorized the bar to collect; as explainedabove, reappropriating such funds to support a separate, newly created discipline system would be far more intrusive on the legislative function than assessing an additional fee to support the legislatively created system that now exists. ***618**

D. *Other Alternatives*

Additional alternatives have been suggested by the Governor and others, but as indicated below, on closer examination they do not appear to provide viable alternatives under the existing conditions. The Governor in his response outlined a series of suggestions, which are discussed in the margin. [FN23] ***619** As we conclude, each of these proposed options presents substantial practical problems, and most would result in the court's having to redirect the use of legislatively created resources. We already have explained the critical importance of having a bar disciplinary system and why leaving complaints to the existing civil and criminal litigation system will not provide the necessary protection for the public. Similarly, it has been explained why transferring the disciplinary system to the AOC, as suggested by Senator Kopp and Professor Barnett, is inappropriate.

FN23 The Governor specifically raised the following options:
(1) Use existing bar resources to finance the discipline system until the end of the fiscal year, and ask the Legislature for funds to support the disciplinary system "as part of the [Supreme Court] budget that commences on July 1, 1999." This approach contemplates that the court immediately would assume direct control of and fiscal responsibility for the bar, utilizing the existing bar funds augmented as necessary by the court's own existing limited budget. (At oral argument, the Governor's legal affairs secretary acknowledged that the $27 now available to support the disciplinary system is insufficient, and that a request by the court for supplemental funding would be required.) The court does not have the present resources to undertake this task, nor would it be prudent or reasonable to expect the court to divert, to the support of the bar, funds appropriated to the court by the Legislature for other important purposes. Furthermore, there are no guarantees that the Legislature would respond positively to a request for supplemental funding.
(2) Use the $27 collected under sections 6140.6 and 6140.9 to pay for the full complement of judges and staff of the State Bar Court for the remaining six months of the fiscal year-or staff a limited State Bar Court and use some of these funds for other purposes. A State Bar Court without a staffed Office of Trial Counsel to investigate and prosecute matters before it would have few matters to address. Moreover, the suggestion also contemplates that the court would include in its budget for the next fiscal year the funds to operate a full discipline system.
(3) Use other existing State Bar resources, including the more than $10 million in equity in its real estate. As noted previously, the money invested in real estate is part of the building fund that is expressly dedicated by statute to specific purposes, not including discipline. The same holds true for money deposited in the Client Security Fund, and for other dedicated funds held by the bar.
(4) Use local bar associations to screen complaints. Voluntary action at the local level clearly should be encouraged, but numerous speakers at our hearing on this matter, including members of various local bar associations, the National Organization of Bar Counsel,and Professor Sims, stressed the need for a professional disciplinary system in order to handle complaints against attorneys, and the inadequacy of relying on a volunteer system. Reliance on the local bars may provide some supplemental assistance, but would not afford adequate protection for the public.
(5) As to staffing the enforcement unit and preparing responses to petitions filed in this court, the Governor first suggested that

volunteers could be used to answer petitions. This function presently is carried out by the Office of General Counsel. The use of volunteers would provide less consistent services to the court and require it to increase its oversight of petitions to a level far greater than presently exercised.

As to enforcement, the Governor suggested that "the Court could simply process the more egregious claims." This would place the court squarely in the business of investigating complaints in order to make the initial determination of which claims merit additional processing. Doing so would be far from simple.

(6) As to who would handle these claims, the Governor offered as a recommendation that the court "place on its payroll those members of the State Bar's staff which would administer the Court's regulation of the disciplinary system." It is suggested that these individuals could be transferred back to a reformed State Bar, once established. Resources to carry out this option again pose a problem: the Supreme Court has no funding to provide salaries and benefits for an attorney disciplinary staff, and transferring funds to the bar that the Legislature has designated for other purposes potentially would amount to a far more substantial invasion into the legislative function. Moreover, the burden imposed by this temporary solution would greatly disrupt the court's regular work.

(7) The court could maintain the roll of those admitted to the practice of law. As observed by the Governor in his response, this court maintained the roll until the adoption of California Rules of Court, rule 950.5, in 1996. Although the court formerly maintained the physical roll of attorneys, keeping the roll up-to-date, taking changes of address, entering information on the status of attorneys, and the like, were functions performed by State Bar personnel even before 1996.

(8) The court could limit the functions it would oversee, excluding some that the bar wishes to include in the court's definition of a disciplinary system. We discuss hereafter the specifics of the bar's request.

In sum, none of the alternatives presented offers a method of fulfilling our goal of protecting the public and using the least intrusive approach to do so. To the extent the various alternatives contemplate that this court (i) would commandeer funds collected by the bar pursuant to statutory authorization and utilize them directly to support a disciplinary system, (ii) would expend money from its own appropriated budget to support a disciplinary system, (iii) would appropriate the entire State Bar structure and its existing personnel to the court's own devices, or (iv) would start a discipline system from scratch or by using selected parts of the existing system, they all suffer from the same defect: they would require the court to take action that would upset the status quo under which the bar disciplinary system now functions (to the extentpossible, given its limited resources) pursuant to an existing and complete statutory structure. We conclude that none of the alternatives suggested would adequately preserve the status quo and allow the bar to resume at an early date its role of providing a functioning disciplinary system effective in protecting the public.

IV

(10) As we have explained, given the present circumstances, our imposition of a fee upon practicing attorneys in order to fund a disciplinary *620 system for attorneys not only is within our power, but also is necessary to fulfill our fundamental responsibilities concerning the regulation of the practice of law in our state. We note that California attorneys have been required to pay a fee for attorney discipline from the inception of the State Bar in 1927, but that because of the impasse relating to aspects of the State Bar's operations other than discipline, California attorneys have been required to pay only a relatively minimal fee this year.

Our inquiry does not end here, however. The amount of the supplemental fee, the mechanism by which such a fee should be imposed, and the restrictions and oversight that the court should place on the expenditure of the money collected also must be determined.

In considering how to proceed, we are guided by certain general policies. First, any fee imposed by the court shall be used solely for the purpose of supporting disciplinary activities. Second, our action is intended to be temporary in nature and to provide continuity in the discipline system until such time as legislation is enacted that provides for the funding of an effective disciplinary system. Third, our action

should recognize that the statutes creating the existing State Bar disciplinary system remain in full force and effect; none of the provisions affecting the system's structure or operations has been repealed. Fourth, we shall utilize the least intrusive approach in order to best preserve the status quo so that future legislation can be based upon the existing system rather than upon a hastily created hybrid or completely unprecedented structure. Fifth, although we have been urged by various parties to assume the direct supervision of the bar, the Supreme Court has neither the resources nor the present expertise to do so in an effective and efficient fashion.

A. *Disciplinary Functions to Be Funded by Special Regulatory Fee*

We turn now to the specific fee assessment sought by the bar.

The bar requests an order requiring active members of the bar to pay an additional fee of $171.44. When the $27 already authorized by statute is added, that amounts to 65 percent of the bar's annual budgeted expenses for specified discipline-related services as calculated prior to June 28, 1998, the day of the layoffs. The bar states that this figure is based upon a 12-month budget, but acknowledges that this amount would have to be used through 1999, if no other relief is afforded by legislative action before that time. [FN24] *621

FN24 The brief filed by Anthony T. Caso on behalf of Raymond Brosterhous suggests that the request to collect dues of $171 is for the last two months of 1998 and thus, on an annualized basis, equals dues in the amount of $1,103, far more than ever has been authorized by the Legislature. As to the use of this money in 1999, Caso characterizes this part of the request as an attempt to preempt future legislative action. The bar does not suggest that the $171 is for the final two months of this year, or that the additional fees that will be sought pursuant to legislative authority next year would be sought without regard to the collection of this amount. We emphasize that the relief to be granted by this court is interim in nature and intended to be complementary to the legislative process.

The bar lists six components of its request for fees:

Chief Trial Counsel: Intake and Enforcement	$196.27
State Bar Court	51.09
Fee Arbitration	4.63
Competence (rules of professional conduct andn ethics hotline)	15.86
Membership Records	13.30
General Counsel (Support of Discipline)	9.60
Total	$290.75
less $27	$263.75
Requested Assessment (balance X 65%)	$171.44

The bar's brief contains copies of the proposed budget submitted to the Legislature and to this court in the bar's earlier request. If the $171.44 were the total fee imposed next year from any source in addition to the existing $77 of assessments already mandated, the total fee would be $248.44 - approximately $198 of which would be available for discipline, with the balance required by statute to be used for the Client Security Fund and Building Fund. As a comparison, the fee amounts that would have been imposed on attorneys in 1998 and 1999 under Senate Bill No. 1145 (1997-1998 Reg. Sess.), the bill vetoed by Governor Wilson, would have totalled $458 per year, including a special $110 disciplinary assessment. Assemblymember Morrow's bill, Assembly Bill No. 1798, introduced during the last session, would have imposed annual fees of $358 per year. Senator Kopp's bill, Senate Bill No. 1371, also introduced last year, would have vested in the Supreme Court all powers and duties relating to admission, discipline, mandatory continuing legal education, and the Client Security Fund now vested in the Board of Governors of the State Bar. The related costs would have been made part of the Supreme Court budget, and the Bureau of State Audits would "determine the costs of those

disciplinary functions and would provide for reimbursement of the Supreme Court for those costs from funds derived from licensing fees." We are unaware of any seriously considered proposal that would have resulted in fees as low as the amount now requested by the State Bar-although the fees sought are not intended to cover the entire range of the bar's existing activities. ***622**

In considering the bar's requested amount, two initial observations are pertinent. First, attorneys have paid a total of only $77 for all bar functions for the entire current year. The money requested is an assessment on attorneys, not moneys sought from the General Fund or another general revenue source. Second, given the already accrued backlog and the start-up efforts that will be necessary, the fee that the court imposes should be in an amount that will make a positive difference, rather than compound the current difficulties. [FN25]

> FN25 The submission from Senator Kopp and Professor Barnett, while otherwise critical of the State Bar, concluded that a $171 assessment is warranted. As previously stated, the Governor also acknowledged at our hearing that $27 is insufficient to support the disciplinary function.

We turn now to consider the components of the bar's request. The Office of Chief Trial Counsel and the State Bar Court are self-evident parts of the discipline system. Fee arbitration may not appear immediately to be an integral function, but funding this activity will have a direct bearing on future costs of the bar's disciplinary operations. There are local programs in 41 counties participating in the State Bar's fee arbitration program. Of almost 7,000 annual calls to the State Bar's Arbitration Program, almost half were handled through the network of local bars or the State Bar's program, or were resolved before filing. Most complaints come to the program independently of the Office of Trial Counsel's Intake Unit, and the availability of this service almost certainly prevents the filing of additional disciplinary complaints. A substantial backlog of cases already has grown; maintaining a program that will decrease the number of additional complaints will assist the disciplinary system in processing those cases that cannot otherwise be handled. Although it may be argued that the arbitration program is not necessarily an indispensable part of an attorney disciplinary process, it is a valuable and justifiable component of a comprehensive disciplinary system.

"Competence" includes the promulgation of rules of professional conduct and staffing for the "ethics hotline," which responds to calls from members of the bar. The ethics hotline provides information that assists practicing attorneys in performing ethically and in avoiding violations. The letter submitted by Ellen Peck, former State Bar Court judge, states that of the more than 1,000 attorneys over whose cases she presided as a judge, she cannot recall any who had sought assistance from the hotline. In her view, this service is a vitally important prophylactic tool that avoids disciplinary problems for many practitioners. The costs associated with promulgating rules also appear to be a legitimate component of a comprehensive disciplinary system. The ethics hotline, although not immediately apparent as an essential element of a disciplinary system, on closer examination plays an ***623** important role. Like the arbitration programs, the availability of this tool will save costs to the overall system and reduce delay in the processing of cases by avoiding the filing of additional complaints.

The bar maintains membership records and, as a practical matter, has done so for many years, although the formal transfer of this responsibility from the Supreme Court to the bar did not take place until approximately two years ago. The bar's Membership Records Office bills and collects fees, costs, and penalties imposed on licensed attorneys, including reimbursements to the Client Security Fund and disciplinary costs. It also keeps track of all members of the bar, including any record of discipline, and answers inquiries from courts, other governmental agencies, other states, and the public. Accurate records are integral to a meaningful licensing and disciplinary system. We consider the fees requested for this service to be an appropriate disciplinary expenditure.

The Office of General Counsel files pleadings and responds to petitions filed in the Supreme Court. It serves as in-house counsel to the bar. To the extent it serves as counsel for the Office of the Chief Trial Counsel and other component parts of the bar structure (such as the Committee of Bar Examiners) in proceedings relating to admissions and discipline before this court, this function appears to be an integral part of the bar's disciplinary system.

The figure requested by the State Bar is, according to

its submission, set at 65 percent of its budgeted needs for the specified functions. Given the information available, and in light of the figures that were discussed during this year's legislative session, the amount requested presumptively appears reasonably calculated to provide at least minimally adequate support for the disciplinary functions normally carried out by the State Bar of California and the State Bar Court. We shall presume that the six functions should be funded in the amounts requested, subject to evaluation by the special master (whose appointment and functions are described below)-who may recommend to the court that it reconsider the allocation of the fees collected.

B. *Imposition of a Fee and Oversight of Expenditures*

In order to levy a fee on attorneys adequate to support the disciplinary system, the court today adopts a rule requiring attorneys in active practice to remit $173, in addition to the $77 presently authorized by statute, to support the disciplinary system. (A copy of the order adopting the rule appears in an appendix to this opinion.) Of the $173, the amount of $171.44 is for the purposes requested by the bar, subject to reallocation by the court upon recommendation of the special master should that be deemed appropriate to ***624** best support the disciplinary system. The remaining $1.56 is imposed in order to pay for the fees and expenses related to the special master and his activities. (Cf. § 6140.9 [imposing a fee of $2 per active member per year to pay for the discipline monitor, and, after expiration of the relevant contract, to be applied to fund disciplinary services].) Payment of the $173 assessed by the court shall be made by separate check to a special fund as designated by the court. Instructions for the payment of this assessment will be included in the State Bar's membership statement for 1999, but the money received will be kept in an account created by the Supreme Court entitled the "Special Master's Attorney Discipline Fund" and maintained separately from money collected by the bar pursuant to its statutory authority or through voluntary payments by members of the bar. [FN26]

FN26 If the Legislature adopts and implements a fee bill during 1999, any unexpended amounts collected pursuant to the rule may be dedicated to disciplinary purposes. If the Legislature does not adopt and implement a fee bill during 1999, any unexpended amounts may be transferred for the support of the disciplinary system or credited against the following year's fees, as directed by the court. The payment of all fees, expenses, and costs related to the special master's services shall be made only pursuant to an order of this court.

In recognition of the extraordinary circumstances with which we are faced, the court, pursuant to its inherent power over attorney discipline, appoints as a special master retired Justice Elwood Lui to act on its behalf in overseeing the collection and disbursement to the State Bar of the fees imposed under our newly adopted rule. [FN27] The role of the special master will be to ensure that the funds collected pursuant to the newly adopted rule and disbursed to the bar are used for the limited purpose of supporting the discipline functions as described. The State Bar shall continue to have responsibility for the day- to-day management and operation of the disciplinary system. The special master may evaluate these functions and the expenditures related thereto, and recommend to the court that it reallocate funds or otherwise reconsider their use. ***625**

FN27 See appendix. Justice Lui is a certified public accountant; served on the Court of Appeal, Second Appellate District, and on the superior and municipal courts in Los Angeles County; has served as a special master in state and federal court in complex cases involving accounting, financial, and tax questions; has acted at the request of Governor Wilson to mediate difficult public agency labor controversies and served on the Governor's Independent Panel on Redistricting; at the request of the Los Angeles County Board of Supervisors, he undertook temporarily the management of the Los Angeles County Department of Children and Family Services; served as a member of the Commission on the Future of the Legal Profession and the State Bar; is a past president of the California Judges Association; and co-authored the California Judicial Retirement Handbook. He has served as an adjunct professor of accounting and business law at the University of Southern California, and has served on the board of directors of numerous public service organizations, participated in a wide range of public activities, and taught judges,

lawyers, and others in diverse areas of the law. In short, he brings to the role of special master an in-depth background in the law, accounting, public service, and complex dispute resolution.

In order to fulfill his duties, the special master may request reports from the bar and may require audits of the bar's expenditures relating to its disciplinary services. In disbursing funds to the bar, the special master shall provide that they may be used only for the support of the discipline-related functions described above, and shall be guided by the existing statutory duties and structure relating to the bar's disciplinary system and the need to provide resources to assist the bar in complying with these provisions. The special master shall report to this court regularly, and no less frequently than every three months, on collections and disbursements made pursuant to the rule we adopt today. He at any time may request further guidance from or make recommendations to the court as he determines is appropriate.

V

Our action today is intended to respond to an unprecedented emergency threatening the protection of the public, the integrity of the legal profession, and the interests of the courts. In short, the administration of justice is at risk. As we indicated during earlier stages of the dispute among the Governor, the Legislature, and the bar, we urge that a reasonable and speedy resolution of the disagreements impeding the bar from fulfilling its traditional role in the area of attorney discipline be reached among the concerned parties. In the interim, pending such resolution, the court will exercise its inherent authority over attorney discipline by adopting the accompanying interim rule.

The rule that we adopt today, and our concurrent appointment of a special master to oversee the collection and disbursement of funds pursuant to that rule, are actions designed to preserve the status quo pending the enactment and effective date of legislation providing for an attorney discipline system capable of providing meaningful public protection. California has had ample reason during the past 10 years to take pride in an attorney discipline system that has been recognized as one of our nation's finest. We anticipate that in the near future, it will again return to normal operation with appropriate funding as determined by the Legislature and the Governor. Until that occurs, we shall shoulder our responsibility to ensure continuity in attorney discipline in order to best serve the people of our state.

Mosk, J., Kennard, J., Baxter, J., Werdegar, J., Chin, J., and Brown, J., concurred. ***626**

A
Order

Rule 963 of the California Rules of Court, regarding an interim special regulatory fee for attorney discipline, is hereby adopted, to become effective immediately, as set forth in the attachment hereto.

Pursuant to this court's inherent authority over attorney discipline and rule 963(c), retired Justice Elwood Lui is hereby appointed as special master to supervise and oversee the collection, disbursement, and allocation of fees mandated by rule 963. The special master shall ensure that funds collected pursuant to rule 963 are used exclusively for the purpose of maintaining and operating an attorney disciplinary system. It is contemplated that these funds will be used to support the State Bar's Office of Chief Trial Counsel, the State Bar Court, the bar's fee arbitration program, the bar's competence functions including the promulgation of rules of professional conduct and the ethics hotline, the bar's membership records office, and the Office of General Counsel as necessary to support the State Bar's disciplinary functions. The special master may evaluate these components of the bar's disciplinary function and related expenditures, and recommend to the court that funds generated by rule 963 be allocated among these or other components in a particular manner.

Fees collected pursuant to rule 963 shall be segregated from all other fees and revenue collected by the State Bar, and deposited into a separate account or accounts at a financial institution as determined by the special master and approved by this court. The special master shall manage the funds generated pursuant to rule 963, before their disbursement, as he deems appropriate. The special master and the Clerk/Administrator of the California Supreme Court each shall have authority to make disbursements from such account(s) for the limited purposes described herein. In managing and disbursing these funds, the special master shall act as an agent of this court. The special master shall be paid the fees and expenses incurred in performing the

duties described herein only upon the prior order of this court.

The special master may request that the bar provide him with information and reports as necessary, and may require audits of the bar's expenditures related to its disciplinary functions. The special master shall report to the court regularly, and no less frequently than every three months, on collections and disbursements made pursuant to rule 963. He at any time may ***627** request further guidance from or make recommendations to the court as he determines is appropriate.

This order is final forthwith. ***628**

Rule 963. Interim Special Regulatory Fee for Attorney Discipline

(a) This rule is adopted by the Supreme Court solely as an emergency interim measure to protect the public, the courts, and the legal profession from the harm caused by the absence of an adequately functioning attorney disciplinary system. The Supreme Court contemplates that the rule may be modified or repealed once legislation designed to fund an adequate attorney disciplinary system is enacted and becomes effective.

(b) Each active member shall pay a mandatory regulatory fee of one hundred seventy-three dollars ($173) to the Special Master's Attorney Discipline Fund, to be established by a special master appointed pursuant to subdivision (c). This $173 assessment is in addition to the mandatory fees currently authorized by statute.

Payment of this fee is due by February 1, 1999. Late payment or nonpayment of the fee shall subject a member to the same penalties and/or sanctions applicable to mandatory fees authorized by statute.

(c) All money collected pursuant to this rule shall be deposited into the Special Master's Attorney Discipline Fund, and shall be used exclusively for the purpose of maintaining and operating an attorney disciplinary system, including payment of the reasonable fees, costs and expenses of a special master as ordered by the Supreme Court.

A special master appointed by the Supreme Court shall disburse and allocate funds from the Special Master's Attorney Discipline Fund for the limited purpose of supporting an attorney discipline system. The special master shall exercise authority pursuant to the charge of the Supreme Court and shall submit quarterly reports and recommendations to the Supreme Court regarding the use of these funds.

Should any funds collected pursuant to this rule not be used for the limited purpose set forth in the rule, the Supreme Court may order the refund of an appropriate amount to members or take any other action that it deems appropriate.***629**

Cal. 1998.

In re Attorney Discipline System

END OF DOCUMENT

JAMES W. OBRIEN et al., Petitioners,
v.
BILL JONES, as Secretary of State, etc., et al., Respondents.

No. S085212.

Supreme Court of California

June 1, 2000.

SUMMARY

A revised version of Bus. & Prof. Code, § 6079.1, subd. (a), effective Nov. 1, 2000, provides that of the five judges of the State Bar Court Hearing Department, two shall be appointed by the Supreme Court, one by the Governor, one by the Senate Committee on Rules, and one by the Speaker of the Assembly. A revised version of Bus. & Prof. Code, § 6086.65, subd. (a), also operative Nov. 1, 2000, provides that the lay judge of the review department shall be replaced by a judge who is a member of the State Bar. Judges of the State Bar Court who had been appointed by the Supreme Court filed a petition for a writ of mandate, prohibition, or certiorari, or other appropriate relief, to preclude implementation of the revised statutes.

The Supreme Court denied the petition. The court held that the revised legislation does not defeat or materially impair the authority of the Supreme Court and thus does not violate the separation of powers provision (Cal. Const., art. III, § 3). Although the Supreme Court's inherent authority over attorney admission and discipline includes the power to appoint the judges of the State Bar Court and to specify their qualifications, other appointment mechanisms specified by the Legislature are permissible so long as they are subject to sufficient judicially controlled protective measures. Revised Bus. & Prof. Code, § 6079.1, subd. (a), does not materially impair the Supreme Court's ultimate regulatory power over attorney admission and discipline, pursuant to the safeguards and procedures utilized by the Supreme Court to ensure that State Bar Court appointees are qualified, including screening and evaluation by the Applicant Evaluation and Nomination Committee pursuant to Cal. Rules of Court, rule 961, the factors specified in Bus. & Prof. Code, § 6079.1, subd. (b), and Gov. Code, § 12011.5, subd. (d). In addition, the Supreme Court's inherent authority over attorney discipline is not defeated or materially impaired by the requirement of revised Bus. & Prof. Code, § 6086.65, subd. (a), that all judges in the review department (who continue to be appointed by the Supreme Court) should be lawyers. (Opinion by George, C. J., with Mosk, Baxter, and Chin, JJ., concurring. Dissenting opinion by Kennard, J., with Werdegar, J., concurring (see p. 63). Dissenting opinion by Brown, J. (see p. 74).) *41

HEADNOTES

Classified to California Digest of Official Reports

(1) Attorneys at Law § 46--Disciplinary Proceedings--Stages of Review.
Pursuant to rules promulgated by the State Bar, hearing judges of the State Bar Court conduct evidentiary hearings on the merits in disciplinary matters and render written decisions recommending whether attorneys should be disciplined. A decision of the hearing department is reviewable by the review department at the request of the disciplined attorney or the State Bar. A recommendation of suspension or disbarment, and the accompanying record of the proceedings in the State Bar Court, are transmitted to the Supreme Court after the State Bar Court's decision becomes final (Bus. & Prof. Code, § 6081). The Supreme Court independently examines the findings and conclusions of the State Bar Court in light of the entire record and determines whether to impose the discipline recommended by the State Bar Court.

(2a, 2b) Attorneys at Law § 46--Disciplinary Proceedings--State Bar Court--Inherent Authority of Supreme Court--Legislative Appointment of Judges:Constitutional Law § 36--Doctrine of Separation of Powers.
Revised statutes, effective Nov. 1, 2000, which provide that of the five judges of the State Bar Court Hearing Department, two be appointed by the Supreme Court, one by the Governor, one by the Senate Committee on Rules, and one by the Speaker of the Assembly (Bus. & Prof. Code, § 6079.1, subd. (a)) and that the lay judge of the review department be replaced by a judge who is a member of the State Bar (Bus. & Prof. Code, § 6086.65, subd. (a)), do not violate the separation of powers doctrine (Cal. Const., art. III, § 3). Although the Supreme Court's inherent authority over attorney admission and discipline includes the power to appoint the judges of the State Bar Court and to specify their qualifications,

other appointment mechanisms specified by the Legislature are permissible so long as they are subject to sufficient judicially controlled protective measures. Revised Bus. & Prof. Code, § 6079.1, subd. (a), does not materially impair the Supreme Court's ultimate regulatory power over attorney admission and discipline, pursuant to the safeguards and procedures utilized by the Supreme Court to ensure that State Bar Court appointees are qualified, including screening and evaluation by the Applicant Evaluation and Nomination Committee pursuant to Cal. Rules of Court, rule 961, the factors specified in Bus. & Prof. Code, § 6079.1, subd. (b), and Gov. Code, § 12011.5, subd. (d). In addition, the Supreme Court's inherent authority over attorney discipline is not defeated or materially impaired by the requirement of revised Bus. & Prof. Code, § 6086.65, ***42** subd. (a), that all judges in the review department (who continue to be appointed by the Supreme Court) should be lawyers.

[See 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 626.]

(3) Attorneys at Law § 3--State Bar Act--Inherent Authority of Supreme Court--Interplay with Legislative Regulation:Constitutional Law § 36--Doctrine of Separation of Powers.

The power to discipline licensed attorneys in California is an expressly reserved, primary, and inherent power of the Supreme Court. Although the State Bar originally was created by the Legislature, the bar subsequently became, and remains, a constitutional entity and its assistance to the Supreme Court in the disciplinary process is an integral part of the judicial function (Cal. Const., art. VI, § 9). The State Bar Act did not delegate to the State Bar, the Legislature, the executive branch, or any other entity the Supreme Court's inherent judicial authority over the discipline of attorneys. The Supreme Court retains its preexisting powers to regulate and control the attorney admission and disciplinary system, including the State Bar Court, at every step. The Legislature, however, does not necessarily violate the separation of powers doctrine whenever it legislates with regard to an inherent judicial power or function. The Supreme Court has respected the exercise by the Legislature, under the police power, of a reasonable degree of regulation and control over the profession and practice of law in this state. However, any statute regarding the admission and discipline of attorneys is not exclusive, but is supplementary to, and in aid of, the Supreme Court's inherent authority as the final policy maker in this area.

COUNSEL

Kerr & Wagstaffe, James M. Wagstaffe and Timothy J. Fox for Petitioners.

Hansen, Boyd, Culhane & Watson, Kevin R. Culhane and Betsy S. Kimball as Amici Curiae on behalf of Petitioners.

Robert C. Fellmeth for the Center for Public Interest Law as Amicus Curiae on behalf of Petitioners.

Jerome Fishkin; Law Offices of Ephraim Margolin, Ephraim Margolin, Gerald Uelman and Vicki H. Young as Amici Curiae on behalf of Petitioners. ***43**

Bill Lockyer, Attorney General, Manuel M. Medeiros, Assistant Attorney General, Andrea Lynn Hoch and Daniel G. Stone, Deputy Attorneys General, for Respondents Governor Gray Davis, Senate President Pro Tempore John Burton and Speaker of the Assembly Antonio R. Villaraigosa.

William P. Wood, Oliver S. Cox and Pamela S. Giarrizzo for Respondent Secretary of State Bill Jones.

Jerome Berg, in pro. per., as Amicus Curiae on behalf of Respondents.

GEORGE, C. J.

From the creation of the State Bar Court in 1988 until the present, Business and Professions Code sections 6079.1, subdivision (a), and 6086.65, subdivision (a), have provided that this court appoints all judges of the State Bar Court. Revised versions of these statutes, operative November 1, 2000, provide that of the five judges of the State Bar Court Hearing Department (hereafter Hearing Department), two judges shall be appointed by this court, one by the Governor, one by the Senate Committee on Rules, and one by the Speaker of the Assembly. The revised statutes further provide that all three judges of the State Bar Court Review Department (hereafter Review Department) shall continue to be appointed by this court, but that the current lay judge of the Review Department shall be replaced by a judge who is a member of the State Bar.

Petitioners James W. Obrien, H. Kenneth Norian, and Nancy R. Lonsdale previously were appointed by this court as judges of the State Bar Court, and

currently are serving in that capacity. On January 19, 2000, they filed this original proceeding in this court, seeking a writ of mandate, prohibition, or certiorari, or other appropriate relief, to preclude respondents Governor, Senate President Pro Tempore (who also serves as chair of the Senate Committee on Rules), and Speaker of the Assembly from appointing any judges of the State Bar Court, and to prohibit respondent Secretary of State from accepting for filing the oaths of office administered in connection with any such appointments. Petitioners further seek a declaration that the statutory revisions described above violate the separation of powers provision of the Constitution. (Cal. Const., art. III, § 3.)

Because uncertainty regarding the effect of the revised statutes might cast doubt upon the legitimacy of disciplinary recommendations rendered by judges appointed pursuant to those provisions, we issued an order to show cause on March 1, 2000, and established an expedited briefing and oral argument schedule to permit the court to resolve the matter prior to the appointment of individuals who will occupy the positions currently held by ***44** judges whose terms expire on November 1, 2000. The petition is opposed collectively by the Senate President Pro Tempore and the Speaker of the Assembly (hereafter respondents). The Governor and the Secretary of State take no position on the merits.

We conclude that although this court's inherent authority over attorney admission and discipline includes the power of this court to appoint the judges of the State Bar Court and to specify their qualifications, other appointment mechanisms specified by the Legislature are permissible so long as they are subject to sufficient judicially controlled protective measures to ensure that such appointments do not impair the court's primary and ultimate authority over the attorney admission and discipline process. As we shall explain, because of our continuing primary authority over the operations of the State Bar Court- including the appointment of that court's judges-and the numerous structural and procedural safeguards, described herein, that exist both within the attorney discipline system and within the State Bar Court appointment process established by this court, we conclude that the legislation here at issue, providing that some of the hearing judges shall be appointed by the executive and legislative branches and that the lay judge of the Review Department shall be replaced with a judge who is a member of the State Bar, does not defeat or materially impair our authority over the practice of law, and thus does not violate the separation of powers provision.

I

Until 1988, the State Bar's attorney disciplinary system was operated primarily with the assistance of volunteers from local bar associations. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 611 [79 Cal.Rptr.2d 836, 967 P.2d 49] (*Attorney Discipline*).) These volunteers and other individuals appointed by the bar's board of governors acted as referees and made recommendations to the board, which in turn made recommendations to this court regarding the discipline of attorneys. (Bus. & Prof. Code, § 6078; [FN1] *In re Rose* (2000) 22 Cal.4th 430, 438 [93 Cal.Rptr.2d 298, 993 P.2d 956] (*Rose*).)

FN1 Further undesignated statutory references are to the Business and Professions Code.

(1) In 1988, the Legislature directed the board to establish a State Bar Court that would assume the board's disciplinary functions. (§ 6086.5.) The State Bar Court includes a Hearing Department and a Review Department. (§ § 6079.1, 6086.65.) Pursuant to rules promulgated by the bar, hearing judges conduct evidentiary hearings on the merits in disciplinary matters and render written decisions recommending whether attorneys should be disciplined. (*Rose*, *supra*, 22 Cal.4th at p. 439.) A decision of the Hearing ***45** Department is reviewable by the Review Department at the request of the disciplined attorney or the State Bar. (*Ibid.*) The Review Department independently reviews the record and may adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing judge. (Cal. Rules of Court, rule 951.5, adopted Feb. 28, 2000; [FN2] see § 6086.65, subd. (d) [specifying an alternative standard of review "[u]nless otherwise provided by a rule of practice or procedure approved by the Supreme Court"].)

FN2 Further undesignated rule references are to the California Rules of Court.

A recommendation of suspension or disbarment, and the accompanying record of the proceedings in the State Bar Court, are transmitted to this court after the State Bar Court's decision becomes final. (§ 6081; *Rose*, *supra*, 22 Cal.4th at p. 439.) The affected

attorney or the State Bar Chief Trial Counsel may file a petition requesting that this court review, reverse, or modify the recommended discipline. (§ § 6082, 6083; rules 952(a), 952.5.) We independently examine the findings and conclusions of the State Bar Court in light of the entire record and determine whether to impose the discipline recommended by the State Bar Court. (*Rose, supra*, 22 Cal.4th at pp. 439, 456-457.)

Pursuant to statutes and rules of court, this court has appointed the judges of the State Bar Court and has prescribed the evaluation and nomination process. Thus, under presently applicable law, we appoint the Presiding Judge of the State Bar Court and five hearing judges for terms of six years, subject to reappointment by this court for additional six-year terms. (§ 6079.1, subd. (a).) [FN3] Although this statute requires the appointment of no fewer than seven hearing judges, we have ordered that only five hearing judges be appointed, as recommended by the presiding judge, in light of the State Bar Court's caseload. We also appoint the Review Department, consisting of the presiding judge of the State Bar Court, one lay judge, and one attorney judge. (§ 6086.65, subd. (a).) [FN4] ***46**

FN3 Section 6079.1, subdivision (a), operative until November 1, 2000, states: "The Supreme Court shall appoint a presiding judge of the State Bar Court and no fewer than seven hearing judges, and any additional hearing judges as may be authorized by the Legislature, to efficiently decide any and all regulatory matters pending before the Hearing Department of the State Bar Court. The presiding judge and all other judges of that department shall be appointed for a term of six years and may be reappointed for additional six-year terms. Any judge appointed under this section shall be subject to admonition, censure, removal, or retirement by the Supreme Court upon the same grounds as provided for judges of courts of record of this state." (Stats. 1999, ch. 221, § 2.)

FN4 Section 6086.65, subdivision (a), operative until November 1, 2000, states in relevant part: "There is a Review Department of the State Bar Court, which consists of the Presiding Judge of the State Bar Court, one Lay Judge, and one Review Department Judge. The judges of the Review Department shall be nominated, appointed, and subject to discipline as provided by subdivision (a) of Section 6079.1 .... [T]he Lay Judge ... shall be a person who has never been a member of the State Bar or admitted to practice law before any court in the United States ...." (Stats. 1999, ch. 221, § 5.)

Section 6079.1, subdivision (c), provides that the State Bar Board of Governors shall screen and rate all applicants for appointment or reappointment, unless otherwise directed by the Supreme Court. We have chosen not to utilize the board for this purpose and instead to appoint a seven-member Applicant Evaluation and Nomination Committee to solicit, receive, screen, and evaluate all applications for appointment or reappointment to the State Bar Court after considering factors specified by statute and by rule 961(b)(2). The committee then rates all applicants and nominates for each vacancy at least three candidates who, in the committee's view, possess the qualifications necessary to perform the duties of a State Bar Court hearing judge or review judge. (Rule 961(a), (b).)

Once appointed, State Bar Court judges are subject to discipline by this court on the same grounds as a judge of a court of record in this state. (§ § 6079.1, subd. (a), 6086.65, subd. (a); rule 961(d).) We have designated the Executive Director-Chief Counsel of the Commission on Judicial Performance to review and investigate complaints concerning the conduct of State Bar Court judges. (Rule 961(d).) If there is reasonable cause to institute formal proceedings, this court appoints active or retired judges of superior courts or Courts of Appeal as the court's special masters to hear the matter and report to this court their findings, conclusions, and recommendations regarding discipline. (*Ibid.*)

In 1995, this court appointed or reappointed a number of State Bar Court judges, including petitioners. Some judges were appointed for terms of less than six years in order to provide for staggered terms. In addition, in 1998 and 1999, we extended the terms of some judges who had been appointed previously. (See rule 961(c) [this court may extend the term of incumbent judges and provide for staggered terms].) Petitioner Obrien is the Presiding Judge of the State Bar Court, and was appointed by this court to a six-year term beginning November 1995. Petitioner Norian, the lay judge in the Review

Department, was appointed in 1989 to a six-year term and reappointed in November 1995 to a three-year term. We subsequently extended Judge Norian's term, which currently expires on November 1, 2000. In 1995, we appointed petitioner Lonsdale to a three-year term as a judge in the Hearing Department, and subsequently extended that term to November 1, 2000. The terms of two other hearing judges and one other review judge, who are not parties to this proceeding, also expire on November 1, 2000.

Senate Bill No. 143 (1999-2000 Reg. Sess.) (hereafter referred to as Senate Bill 143) amended sections 6079.1 and 6086.65 to specify that those ***47** sections are repealed as of November 1, 2000, and that revised versions of those sections will be operative on the same date. (Stats. 1999, ch. 221, § § 2, 3, 5, 6.) Revised section 6079.1, subdivision (a), provides that this court shall appoint the Presiding Judge of the State Bar Court and two of five hearing judges. Under the revised statute, the Governor, the Senate Committee on Rules, and the Speaker of the Assembly each appoints one of the three remaining hearing judges. [FN5] In addition, revised section 6086.65, subdivision (a), replaces the lay judge in the Review Department with a judge who is a member of the State Bar, although this court continues to appoint all three Review Department judges. [FN6]

FN5 Section 6079.1, subdivision (a), operative November 1, 2000, states in part: "The Supreme Court shall appoint a presiding judge of the State Bar Court. In addition, five hearing judges shall be appointed, two by the Supreme Court, one by the Governor, one by the Senate Committee on Rules, and one by the Speaker of the Assembly, to efficiently decide any and all regulatory matters pending before the Hearing Department of the State Bar Court...." (Stats. 1999, ch. 221, § 3.)

FN6 Section 6086.65, subdivision (a), operative November 1, 2000, states in part: "There is a Review Department of the State Bar Court, that consists of the Presiding Judge of the State Bar Court and two Review Department Judges appointed by the Supreme Court. The judges of the Review Department shall be nominated, appointed, and subject to discipline as provided by subdivision (a) of Section 6079.1 ...." (Stats. 1999, ch. 221, § 6.)

Petitioners challenge the constitutionality of the foregoing revisions effected by Senate Bill 143. [FN7]

FN7 Amicus curiae briefs in support of petitioners have been filed by the Center for Public Interest Law (represented by Robert C. Fellmeth, the State Bar discipline monitor from 1987 to 1992); by Attorneys Ephraim Margolin, Gerald Uelmen, and Jerome Fishkin; and by the law firm of Hansen, Boyd, Culhane & Watson, LLP, whose members include two former members of the State Bar's board of governors. Attorney Jerome Berg has filed a brief opposing the petition.

II

(2a) Petitioners contend that the Legislature's attempt to divest this court of the power to select and appoint all State Bar Court hearing judges, and its attempt to eliminate the lay judge position in the Review Department, violate the separation of powers doctrine. Emphasizing this court's inherent judicial authority over attorney discipline and our reliance upon the decisions and recommendations of the judges of the State Bar Court when we render disciplinary orders, petitioners assert that revised section 6079.1 exceeds the permissive level of legislative involvement in the attorney disciplinary process and defeats or materially impairs the exercise of our authority in this area. Petitioners further contend that the decision to eliminate the lay judge position in the Review Department, as specified in revised section 6086.65, is a public policy decision within the exclusive, inherent authority of this court, and not one that properly may be made by the ***48** Legislature. Respondents, on the other hand, maintain that these revised statutes neither usurp nor infringe upon our inherent power, because the authority to dictate the composition and membership of the State Bar Court is a legislative function, and the changes made by the statutes do not alter the function of the disciplinary system. In evaluating the contentions of the parties, we shall consider our inherent authority over attorney admission and discipline, and the effect of the separation of powers doctrine upon legislative regulation in this area.

Article III, section 3 of the California Constitution states: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

(3) As we repeatedly have held, as the Legislature has recognized, and as respondents concede, the power to discipline licensed attorneys in this state is an expressly reserved, primary, and inherent power of this court. (*Rose*, *supra*, 22 Cal.4th at pp. 441-442; *Attorney Discipline*, *supra*, 19 Cal.4th at pp. 592-593, 601-603, and cases cited therein; § 6087.) Although the State Bar originally was created by the Legislature, the bar subsequently became-and remains-a constitutional entity within the judicial article of the California Constitution, and its assistance to this court in the disciplinary process is an integral part of the judicial function. (Cal. Const., art. VI, § 9; *Attorney Discipline*, *supra*, 19 Cal.4th at pp. 598-599.) "The State Bar Act did not delegate to the State Bar, the Legislature, the executive branch, or any other entity our inherent judicial authority over the discipline of attorneys." (*Attorney Discipline*, *supra*, 19 Cal.4th at p. 601.) We retain our preexisting powers to regulate and control the attorney admission and disciplinary system, including the State Bar Court, at every step. (*Id.* at pp. 606-607; *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301 [19 Cal.Rptr. 153, 368 P.2d 697, 94 A.L.R.2d 1310].)

The Legislature, however, does not necessarily violate the separation of powers doctrine whenever it legislates with regard to an inherent judicial power or function. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 57 [51 Cal.Rptr.2d 837, 913 P.2d 1046].) " '[T]his court has respected the exercise by the Legislature, under the police power, of "a reasonable degree of regulation and control over the profession and practice of law ... " in this state. [Citations.] This pragmaticapproach is grounded in this court's recognition that the separation of powers principle does not command "a hermetic sealing off of the three branches of Government from one another. " [Citation.]' (*Hustedt v. Workers' Comp. Appeals Bd.* [(1981)] 30 Cal.3d 329, 337-338 [178 Cal.Rptr. 801, 636 P.2d 1139], fn. omitted; see ***49** also *Santa Clara County Counsel Attys. Assn. v. Woodside* [(1994)] 7 Cal.4th 525, 543 [28 Cal.Rptr.2d 617, 869 P.2d 1142] ['In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation.'].)" (*Attorney Discipline*, *supra*, 19 Cal.4th at p. 602.)

"[O]ur traditional respect for legislative regulation of the practice of law, based upon principles of comity and pragmatism, is not to be viewed as an abdication of our inherent responsibility and authority over the core functions of admission and discipline of attorneys." (*Attorney Discipline*, *supra*, 19 Cal.4th at p. 603.) Thus, we have invalidated legislative enactments that materially impaired this inherent power, such as provisions authorizing another entity to discipline an attorney (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d at pp. 339-341), permitting a corporation to appear in an action through an individual who is not an attorney (*Merco v. Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 727-733 [147 Cal.Rptr. 631, 581 P.2d 636]), and requiring the readmission of attorneys pardoned after disbarment for felony convictions (*In re Lavine* (1935) 2 Cal.2d 324, 329 [41 P.2d 161, 42 P.2d 311]). Moreover, any statute regarding the admission and discipline of attorneys is not exclusive, but is supplementary to, and in aid of, this court's inherent authority as the final policy maker in this area. (*Attorney Discipline*, *supra*, 19 Cal.4th at pp. 602-604, 607.)

The Legislature expressly has acknowledged that the disciplinary scheme and procedures set forth in the State Bar Act are not exclusive. "In their relation to the provisions of [the State Bar Act], concerning the disciplinary authority of the courts, the provisions of this article provide a complete alternative and cumulative method of hearing and determining accusations against members of the State Bar." (§ 6075; see also *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224 [113 Cal.Rptr. 175, 520 P.2d 991].) Indeed, when the Legislature directed the board of governors to create a State Bar Court, it added the following language to section 6087: "Notwithstanding any other provision of law, the Supreme Court may by rule authorize the State Bar to take any action otherwise reserved to the Supreme Court in any matter arising under this chapter or initiated by the Supreme Court; provided, that any such action by the State Bar shall be reviewable by the Supreme Court pursuant to such rules as the Supreme Court may prescribe."

Accordingly, although in 1988 the Legislature directed the creation of the State Bar Court, and also provided for the appointment of State Bar Court judges, the decision to utilize and to rely upon the legislatively created disciplinary structure was reserved to this court. Furthermore, although we ***50** have chosen to utilize the assistance of the State Bar Court in deciding admission and discipline matters,

we also have prescribed procedures and criteria for the evaluation, selection, and appointment of State Bar Court judges, as well as procedural rules for the State Bar Court itself, that are separate from-and sometimes *different* from-those in the statutory provisions. (E.g., rules 951.5, 961; see also *Attorney Discipline*, *supra*, 19 Cal.4th 582 [this court unilaterally may impose fees upon attorneys to fund the legislatively created disciplinary system when the Legislature fails to assess sufficient State Bar dues for this purpose].)

(2b) Respondents therefore mischaracterize the State Bar Court to the extent they contend that, because it was legislatively created, it is not an arm of this court and its composition and administration are within the exclusive power of the Legislature. We recently rejected a very similar contention: "[T]he State Bar is not an entity created solely by the Legislature or within the Legislature's exclusive control, but rather is a constitutional entity subject to this court's expressly reserved, primary, inherent authority over admission and discipline.... Statutes [regarding the] disciplinary system are not exclusive-but are supplementary to, and in aid of, our inherent authority in this area." (*Attorney Discipline*, *supra*, 19 Cal.4th at p. 607.) We further rejected an assertion that this court may utilize the State Bar's existing disciplinary structure only if we acquiesce in all legislative determinations regarding the discipline system. (*Id.* at pp. 597-607.) Accordingly, contrary to the position of respondents, the Legislature does not possess the ultimate authority with regard to the structure or operations of the State Bar Court. Rather, this court retains the ultimate authority to determine and approve the composition, procedures, and functions of the State Bar Court.

In light of the foregoing well-established principles, this court's primary, inherent power over attorney admission and discipline undoubtedly encompasses the authority to appoint the State Bar Court judges who assist this court in exercising this power. As established above, however, the circumstance that the power to appoint State Bar Court judges is an aspect of the judicial power over the practice of law does not end our inquiry. The question is whether a legislative provision permitting the executive and legislative branches to appoint three of the five hearing judges in the State Bar Court, as specified in revised section 6079.1, subdivision (a), necessarily results in a material impairment of this court's inherent power over admission and discipline. As we shall explain, in light of the numerous significant safeguards and checks described below, we conclude that it does not.

Petitioners maintain that our inherent authority over the admission and discipline of attorneys includes the *exclusive* power to appoint State Bar ***51** Court judges. According to petitioners, we can repose confidence in the findings and recommendations of these judges only if they possess the qualifications and attributes that this court deems important and desirable. In evaluating petitioners' contention, we first consider the necessary qualifications for State Bar Court judges established by statute and by this court's rules.

The existing and the revised versions of section 6079.1 set forth the same qualifications for State Bar Court hearing judges. Thus, in both versions of the statute, section 6079.1, subdivision (b), specifies that each hearing judge must have been a member of the State Bar for at least five years, must not have any record of discipline as an attorney, and must meet other requirements as established by Government Code section 12011.5, subdivision (d). This Government Code provision, which concerns the evaluation by the State Bar of candidates for judicial office in courts of record, states: "In determining the qualifications of a candidate for judicial office, the State Bar shall consider, among other appropriate factors, his or her industry, judicial temperament, honesty, objectivity, community respect, integrity, health, ability, and legal experience." These factors track those that this court has directed the Applicant Evaluation and Nomination Committee to consider in evaluating candidates for State Bar Court judge. Rule 961(b)(2), promulgated by this court, states in part: "In determining the qualifications of an applicant for appointment or reappointment the committee shall consider, among other appropriate factors, the following: industry, legal and judicial experience (including prior service as a judge of the State Bar Court), judicial temperament, honesty, objectivity, community respect, integrity, and ability." In addition, rule 961(b)(2) specifies that the committee's recommendations for appointment "shall be made in conformity with" section 6079.1, subdivision (b).

Thus, seven of the enumerated factors in the statute and the rule are identical, the eighth is almost identical ("legal experience" versus "legal and judicial experience (including prior service as a judge of the State Bar Court)"), and the statutory provision includes an additional factor (health) that is not included in rule 961. Accordingly, section 6079.1, subdivision (b), requires that the Governor, the Senate Committee on Rules, and the Speaker of the

Assembly each shall consider applicant qualifications and attributes that are virtually identical to, and equally important as, those specified by this court.

Nevertheless, petitioners suggest that the Governor, the Senate Committee on Rules, and the Speaker of the Assembly might place importance upon different qualifications and characteristics, thus abrogating the appointment ***52** mechanism created by this court pursuant to rule 961 and undermining our ability to rely upon the decisions of their appointees. Although the various appointing authorities might evaluate and balance these factors in a different manner, we find that this circumstance would not necessarily result in the appointment of unqualified hearing judges or preclude this court from relying upon the decisions and recommendations of hearing judges whom we do not appoint. Contrary to the assertion of petitioners, the absence of a statutory provision expressly conferring authority upon this court to ensure the appointment of qualified hearing judges does not preclude us from exercising such authority pursuant to our inherent powers and rule 961.

Despite the existence or nonexistence of statutes governing particular subjects or procedures regarding attorney admission and discipline, this court retains ultimate control over all the admission and disciplinary functions of the State Bar Court. For example, we previously decreased the number of hearing judges from seven to five, contrary to the express mandate in section 6079.1, subdivision (a), that this court shall appoint no fewer than seven hearing judges. In addition, it is well established that in this arena we possess the authority to require more protection of the public and the profession than the Legislature has specified. (*Attorney Discipline*, *supra*, 19 Cal.4th at p. 602.) One instance of the exercise of such authority is this court's adoption of rule 961 as an alternative to section 6079.1, subdivision (c), which, both before and after passage of Senate Bill 143, provides that the State Bar Board of Governors shall screen and rate all applicants for appointment or reappointment as a State Bar Court judge, unless otherwise directed by the appointing authority. In 1995, after several years of experience with the operations of the State Bar Court, we determined that, because the bar's board of governors also oversees the prosecutorial arm of the State Bar (the Office of Trial Counsel, which is a party in all proceedings before the State Bar Court), it would be more appropriate for this court, before appointing or reappointing individuals to positions as State Bar Court judges, to rely instead upon an independent entity, appointed by this court, to rate applicants and to make recommendations regarding the appointment of individuals engaged in the adjudicatory function of the disciplinary system. Thus, we promulgated a rule providing for the creation of the seven-member Applicant Evaluation and Nomination Committee, appointed by this court, which consists of four members of the State Bar in good standing, two retired or active judicial officers, and one public member. Two of these seven members must be present members of the State Bar's board of governors, but neither of these two individuals may be members of the board's discipline committee. (Rule 961(a)(1).)

Although section 6079.1, subdivision (c), as amended by Senate Bill 143, provides that the board of governors shall screen and rate all applicants and ***53** "submit its recommendations to the appointing authority, unless otherwise directed by the appointing authority," in order to ensure the appointment of qualified judges in whom the public, the legal profession, and the judiciary may repose confidence, this court, consistent with its prior practice, shall continue to direct *all* applicants seeking appointment as a State Bar Court judge to be screened and evaluated by the Applicant Evaluation and Nomination Committee pursuant to rule 961 and in light of the factors specified in section 6079.1, subdivision (b), and Government Code section 12011.5, subdivision (d). The committee shall report in confidence its evaluations and ratings of each applicant to the respective appointing authority as well as to this court, and only those applicants shall be appointed whom the committee (or this court, upon a request for reconsideration by the appointing authority) finds qualified, in light of all of the relevant factors, to perform the duties of a State Bar Court judge. Thus, the court can ensure that any particular applicant appointed by the executive or legislative branch has been evaluated objectively by an independent and neutral entity appointed by this court, and possesses the statutory qualifications and attributes, as well as the qualifications required by this court, that are necessary to serve as a State Bar Court judge. In this manner, we may continue to have confidence in and to rely upon the decisions of these judges.

Petitioners contend that several California decisions support the position that only a court may appoint commissioners, magistrates, special masters, referees, or other assistants upon whom the court relies in exercising judicial functions. (*Millholen v. Riley* (1930) 211 Cal. 29 [293 P. 69] [affirming the power of a court to appoint its employees and fix their

salaries, in the absence of legislation on the subject]; *People v. Hayne* (1890) 83 Cal. 111 [23 P. 1] [upholding legislation conferring upon this court the authority and funds to appoint commissioners]; *Tuolumne County v. Stanislaus County* (1856) 6 Cal. 440 [holding that the appointment of commissioners is a judicial function]; [FN8] see also *State v. Noble* (1889) 118 Ind. 350 [21 N.E. 244, 245-249] [concluding that the court's judicial power to appoint its assistants is exclusive, and that no other branch may exercise that authority without violating the separation of powers doctrine]; *In re Supreme Court Commission* (1916) 100 Neb. 426 [160 N.W. 737, 738] ["Neither the Legislature nor the Governor has the right to dictate whom the court shall appoint as its referees or assistants."].) State Bar Court judges, petitioners assert, act in a capacity similar to that of a special master or referee, and their appointment also should be an exclusively judicial function. ***54**

FN8 We subsequently overruled *Tuolumne County v. Stanislaus County*, *supra*, 6 Cal. 440, to the extent it concluded that the appointment of the particular commissioners in that case-whose sole duty as prescribed by the Legislature was to apportion debt between two counties-was a judicial function. (*People v. Provines* (1868) 34 Cal. 520, 531.)

We agree with petitioners that the cited decisions embody principles that are fundamental to the separation of powers doctrine. Nonetheless, although a State Bar Court hearing judge may in some respects occupy a position analogous to that of a special master or referee, we believe that these decisions are distinguishable from this case on at least three grounds. First, none of the decisions involved the appointment of assistants who operate only within a discrete arena, like the attorney discipline system, in which a significant degree of legislative regulation has been found permissible. [FN9] As we have explained, California's unique system for the admission and discipline of attorneys is in some sense a cooperative endeavor between the judiciary and the Legislature, and this court often has upheld legislative measures touching upon this arena, invalidating laws only on the rare occasions when it is determined that they materially impaired our inherent power over attorney admission and discipline. (*Attorney Discipline*, *supra*, 19 Cal.4th at pp. 602-603.)

FN9 As respondents observe, before the creation of the State Bar Court the Legislature had specified that some members of the bar's disciplinary boards were to be appointed by the Governor. (See, e.g., Stats. 1975, ch. 874, § 9, p. 1954.)

Second, the decisions upon which petitioners rely did not consider whether the executive or legislative branch may appoint judicial assistants only after they have been found to be qualified by an independent entity whose members are appointed by the judiciary. As explained above, consistent with the procedure that this court has utilized in the past for its appointments to the State Bar Court, all applicants who seek appointment as a State Bar Court judge must be screened and evaluated by the Applicant Evaluation and Nomination Committee in light of the qualifications specified by statute and by rule of court.

Third, even within the limited realm of attorney admission and discipline, the State Bar Court hearing judges are distinguishable from the judicial assistants considered in the prior cases, because unlike special masters or referees who render findings and recommendations directly to the court, with no opportunity for an intermediate level of review or evaluation, the findings and recommendations of State Bar Court hearing judges are reviewable by this court's appointees in the Review Department at the request of the disciplined attorney or the State Bar. (Rules Proc. of State Bar, rule 301.)

As noted above, the Review Department independently reviews the record and may adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing judge. (Rule 951.5; Rules Proc. of State Bar, rule 305(a).) Although in 1999 the Legislature specified a more deferential standard of review governing Review Department consideration of Hearing Department decisions (§ 6086.65, subd. (d)), we subsequently ***55** reinstated the traditional independent standard of review when we adopted rule 951.5. The Review Department also may remand the proceeding to the Hearing Department for a new trial on specified issues or a trial de novo. (Rules Proc. of State Bar, rule 305(a).) Although the original proceeding and the proceeding on remand ordinarily are held before the same hearing judge, the Review Department may order otherwise. (*Ibid.*) The Review Department must accord great weight to the hearing

judge's findings of fact resolving issues involving the credibility of witnesses, but it is not bound by such findings. (*Ibid.*) Furthermore, as an alternative to remanding the proceeding to the Hearing Department, the Review Department may appointa hearing judge as a referee to receive evidence and make proposed additional findings of fact. (*Id.*, rule 306(d).) Finally, even after a State Bar Court decision is transmitted to this court, we "may remand the matter to the State Bar Court with instructions to conduct such further proceedings as [we] deem[] necessary." (Rule 953.5.)

In light of the requirement that an applicant must be found qualified by the Applicant Evaluation and Nomination Committee or by this court before he or she may be appointed as a State Bar Court hearing judge, and the broad authority of the Review Department (all of whose members we appoint) to evaluate and to accept or reject independently the findings and recommendations of hearing judges, to order additional evidentiary proceedings, and to render the State Bar Court's ultimate findings and recommendations that are presented for this court's consideration, we presently discern no reason why we may not continue to repose confidence in and to rely upon a State Bar Court in which some hearing judges are appointed by the executive and legislative branches pursuant to section 6079.1. Despite the circumstance that such appointees are subject to reappointment by the same nonjudicial appointing authorities, our reserved power over the appointment (and reappointment) process and the structural and procedural safeguards in both that process and the disciplinary system guard against any risk or perception that the process may become politicized, as predicted by petitioners and amicus curiae Center for Public Interest Law. As in the past, all hearing judges shall be subject to the primary authority and supervision of this court. (See *People ex rel. Lowe v. Marquette Nat. Fire Ins. Co.* (1933) 351 Ill. 516 [184 N.E. 800, 805-806] [the legislature's designation of an officer of the executive branch to function as a judicial receiver in specified proceedings grants the officer no powers independent of the court, because his or her acts and reports are subject to the approval of the court].) [FN10]

FN10 Other decisions have limited the power of the Legislature to interfere with the judicial branch's ultimate authority over its judicial assistants, but these decisions also are distinguishable from the present matter. For example, *In re Edgar M.* (1975) 14 Cal.3d 727, 736 [122 Cal.Rptr. 574, 537 P.2d 406], held that the findings and order of a juvenile court referee cannot become final by operation of law when the court fails to act upon an application for rehearing within the time specified by statute. Our decision states that allowing such a result would violate the restriction of the referee's powers to *subordinate* judicial duties (Cal. Const., art. VI, § 22), because the referee's decision automatically would become that of the court. In contrast, a recommendation of a State Bar Court judge cannot become final until this court enters an order adopting the recommendation, and we very recently upheld the constitutionality of this scheme for judicial review of State Bar Court decisions. (*Rose, supra*, 22 Cal.4th 430.) In *People v. Superior Court (Mudge)* (1997) 54 Cal.App.4th 407, 411-413 [62 Cal.Rptr.2d 721], the Court of Appeal held unconstitutional a statute providing that a retired judge assigned by the Chief Justice to hear an action cannot preside if the parties stipulate that the retired judge is unqualified. The court determined that this statute defeated or substantially impaired the Chief Justice's express authority to assign such judges under a separate and distinct constitutional provision (Cal. Const., art. VI, § 6). In the present case, however, *this court* has decided that, *as a general matter*, its inherent constitutional power to appoint State Bar Court judges is not defeated or materially impaired by permitting other branches to exercise an appointment authority pursuant to the procedures the court has prescribed. No other entity or party is exercising a unilateral power to defeat a previously asserted judicial power in a particular proceeding.

Thus, unlike other instances of legislative regulation of the practice of law that we have found would materially impair our inherent authority in this ***56** area, revised section 6079.1, subdivision (a), does not undermine our ultimate regulatory power over attorney admission and discipline. Therefore, permitting the Governor, the Senate Committee on Rules, and the Speaker of the Assembly each to appoint one hearing judge found to be qualified by the Applicant Evaluation and Nomination Committee (or by this court upon reconsideration) does not necessarily defeat or materially impair our inherent

authority over the practice of law.

We reach the same conclusion with regard to the elimination of the lay judge position in the Review Department, as provided in revised section 6086.65, subdivision (a). In challenging this provision, petitioners refer to a number of public policy considerations supporting public participation in the attorney disciplinary process, such as promoting public confidence and broadening the perspective of the State Bar Court. Although we recognize that these are legitimate considerations, we conclude that our inherent authority over attorney discipline is not defeated or materially impaired by a requirement that all judges in the Review Department (who continue to be appointed by this court) should be lawyers. (Cf. *Gordon v. Justice Court* (1974) 12 Cal.3d 323, 328-332 [115 Cal.Rptr. 632, 525 P.2d 72, 71 A.L.R.3d 551] [discussing disadvantages of permitting a nonattorney to act as a justice court judge in a criminal proceeding].) In this regard, we note that at least some of the benefits of a more diverse perspective formerly provided by the lay review judge may be achieved through nonjudicial appointment of some hearing judges. The circumstance that this revision emanated from the Legislature does not, in itself, render the measure violative of the separation of powers doctrine. (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 643-644, fn. 9 [88 Cal.Rptr.2d 283, 982 P.2d 154] [noting ***57** adoption by this court of exemptions to mandatory continuing legal education program requirements consistent with the legislative policy judgments embodied in § 6070].)

In sum, our inherent, primary authority over the practice of law extends to determining the composition of the State Bar Court and appointing State Bar Court judges. Nevertheless, this authority is not defeated or materially impaired by the replacement of the lay judge in the Review Department with an attorney review judge or by the appointment of three of the five Hearing Department judges by the executive and legislative branches, pursuant to the safeguards and procedures previously utilized by this court to ensure that State Bar Court appointees are qualified to perform the duties of review or hearing judges. Therefore, these provisions in revised sections 6079.1 and 6086.65 do not violate the separation of powers doctrine.

III

Revised section 6079.1, subdivision (a), provides that two hearing judges shall be appointed by this court and that three hearing judges shall be appointed respectively by the Governor, the Senate Committee on Rules, and the Speaker of the Assembly. The statute, however, does not specify the order in which these appointing authorities will fill vacancies on the State Bar Court, or in which location their appointees will serve. Therefore, pursuant to our inherent authority and rule 961(c), we shall issue an order, included as an appendix to this opinion, specifying procedures for the appointment of State Bar Court judges under the new law.

The Hearing Department presently conducts proceedings at two locations-Los Angeles and San Francisco. The State Bar's Rules of Procedure govern the venue in which proceedings shall occur, and specify that the presiding judge shall provide for the overall supervision of calendar management and assignment of judges. (Rules Proc. of State Bar, rules 52-54, 1013.) Thus, the presiding judge determines how many judges sit in each venue. Presently three hearing judges sit in Los Angeles and two sit in San Francisco, and this division of resources roughly approximates the allocation of cases between the two venues.

The terms of two Los Angeles hearing judges and one San Francisco hearing judge expire on November 1, 2000. Because the two hearing judges whose terms do not expire this year were appointed by this court, we shall permit the Governor, the Senate Committee on Rules, and the Speaker of the Assembly each to fill one of the three vacancies occurring on November 1, 2000. The Governor and the Speaker of the Assembly each shall appoint a judge to serve in Los Angeles, and the Senate Committee on Rules shall appoint a judge to serve in San Francisco. This court retains the authority to ***58** designate appointments in different locations and to direct that previously appointed judges serve in other venues as administrative needs or other circumstances change.

We also shall provide for newly staggered terms for all State Bar Court judges. Presently the terms of current judges all expire in November 2000 or November 2001. In order to provide for the orderly recruitment, evaluation, and appointment of an approximately equal number of judges every two years, the appointees of the Governor, the Senate Committee on Rules, and the Speaker of the Assembly each shall serve initial terms of six, four, and two years, respectively, subject to reappointment by the same appointing authority for a full six-year term. The terms of the judges whom we shall appoint in November 2000 and November 2001 similarly

shall be staggered, as specified in the appended order.

Our order also shall amend rule 961 as necessary to implement the revised statutory scheme. As explained above, rule 961(a) presently provides that this court appoints an Applicant Evaluation and Nomination Committee to solicit, receive, screen, and evaluate applications for appointment and/or reappointment to any appointive position of judge of the State Bar Court. The committee adopts and implements procedures for the notice of anticipated vacancies, receipt and evaluation of applications, and transmittal of its recommendations to this court. As specified in the amended rule, and consistent with our previous practice pursuant to rule 961, we shall continue to require all applicants for positions as a State Bar Court judge to submit applications to this court's Applicant Evaluation and Nomination Committee and to follow the procedures adopted by that committee. So that this court may ensure that all appointees are qualified to perform the duties of a State Bar Court judge, the committee shall submit in confidence its ratings and evaluations of all applicants for nonjudicial appointments, including the candidate's application, to this court as well as to the nonjudicial appointing authority. Only applicants found to be qualified by the committee, or by this court upon a request for reconsideration by the appointing authority, are eligible to be appointed to a position as a State Bar Court judge.

IV

The petition is denied and the order to show cause is discharged. Each party shall bear his or her own costs.

Mosk, J., Baxter, J., and Chin, J., concurred. ***59**

The court anticipates that, unless otherwise specified, the following order will be issued and become effective immediately upon the finality of the accompanying opinion.

Order

Amendments to rule 961 of the California Rules of Court, regarding State Bar Court judges, as set forth in the attachment hereto, are hereby adopted. The amendments to rule 961 shall become effective July 1, 2000.

Business and Professions Code section 6079.1, subdivision (a), operative November 1, 2000, provides that this court shall appoint two State Bar Court hearing judges, and that the Governor, the Senate Committee on Rules, and the Speaker of the Assembly each shall appoint one hearing judge. Presently three hearing judges sit in Los Angeles and two sit in San Francisco. The terms of two Los Angeles hearing judges and one San Francisco hearing judge expire on November 1, 2000. No statute or other provision specifies which appointing authorities shall appoint judges for these positions.

Therefore, pursuant to this court's inherent authority over the admission and discipline of attorneys, and rule 961(c) of the California Rules of Court, we hereby implement Business and Professions Code section 6079.1, subdivision (a), as follows.

The appointments for the positions of the three hearing judges whose terms expire on November 1, 2000, shall be made by the Governor, the Senate Committee on Rules, and the Speaker of the Assembly. The appointees of the Governor and the Speaker of the Assembly shall serve in Los Angeles, and the appointee of the Senate Committee on Rules shall serve in San Francisco. In order to obtain the significant benefits of staggered terms, the appointees of the Governor, the Senate Committee on Rules, and the Speaker of the Assembly shall be appointed to initial terms of six, four, and two years, respectively. Upon the expiration of these terms, appointees or reappointees to these positions shall be appointed by the respective appointing authority to full six-year terms.

The terms of the Supreme Court appointees to the State Bar Court similarly shall be staggered. The current term of the Presiding Judge of the State Bar Court expires on November 1, 2001, and the Supreme Court's next appointee or reappointee to that position shall serve an initial term of five years, expiring on November 1, 2006. The current terms of the two other ***60** Review Department judges expire on November 1, 2000. The court's next appointee or reappointee to the position that is now held by an attorney review judge shall serve an initial term of four years, expiring on November 1, 2004. The court's appointee to the position that is now held by the lay review judge shall serve an initial term of two years, expiring on November 1, 2002. The current terms of the two hearing judges whose positions will be filled by the Supreme Court expire on November 1, 2001. The court's next appointee or reappointee to the hearing judge position in San Francisco shall

serve an initial term of five years, expiring on November 1, 2006. The court's next appointee or reappointee to the hearing judge position in Los Angeles shall serve an initial term of three years, expiring on November 1, 2004. Upon the expiration of these terms, Supreme Court appointees or reappointees to all of these positions shall be appointed by the Supreme Court to full six-year terms.

All applicants for any appointive position as a State Bar Court judge shall submit an application to the Applicant Evaluation and Nomination Committee created pursuant to rule 961, and the committee shall screen, evaluate, and rate all such applicants after considering the factors set forth in Business and Professions Code section 6079.1, subdivision (b), Government Code section 12011.5, subdivision (d), and rule 961(b)(3). The committee shall notify potential applicants of vacancies occurring on November 1, 2000, no later than July 15, 2000. The committee shall submit the materials specified in rule 961(b) to this court and, as applicable, to nonjudicial appointing authorities no later than October 1, 2000. In the event the Governor, the Senate Committee on Rules, or the Speaker of the Assembly wishes to seek reconsideration of a finding by the committee that a particular applicant is unqualified, a request for reconsideration may be filed with this court no later than October 6, 2000. Only applicants found qualified by the committee or by this court, in light of the factors specified in the provisions referred to above, may be appointed to a position as a State Bar Court judge.

RULE 961. STATE BAR COURT JUDGES

(a) [Applicant Evaluation and Nomination Committee]

(1) The Supreme Court shall create an Applicant Evaluation and Nomination Committee (committee) to solicit, receive, screen and evaluate all applications for appointment and/or reappointment to any appointive position of judge of the State Bar Court (hearing judge, presiding judge, and review department judge). The committee, which shall serve at the pleasure of the Supreme Court, shall consist of seven members appointed by the court of whom four shall be ***61** members of the State Bar in good standing, two shall be retired or active judicial officers, and one shall be a public member who has never been a member of the State Bar or admitted to practice before any court in the United States. Two members of the committee shall be present members of the Board of Governors of the State Bar (neither of whom shall be from the Board's Discipline Committee).

(2) The committee shall adopt, and implement upon approval by the Supreme Court, procedures for: (a) timely notice to potential applicants of vacancies; (b) receipt of applications for appointments to those positions from both incumbents and other qualified persons; (c) soliciting and receiving public comment; (d) evaluation and rating of applicants,; and (e) transmittal of the materials specified in rule 961(b) to the Supreme Court and, as applicable, other appointing authorities. The procedures adopted by the committee shall include provisions to ensure confidentiality comparable to those followed by the commission established pursuant to Government Code section 12011.5 [Judicial Nominees Evaluation Commission].

(3) The Board of Governors of the State Bar, in consultation with the Supreme Court if necessary, shall provide facilities and support staff needed by the committee to carry out its obligations under this rule.

(b) [Evaluations]

(1) With regard to applicants seeking positions appointed by the Supreme Court, the committee shall evaluate the qualifications of and rate all applicants and shall submit to the Supreme Court the nominations of at least three qualified candidates for each vacancy. The committee shall report in confidence to the Supreme Court its evaluation and rating of applicants recommended for appointment, and the reasons therefor, including a succinct summary of their qualifications, at a time to be designated by the Supreme Court. The report shall include written comment received by the committee, which shall be transmitted to the Supreme Court together with the nominations.

(2) With regard to applicants seeking positions appointed by the Governor, the Senate Committee on Rules, or the Speaker of the Assembly, the committee shall evaluate the qualifications of and rate all applicants and shall submit in confidence to the Supreme Court and, as applicable, to other appointing authorities all applications for such positions together with the ***62** committee's evaluation and rating of these applicants, including any written comments received by the committee, at a time to be designated by the Supreme Court.

(3) In determining the qualifications of an applicant

for appointment or reappointment the committee shall consider, among other appropriate factors, the following: industry, legal and judicial experience (including prior service as a judge of the State Bar Court), judicial temperament, honesty, objectivity, community respect, integrity, and ability. Any evaluation or rating of an applicant and any recommendation for appointment or reappointment by the committee shall be made in conformity with subdivision (b) of Business and Professions Code section 6079.1 and in light of the factors specified in Government Code section 12011.5, subdivision (d), and those specified in this subdivision.

(4) Upon transmittal of its report to the Supreme Court, the committee shall notify any incumbent who has applied for reappointment by the Supreme Court if he or she is or is not among the applicants recommended for appointment to the new term by the committee. The applicable appointing authority shall notify as soon as possible an incumbent who has applied for reappointment but is not selected .

(c) [Appointments] Only applicants found to be qualified by the committee or by the Supreme Court may be appointed. Upon the request of the Governor, the Senate Committee on Rules, or the Speaker of the Assembly, the Supreme Court will reconsider a finding by the committee that a particular applicant is not qualified. The Supreme Court shall make such orders as to the appointment of applicants as it deems appropriate, including extending the term of incumbent judges pending such order or providing for staggered terms.

(d) [Discipline for misconduct or disability] A judge of the State Bar Court is subject to discipline or retirement on the same grounds as a judge of a court of this state. Complaints concerning the conduct of a judge of the ***63** State Bar Court shall be addressed to the Executive Director-Chief Counsel of the Commission on Judicial Performance, who is hereby designated as the Supreme Court's investigator for the purpose of evaluating those complaints, conducting any necessary further investigation, and determining whether formal proceedings should be instituted. If there is reasonable cause to institute formal proceedings, the investigator shall notify the Supreme Court of that fact and shall serve as or appoint the examiner and make other appointments and arrangements necessary for the hearing. The Supreme Court shall then appoint one or more active or retired judges of superior courts or Courts of Appeal as its special masters to hear the complaint and the results of the investigation, and to report to the Supreme Court on the masters' findings, conclusions, and recommendations as to discipline. The procedures of the Commission on Judicial Performance shall be followed by the investigator and special masters, to the extent feasible. Procedure in the Supreme Court after a discipline recommendation is filed shall, to the extent feasible, be the same as is followed when a determination of the Commission on Judicial Performance is filed.

KENNARD, J.

I dissent.

The majority holds that the state Constitution's separation of powers clause permits officers of the legislative and executive branches to appoint and reappoint judges of the State Bar Court and to alter that court's composition by eliminating public (that is, nonattorney) representation. I disagree. Because the State Bar Court operates as an arm of this court in hearing attorney discipline matters, and because this court has primary authority over attorney discipline, judges of the State Bar Court are subordinate judicial officers that must be answerable only to this court. Because the law at issue makes State Bar Court judges subservient to members of the political branches, and because it alters the composition of the State Bar Court in a way likely to reduce public confidence in the attorney discipline system, the law is invalid under the separation of powers clause of the California Constitution.

I

Article VI of the California Constitution vests the judicial power of this state "in the Supreme Court, courts of appeal, superior courts, and municipal courts, all of which are courts of record." (Cal. Const., art. VI, § 1.) "In ***64** 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." (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337 [178 Cal.Rptr. 801, 636 P.2d 1139], fn. omitted.) In exercising its power over attorney discipline, this court has long relied on the State Bar, a public corporation constitutionally recognized as integral to the operations of the judicial branch. (*In re Rose* (2000) 22 Cal.4th 430, 438 [93 Cal.Rptr. 298,

993 P.2d 956].)

Before 1988, the State Bar's disciplinary system was staffed by volunteer attorneys serving as referees, who conducted hearings and made recommendations to the bar's board of governors, which in turn made recommendations to this court for the disciplining of attorneys. (*In re Rose, supra,* 22 Cal.4th 430, 438.) Since 1988, the State Bar Court has assumed this role. (*Ibid.*) Because it assists in the discharge of this court's duty to discipline attorneys, the State Bar Court operates as an administrative arm of this court. (*Id.* at p. 439.) The State Bar Court is staffed by salaried judges who, until now, have all been appointed by this court. (Cal. Rules of Court, rule 961(c).) They are subject to removal by this court only on grounds that would justify removal of a judge of this state. (*Id.*, rule 961(d).)

The State Bar Court is divided into the Hearing Department and the Review Department. The Hearing Department is the trial department of the State Bar Court (Rules Proc. of State Bar, rule 2, definition 2.60); in attorney discipline proceedings, the trial is an evidentiary hearing on the merits conducted before a hearing judge (*id.*, rule 2, definition 3.16). At the conclusion of the hearing, the hearing judge renders a written decision recommending the discipline, if any, to be imposed. (*Id.*, rule 220.) The Review Department is the appellate department of the State Bar Court (*id.*, rule 2, definition 3.02), in which the rulings and orders of a hearing judge are reviewed (*id.*, rule 300 et seq.). After it becomes final, a State Bar Court decision recommending that an attorney be suspended or disbarred is transmitted to this court. (*Id.*, rule 250.) The State Bar Court's discipline recommendations are advisory and may be implemented only by order of this court after independent review on the merits. (*In re Rose, supra,* 22 Cal.4th 430, 441-448.)

The State Bar Court is now staffed by five hearing judges and three judges of the Review Department, all of whom serve six-year terms. (Bus. & Prof. Code, § § 6079.1, 6086.65; see maj. opn., *ante,* at p. 45.) One of the judges of the Review Department is a "lay judge," meaning a person who is not and has never been licensed to practice law. (Maj. opn., *ante,* at p. 45, fn. 4.) ***65**

By Senate Bill No. 143 (1999-2000 Reg. Sess.), the Legislature has recently amended Business and Professions Code section 6079.1 to provide for appointment of three of the five hearing judges by persons other than this court. This law, the validity of which is here challenged, grants the Governor, the Senate Committee on Rules (chaired by the Senate President Pro Tempore), and the Speaker of the Assembly authority to each appoint one hearing judge. The same bill also amended Business and Professions Code section 6086.65 to replace the lay judge in the Review Department with a judge who is a member of the State Bar.

II

The California Constitution expressly provides for the separation of governmental powers among the three branches of state government: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) Although this particular provision dates only from 1972, our state Constitution "[f]rom its inception ... has contained an explicit provision embodying the separation of powers doctrine." (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52 [51 Cal.Rptr.2d 837, 913 P.2d 1046].)

The doctrine of separation of powers long predates our state Constitution; its origins "can be traced to the fourth century B.C. when Aristotle, in his treatise entitled *Politics*, described three agencies of government: the general assembly, the public officials, and the judiciary." (Ervin, *Separation of Powers: Judicial Independence* (1970) 35 Law & Contemp. Probs. 108, fn. omitted.) The "leading Framers" of the federal Constitution "viewed the principle of separation of powers as the central guarantee of a just government." (*Freytag v. Commissioner* (1991) 501 U.S. 868, 870 [111 S.Ct. 2631, 2364, 115 L.Ed.2d 764].) Referring to the separation of powers doctrine, James Madison said: "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty ...." (Madison, The Federalist No. 47 (Rossiter edit. 1961) p. 301.)

The purpose of separation of powers is to protect individual liberty by preventing concentration of powers in the hands of any one individual or body. (*Buckley v. Valeo* (1976) 424 U.S. 1, 122 [96 S.Ct. 612, 683-684, 46 L.Ed.2d 659].) Among the three great departments or branches into which the state and the federal governments are divided-the legislative, executive, and judicial branches-the framers of the federal Constitution were most apprehensive about the legislative branch. (*Buckley v. Valeo, supra,* at p. 129 [96 S.Ct. at p. 687] ["the debates of the Constitutional Convention, and the ***66**

Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches"].) At the Philadelphia convention, James Madison explained it this way: " '[E]xperience in all states has evinced a powerful tendency in the legislature to absorb all power into its vortex. This was the real source of danger to the American [state] Constitutions; and suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.' " (Ervin, *Separation of Powers: Judicial Independence, supra,* 35 Law & Contemp. Probs. 108, 113.)

Because the manipulation of official appointments "was deemed 'the most insidious and powerful weapon of eighteenth century despotism' " (*Freytag v. Commissioner, supra,* 501 U.S. 868, 883 [111 S.Ct. 2631, 2641]), the framers of the federal Constitution very carefully and deliberately embedded the separation of powers concept in that Constitution's appointments clause (*Freytag v. Commissioner, supra,* at p. 882 [111 S.Ct. at pp. 2640-2641]). Under that clause (U.S. Const., art. II, § 2, cl. 2), Congress retains authority "to appoint its own officers to perform functions necessary to that body as an institution." (*Buckley v. Valeo, supra,* 424 U.S. 1, 127 [96 S.Ct. 612, 686].) But Congress is denied authority to appoint any officers of the judicial or executive branches. (*Id.* at p. 129 [96 S.Ct. at p. 687].) For higher ranking officers, such as cabinet-level department heads, ambassadors, and justices of the United States Supreme Court, the appointments clause provides that the President is to nominate and appoint the officer, "by and with the advice and consent of the Senate." For all other judicial and executive branch officers, Congress has discretion to select the appointing authority, but its choice is confined to only three possible designees, a limitation that "reflects our Framers' conclusion that widely distributed appointment power subverts democratic government." (*Freytag v. Commissioner, supra,* at p. 885 [111 S.Ct. at p. 2642].) Congress may vest authority to appoint officers of lesser rank "in the President alone, in the courts of law, or in the heads of departments." (U.S. Const., art. II, § 2, cl. 2.) Thus, Congress is not permitted to designate itself or any of its officers as the appointing authority for lower ranking officers of the executive and judicial branches of government. (*Buckley v. Valeo, supra,* at p. 129 [96 S.Ct. at p. 687].) Nor may Congress retain for itself a power, apart from impeachment, to remove an officer who exercises executive or judicial authority. (*Bowsher v. Synar* (1986) 478 U.S. 714, 732 [106 S.Ct. 3181, 3190-3191, 92 L.Ed.2d 583].)

The decision to deny Congress authority to control the appointment or removal of lower ranking executive and judicial officers was deliberate. As James Madison said in the First Congress: " 'The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. ***67** This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office.' " (*Myers v. United States* (1926) 272 U.S. 52, 128 [47 S.Ct. 21, 29, 71 L.Ed. 160], quoting 1 Annals of Cong. (1789) 581, 582.)

When construing the appointments clause of the federal Constitution, the United States Supreme Court has recognized that it is "usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain." (*Ex parte Siebold* (1880) 100 U.S. (10 Otto) 371, 397 [25 L.Ed. 717, 726].) Although interbranch appointments are not invariably proscribed, Congress's power to provide for such appointments is limited by "separation-of-powers concerns, which would arise if such provision for appointment had the potential to impair the constitutional functions assigned to one of the branches," and a provision for interbranch appointment likely would be improper if there were an "incongruity" between the functions normally performed by the appointing power and the exercise of the appointment authority. (*Morrison v. Olson* (1988) 487 U.S. 654, 675-676 [108 S.Ct. 2597, 2611, 101 L.Ed.2d 569]; see also *Springer v. Philippine Islands* (1928) 277 U.S. 189 [48 S.Ct. 480, 72 L.Ed. 845] [legislature of the Philippine Islands could not provide for legislative appointments to executive agencies].)

Although federal judges serving in courts established under article III of the federal Constitution are themselves the products of interbranch appointments (being appointed by the President, with the advice and consent of the Senate), their terms of office are limited only by "good behavior," and Congress may not reduce their salaries during their terms of office. (U.S. Const., art. III, § 1.) In this way, the Framers ensured that after appointment federal judges would be free from influence by their appointing authority: "The separation of powers concept as understood by the founding fathers assumed the existence of a judicial system free from outside influence of whatever kind and from whatever source ...." (Ervin, *Separation of Powers: Judicial Independence, supra,*

35 Law & Contemp. Probs. 108, 121.)

The California Constitution has no equivalent of the federal Constitution's appointments clause. But the federal experience is instructive in construing the separation of powers guarantee of the state Constitution. It is worth noting that, consistent with the federal Constitution's limitations on Congress's role in the appointment and removal of executive and judicial branch officers, the California Constitution gives the Legislature no role at all in the appointment of judges. Judges are elected by the voters, with the Governor having authority to fill vacancies by appointment. (Cal. Const., art. VI, § 16.) ***68**

Although the precise issue presented here has never arisen before in California, courts in other states have held that the legislative branch lacks authority to appoint or remove subordinate judicial officers and confidential judicial assistants. In *State v. Noble* (1889) 118 Ind. 350 [21 N.E. 244], for example, the Indiana Supreme Court struck down a statute granting the state legislature authority to appoint commissioners to assist the court in the performance of its duties, and granting the governor authority to appoint commissioners to fill vacancies. Explaining why these interbranch appointments violated the doctrine of separation of powers, the court said: "*A department without the power to select those to whom it must entrust part of its essential duties can not be independent....* [¶] If it be conceded that the right to make choice of ministers and assistants for the court is a legislative power, then neither the judiciary nor the executive can limit its exercise, nor impose restraints upon the legislative discretion.... If this be so, then the Legislature may select any number of assistants, assign to them whatsoever duties they may see fit, give them access to the records of the court and surrender to them the right to share with it all labors and all duties. Surely, a court thus subject to legislative rule would be a mere dependent, without a right to control its own business and records. But a constitutional court is not subject to any such legislative control. The Legislature can not for any purpose cross the line which separates the departments and secures the independence of the judiciary. It is not the length of the step inside the sphere of the judiciary that summons the courts to assert their constitutional right and demands of them the performance of their sworn duty, for the slightest encroachment is a wrong to be at once condemned and resisted." (*Id.* at p. 357 [21 N.E. at p. 247], italics added.)

Summing up, the Indiana Supreme Court said: "[I]t can not be doubted that judicial power includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as the assistants of the judges in the performance of their judicial functions, whether they be referees, receivers, attorneys, masters, or commissioners. [¶] ... It was, as we have shown, a well known and fully recognized principle, that *courts should, as part of the judicial power, have the right to choose their own assistants, and the Constitution has secured and confirmed that principle beyond the power of the Legislature to shake it.*" (*State v. Noble, supra,* 118 Ind. 350, 360-361 [21 N.E. 244, 248], italics added.) This court quoted these very words with apparent approval in *People v. Hayne* (1890) 83 Cal. 111 [23 P. 11], upholding legislation reserving to this court the authority to appoint Supreme Court commissioners. Other state courts have similarly concluded that, just as the judiciary ordinarily may not appoint persons discharging executive or legislative duties (*Hutchins v. City of Des Moines* (1916) 176 Iowa 189, 212 [157 N.W. 881, 889], the legislative and executive ***69** branches may not appoint or remove subordinate judicial officers or confidential judicial assistants (*Barland v. Eau Claire County* (1998) 216 Wis.2d 559, 589 [575 N.W.2d 691, 703]; *Witter v. Cook County Com'rs* (1912) 256 Ill. 616 [100 N.E. 148].)

III

Because they raise serious separation of powers concerns, interbranch appointments must be carefully scrutinized and should be permitted only if there exists either a special justification for the interbranch appointing mechanism or particular safeguards to protect the appointee from extrabranch influence after appointment. Because here the proponents of the challenged law have shown neither a special justification nor particular safeguards, the challenged law is invalid.

An interbranch appointment would be justified if, for example, vesting the appointing power within the same branch in which the officer serves would implicate a conflict of interest. (See, e.g., *Morrison v. Olson, supra,* 487 U.S. 654, 677 [108 S.Ct. 2597, 2611-2612] [upholding law providing for judicial appointment of special prosecutor].) Consistent with this principle, the state Constitution provides for interbranch appointment of the members of the Commission on Judicial Performance, the body charged with disciplining judges. (Cal. Const., art. VI, § 8, subd. (a).) Of the commission's 11 members, this court appoints three, the Governor appoints four,

and the legislative branch (by the Senate Committee on Rules and by the Speaker of the Assembly) appoints the other four. (*Ibid.*) But there is no comparable conflict of interest concern in the appointment of those charged with administering the attorney discipline system. Because judges are not members of the State Bar, this court's appointment of State Bar Court hearing judges poses no issue of bias or conflict of interest.

An interbranch appointment might also be justified if the appointee's duties were not purely executive or judicial or legislative, but of a combined or hybrid sort. Again, nothing like that has been demonstrated here. The duties of hearing judges involve supervising discovery, presiding at evidentiary hearings, and making written findings and recommendations. As the United States Supreme Court has explained, these duties "are quintessentially judicial in nature." (*Freytag v. Commissioner, supra,* 501 U.S. 868, 891 [111 S.Ct. 2631, 2645].)

Not only is there no special justification for interbranch appointment of State Bar Court hearing judges, the law at issue contains no safeguards to ensure that hearing judges appointed by the executive or legislative branches will be independent of their appointing authorities. During their terms of ***70** office, hearing judges are removable only for cause in the same manner as other state judges presiding in courts established under article VI of the state Constitution. But hearing judges serve six-year terms, subject to reappointment for additional terms by the same appointing authority. Under these circumstances, hearing judges are necessarily subservient to their appointing authorities, which hold the power to determine whether they will continue in office. The Speaker of the Assembly, for example, could decline to reappoint, or threaten to decline to reappoint, a hearing judge who failed a political litmus test or who exercised judicial powers in a fashion unsatisfactory to the Speaker. (See *Bowsher v. Synar, supra,* 478 U.S. 714, 726 [106 S.Ct. 3181, 3187-3188].) This kind of political influence over the performance of judicial duties is constitutionally impermissible. Because hearing judges are subordinate judicial officers, they must owe their allegiance entirely to the judicial branch or to the voters, not to officers of the political branches of state government.

The majority suggests that appointment of hearing judges by members of the executive and legislative branches is permissible because hearing judges "operate only within a discrete arena ... in which a significant degree of legislative regulation has been found permissible." (Maj. opn., *ante,* at p. 54.) I disagree. The Legislature acts within its proper sphere when it enacts legislation. The legislation may regulate the practice of law or the practice of medicine, or it may define crimes and prescribe punishments. Enacting laws of this character is quintessentially legislative in character. Within limits, the Legislature may also enact laws regulating judicial procedures. But when the Legislature has enacted the substantive law, and prescribed the procedure for its enforcement, it has ordinarily exhausted its legislative role. It may not also control the execution of the laws it has enacted or sit in judgment on persons accused of violating those laws. All judges, and indeed all executive officers, operate within arenas subject to a significant degree of legislative regulation through enactment of substantive and procedural laws. This legislative regulation provides no justification for legislative intrusion into the appointment of particular judicial officers.

The majority also suggests that interbranch appointment of hearing judges is permissible because hearing judges' decisions are subject to review in the Review Department, all of whose judges are appointed by this court. (Maj. opn., *ante,* at p. 54.) But it is no justification that the legislative and executive usurpation of the appointment process for the State Bar Court is not yet complete. To repeat the words of the Indiana Supreme Court, "[i]t is not the length of the step inside the sphere of the judiciary that summons the courts to assert their constitutional right, and demands of them the performance of their sworn duty, for *the slightest encroachment* is a wrong to be at ***71** once condemned and resisted." (*State v. Noble, supra,* 21 N.E. 244, 247, italics added.)

Finally, the majority suggests that interbranch appointment of hearing judges by the political and executive branches is permissible because any appointees must first be found qualified by an independent entity whose members are appointed by the judiciary. (Maj. opn., *ante,* at p. 54.) But this kind of screening merely ensures that the appointee will possess minimum qualifications essential for the position. It does not reduce or eliminate the appointed officer's subservience to the appointing authority; reappointment will depend on pleasing the appointing authority, not the screening commission.

I conclude, accordingly, that appointment of hearing judges of the State Bar Court by the Senate Committee on Rules, the Speaker of the Assembly,

and the Governor violates the separation of power provision of our state Constitution.

IV

The challenged provision deleting the position of lay judge in the Review Department also violates the principle of separation of powers. Ordinarily, the legislative branch may establish offices in the other branches and determine the minimum qualifications for those offices. But attorney discipline is a subject committed entirely to the judicial branch. Attorneys are officers of the court, and, as the United States Supreme Court has said, "it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." (*Ex parte Secombe* (1856) 60 U.S. (19 How.) 9, 13 [15 L.Ed. 565].) The majority correctly recognizes that in attorney discipline matters our authority is primary and extends to the composition of the State Bar Court. (Maj. opn., *ante*, at p. 57.) Accordingly, statutes enacted by the Legislature dealing with the composition of the State Bar Court are properly considered recommendations that this court may accept or reject. In this instance, because there is no sound basis for eliminating the lay judge position in the Review Department, the recommendation should be firmly rejected.

In 1989, the American Bar Association created the Commission on Evaluation of Disciplinary Enforcement "to conduct a nationwide evaluation of lawyer disciplinary enforcement and to provide a model for responsible ***72** regulation of the legal profession into the twenty-first century." (ABA, Lawyer Regulation for a New Century (1992) p. xi.) The commission continued the work of an American Bar Association committee formed in 1967 and chaired by retired United States Supreme Court Justice Tom Clark, a committee whose work this court has cited with approval. (See *Hustedt v. Workers' Comp. Appeals Bd., supra,* 30 Cal.3d 329, 341.) In 1992, the House of Delegates of the American Bar Association adopted the commission's report. (ABA, Lawyer Regulation for a New Century, *supra,* at p. xi.) Regarding participation by nonattorneys in lawyer discipline, the commission recommended that "[a]t least one third ... of all adjudicators should be nonlawyers." (*Id.* at p. 63.) The commission explained: "Over two thirds of the states have nonlawyer members sitting with lawyers to adjudicate disciplinary cases. The opinion of disciplinary counsel, lawyer members, and the courts of those states is that nonlawyers are a great benefit to the process. The presence of nonlawyers serves to assure the public that the disciplinary process is not a 'whitewash.' Nonlawyers bring a perspective that adds depth and breadth to the adjudication. [¶] The appointment of nonlawyers as disciplinary adjudicators has been the policy of the American Bar Association for twenty years.... The lack of nonlawyer adjudicators creates distrust among the public and provides a target for critics of judicial regulation of lawyers.... [¶] ... [¶] Failing to include nonlawyer members increases suspicion that the profession is protecting its own. It denies the Court, the public, and the profession depth and quality in the adjudicative process." (*Id.* at pp. 63-64.) [FN1]

FN1 The commission also recommended that "[r]egulation of the legal profession should remain under the authority of the judicial branch of government" (ABA, Lawyer Regulation for a New Century, *supra,* at p. 1) and that "[a]ll jurisdictions should structure their lawyer disciplinary systems so that disciplinary officials are appointed by the highest court of the jurisdiction or by other disciplinary officials who are appointed by the Court" (*id.* at p. 24). The commission found "no basis to believe that legislative regulation of lawyers *per se* would be an improvement over judicial regulation" and "no persuasive evidence that a system regulated by the judiciary is biased for respondent lawyers against complainants." (*Id.* at p. 5.)

In 1993, the American Bar Association's House of Delegates adopted Model Rules for Lawyer Disciplinary Enforcement. The model rules provide for a statewide board and hearing committees to administer the attorney discipline system. (ABA, Model Rules for Lawyer Disciplinary Enforcement (1996) rule 2(A).) Public members constitute one-third of the board, which corresponds to the State Bar Court's Review Department. (*Id.*, rule 2(B).) The commentary to the Model Rules explains: "A combination of lawyers and nonlawyers on the board results in a more balanced evaluation of complaints. Currently more than two-thirds of all jurisdictions involve public members in their disciplinary structure. Participation by nonlawyers increases the credibility of the discipline and disability process in the eyes of ***73** the public. There is a human tendency to suspect the objectivity of a discipline body composed solely of members of the respondent's

professional colleagues. Involving public members helps allay that suspicion." (*Id.*, com. to rule 2.) [FN2]

FN2 The principle of public representation in professional discipline is also embedded in the state Constitution's provisions for judicial discipline. The 11-member Commission on Judicial Performance, which administers the system of judicial discipline, consists of three judges, two attorneys, "and 6 citizens who are not judges, retired judges, or members of the State Bar of California ...." (Cal. Const., art. VI, § 8, subd. (a).)

I find that reasoning persuasive. Public confidence is essential for the proper functioning of the attorney discipline system. One way to instill public confidence is to provide for nonattorney representation in the Review Department through the position of lay judge. A substantial majority of other jurisdictions use nonattorney adjudicators in their attorney discipline systems. In state boards regulating other professions, public members are invariably included, constituting at least one-third of the membership. [FN3] Here, the majority suggests no reason why we should defer to the political branches by eliminating the only nonattorney adjudicator in the State Bar Court. Therefore, I find the challenged law invalid insofar as it eliminates the position of lay review judge.

FN3 Representative statutory provisions providing for public members on state boards or committees administering disciplinary systems for various professions and occupations are the following: Business and Professions Code sections 1000-1 (State Board of Chiropractic Examiners: 2 of 7 members are public members), 1601 (Dental Board of California: 4 of 14 members are public members), 2001 (Medical Board of California: 7 of 19 members are public members), 2008 (Division of Medical Quality: 4 of 12 members are public members), 2230 (Division of Medical Quality panels: 2 of 6 members are public members), 2531 (Speech-Language Pathology and Audiology Board: 3 of 9 members are public members), 2603 (Physical Therapy Board of California: 3 of 7 members are public members), 2702 (Board of Registered Nursing: 3 of 9 members are public members), 2842 (Board of Vocational Nursing and Psychiatric Technicians: 6 of 11 members are public members), 2920 (Board of Psychology: 4 of 9 members are public members), 3320 (Hearing Aid Dispensers Examining Committee: 4 of 7 members are public members), 3711 (Respiratory Care Board of California: 4 of 9 members are public members), 4800 (Veterinary Medical Board: 3 of 7 members are public members), 5000 (California Board of Accountancy: 4 of 10 members are public members), 5514 (California Architects Board: 5 of 10 members are public members), and 6711 (Board for Professional Engineers and Land Surveyors: 7 of 13 members are public members).

V

We consider here a law that intrudes on this court's authority over attorney discipline by restructuring the State Bar Court to remove our authority to appoint three of the five hearing judges and by eliminating the position of lay review judge. The majority concludes that this law does not defeat or materially impair judicial authority (maj. opn., *ante*, at p. 57), and ***74** that under this vague standard the law does not violate the separation of powers doctrine. In so concluding, the majority "underestimates the incremental effect of interbranch intrusions." (McCabe, *Four Faces of State Constitutional Separation of Powers: Challenges to Speedy Trial and Speedy Disposition Provisions* (1989) 62 Temple L.Rev. 177, 218.) As the United States Supreme Court has explained, "the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of harm, can be identified." (*Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 239 [115 S.Ct. 1447, 1463, 131 L.Ed.2d 328].) It is a doctrine "establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." (*Ibid.*; see also *Bowsher v. Synar, supra*, 478 U.S. 714, 730 [106 S.Ct. 3181, 3190] ["The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."].)

Although the law here challenged poses no immediate threat to liberty, it is an impermissible weakening of structural protections, and therefore a violation of the separation of powers doctrine. Justice

Kennedy put it this way: "It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when, as in the case here, no immediate threat to liberty is apparent. When structure fails, liberty is always in peril." (*Public Citizen v. Department of Justice* (1989) 491 U.S. 440, 468 [109 S.Ct. 2558, 2574, 105 L.Ed.2d 377] (conc. opn. of Kennedy, J.).)

For these reasons, I dissent.

Werdegar, J., concurred.

BROWN, J., Dissenting.

The wanton pursuit of power is not a new problem. In his farewell address, George Washington warned "[t]he spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of the love of power and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position." (Speeches of the American Presidents (Podell & Anzovin edits. 1988) p. 17.)

California government has never been immune to the spirit of encroachment. Writing in 1859, a decade after this court's founding, Justice Stephen J. Field responded to legislation requiring us to issue written opinions in all cases: "It is but one of many provisions embodied in different statutes by which control over the Judiciary department of the government has been ***75** attempted by legislation. To accede to it any obligatory force, would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter.... [¶] The truth is, no such power can exist in the Legislative Department or be sanctioned by any Court which has the least respect for its own dignity and independence. *In its own sphere of duties, this Court cannot be trammeled by any legislative restrictions.*" (*Houston v. Williams* (1859) 13 Cal. 24, 25, italics added.)

One hundred and forty years, seven generations, have come and gone, during which time this court has successfully labored to maintain the judiciary's self-respect. Yet, today's ruling marks the third time in as many months a majority has willingly ceded constitutional ground. (See *In re Rose* (2000) 22 Cal.4th 430 [93 Cal.Rptr.2d 298, 993 P.2d 956] [neither legislation establishing State Bar Court nor summary denial of judicial review in professional discipline case is unconstitutional]; *Leone v. Medical Board* (2000) 22 Cal.4th 660 [94 Cal.Rptr.2d 61, 995 P.2d 191] [Legislature can constitutionally limit appellate review of professional discipline by writ of mandate rather than direct appeal].)

The legislation examined here shows disrespect for this court as a coordinate branch of government. The majority's abject acceptance of such legislative impudence goes far beyond comity and cooperation. This is abdication.

I

The doctrine of the separation of governmental powers, a principle embodied in the Constitutions of the United States and of most of the states, including California, is a structural means of thwarting tyranny by dividing political power, the better to resist its consolidation and abuse. Nevertheless, like that of many American high courts, our separation of powers jurisprudence has tempered formal doctrine with insights drawn from the pragmatic necessities of effective government. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." (*Youngstown Co. v. Sawyer* (1952) 343 U.S. 579, 635 [72 S.Ct. 863, 870, 96 L.Ed. 1153] (conc. opn. of Jackson, J.).) We have, in short, practiced a sensible doctrine of shared powers, rather than strictly separated powers.

In an area of regulation where the practical reality of the activities of the regulated class implicates legitimate interests of more than one department ***76** of government, recognizing the utility of a shared jurisdiction makes eminently good sense. But shared jurisdiction should be distinguished from officious intermeddling. In the interest of ensuring workable government and avoiding interbranch conflicts, each branch needs to exercise self-discipline, showing institutional restraint and a respect for constitutional limits. As then Professor Felix Frankfurter explained: "The dominant note" in separation of powers jurisprudence "is respect for the action of that branch of the government upon which is cast the primary responsibility for adjusting public affairs. The accommodations among the three branches of the government are not automatic. They are undefined, and in the very nature of things could not have been

defined, by the Constitution. To speak of *lines* of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory." (Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts-A Study in Separation of Powers* (1924) 37 Harv. L.Rev. 1010, 1016, italics in original; see also Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision* (1958) 107 U. Pa. L.Rev. 1; Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law-A Proposed Delineation* (1976) 60 Minn. L.Rev. 783.) Once this obvious point is acknowledged-that the activities of government are such that at times departmental functions blur-the mature solution to the threat of interbranch conflicts is a pragmatic, respectful give-and-take, adjusting the powers of a department relative to another so that functions deemed basic to one are not trenched upon by another.

Our own cases exhibit just such an effort to accommodate legitimate legislative interests in the judicial sphere. We have upheld, for example, legislation fixing the compensation paid court employees (*Millholen v. Riley* (1930) 211 Cal. 29 [293 P. 69]), prescribing the conditions under which judges may be disqualified (*Johnson v. Superior Court* (1958) 50 Cal.2d 693 [329 P.2d 5]), and fixing the punishment for contempt of court (*In re McKinney* (1968) 70 Cal.2d 8 [73 Cal.Rptr. 580, 447 P.2d 972]). Given that much of what attorneys do in contemporary California society is of legitimate interest to the Legislature under its broad police powers, we have also approved legislation prescribing criteria for admission to the bar (*Brydonjack v. State Bar* (1929) 208 Cal. 439 [281 P. 1018, 66 A.L.R. 1507]), and regulating attorney fees (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920 [211 Cal.Rptr. 77, 695 P.2d 164]). (See also *In re Attorney Discipline System* (1998) 19 Cal.4th 582 [79 Cal.Rptr.2d 836, 967 P.2d 49].)

Yet equally, and even emphatically, when legislation trammeled on core judicial functions, we did not hesitate to strike it down on separation of powers grounds. Indeed, we aggressively defended the perimeter of our ***77** constitutionally conferred territory, on occasion going so far as to invalidate legislation with little impact on the operations of the courts. [FN1] (See, e.g., *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329 [178 Cal.Rptr. 801, 636 P.2d 1139] [statute authorizing administrative agency to discipline attorneys appearing before it void as violating separation of powers]; *Katz v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 353 [178 Cal.Rptr. 815, 636 P.2d 1153] [same]; cf. Wolfram, Modern Legal Ethics (1986) § 2.2.3, pp. 27-28 & fn. 53.)

FN1 Robert C. Fellmeth, formerly the Legislature's special State Bar discipline monitor, has characterized legislative and executive branch involvement in the bar disciplinary function in California as "perhaps ... unprecedented ...." (Third Progress Report of the State Bar Discipline Monitor (1988) p. 99.) Yet in his 1988 progress report, Mr. Fellmeth rejected the notion of executive or legislative appointments to the State Bar Court: "[I]n 33 states," he wrote, "the state supreme court appoints not only the adjudicators, but also the commission overseeing the entire disciplinary system operation, including investigations and trial counsel.... [¶] Perhaps, more importantly, this is a judicial position and one unique to the very special jurisdiction of the Supreme Court." (*Id.* at pp. 99-100.)

Regrettably, the legislation before us lacks any sense of constitutional restraint. Here, we deal not with such matters as regulation of attorney fee arrangements or administrative operation of the courts. (Cf. *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53-58 [51 Cal.Rptr.2d 837, 913 P.2d 1046] [legislative declaration of unpaid furlough days on which trial courts are not in session does not facially violate separation of powers].) Instead, the subject-the naming and vetting of judicial officers-lies close to the heart of the courts' function and implicates the "longstanding Anglo- American tradition of an independent Judiciary" (*United States v. Will* (1980) 449 U.S. 200, 217 [101 S.Ct. 471, 482, 66 L.Ed.2d 392]; see also *Northern Pipeline Co. v. Marathon Pipe Line Co.* (1982) 458 U.S. 50, 58 [102 S.Ct. 2858, 2864-2865, 73 L.Ed.2d 598]). Why? Because "[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." (*United States v. Will, supra*, 449 U.S. at pp. 217-218 [101 S.Ct. at p. 482].)

The vice of this statute is not so much that it raises palpable concerns that biased or even corrupt judges will be appointed by the legislative or executive

departments-that is at least a possibility under any appointment process, including the one by which article VI judges are chosen. But, by arrogating to themselves the staffing of a disciplinary tribunal we have repeatedly referred to as our "administrative assistant[s]" (see, e.g., *In re Attorney Discipline System*, *supra*, 19 Cal.4th at p. 600; *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 47-48 [278 Cal.Rptr. 845, 806 P.2d 317]; *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224 [113 Cal.Rptr. 175, 520 P.2d 991]; ***78** *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557 [216 Cal.Rptr. 367, 702 P.2d 525]; *Jacobs v. State Bar* (1977) 20 Cal.3d 191, 196 [141 Cal.Rptr. 812, 570 P.2d 1230]; *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301 [19 Cal.Rptr. 153, 368 P.2d 697, 94 A.L.R.2d 1310]), the Legislature and the executive infringe this court's most basic prerogative. What does it say about the constitutional independence of the judiciary if the Legislature can deprive us of the power to choose our own subordinates?

The majority suggest this legislation may nevertheless be upheld because review of State Bar Court Hearing Department (Hearing Department) rulings will remain the task of the State Bar's Review Department (Review Department), whose judges remain our appointees (for now, at least) and, ultimately, by this court. (Maj. opn., *ante*, at pp. 54-56.) But judicial control cannot practically be divorced from the power to find facts. Alone, the power to resolve ultimate issues of law is insufficient to ensure a thoroughgoing judicial independence because the essence of the decisionmaking process includes factual determinations: "And of course making impartial decisions in individual cases requires control over fact-finding as well as law-declaring. In the run of the mill case, the facts are everything." (Strauss, *Article III Courts and the Constitutional Structure* (1990) 65 Ind. L.J. 307, 309.) Because these two components of the judicial function are inextricably intertwined, the Legislature cannot devolve one to itself without violating the separation of powers doctrine.

Our own State Bar precedents reflect this same reality. Although the recommendations of the Hearing Department judges do not bind us, we give them " 'great weight.' " (*In re Menna* (1995) 11 Cal.4th 975, 984 [47 Cal.Rptr.2d 2, 905 P.2d 944].) Because we do not conduct hearings, "[t]he findings of the hearing panel have long been accorded significant weight, inasmuch as the hearing judge is in the best position to weigh intangibles such as credibility and demeanor." (*Id.* at p. 985.) Given that practical necessity, it is by no means clear that a tribunal consisting of administrative judges with political ties to the other two departments of government can be squared with the notion of judicial independence. It ought to go without saying that, "[b]y freeing ... judges from continuing review by appointing authorities, conflicts of interest are minimized. An independent judiciary is the hallmark of the constitutional state." (Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence* (1989) 30 Wm. & Mary L.Rev. 301, 308.) [FN2] ***79**

FN2 A famous incident in federal constitutional history-the "court- packing" plan of the mid-1930's that so riled the nation-may make the point more sharply than any legal analysis. Although not exact, the parallel to this case is not inapt. What was feared was the perceived attempt by one department of the federal government-the executive-to undercut the constitutional independence of another department-the judiciary-by expanding the size of the United States Supreme Court. The widespread anxiety over the plan was not provoked by the idea of presidential appointment, but by the public's felt sense that the administration, unhappy with the high court's jurisprudence in matters social and economic, was in effect attempting to overthrow the court as a coordinate department of government, swamping its membership with new appointees handpicked by the administration.

II

There is a second reason why the legislation petitioners attack here fails to pass muster, one not derived from abstract theory but tied instead to pertinent precedents of this court. In *In re Lavine* (1935) 2 Cal.2d 324 [41 P.2d 161, 42 P.2d 311], an attorney was disbarred after being convicted of attempted extortion. Later, he applied to be reinstated, invoking a pardon conferred by the Governor and the "pardon statute" purporting to restore all rights to those so pardoned. (*Id.* at p. 326; see Stats. 1933, ch. 945, § 1, p. 2476.) We denied his application, holding the statute "unconstitutional and void as a legislative encroachment upon the inherent power of this court to admit attorneys to the practice of the law and ... tantamount to the vacating of a judicial order by legislative mandate." (*Lavine*, at p.

329.) In *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724 [147 Cal.Rptr. 631, 581 P.2d 636], the petitioner engineering firm sought mandate permitting it to appear in a municipal court civil action through a corporate officer who was not an attorney, relying on a statute authorizing such appearances. We denied relief, saying it was "established without serious challenge that legislative enactments relating to admission to practice law are valid only to the extent they do not conflict with rules for admission adopted or approved by the judiciary" (*id.*, at pp. 728-729), and again invalidated the law as " 'the vacating of a judicial order by legislative mandate.' " (*Id.* at p. 728, quoting *In re Lavine, supra*, 2 Cal.2d at p. 329.) And in *Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d 329, the Workers' Compensation Appeals Board began contempt proceedings against the petitioner-attorney arising out of an administrative hearing, relying on a provision of the Labor Code. We granted the attorney's petition for mandate restraining the board's action, concluding the statute did not displace our exclusive jurisdiction to suspend or remove attorneys. (*Id.* at p. 344.)

This case, too, falls within the rule we announced in *Lavine* and have since applied to invalidate legislation vacating our orders. The 1988 legislation establishing the State Bar Court provided that statutory procedures for the appointment of judges of the State Bar Court are to be followed "unless otherwise directed by the Supreme Court." (Bus. & Prof. Code, § 6079.1, subd. (c).) In 1991, this court adopted rule 961 as a Rule of Court (hereafter all undesignated rules references are to the California Rules of Court). The rule prescribes in detail procedures for the evaluation and nomination of ***80** judges to the State Bar Court. In 1995, in response to concerns that the appointmentof State Bar judges by the bar's board of governors raised substantial conflict of interest problems, we amended rule 961 to establish an Applicant Evaluation and Nomination Committee, empowering it to solicit and evaluate applications for appointments and reappointments as State Bar Court judges. The rule specifies the composition of the committee, provides that it serves at the court's pleasure, and directs it to adopt, with our approval, procedures for the selection process. (Rule 961(a).) Through the rule, we have reserved the right to extend the terms of incumbent judges and provide for staggered terms (rule 961(c)), and, over the course of the last few years, have done so several times.

The legislation challenged by petitioners in this proceeding failed to carry forward the specific legislative recognition of our inherent power to direct a different appointment process. Instead, the new legislation vests without qualification the appointive power over three of the five Hearing Department judges in the Speaker of the Assembly, the Senate Rules Committee, and the Governor. The measure, in other words, purports to delete this court's authority to adopt its own procedures for the selection and retention of State Bar Court judges despite our express ruling that the "reserved judicial power over admission and discipline" was "critical to the constitutionality of the State Bar Act." (*In re Attorney Discipline System, supra*, 19 Cal.4th at p. 600.) The challenged legislation not only invades a subject which, in both substance and history, has belonged wholly to the judiciary, it sweeps aside- "vacates"-the rule we have adopted for conducting our own business. It is equivalent to this court's appointing the membership of legislative committees. Because the legislation substantially compromises our inherent power to adopt an appointment procedure of our own devising and changes the rules under which our own house is governed, it violates the separation of powers doctrine. (*Chambers v. NASCO, Inc.* (1991) 501 U.S. 32, 43 [111 S.Ct. 2123, 2132, 115 L.Ed.2d 27], quoting *United States v. Hudson* (1812) 11 U.S. (7 Cranch) 32, 34 [3 L.Ed. 259, 260] [" '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others' "].)

Conclusion

Dissenting in *Baker v. Carr* (1962) 369 U.S. 186, 267 [82 S.Ct. 691, 737- 738, 7 L.Ed.2d 663], Justice Frankfurter noted a court's authority "ultimately rests on sustained public confidence in its moral sanction" and that confidence is nourished by the judiciary's "complete detachment, in fact and in appearance, from political entanglements ...." Who can doubt that, ***81** by upholding the law at issue here, the majority blithely welcomes into the judiciary's own household the specter of "political entanglement" in one of its core functions-the appointment and reappointment of judicial officers, of, in a word, ... judges.

James Madison said of the separation of powers that it was a "political maxim." (Madison, The Federalist No. 47 (Kramnick edit. 1987) p. 302.) He meant, I think, that while the phrase itself is a formula, or an aspiration, its success as an operative principle depends upon the skill with which the political game is played out among the departments of government.

The preservation of a viable constitutional government is not a task for wimps. We cannot, as the majority seem to suppose, simply defer to the violation of the Constitution. The struggle for judicial supremacy-not primacy, but supremacy- within the courts' constitutional domain is unending. Unending because, as Washington understood, it derives from the human heart. With the decisions of this term, the ceaseless struggle to preserve the independence of the judiciary-a struggle that is a constitutional obligation of this court-has been placed at risk. With "earnest heart and troubled mind[,] hav[ing] sought gropingly but honestly for what was best for [our] day," I dissent. (Jackson, The Struggle for Judicial Supremacy (1941) p. xvi.) ***82**

Cal. 2000.

JAMES W. OBRIEN et al., Petitioners, v. BILL JONES, as Secretary of State, etc., et al., Respondents.

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C. MODELS

THE SUPREME COURT'S ADVISORY COMMITTEE
ON LAWYER REGULATION
Table Of Contents
June 19, 2002

C. MODELS

C1. Basic Attorney Discipline Models (with Four Attachments)

BASIC ATTORNEY DISCIPLINE MODELS

Among the 50 states and the District of Columbia, there is a veritable "cornucopia" of programs, functions and funding sources for the attorney discipline system. There are 51 models (54 if New York's four separate systems are counted) for 51 jurisdictions, each highly reflective of local custom and practice, the diversity of the profession, and differing perceptions of what is the appropriate role of members of the public, lawyers, the judiciary and the Legislature in the regulation of the legal profession. It is, however, generally acknowledged that California's model is truly unique and does not fit exclusively into any of the basic models.

While each system has its nuances, there are three basic attorney discipline system models in use in the United States. Each model is extremely dependent on whether or not the state has an integrated (unified or mandatory) state bar association (in which membership and dues are required as a condition of practicing law in the state) or a voluntary state bar association (where membership in the bar is purely voluntary and the bar may undertake some Supreme Court–directed functions), and whether regulatory functions (discipline) are combined with non–regulatory activities. In most, but not all, integrated bar states, the bar undertakes the discipline function directly on behalf of the Supreme Court. However, in a number of bar states, the Supreme Court or the

Legislature has created a separate and distinct board, commission or agency to oversee the discipline function. In most voluntary bar states, the Supreme Court has created a separate and distinct board, commission or agency to oversee the discipline function.

SUMMARY

Predominant Integrated Bar Model

The predominant model, found in 20 of the 51 jurisdictions, is the integrated bar in which day–to–day operational responsibility for the discipline system resides in the integrated bar. The Supreme Court exercises direct oversight and direction through its power of appointment to discipline boards operating within the general structure of the bar. (See Attachment A.)

Predominant Voluntary Bar Model

In this model, found in 18 of the 51 jurisdictions, the Supreme Court undertakes more direct day–to–day oversight of and responsibility for the disciplinary system by using (either by court rule or legislative act) a distinct board, commission or agency separate from the bar with an exclusive focus on discipline–related issues. (See Attachment B.)

The Hybrid Integrated Model

13 of the 51 jurisdictions use this model which includes attributes of both the integrated and voluntary bar models. It is similar to the integrated model because a lawyer must belong to the bar in order to practice law. Typically, however, the Supreme Court or Legislature has created a disciplinary oversight board, commission or agency to oversee the regulatory (discipline) functions separate from the integrated bar. In this model, the Supreme Court assesses fees directly for both the disciplinary agency and the mandatory bar for more traditional bar association activities. In this model, the Supreme Court usually, but not exclusively, appoints the members of the oversight board, commission or agency. (See Attachment C.)

A chart of Jurisdiction by Model Type is set forth in Attachment D.

ATTRIBUTES

All models share one overriding concept — that the court of highest jurisdiction exercises plenary power over the discipline system.[1]

Generally, what distinguishes the structure of the three basic models is the scope of Supreme Court involvement in the oversight function, either through the integrated bar or through the separate agency, and the specific vehicle by which it exercises that oversight.

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[1] Whether or not this is the case in the State of New York is unclear in that the Court of Appeal is the highest court in New York, yet the discipline function is carried out independently by the appellate departments, which are nominally under the Court of Appeal. The Court of Appeal apparently exercises no oversight.

Shared attributes of all models include:

- Fee–setting authority
- Budget approval process (earmarked discipline funds or not)
- Appointment to oversight group
- Selection of adjudicators
- Selection of chief prosecutor
- Inclusion of public members (either as adjudicators or on oversight board)
- Inclusion of other regulatory–related functions.

BREADTH OF OPTIONS

Fee–Setting/Budget Approval

In almost all states, other than the ten states in which the Legislature sets a fee by statute, the Supreme Court—either directly through an assessment process or indirectly through a budget approval process—sets the fee for the disciplinary and other regulatory functions. Roughly half of the states "earmark" a portion of the general bar fees for disciplinary and other related functions, such as client security funds, lawyer assistance programs, etc. Examples of the various processes used in various states include:

1. ***Legislative Approval/Fee Ceiling Process***: In 11 states (Alabama, California, Connecticut, Idaho, Mississippi, North Carolina, New York

(four appellate departments), Oklahoma, North Dakota, Vermont, and Virginia,[2]), the Legislature approves the fee or sets the fee ceiling.

2. ***Bar Association Earmarked Fee/Dues Process***: In 11 jurisdictions (Arizona, District of Columbia, Florida, Georgia, Kentucky, Michigan, Nebraska, New Mexico, Oregon, Texas and Wisconsin), the State Bar sets general bar membership fees and, in consultation with the Supreme Court, earmarks a portion of these fees for the disciplinary system.

3. ***Direct Supreme Court Assessed Fees Process***: In 23 states (Colorado, Delaware, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Washington, Nevada, Utah, and West Virginia), the Supreme Court directly sets and collects the

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[2] In 11 states in which the Legislature exercises final fee authority, it appears that in Alabama, California, Mississippi, North Carolina and Oklahoma, the Supreme Court is not involved in the process. In Alabama, the bar prepares a budget which is submitted to the State Budget Office and then to the Governor. In New York, the fee is set by the appellate departments as part of the annual budget approval process with the Legislature. In North Dakota, the Legislature sets a fee ceiling (similar to California), and the exact amount is set by the bar. Monies collected pass through the general fund and approximately 30% of expenses are paid by general fund monies. The State Court Administrator participates in the budget development, and the discipline budget is included in the State Court system budget. In Vermont, fees are set by the Supreme Court subject to legislative review and revision. The Court Administrator participates in the budget preparation process. In Virginia, the Legislature sets a fee ceiling, but the Supreme Court sets the exact fee amount with the bar preparing and recommending the actual budget to the Court. Idaho requires both the Legislature and the Supreme Court to agree on the fee. Connecticut's Legislature assesses an annual occupation tax paid directly to the General Fund.

fees for the disciplinary system, typically through a regulatory oversight board that is separate and distinct from the bar association.

4. ***Supreme Court General Budget Process***: In two states (Connecticut and South Carolina), the Supreme Court sets the fee for the disciplinary system, which is included as part of the Supreme Court's general budget process. (See also Footnote 2.)

In most of the integrated bar states, the bar association is responsible for the discipline and budget process, subject to some consultation with the Supreme Court. Alternatively, the voluntary bar states use a direct Supreme Court assessment process to fund the function, with some states providing a role for the bar in the process. However, neither is exclusive. Some integrated bars also use a direct Supreme Court assessment process for the discipline functions (Michigan, Louisiana, Washington, Wisconsin).

DISCIPLINE OVERSIGHT MODELS

The vehicle used to actually oversee the operations of the discipline/regulatory system, the process to accomplish the oversight, and the composition of the body responsible is crucial, and states differ substantially in the details of the process.

Predominant Integrated Bar Model

In this model, the state bar, by legislation or Supreme Court Rule, is primarily responsible for the day–to–day operation of the discipline system. It generally oversees all functions, appoints and hires the chief prosecutor, assesses and collects the fee (normally part of the general membership fee with some states earmarking funds), and appoints some or all of the adjudicators. In this model, frequently a "disciplinary board" of some type, separate from the Bar governors/directors is appointed to oversee these functions. Often, but not predominantly, the Supreme Court of the state also makes appointments to that disciplinary board if it does not make appointments directly at the State Bar Board director level. Typical models of this system are Arizona, Georgia, Kentucky, Virginia and Wyoming.

Predominant Voluntary Bar Model

In this model, the Supreme Court, usually by rule of court, creates a board, commission or agency distinct from the voluntary state bar association. Lawyers are required to pay a special assessment, as a condition of practice, that is used to support the discipline oversight entity. In almost all voluntary bar states, with few exceptions, the Supreme Court makes all of the appointments to the oversight panel, board or commission. This entity appoints adjudicators or acts as adjudicator itself; it frequently selects and hires the chief prosecutor after some form of consultation with the Supreme Court and often provides administrative oversight to the entire 'system.'

The composition of the oversight group in this model varies dramatically from state to state. Frequently, public members are appointed by the Court, and in some instances the voluntary state bar association has a number of appointments to the oversight board.

In this model, the voluntary state bar association is a stakeholder in the system rather than the governing body responsible for oversight of day–to–day operation. Typically, this model tends to limit itself solely to discipline–related functions and the less directly related functions, such as fee arbitration and lawyer assistance programs, often fall within the "member services" ambit of the voluntary state bar association". Illinois, New Jersey and Pennsylvania are examples of this type of system.

Predominant Hybrid Integrated Model

This model is a combination of a traditional integrated bar model with an oversight board, commission or agency separate from the Bar, reporting directly to the Court. In states employing this model, there are separate fee assessments, either directly by the Supreme Court or by the integrated bar as part of the general fee to fund the day–to–day operations of both an integrated bar and the separate discipline operation. In these states, the Supreme Court appoints the oversight board(s) for the discipline function. There may be separate adjudication/prosecution entities (Michigan) or one integrated entity, in which there is adjudication, prosecution, and administrative oversight (Louisiana). Louisiana, New Hampshire, Nebraska, Wisconsin, Montana, New Mexico, Rhode Island and Michigan are examples of this type of model.

Commonalities

Several generalizations are possible:

1. In almost all states, the Supreme Court appoints the adjudicators directly or appoints a board or an adjudicative body, which in turn selects other adjudicators.[3]

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[3] A small number of states does not use volunteer adjudicators which is the historical model. California uses a professional State Bar Court. Minnesota uses Special Referees from the general court system who also hear other cases. Maryland and Utah utilize judges from other courts of record. Florida provides for Supreme Court selected referees from the court systems. New York and New Hampshire may use a retired judge, and Texas allows for a "trial by jury" option by the lawyer within the general court system. North Carolina operates a "parallel" system with courts of record exercising optional original jurisdiction. Virginia allows an "opt–out process" to Circuit Court from the regular system at respondents' request.

2. In integrated bar states, the bar usually appoints the chief prosecutor subject to approval or confirmation by the Supreme Court. (In Virginia, the attorney general must approve the selection.) In voluntary bar states, the separate agency reporting directly to the Supreme Court as its discipline oversight board selects the chief prosecutor, frequently with Court concurrence.

3. Generally, the oversight boards, whether in integrated or voluntary states, are comprised of from 7 to 26 members and frequently have a mixed administrative/adjudicative responsibility.

4. Public members (non–attorneys),[4] frequently selected by the Supreme Court or specifically appointed by designated stakeholders, serve on almost all oversight bodies. Normally, attorney members of those oversight entities are direct appointees of the voluntary or integrated bar. For example, the bar appoints all members of the oversight board in Alabama, Alaska, Florida, Georgia, Indiana, Kentucky, Minnesota, Nebraska, Nevada and West Virginia. The Supreme Court appoints all members of the

[4] Ohio, with 28 members (17 attorneys, 4 lay people and 7 judges), appears to be the exception to the general rule, but that is primarily because the oversight body oversees both attorney and judicial discipline.

oversight board(s) in Wyoming, Wisconsin, Virginia, Michigan, Montana, New Hampshire, North Dakota, Rhode Island, South Carolina, and Vermont. Shared appointment power between the bar and the Supreme Court in some combination, frequently including public members, is in effect in Arizona, Hawaii, Louisiana, New Mexico, Oregon, South Dakota, Washington and the District of Columbia.[5] Some states, such as North Carolina and Virginia, have both a voluntary state bar association which provides lawyer association activities and an integrated state bar which is responsible for the disciplinary function. Oklahoma's Professional Responsibility Commission, similar to California, includes appointees by the Speaker of the House of Representatives and the President Pro Temp of the Senate.[6]

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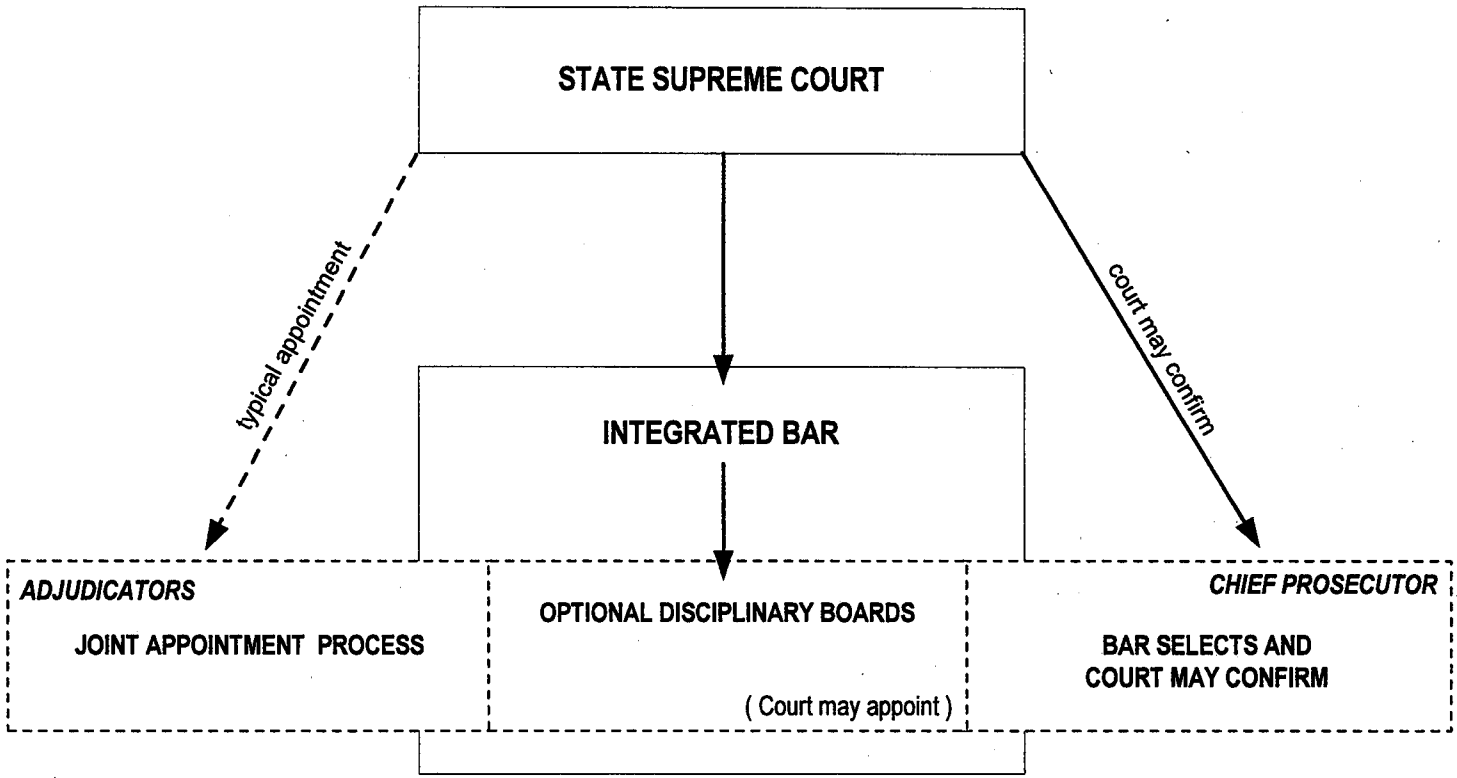
[5] North Carolina's disciplinary hearing commission is unique in that the bar makes a significant number of appointments (10 out of 15), but the balance are appointed by the Governor, the Lieutenant Governor and the Speaker of the House of Representatives. Oklahoma's Disciplinary Board (adjudicative) consists of 21 members, 14 lawyers appointed by the bar and 7 non–lawyers appointed by Governor.

[6] In the unique California model, plenary authority over the system is reserved to the Supreme Court. However, the Court exercises no direct appointment power other than in the selection of adjudicators, which it shares with the legislative and executive branches. North Carolina and Oklahoma appear to be the only other states that share such appointment power.

TYPICAL INTEGRATED BAR MODEL

(Georgia)



- *Bar prepares budget and Court assesses fee and Bar collects as part of member fee.*

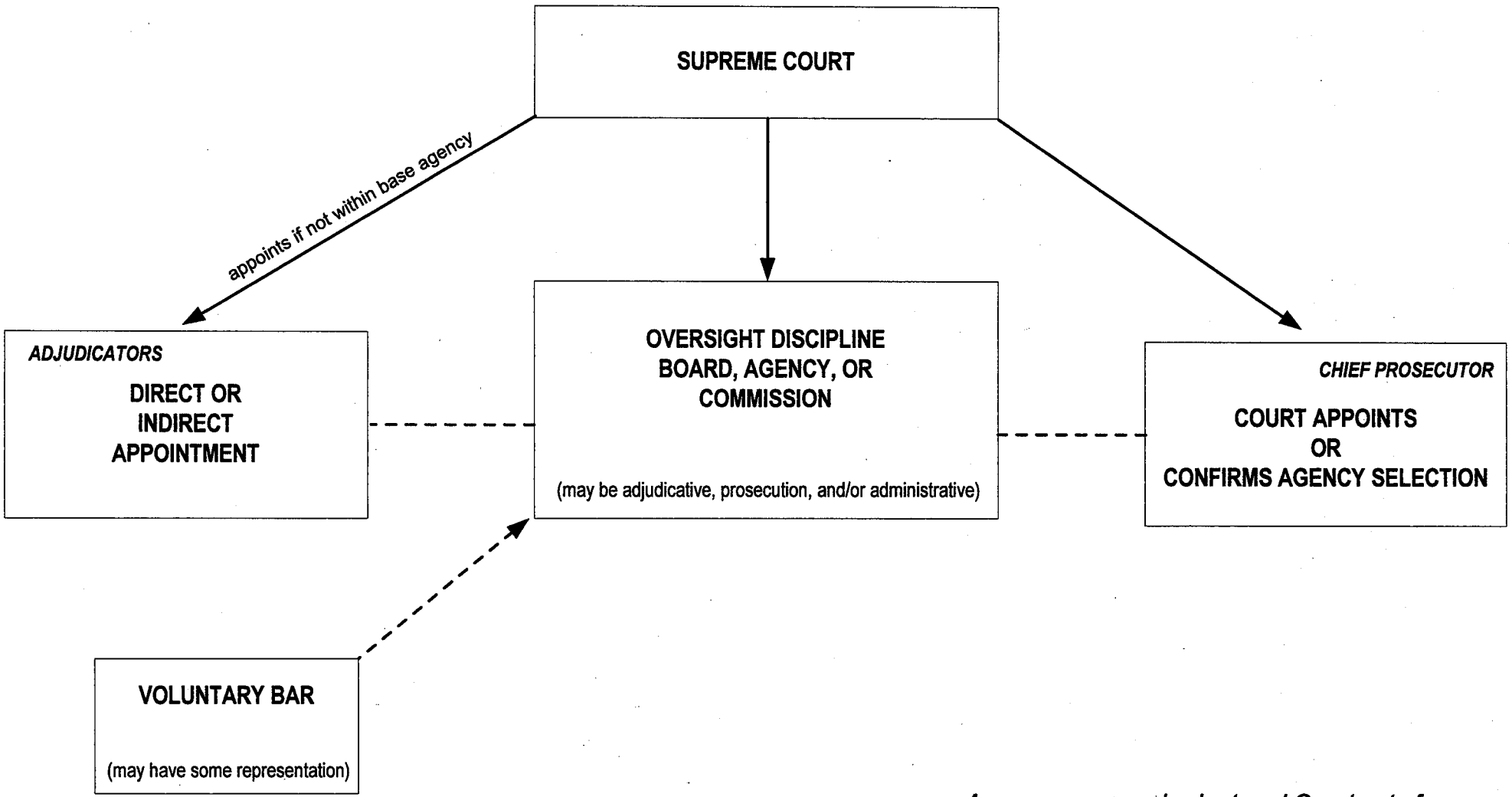
- *Court may appoint to Disciplinary Board (mixed function) or appoints Adjudicators directly.*

- *Bar selects prosecutor and Supreme Court may concur or no Supreme Court role.*

Attachment "A"

TYPICAL VOLUNTARY BAR MODEL

(New Jersey)



- *Agency prepares budget and Court sets fee.*

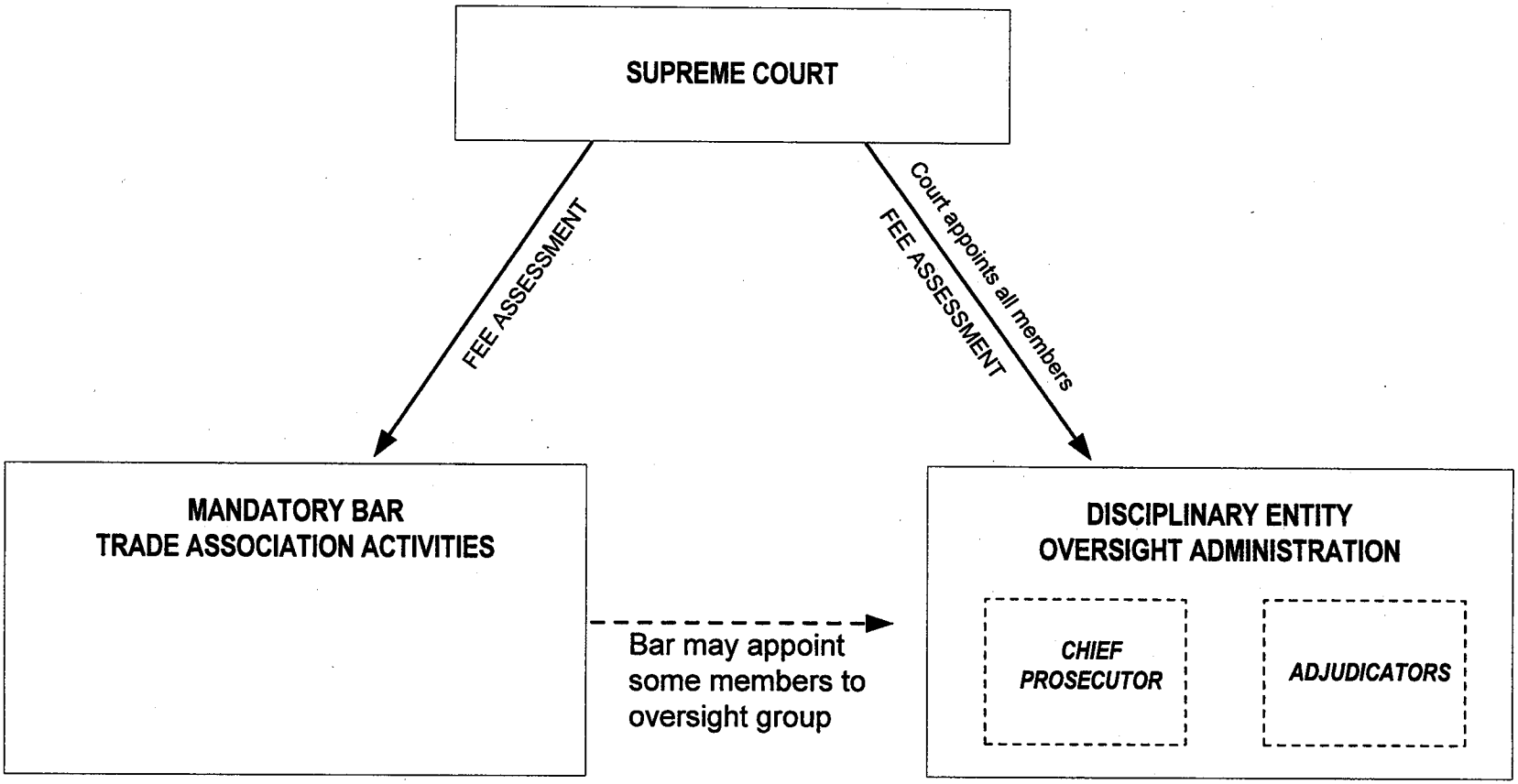
- *Court selects or confirms Chief Prosecutor.*

- *Court selects Adjudicators. Voluntary Bar may have "stakeholder" interest in agency or Adjudicator selection.*

Attachment "B"

HYBRID INTEGRATED MODEL

(Michigan)



- *Bar membership is mandatory and supported by Supreme Court fee assessment.*

- *Separate discipline entity supported by Supreme Court fee assessment.*

- *Entity selects Chief Prosecutor/Adjudicators.*

- *No legislative involvement.*

Attachment "C"

JURISDICTION BY MODEL TYPE

INTEGRATED MODEL (GEORGIA)	VOLUNTARY MODEL (NEW JERSEY)	HYBRID (MICHIGAN)
Alabama	Arkansas	District of Columbia
Alaska	Colorado	Hawaii
Arizona	Connecticut	Louisiana
California	Delaware	Michigan
Florida	Illinois	Missouri
Georgia	Indiana	Montana (3/1/02)
Idaho	Iowa	Nebraska
Kentucky	Kansas	New Hampshire
Mississippi	Maine	New Mexico
Nevada	Maryland	North Dakota
North Carolina	Massachusetts	Rhode Island
Oklahoma	Minnesota	South Carolina
Oregon	New Jersey	Wisconsin
South Dakota	New York	
Texas	Ohio	
Utah	Pennsylvania	
Virginia	Tennessee	
Washington	Vermont	
West Virginia		
Wyoming		

Attachment "D"

C2. Chart_Selection of Discipline Governing Body

Selection of Discipline Governing Body

States	Supreme Court	Lawyers	Gov/ Leg
California ✻ Ω		✓	◆
Alabama ✻ Ω		✓	
Alaska ✻ Ω		✓	◆
Arizona ✻ Ω	✓	◆ ✓	
Arkansas	✓		
Colorado	✓		
Connecticut	✓		
Delaware	✓		
District of Columbia Ω	✓ ◆		
Florida ✻ Ω	◆	✓	
Georgia ✻ Ω		✓	
Hawaii Ω	✓		

✓ Appoints or selects lawyer members

◆ Appoints non-lawyer members

✝ Appoints judge members

✻ Unified State Bars whose board also serves as governing body for the discipline system

Ω Unified bar state

Selection of Discipline Governing Body			
	Supreme Court	Lawyers	Gov/ Leg
States			
Idaho ✻ Ω		✓	
Illinois	✓ ◆		
Indiana	✓ ◆		
Iowa	✓ ◆		
Kansas	✓ ◆		
Kentucky ✻ Ω		✓	
Louisiana Ω	✓ ◆		
Maine	✓ ◆		
Maryland	✓ ◆		
Massachusetts	✓		
Michigan Ω	✓ ◆		
Minnesota	✓ ◆	✓	

✓ Appoints or selects lawyer members

◆ Appoints non-lawyer members

+ Appoints judge members

✻ Unified State Bars whose board also serves as governing body for the discipline system

Ω Unified bar state

Selection of Discipline Governing Body			
	Supreme Court	Lawyers	Gov/ Leg
States			
Mississippi ✻ Ω		✓	
Missouri Ω	✓ ◆		
Montana Ω	✓ ◆		
Nebraska Ω		✓	
Nevada ✻ Ω		✓	
New Hampshire Ω	✓ ◆		
New Jersey	✓ ◆		
New Mexico Ω	✓	✓	
New York	*[four appellate divisions appoint]*		
North Carolina ✻ Ω		✓	
North Dakota Ω	✓	◆	
Ohio	✓ ◆ +		

✓ Appoints or selects lawyer members

◆ Appoints non-lawyer members

\+ Appoints judge members

✻ Unified State Bars whose board also serves as governing body for the discipline system

Ω Unified bar state

Selection of Discipline Governing Body			
	Supreme Court	Lawyers	Gov/ Leg
States			
Oklahoma Ω		✓	◆
Oregon Ω	✓		
Pennsylvania	✓ ◆		
Rhode Island Ω	✓ ◆		
South Carolina Ω	✓ ◆		
South Dakota Ω	◆	✓	
Tennessee	✓ ◆		
Texas Ω	✓ ◆	✓	
Utah ✻ Ω	◆	✓	
Vermont	✓ ◆		
Virginia ✻ Ω	✓ ◆		
Washington State ✻ Ω		✓	

✓ Appoints or selects lawyer members

◆ Appoints non-lawyer members

+ Appoints judge members

✻ Unified State Bars whose board also serves as governing body for the discipline system

Ω Unified bar state

Selection of Discipline Governing Body			
	Supreme Court	Lawyers	Gov/ Leg
States			
West Virginia Ω		✓ ◆	
Wisconsin Ω	✓ ◆		
Wyoming Ω	✓ ◆		

✓ Appoints or selects lawyer members

◆ Appoints non-lawyer members

+ Appoints judge members

✻ Unified State Bars whose board also serves as governing body for the discipline system

Ω Unified bar state

C3. Chart_Fee Authority

Fee Authority

	Supreme Court	Legislature
States		
California		✓
Alabama		✓
Alaska	✓	
Arizona	✓	
Arkansas	✓	
Colorado	✓	
Connecticut		✓
Delaware	✓	
District of Columbia	✓	
Florida	✓	
Georgia	✓	
Hawaii	✓	
Idaho	✓	✓[1]
Illinois	✓	

[1] In Idaho, the Legislature and the Court must agree on the fee.

✓ Sets the fee

Fee Authority		
	Supreme Court	Legislature
States		
Indiana	✓	
Iowa	✓	
Kansas	✓	
Kentucky	✓	
Louisiana	✓	
Maine	✓	
Maryland	✓	
Massachusetts	✓	
Michigan	✓	
Minnesota	✓	
Mississippi		✓
Missouri	✓	
Montana	✓	
Nebraska	✓	
Nevada	✓	

✓ Sets the fee

Fee Authority		
	Supreme Court	Legislature
States		
New Hampshire	✓	
New Jersey	✓	
New Mexico	✓	
New York *[four appellate divisions appoint]*		✓
North Carolina		✓
North Dakota		✓
Ohio	✓	
Oklahoma		✓
Oregon	✓	
Pennsylvania	✓	
Rhode Island	✓	
South Carolina	✓	
South Dakota	✓	
Tennessee	✓	
Texas	✓	

✓ Sets the fee

Fee Authority		
	Supreme Court	Legislature
States		
Utah	✓	
Vermont		✓
Virginia		✓
Washington State	✓	
West Virginia	✓	
Wisconsin	✓	
Wyoming	✓	

✓ Sets the fee

C4. Chart_Selection of Chief Disciplinary Counsel

Selection of the Chief Disciplinary Counsel			
	Supreme Court	Board	Legislature
States			
California		✓	+
Alabama		✓	
Alaska		✓	
Arizona		✓[1]	
Arkansas	✓		
Colorado	+	✓	
Connecticut	✓		
Delaware	✓		
District of Columbia		✓	
Florida		✓	
Georgia		✓	
Hawaii		✓	
Idaho		✓	

[1] The Executive Director appoints the Chief Disciplinary Counsel.

✓ Appoints or selects

+ Must approve

Selection of the Chief Disciplinary Counsel			
	Supreme Court	Board	Legislature
States			
Illinois	+	✓	
Indiana	+	✓	
Iowa	✓		
Kansas	✓		
Kentucky		✓	
Louisiana	✓		
Maine		✓	
Maryland		✓	
Massachusetts	+	✓	
Michigan	✓		
Minnesota	✓		
Mississippi		✓	
Missouri	✓		
Montana	✓		

✓ Appoints or selects

\+ Must approve

Selection of the Chief Disciplinary Counsel			
	Supreme Court	Board	Legislature
States			
Nebraska	✓		
Nevada	✓		
New Hampshire		✓	
New Jersey	✓		
New Mexico	+	✓	
New York *[four appellate divisions appoint]*	✓		
North Carolina		✓[1]	
North Dakota		✓	
Ohio	+	✓	
Oklahoma		✓	
Oregon		✓[1]	
Pennsylvania		✓	
Rhode Island	✓		
South Carolina	✓		

✓ Appoints or selects

+ Must approve

Selection of the Chief Disciplinary Counsel			
	Supreme Court	Board	Legislature
States			
South Dakota		✓	
Tennessee		✓	
Texas		✓	
Utah		✓	
Vermont	+	✓	
Virginia		✓[2]	
Washington State		✓	
West Virginia	✓		
Wisconsin	✓		
Wyoming		✓	

[2] Subject to approval of the attorney general.

✓ Appoints or selects

+ Must approve

C5. Chart_Selection of Disciplinary Adjudicators

Selection of Disciplinary Adjudicators

States	Supreme Court	Legislature/ Governor
California	✓	✓[1]
Alabama	Appointed by Board of Bar Commissioners, members of which are elected by membership.	
Alaska	✓	
Arizona	✓	
Arkansas	✓	
Colorado	✓	
Connecticut	✓	
Delaware	✓	
District of Columbia	▣	
Florida	✓	
Georgia	✓	
Hawaii	▣	

[1] In California, Supreme Court appoints all three review department judges and two of five hearing department judges. One hearing department judge is appointed by the Governor, one by the Senate Committee on Rules and one by the Speaker of the Assembly.

✓ Adjudicators appointed directly by Supreme Court

▣ Adjudicators selected by a board appointed by Supreme Court

Selection of Disciplinary Adjudicators		
	Supreme Court	Legislature/ Governor
States		
Idaho	Appointed by Board of Commissioners, members of which are elected by membership, subject to approval of Supreme Court.	
Illinois	▣	
Indiana	✓	
Iowa	✓	
Kansas	▣	
Kentucky	✓	
Louisiana	▣	
Maine	▣	
Maryland	✓	
Massachusetts	▣	
Michigan	▣	
Minnesota	✓	
Mississippi	✓	

✓ Adjudicators appointed directly by Supreme Court

▣ Adjudicators selected by a board appointed by Supreme Court

Selection of Disciplinary Adjudicators

States	Supreme Court	Legislature/ Governor
Missouri	▣	
Montana	▣	
Nebraska	✓	
Nevada	Appointed by Board of Governors, members of which are elected by membership.	
New Hampshire	✓	
New Jersey	▣	
New Mexico	✓	
New York *[four appellate divisions appoint]*	✓	
North Carolina	Handled by either: (1) Disciplinary Hearing Commission (DHC) or (2) regular state courts. DHC is comprised of 10 attorney members chosen by Council (Council elected by membership) and 5 non-attorney members (appointed by governor, senate majority leader, and speaker of the house).	✓
North Dakota	▣	
Ohio	▣	

✓ Adjudicators appointed directly by Supreme Court

▣ Adjudicators selected by a board appointed by Supreme Court

Selection of Disciplinary Adjudicators		
	Supreme Court	Legislature/ Governor
States		
Oklahoma		✓ The lawyer members of the Professional Responsibility Commission are appointed by the President subject to the approval of the Board of Governors. The non-lawyer members are appointed by the Governor of the State of Oklahoma.
Oregon	✓	
Pennsylvania	▣	
Rhode Island	✓	
South Carolina	✓	
South Dakota	✓	
Tennessee	✓	
Texas	✓[2]	
Utah	✓	
Vermont	▣	

[2] In Texas, the respondent against whom disciplinary charges are brought chooses the venue. Respondent may select: a volunteer attorney panel approved by the Texas Bar for "low-level" stipulations; a hearing before a district committee composed of two lawyers and one public member with review of the committee's decision by a nine-member discipline board appointed by the Supreme Court; or a jury trial in court of record with review by an intermediate appellate court and final review by the Supreme Court.

✓ Adjudicators appointed directly by Supreme Court

▣ Adjudicators selected by a board appointed by Supreme Court

Selection of Disciplinary Adjudicators		
	Supreme Court	Legislature/ Governor
States		
Virginia	✓ Disciplinary Board (appointed by Chief Justice) OR Circuit Court (3 judge panels) – Respondent has right to request matter be transferred to circuit court	
Washington State	✓[3]	
West Virginia	Appointed by Lawyer Disciplinary Board, members of which are elected by membership.	
Wisconsin	✓	
Wyoming	✓	

[3] In Washington state, trial-level adjudicators are selected by the State Bar Board of Governors. The appellate panel is composed of lawyer members selected by the State Bar and public members appointed by the Supreme Court.

✓ Adjudicators appointed directly by Supreme Court

▣ Adjudicators selected by a board appointed by Supreme Court