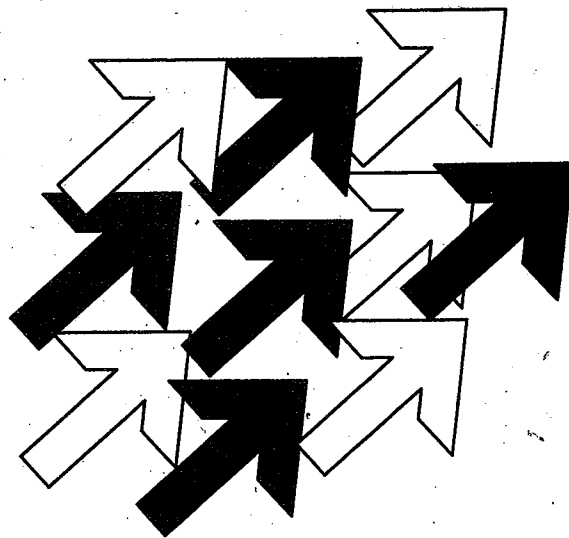


THE FUTURE OF THE



CALIFORNIA BAR

Final Report of the Commission on the Future of the
Legal Profession and the State Bar of California
State Bar of California, April 1995

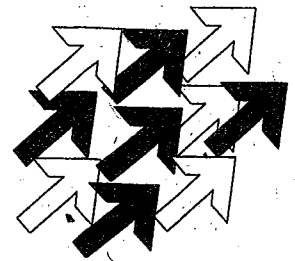
THE FUTURE OF THE CALIFORNIA BAR

The Final Report of
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and the State Bar

The State Bar of California
April 1995

TABLE OF CONTENTS

A.	INTRODUCTION BY THE CHAIR AND FUTURE SCENARIOS	1
B.	BACKGROUND	9
	1. MISSION STATEMENT	9
	2. MEMBERS OF THE COMMISSION	10
C.	METHODOLOGY	13
D.	SUMMARY	16
E.	FINAL RECOMMENDATIONS	22
F.	TRENDS IN THE LAW	33
G.	DISCIPLINE, ADMISSIONS AND COMPETENCE	58
H.	SERVICES TO THE PUBLIC AND PROFESSIONALISM	86
I.	ADMINISTRATION OF JUSTICE RESOURCES	110
J.	SERVICES TO AND FOR LAWYERS	122
K.	BAR STRUCTURE AND ORGANIZATION	143
L.	MINORITY REPORT	167
M.	CONCLUDING REMARKS	174



SUMMARY

"...[L]awyers must find ways to 'fantasize' about themselves and their profession -- to see and thus to create the possibility of a legal profession that is once again independent, willing to sacrifice money for pride, eager to reassert its role as the guarantor of rights. To make the contribution only lawyers can make to the future of our country and the world, we must accept rather than simply assert our responsibilities."

-- Sol Linowitz

D. SUMMARY

Several recurring themes permeated the study and deliberations of the Futures Commission in undertaking its mission, and generated the majority of proposals ultimately presented.

1. PUBLIC PROTECTION: DISCIPLINE, ADMISSIONS AND COMPETENCE

The Commission began with the premise that lawyers take very seriously their duty to assure adequate public protection. Outside studies of attorney disciplinary systems and numerous opinion surveys confirm that this is the cornerstone of public confidence in the profession. It follows that it is in the best interest of all lawyers for the practicing bar to be educated, ethical, and professional, and for those falling short of the mark to be promptly and appropriately sanctioned.

How these goals can best be achieved was a primary focus of the Commission. Over two dozen recommendations deal with public protection issues. Some recommended actions are geared toward law school training and admissions requirements. Others set their sights on improving the bar's competence and ability to serve clients more effectively in the future.

With respect to legal education, the Commission noted the ongoing dialogue in which the bench, organized bar, and law schools have considered the sufficiency or deficiency of many law graduates' preparation for the realities of law practice. The American Bar Association's widely disseminated "MacCrate Report, Legal Education and Professional Development - An Educational Continuum", captured many of the issues and conflicts about whose responsibility it is to assure competence in the bar and how those duties can be discharged.

Law schools are certainly implicated; given their resources, mission, and special province and strength, they are charged with providing an academic grounding in substantive law and teaching analytical and research skills. But what is the bar's responsibility? How can the academy, bar, and bench work together to better prepare lawyers for the rigors of the real world of law? The outcome should be not more lawyers, but better ones.

The attorney discipline process occupied a great deal of the Commission's time. There was consensus that discipline should remain a judicial branch responsibility and that ties to the Supreme Court, which has plenary authority over the process, should be considerably strengthened and publicized. Reducing the Legislature's influence and involvement in attorney regulation also drew full support.

However, there were points of division among Commissioners with respect to shifting all or only a portion of the discipline system from the State Bar to the Supreme Court, thereby placing it under the high court's direct supervision. The management, process, productivity, and quality of the current system were not at issue, although some questioned the cost. Rather, public perception about the fairness and objectivity of the discipline system was the motivating force for change. In the end, the majority felt that a partial transfer was feasible, and preferable to total severance. The State Bar should continue to play a major role, not only in investigation and prosecution of misconduct, but also in funding the process through membership dues.

2. SERVICES TO THE PUBLIC

The work of the Commission centered on another aspect of the public's relationship with the bar. There is a serious, persistent mismatch between available, affordable lawyers and the public's legal needs. This is true despite repeated complaints from every quarter about the glut of lawyers in the state, and especially true for the middle class and "near poor." Future demographic information suggests that the situation will worsen as the state's population continues to rise and its corresponding legal needs increase.

Prior efforts to reverse the unavailability trend have been thwarted by economic and societal realities. Many lawyers cannot maintain a viable practice serving individual clients, as the sharp decline in small firm and solo practitioners among newer attorneys attests. Inroads made by nonlawyer practitioners, such as paralegals and legal technicians, exacerbate an already intensely competitive climate for these lawyers. Protectionism is a great temptation. So is the pursuit of high end legal work, where the oversupply of attorneys is acute.

Legal aid funding and pro bono efforts help, but are clearly inadequate to the task. At best, they meet only 15 to 25% of the need. The Commission therefore recommends an array of approaches to close the gap. Rightly or wrongly, the public expects lawyers to be part of the solution to access and affordability, not part of the problem. Thus, wherever a lawyer fits in on the employment continuum in terms of income or types of clients served, it is essential that lawyers collectively help discharge this responsibility. Failure to do so may jeopardize permanently the special privileges, position, and independence of the profession.

For a host of economic and social reasons, the future will unquestionably broaden and amplify alternative dispute resolution mechanisms. The legal profession should therefore emphasize the positive side of ADR and be constructive in resolving its negative elements, such as lack of quality controls, standards, and

accountability.

3. DECLINE IN ATTORNEY PROFESSIONALISM

The deterioration of lawyer professionalism is a recurring theme in the 1990's. The Commission has been struck by the sizable segment of the California bar that expresses dissatisfaction with their legal careers. Only 52% of the lawyers responding to the RAND Survey said they would choose law practice if they had the chance to start all over again. Moreover, nearly two-thirds affirmed there were too many lawyers in California, and 43% agree with the public notion that lawyers' fees are too high.

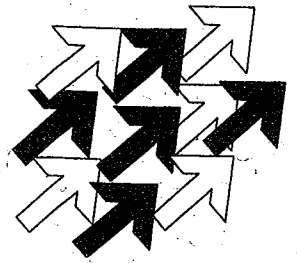
Lawyers believe that in the future, collegiality and civility will continue to decline. Furthermore, they predict that law practice will become even more stressful. These troubling trends appear to be prompted by a confluence of developments, of which the most prominent are economic pressures. Overall, lawyers are concerned that law has become far more a business than a profession. Increased commercialization and advertising, in their view, has spawned incivility and lack of respect for the legal system and its participants. "Practicing law isn't fun anymore" is a repeated refrain.

Notwithstanding this litany of problems, some of which seem intractable, the Commission's research reveals that four-fifths of California lawyers are deeply concerned about the state of attorney ethics and professionalism. They sense the profession is at a crossroads. Commission members responded with recommendations designed to reenergize the profession, reinforce its ethical and public responsibilities, and take steps to tone down the stridency and incivility.

4. LAWYERS AND THE JUSTICE SYSTEM

Turning to the system of justice, there is additional cause for alarm. As is well documented in Justice in the Balance: 2020, the comprehensive 1994 report of the Commission on the Future of the California Courts, it is widely acknowledged that the criminal justice system is at or near the point of being overwhelmed. Demands on the system are predicted to increase, as are problems resulting from inadequate resources. The Futures Commission recognizes that the focus in terms of solutions will be on crime, deterrence, prevention, punishment and rehabilitation, and protection of the public.

The press of criminal cases may result in closing the courts to civil matters. Securing sufficient resources for the civil justice system is a high priority for the bar, as are fairness, access and efficiency. The appellate process also needs support



FINAL RECOMMENDATIONS

"Don't find fault. Find a remedy."

-- Henry Ford

On the contrary, abolition of the mandatory bar would diffuse and weaken efforts to promote public protection and competency. It would impel the new association to divert valuable resources toward advertising and recruitment drives as it competes against the state's 240 existing voluntary bars. Obtaining a fee bill from the legislature is one problem the Bar faces. A voluntary bar would have the comparable problem collecting dues from members unless it avoids undue controversy. The ultimate financial burden would fall heavily on whatever percentage of the membership that deigned to join (barely 50% or less, if other states are any guide).

A voluntary system would also promote fragmentation of the bar, permitting dominance by certain practice groups or geographic regions, which is the case in the large states surveyed: for example, the Illinois Bar must compete for members and dues with the Chicago Bar and the Ohio State Bar Association is in similar competition with the large urban bars in that state.

Furthermore, the integrated bar provides the organizational structure for performing critical public service obligations. Part of the justification for the monopoly power lawyers exercise is based on the expectation that public service, not simply individual economic gain, will motivate members of the profession. The unified framework is by definition inclusive of the entire profession, bringing together the diverse elements of the bar to affirm the common core of professional responsibilities. It can aggregate and reconcile differing views and send a strong signal that the expectations of the public are in fact being addressed by the entire bar.

At a time when a collective, focused approach has the best chance for success, the majority believes that the unified bar should be preserved. It remains the best way to assure that the entire profession contributes to the inherent responsibilities of all members of the bar to public protection, public service, competence, ethics, legal services, and support of the justice system.

E. FINAL RECOMMENDATIONS

Below is a listing of the Commission's final proposals, grouped according to subject matter. Due to the broad scope of the Commission's task, there was inevitable overlap on some topics with some of the Subcommittees. For ease of reference, therefore, all the recommendations with common themes have been clustered together, regardless of the Subcommittee which originally formulated it.

All recommendations were the product of consensus, unless the Commission's vote is recorded in brackets at the end of the description. For purposes of this report, "consensus" means that no Commission member "called up" the item from the agenda for discussion and vote by the full Commission, with the implication being that there was no objection to including that recommendation in the final report.

DISCIPLINE, ADMISSIONS AND COMPETENCE

1. California should not require specified law school curricula. The role of the State Bar (through the Committee of Bar Examiners) should continue to be limited to choosing the subjects to be tested on the bar examination.
2. The legal profession should encourage the goal of increased practical skills and competency training for those entering the legal profession. Clinical programs in law schools should not be required, but ways should be explored for creating models to enable all students to gain more practical experience and offering those programs in partnership with law schools, the judiciary, and the profession.
3. Only graduates of American Bar Association or California approved law schools should be allowed to take the California bar examination. [Vote 11 yes - 8 no]
4. Pro bono requirements for law students should be encouraged but not be required.
5. In judging good moral character for admission or for reinstatement, positive factors to be considered should include: (a) respect for the law and the judicial process; (b) willingness to adhere to the Rules of Professional Conduct and the State Bar Act; (c) honesty, fairness, and reliability; (d) integrity, candor, trustworthiness, and discretion; (e) respect for the rights of others; (f) fiscal responsibility; and (g) mental and emotional stability.

6. An applicant should be permanently disqualified from admission to practice law if convicted of a violent felony or crime involving moral turpitude (unless pardoned). [Vote 11 yes-10 no]
7. Law schools should make possible disclosure to the admissions agency regarding moral character, including substance abuse, cheating, and acts involving moral turpitude. [vote 12 yes-11 no]
8. Admissions to the bar should be handled by the mandatory bar. [Vote 17 yes-2 no]
9. The bar examination in its present format (with written essay and Multistate Bar Examination components) should be continued, but the Bar should keep abreast of new testing methods and be open to experimentation.
10. Conditional admission to the bar (limited in scope, manner, or duration) should continue to be denied.
11. Reciprocity in admissions should be available to active members in other jurisdictions in good standing, subject to prerequisites, including: (a) membership in other jurisdiction for at least three years; (b) satisfaction of California's moral character and ethical standards; and (c) other jurisdiction affords reciprocity to California attorneys.
12. California should support a national licensure program, e.g., for attorneys who litigate cases exclusively in federal courts.
13. Discipline should continue to be a function of the judicial branch of government, and that fact should be emphasized to the public.
14. The discipline system -- other than adjudication -- should be handled by the mandatory bar. [Vote 17 yes-2 no]
15. Lawyers should continue to fund the discipline system.
16. Adjudication of discipline cases (currently in the State Bar Court) should be under the aegis of the California Supreme Court. [Vote 14 yes-6 no-1 abstention]
17. The budget for the attorney discipline function should be approved by the Supreme Court rather than the Legislature.
18. The Chief Trial Counsel should be appointed by the Supreme Court without confirmation by the Senate.

19. Complaints against attorneys should be made public when the investigation is completed and action other than dismissal is taken by the Bar (e.g., situations where the Bar issues a warning letter, admonishment, directional letter, or agreement in lieu of discipline).
20. All State Bar Court hearings, other than moral character hearings, should be open to the public.
21. A "whistleblower rule" for reporting discipline matters should not be adopted; existing statutory reporting mechanisms (notifications of criminal convictions, and reports from insurers, judges, and banks) are sufficient.
22. Conclaves of bench, bar, and academic representatives as recommended by the American Bar Association's MacCrate Report, Legal Education and Professional Development -- An Educational Continuum, should be convened to develop a plan for post-graduate skills training for new lawyers.
23. Professional liability insurance should be mandatory for all active members of the State Bar. If minimum levels of insurance are not maintained, members should be suspended from practice.
24. Mandatory continuing legal education should continue as a requirement for California attorneys, if appropriate steps are taken to ensure the quality of programs is meaningful to attorneys.
25. Mandatory periodic examination of lawyers should not be required to ensure competence.
26. Random examination of lawyers should not be required to ensure competence.
27. Random audits of lawyers should not be conducted to ensure competence.

SERVICES TO THE PUBLIC AND PROFESSIONALISM

28. The legal profession should attempt to find ways to match the large, and in some opinions, excess, supply of lawyers to the unmet need for legal services. Lowering attorneys' financial expectations would help greatly in this endeavor.
29. The legal profession should reinvent its value system so that all attorneys, no matter whom they represent or how much money they make, are truly recognized and honored as valuable contributors to the profession and society. The legal profession should consider inculcating such values in its

members through law school education and post-admission continuing legal education.

30. The legal profession should publicize the importance of service to the public at every opportunity, through articles in the legal press, speeches by influential members of the legal profession, and service awards to attorneys.
31. The focus on alternative dispute resolution (ADR) should not only be about increasing access to the legal system, which is an important objective, but also about ensuring that ADR processes produce fair, just results for all participants.
32. The legal profession should ensure that lawyers assisting clients in ADR or acting as ADR mediators or arbitrators are knowledgeable regarding the law, and are competent and ethical.
33. The legal profession should ensure that parties to ADR proceedings are informed of the law applying to their matter and of any legal rights that they are or may be waiving in resolving their dispute.
34. ADR mediators and arbitrators need not necessarily be licensed attorneys, but only attorneys shall give legal advice to clients. [Vote 15 yes-3 no]
35. The legal profession should work with ADR groups to develop ethical and professional standards for ADR providers.
36. The legal profession should work to find adequate funding for delivering legal services for the poor.
37. The legal profession should work to lower economic and cultural barriers limiting access to justice.
38. The legal profession should support efforts to expand legal aid to include the "near poor" who are not now eligible.
39. The legal profession should assist legal aid programs in maximizing investment strategies and collection of public and private grant moneys.
40. The legal profession should consider working to establish funding or civil counsel or establish a right to counsel in certain civil cases where basic human needs are involved. [Vote 16 yes-7 no]
41. The legal profession should support client outreach by legal aid programs and incentives for lawyers to enter legal aid practice.

42. The legal profession should encourage the goal of increased practical skills/competence training for those entering the legal profession, including the concept of internships.
43. The legal profession should support the expansion of prepaid legal plans, particularly to help the moderate income and small businesses.
44. The legal profession must ensure that the form and administration of legal service plans allow plan attorneys to practice in an independent and ethical manner.
45. The legal profession should support prepaid legal service plans so long as safeguards are first put into place to ensure independent, ethical practice by plan attorneys on behalf of clients.
46. The legal profession must ensure that any person providing legal services in California does so in a knowledgeable, competent, and ethical manner and under judicial agency oversight.
47. With proper public protection safeguards first put in place, the legal profession should support a broader range of legal technician services to the public, which will help achieve greater, more meaningful access to the legal system for more Californians. [Vote 15 yes-7 no]
48. Pro bono should be encouraged but not required for attorneys.
49. The legal profession should seek contributions from members and law firms to sponsor increased pro bono activities, and to represent clients at rates commensurate with clients' ability to pay. Representing such clients promotes a committed attorney-client relationship, and responds to the needs of the poor and those with modest means.
50. The legal profession should encourage approaches to emphasize the importance of pro bono service to its membership, including possible adoption of a Rule of Professional Conduct.
51. The legal profession should encourage pro bono activities by its members by supporting pro bono efforts conducted by state and local, specialty, minority, and women's bar associations.
52. The legal profession should support pro per assistance and "unbundling" (i.e., breaking out the component services usually performed by the attorney and having the client assume responsibility for certain of those services instead) as possible methods of increasing access to the legal system, but concerns regarding competent representation and legal malpractice exposure should first be examined and addressed

fully.

53. The legal profession should increase the use of public service announcements to disseminate information regarding existing educational public outreach activities.
54. The legal profession should assist local and specialty bar associations in conducting local education public outreach activities, such as workshops, seminars, or clinics.
55. The legal profession should work closely with the Legislature to ensure that rules and statutes regulating attorney practice are well-written, understandable, efficacious, and not in conflict.
56. Given the unique role of attorneys in society, the paradigm of professionalism in the legal profession is and should include:
(a) ensuring attorney competence; (b) maintaining high standards of integrity, civility, and ethics; (c) encouraging access to legal services and the legal system; (d) providing service to the public; (e) regulation within the judicial branch of government; and (f) providing leadership on significant issues which impact the general welfare of society and which relate to improving the administration of justice and defending and ensuring constitutional rights and obligations. [Vote 15 yes-7 no]
57. The legal profession needs to infuse the understanding of, and the commitment to, professionalism in its members.
58. The legal profession should consider adoption of a statewide code of professionalism which contains a broad list of aspirational goals and precatory duties.
59. The legal profession should encourage and assist, but not require, all California law schools to provide professionalism education to law students that goes beyond the instruction presently required by the American Bar Association and the California Committee of Bar Examiners.
60. The legal profession should seek to publicize the importance of professionalism at every opportunity in order to send a clear signal to its members that professionalism is neither an outdated concept nor passe, but instead is a living set of principles and practices that have meaning and application today.

ADMINISTRATION OF JUSTICE RESOURCES

61. When considering reforms of the justice system, the legal profession must assure that such proposals are first analyzed

to ensure that implementation will not have an unduly negative impact on access to the courts by the poor and "near poor."

62. The legal profession must exercise care to assure that innovative technology to improve the efficiency of the courts does not unduly limit access to the courts by those without adequate access to those new technologies.
63. Lawyers as a profession have an obligation to work to assure adequate resources are devoted to the administration of the judicial system.
64. The legal profession should educate the public and the media on the role of lawyers and on how the justice system works. Lawyers should be actively involved in public discussions about how to resolve societal problems.
65. The legal profession should support development and establishment of models for user-friendly, cost-efficient, and effective forums for resolving legal disputes, to be implemented throughout the state, as appropriate. Such forums may include the multi-door courthouse concept and community dispute resolution centers.
66. The legal profession should consider whether or not to support efforts to consolidate the state's trial courts.
67. The legal profession should support efforts to establish uniform court rules.
68. The legal profession should support efforts to require bias and fairness training for judges, lawyers, and law students.
69. The legal profession should work toward increasing diversity on the bench.
70. The legal profession should be actively involved in analyzing proposals to revise the judicial selection process to make merit the principal factor, to ensure the best possible system to attract the highest quality judges. [Vote 14 yes-8 no]
71. The legal profession should be involved in evaluating and developing the most appropriate methods for judicial evaluation.
72. The legal profession should play an integral role in developing appropriate systems to address complaints about the justice system, including judges, lawyers, and court personnel, balancing the information needs of the public and the privacy needs of the parties involved.

73. Lawyers and nonlawyers should be on the Commission on Judicial Performance.
74. The legal profession should consider supporting the establishment of alternatives to the existing system of contested elections, such as retention elections for sitting trial judges.
75. The legal profession should support efforts to maintain confidentiality in juvenile delinquency cases and the use of mediation as a diversion method.
76. The legal profession should be actively involved in analyzing the effects of proposals to lower the age at which juveniles can be tried as adults to ensure that the proper balance is struck between public protection and the desire to rehabilitate the juvenile involved.
77. In juvenile dependency cases, the legal profession should support efforts to maintain confidentiality and early family mediation in order to increase the likelihood of reunification.
78. The role of attorneys should be expanded and lawyers should develop additional skills to address juvenile problems at earlier stages in order to prevent escalation of criminal behavior.
79. The legal profession should work to ensure adequate attention to needs of children in dissolution and other family matters.
80. The legal profession should work to ensure that adequate resources are devoted to the civil justice system. The legal profession should play an important role in public education about the civil justice system.
81. The legal profession should work toward ensuring that efforts to streamline the civil justice system do not diminish its fairness.
82. The legal profession should be involved in analyzing proposals to establish specialized courts to ensure that any such courts would provide the highest quality service and maintain fairness while achieving diversity.
83. The legal profession should work toward ensuring that more resources will be provided to the criminal justice system because of the continuing and increasing demands on that system.
84. Attorneys should play a role in ensuring fairness under ongoing pressure to streamline the criminal justice process.

85. The legal profession should play a central role in analyzing the impact of proposals to change how capital cases are handled; at a minimum, the profession should work to increase the staffing available to the Supreme Court.
86. The legal profession should support efforts aimed at streamlining the presentation of arguments to appellate courts by using electronic filings and use of telecommunications and video conferencing for oral arguments, provided that such changes do not have a negative impact on access to the courts by the poor and those without access to the new technologies.
87. To assure the proper resolution of appellate cases, the following possible reforms should be investigated: (a) summary adjudication for routine criminal issues; (b) discretion to use expedited review process; (c) single issue opinions; (d) dispensing with requirement of full opinions in some cases.
88. When proposals are made to shift the costs of appeals to the losing party, the legal profession should be actively involved in analyzing the impact of such proposals, particularly on the question of access to justice for the poor and moderate income.
89. The legal profession should be involved with considering innovative settlement and mediation processes, including: (a) three-member appellate settlement panels; (b) use of appellate specialists as alternatives to judges.

SERVICES TO AND FOR LAWYERS

90. The following are services and benefits that are vitally necessary for the State Bar (or a subsequent organization) to provide to its members:
 - a. Ethics Committee
 - b. Attorney advertising guidelines
 - c. Ethics Hotline
 - d. Client relations education
 - e. Competence education [Vote 17 yes-2 no]
 - f. Unauthorized practice of law division
 - g. Section membership
 - h. New admittees' orientation program
 - i. Representation of the profession in Sacramento
 - j. Clarification of and technical corrections to statutes [Vote 15 yes-4 no]
 - k. Legislative reform [Vote 13 yes-7 no]
 - l. Minimum continuing legal education (MCLE) regulation, standards, enforcement

- m. Section education - continuing legal education programs [Vote 15 yes-4 no]
 - n. Alternative dispute resolution standards
 - o. Fee arbitration panels
 - p. Publicity regarding pro bono work done for the poor
 - q. Emeritus attorney pro bono participation program
 - r. Promotion of legal services delivery systems for the poor and middle income, pro per, ADR, pro bono, Legal Services Trust Fund, etc. [Vote 15 yes-6 no]
 - s. Education of the public about lawyers and the justice system [Vote 13 yes-8 no]
 - t. Malpractice insurance
 - u. Court improvement
 - v. Judicial candidate evaluation
 - w. Diversity programs/Access to the profession
91. The following are services and benefits that are necessary and desirable for the State Bar (or a subsequent organization) to provide to all bar members, but to a lesser extent than those described above:
- a. Compendium on professional responsibility
 - b. Legal specialization program
 - c. Assistance for law practice management administration
 - d. Solo and small firm practitioners' practice manuals for local practice
 - e. Speakers bureau
 - f. Local bar directories and lists
 - g. Membership directories
 - h. Monthly newsletters and magazines
 - i. Legislative digest/tracking program
 - j. Bar leaders conference
 - k. Video/Audio tapes lending library
 - l. Annual meeting
 - m. Enforcement of ADR standards
 - n. Certification of and publicity concerning lawyer referral services
 - o. Law Day programs
 - p. Utilization of mass media to publicize positive messages and educate
 - q. Billing alternatives for bar dues payments (e.g., credit card)
 - r. Plastic bar membership card
 - s. Computerized legal research
 - t. Discount office services and supplies
 - u. Law library
 - v. Meeting space rental
 - w. Model legal forms (fee agreements, etc.)
 - x. Personal assistance programs (alcohol, substance abuse, counseling services, stress management)
 - y. Quality of life committee or programs (e.g., child care leave, sabbaticals, family leave)

- z. Awards programs/Social events
- aa. Research surveys
- bb. Special masters program
- cc. Judicial polls
- dd. Research projects on administration of justice and other law-related topics
- ee. Information packages for bar associations
- ff. Mailing lists
- gg. Networking publications
- hh. Master calendar of bar events statewide
- ii. Model CLE programs

BAR STRUCTURE AND ORGANIZATION

- 92. To assure Judicial Branch oversight of the legal profession, the total fees attorneys pay to practice law should be determined by the California Supreme Court.
- 93. The unified (mandatory) bar should be retained in California for all current functions (other than the adjudication of attorney discipline cases in the State Bar Court). [vote 13 yes-8 no]
- 94. The unified bar in California should adopt internal reforms to ensure that the organization is more effective and responsive in its communications with and representation of its membership.

