GOVERNANCE TASK FORCE PUBLIC HEARING SAN FRANCISCO
SPEAKER LIST

JANUARY 27, 2011
9:30 a.m. – 5:00 p.m.

Speakers will be called in the following order:

Number	Name & Contact Information	Response to Request for Information	Time
1	HALT Terri Rudy tmrudy@halt.org Rodd Santomauro RSantomauro@halt.org 1612 K Street NW, Suite 1102 Washington, DC 20006 (202) 887-8255	Detailed letter	A.M.
2	Sacramento County Bar Association Carol Prosser, Executive Director 1329 Howe Avenue #100 Sacramento, CA 95825 (916) 564-3780 cprosser@sacbar.org	Detailed letter	A.M.
3	Santa Clara County Bar Association Christine Burdick, Executive Director & General Counsel (408) 850-1506 chrisb@sccba.com	Detailed letter	A.M.
BREAK			
4	San Francisco Trial Lawyers Association Juliette Bleecker, Executive Director 225 Bush Street #357 San Francisco, CA 94104 (415) 956-6401 sftla@pacbell.net	Letter	A.M.
5	Legal Aid of San Francisco (415) 834-0100		A.M.
LUNCH 12:15 p.m.-1:00 p.m.			
6	Law Practice & Management State Bar		P.M.
7	Allan Kaplan, member akaplan@ipro.com		
8	Erin Baldwin erinbaldwin@rocketmail.com		P.M.
BREAK			
9	Kimberly D. laces@99622mypacks.net	Email letters	P.M.
10	Patrick Missud SBN: 219614 91 San Juan Avenue San Francisco, CA 94112 (415) 584-7251 missudpat@yahoo.com	Email letters	P.M.

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January 10, 2011

Ms. Amy Anderson
Office of the General Counsel
State Bar of California, Governance in the Public Interest Task Force
180 Howard Street
San Francisco, CA 94105

To the Task Force:

Thank you for your public invitation to provide recommendations for enhancing the State Bar's protection of California's client population. By creating this Task Force and soliciting input, the State Bar demonstrates its dedication to maintaining a lawyer discipline system that ensures public protection.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. Our Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through HALT's Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, our organization has been on the forefront of fights to improve the systems in place to hold unethical lawyers accountable and to provide meaningful recourse to aggrieved clients.

Recently, HALT released its Lawyer Discipline Best Practices report to draw attention to 10 model procedures currently applied by specific lawyer discipline systems across the country. In addition to conducting our own analysis, we received feedback from disciplinary administrators in 11 states who relied on their own day-to-day experiences to provide us with practical solutions to some of the most critical challenges facing our nation's lawyer discipline system. We are enclosing our Best Practices report for your review and consideration.

The State Bar of California serves as a leader to the rest of the nation in many of the areas that our Best Practices report addresses. The State Bar openly disseminates information related to each lawyer's public discipline history; it allows for permanent disbarment in cases of egregious misconduct; and it maintains a consumer-friendly, easily navigable website that helps individuals understand the lawyer discipline process. As the Task Force reviews the way in which the State Bar is governed, we hope that it will go a

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step further by considering adopting the remaining practices highlighted in our report, as each standard works toward the State Bar's goal of public protection.

In the first survey question, the Task Force requested input on the definition of public protection in the context of governance of the State Bar. To satisfy its mission of safeguarding the public, we believe that the State Bar must be governed by individuals who apply sanctions that carry teeth and prevent harm to future clients. To this end, we urge the State Bar to eliminate private discipline. Addressing incompetent and abusive actions with real consequences—public censures, fines, suspensions and in the most egregious cases, permanent disbarment—effectively filters the pool of qualified lawyers available to the public. Disclosure of all discipline deters misconduct by others in the profession and enhances the public perception of the self-regulated system.

Unfortunately, California continues to issue closed-door sanctions in some circumstances. If an attorney stipulates for a private reproval prior to the filing of formal charges, the misconduct is not a public record and will not be listed as discipline on the Bar's website, nor will it be revealed to any individual asking the bar whether his or her lawyer has committed any past transgressions. When issued a private reproval, the attorney is not suspended from practicing law for any period of time and the offense, for all intents and purposes, is swept under the rug with little more than a slap on the wrist.

Fifteen states discipline all lawyers out in the open. Jurisdictions including Arizona, New Jersey and Washington have never applied or, in some cases, recently abolished concealed sanctions. New Jersey, for example, amended its court rules in 2000 to explicitly eliminate secret reprimands, saying: "There shall be no private discipline."[1] Instead, the Office of Attorney Ethics publicly reprimands, censures, suspends and disbars wayward attorneys. Even in cases of minor misconduct, the office publicly admonishes lawyers and includes the offense on the attorney's record.

As the Task Force analyzes the State Bar's current governing structure with an eye toward strengthening public protection, we hope that it will follow the modern trend of authority and abolish private discipline. The public should have the right to be notified about all violations of the professional conduct rules so that they can make better-informed decisions when deciding to retain a particular lawyer. By arming legal consumers with complete information about an attorney's discipline history (including minor offenses), the State Bar better satisfies its duty of public protection.

With respect to the composition of the Board of Governors, we hope that the Task Force will recommend increasing non-lawyer membership so that laypersons represent at least 51 percent of the Board. Our organization regularly hears from individuals who express concern about the fairness and impartiality of lawyer discipline systems that are

[1] See New Jersey Court Rule 1:20(d) (2008).

controlled almost exclusively by lawyers. Victims of attorney abuses often feel reluctant to file complaints in a system that appears stacked in favor of the lawyer who betrayed their trust. Participation on the Board by individuals outside of the legal profession increases the credibility of the discipline process in the public's eyes.

California's Constitution provides for meaningful public participation in the discipline system. Pursuant to Article VI, section 8, lay citizens occupy six of the 11 seats on the Commission on Judicial Performance. One of only six judicial conduct boards in the country in which non-judges outnumber judges, California strongly values participation by ordinary citizens. The State Bar should extend this important standard and practice to its Board of Governors.

Currently, laypersons occupy only six out of 23 seats—or 26 percent—on the State Bar's Board of Governors. This is a surprisingly low ratio, especially in light of the fact that so many other jurisdictions provide the public with a more meaningful role in the administrative and adjudicatory process.

According to the latest statistics from the American Bar Association, laypersons comprise at least one-third of the positions on lawyer discipline boards in numerous states, including Arizona, Connecticut, Delaware, Idaho, Louisiana, Massachusetts, Michigan, New Jersey and New Mexico.[2] In Vermont, ordinary citizens have a particularly strong presence on the state's Board of Professional Responsibility. Public members occupy three of seven seats on the Board and often serve as chair or vice-chair.

We urge California to lead the nation by going a step further than Vermont and allowing at least 51 percent of its seats to be occupied by non-lawyers. California's Board of Governors should be composed of at least 12 lay representatives in addition to its 11 attorney members.

As Task Force members know, state high courts and state bars (or some combination thereof) typically appoint members of professional responsibility boards. In Massachusetts, for example, the state's Supreme Judicial Court allows lawyers to submit unlimited names of nominees and requests two nominations each from the state bar association and every county bar association.

We believe that the State Bar should not have a role in nominating or selecting board members. As the American Bar Association urged when it created its Model Rules for Lawyer Disciplinary Enforcement, the internal politics of bar associations should not

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[2] "Survey on Lawyer Discipline Systems," American Bar Association, Center on Professional Responsibility (2009).

influence the disciplinary process.[3] In addition, bar control of board membership creates, at a minimum, the appearance of a conflict of interest.

Instead, we urge the Task Force to recommend that the California Supreme Court solicit nominations from the general public, and specifically the state's client population. The Court should publicize its nomination process in local newspapers of general circulation, legal services clinics, courthouses and State Bar and court websites. The Court should select board members out of the nominations submitted by the general public.

Members should bring a diverse range of views and professional experiences to the process. In Arizona, for example, public members of the state's Disciplinary Commission include a school counselor, an elections director and a physician who has also served on the state's medical board. While they have never practiced law, their careers have prepared them to analyze ethics standards.

As the Task Force works to enhance public protection by the State Bar, we hope that it will consider recommending that lawyer discipline will not happen behind closed doors and that the public will have access to the complete disciplinary history of all lawyers licensed in the state. Further, we urge the Task Force to support an increase in the number of seats allocated to non-lawyers on the Board of Governors. Finally, we encourage the Task Force to increase the public's input in the Board nomination process and to select Board members from a diverse range of cultural and professional backgrounds. If HALT could be of any further assistance, please feel free to contact us at (202) 887-8255. Thank you for your consideration of our recommendations.

Sincerely,

Rodd M. Santomauro
Executive Director

Suzanne M. Blonder
Of Counsel
California Bar No. 217873

Enc: HALT Lawyer Discipline Best Practices

[3] Model Rules for Lawyer Disciplinary Enforcement, American Bar Association, Center for Professional Responsibility, Rule 2 (Commentary).

Lawyer Discipline Best Practices: Ten Reforms Disciplinary Agencies Are Doing Right Now to Protect the Public

Clients trust attorneys with their deepest confidences at some of the most critical moments in their lives and rely on the system of lawyer discipline to protect them from attorneys who abuse that trust. HALT has identified 10 best practices that provide models to help every state's lawyer discipline system satisfy that responsibility. In addition to conducting our own analysis, we received recommendations from disciplinary administrators around the country. The officials drew upon their own day-to-day experience fielding complaints against attorneys to provide us with practical solutions to some of the most critical challenges facing our nation's lawyer discipline system.

(1) Disclose a lawyer's complete disciplinary history so that consumers can make informed decisions about whether to hire an attorney.

Too often, the public is kept in the dark about complaints filed against incompetent, dishonest or abusive lawyers. When a consumer calls the disciplinary agency to inquire about a lawyer's history of misconduct, administrators typically are forced to omit a number of past transgressions because they never made their way onto the public record. Even when officials do disclose that an attorney was once formally sanctioned, the staff often does not know or is not at liberty to specify the basis for the discipline (e.g., theft, neglect or incompetence). Lawyer discipline agencies almost never release pending complaints until they lead to formal charges, so the state bar may have to tell a prospective client that the attorney he or she is considering retaining has never been disciplined, when in fact there are dozens of unresolved complaints currently pending against the lawyer.

By providing comprehensive information about complaints, charges and discipline (including informal sanctions) lodged against attorneys, state bars and courts arm consumers with critical information to help them decide whether to hire a particular lawyer and, more importantly, whether to trust that lawyer with their most valued resources.

California, Florida, New Hampshire, Oregon and West Virginia all publicize lawyers' complete disciplinary history, but Oregon sets the nation's best example. Since the Oregon Supreme Court's decision in *Sadler v. Oregon State Bar,*[1] the disciplinary records of Oregon lawyers—including dismissed grievances, pending matters and all past informal and formal sanctions—have been open to the public under Oregon's Public Records Law. In summarizing its decision in *Sadler*, the court concluded: "Opening up

[1] *Sadler v. Oregon State Bar*, 550 P.2d 1218 (1976).

the files of the Bar to the public may restore confidence in the integrity of the individual attorney and assure those concerned that the profession is truly committed to maintaining the highest legal ethics."[2]

Consequently, the Oregon State Bar fields inquiries over the telephone about a lawyer's complete disciplinary history and makes all written records available for public inspection. Disciplinary history for individual bar members is also available in a searchable database on the Web site for the Oregon State Bar.

Dozens of states already have open government laws on the books and in the next year, lawyer discipline administrators should urge lawmakers to amend statutes to clarify their application to records collected by state disciplinary agencies. Lawyer discipline bodies already keep decades of past files on hand and should make them available to the public as quickly as record management systems allow.

(2) Host a user-friendly Web site that is easy to find and provides helpful information about the discipline process.

Americans increasingly rely on the Internet as the first stop for finding information. To respond to consumers' online needs, every state should host an easily navigable Web site that provides the public with clear and comprehensive information about its mechanism for holding lawyers accountable. An interested citizen should be able to locate the site through a straightforward query on Google. Online disciplinary resources should be easily navigable and include a downloadable complaint form, samples of completed complaint forms, guidance about what misconduct qualifies as an ethics violation, a database where consumers can search for pending and past disciplinary actions, links to rules of professional conduct and information about other avenues for addressing disputes with lawyers, such as the local fee arbitration board and the state's client protection fund.

Unfortunately, many states are still stuck in the Dark Ages with paltry and outdated online resources. Some jurisdictions offer little more than passing references to the existence of a disciplinary mechanism without even supplying a phone number to call for more information. Even Web sites with more resources are often laced with complicated legal jargon and written in a sympathetic tone toward lawyers who have had complaints filed against them. Alabama's Web site on attorney discipline was almost impossible to find after multiple searches and when information was finally discovered, it seemed more focused on shielding lawyers than safeguarding consumers. The introduction on its site states, "A complaint should not be made lightly or used to try to gain an advantage in your transactions with a lawyer. A lawyer who is accused of misconduct suffers whether or not he is found to be at fault."

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[2] *Id.* at 1227.

The Illinois Attorney Registration and Disciplinary Commission should serve as a model for the rest of the country. The site is easily found online and features a user-friendly, logical interface. It offers a search tool that allows the public to check on an attorney's disciplinary record, including pending complaints, as well as whether he or she is covered by legal malpractice insurance. The site also provides a clear explanation of the disciplinary process, written from the complainant's perspective, and a downloadable "Request for Investigation" form. Consumers can access recently filed complaints, a schedule of upcoming hearings, links to rules governing lawyer conduct and the commission's annual reports, as well as information about the state's client protection fund.

While cautioning against a "one-size-fits-all" approach to restructuring the lawyer discipline process, Douglas Ende, chief disciplinary counsel in Washington state, pointed to helpful components of his state's Web site that could be exported to other disciplinary sites. Washington's Web site includes information in four languages, brochures dealing with common situations between clients and lawyers, details about the Lawyer's Fund for Client Protection and a reference to each lawyer's malpractice insurance coverage.

Pennsylvania's Web site also contains exemplary resources, including an engaging video emphasizing the board's desire to protect clients from wayward attorneys. The site offers materials in Spanish, a helpful Frequently Asked Questions page and information about recently sanctioned attorneys.

Dennis Carlson, Nebraska's counsel for discipline, recommended Web sites go a step further than simply posting names of sanctioned lawyers by also offering consumers a direct link to the reported disciplinary case to give the public a more comprehensive understanding of the lawyer's misconduct.

In 2008, the California State Bar transformed its Web site into a more useful mechanism by posting lawyers' pending disciplinary information online. Charges in the state are public when they are filed and the bar's board of governors concluded that the best way of making the information available to consumers was through its Web site.

Lawyer discipline systems across the country should request funds from the local court or state bar association to update and expand their disciplinary Web sites. Even if the agency cannot afford to hire a professional Web designer to upgrade the interface, limit scrolling and enrich readability functions, non-technical staff can still make some simple improvements. Administrators should revise the site's language so that it is written from the consumer's point of view, provide complaint forms in PDF form, update their sites with hearing schedules and recent disciplinary rulings and include information about what does and does not constitute an ethics violation. These straightforward changes will go a long way toward increasing public access to an often mysterious system.

(3) Abolish closed-door sanctions and replace private admonitions with formal and public censures, fines, suspensions and disbarments.

To increase transparency and public confidence in our system for holding attorneys accountable, lawyer discipline agencies should heighten the visibility and severity of sanctions against wayward attorneys. Disclosure of discipline deters misconduct by others in the profession, enhances the public perception of the self-regulated system and enables prospective clients to make better-informed decisions about hiring a particular lawyer. Addressing incompetent and abusive actions with real consequences—public censures, fines, suspensions and in the most egregious cases, permanent disbarment—effectively filters the pool of qualified lawyers available to the public.

Unfortunately, most states typically give disreputable lawyers little more than a slap on the wrist and routinely hide incompetent and deceptive practices from the public. Behind closed doors, panels often admonish lawyers to avoid repeating transgressions or reprimand them for a more severe offense—but these sanctions are usually left off the public record. Many states limit public discipline to serial offenders and to those who commit crimes or ruthless misconduct against multiple victims.

As of 2010, 15 states discipline all lawyers out in the open. Jurisdictions including Arizona, New Jersey and Washington have never applied or, in some cases, recently abolished concealed sanctions. New Jersey, for example, amended its court rules in 2000 to explicitly eliminate secret scoldings, saying: "There shall be no private discipline."[3] Instead, the Office of Attorney Ethics publicly reprimands, censures, suspends and disbars wayward attorneys. Even in cases of minor misconduct, the office publicly admonishes lawyers and includes the offense on the attorney's record.

Agreeing with the need for meaningful sanctions, Frederick Iobst, chief counsel to Delaware's disciplinary system, suggested states follow Delaware's lead by giving disciplinary officials the authority to impose court-ordered restitution. By implementing this reform, victims could be reimbursed for losses suffered at the hands of a fraudulent lawyer.

As a short-term goal, states still applying discipline behind closed doors should eliminate unofficial "three-strikes-you're-publicly-sanctioned" practices and treat each rule violation with serious consequences. In the coming years, courts and state bars should amend their disciplinary rules to abolish private discipline and to make every transgression a matter of public record. In addition to issuing public sanctions, disciplinary bodies should have the power to impose restitution so that victims may be compensated for an attorney's abuse or neglect.

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[3] See New Jersey Court Rule 1:20(d) (2008).

(4) Permanently disbar lawyers who commit abusive practices against clients.

While most lay persons believe that disbarment is a permanent prohibition from practicing law, in reality disbarment is treated in most states as a slightly longer suspension. Most lawyer discipline bodies provide disbarred attorneys with the opportunity to apply for reinstatement within a year or two. At a reinstatement hearing, a lawyer usually must simply acknowledge his or her past offenses, demonstrate an interest in reform and pledge to abide by ethics rules in the future. At that point, he or she is permitted to resume practice without even informing new clients of the previous disbarment, in many states.

In most circumstances, attorney ethics violations can be addressed with censures, fines, suspensions and disbarment with the opportunity for reinstatement. Lawyers breaking ethics rules due to substance abuse problems, for example, should usually be given a chance at rehabilitation. But when an attorney commits the most severe kind of infraction without contrition or justification, the sanction of permanent disbarment should at least be an available option to disciplinary bodies.

Unfortunately, the vast majority of states are permitted to return law licenses even to criminals and the most abusive offenders. The case of California lawyer Ronald Silverton demonstrates the dangerous consequences of reinstatement of attorneys who abuse their positions of power. In the 1970s, the California State Bar suspended Silverton for running a long-standing insurance fraud scam. When his suspension came to an end, he resumed practice and proceeded to commit additional crimes, including an illegal adoption racket in the Caribbean. The state disbarred him but later allowed Silverton to apply for reinstatement. After he resumed practicing law for the second time, Silverton began charging unconscionably high fees and entering into settlements without consulting clients first. Once again, California disbarred him. Ultimately, Silverton's repeated abuses over the course of three decades led the state supreme court in 2006 to adopt permanent disbarment as a possible sanction against the profession's worst offenders.

Sadly, the Silverton saga is relatively common as the recidivism rate for disbarred lawyers is alarmingly high. Louisiana, for example, recently reported that 44 percent of lawyers who had been readmitted after disbarment later found themselves facing new disciplinary charges.

A small set of states, such as Indiana, Kentucky and Mississippi, provide for permanent disbarment and another handful, including Alabama, Minnesota and West Virginia, make it permanent at the court's discretion. According to Oregon Disciplinary Counsel Jeffrey Sapiro, Oregon joined this group of states by making disbarment permanent by court rule. State supreme courts should amend court rules to include

permanent disbarment as a possible sanction. The amended rules should contain clear guidance about the circumstances under which the lawyer discipline board should impose this weighty penalty. Factors may include the severity of the transgressions, the number of victims affected and the lawyer's acknowledgment of wrongdoing and attempts at redress.

(5) Abolish gag rules that prevent people from speaking publicly about the complaints they've filed.

To uphold citizens' First Amendment right to free speech and to keep communities informed about attorney abuses, lawyer discipline systems across the country should abolish overly broad confidentiality rules that silence those who file ethics complaints against attorneys. Typically these rules require state bars and courts to caution complainants that they may not publicly disclose the fact that they have filed a grievance. Some states even threaten victims with court sanctions if they choose to confide this information to anyone, including a friend or family member.

Lawyer discipline systems usually include the confidentiality mandate on a complaint form or in a response letter from disciplinary staff. The signature line of Pennsylvania's grievance form, for instance, warns victims to keep quiet, stating, "[Y]ou are requested not to breach the confidentiality of our consideration of your complaint by disclosing your involvement with the Disciplinary Board with other persons."

A few states incorporate the disclosure prohibition into their procedural rules. For example, Alaska's bar regulations provide, "Complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline and disability proceedings prior to the initiation of formal proceedings . . . . It will be regarded as contempt of court to breach this confidentiality in any way."[4] Perhaps most alarming, when we surveyed court and bar administrators in 2006, we learned that at least a dozen states keep their gag rules hidden from public view but ask disciplinary staff to privately caution some victims against publicly disclosing that they have filed a complaint, while others are kept in the dark and only discover the confidentiality requirement after they have inadvertently breached it.

Fortunately, the modern trend recognizes citizens' right to speak freely about the lawyer discipline system and their complaints against lawyers. In the past five years, a few state supreme courts, including those in New Jersey and Tennessee, have struck down complainant confidentiality requirements on First Amendment grounds.[5] In 2009 , Louisiana became the latest state to abolish a rule that once required victims to maintain

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[4] See Alaska Bar. R. 22(b) (2008).

[5] See *R.M. v. Sup. Ct.*, 883 A.2d 369 (N.J. 2005) and *Doe v. Doe*, 127 S.W.3d 728 (Tenn. 2004).

the confidentiality of bar complaints.[6] The Louisiana Supreme Court held that the confidentiality provision represented an unconstitutional content-based restriction on speech. Pursuant to the court's order, the chief justice of the Louisiana Supreme Court will issue an order to remove language from the Rules for Lawyer Disciplinary Enforcement that prohibits complainants and witnesses from speaking freely.

High courts in states that continue to maintain overly broad confidentiality requirements should revisit their disciplinary rules and strike provisions that place unconstitutional restrictions on complainants. Disciplinary administrators should remove confidentiality instructions from complaint forms and refrain from threatening victims with contempt of court for speaking publicly about the disciplinary process. To combat the widespread notion among victims that they should remain silent about the disciplinary process, state bar and court officials should advise each complainant and witness in writing that they have the unfettered right to speak freely about attorney grievances.

(6) Publicize the availability of lawyer discipline programs through required client notification and local advertising.

The finest lawyer discipline mechanism in the country is relatively useless if few Americans know of its existence. HALT regularly hears from victims of lawyer misconduct who have no idea how to seek recourse and from consumers who are unsure where to go to find out whether their lawyer has committed past transgressions.

Take a 2008 case in Tennessee. When a pregnant woman was jailed for a routine traffic violation and shackled while going into labor, Juana Villegas' husband hired attorney Michael Sneed, who had committed a string of abuses against past clients and was then facing disbarment—much to the Villegases' shock. The information would have helped the Villegases, who could not understand why Sneed was ignoring their phone calls after they paid him his upfront fee. Widespread advertising and a requirement that attorneys notify clients about where to file an ethics complaint and how to review a lawyer's disciplinary record would go a long way toward preventing the problems faced by the Villegases and other victims of attorney abuses.

Requiring attorneys to notify clients and prospective clients about their right to file an ethics complaint is the best way to ensure awareness of and access to the system. Texas provides a useful model. Attorneys practicing law in the state must provide notice to clients of the existence of a grievance process by one of four means: distributing a State Bar brochure describing the grievance process; posting a sign prominently displayed in the attorney's place of business describing the grievance process; including the grievance

[6] See *In Re: Warner*, 2005-B-1303 (April 17, 2009).

process information in the written contract for services with the client; or providing the information in a bill for services.[7]

In addition, Texas law requires the state bar to distribute a brochure written in English and Spanish describing the bar's grievance process, to establish a toll-free telephone number for public access to the chief disciplinary counsel's office, to describe the grievance process in the bar's *Yellow Pages* listings statewide and to make complaint forms written in English and Spanish available in every county courthouse.[8]

To ensure that the public understands where and how to file a complaint against a lawyer, state legislatures and court disciplinary committees should follow Texas' example by requiring lawyers to conduct notification procedures and by posting the information in local telephone directories, public venues and in local newspapers of general circulation. All agencies should have toll-free numbers and allow callers to access a live person, rather than simply automated instructions. In addition, the office should allow for e-mail inquiries. By implementing these measures in the next year, the lawyer discipline agency not only guarantees increased reporting of lawyer misconduct but also proactively demonstrates the agency's dedication to protecting the client population.

(7) Open lawyer discipline hearings to everyone to increase the public's trust.

To increase public trust in the insular lawyer discipline system, states should open their disciplinary hearings to the public and post hearing schedules on disciplinary Web sites and at civic venues. While civil and criminal proceedings are open to the public at every courthouse in the country, many states keep their lawyer ethics proceedings shrouded in secrecy. In at least a dozen jurisdictions, the general public and the press are forbidden to attend. And although the public is technically permitted to be present at disciplinary hearings in most states, information about hearing dates and locations is nearly impossible to find.

Massachusetts is one notable exception. The state's Board of Bar Overseers not only allows the general public and press to attend disciplinary hearings and prehearing conferences but also makes a concerted effort to provide the public with ample notice of the proceedings. The agency's Web site provides a clear link on its home page to a list of dates, times and locations for hearings scheduled that quarter and the same directory is posted in a variety of public venues throughout the state, including courthouses and government agencies.

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[7] See Tex. Gov't Code Ann. § 81.079(b) (2008).
[8] See Tex. Gov't Code Ann. § 81.079(a) (2008).

The Virginia State Bar also proactively disseminates information about upcoming disciplinary proceedings. According to Virginia Bar Counsel Edward Davis, the clerk of the disciplinary system publishes a docket reflecting the dates, times and locations of all hearings that is readily available on the bar's Web site. Further, the clerk regularly fields telephone inquiries from the public and the press about matters scheduled for hearing.

To follow these examples, courts need to amend rules this year to provide that hearings are open to the public. Because the rule change is useless without widespread announcements of hearings, disciplinary bodies should include timely hearing calendars on their Web sites and in a variety of public forums. The information should be updated monthly and provide specific hearing times and directions to proceedings.

(8) Provide ordinary citizens with a majority voice on the panels that decide attorney misconduct cases.

The self-regulated nature of lawyer discipline systems across the country creates, at a minimum, the appearance of bias. Lawyers dominate the panels that decide complaints against other lawyers. According to the American Bar Association's most recent data, most states allow only token participation by non-lawyers—typically a single seat on a tribunal that is filled and chaired by lawyers and judges.[9] The inherent unfairness in the system suggests that even some of the most abusive lawyers may be given a free pass, as long as they are generally well-liked or maintain power within the profession.

If a jury of ordinary Americans can be trusted to decide complex, multimillion-dollar civil cases and life-or-death capital cases at the criminal level, certainly we can trust lay persons to help decide ethics cases against lawyers. Attorneys can continue to serve as expert witnesses to instruct panels on the appropriate standard of care, but they should no longer be permitted to dominate the disciplinary decision-making process.

Vermont provides a useful—albeit imperfect—model. Like most states, Vermont permits non-lawyers one of three seats on the panels that hear cases and impose sanctions. What is striking about Vermont is its more pronounced reliance on lay persons on its Board of Professional Responsibility, which adopts internal procedures for the administration of lawyer discipline, supervises the program's case docket and case-flow management procedures and assigns hearing panels. Vermont gives ordinary citizens three of the seven seats on the board and often appoints one of the public members as chair or vice-chair. Giving non-lawyers a meaningful role on the panels that decide cases against lawyers helps to ensure impartiality and to increase public confidence in Vermont's lawyer discipline system.

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[9] "ABA 2008 Survey on Lawyer Discipline, Chart VIII," American Bar Association, 2008, *www.abanet.org/cpr/discipline/sold/home.html.*

In the next year, courts and state bars should amend their disciplinary procedural rules to augment participation by consumers. Non-lawyers should have at least an equal voice on the panels that decide cases against lawyers and on the boards that manage the system.

(9) Grant clients and witnesses immunity from civil liability for any information given to the agency during a disciplinary investigation.

When we conducted research for our 2006 Lawyer Discipline Report Card, HALT found that attorney ethics violations frequently go unreported because many Americans feel somewhat intimidated by the insular system of lawyer discipline. In particular, victims of lawyer misconduct expressed concern over the possibility of being retaliated against or even sued by the attorney about whom they complained. The lawyer has access to all information exchanged in a disciplinary matter and in at least 20 states, has the opportunity to sue the complainant and third-party witnesses over allegations and affidavits included in the complaint, statements made to investigators and testimony given at hearings.

On its Web site, the Virginia State Bar warns complainants: "[T]he complaint process will not protect you from being sued by a lawyer who believes he or she has been wrongly accused in a bar complaint." Some states provide qualified immunity but do not guarantee protection. For example, Alaska's bar rules provide: "The Court or its designee may, *in its discretion*, grant immunity from criminal prosecution to witnesses in disciplinary, disability, or reinstatement proceedings upon application by the Board, Bar Counsel, or counsel for Respondent, and after receiving the consent of the appropriate prosecuting authority."[10] [Emphasis added.]

Fortunately, lawyer discipline bodies are increasingly defending victims and third-party witnesses from prosecution and civil suits. Iowa rules, for instance, provide absolute immunity for communications made during the course of disciplinary proceedings: "Complaints submitted to the grievance commission or the disciplinary board, or testimony with respect thereto, shall be privileged and no lawsuit predicated thereon may be instituted."[11] By inviting citizens to speak candidly about incompetent and abusive attorney practices without fear of reprisal, Iowa's lawyer discipline body strengthens public trust in the system and helps ensure that all misconduct gets reported.

After receiving a draft copy of this report, Indiana's Disciplinary Commission responded that the state's highest court will now amend its rules to provide complainants with absolute civil immunity. Under this important rule change, those who file a grievance

[10] Alaska Bar Rule 17(b) (2008).
[11] Iowa Court Rule 35.23(1) (2008).

against a lawyer in Indiana may no longer be sued by that lawyer for anything written in the grievance or stated during a disciplinary proceeding.

To encourage this same candor, lawyer discipline bodies should amend court rules to grant absolute immunity to complainants and witnesses who participate in disciplinary investigations and hearings. In addition, notice of this immunity should be provided on complaint forms, at the outset of any interview by investigating disciplinary administrators and prior to all testimony at hearings.

(10) Allow citizens the right to appeal initial complaint dismissals and hearing panel decisions.

As a final protection against the miscarriage of justice in lawyer discipline proceedings, consumers should have the opportunity to appeal complaint dismissals and hearing panel or board rulings. Investigators and decision-makers should be required to provide substantive explanations for dismissals and dispositions so that complainants understand the basis for decisions and, in appropriate cases, have the grounds to challenge them.

The American Bar Association observed in the commentary to its Model Rules for Lawyer Disciplinary Enforcement, "Disciplinary hearings are neither civil nor criminal but *sui generis*. It is incorrect to assume that, as in a criminal proceeding, the complainant has no rights in regard to case disposition."[12] Complainants should have the opportunity to file an appeal at two distinct stages in the disciplinary process: (1) after the central intake office issues a dismissal of a complaint and (2) following a hearing panel or board decision (depending on the state's structure). Some states, such as Maine, New Hampshire and Utah, provide complainants with the right to challenge initial complaint dismissals but do not allow them the chance to appeal disciplinary rulings by hearing panels or district courts. To ensure justice throughout the entire process, states should present complainants with the opportunity to challenge both initial dismissals as well as hearing panel decisions.

Louisiana provides a helpful model. The state's Rules for Lawyer Disciplinary Enforcement provide complainants with the right to request reconsideration of the disposition of a matter following the initial investigation and to appeal decisions by a hearing committee.[13] The complainant may bring his or her appeal to a panel of the disciplinary board or to the state supreme court.

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[12] See ABA Model Rule 31, Commentary (2008).
[13] See Louisiana Supreme Court Rule XIX § 30 (2008).

To further protect against wrongful dismissals, the deputy administrator of Illinois' disciplinary system, James Grogan, recommended that other jurisdictions follow his state's example by creating a disciplinary Oversight Committee. In Illinois, Oversight Committee members conduct regular internal quality reviews of a representative sample of dismissed cases.

Courts and state bars should amend court rules to provide complainants with the right to challenge initial dismissals and decisions by hearing panels and boards of professional conduct. Providing a complainant with this ongoing right to appeal helps to guarantee an additional check and balance within the otherwise self-governed system of lawyer discipline. In addition, every state should establish an oversight committee to regularly evaluate dismissed cases to ensure that they are being discarded for the right reasons.

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SACRAMENTO COUNTY BAR ASSOCIATION

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10 January 2011

Amy Anderson
Office of the General Counsel
180 Howard Street
San Francisco, CA 94105

Re: State Bar Governance Task Force Questionnaire

Dear Ms. Anderson:

On behalf of the Sacramento County Bar Association and the thousands of attorney members of our association, I respectfully submit these comments in response to the Task Force survey. Please include me in the line-up of speakers for the January 27 public hearing, and please confirm that I am in the speakers' queue by calling me at (916) 654-3951or via email at mlevy@energy.state.ca.us.

I would like to preface our comments with a general concern. The Task Force's efforts and the survey appear to demonstrate a process inherently backwards: Its focus is on changes to the governance structure of the State Bar of California without first identifying the problems that the changes would be designed to correct. AB 2764 contains a variety of assumptions about the State Bar's role and operations. Among the assumptions are certainly legitimate and warranted criticisms. Some, however, may not be. Legitimate criticism should be addressed with appropriate reforms. Misperceptions should be addressed with education. The basis for criticism should be documented, and also responded to in an appropriate manner through education and an introspective look at how our systems can increase meaningful access to justice for all citizens, and strive to foster a universal perception that justice has in fact been dispensed in every case. Notably, reforms of this magnitude are not accomplished simply by changing the governance structure of the State Bar, but require a global approach, including changes to the State Bar Act and a commitment from our judges to manage courtrooms with a sincere focus on improving access to justice. The first and most significant "officers" in line of attorney professionalism are the judges in front of whom they practice. The Board of Governors and the State Bar's discipline system are far too late in the day, and—to be blunt—ill equipped to address, for instance, some of the commonplace but outrageous attorney conduct that judicial officers routinely witness yet unfortunately often ignore. In sum, the Task Force should—indeed, must—engage in a meaningful problem identification process before purporting to propose solutions. The fundamental tenets of thoughtful legal

analysis include a structured order of first identifying the issue, marshalling the evidence, applying the evidence to the issue, all before forming a conclusion. The survey proposed by the Task Force has not done so, and in failing to do so, we in Sacramento take serious exception.

We recognize the constraints under which the State Bar finds itself as a result of the passage of AB 2764, and we suspect that this questionnaire is a reaction to the pressures associated with defending the State Bar and, by extension, the practice of law in California. Certainly, a profession that polices itself can be a target of inquiry and concern. We may be asked if we lawyers can be trusted to properly and adequately protect the public and the administration of justice when we must ferret out the wrongdoers from among ourselves and punish them. We believe the answer to this question is unequivocally "yes". As in any profession, there are attorneys who perform services poorly, who take advantage of their office and clients through graft and misconduct, who lie, cheat and steal. Also, as in most professions, these bad actors are typically a minority, a small and numerically insignificant number of us who, through their exploitations and lack of honor, give the rest of us, and our profession, a bad name. From a self-interested perspective, they also place honest attorneys at a competitive disadvantage to the extent profit inures from malfeasance. It is interesting to me and many of my colleagues that, despite a substantial increase in the State Bar's budget to professionalize the disciplinary system, there are fewer State Bar prosecutions of unethical and illegal behavior of attorneys, especially when thousands of new attorneys are admitted to practice in California each year. To the extent that the discipline system is not provided with sufficient resources to prosecute unethical lawyers, then a focus must be directed to providing the support to allow the Office of Trial Counsel to do its work, including responding to even the most complex of disciplinary charges, in addition to the "low hanging fruit". While the Board of Governors has a vested interest in determining where State Bar staff may have failed in this regard, ultimately this may be more a result of the Board's failure to provide a clear direction to the Office of Trial Counsel than a structural problem with the Board itself.

As responsible and engaged members of our profession, my colleagues and I agree that if our licensing and discipline authority is failing to meet its mission or its potential, it must be dealt with. We agree that corrective measures must be imposed for matters in need of repair. Like elected and appointed officials in the other branches of government, we have taken an oath to support the Constitution of the United States and the Constitution of the State of California. We know how the practice of law and the judicial system work (or should work), we know the good we do for our clients, and we know that the vast majority of lawyers are honest and good citizens who work diligently and fairly. That assumption that the State Bar staff and Board of Governors need an overhaul may be legitimate, but we urge this body to perform that undertaking carefully, with meaningful deliberation, without haste, and with an understanding that by and large attorneys take seriously the practice of law and the governance of our profession. And it must be done with a keen understanding of the specific problems that the reforms are sought to remedy, and an explanation of how the reforms are likely to precipitate the remedies.

There appears to be a misconception about the business of law, that somehow lawyers are the cause of our increasingly litigious culture, as if we could create and bring lawsuits out of thin air. Along these lines, it is repeated often in political advertising that the trial lawyer is solely responsible for this culture as well as for inflation and the costs of doing business by bringing and fighting costly lawsuits. As is understood by those actively engaged in the practice of law, this isn't true or reflective of the practice of law. That said, it should be noted that "lawyering" is messy work. It requires hours of research, analysis, discussion and writing. It has rules and procedures, typically invoked to protect one party's

rights as against the other party. It has timeframes and time limits. It has decorum, formality and process, all invoked to create an accurate record of the proceedings. And while a lawyer can (and must) adhere to the rules and the processes and the intensive procedures that govern the practice, the one thing a lawyer cannot do is create and bring a lawsuit without a client. In all litigation cases, there must be a legal wrong, and that wrong must, by necessity, result in the wronged party seeking redress. Lawyers are permitted, by education and licensure, to undertake the cases on behalf of their clients, but "We the People" are the ones "guilty" of bringing the lawsuits. We hire the lawyers. Without the will and desires of and injuries to the public, lawyers would have no work. To the extent the legislature chooses to authorize litigation as a means to vindicate public or private rights is question properly directed to the political branches of our government. Blaming the legal profession for its necessary role in the vindication or defense of those rights, however, is to scapegoat the guardians of our adversarial system of justice for performing their very Constitutionally recognized responsibilities.

The reason we raise these points is to make clear our concern that the very foundation of AB 2764 may be a misperception about the practice of law and those engaged in it. The notion that the State Bar must convene a Governance in the Public Interest Task Force in order to ensure that we lawyers, and more specifically the State Bar, are "enhancing and ensuring the protection of the public" is redundant to the oath of office we swear when we are admitted to practice. Furthermore, the call for such a task force seems to indicate that there is a question about the State Bar's ability to manage the licensure and governance of our profession. Certainly the State Bar, like all businesses or public bodies at times, has suffered from policy problems, a lack of adequate internal controls, a need for a more user-friendly paradigm, and a current set of protocols for carrying out its charge. But a task force convened to discover if the State Bar is working in/for the public interest is tantamount to a claim that lawyers are not interested in routing out the bad players in our profession, that somehow we and our profession would be better served by covering up rather than finding out and punishing them. We cannot imagine anything further from the truth or more antithetical to the practice of law and the administration of justice.

To some of the substance of the questionnaire:

Question #1

The question about defining the "protection of the public" offers a number of various responses. The Task Force must distinguish between legitimate criticism on the one hand, and misperceptions and criticisms borne of negative experiences inherent in an adversarial system on the other. Without this distinction, the endeavor becomes more a witch hunt than a tool for professional improvement and development.

Nevertheless, fleshing out the idea of "protection of the public" can be done. For most of the attorneys active in the Sacramento County volunteer legal community, it means ensuring that those lawyers to whom the public turns for assistance are ethical and qualified. It means they are properly licensed, regulated and disciplined. Perhaps there should be a review of how an attorney is deemed qualified to practice and how quickly and carefully the State Bar investigates and acts on complaints or concerns. Perhaps the State Bar must tighten up its rules for licensing and/or continuing education. Perhaps there ought to be a limit to the number of times the Bar exam can be taken. Perhaps there ought to be a more rigorous background screening process for applicants. In light of recent situations in which lawyers have been disciplined for taking advantage of clients faced with economic problems as well as in a

couple of other areas where the State Bar had to step in to stop lawyers from taking advantage of their clients, perhaps the State Bar needs to toughen up its ethics examination requirements, its continuing education requirements on the subject of ethics, or become more involved in setting ethics curriculum in accredited law schools. Consideration must be given to amending the State Bar Act to reflect the evolving ethical concerns that continue to erode the public's confidence in the legal system. While there is no doubt that lawyers perform a critical and valuable service by representing people who need representation in our judicial labyrinth, we are prepared to work hard to ensure that the public does trust our profession and that we are open to appropriate changes and improvements to earn that trust. Additionally, the State Bar has a legitimate interest in advocacy to make sure that the law works for the public. This likely includes the work of the Bar's various committees and sections.

Question #2

Question #2 asks who should sit on the State Bar's Board of Governors. In order for the practice and administration of justice to be truly in the public's interest, only those people with a keen understanding of both the varying responsibilities of attorneys and our fiduciary responsibilities to our clients and the profession should serve on the Board. There must be this minimum level of understanding and awareness of the rules and expectations governing lawyers for anyone sitting on the Board. Any Board member without this understanding cannot understand what truly is in the public interest. It must be pointed out that "public interest" may be in the eye of the beholder. In our adversarial system, one party wins and, by definition the other party loses. It stands to reason that the losing party may feel it has been treated unfairly and unjustly by virtue of the loss. Only someone who understands the practice and nature of the law would recognize this; likewise, only such a person should be able to serve on the Board of Governors.

We do not believe the problems of the Bar's Board have anything to do with its size. A structural criticism often cited, however, is that the executive director has been reputed to have had too much control and inadequately checked authority. With the regular and built-in turnover of the Board, the State Bar may have become too staff driven. Likewise, district representatives serve for three-year terms, yet public members may be reappointed for a number of consecutive terms, with the effect of marginalizing those with perhaps the greatest ability to recognize the actual impact of the Board of Governors' actions on the actual practice of law. We recognize that, like most boards, the State Bar needs to focus on policy and not get mired in details. Nevertheless, any board without some continuity of its membership would necessarily tend to defer to its staff for even the most important of policy decisions. The members must, by definition, accept the "recommendations" of staff without sufficient explanation or exploration. Perhaps extending the time of service of the State Bar officers to two years would provide more time for the president to put certain plans and projects in motion in a more thoughtful manner, giving the rest of the Board sufficient time to consider and act. This two-year tenure also would provide subsequent candidates for Bar president time to learn how the organization works, what it needs to operate effectively and how to set and accomplish goals in the given amount of time.

Additionally, the Board can improve its operations and oversight related to proceedings and staff activities. We must deal with the issue of the JNE committee's failing to follow state law in its proceedings, and in the failure of the committee to keep proceedings confidential. This unfortunately illustrates the example of a definite need to improve the caliber of JNE committee members. And the Board needs to improve its paradigm for reviewing the day-to-day activities of the staff and committees,

such as implementing procedures and controls that would, from this point forward, prevent a staff member from embezzling hundreds of thousands of dollars.

Questions #3 through #8

We believe these questions are premature until/unless there is first a thorough discussion about the current system and how and under what circumstances it is not serving the public interest. (That said, we believe our comments to question #2 could be extended to question #4 because we think a candidate for the Board of Governors must demonstrate some knowledge about the fundamental structure of our legal system and practice of law to be able to serve on the Board.) As an active, engaged leader in the California legal community, I believe that the majority of attorneys in California, and by extension the State Bar staff and Board, serve our interests and work hard to protect the public. The Task Force should investigate and develop an understanding about the current framework and efficacy of the legal profession and law community in California. It seems to us that this would be the logical and critical first step prior to assuming there is a need for a restructuring of the Board of Governors.

Question #9

I would like to speak at the January 27th public hearing in San Francisco. My contact information follows:

Michael J. Levy, President
Sacramento County Bar Association
C/O Office of the Chief Counsel
California Energy Commission
1516 Ninth Street, MS-14
Sacramento, CA 95814
(916) 654-3951
mlevy@energy.state.ca.us

I appreciate the opportunity to be part of this effort, and I look forward to participating in the State Bar's process now and in the future. Please confirm that I will be able to speak at the San Francisco public hearing on January 27th. I look forward to hearing from you.

Very truly yours,

/s/

Michael J. Levy,
President

Santa Clara County Bar Association

Memo

To: The State Bar of California Governance in the Public Interest Task Force

From: Shannon Stein, President, Santa Clara County Bar Association

Date: January 13, 2011

Re: Input re Governance of the State Bar of California

On behalf of the Santa Clara County Bar Association (SCCBA), I am providing the following comments in response to the State Bar of California Governance in the Public Interest Task Force (Task Force) December 3, 2010, request for input on the current governance model of the State Bar of California (State Bar) and ways it could be improved with a view to enhancing public protection. Thank you for the opportunity to provide input. These comments do not follow the individual questions posed by the Task Force as the SCCBA's comments do not neatly fit within the parameters of those questions.

Having said that, in response to the question regarding the composition of the State Bar Board, the SCCBA strongly supports a Board composed of more lawyers not fewer. It is critically important that the Board represent the diversity and multiplicity of perspectives from the legal community across the State.

RECOMMENDATION: The State Bar should take all necessary measures and steps to ensure that more significant oversight of the "governance structure" of the State Bar is accomplished by the California Supreme Court (Court) through the Court's constitutional responsibility for licensing, regulation and discipline of attorneys. Oversight of the State Bar and its functions by the California Legislature and Executive Branch through their authority to approve the State Bar dues encroaches on the authority of the Court. The SCCBA suggests that the historical and increasing involvement of the Legislature over the past 15 years in the day-to -day management, policy and governance of the State Bar is an unconstitutional violation of the separation of powers between the judicial, legislative and executive branches. Addressing the "governance structure," meaning the composition of, appointment/election of, terms of and other elements of the State Bar governing board, will not address the issues underlying the legislature's perceived concerns regarding the State Bar's execution of its responsibilities related to public protection, namely, licensing, regulation, and discipline of attorneys. In deed, the SCCBA does not believe that the current Board model of the State Bar Board requires any modification.

ISSUE/S ADDRESSED: The Legislature apparently is interested in ensuring that the State Bar is adequately discharging its public protection responsibilities. The Legislature's mandate to this Task Force is to submit recommendations for enhancing and ensuring protection of the public. In addressing that, the Task Force has presupposed that public protection can be enhanced by changing the governance model, i.e., the State Bar Board. The SCCBA suspects that the focus on the governance structure was informally agreed on between the State Bar and the Legislature to advance the signing of the 2010 dues bill. However, the SCCBA believes that before the State Bar Board considers any legislative mandate, a more fundamental, threshold question should be addressed. The authority for determining how the State Bar should discharge its public protection responsibilities; who has authority to mandate to the State Bar how its public

protection responsibilities should be discharged, including what the governance of the State Bar should be and who has authority to mandate that the State Bar provide recommendations regarding any of the State Bar operations., policies or functions must be clarified and transparent.

DISCUSSION: At the outset, the SCCBA acknowledges that the Legislature has a valid interest in the public protection responsibilities of the legal profession. The SCCBA also understands that the Legislature has, historically, by statute, approved the amount of dues charged licensed attorneys. The SCCBA does not oppose the participation and input of the Legislature in the State Bar's public protection responsibilities. How that input is provided and the degree to which the State Bar is compelled to implement that must be consistent with the Court's constitutional authority and obligation to regulate and oversee the practice of law in California.

First, it should be noted that the public protection responsibilities of licensing, regulating and disciplining attorneys, do not originate with the State Bar or the Legislature. These public protection responsibilities are within the jurisdiction of the judicial branch, namely, the California Supreme Court. The State Bar is the mechanism by which these responsibilities of the Court are discharged. The authority to license attorneys, to determine how licensed attorneys should be regulated, including the disciplinary rules by which attorneys must practice and whether and how attorneys should be disciplined for violating the disciplinary rules resides with the Court. The Court has complete and sole authority to determine whether and how the State is discharging these responsibilities on behalf of the Court.

Over the past 20 years or more, the Legislature has increasingly become involved in mandating what activities are within the scope and purview of the State Bar, how it should carry out certain of its responsibilities, what positions the State Bar should or should not take, along with various other aspects of the structure of the State Bar. This involvement has come by way of the governor threatening or actually vetoing or by the legislature delaying or refusing to approve the State Bar dues bill. This has caused debilitating disruptions to the State Bar and increasingly so over the past 15 years. These disruptions neither inure to the benefit of the licensed attorneys nor truly enhance the goals of public protection. In deed, these disruptions only serve to cripple the State Bar's ability to discharge its professional obligations and those of the Court, divert its resources to address issues "mandated" by the Legislature and increasingly allow the Legislature, as opposed to the Court, to oversee and at times micro-manage the State Bar. That is not the role of the Legislature. It is the Court that has the constitutional authority to regulate the legal profession and because that has been delegated to the State Bar, it is the Court that has or should have the role of addressing issues related to the State Bar's discharge of those responsibilities. The Legislature can certainly provide input and participate in addressing concerns related to the public protection functions of the State Bar. But, it should be the Court's decision as to whether to require the State Bar to change its governance structure or any other aspect of how the State Bar functions.

The SCCBA believes that the State Bar needs to take a bold stand on this issue. The State Bar has been abdicating to the Legislature for decades. This has only resulted in the Legislature's increased involvement in how the State Bar functions and what issues it can focus on from year to year. This has resulted in the Legislature becoming a "Super Board" exercising oversight over the substance, function and management of the State Bar. Addressing the current governance structure of the State Bar Board will not resolve the underlying, continual tension between the State Bar, the Legislature and the Governor. In deed, whenever the Legislature or the Governor disagrees with something the State Bar is or is not doing or has done, the State Bar is either punished through the threat of the dues bill or the Legislature uses the dues bill to manage and oversee the State Bar. Until the authority of the Legislature and the Court is once again aligned within constitutional parameters, the State Bar will continue to be whipped around at periodic intervals by the Legislature, which likely is looking for an opportune time to divest the State Bar of regulating and disciplining attorneys in favor of a governmental agency directly responsible to

the legislative and executive branch. This would be an unacceptable outcome. One of the hallmarks of the legal profession and which defines it as a profession is its self regulation, which it performs better than any other licensed profession in the United States.

CONCLUSION: The SCCBA strongly encourages the State Bar to take this opportunity to address the real issue related to the governing structure of the State Bar. We understand that this will not be an easy or popular position for the State Bar to adopt and/or to try to implement. However, the SCCBA strongly believes that to preserve the legal profession's historical and important professional obligation of self-regulation, the encroachment of the Legislature on the constitutional responsibilities of the Court must be addressed and constitutionally resolved. Until and unless it is, the State Bar will continue to increasingly report and justify itself to the Legislature.

San Francisco Trial Lawyers Association

1. What do you understand protection of the public to mean in the context of governance of the State Bar?

   The State Bar's role in protection of the public should be to ensure that lawyers comport themselves in compliance with the standards set out in California's Rules of Professional conduct.

2. Who should serve on the board that governs the State Bar?

   The board should consist of members who are diverse in law practice areas, law firm size, geography, age, race, gender, sexual orientation, disability, religion and national origin. The board should comprise of at least: (1) one attorney who maintains a solo or small practice; (2) two attorneys who practice primarily plaintiff personal injury/consumer law; (3) two attorneys who primarily practices civil defense; (4) one attorney who practices in a governmental legal office; and (5) one attorney who practices criminal defense.

3. How should each of these individuals be selected? By whom and by what criteria?

   A nominating committee consisting of current board members, a past president, and senior state bar staff The State Bar, in conjunction with interested groups should create a set of board member standards and criteria. If the member is an attorney, the member must be in good standing with the State Bar

   a. Public members:
      - Governor appoints 3 members
      - 1 appointed by the Chair of the Judiciary
      - 1 appointed by the Senate Rules Committee and
      - 1 by the Speaker

4. What qualifications should be required for each member of the board?

   The State Bar create and publish these qualifications which should include, but should not be limited to, integrity and years in practice. Special consideration should be given to individuals characterized by differences and similarities in age, race, gender, sexual orientation, disabilities, ethnicity, religion and national origin.

5. What size should the board be?

   Current size is adequate.

6. How long should the terms of the Members (and of the president) be?

   One year term for each position. Maximum of 6 years for lawyers (not including officer positions) and public members.

7. How should the president and the other officers be selected?

   Nominated by a Nominating Committee and elected by the Board.

8. What changes or other governance models may enable the board to better serve the interest of public protection?

   Establish a committee on public protection which consists of board members, members of the State Bar and representatives from consumer groups. The function of this committee should be periodically review the work of the State Bar and to make recommendations to the Board regarding changes to the State Bar's practices, rules or other procedures that affect public protection and/or the public's perception of the State Bar's role in public protection.