GOVERNANCE TASK FORCE PUBLIC HEARING LOS ANGELES
SPEAKER LIST

JANUARY 20, 2011
9:30 a.m. – 5:00 p.m.

Speakers will be called in the following order:

Order	Name & Contact Information	Response to Request for Information	A.M. or P.M.
1	Professor Robert C. Fellmeth ED Center for Public Interest Law University of San Diego School of Law 5998 Alcala Park, San Diego, CA 92110 (619) 260-4806 cpil@sandiego.edu	Letter	A.M.
2	Los Angeles County Bar Association Sally Suchil, Executive Director 1055 West 7th Street, Suite 2700 Los Angeles, CA 90017 (213) 896-6424 ssuchil@lacba.org	Letter	A.M.
	BREAK		
3	Professor Richard Abel Connell Professor of Law Emeritus UCLA Law School Box 951476 Los Angeles, CA 90095-1476 (310) 825-7392 abel@law.ucla.edu	Letter	A.M.
4	Mexican American Bar Association of Los Angeles County Victor Acevedo, 2011 President 714 West Olympic Blvd., Suite 450 Los Angeles, CA 90015 (213) 749-2889 acevedoesq@yahoo.com	Letter	A.M.
5	Beverly Hills Bar Association Stephen L. Raucher, President 10940 Wilshire Blvd., 18th Floor Los Angeles, CA 90024 (310) 777-1990 slr@rrbattorneys.com	On-line survey response	A.M.
	LUNCH BREAK		12:15-1:00 p.m.
6	San Fernando Valley Bar Association (818) 227-0490 x101	On-line survey response	P.M.
7	Douglas A. Crowder (800) 455-1592	On-line survey response	P.M.
8	F. Tepedino Bar #64658 (858) 569-6454 condorgrup@aol.com	On-line survey response	P.M.
	BREAK		
9	Legal Aid Foundation of Los Angeles	On-line survey	P.M.

	Toby Rothschild, General Counsel 1102 Crenshaw Blvd. Los Angeles, CA 90019 (323) 801-7978 TRothschild@lafla.org	response	
10	Roy Torres rttorresca@yahoo.com	Email response to Request for Information	P.M.
11	Tonja Jarrett, CIC, CISR Vice President Personal Lines Manager, Kaercher Campbell & Associates Insurance Brokerage 1800 Century Park East, Suite 400 Los Angeles, CA 90067 (310) 556-4732 work; (818) 693-2224 cell (310) 551-6809 fax tjarrett@kcaib.com	Email response	P.M.
12	Eileen Theofanous-Lasher 716 F Avenue #10 Coronado, CA 92118 (619) 847-8094 etheolasher@gmail.com	On-line survey response	P.M.

January 10, 2011

William N. Hebert, Chair, and Members
Governance in the Public Interest Task Force
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: **Testimony of the Center for Public Interest Law**

Dear Mr. Hebert and Task Force Members:

The Center for Public Interest Law (CPIL) is pleased to submit the following testimony to the Task Force as it prepares to make "recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys ...." Business and Professions Code section 6001.2(b), added by Assembly Bill 2764 (Committee on Judiciary) (Chapter 476, Statutes of 2010).

CPIL is a nonprofit, nonpartisan academic and advocacy center based at the University of San Diego School of Law. Since 1980, CPIL has examined and critiqued California's regulatory agencies, including the State Bar of California. We have attended the Bar's meetings and followed its activities for 30 years. From 1987 to 1992, I served as the State Bar Discipline Monitor (under now-repealed Business and Professions Code section 6086.9), under appointment by then-Attorney General John Van de Kamp, with CPIL serving as the Monitor's staff. The State Bar Discipline Monitor position was created by the Legislature and — over the course of almost five years — we wrote eleven reports on the operation of the State Bar's discipline system. We worked with Senator Robert Presley and a succession of State Bar Presidents to fashion some 40 reforms of the Bar's attorney discipline system, including the passage of Senate Bill 1498 (Presley), 1988 legislation creating the independent State Bar Court. We are well aware that the State Bar's Board of Governors is part of the judicial branch under the aegis of the California Supreme Court. And we are similarly familiar with the executive branch agencies that license and regulate other professions and trades in California.

Section II of our testimony below responds to the questions listed in the "Request for Information" issued by the Task Force on December 3, 2010. Those questions focus on the structure of the Board of Governors, the composition of the Board of Governors, the method in which members of the Board of Governors are selected, the length of terms of members of the Board of Governors, and qualifications for members of the Board of Governors.

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As noted in our November 29, 2010 letter to the Task Force (which is hereby incorporated by reference as additional formal testimony to the Task Force), CPIL agrees that these structural issues are relevant to the Legislature's intent in creating the Task Force in AB 2764. However, we do not believe the statute's scope is as limited as the questions listed in the "Request for Information" indicate. We note that the term "Board of Governors" does not appear in the statute at all. Instead, the statute broadly directs the Task Force to make "recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys...." Nor do the legislative analyses of AB 2764 focus merely on possible changes to the structure, composition, and/or method of selection of the members of the Board of Governors. Both the Senate Judiciary Committee's analysis dated August 24, 2010, and the Assembly Floor analysis dated August 30, 2010, note that the bill "also contains a helpful new Task Force within the Bar, again with the Bar's support, to take helpful stock about what if any **structural *and other* potential improvements** might make ***the Bar's* public protection efforts** as vigorous as possible" (emphases added).

As such, Section I of our testimony focuses on more fundamental structural issues that CPIL believes the Task Force — either this one or the one that is required to issue another report in May 2014 — must address if the State Bar is ever to fulfill the Legislature's goal of "ensuring that protection of the public is the [Bar's] highest priority in the licensing, regulation, and discipline of attorneys...." Section I also seeks to respond to a legitimate question raised by several Task Force members during its recent meetings: **Just what is the problem with the State Bar?**

I. The Necessary Separation of the "Integrated Bar" — A Combination Trade Association / State Agency

A. The Two-Way Problem of Mixing Public and Private

One underlying structural issue that will have to be addressed (if not in the report required in May 2011, then in the very near future) is the "elephant in the room" — the hybrid structure of the State Bar generally, which differs substantially from all other professional licensing agencies in California and from the structure of many other state bars.[1] The State Bar of California's "integrated" status has been an issue for at least two decades, and is a key issue of concern to the Legislature.

[1] "The State Bar of California is radically different from most other entities that would be regarded in common parlance as 'governmental agencies. .... Only lawyers admitted to practice in the State of California are members of the State Bar, and all lawyers admitted to practice in the State must be members. [The Bar] undoubtedly performs important and valuable services for the State by way of ***governance*** of the profession, but those services are essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, nor does it ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court." *Keller v. State Bar of California*, 496 U.S. 1, 11 (1990) (emphasis added). The Court's use of the term "governance" is instructive in that it refers to the overall structure of the State Bar, and not merely its Board of Governors.

That "integration" means that the State Bar is "an association of attorneys in which membership and dues are required as a condition of practicing law in a State." *Keller v. State Bar of California*, 496 U.S. 1, 5 (1990). The State Bar exercises (in a strictly advisory role to the California Supreme Court) the traditional police power functions of an occupational licensing agency, "such as examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, [and] preventing unlawful practice of the law...." *Id.*

In addition to these traditional functions, the State Bar also engages in a number of other activities (*e.g.*, lobbying, litigation, political activities) on issues that are not directly related to the regulation of the legal profession or to improving the quality of legal services. In *Keller*, the Bar's use of compelled member dues to fund those "other" functions — which are more commonly within the province of a labor union or a voluntary trade/professional association — was challenged, and the U.S. Supreme Court held that it is unconstitutional (under the first amendment) for the California Bar to use compelled member dues on political and ideological activities that are unrelated to its core regulatory functions without allowing its members to "opt out" of paying for those unrelated activities.[2]

In other words, the California State Bar is a hybrid organization; it is part regulatory agency and part trade association. Under *Keller*, that structure can continue to exist, and the Bar may continue to engage in trade-association-type political and ideological activities unrelated to the regulation of the legal profession and improving the quality of legal services *so long as* it provides dissenting members with an opportunity to opt out of paying for those unrelated activities. And indeed, following *Keller*, the Bar established a "*Hudson* deduction" method by which dissenting members could avoid funding (with compulsory Bar dues) the Bar's unrelated political/ideological activities.[3]

In stark contrast to the Bar's structure and the limitations on its use of compelled licensee dues imposed by the U.S. Supreme Court, the California Supreme Court, and the California Legislature, other California occupational licensing agencies are limited to the traditional police power functions of licensing, standardsetting, and discipline. All other California occupational licensing agencies are strictly occupational licensing agencies; they have no "trade association"

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[2] "[T]he compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Keller*, 496 U.S. at 13.

[3] That process has been controversial at times. Shortly after the Bar established a $3 "*Hudson* deduction" in 1991, several dozen attorneys challenged the Bar's calculation of the deduction, asserting that many expenditures cited by the Bar as "*Keller*-good" were in fact "*Keller*-bad." This challenge culminated in the California Supreme Court's decision in *Brosterhous v. State Bar of California*, 12 Cal. 4th 315 (1995), in which the Court disagreed with the Bar's calculations and ordered it to discontinue funding numerous Bar activities with compelled Bar dues; and in the California Legislature's further limitation on the Bar's use of compelled Bar dues and its statutory adjustment of the "*Hudson* deduction" in SB 144 (Schiff and Hertzberg) (Chapter 342, Statutes of 1999).

component or function. No other agency has a "*Hudson* deduction." Unlike the State Bar, they need not engage in detailed documentation of each and every expenditure so as to determine whether each comports with their core regulatory functions; they are simply not permitted to spend public money on issues outside their core regulatory functions. If licensees of those agencies want to engage — as members of a profession — in advocacy on issues related to their profession but unrelated to licensing, standardsetting, and/or discipline, they voluntarily join an external, independent trade association (and pay it membership dues, which are pooled and used to pay lobbyists, lawyers, and others needed to influence government on such issues). The agencies that license them have no authority to engage in lobbying on those issues and, as a result, the agencies play no role in such political lobbying.

The "integrated" structure that combines a private trade association entity with the exercise of police power that properly emanates from the People raises profound ethical issues. The most fundamental check in our system is not legislative/executive/judicial; rather, it is the overriding separation between public and private. The Bar's current "integrated" structure violates that check. One aspect of this problem is addressed implicitly by the Task Force's questions and focus: How should members of the Board or other body controlling the State Bar be selected? And we argue at length below that because of its important function over basic public police power functions, Board members must be appointed by public officials, not elected by those with a financial interest in the exercise of that authority.

But the need for separation between public and private also commends private control of the private side. That is, were public officials to appoint Bar Board members, as we advocate, then the Bar should not serve as a trade association, any more than a trade association should perform agency functions. We are not concerned about the structure or governance of local bar associations, because they do not exercise a role in setting entry conditions, nor do they decide who to prosecute for violation of professional standards. Their members voluntarily agree to membership and to the payment of dues separate and apart from police power compulsion. And the function of such a professional association is then not limited by the *Keller* decision. And we would say parenthetically, that such an entity can do much good. It can lobby to enhance professional responsibility. It can work to educate the public about what attorneys do. It can represent the interests of the profession before numerous fora. Indeed, we would want to be, and would take pride in being, dues paying and active members of such an association. However, such voluntary associations do not exercise public police power.

B. The Particular Problem of Private Control of Profound Public Functions

To the extent the Bar exercises police powers that emanate from the People, they are not appropriately performed by a professional association of those financially affected by those decisions and policies. The current "integrated" structure subordinates state functions to a cartel. This is something that few if any attorneys would tolerate for a minute were the accountants, doctors, pharmacists, or any other group to propose such a privileged role. Nor does the public have a categorically exalted view of attorneys to support its distinctive status as its own public

governor. The fact that some of us believe we are so exalted is part of the legitimate problem much of the public has with us.

A legitimate concern about public-private confusion is not necessarily based on a record of errors or evidence of bad faith by current or prior Bar Governors. We know that Board of Governors members are not paid. And we have been witness to many Bar decisions and activities that are laudable. The Bar has often had admirable leadership, including a willingness to give up territory where higher principle so commends. And so when we — in 1988 — proposed moving the State Bar Court from under the effective control of the Board of Governors to an independent, professional body of Supreme Court-appointed judges, we not only had the backing of five consecutive State Bar Presidents; they effectively led the reform. We ended up essentially following their lead; names like Anderlini, Culhane, Rothenberg, Wied, and others have our enduring respect, and warrant yours.

And we also acknowledge the traditional arguments advanced for control of the Bar by lawyers. They include the following: (1) the State Bar is somewhat different from many other agencies; (2) the California Supreme Court, consisting of public officials, has supervisory authority over much of what the State Bar does; (3) many regulatory decisions require expertise, and attorney selection of attorney members of the Board better assures it; and (4) the democratic selection of governors is entitled to respect as such.

1. The State Bar Is Part of the Judiciary

As to the first acknowledgment above, we do not dispute the oft-repeated admonition that the Bar has some disparate features from many agencies — including its association with the judiciary. But most attorneys spend little time in court; they interact with consumers and businesses as do accountants and brokers and many other professionals. And while attorney services are of particular importance, so are those of doctors and engineers and other professionals. While legal regulation may require expertise, as discussed below, that needs to be expertise on point. The State Bar has some differences from other agencies, but what is the nexus between those differences and private trade association control of its governance? Many agencies have features that demark them from their counterparts, but the Bar performs many of the same functions – including mandatory assessment of fees for its budget, control over entry into the profession, generation of rules, and substantial discretion in disciplinary enforcement.

We do agree that many aspects of the Bar can and do benefit from a strong connection to the California Supreme Court. And members of the Bar are authorized to practice in our courts. That is a point of some distinction. But the Bar also exercises the common public powers noted above for consumer protection purposes. The State Bar Act is a statute, not a court rule. And consumers are vulnerable to irreparable harm from dishonest and incompetent attorneys quite outside of Court purview. In our proposal, these common aspects and the special judicial connection are reconciled by giving the Supreme Court power to appoint the majority of the Bar Board's membership (as suggested below).

2. The State Bar is Supervised by Public Officials – The Supreme Court

The problem of private control of the Bar is not fully ameliorated by the potential for Supreme Court supervision. Much of what the State Bar does involves police power function that is not specifically so reviewed. Of course, final disciplinary decisions are made by Supreme Court appointees and subject to discretionary Court review; and the Court reserves the power to make decisions on the Rules of Professional Conduct. But much of what the Bar does is not reviewed by the Court, including much of the entry system into the profession, its finances,[4] the critical decisions about what should be investigated, and the filing of notices of disciplinary charges.

Pointing to some Supreme Court supervisory role actually ignores the significantly more extensive public-official oversight of every other occupational liccensing agency. An apt example is the Medical Board of California (MBC). It consists of eight physicians and seven non-physician public members. The Governor appoints all of the physician members and five of the public members; the Legislature appoints the remaining two public members. The Medical Board and most other professional regulators have their rules reviewed by the Department of Consumer Affairs (DCA) — headed by a person appointed by the elected Governor. DCA also has a substantial review role in MBC's budgetary process. And although the Medical Board controls its investigators, the public Office of the Attorney General (headed by a separate elected constitutional official) prosecutes disciplinary cases, not an Office of Trial Counsel appointed by the Board. (Indeed, the investigators handling discipline matters for most trades are under the DCA.) Evidentiary hearings in MBC disciplinary matters are handled not by in-house judges but by administrative law judges employed by the separate Office of Administrative Hearings (again, directed by an individual appointed by the elected Governor). And even as to rulemaking, the Office of Administrative Law — headed by a director appointed by the elected Governor — reviews all MBC regulatory changes and can reject them if they lack authority, clarity, necessity, consistency, nonduplication, and/or reference. So having public officials in a review capacity might be a more persuasive argument for Medical Board member selection by the California Medical Association or by licensed doctors, than it is for Bar Board member selection by attorneys — because of the rather looser oversight of the Supreme Court.

3. Many Regulatory Decisions Require Expertise

Proponents of the current structure argue that an attorney supermajority selected by attorneys who can weigh expertise is necessary to ensure informed and competent decisionmaking. We are aware that expertise may sometimes be an asset. And we do not object to having attorneys on the Bar Board of Governors, although it should certainly not be a 73% share — the current proportion! But where expertise is needed, it should be "on point." And

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[4] Note that the Court did belatedly intervene to require attorney assessment after the regrettable 1997 veto of the Bar dues bill by Governor Wilson, but only after a substantial delay during which the discipline system had been eviscerated.

attorneys, who have to provide foundation for expert witnesses, well know about on-point expertise. General practitioners may not know much about a consumer class action case in federal court. Not too many of us who practice real estate law would know a great deal about immigration or personal injury or bankruptcy law. We well know that a podiatrist is not going to testify in a malpractice case involving brain surgery. The trick for us is to find that applicable expertise and to combine it with a process that preserves a measure of independence from the economic result of the decision. Ideally, we allow generalists to make decisions from a broad perspective on behalf of the public — informed by those who know a lot about the subject — including from those with a disclosed financial interest. Ironically, that reliance on a non-expert generalist is the lifeblood of our own profession. We do not vest our expert witnesses with final decisionmaking power. For one thing, we would be fighting over whose expert witnesses to rely upon. For another, we know that generalist judges and juries are best able to make a fair decision informed by on-point expertise. Why should we pretend that our own governance should eschew the very respect for the generalist public official that we all rely upon professionally and in the making of the most serious decisions in which we are involved?

4. The Democratic Selection of Governors

The democratic selection of governors evokes an understandable positive connotation (even though only a small percentage of the qualified constituency casts votes). But the problem is not the mechanism of an election; it is the limitation of the electorate to attorneys — a group whose regulation is presumably governed in the interests of the broad body politic. Moreover, those who are elected to serve on the Bar Board are expected to represent the interests of the constituents who elected them — which contrasts starkly with the duty of other occupational licensing board members to treat public protection to their highest priority.

How does this governing constituency view the current system? Interestingly, one survey has suggested that support for the current system may not be strong even among that group. In 1992, a bill was proposed to abolish the State Bar and delegate attorney regulation to a new Attorneys' Board of California within the executive branch Department of Consumer Affairs. In October of that year, *California Lawyer* magazine conducted a poll of attorneys and published the results in its December 1992 issue. Eighty-nine percent (89%) of respondents answered "no" to the question: "Should the State Bar as it is currently structured continue to exist?" Over 75% said membership in a statewide bar should not be mandatory. In response to the question "How should the legal profession be regulated?," only 33% said "self-regulated as it is now," whereas 57% responded that lawyers should be regulated "by a state agency, like other professions." In response to the question "Would you favor a bifurcated bar in California with a mandatory bar regulating admission and discipline and a voluntary bar for all other activities?," 64% of respondents said "yes."[5]

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[5] We acknowledge that, pursuant to SB 60 (Kopp) (Chapter 782, Statutes of 1995), the State Bar was required to conduct an advisory plebiscite of its active members in good standing with respect to the following question: "Shall the State Bar be abolished as the agency regulating lawyers in this state on behalf of the Legislature

Our bottom line is that it is unethical for a private trade association to engage in the exercise of public police powers; and improper for public officials to purport to run a trade association. The "integrated Bar" can and should be divided; its trade association functions should be spun off to voluntary trade association(s) funded with voluntary dollars.

II. The Board of Governors' Selection and Tenure

In addition to the political/ethical issues raised by the hybrid structure of the State Bar and the need to separate the disparate functions of public agency and trade association, the composition of the Bar's Board of Governors arguably hinders the Legislature's goal of "ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys ..." (Bus. & Profs. Code § 6001.2(b)). These structural issues are not illuminated by the bulletpoint description of the Board of Governors included in the currently published "Request for Information." Instead, they are revealed by comparing the Board of Governors' structure and composition to those of most other California occupational licensing boards.

The Board of Governors consists of 23 members, sixteen of whom must be lawyers. Fifteen of those sixteen lawyers are elected by lawyers from designated "districts" within California. (By the way, usually only 13–19% of lawyers participate in these elections.) The sixteenth lawyer member is elected by board of directors of the California Young Lawyers Association (made up exclusively of lawyers). Six additional members are so-called "public members" — non-lawyers who have never been admitted to the Bar in California or any other state.[6] Four of the six public members are appointed by the Governor; the other two public

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and Supreme Court, with its regulatory functions turned over to another body or bodies and some or all of its other activities handled by a voluntary bar association or associations?" In the plebiscite conducted during June 1996, 64.5% of attorney respondents answered "no" to that question. However, many commenters (including opponents of Senator Kopp's initiative) argued that "the plebiscite question, as written by the Legislature, does not specify what would replace the independent bar, what it would cost, or how it would be governed." See Towery and Zelon, "Leave Well Enough Alone," Los Angeles Times (May 30, 1996). Thus, the multiple-choice question included in the 1992 *California Lawyer* poll — which offered respondents a choice between "self-regulated as it is now" (33%), "by a state agency, like other professions" (57%), and "not at all" (10%) — may more accurately reflect the view of California attorneys.

[6] The "Request for Information" states that public members of the Board of Governors "may not within 5 years before being appointed employ or be employed by lawyers. Public members may not have a financial interest in any organization regulated by the board and may not within five years before being appointed have 'engaged in pursuits' within the legal profession or represented the legal profession." This is erroneous. These restrictions appear in Business and Professions Code sections 450-453 and apply to public members of occupational licensing boards within the Department of Consumer Affairs. They do not apply to public members of the State Bar Board of Governors, nor do any of the appointing authorities recognize them as applicable. Public members of the State Bar Board of Governors are governed exclusively by Business and Professions Code section 6013.5, which states only that — "notwithstanding any other provision of law" (thus negating the applicability of sections 450-453) — BOG public members "shall be members of the public who have never been members of the State Bar or admitted to practice before any court in the United States."

members are appointed by the Senate Rules Committee and the Assembly Speaker. The 23rd member of the Board is the Board president, who is elected by his/her fellow Board members (and is usually a lawyer); only Board members who have served three years on the Board are eligible to run for president. Attorney members of the Board of Governors serve three-year terms (with the exception of the Board president, who may serve one additional year during his/her presidency); they may not be reelected to serve an additional term. Public members also serve three-year terms, but may be reappointed for additional three-year terms.[7]

By comparison, as discussed above, other boards that license and regulate professions in California are composed of members who are appointed by public officials (the Governor and the two houses of the Legislature). No members of those boards are elected by fellow licensees. Members of those boards are appointed for a four-year term, and may be reappointed to a second four-year term (for a maximum of eight consecutive years). The terms of all board members are staggered so that the terms of only 2-3 members (depending on the size of the board) expire each year; in no case does one-third of any board's members leave during the same year — every year. As discussed, most boards are composed of a fairly even split between licensee and non-licensee members; many now consist in majority of non-licensee members. Some of the health care boards have the lowest proportion of public members. But even in this area, the Medical Board of California is composed of 8 physicians and 7 public members; in other words, 47% (not 27%) of the Medical Board's members are not physicians. Those boards may elect any member as president (MBC's current president and vice-president are both experienced public members), and are not precluded from re-electing a president for a second year or for a two-year term.

The statute creating every other occupational licensing board in the State of California mandates that "public protection" (not professional promotion or protection) is the highest priority for each board. Example: Business and Professions Code section 2001.1 states: "Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." No similar language exists in the State Bar Act.

These practical differences between the structure and composition of the Board of Governors vs. every other occupational licensing board — differences that bear on the Board's ability to protect the public as its highest priority — include the following[8]:

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[7] Business and Professions Code section 6013.5, which governs public members of the Board of Governors, is silent on the number of terms and/or consecutive years that public members may serve. All members of other California occupational licensing boards are generally restricted to two consecutive four-year terms (for a maximum of eight consecutive years of service).

[8] Some of these problems have been articulated by members of this Task Force. Others were identified in a document called "Board Governance Review" which was discussed at the January 8, 2010 meeting of the Board's Planning, Program Development & Budget Committee. Still others were formulated by the Commission on the Future of the Legal Profession and the State Bar in its April 1995 final report. Finally, others are the opinions of the Center for Public Interest Law.

- the 16 elected attorney members may perceive their role as "representation" of the attorney constituency that elected them, rather than as consumer advocates charged with public protection;

- one-third of the members of the Board of Governors turns over every year. This required exodus of the most experienced Board members presents a huge challenge to continuity, competent decisionmaking, effective long-term strategic planning, and reliable institutional memory among Board members;

- the fact that most Board of Governors members serve a maximum of three years (whereas other occupational licensing board members may serve up to eight consecutive years) inhibits institutional memory and experience;

- the fact that only third-year members of the Board of Governors are eligible to (a) chair Board committees, and (b) run for Board president results in excessive "presidential politicking" among eligible members every year, to the detriment of overall Bar governance and public protection;

- the brief one-year term of the Board president, and his/her inability to serve a second year or a second term, subjects the Board to the short-term priorities of the president and inhibits long-term planning or in-depth focus on difficult issues;

- the State Bar Act fails to establish a mandate requiring the Board of Governors to regulate the legal profession in the public interest, and to ensure access to the legal system;

- the State Bar Act fails to delineate meaningful requirements for public members of the Board of Governors to ensure they truly represent the public and not the legal profession; and

- the State Bar Act fails to subject the Board of Governors to the Bagley-Keene Open Meeting Act, Gov't Code §11120 *et seq*., with which every other California occupational licensing board complies and which offers multiple remedies for its violation (unlike the Bar's open meetings "rules").

With this comparison in mind, we now respond to the questions listed on the "Request for Information."

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

As discussed above, statutory law applicable to every other occupational licensing agency includes identical "public protection is highest / paramount priority language" (added by AB 269 (Correa) (Chapter 107, Statutes of 2002)), which is missing from the State Bar Act.

"Protection of the public" means that the Bar's system should reflect the theoretical rationale for any system that imposes a "prior restraint" on practice. Nobody may engage in this enterprise unless they are cleared for honesty and competence in advance. Accordingly, the entry and renewal system properly focuses on at least those two traditional purposes. In terms of competence, "public protection" means that those who cannot themselves screen for competence should be able to rely on this agency to assure it. That competence is hardly the focus of the current Bar system. We give a single examination to applicants commonly at the age of 25, an examination that may not test actual competence in areas of common practice and consumer reliance. We do not license by actual area of specialty – where competence is critical. We have no monitoring of continuing competence in a profession where not knowing of a single court decision can be most unfortunate for a client. And we allow our members to dabble in ten disparate areas of the law — without ever testing them in actual competence for the forty or fifty or sixty years following a Bar examination taken at age 25. And we exacerbate these problems by failing to require any malpractice coverage. Indeed, we had an embarrassing struggle over whether to require the disclosure of the lack of insurance coverage, which might ensure a practical remedy for negligence to our clients — to whom we allegedly owe a fiduciary duty "of the highest order." "Public protection" also means honesty and fair billing. How much has the Bar done to police that?

Of course, "public protection" for the Bar may extend beyond ensuring honesty and competence. Arguably, and according to the U.S. Supreme Court, access to the courts and improvement in the administration of justice — in a profession extolling "equal justice under the law" — may be co-equal public interest goals (just as physicians should be concerned about access to health care). So we should acknowledge that our regulatory goals go beyond merely protecting the public from damage due to our misdeeds. They should include the chance to resolve disputes regardless of means. They might even include, perchance, hard work to prevent the need for our services, which is arguably the highest calling of anyone seeking to be considered a "professional."

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

The Board of Governors should be composed of 17 persons. Nine of them should be attorneys selected by the California Supreme Court, and eight should be public members appointed by the Governor and Legislature (the Assembly Speaker and the Senate Rules Committee). Accordingly, attorney members will have a narrow one-vote majority, and all three branches of government will be involved in making the appointments in a balanced and

reasonable fashion – with the court having more appointments than the other two branches, reflecting the connection between attorneys and the Court. The name of the board should be changed from "Board of Governors" to "Board of Directors" or — more advisedly — the "Board of Trustees," to emphasize its role as fiduciary to the public.

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

See above. The appointing authorities should be encouraged to make appointments reflecting the diversity of the profession and the state, including personal, professional, and geographic diversity. We would hope that those with an interest and background in legal ethics, consumer protection, and professional competence would be included.

4. <u>What qualifications should be required for each member of the board?</u>

See above. Note that future public members of the Board should be fully and expressly subject to the limitations in Business and Professions Code sections 450-453.[9]

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[9] 450. In addition to the qualifications provided in the respective chapters of this code, a public member or a lay member of any board shall not be, nor shall he have been within the period of five years immediately preceding his appointment, any of the following:

(a) An employer, or an officer, director, or substantially full-time representative of an employer or group of employers, of any licentiate of such board, except that this shall not preclude the appointment of a person which maintains infrequent employer status with such licentiate, or maintains a client, patient, or customer relationship with any such licentiate which does not constitute more than 2 percent of the practice or business of the licentiate.

(b) A person maintaining a contractual relationship with a licentiate of such board, which would constitute more than 2 percent of the practice or business of any such licentiate, or an officer, director, or substantially full-time representative of such person or group of persons.

(c) An employee of any licentiate of such board, or a representative of such employee, except that this shall not preclude the appointment of a person who maintains an infrequent employee relationship or a person rendering professional or related services to a licentiate if such employment or service does not constitute more than 2 percent of the employment or practice of the member of the board.

450.2. In order to avoid a potential for a conflict of interest, a public member of a board shall not:
(a) Be a current or past licensee of that board.
(b) Be a close family member of a licensee of that board.

450.3. No public member shall either at the time of his appointment or during his tenure in office have any financial interest in any organization subject to regulation by the board, commission or committee of which he is a member.

450.5. A public member, or a lay member, at any time within five years immediately preceding his or her appointment, shall not have been engaged in pursuits which lie within the field of the industry or profession, or have provided representation to the industry or profession, regulated by the board of which he or she is a member, nor shall he or she engage in those pursuits or provide that representation during his or her term of office.

450.6. Notwithstanding any other section of law, a public member may be appointed without regard to age so long as the public member has reached the age of majority prior to appointment.

5. What size should the board be?

See above. This 17-member composition is consistent with the size of other occupational licensing boards regulating professionals whose incompetence can cause irreparable harm to the public, *e.g.*, the Medical Board of California (15 members) and the California Board of Accountancy (15 members).

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

Each member should serve a four-year term, with a maximum of two terms per person. The appointments would be staggered (*i.e.*, approximately 3-4 of the 17 seats would be subject to appointment or reappointment each year) to ensure continuity over time, as is the custom with many state boards and commissions. The Supreme Court would invite applications and select its nine appointees through a process that it would fashion. The amended system should allow the Board to select the Bar President from among its membership, but confer a two-year term as President, with two terms as a maximum.

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

See above — the president should be elected by the Board for a two-year term. Advisedly, a succession of officers from vice president to president, or an arrangement where a president who has served a term remains on the Board as an emeritus member for one year, or other measures might be considered to stimulate continuity.

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451. If any board shall as a part of its functions delegate any duty or responsibility to be performed by a single member of such board, such delegation shall not be made solely to any public member or any lay member of the board in any of the following instances:

(a) The actual preparation of, the administration of, and the grading of, examinations.

(b) The inspection or investigation of licentiates, the manner or method of practice or doing business, or their place of practice or business. Nothing in this section shall be construed as precluding a public member or a lay member from participating in the formation of policy relating to the scope of the activities set forth in subdivisions (a) and (b) or in the approval, disapproval or modification of the action of its individual members, nor preclude such member from participating as a member of a subcommittee consisting of more than one member of the board in the performance of any duty.

452. "Board," as used in this chapter, includes a board, advisory board, commission, examining committee, committee or other similarly constituted body exercising powers under this code.

453. Every newly appointed board member shall, within one year of assuming office, complete a training and orientation program offered by the department regarding, among other things, his or her functions, responsibilities, and obligations as a member of a board. The department shall adopt regulations necessary to establish this training and orientation program and its content.

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

A. ***Severance of State Bar's Trade Association Component.*** The State Bar's trade association component and functions should be severed from the Bar and spun off into voluntary trade association(s). See Section I above for a discussion of the proper separation of the trade association from state agency / police power functions.

B. ***Public Protection / Assurance of Access to the Legal System Mandate.*** The State Bar Act should be amended to include a "public protection mandate" similar to the language that is included in the statute creating every other occupational licensing agency in the state (see AB 269 (Correa) (Chapter 107, Statutes of 2002)). The mandate should be based on language in the U.S. Supreme Court's decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and should require the Bar to ensure that protection of the public is the highest priority the licensing, regulation, and discipline of attorneys; additionally, the Bar should strive to improve the quality of and access to legal services.

C. ***Board of Governors Transparency.*** The State Bar Act should be amended to subject the Board of Governors to the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.*

In 1985, CPIL sponsored AB 1971 (Harris), which — as amended July 1, 1985 — would have imposed numerous provisions of the Bagley-Keene Act on the Board of Governors and its committees. The Bagley-Keene Act applies to every other occupational licensing board in the state, including all of the boards in the Department of Consumer Affairs. In exchange for our agreement to drop the bill, the Bar promised to adopt open meetings rules very similar to those in Bagley-Keene; it has reneged on that promise. As reflected in your General Counsel's memo to the Task Force dated November 10, 2010, there are many significant differences between the Bar's rules and the Bagley-Keene Act. These differences include the following:

- The Bagley-Keene Act requires 10-day advance publication of agendas and public record agenda materials (Gov't Code § 11125). The Bar's rules require only 5-day advance publication of meeting agendas and public record agenda materials (Rule 6.51(A)(1)).

- The Bagley Keene Act requires boards to allow public comment on any agenda item (Gov't Code § 11125.7). The Bar's rules do not require the Board or a Board committee to entertain public comment; the public is permitted only to "attend and hear the discussions" (Rule 6.52(A)).

- Both sets of rules permit teleconference meetings, except that Bar members are permitted to participate from unnoticed non-public locations (thus opening the door to potential *ex parte* communications with interested parties during the

discussion and meeting) (Rule 6.52(B)), whereas the Bagley-Keene Act requires board members to participate from an open, public, noticed location (Gov't Code § 11123(b)(2)). Additionally, members of the public who wish to participate in a Board of Governors teleconference meeting (or the teleconference meeting of a Board-created committee) must travel to the Bar's Los Angeles or San Francisco office (Rule 6.52(B)); whereas members of the public who wish to participate in a DCA board teleconference meeting may participate from any of the open, public, noticed locations from which board members participate, and members of the public must be allowed to provide public comment from any noticed location (Gov't Code § 11123(b)(1)(B) and (C)).

- The grounds for a closed session under B-K are enumerated and are generally intended to protect a privileged communication or a privacy interest (Gov't Code § 11126); the grounds for a closed session of the Board of Governors or one of its committees are very vague (including "to receive advice of counsel" on any matter) (Rule 6.53).

- Under Bagley-Keene, board members are generally prohibited from taking action on items not appearing on the 10-day advance agenda. However, under Bagley-Keene's "special meeting" provision (Gov't Code section 11125.4), a board may entertain and act upon nine specified items not on the 10-day advance agenda only under certain circumstances — including at least 48 hours' notice on the board's Web site and a finding adopted by a two-thirds vote of the board at the meeting that compliance with the 10-day notice requirement would pose a substantial hardship on the agency, or that immediate action is required to protect the public interest. Under the Bar's rules, the Board of Governors may entertain and act upon any item not appearing on the required 5-day advance agenda, so long as it is an issue that "call[s] for immediate action before the next regular meeting of the board or board committee." The Board need provide no advance notice of its addition of the new agenda item, and no "hardship" finding is required.

And your General Counsel's memo omits to mention one difference of critical importance: The Bagley-Keene Act includes both a civil (Gov't Code section 11130) and a criminal (Gov't Code section 11130.7) remedy for decisions made in violation of the Act. An unlawful decision may be voided and/or board members may be prosecuted (for a misdemeanor) if they knowingly and intentionally violate the Bagley-Keene Act. However, there is **no expressed remedy** for the Bar's violation of its "open meeting rules." The Bar is free to violate its own rules with impunity.

Several Task Force members stressed that the Board of Governors and its committees usually comply "in spirit" with the Bagley-Keene Act. If that is the case, what legitimate objection could the Bar have to being subject to it?

Other Task Force members assert that, while the Legislature is authorized to enact the Bagley-Keene Act and require executive branch occupational licensing boards to comply with it, the separation of powers doctrine allegedly "prohibits" the Legislature from "imposing" the Bagley-Keene Act on a judicial branch entity. This argument is distracting and incorrect. As noted herein, many aspects of the Bar's attorney discipline system, which is inherently the province of the California Supreme Court, are legislatively-mandated — from the level of mandatory Bar dues that support the Bar's attorney discipline system; to the 1986 creation of the State Bar Discipline Monitor position in SB 1543 (Presley); to the creation of the independent State Bar Court in SB 1498 (Presley) (Chapter 1159, Statutes of1988); to the change in the way the hearing judges of the State Bar Court are appointed (SB 143 (Burton), Chapter 221, Statutes of 1999). While the Supreme Court exercises plenary jurisdiction over many aspects of the State Bar's operations, it is clear that it shares that jurisdiction with the California Legislature.

Every other occupational licensing board in the State of California has found a way to comply with the Bagley-Keene Open Meeting Act since its enactment in 1967. And members of most of those boards exercise quasi-judicial authority that the Board of Governors does not exercise. For example, members of the Medical Board and the Pharmacy Board and the Board of Accountancy review and approve proposed disciplinary decisions drafted by administrative law judges, and make the final decision in individual disciplinary matters. The Bagley-Keene Act allows members to engage in disciplinary decisionmaking in closed session. The State Bar Board of Governors exercises <u>no</u> quasi-judicial authority; it does not review and/or approve decisions of the State Bar Court's Hearing Judge Panel or the Review Department. If the Bagley-Keene Act can accommodate the significantly more "judicial" authority exercised by executive branch agencies, why is it inappropriate for the Board of Governors — which exercises no such judicial authority and exercises its other authorities in relative sunshine?

As noted, the Bagley-Keene Act has existed since 1967; its provisions have been flexibly expanded to accommodate new technology and changed circumstances; and it has been subject to fairly extensive judicial interpretation. There are clear advantages to signing onto the existing transparency statute for statewide agencies. The law has been amended to allow for all of the necessary exceptions to the open meeting requirement, such as closed sessions to discuss examinations or pending litigation; emergency meetings where necessary; and special meetings for certain items where there is a time constraint. And there is a body of law in place – one that has already considered the issues that will similarly impact the Board of Governors. We realize that the Judicial Council and other judicial bodies properly have their own disparate rules,[10] but the functioning of the Board of Governors — including its connection to the judiciary — does not justify any less transparency than other agencies performing similar licensing, standardsetting, and public protection roles. We emphasize that the existing body of law is very much attuned with the Board's role and function. If there is a justifiable need for some special confidentiality uniquely applicable to the Board of Governors, it can be written into the law.

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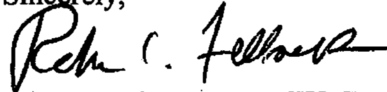
[10] We also note that even the Judicial Council requires 7-day advance notice of its meetings, and has a rule allowing public comment.

To be clear, the most important elements of open meetings law that properly apply are: (a) the 10-day advance notice and agenda provision; (b) the opportunity for public attendance and comment; and (c) a mechanism for enforcement. These and other Bagley-Keene Act measures are currently absent from the Bar's open meeting rules. The last omission is particularly galling given the universal mechanism extant for open meetings laws in all fifty states — litigation — which is what attorneys do to enforce the law.

Thank you for your consideration of these comments.

Sincerely,



ROBERT C. FELLMETH, Executive Director
Center for Public Interest Law

Price Chair in Public Interest Law

cc: Honorable Noreen Evans, Chair, Senate Judiciary Committee
Honorable Mike Feuer, Chair, Assembly Judiciary Committee

Los Angeles County Bar Association

Statement to State Bar of California
Governance in the Public Interest Task Force

EXECUTIVE SUMMARY

January 14, 2011

The Los Angeles County Bar Association ("LACBA"), on behalf of its more than 27,000 members, submits this Executive Summary as a supplement to its previously submitted Statement.

- Lawyers, as officers of the Court, have a responsibility to the Justice System and through it to serve and protect the members of the public.

- The State Bar's highest priority is protection of the public in its admission, regulation and discipline roles. The Board of Governors' ("BOG") oversight of attorney licensing and discipline is essential to fulfilling this core mission.

- The Rules of Professional Conduct are vital to protection of the public.

- Public service is a secondary, but also core, mission of the State Bar. The State Bar's work in the areas of professional education, improving access to justice, pro bono services and evaluation of candidates for judicial office must continue.

- Effective administration of justice and access to justice are key elements of protecting all members of the public. Ultimate control of the Justice System and the Bar rests with the California Supreme Court, the third branch of government.

- State Bar Governors ideally should be (1) sincerely dedicated to the State Bar's core public protection and service missions, and (2) competent and otherwise well qualified to oversee and implement the core State Bar missions effectively.

- We welcome self evaluation of the BOG's current governance, encourage worthwhile improvements to it, but do not understand the instances cited in the legislation creating the Task Force to be valid reasons for change in the governance of the State Bar.

- We would welcome increased participation by the Supreme Court in selecting both attorney and non-attorney Governors. We would also welcome vetting procedures for both non-attorney and attorney Governors designed to ensure that they are well-qualified to serve.

- We believe that any changes that would increase partisan political influence in the process, for example by increasing the number of appointments to the BOG by the political entities, should be avoided for two reasons. First, such changes would not clearly improve governance of the State Bar. Second, such changes would be an unnecessary and unwise encroachment on the Judicial Branch.

THE STATE BAR
OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2339 FAX: (415) 538-2321

December 3, 2010

**Request for Information from The State Bar of California
Governance in the Public Interest Task Force**

The California legislature recently created within the State Bar a *Governance in the Public Interest Task Force* to provide "recommendations for enhancing protection of the public and ensuring that public protection is the highest priority in the licensing, regulation, and discipline of attorneys."

As it develops these recommendations, the Task Force is seeking input from all interested individuals and organizations. In particular, we invite you to share your thoughts on the State Bar's current governance model and on ways it could be improved with a view to enhancing public protection.

Please see the attached description of the current governance model together with a list of questions to which the Task Force would appreciate receiving your responses. (An overview of the State Bar and its various functions is available at www.calbar.ca.gov under "About Us.")

If you would like your written responses to be discussed and considered at the public hearing meetings (details set out below), please return them to Amy Anderson, Office of the General Counsel, 180 Howard St., San Francisco, CA 94105 or amy.anderson@calbar.ca.gov. Priority to speak at the public hearings will be given to those who have submitted written responses. For speaking priority, please return your responses no later than Monday, **January 10, 2011**.

To be considered by the Task Force in preparation for its final report, all written responses are due by Tuesday, **February 1, 2011**, and should be sent to Amy Anderson, Office of the General Counsel, 180 Howard St., San Francisco, CA 94105 or amy.anderson@calbar.ca.gov. All written responses will become public and will be posted on the State Bar's website.

The State Bar will hold public hearings to receive additional input from interested parties. The hearings will take place as follows:

January 20, 2011 (Thursday), from 9:30 a.m. to 5:00 p.m.
Los Angeles Office of the State Bar, 1149 S. Hill St., 7th Flr.

January 27, 2011 (Thursday), from 9:30 a.m. to 5:00 p.m.
San Francisco Office of the State Bar, 180 Howard St., 4th Flr.

Please contact Amy Anderson at (415) 538-2539 or amy.anderson@calbar.ca.gov if you would like to participate at one of the hearings. You do not need to register in advance to be allowed to speak, but speakers who do register will receive priority. For any other questions, please contact Starr Babcock at (415) 538-2070 or starr.babcock@calbar.ca.gov.

Sincerely,

William N. Hebert
President, State Bar of California

REQUEST FOR INFORMATION

I. Description of current governance model. The State Bar is governed by a Board of Governors consisting of 22 members plus a president.

Composition

- 15 lawyers elected by active lawyers from 9 geographic districts of 1 or more counties
- 1 lawyer selected from among lawyers age 36 or under (or in practice less than 5 years) by the board of the California Young Lawyers Association (CYLA)
- 6 members of the public (4 appointed by the Governor, 1 appointed by the Senate Rules Committee, and 1 appointed by the Speaker of the Assembly)
- A president elected by the board from among board members whose terms expire that year

Qualifications

Elected lawyer members must be active lawyers and have their principal office for the practice of law in the geographic district from which elected.

Public members may not be current or former lawyers and may not within 5 years before being appointed employ or be employed by lawyers. Public members may not have a financial interest in any organization regulated by the board and may not within five years before being appointed have "engaged in pursuits" within the legal profession or represented the legal profession.

Terms

Each elected lawyer member and each public member serves a term of 3 years. (Elected lawyer members are not eligible to serve consecutive terms; public members may be reappointed to consecutive terms.) The CYLA representative serves for 1 year. The president serves for 1 year.[1]

See Cal. Bus. & Prof. Code §§ 6010-6028.

II. Questions to address

1. The legislature is interested in receiving "recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys." What do you understand "protection of the public" to mean in the context of governance of the State Bar?

   Lawyers are the indispensable intermediaries in the legal system. Because of their specialized expertise and privileged information, it is imperative that others be able to trust them: clients above all, but also opposing counsel, courts, agencies, and the general public. The most important function of the State Bar is to ensure that lawyers are trustworthy. I have written about this in two recent books, in which I use disciplinary cases (from California and New York) to understand how lawyers betray trust and what must be done to restore it. Those books are "Lawyers in the Dock" (Oxford University Press, 2008) and "Lawyers on Trial" (Oxford University Press, 2010). Each contains a concluding chapter with proposals for improving the trustworthiness of lawyers.

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

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[1] Neither the president nor the lawyer members receive compensation other than reimbursement of necessary expenses; public members receive $50 for each day spent discharging official duties, up to $500 per month.

All those who can play a role in rendering lawyers trustworthy: the lawyers themselves; their clients; and representatives of the fora in which lawyers practice.

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

Lawyers should select their own representatives. At present, constituencies are geographic. This made sense when the State Bar was created (as I explain in my history of the State Bar, which is contained in chapter one of "Lawyers on Trial"). Geographic constituencies make much less sense today. The significant divisions within the bar are between independent practitioners and lawyers employed in the public and private sectors, and among independent practitioners the divisions are firm size and specialization by subject matter and clientele. Lawyer constituencies should be reconfigured to reflect these divisions.

Client representatives should NOT be chosen by the Governor or Legislature; those political offices lack the time and interest in finding the best representatives. Consumer groups should be charged with this responsibility. Because lawyers' clienteles are generally unorganized, the groups will have to represent consumers in general. Governmental consumer advocates could also appoint representatives or serve themselves.

State (and possibly federal) courts and the administrative agencies in which lawyers appear regularly should also select representatives.

4. What qualifications should be required for each member of the board?
5. What size should the board be?
6. How long should the terms of the members (and of the president) be?
7. How should the president and other officers be selected?
8. What changes or other governance models may enable the board to better serve the interest of public protection?

The single most important function performed by the State Bar is discipline. Lawyers who overcharge, or neglect clients, or engage in egregious malpractice or serious conflicts of interest destroy the trust that is essential to every legal system and damage the reputation of all lawyers. The present inquiry does not address discipline as such. I believe that a separate inquiry should be directed at discipline broadly conceived (to include malpractice and sanctions).

1. The Politics of Self-Regulation

Self-governance and self-regulation are defining characteristics of all professions.[1] The British Royal Commission on Legal Services began its list of the "five main features of a profession" with "a governing body" that "represents a profession and...has powers of control and discipline over its members."[2] The preamble to the ABA Model Rules of Professional Conduct acknowledged why professions claim such authority: "To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."[3] But these core powers are ambivalently asserted, expediently exercised, and constantly contested. This chapter traces the institutional history of lawyer discipline in California in order to show how the system's capacities and limitations influence the way it constructs lawyer deviance.

I. Becoming Self-Regulating

Until 1927 bar associations were local, weak, ephemeral, and found in only 18 of the state's 58 counties. A contemporary observer called them "little more than social clubs." In 1916, the chairman of the Los Angeles Bar Association publicity committee deplored that all it offered members was a "little protection through the Grievance Committee."[4] In San Francisco, local grievance committees made disciplinary recommendations to the city association (the strongest in the state), but the respondent's friends often were able to block action; even after conviction only the District Attorney or Superior Court could seek penalties. Four statewide organizations rose and fell before World War I, enrolling only a tiny fraction of all lawyers, partly because rural practitioners resented urban dominance. One member remarked ruefully that "we are laughed at in the interior," where lawyers "not only do not join, but they ridicule us."[5]

Inspired by a 1912 visit to Ontario, Canada, whose lawyers had to join a "unified" self-governing bar, Herbert Harley, secretary of the American Judicature Society, drafted a model State Bar Act, published in 1918 and endorsed by the ABA Conference of Delegates two years later. North Dakota created the first such bar in 1921, followed by Alabama in 1923 and New Mexico and Idaho in 1925. California was next, but the effort took a decade. In 1917 worsening judicial backlogs and corruption scandals (ranging from police courts to the Supreme Court) prompted the Legislature to threaten to take over the entire judiciary, finally moving lawyers to collective action. One urged his colleagues to "take a leaf out of the book of the labor union movement and establish a quasi principle of closed shop." At the (voluntary) California State Bar Association meeting that year, the San Francisco Bar Association president proposed that all such groups be authorized to discipline and granted subpoena power because they were

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[1] Parsons (1968); Carr-Saunders & Wilson (1933).
[2] Royal Commission on Legal Services (1979: vol. 1, pp. 28, 30).
[3] American Bar Association (1981: 1-2).
[4] Robinson (1959: 159).
[5] 28 Los Angeles Bar Association Bulletin 9 (10.52); John A. Wright, How to Get Good Judges 38, 40 (1892); Charles S. Wheeler, After-Dinner Proceedings of the Bar Association of San Francisco (5.20.10); 1 California Bar Association Proceedings 30 (1910); 8 California Bar Association Proceedings 192 (1917); A.Y. Wood (1926), "State Bar Organizations in California," in Historical and Contemporary Review of the Bench and Bar of California 41 (1926). I rely heavily on Gilb (1956: 4, 33-34, 38-39, 102-03).

"practically impotent in the investigation of charges." Bills to do this died in the Legislature in 1919 and 1921. Between 1922 and 1924 the California State Bar Association appointed a Special Committee on the "Self-Governing Bar," adopted its report, and persuaded 20 local bar associations to concur. Although a bill to create a unified bar passed the Legislature the following year (the Senate unanimously, the Assembly 65-11) and was endorsed by the entire California Supreme Court as well as national notables like Charles Evans Hughes and Elihu Root, Governor Richardson refused to sign it because he wanted to appoint the governing board. But others also had reservations: rural lawyers feared urban dominance and resented paying for discipline, which they saw as a uniquely urban problem; others worried that discipline would target those who challenged powerful interests.[6]

The California State Bar Association persisted, empowering rural lawyers by giving each Congressional district a delegate and enlisting the support of competing occupations: realtors, title insurance and trust companies, and banks. Although a new bill was opposed by the influential chairman of the Senate Judiciary Committee, who wondered why only lawyers should be self-governing, it passed the Senate (25-14) and Assembly (61-15) and was signed by Governor Young, flanked by Joseph J. Webb, chairman of the Campaign Committee for the State Bar Bill, who became president of the new State Bar of California. The voluntary California State Bar Association dissolved.[7]

In its early decades, the State Bar (SB) was more interested in restricting entry and suppressing competition than in disciplining its members.[8] (Indeed, a referendum that repealed a 1921 bill prohibiting unauthorized practice of law was one reason lawyers embraced the unified bar.) A month after the State Bar adopted the nation's first Rules of Professional Conduct, President Webb appointed a committee to investigate ambulance chasing, focusing on Los Angeles. Two years later SB President Beardsley warned that the ambulance chaser was "apt to be an outlaw generally. Subornation of perjury, blackmail, forgery embezzlement and general disregard of the interests of the individual client are frequent companions...." Violators "offend against the profession as a whole by obstructing the natural course of professional employment so as to prevent it from being spread out normally among the members of the bar...." The State Bar also created committees to deal with Trust and Title Companies, Claims Adjusters, and Unlawful Practice generally; their contributions to the 1930 annual meeting occupied 26 of the 35 pages devoted to committee reports. Discussion was "intense," sometimes "vehement." One newspaper "said the applause at times would have done credit to a group of `college rooters.'" A lawyer expressed confidence that "society will, when informed," never "consent to the destruction of the profession and practice of law by unlicensed persons." The following year the State Bar appointed a new Committee on Suppression of Soliciting Legal Business, which submitted a 14-page report to the annual meeting; and

[6] Herbert Harley, "Redeeming of the Profession," 2 J. Am. Jud. Soc'y 105 (1918); 20 J. Am Jud. Soc'y 202 (1937); Dayton David McKean, The Integrated Bar 30-51 (Boston: Houghton Mifflin Co., 1963); The Recorder 12 (9.21.17); The Recorder 1 (1.11.19); 8 California Bar Association Proceedings 201 (1917); 9 California Bar Association Proceedings (1918); Wood (1926: 69-70); California Assembly Journal 2161 (1919); Gilb (1956: 37, 39-40, 53, 55-57, 61-63).

[7] Wood (1926: 70-71); "State Bar Organization Assured," 1 SBJ 157 (1927); "State Bar Bill Signed," 1 SBJ 179 (1927); "The First Step Toward Organization," 1 SBJ 227, 236 (1927); Gilb (1956: 45, 69, 71-74); SB 9 (Nelson & Weller), Chap 34, Stats. of 1927.

[8] Robinson (1959: Chapter 10).

the *State Bar Journal* endorsed two Assembly bills to outlaw lay solicitation. Although the Bar passively responded to client grievances, its proactive investigations of advertising and solicitation accounted for about 5 percent of cases heard. Two committees on ambulance chasing in San Francisco and Los Angeles submitted 11 pages of statistics documenting the magnitude of the problem in 1934. That year the Los Angeles City Council criminalized the practice, and a Los Angeles Special Local Administrative Committee (LAC) of the State Bar prosecuted 26 cappers under it, winning convictions of all but one.[9]

Although ambulance chasing was the most visible competitive threat, and the most easily demonized, there were many others. The Bar began agitating against non-lawyers practicing in the (lay) Justices' Courts in 1930 and succeeded in ousting lay advocates three years later; but a similar campaign against lay representation before administrative agencies failed. A lawyer complained in 1931 that "the illegal practice of law in Los Angeles County alone...costs the attorneys over six million dollars annually in loss of fees." A year later another lawyer urged his colleagues not to "raise the standards of our profession upon the fallen bodies of our fellows. A decent chance will make a decent lawyer. Clean up encroachment and lawyers will 'clean up' themselves—and gladly!" The State Bar Board of Governors (BoG) "strongly disapproved" of radio stations that broadcast advice by judges in response to "tales of human misery." A Special LAC concluded that patent attorneys should not be allowed to call themselves attorneys or solicit business. The State Bar vigorously resisted proposals to transfer the growing number of automobile accident claims to a commission, where lawyers would be unnecessary (as had happened with workplace injuries).[10]

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[9] 2 SBJ 203-05 (1928); Joseph J. Webb, "A Message from the President," 2 SBJ 206-07 (1928); "The Story of the Pasadena Convention," 3 SBJ 75, 82 (1928); "The Work of the Board of Governors," 3 SBJ 175 (1928); "Report of Committee on Ambulance Chasing," 4 SBJ 28-30 (1929); Charles A. Beardsley, "A Message from the President," 4 SBJ 154-55, 224 (1930); "The Unlawful Practice of Law," 4 SBJ 234 (1930); "Report of the Adjusters Committee," 4 SBJ 240 (1930); 5 SBJ 11-36 (1930); Frank G. Tyrell, "Unlawful Practice—Convention Action," 5 SBJ 410-11 (1930); Ewell D. Moore, "The Trust Companies and the Bar Associations," 6 SBJ 58, 85 (1931); Vernon S. Gray, "The Practice of the Law," 6 SBJ 105 (1931); Philbrick McCoy, "The Unlawful Practice of the Law," 6 SBJ 111 (1931); Wallace E. Hyde, "Is There No Common Ground?" 6 SBJ 130 (1931); Oscar J. Seiler, "Suppression of Soliciting of Legal Business," 6 SBJ 153 (1931); "Committee on Suppression of Soliciting of Legal Business," 6 (Pt. II) SBJ 18-32 (1931); "More Proposed Measures Affecting Practice of Law," 6 SBJ 69-70 (1931); Leonard B. Slosson, "A Message from the President," 6 SBJ 166-67 (1931); E.V. Knauf, "Ambulance Chasing and Related Evils," 7 SBJ 22 (1932); "Report Concerning Work of Special Committee on Ambulance Chasing for San Francisco," 9 SBJ 225 (1934); Marion P. Betty, "'Ambulance Chasing' Ordinance," 9 SBJ 165 (1934); "Report of Special Committee on Ambulance Chasing for Los Angeles County," 9 SBJ 238 (1934); John E. Biby, "Ambulance Chasers," 10 SBJ 42-43 (1935); 10 SBJ 295 (1935); T.P. Wittschen, "A Message from the President," 10 SBJ 299-300 (1935); John E. Biby, "Chasing Ambulance Chasers," 11 SBJ 97 (1936); Gilb, 1956: 43-44, 104-06. A defense of ambulance chasing, James F. Brennan, "The Bugaboo 'Ambulance Chasing,'" 6 SBJ 37 (1931), provoked furious replies: Bartley C. Crum, "Clean Up the Legal Profession," 6 SBJ 54 (1931); Fred L. Berry," The Bugaboo 'Ambulance Chasing,'" 6 SBJ 66 (1931); John W. Hart, "Ambulance Chasing," 6 SBJ 79 (1931); David B. Maxwell, "Science of Law, or Law as a Business," 6 SBJ 148 (1931). Brennan retorted: "Concerning Soliciting Professional Employment," 6 SBJ 97 (1931).

[10] Arthur P. Hayne, "The Right of Unlicensed Persons to Practice in the Justices' Courts," 4 SBJ 208 (1930); George Allan Smith, "Compensation for Automobile Accident Injuries," 6 SBJ 19 (1931); James C. Nichols, "What Is a Complete Policy for the Bar to Adopt in Personal Injury Cases?" 6 SBJ 21 (1931); A.G. Bailey, "No More Commissions," 6 SBJ 94 (1931); "Problems of the Claims Adjuster," 6 SBJ 151

But the greatest challenge was corporate competitors. As early as 1926 the Attorney General responded to local bar association complaints by successfully prosecuting a corporation for practicing law. The State Bar Board of Governors declared in 1930 that "the most important problem before the bar...is the activities of the banks, title and trust companies." Candidates for the Board campaigned on this issue, complaining that "Control of your State Bar is now vested in banks, trust companies, casualty insurance companies and other business groups...." The preferred solution was a treaty dividing markets with competing trade associations. In 1932 the State Bar negotiated an agreement limiting automobile clubs to representing members only in small claims. When the State Bar sued banks for unauthorized practice of law in 1933, two of the state's largest sought legislation allowing laypersons to give free legal advice; they were joined by the California Bankers Association, California Real Estate Association, Retail Merchants Credit Association, California Land Title Association, and Life Underwriters Association. The Bar negotiated a treaty in which banks and trust companies agreed not to draft wills, appear in court except through an attorney, or advertise legal services. A 1936 State Bar treaty allowing the California Land Title Association to fill in blanks or retype forms outraged the Napa, Sonoma and San Joaquin county bars, which had concluded far more restrictive local agreements. Seven years after the Los Angeles Superior Court affirmed the right of realtors to fill in blanks the State Bar persuaded the State Real Estate Commissioner to remove certain legal forms from the real estate handbook. In 1939 the State Bar secured legislation requiring collection agencies to use attorneys; 13 years later it reached a further agreement with the California Association of Collectors and the Associated Credit Bureaus of California. Although a 1944 treaty between the American Bar Association and the American Institute of Accountants surrendered much of the tax field to the latter, a California court ruled in 1954 that an accountant who did legal research for a client was engaging in unauthorized practice; and when the U.S. Tax Court was established in 1947, the State Bar sought to limit practice to lawyers.[11]

If lawyers were united by efforts to curb external competition, they were much more ambivalent about disciplining themselves. The Legal Ethics section report to the State Bar's first annual meeting in 1927 blamed "the unfavorable comment received by the legal profession" on the fact that "the public is altogether lacking knowledge of just what they may reasonably expect." The section proposed to remedy this with "a carefully written series of articles...setting forth in simple language the ideals and principles of the

(1931); "More Proposed Measures Affecting Practice of Law," 6 SBJ 69 (1931); Alfred L. Bartlett, "The President's Message," 11 SBJ 267-69 (1936); John W. Hart, "Are Patent Attorneys Practicing Law?" 13(2) SBJ 18 (2.38); Gray v. Justice's Court of Williams Judicial Township, 18 Cal.App.2d 420 (1937); 21 SBJ 167 (1946); Gilb (1956: 221-22).

[11] People v. Calif. Protective Corp., 76 Cal.App. 354 (1926); People v. Sipper, 61 Cal.App.2d 544 (1936); California Statutes 2753 (1939); "The Work of the Board of Governors," 4 SBJ 167, 170 (1930); Hubert C. Wyckoff, "Trust Companies and Lawyers," 7 SBJ 54 (1932); 9 SBJ 85, 88, 142 (1934); 10 SBJ 139 (1935); "Agreement Between The State Bar of California and the California Land Title Association," 11 SBJ 190 (1936); "The Treaty with the Title Companies; Correspondence," 11 SBJ 223, 229 (1936); A.G. Bailey, "Unlawful Practice by Collection Agencies," 13(6-7) SBJ 48 (6-7.38); 13(8 Pt. II) SBJ 117 (8.38); 14(8) SBJ 75 (8.39); 15(8) SBJ 80 (8.40); 16(8) SBJ 181 (6.41); 18 SBJ 467 (1943); 19 SBJ 289 (1944); 25 SBJ 21 (1950); 22 SBJ 476 (1947); Gilb (1956: 234-35, 239-42); "Bar Periscope," 54 CSBJ 532-33 (1979). All these treaties were revoked in 1979, after the U.S. Department of Justice questioned whether they violated anti-trust laws.

profession" while reassuring lawyers that the State Bar's policy was "to keep 'hands off' in all matters of grievance where there is a local Bar Association" and noting that, although the State Bar had handled eight complaints, "in none of these cases was any prosecution undertaken or hearing held...." President Webb appointed a Committee on Legal Ethics to answer members' questions, which dealt primarily with advertising and ambulance chasing; but it was abolished after two years because it was "inadvisable to advise lawyers in advance upon questions that might later form the basis of disciplinary action." His successor reiterated that "the Board is ever zealous of protecting the interests of the attorney in all disciplinary matters." A year later a State Bar Governor reported the "very gratifying" "experience" that "complaints are fewer and more than a majority of these are trivial." "Every member of the Board is impressed with the fact that in suspension and disbarment cases the accused has his life's work at stake...." The Board found "that over 80 percent of the complaints were without any merit at all" and prompted by "a lack of understanding on the part of the client as to just what are the duties of a lawyer." The fourth SB president reiterated this statistic and sought to dispel "the altogether...erroneous impression...that The State Bar's principal occupation to date has been to investigate its members for their alleged delinquencies, great and small, and to suspend or disbar as many as possible." On the contrary, the Board had adopted a process "by which complaints against members may be quickly investigated and tried, with a minimum of publicity to the accused attorney if the facts are found not sufficient to warrant discipline." A month later the president was "glad to say that there has been a pronounced falling off recently in the number of disciplinary cases coming before the board." At the end of the first decade, the SB president attributed the steady decline in punishment to "the fact that any lawyer who might be inclined to forget his oath and his professional obligations realizes that he cannot get away with it and also the fact that the type of men and women admitted to the bar in the last several years has much higher standards than formerly."[12]

As this defensiveness showed, members strongly resented discipline. One wrote the *San Francisco Recorder*: "we are zealously raising the standards of our profession upon the fallen bodies of our fellow lawyers and unwittingly building a barrier of distrust between our profession and the public. Return to reason. Stop the witch-burning; leave off the inquisition." A State Bar president felt compelled to devote his monthly message to a four-page defense of the disciplinary record. His successor deplored that

> the public thought that all the crime, all the dishonesty, all the fraud, all the delays in the administration of justice, all drought, all floods, all wind storms, all the overproduction, all the lack of proper distribution, were due to the delinquencies of lawyers.

But after declaring that "no other class of citizens is making such diligent efforts to weed out those who are unworthy to be trusted," he conceded that "the surface of discipline in this State has been scarcely scratched" and placed responsibility "at your door and mine."

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[12] "The Coronado Convention Program," 2 SBJ 228-30 (1928); "The Work of the Board of Governors," 3 SBJ 94-95 (1928); Frank James, "The Board of Governors' Page," 3 SBJ 208-09 (1929) "Questions in Legal Ethics Answered," 3 SBJ 11, 54-57 (1928); "Report of Committee on Legal Ethics," 3 SBJ 30-32 (1929); Leonard B. Slosson, "A Message from the President," 5 SBJ 404-05 (1930); Leonard B. Slosson, "A Message from the President," 6 SBJ 10 (1931); Phillips & McCoy (1952: 90).

> I venture to say that there is not a man in this room who has not, at some time in his career, become possessed of facts which, if they had been brought to the attention of the proper authorities, would have resulted in the discipline, perhaps the disbarment, of some lawyer.

But they had done nothing. "It is [also] the duty of the judge, when the misconduct of attorneys is brought to his attention, to report with the record to The State Bar. But how many times is it done?" The Board successfully opposed members' efforts to fend off discipline: a one year statute of limitations, a requirement that grievances be verified (exposing complainants to prosecution for perjury), a ban on publicity until the Supreme Court acted, even a proposal that all discipline be subject to referendum and all Governors subject to recall. The *State Bar Journal* resisted these "step[s] backward" to "the old ineffective procedure under which but 27 attorneys were disciplined in [the] 78 years" before the State Bar was established, compared with the 53 disbarred or suspended in the <u>three</u> years since then. But the new regime was hardly punitive: in its first 20 years, the Board heard an average of 100 complaints annually, dismissing half for lack of jurisdiction or because they charged "minor negligence or discourtesy or ignorance of the law...or that fees are too large." By the 1950s California was disbarring just a few each year—sometimes none.[13]

For its first half century, State Bar discipline relied entirely on volunteers: 178 members of the 35 LACs, which investigated complaints, decided whether to issue a notice to show cause (NTSC), and then held a formal hearing (closed to the public). The BoG could accept the LAC disciplinary recommendation or hear the case de novo. From the outset, discipline occupied a distressingly large proportion of the Board's time: the entire two-day July 1928 meeting, for instance. The Supreme Court heard every case de novo; as of 1956 it had <u>never</u> increased the penalty and frequently reduced it. (In the first ten years it reduced the penalty in 23 percent of the 119 cases it reviewed and dismissed the proceedings in another 8 percent.) The view of one justice that only intentional misconduct should be punished demoralized the entire process according to contemporaneous observers. The *State Bar Journal* published monthly (anonymous) reports of State Bar convictions and recommended punishments, as well as the names and penalties of those punished by the Supreme Court (without identifying the offenses). The State Bar suspended all disciplinary proceedings for months after the Supreme Court required verified complaints, causing a "decided falling off" of discipline for a year. To strengthen the appearance that justice was being done, the president in 1933 urged that smaller counties create two LACs, one for investigation, accusation and prosecution and the other to hear trials. Although he rejected the charge that "a group of ambulance-chasing lawyers has contrived to get control of the Board of Governors and has thus made disciplinary action impossible," he warned that "subversive elements of the bar are

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[13] AB 423 (1931); Leonard B. Slosson, "A Message from the President," 6 SBJ 62 (1931); "Legislation Sought by or Affecting The State Bar," 6 SBJ 48, 50-52 (1931); Charles A. Beardsley, "Investigation and Discipline Without a Verified Complaint," 6 SBJ 183 (1931); Charles A. Beardsley, "The Disciplinary Procedure of The State Bar," 6 SBJ 241 (1931); In re Herron, 81 Cal.Dec. 549 (1931); Hubert C. Wyckoff, "State Bar Policies," 7 SBJ 160 (1932); M. Mitchell Bourquin, "State Bar Policies: A Reply to Hubert C. Wyckoff," 7 SBJ 186 (1932); Guy R. Crump, "Message from the President," 7 SBJ 274 (1932); Norman A. Bailie, "The President Speaks," 9 SBJ 301 (1934); Phillips & McCoy (1952: 95, 101); Blaustein & Porter (1954: 254-55); Turrentine (1935); Gilb (1956: 80-83, 101, 104, 110).

organized and keep up a campaign to thwart the activities of the organization. They would scuttle the ship if they could."[14]

The threat was not just internal. James F. Brennan (who had defended ambulance chasing) became chair of the Assembly committee to investigate "the present status, conditions and mode of operation of the State Bar of California." Together with William B. Hornblower (a fellow Assembly member who had earlier introduced a bill to divert all State Bar dues to the State Treasury), the committee asked the State Bar in February 1935 to conduct a plebiscite on the question: "Do you favor repeal of The State Bar Act?" The Bar disparaged the initiative as a misguided expression of lawyer discontent with discipline and admissions. But it made the mistake of asking "what better way can be suggested for the handling of these important and sometimes intricate problems that is more democratic than a self-governing Bar?" Brennan retorted: "if the Bar is to be self-governing, its members should be allowed to express themselves through a plebiscite...." The results strongly vindicated the State Bar; but a quarter of those voting favored repeal, and 42 percent did not vote.[15]

Although the State Bar concentrated on issues closely related to the legal profession, it inevitably became involved in politics. Soon after its founding, the Bar retained a lobbyist in Sacramento, who not only advocated on its behalf but also examined every bill. In 1934 it created a Conference of Bar Association Delegates, representing local (and later specialist) organizations, which reviewed legislation proposed by State Bar committees before it was presented in Sacramento. But the Conference cautiously avoided controversial issues: foreign affairs, national politics, adultery, animal control, even adapting tort law to the growing number of automobile accidents. During the McCarthy era the Board resisted demands to expel communists voiced by the House Committee on Un-American Activities, the ABA Special Committee on Communist Tactics, Strategy and Objectives, and even the State Bar's own Rules Committee. The September 1966 Conference of Delegates held a "lively debate" about whether the State Bar should take positions on anything other than "procedural law." While acknowledging that this boundary was "often blurred," the president insisted that it excluded abortion and the death penalty, although "it can be argued that capital punishment is merely a step in the administration of criminal justice." Even the automobile guest statute was out of bounds because "the State Bar should not advocate the repeal of legislation that has been enacted as a matter of public policy—particularly when the repeal would result in a financial benefit to one segment of the bar...." Until the U.S. Supreme Court clarified its opaque decision about the activities permitted the unified Wisconsin bar,[16] the Conference should limit itself to the administration of justice, judicial reform, and procedure. The next president agreed that the Conference should not address "questions of moral, social, or political policy." The Board of

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[14] Joseph J. Webb, "A Message from the President," 2 SBJ 142-43 (1928); "The Work of the Board of Governors," 3 SBJ 1 (1928); "The Story of the Del Monte Convention," 6 SBJ 267 (1931); "Disciplinary Proceedings Suspended," 5 SBJ 335-40 (1930); Hubert C. Wyckoff, "A Message from the President," 8 SBJ 242-43 (1933); "A Message from the President," 8 SBJ 292-93 (1933); Phillips & McCoy (1952: 98, 100-04); Gilb (1956: 108-09); CAG (1977c).

[15] "Legislation Sought by or Affecting The State Bar," 6 SBJ 48, 50-52 (1931); "The State Bar Plebiscite," 10 SBJ 57, 83 (1935).

[16] Lathrop v. Donohue, 367 U.S. 820 (1961).

Governors was "gravely concerned" that the very number of bills proposed might "wear[] out our welcome in our State Capitol."[17]

The State Bar was particularly vulnerable because the 1927 Act required the Legislature to approve the dues. These rose from $5 (for active members) in 1927 to $20 in 1963. But when the Bar sought an increase to $50, members of both Judiciary Committees authorized only $35, expressing "their very strong view that the State Bar should intensify its activities in respect to the enforcement of discipline and in the field of unauthorized practice of law." Returning to an Extraordinary Session in 1964, the State Bar argued that it needed "a full staff of capable investigators" because clients did not complain about ambulance chasing; furthermore, lawyers paid substantially lower dues than doctors, and expenditures on both discipline and unauthorized practice of law had doubled between 1960 and 1964. It won the $50 ceiling.[18]

The State Bar consistently demonstrated its reluctance to regulate. Although its first president had noted as early as 1928 that "a large percentage of the serious charges made against attorneys grow out of the use of funds coming into their possession and their inability to pay their clients when demand is made for same," it was not until 1956 that the Rules of Professional Conduct mandated lawyers to deposit all client funds into a separate trust account. A few years later the Board approved a unanimous Rules Committee recommendation that "no Rule of Professional Conduct constituting negligence as a basis for discipline be adopted." In 1961 a former president urged the Bar to create a clients' security fund for the "moral" reason that "when a lawyer betrays...trust by stealing a client's money, all lawyers are to a degree responsible...." Such a plan would also "improve the profession's public relations" and avoid the threat of legislation mandating individual malpractice insurance. But opponents argued successfully that such a plan would "be an official recognition of the fact that the legal profession is the one profession in this country whose members are so corrupt that it must assess itself to indemnify the public." It would "publicize the dishonesty of lawyers" and "unjustifiably encourage and increase charges of dishonesty against members of the bar" as well as "actions for malpractice based upon claims of simple negligence." The estimated $5 charge "would succeed only in getting a proverbial foot in the door."

Although the 1957 SB president praised the Bar's "commendable" record in "disciplining the small number of its members who are complained against," on the basis of a "thorough study of our disciplinary system" the Board approved adding two more staff lawyers to the two already devoted to discipline, freeing the latter "to `ride circuit' among the disciplinary committees in the nonmetropolitan areas and assist them in a more expeditious handling of their cases." Another indication of the limits of volunteerism was the fact that the Board was spending "close to half" its time on disciplinary matters in 1959, a week every month by 1965. It responded in several ways:

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[17] "Report of the Committee on Rules of Professional Conduct to the Board of Governors," 29 SBJ 349 (1954), 30 SBJ 348 (1955); William P. Gray, "President's Message," 38 SBJ 162 (1963); "Report of Committee on Communist Lawyers to Board of Governors," 38 SBJ 172 (1963); A. Stevens Halsted, Jr., "Message of the President: Role of the State Bar in Social Reform: Procedural: Not Substantive," 42 SBJ 321 (1967); Daniel A. Weber, "A Dissent: The Role of the State Bar," 42 SBJ 849 (1967); John M. Cranston, "Scope of State Bar Legislative Activity," 42 SBJ 858 (1967); J. Thomas Crowe, "Message from the President: The Question of Purview," 44 SBJ 769 (1969); Gilb (1956: 142-50).

[18] "The First Step Toward Organization," 1 SBJ 227, 236 (1927); Samuel H. Wagener, "President's Message," 39 SBJ 7 (1964); SB 7, Chap 29, First Extraordinary Session of 1964.

promulgating "Guides to Disciplinary Procedure," delegating hearings to two Disciplinary Review Boards (DRBs, soon merged into a single 15-person board), and assigning primary responsibility for discipline to the General Counsel (assisted by five new attorneys). Although the State Bar defended itself against Governor Reagan's criticism of its disciplinary record (which was echoed in the press), it doubled bar dues to finance more activity.[19]

II. The Rise of Consumerism

These reforms were unlikely to satisfy the rising tide of criticism, reflected in the ABA's creation in 1968 of a special committee, chaired by retired Supreme Court Justice Tom C. Clark, to investigate lawyer discipline nationwide. Its 1970 report began by decrying

> a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.[20]

The committee found disbarred attorneys practicing in other jurisdictions and routinely reinstated, tax evaders and convicted felons continuing to practice, and lawyers covering up their peers' unethical and criminal conduct, especially in smaller in communities. It identified 36 problems, including inadequate funding, decentralization, delay, reliance on volunteers, dependence on complaints by clients (who were discouraged from making them), poor record-keeping, lack of lesser penalties for minor offenses, inadequate procedures for resignations with charges pending or incapacitated lawyers, no mechanism for reciprocal discipline in other states, no interim suspension, excessive secrecy, no protection for clients abandoned by counsel, no compulsory accounting and auditing of client trust funds, and the need for mandatory malpractice insurance, client security funds, and fee dispute arbitration.[21]

Based on the Clark Report's occasional praise for the California State Bar, President Plant boasted that it "utilizes most of the disciplinary procedures recommended." The Report's criticism "that `at the root of the problem (of self-policing) is the widespread disinclination of individual lawyers and bar associations to take action against fellow attorneys,' is not true in California." The State Bar relied on 600 volunteer lawyers, and 15 attorney and 21 clerical employees; "record keeping procedures are being revised and updated, and a determination has been made to initiate the use of professional staff examiners in place of volunteer examiners, at least on a trial basis." The

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[19] 2 SBJ 203-07 (1928); 31 SBJ 293 (1956); Graham L. Sterling, "Report of President for 1958-1959," 34 SBJ 808, 811-12 (1959); Burnham Emersen, "President's Message: The Supreme Court and the State Bar," 34 SBJ 893, 897 (1959); Graham L. Sterling, Sr., "The Argument for a Clients' Security Fund," 36 SBJ 957 (1961); Galen McKnight, "The Argument Against Clients' Security Fund," 36 SBJ 963 (1961); August F. Mack, Jr., "Annual Report of the Board of Governors," 40 SBJ 659, 661-64 (1965); John H. Finger, "President's Message: Disciplinary Procedure Updated and Streamlined," 43 SBJ 9 (1968); ABA Special Committee (1970: 35); Business & Professions Code § 6086.5; Gallagher (1993: 92).

[20] ABA Special Committee (1970: 1).

[21] Id. 19, 24, 30, 46, 48, 60, 71, 74, 77, 86, 92, 97, 101, 110, 116, 122, 138, 147, 150, 156, 167, 172, 186.

president recognized that "in the public view our effort to deal with misconduct of attorneys…is the major task facing the organized bar" and warned that "unsatisfactory performance" could threaten the "precious right of self-discipline," as had happened in Michigan with the addition of public members. He urged lawyers to report misconduct, even though this was "not the recommended way of becoming the most popular fellow at the cocktail hour preceding the local bar association's annual dinner meeting."[22]

The Clark Report was just the first salvo in a continuous cycle of criticism, defense, and piecemeal reform. In 1970 the DRB rejected an examiner's proposal that it give reasons for dismissing charges, because "it may not be possible to get a majority of the [DRB] to agree on the reasons for dismissal." But the Board of Governors did recommend that the LAC hearing the case be different from the one that investigated it. The following year President Robinson opposed a bill (supported by the Attorney General) making incompetence a basis for discipline. "[T]he Supreme Court has stated in these situations that no discipline is warranted." In response to "justifiable" criticism of "delay and inefficiency," the State Bar had made "major improvements in our disciplinary procedures" and would "be able to intensify our efforts" if the dues increase were approved. The "State Bar's activities and results in this field have been major and second to no association in the nation." "[O]ne of the most important changes in policy" was the Supreme Court's decision to issue press releases about disciplinary decisions. Over the next few years the Bar would replace volunteer examiners with employees. "We have now developed a modern system of record keeping so that we can keep track of all of our cases and know which ones are delinquent and why, and compare our progress with prior periods."[23]

Noting that delay had been a "continuing" problem and was becoming "serious," the next president, Leonard Janofsky, warned: "If we fail to meet this challenge, the administration of this exceedingly important responsibility may be assumed by some other public body." A SB special committee recommended that parties be able to stipulate for a single hearing officer, only one continuance should be granted without good cause, and a staff examiner should be able to file an NTSC without a preliminary hearing in commingling cases and refer complaints lacking probable cause to client relations committees. His successor, Seth Hufstedler, blamed Watergate for the fact that "the State Bar probably receives more questions from lawyers, the press and the public about our disciplinary system than any other subject." Having served three years on the Board and several more on LACs, he believed that "the system is quite good" and the results "acceptable to the public, the bench and the bar" as shown by the fact that in three recent years the DRB had followed LAC recommendations in 162 out of 300 matters and the Supreme Court had followed the DRB in 76 out of 93 cases. Noting that 83 percent of the last 42 lawyers disciplined were solo practitioners and all but one belonged to firms of less than six, he urged "periodic supervision and review of financial records." Because proceedings were "still too slow," taking "years not months," the BoG had approved "a new, imaginative proposal" to combine the formal LAC hearing and DRB review. Since

[22] Id. 35-36, 122; Forrest A. Plant, "President's Message: The Disciplinary Problem: A Call for Individual Dedication," 46 SBJ 130 (1971).

[23] Disciplinary Board, "1970 Annual Report to Board of Governors," 46 SBJ 538, 540-41 (1971); David K. Robinson, "President's Message: Leadership Exercised by the Organized Bar," 46 SBJ 570 (1971); David K. Robinson, "Annual Report of the Board of Governors," 47 CSBJ 501, 512 (1972).

"by far, the largest share of complaints we receive is about lawyers who have failed to perform in a pleasing and satisfactory manner," he suggested a "non-disciplinary complaint committee—a `friend of the client,'" to deal with neglect. To reduce excessive secrecy "we should now consider whether or not a [NTSC] should be made public when it is issued." For the fourth successive year after the Clark Report, the SB president urged lawyers to anticipate complaints about neglect and delay by sending clients "a copy of every paper and letter you file," returning phone calls, and "keep[ing] your client informed about the progress of his matter, without waiting to be asked." His vice president urged local bars to create fee arbitration panels with lay participation and engage in an "aggressive campaign" to persuade lawyers to submit to them. "[W]hen our level of enforcement of the rules of professional responsibility fail [sic] to adequately protect those for whom they were designed, we must necessarily expect that the task of disciplinary enforcement and administration will be taken from us, as has happened in other states." The 1979 SB president again pronounced that California's disciplinary system was "widely regarded as the nation's best" and "the Bar here was moving further out front as the national leader…." He urged earlier publicity of proceedings, random trust account audits, conciliation of non-disciplinary complaints, and mandatory continuing education in legal ethics and law office management.[24]

The pressure for reform was not just talk. The California Supreme Court ruled in 1971 that the statute of limitations for legal malpractice ran from the date the client should reasonably have discovered it. Five years later the SB president proposed that the Bar negotiate a malpractice insurance policy for all members, effectively making it mandatory. After malpractice insurance premiums increased as much as 400 percent between 1976 and 1977 and the number of insurers dropped from six to three, the president promised a lawyers' mutual as soon as 3,000 members subscribed.[25] The client security fund, first proposed by a SB president in 1961, was finally established in 1972.[26] California responded to the ABA's 1969 Code of Professional Responsibility by revising its own rules in 1973, prohibiting illegal or clearly excessive fees, requiring lawyers to maintain records of client funds, and exposing to discipline those who willfully or habitually performed legal services for which they lacked the skills or knowledge or failed to use reasonable diligence.[27] In 1975 the *California State Bar Journal* finally began reporting the misconduct underlying Supreme Court disciplinary decisions.[28] The BoG embraced mandatory fee arbitration in 1977.[29]

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[24] Leonard S. Janofsky, "President's Message: Reducing Delays in Lawyer Discipline," 48 CSBJ 8 (1973); Seth M. Hufstedler, "President's Message: Another Look at Discipline," 49 CSBJ 224 (1974); Brent M. Abel, "President's Message: Are You Subject to Complaint?" 50 CSBJ 6 (1975); Brent M. Abel, "President's Message: Following the Rules," 50 CSBJ 70 (1975). Hufstedler's identification of the most frequent bases for discipline was confirmed four years later. Richard Blum, "A Perspective on the Bar," 53 CSBJ 98 (1978); Charles H. Clifford, "President's Message," 54 CSBJ 490 (1979).

[25] Neel v. Magana, Olney, Cathcart & Gelfand, 6 Cal.3d 176 (1971); Ralph J. Gampell, "President's Message: Malpractice Insurance: Equal Burden for All?" 51 CSBJ 575 (1976); Ronald E. Mallen, "Panacea or Pandora's Box? A Statute of Limitations for Lawyers," 52 CSBJ 22 (1977); David J. Levy, "President's Message," 54 CSBJ 366-67 (1978).

[26] David K. Robinson, "Annual Report of the Board of Governors," 47 CSBJ 501, 508 (1972).

[27] Leonard S. Janofsky, "President's Message: After 45 Years—New Rules of Professional Conduct," 48 CSBJ 224 (1973).

[28] "Disciplinary Board Proceedings," 50 CSBJ 279 (1975).

[29] Ferdinand F. Fernandez, "The Pending Proposal for Mandatory Fee Arbitration," 52 CSBJ 520 (1977).

In 1976 the Bar implemented "a comprehensive change in the procedure...which completely revolutionizes the concept and administration of the trial and review phases of the disciplinary panel." It replaced the LACs and DRB with a new Disciplinary Board composed of 40 lawyers and seven laypeople, assisted by another 80 lawyer and three lay pro tem referees. Parties could stipulate to a single hearing officer and request review, which was merely advisory. Three years later the Bar delegated all disciplinary authority to the State Bar Court (SBC), divided into investigation (260 referees), hearing 315 referees), and review (12 lawyers and 3 laypersons sitting en banc).

The chair of the Bar's Committee on Discipline rejected the criticism "that the disciplinary process is a backscratching, self-protecting exercise." The Bar was reducing delay by using staff examiners, setting fixed time limits, and holding hearings on evenings and weekends. It was increasing uniformity by training referees and publishing a "Summary of Discipline Imposed." Review became binding rather than advisory. The chair was "absolutely convinced" that using volunteer "lawyer-peers with a mix of public members provides benefits which far outweigh any other procedure." Critics who glibly compared the approximately 5,000 complaints with just 200 NTSCs and 75 serious penalties were playing a "truly superficial" "numbers game." Lawyers

> are probably monitored more closely and by more people than persons who are engaged in any other type of activity...many complaints arise that are totally lacking in merit.... When the result is not in accord with [clients'] optimistic expectations, they often attribute the loss not to the merits but to either their own attorney or opposing counsel, and are quick to translate that into a charge of violating the Rules of Professional Conduct.

The disciplinary process was "not a procedure for testing or reviewing competence...a wholly separate subject." Because "every member of the bar has been through a rigorous screening process" and had reached "25 years of age or older, without serious instances of misconduct...it is to be expected that deliberate violations of moral or ethical standards would be unusual." When the Director of the California Office of Administrative Hearings called "the use of volunteer lawyers from the community...a defect" and its "secret nature" the "worst indictment against the Bar's disciplinary process," a lawyer responded that "the entire system of justice under which we operate involves a trial by peers," and the process was far from secret: "one newspaper in Los Angeles County rejoices in publishing each and every transgression." (He meant the *Daily Journal*, which was read only by lawyers.) The lawyer dismissed administrative agencies as "usually composed of hearing officers who can't make it in the private sector." Nevertheless, reports by Bar committees in 1979 (Sproul/Steiner) and 1982 (Hanst) "reluctant[ly]" recommended "consideration of permanent staff as State Bar Court referees." In 1981, SB President Robert D. Raven again claimed that "the ABA's model system [proposed by the Clark Report] was the California discipline system," which was "nationally recognized as `outstanding'—an example for other states to follow." Sentiments like these help to explain why the BoG rejected a 1981 proposal to open disciplinary proceedings to the public (all 13 lawyer members voting against, all 6 public members voting for) and opposed mandatory continuing education in 1983 and written fee agreements in 1984.[30]

[30] E. Dean Price, "President's Message: The Hewes Plan and Disciplinary Procedures," 51 CSBJ 175 (1976); Peter J. Hughes, "President's Message," 54 CSBJ 6 (1979); Herbert W. Nobriga, "Letter to the

External critics remained unsatisfied. The cover sheet of a 1976 report by the California Auditor General—featuring a fat man in a wig and robe clutching an equally bloated money bag and sticking out his tongue—was captioned "incredulous membership fee increase." Noting that two years earlier the Auditor General had found that the Bar had "not yet fully developed workload standards upon which to make a satisfactory analysis of projected staffing needs," the chair of the Joint Legislative Audit Committee derided the request for a 32 percent dues increase on the ground that the Bar would have a $250,000 surplus even without which the augmentation. When the Bar resisted what it called "deficit financing," the Auditor General reiterated that proposed expenditures could not be "verified without...an allocation of expenses among departments." Subsequent Auditor General reports urged the Bar to make full use of existing facilities before constructing new ones, replace lawyer employees with laypersons, increase *California State Bar Journal* advertising revenues, and budget for several years. It also criticized the Bar's continued reliance on volunteers to prosecute two-thirds of disciplinary cases despite the 1970 Clark Report's recommendation to make ending this practice "a first priority" and the BoG's 1972 resolution to do so as soon as possible.[31]

Journalistic exposés were another prod for change. In 1981, the *Los Angeles Daily Journal*—read by virtually every local lawyer—published the results of a six-month investigation, which reached "the unavoidable conclusion that California lawyers seldom are held accountable for their misdeeds." Lawyers rarely reported misconduct; less than one complaint in five was investigated; few of those investigated were disciplined; most of those disciplined were just reprimanded; and nothing was done about incompetence.[32]

But the Bar remained impervious to criticism and slow to recognize the chronic and worsening delay in the disciplinary process. Lily Barry (who had joined the State Bar as a staff lawyer in 1966) became chief trial counsel in 1976, the year the Bar replaced LACs with the DB and began using staff attorneys to prosecute cases. More comfortable managing a small law office than a large bureaucracy, Barry let backlogs accumulate and then made staff work overtime to clear them. She believed "the backlog shouldn't determine your long-range staffing" and refrained from seeking more funds because the Board would "laugh at you" and cut even her modest budget. Barry resigned under pressure in February 1983. A few months after taking over, Susan Mahoney-St. Clair discovered 6,000 uncatalogued complaints, some ten years old. Although she requested $1.1 million to clear them, the Board appropriated only $100,000. By October, however, the Board made backlog reduction the highest priority, resolving to eliminate it within two years. Philip Schafer, who had won election to the Board in 1982 on a promise to reform discipline and become head of the Committee on Adjudication and Discipline,

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Editor," 54 CSBJ 215 (1979); Clifford R. Anderson, Jr., "Letter to the Editor," 54 CSBJ 420 (1979); Gert K. Hirschberg, "The New State Bar Court," 54 CSBJ 438 (1979); Robert D. Raven, "President's Message," 56 CSBJ 268-29 (1981) (also published in *San Diego Union*, 5.24.81); "Bulletin Board," 1(2) California Lawyer 67 (10.81); "Bulletin Board," 3(7) California Lawyer 49 (7.83); "Bulletin Board, 4(4) California Lawyer 49 (4.84); "Bulletin Board," 5(12) California Lawyer 67 (12.85); Coyle (1984: Appendix 5).

[31] CAG (1976; 1977a; 1977b; 1977c).

[32] Jon Standefer, "Is the Legal Profession Guilty of Failing to Police Itself" LADJ 5 (5.15.81); "State Meting Out Fewer—and Lighter—Penalties," LADJ 6 (5.18.81); "Attorney Incompetence Presents Difficult Problem," LADJ (5.19.81); "State Bar Resisting Discipline Changes," LADJ 8 (5.20.81); Gallagher (1993: 95).

appointed a Subcommittee on Expediting the Discipline Process, chaired by Robert E. Coyle.[33]

The subcommittee's 1984 report found "systemic" inefficiencies: contested cases averaged 40 months; even cases with stipulated facts could take two years to conclude. At the ABA's February meeting, Chief Justice Warren Burger had called for comprehensive examination of disciplinary mechanisms, warning that "State legislatures may move independently if our profession does not act." Coyle agreed this was not "unduly alarmist." U.S. Senator Bob Packwood had recently introduced a "consumer protection" bill to transfer all attorney discipline to the Federal Trade Commission (which had sent "voluntary" questionnaires to state disciplinary bodies in 1978 and 1981). Some Ninth Circuit Court of Appeal judges had proposed a separate disciplinary system for lawyers appearing before them. The subcommittee found 4,392 complaints under investigation, 2,300 of which had been pending more than six months; more than 200 NTSCs had been waiting three months for charges—some much longer. But "the statistics only indicate delay. They are almost useless for anything else and are deceptive." It was "particularly disturbing" that the same criticism had been made ten years earlier "because of the vast amount of money spent on computer resources in the intervening years." Predicting that California's 80,000 attorneys would increase 4 percent a year while the annual number of complaints per lawyer (then one in ten) would grow even faster "because of the larger number of underemployed attorneys and more stringent rules governing attorney competence," the subcommittee recommended that the "temporary" backlog team created by the BoG be made permanent. The Office of Trial Counsel (OTC) should be empowered to issue a NTSC without returning to the investigative referee and to impose admonitions without trial. Simple cases should be heard by a single referee, more complicated ones by a compensated referee (although the subcommittee resisted eliminating volunteers).[34]

Asked by the Coyle subcommittee to evaluate the prosecutorial function, Mark C. Kroeker (a Los Angeles Police Department commander) reported in June 1985 that investigators should handle no more than 35-40 cases; the actual caseload of "100 or more is completely unrealistic." Investigation and prosecution should be separated. Less serious cases, "which are obviously not going to result in disciplinary dispositions," should be mediated by paralegals empowered to draft admonitions and warnings. A "massive effort will be needed to catch up" with the backlog, but "<u>the establishment of numerical closure goals or the ratio of cases per investigator is highly speculative</u>."[35]

The BoG responded by allowing OTC lawyers to issue NTSCs, constituting two referee pools (a few paid to conduct long or complex cases and many volunteers for fee arbitrations), creating a master calendar in order to complete trials in a continuous hearing, separating the Office of Investigations (OI) from the OTC, constructing a career ladder to retain investigators, and instituting mandatory settlement conferences in 11

[33] "Bulletin Board," 3(10) California Lawyer 50 (10.83); Robert Egelko, "State Bar Discipline Under Fire," 6(6) California Lawyer 55 (6.86); Gallagher (1993: 96-97).
[34] "Shorthand," 56 CSBJ 173 (1981); Coyle (1984: 1, 18-19, 28-29).
[35] Kroeker (1985) (emphasis in original).

counties (accounting for 85 percent of complaints). It expected these changes to halve the 40 months from complaint to decision.[36]

The taxpayer revolt that produced Proposition 13 in 1978 also affected the Bar's dues requests. The Legislature granted a $5 increase that year conditioned on a day-long hearing by the Senate and Assembly Judiciary Committees, which resulted in a $10 decrease the following year. The Legislature rejected the Bar's proposal to index dues for inflation and membership growth. Another SB bill to raise the dues floor permanently for the first time since 1976 was amended at the last minute to impose a one-year $5 decrease. Only on the last day of the 1982 legislative session did the SB obtain a substantial increase (to $90 and $160).

In 1978 Senator Robert Wilson also introduced a bill to reduce dues to a flat $50, limit Bar activities to admissions and discipline, assign discipline to administrative hearing officers reviewed by panels of four laypersons and a lawyer, and eliminate the Conference and all SB committees. The voluntary associations also wanted the Conference to have more power and less state control. At its annual meeting in Monterrey, the Conference of Bar Presidents created a study group, which reaffirmed support for the integrated bar. But concerned about a recent U.S. Supreme Court decision limiting the right of unions to use mandatory dues for political advocacy,[37] it proposed to transfer all lobbying (other than for bar dues) to the Conference of Delegates, which would be made more representative and financed voluntarily. Seeking to avoid guilt by association, the Bar authorized the Conference of Delegates to lobby without seeking BoG approval.[38]

III. The Perils of Political Engagement

This cycle of complacency, external criticism, and piecemeal reform might have continued indefinitely but for a political explosion. The Conference of Delegates took positions on increasingly contentious issues, convincing the BoG in 1976 to support decriminalization of prostitution. SB President Shallenberger "became convinced that it was within our purview because so much time and money is taken up in the judicial system processing prostitution cases." But Board members objected to Conference stances on abortion, affirmative action,[39] and the Equal Rights Amendment. In 1980 the Assembly Judiciary Committee held a hearing on the "Use of Mandatory State Bar Dues." Two years later the BoG urged that private clubs be subjected to federal anti-discrimination laws if a "substantial portion" of their revenue came from business sources, and it opposed two law-and-order measures: a constitutional amendment introduced by Senator Robert B. Presley (D-Riverside) to deny bail to defendants charged

[36] "Bulletin Board," 4(8) California Lawyer 49 (8.84); "1983-84 The State Bar of California Annual Report," 4(12) California Lawyer 77-78 (12.84); Gallagher (1993: 100-01).
[37] Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977).
[38] David J. Levy, "President's Message," 54 CSBJ 138 (1979); Bert Z. Tigerman, "Letter to the Editor," 54 CSBJ 286 (1979); Jack Stutman, "President's Message," 54 CSBJ 210 (1979); "Shorthand," 54 CSBJ 528 (1979); Mary A. Eikel, "Where Is the State Bar Going?" 55 CSBJ 154 (1980); Mary A. Eikel, "The Monterrey Committee Report," 55 CSBJ 380-81 (1980); "Shorthand," 54 CSBJ 462 (1979); "Sacramento Scene," 54 CSBJ 531 (1979); "Bar World," 55 CSBJ 265 (1980); "Bar World," 56 CSBJ 168 (1981); "Bulletin Board," 2(2) California Lawyer 44 (2.82).
[39] In response to Bakke v. Regents of the University of California, 438 U.S. 265 (1978).

with capital crimes and other violent felonies, and the just enacted "Victims' Bill of Rights" proposition.[40] In August 1984, Pete Wilson, then a candidate for U.S. Senator, threatened a recall campaign against any California Supreme Court Justice who voted to invalidate the proposition.

This prompted a strong response from SB President-Elect Anthony Murray, who was echoed by the Bar Associations of San Francisco and Los Angeles, among others. Murray used his inaugural speech to the September SB annual meeting to defend the Court's independence.

> We must make it clear that the only legitimate basis for refusing to retain or recalling a justice is a showing of incapacity or misconduct in office. We must make it clear that judges cannot be removed because the politicians disagree with their judicial philosophies or with specific decisions.

Denouncing the proposition as a "dangerous measure," which "pretends to deal with the deep complexities of crime by throwing slogans at the problems," Murray called on the Bar to defend courts from

> the idiotic cries of the self-appointed vigilantes; the committee on law and order; the court watchers; the self-seeking prosecutors and lawyers who want to be judges; *and every unscrupulous politician who thinks there is something in it for him if he gets in line to kick the courts, which he sees as inert and defenseless.* [emphasis added]

While not naming Wilson, he attacked "a candidate for national office, himself a lawyer, who threatens a recall of our chief justice if the Supreme Court dares to overturn Proposition 8." At the same meeting the Conference endorsed propositions for handgun control and a bilateral nuclear weapons freeze, urged that Martin Luther King Jr.'s birthday be made a national holiday, and echoed Murray's criticism of Wilson. The BoG unanimously adopted a resolution strongly supporting the independence of the judiciary.[41]

A group of 55 lawyers, led by Eddie T. Keller (a 16-year veteran of the Attorney General's office, angered by opposition to the death penalty), protested that "it was totally improper for the state bar to have become embroiled in an issue which is so obviously political," which "disenfranchises those in the membership who disagree." The Conference executive committee chair replied that the resolution "was fully debated," "no speaker sought to defend the conduct," and "the vote was the expression of a substantial majority of the delegates." This provoked a *California Lawyer* article declaring "the rock-hard fact...that the state bar has long involved itself in ideological pursuits" and demanding that it be "split[] in two." President Murray retorted that "if we believe that our profession must preserve its dedication to public service, we should retain our unified bar with its commitment to the interests of the public." The following

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[40] Presley, who played a pivotal role in subsequent events, was a World War II veteran who spent 24 years in the Riverside County Sheriff's Department, 12 as Undersheriff, focused on the plight of domestic violence victims.

[41] 53 CSBJ 190-91 (1978); Garvin F. Shallenberger, "President's Message," 53 CSBJ 214 (1978); Claude D. Morgan, "Letter to the Editor," 54 CSBJ 363 (1979); Joseph Carr, "Letter to the Editor," 54 CSBJ 420 (1979); Kenneth Hopp, "Letter to the Editor," 54 CSBJ 493 (1979); Michael V. McIntire, "Letter to the Editor," 54 CSBJ 493 (1979); "Bulletin Board," 2(5) California Lawyer 43-44 (5.82); "Bulletin Board," 2(7) California Lawyer 89 (7-8.82); "Bulletin Board," 2(9) California Lawyer 67 (10.82); "Annual Meeting Wrap," 2(11) California Lawyer 28 (12.82); "Bulletin Board," 2(1) California Lawyer 64 (12.82).

year the Conference called for abolishing the death penalty (on a show of hands because the voice vote was too close to call) and opposed retention elections for California Supreme Court justices. Even before then, however, Keller and co-worker Raymond Brosterhous contacted the conservative Pacific Legal Foundation, which sued on behalf of them and 19 others (including Assemblyman Patrick J. Nolan) to enjoin the State Bar from taking political positions and using dues to do so. On May 24, 1984, the trial court granted the State Bar summary judgment, finding that, as a governmental agency, it had not acted improperly.[42]

In March 1985, while the *Keller* plaintiffs were appealing, the *San Francisco Examiner* published a six-part series entitled "The Brotherhood," which resembled the *Los Angeles Daily Journal* exposé four years earlier but was now on the front page of a major newspaper. It quickly grabbed the reader's attention.

> There are convicted criminals practicing law in California. They include lawyers who have lied, cheated and stolen. A bagman in a bribery scheme is allowed to practice law. So is an attorney who burglarized a client's market. So are a drug smuggler, an embezzler and a stock swindler. So is a lawyer who impersonated a cop. So is an attorney who did dirty tricks for the White House, and another who tried to raise campaign funds for President Nixon by selling an ambassadorship. After punishments ranging from a wrist slap to a few years on the sidelines, all were judged to be fit attorneys.

Although the SB had received 9,000 complaints the previous year, it investigated only two out of five and held formal hearings for just 6 percent, disbarring 11 lawyers while suspending five times as many for failing to pay bar dues than it did for ethical transgressions, in a process that was to slow and secretive.[43]

Once again the Bar insisted everything was fine. Former President Kenneth Jost called California's disciplinary system the "envy" of other states; current President Burke M. Critchfield insisted it was the "most effective" regulatory system "of any bar or other professional group in the country." The *Examiner*'s findings characterized only "an extremely small percentage of California lawyers." And while Critchfield warned local bar leaders that "the number of complaints we are receiving each year exceeds the resources we have available to carry out this important function," he assured them that "a great many reforms have been implemented, and more are proposed to make the discipline program faster [and] more efficient." At its June meeting, the Board diverted money from other functions to let the OTC hire more staff. At the end of his term Critchfield welcomed the "intense public and legislative scrutiny" as "healthy attention," which had simply "sped the bar along" in "the very areas the bar itself already had targeted for reform." But other insiders were more skeptical. David Clare, who had resigned as assistant chief trial counsel after 13 years with the SB, declared: "With one or two exceptions, I never knew a member of the Board of Governors who had the least

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[42] Keller v. State Bar, Superior Court of Sacramento County, No. 307168 (Cechettini, J.); Edward L. Lascher, "Dismantle the unified bar," 3(5) California Lawyer 12 (5.83); Anthony Murray, "The unified bar serves the public interest," 3(5) California Lawyer 13 (5.83); "Conference calls for end to capital punishment," 4(12) California Lawyer 21 (12.84); James Evans, "Behind the Keller Case," 10(5) California Lawyer 35 (5.90).

[43] K. Connie Kang and James A. Finefrock, "The Brotherhood: Justice for Lawyers," San Francisco Examiner (3.24-29.85). Journalistic exposés also prompted reform of discipline in West Virginia, Washington State, and Oregon. Collins (1992).

interest in discipline." And Harriet Katz, a public member of the Board from 1976 to 1981, recalled that when she raised the bar's consumer protection responsibilities at a meeting, "a mild-mannered lawyer stood up and slammed his fist on the table and said, 'The State Bar is not a consumer protection agency.'"[44]

The *Examiner* series had many ramifications. A month after it appeared Senator Presley created a task force to explore the problem and propose solutions. In September a majority of the committee recommended transferring discipline to an independent agency responsible to the Supreme Court, a proposal the *Sacramento Bee* felt "deserves serious consideration." The entire task force recommended random audit of client trust accounts, standardized written fee agreements, itemized bills, arbitration of fee disputes, less delay in discipline, expansion of the client security fund beyond dishonesty, mandatory malpractice insurance, a prohibition against lawyers conditioning settlement of malpractice claims on clients agreeing not to file disciplinary complaints, a public majority on the Board of Governors; the exclusion of trivial matters (such as marijuana possession) from discipline and its extension to "the most common client grievances: overcharging, incompetence, negligence," reduction of investigative caseloads, heightened penalties, discipline of more elite lawyers, reporting of ethical violations by lawyers and judges, and authority to place lawyers on inactive status early in an investigation.[45]

The *Examiner* series also reignited smoldering Legislative resentment toward the dues bill, which Senator Dan Boatwright had introduced on February 13. At a Senate Judiciary Committee hearing on the bill, Presley demanded that the Bar first clear up the disciplinary backlog. The Senate passed a bill requiring the Bar to use any additional fees exclusively for discipline, report to the Legislature on disciplinary reforms, reduce its backlog by 80 percent by the end of 1987, and establish goals for promptly handling future cases. But the bill did not reach the Assembly until Friday, September 13th, the final day of the 1985 session. At the last minute Republican minority leader Patrick Nolan (a *Keller* plaintiff), invoked a recently enacted procedural rule requiring that legislators receive conference committee reports a day before voting. Although the Senate had voted that day (after its Secretary found rule no obstacle), the Chief Clerk of the Assembly disagreed. Although a Legislative counsel agreed with the Senate Secretary, Speaker Willie Brown temporized (perhaps because the previous spring the Board had opposed his bill to require malpractice insurance). At 5:30 AM he ruled that it was a new legislative day, allowing the Assembly to vote, but Nolan successfully

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[44] Kenneth Jost, "The Public's State in Lawyer Discipline," LADJ 2 (4.8.85); Burke M. Critchfield, "The Bar Is Improving a Good System's Shortcomings," LADJ 4 (4.10.85); Karen Ringuette, "Cleaning Up the Act," 5 California Lawyer 12 (1985); "Bulletin Board," 5(7) California Lawyer 71 (5.85); "Bulletin Board," 5(9) California Lawyer 60 (9.85); Burke M. Critchfield," "Looking Back," in "The State Bar of California Annual Report 1984-1985," 5(12) California Lawyer 67, 69 (12.85); Robert Egelko, "State Bar Discipline Under Fire," 6(6) California Lawyer 55 (6.86).

[45] "Recommendations of Senator Presley's Task Force on Bar Discipline, Following Meeting in San Francisco," (9.18.85), in California Assembly (1985: App. A); Philip Carrizosa, "Task Force Urges Stripping State Bar of Discipline Cases," LADJ 1 (9.19.85); "Editorial," Sacramento Bee (10.85), reprinted in LADJ 1 (10.7.85).

objected that the Legislature had been required to adjourn by the previous midnight unless two-thirds of both houses overrode this. The bill died.[46]

On September 30 the Assembly Subcommittee on the Administration of Justice, chaired by Lloyd G. Connelly, held a joint hearing of the Assembly and Senate Judiciary Committees immediately after the SB annual conference in San Diego. Orville A. Armstrong, outgoing chair of the Committee on Admissions and Discipline (CAD) criticized the *Examiner* for focusing on 70 "exceptional cases" out of "tens of thousands." "[R]adical changes" had created a "new State Bar discipline system," which would "cure the backlog very quickly." Armstrong's successor, Joe S. Gray, proposed to alleviate investigators' intolerable burden of 130 cases by "calling on a resource that's available only to the State Bar...the large number of volunteers." Susan Mahony-St. Clair, Chief Trial Counsel, boasted that "an investigation in the past that may take six months...has been able to be completed in five to seven working days." SB President David M. Heilbron had "said yesterday before perhaps a thousand people that we are committed to solving this problem...this is not an idle promise. It's a commitment."[47]

But legislators were skeptical. Assemblymember Richard Robinson (not a lawyer) had chaired three previous Bar dues conference committees, which had been "hung up until the very waning hours" by questions about discipline. He criticized the SB's heavy dependence on volunteers "where a lot of...the `old boy syndrome' operates." Lawyer friends told him that LACs often refused to find moral turpitude because "you're talking about somebody's ability to make a living." Senator Bill Lockyer (Judiciary Committee chair and a lawyer) asked for something "that would be confidence inducing" because he did not see the "small discrete changes" as a "new discipline system." Robinson got Gray to agree that "an attorney who files excessive paper" or engages in "other types of fee running-up procedures is just as much guilty of stealing a client's money as the attorney who converts a client's trust funds." Connolly noted that a few days earlier the *Examiner* had criticized the Bar for failing to distribute a report (prepared at Heilbron's request), which found that it took an average of 488 days from complaint to the filing of formal charges. Claiming not to know that lawyers conditioned settlement of malpractice claims on clients agreeing not to file grievances, Gray said he "would consider that grounds for discipline...and expect a push for disbarment."[48]

Heilbron offered multiple arguments against transferring disciplinary authority: the state constitution lodged it in the judiciary, creating separation of powers issues; "we're geared up to fix [the backlog], and nobody else is;" the Bar's "500 volunteers" made its disciplinary process cheaper; many observers were properly skeptical about the Department of Consumer Affairs; a lawyer could not "freely" "represent people against the state...if that lawyer has to be afraid that...the state can punish him."[49]

Presley task force members were unpersuaded. Stanford Law School Professor Deborah Rhode testified that "the consistent conclusion of all this scholarship is that...professional sanctions and regulations generally ought not to rest with the bar

[46] California Assembly (1985: Exhibits J and K); Gallagher (1993: 110-14). On BoG opposition to Brown's malpractice bill, AB 2087, see James E. Towery, "Malpractice insurance should be mandatory," 5(7) California Lawyer 16 (5.85).
[47] California Assembly (1985: 2-10, 12-14).
[48] Id. 16, 19-21, 23-26, 28, 30.
[49] Id. 33-36.

itself." But her inability to identify a successful regulatory agency moved Lockyer to dismiss the possibility of devising something "independent of politics" as "little more than slogans." Boalt Hall Professor Stephen Bundy agreed with Rhode that self-regulation was "simply a matter of conflict of interest," confirmed by the "history of poor performance." Although Bar Governor Philip Schafer had established the Coyle Commission, he opposed divestment of disciplinary power. "We are not a brotherhood...a Cosa Nostra that's devoted to trying to cover up and protect our brethren."

> Every single complaint is investigated. ... It may be a review saying: "...because you don't like the suit your lawyers [sic] wears it's not a disciplinary matter." Some of them reach that level of absurdity.

Philip Martin, who had prosecuted disciplinary cases for three years and now represented legal malpractice plaintiffs, supported divestment. The lawsuit he had had to bring to force the State Bar to grant due process rights to client security fund claimants showed the "kind of stuck-in-the-mud type bureaucracy that is operating."[50] Three weeks earlier the Bar had directed the OTC to close all complaints filed in 1983, which "may not be good faith compliance with what the legislature had in mind." Richard Annotico, a public Bar Governor, also wanted discipline transferred to an agency composed of a lay majority and lawyers who were appointed rather than elected.[51]

In October the Bar sought authority to collect dues from the Supreme Court, but it deferred to objections from Governor Deukmejian and legislators. In response to a plea for voluntary dues, 54 percent of active members and 90 percent of inactive had paid by February 25, 1986, when the Governor finally signed a dues bill. This legislation required the Auditor General to survey lawyers' views on discipline. Although the State Bar was forbidden to communicate with members, presidents of 33 voluntary bar associations endorsed the integrated bar. This time half the 90,000 members responded. Although only a small plurality thought the Bar was doing "an adequate job of disciplining attorneys" (45 to 38 percent), four out of five still felt it was "the appropriate organization to receive and investigate complaints." Lawyers split almost evenly (49 to 48 percent) over whether the Bar should be able to advocate on topics other than technical law revision, court reform, and issues directly related to the legal profession. If it did, 69 percent wanted dues to be voluntary; and only 44 percent thought they should support the Conference of Delegates. By the time these results were reported, a divided Court of Appeal had reversed *Keller*, holding that the SB had failed to sustain its burden of proof to justify Murray's speech and the BoG might be personally liable for violating the petitioners' rights.[52]

IV. Professionalizing Discipline

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[50] Saleeby v. State Bar, 39 Cal.3d 547 (1985).

[51] California Assembly (1985: 37-43, 47-66, 77). Annotico graduated from law school but acquired his wealth from real estate. David O. Weber, "'Still in Good Standing': The Crisis in Attorney Discipline," ABAJ 58, 60-61 (November 1987).

[52] "Bar Watch: Lawyers back the bar," 6(5) California Lawyer 11 (5.86); "Bar Watch: Local bars support State Bar," 6(7) California Lawyer 11 (7.86); "Bar Watch: State Bar plebiscite results," 6(7) California Lawyer 12-13 (7.86); Gallagher (1993: 115); Keller v. State Bar, Court of Appeal, Third Dist., Civ. No. 24124 (5.86).

In January 1986 Senator Presley introduced two bills: SB 1543 would entrust disciplinary hearings to administrative law judges supervised by a 15-member commission with a lay majority, all of whose members would be appointed (4 by the Governor, 6 by the Legislature, 4 by the State Bar, and one by the Chief Justice); SB 1569 made lesser changes: lawyers had to disclose fees and provide written agreements if fees exceeded $1,000; they had to report three or more malpractice claims filed within a year, as well as some judicial sanctions; the State Bar could audit trust funds; and it had to process complaints within six months and report to the Legislature annually. A supportive *Sacramento Bee* deplored the

> general pattern of laxity that plagues the State Bar's disciplinary proceedings. The bar is slow to act against lawyers who steal from clients, lie to them, misuse drugs and commit felonies. When it does act, it is far less likely than disciplinary authorities in other states to hand out serious punishment such as disbarment and suspension. The State Bar...has failed in its duty to protect the public from misbehaving lawyers. [53]

Although the *Los Angeles Herald* had no doubt that "the State Bar's disciplinary system is not working properly" and is "besieged by some 6,000 backlogged cases, as well as complaints that the discipline it delivers is often absurdly lenient for the violations," it opposed the bills because the Bar had "already acted to reform itself."[54] When the BoG opposed the first bill 18-1 (only Annotico disssenting) and it seemed doomed to fail, Presley proposed an independent director for the Bar's disciplinary system. When the Bar successfully blocked this as well, he settled for a monitor. President Heilbron declared victory. Although Attorney General John Van de Kamp initially envisaged a retired judge as monitor, in January 1987 he picked Robert Fellmeth, a former Nader's Raider turned law professor, who directed the University of San Diego Law School's Center for Public Interest Law.[55] The Long Beach *Press-Telegram* lauded Fellmeth's "impressive consumer advocacy credentials" and hoped lawyers would "feel constrained to take extra care in dealing with clients' money and legal rights."[56]

Just when the Bar was taking comfort from the fact that it remained under the protective wing of the judiciary, the Supreme Court harshly criticized the State Bar Court. Drastically reducing a lawyer's punishment from disbarment to a year's suspension, the Supreme Court said: "This record, like others we are receiving with increasing frequency, leaves material gaps in the analytic path from charges to proof to findings and conclusions to recommendations."[57] The SBC had failed to "relate individual facts to specific professional duties and rules." The Supreme Court found "important evidentiary deficiencies"; in several "significant" instances "conduct not charged, or not proved, is found and relied upon as a basis for discipline." While upholding the penalty in a second case, the Supreme Court deplored that "the record is otherwise deficient with respect to both the findings and the conclusions reached therein."[58] It was "essential that the records offered in support of the disciplinary

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[53] "A New Court for Lawyers," *Sacramento Bee*, reproduced in LADJ 4 (3.6.86).
[54] "A Second Chance," *Los Angeles Herald*, reproduced in LADJ 4 (3.20.86).
[55] Gallagher (1993: 124-31).
[56] "Monitoring the Bar," reproduced in LADJ 4 (2.5.87).
[57] Maltaman v. State Bar, 43 Cal. 3d 924, 931 (1987).
[58] Guzzetta v. State Bar, 43 Cal.3d 962, 968 (1987).

recommendations be adequate to permit [the Supreme Court] to act upon those recommendations."

Presley returned to the fray in February 1987, successfully seeking an Auditor General investigation of the Bar's record in disciplining lawyers who stole from client trust accounts.[59] But this was nothing compared with Fellmeth's first report that June.[60] The disciplinary system's toll free number was not listed in any telephone directory. "Middle-level bar staff is candid about the reason": fear of increasing backlog. Even so, callers encountered a busy signal 62-72 percent of the time. Seven out of eight local bars surveyed accepted complaints they had no power to resolve, referring them to "Client Relations Committees." Only 20 percent of complainants to whom forms were sent bothered to return them. In order to reduce the backlog, the Bar had revived the Volunteer Investigative Assistance Program, whose investigators usually lived and worked in the respondent's community. Of 38 volunteers in one program, only 13 attended the workshop; a large proportion of them did nothing; and most of those who did anything missed the deadline. Staff investigators had caseloads of 150-200 (although Kroeker had recommended no more than 35-40). They had to obtain special permission to conduct on site inquiries, photocopy, travel, or subpoena, could not identify the respondent to potential witnesses, and required approval by three members of CAD to interview other clients. They needed bank names and account numbers to subpoena records, information the Legal Services Trust Fund possessed by would not disclose. The Bar took attorney fingerprints at admission but would not use them in investigations. Although lawyers had to report criminal convictions and malpractice claims to the membership office, it would not give investigators that information. Investigations were routinely abated for pending criminal or civil actions and not always revived when those ended. Only five interim suspension motions had been filed in Los Angeles in the first half of 1987, and some investigators were unaware they had that power. The Bar had to "prove up" default cases, which could take a year, although members who failed to pay dues were placed on inactive status within weeks. OTC lawyers needed special permission to spend any money or take depositions (and hence took very few). Turnover among OTC lawyers was high, and 10 of the 13 who left in 1986 were not replaced. Salaries started at $2,000 a month and peaked just over $3,000, provoking lawyers to strike.[61]

As the backlog rose, the Bar began sending complaining witnesses (CWs) a form letter warning there would be a six-month delay before any response. The first real contact, 12-18 months later, often was just a request for more information. Failure to respond led to closure of the case, accounting for much of the backlog reduction. Another strategy was to classify an increasing proportion of phone calls as "inquiries." Of the 8,574 calls found to be complaints in 1986, 7,715 were closed for "not sufficient facts" (NSF). Although the Bar increased case closings from 580 in January 1987 to 1,096 in March, the proportion producing NTSCs fell from 20 percent to 2. CWs were not informed of admonitions or private reprovals. Because the Hearing Department still relied on 448 lawyers and 80 laypersons, "wide inconsistency exists among the rulings and standards applied by the many briefly-trained referees." Although the SBC boasted

[59] Robert Fairbanks, "Sen. Presley Takes Aim at the California State Bar Once Again," LADJ 4 (4.9.87).
[60] Fellmeth (1987a; 1987b).
[61] See also "Bar Watch: Board of Governors: Three-week strike settled," 6(7) California Lawyer 9 (7.96).

that disbarments and resignations with charges pending rose from 59 in 1985 to 107 in 1986, almost all the increase was attributable to the 69 resignations; per capita disbarment rates in other states were ten times higher.

When SB President Armstrong claimed that Fellmeth's report showed that disciplinary procedures just needed some "fine tuning," the *San Francisco Examiner* replied: "Wrong. They need a complete overhaul." "[T]ogether with the hiring of greater numbers of investigators, the use of administrative law judges would go a long way toward restoring public confidence in the bar and in practicing attorneys."[62] But at the end of his term Armstrong continued to insist that lawyers had "the best professional disciplinary program in California."[63] He boasted that the Bar had anticipated by a year the legislatively mandated goal for reducing the backlog and gave "much credit" to the 450 volunteer lawyers, whom he hoped "will continue to be a part of the discipline system in the future." By the end of the year California would be "a model system for other states." Fellmeth was more cautious: "If California doesn't have a model system within two years, then I haven't done my job. Or they haven't listened to me."[64]

Although Fellmeth's next semi-annual report called the Bar's response "constructive," he still found that "fundamental" deficiencies rendered the disciplinary system "unacceptable."[65] Investigative caseloads were too heavy; complex cases required vertical prosecution. Both Fellmeth and Van de Kamp "strongly" endorsed professional judges in both the Hearing and Review Departments; but the SBC dismissed "any suggestion that [referees] are or have been biased" as "unsupported by any empirical evidence." Although Fellmeth urged the Bar to seek a $50 dues surcharge for discipline, it sought only $25, because "upper staff" had engaged in "blockage of the grim facts concerning backlog, abeyance, and low staff morale." The Bar "should require all local bar associations to immediately transmit any complaint received about any attorney which might facially involve a breach of the Rules of Professional Conduct." The Bar should use and improve systems for notifying it of criminal convictions, malpractice claims, and contempt orders or sanctions. It should address incompetence, perhaps by limiting practice areas. The "highly funneled pattern" of terminating more than 95 percent of cases without a hearing had become even more "exaggerated" in the preceding six months.[66]

The Bar responded by seeking a dramatic dues increase to improve discipline (from $276 to $470, which the Legislature cut to $417).[67] President Anderlini declared that "it is the legal profession's responsibility to run a strong discipline system and that

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[62] "Cleanup Task for the Bar," *San Francisco Examiner*, reproduced in LADJ 5 (6.8.87).
[63] Orville A. Armstrong, "Reflections," in "The State Bar of California Annual Report 1986-1987," 7(12) California Lawyer 60-61 (12.87).
[64] Weber (1987: 63).
[65] Fellmeth (1987c: 1, 6).
[66] Id. 12, 16, 18, 28, 30-34, 37-38, 47-51, 56, 60, 173, 175 and Exhibits I and XII.
[67] Tom Dresslar, "Legislators Trim State Bar Dues, Discipline Bills," LADJ 1 (5.18.88); Tom Dresslar, "Assembly Judiciary Panel Approves Bar Dues Bills," LADJ 2 (5.19.88); Tom Dresslar, "Assembly Approves Landmark Attorney Discipline, Dues Bill," LADJ 2 (6.3.88); Tom Dresslar, "State Legislators Return Today to Full Plate of Bills," LADJ 1 (8.1.88); Tom Dresslar, "Dispute Stalls Action on State Bar Two-Bill Dues Package," LADJ 2 (8.4.88) (public members on BoG and power to appoint SBC judges); Tom Dresslar, "State Bar Discipline, Dues Bills Clear Senate Judiciary Panel," LADJ 2 (8.10.88); Tom Dresslar, "Senate Passes Bar Dues Hike, Companion Bill Stalls," LADJ 2 (8.19.88); Tom Dresslar, "Assembly Sends Bar Dues, Discipline Bills to Governor," LADJ 2 (8.23.88).

anything less will risk having the responsibility taken away but not the cost."[68] The Los Angeles *Daily News* agreed that increased dues should fund improved discipline: "At least this is a reform for which lawyers would pay. The public has paid enough."[69] While also supporting the increase, the *San Gabriel Valley Tribune* warned that the state would assume "complete control of the discipline process...if attorneys don't get their house in order."[70] The *Sacramento Bee* praised the Bar for taking a "first step toward laying the financial basis for some long-overdue reforms in the legal profession's notoriously inept system of self-discipline."[71] The

> bar's current enforcement efforts constitute a system that might as well have been designed to fail. Every conceivable barrier has been enacted to frustrate consumer complaints, prevent investigations into attorney wrongdoing and safeguard the license of lawyers who steal from their clients.

But the newspaper warned that "The Los Angeles and San Francisco bar associations and the state's major corporate law firms exercise a lot more political clout than the board of governors, and they've been able to block reforms proposed by the State Bar in the past." Quoting Anderlini's admission that the disciplinary system is "not one we can be proud of," the *Los Angeles Times* said that "some overdue changes have been undertaken since the Legislature scared the bar," but "problems remain" (listing Fellmeth's criticisms).[72] It endorsed the professionalized State Bar Court and criticized "resistance to a dues increase" as "unbecoming to the profession." "California could learn to respect lawyers—if, this once, they demonstrate that they are willing to pay what it takes to police their own ranks."

Fellmeth's April 1988 report found little improvement. True, in its first eight months the Complainants' Grievance Panel (created by SB 1543 for clients dissatisfied by dismissal of their complaints) had completed 320 cases, ordering further investigation in 88 and recommending action in ten., But intake had cleared its backlog by classifying calls as inquiries rather than complaints. the ratio between which had increased from 1:1 to 4:1. And the bottleneck had simply moved downstream: nearly 2,000 cases had been in investigation more than six months (the legislative definition of backlog), more than half for at least a year, and 700-1,000 cases were awaiting NTSCs. The Supreme Court' Select Committee on Internal Procedures (Richardson Committee) had complicated institutional reform by recommending that the Court of Appeal review SBC decisions. Fellmeth preferred SB 1498 (supported by the Attorney General and State Bar staff), which would professionalize the SBC (and make many of the other changes he had urged).[73]

The Auditor General's first annual report mandated by the 1986 legislation seconded Fellmeth's criticisms.[74] From 1984 to 1986 the State Bar met the six-months goal for resolving complaints in less than half the cases. Even though it obtained 46 new

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[68] Terry Anderlini, "President's Message," 8(3) California Lawyer 66 (3.88); "President's Message," 8(4) California Lawyer 75 (4.88); "Discipline, Fee Bills Advance," 8(7) California Lawyer 75 (7.88); AB 4391.
[69] "It's Broken, So Fix It," *Los Angeles Daily News*, reproduced in LADJ 4 (1.23.88).
[70] "Cleaning House," *San Gabriel Valley Tribune*, reproduced in LADJ 4 (2.8.88).
[71] "Self-Discipline," *Sacramento Bee*, reproduced in LADJ 4 (2.19.09).
[72] "A Little Respect," *Los Angeles Times*, reproduced in LADJ 4 (4.6.93).
[73] Fellmeth (1988a: 5-6, 21-23, 31-51, 53, , 56, 72).
[74] CAG (1988: s-1 to s-3, 10, 20-21, Table B-4); Letter from Terry Anderlini, State Bar President, to Thomas W. Hayes, Auditor General (6.16.88), in Id.

positions in 1986, "it still has been unable to meet its six-month goal because it also lacks an effective case management system." The SB had done no work for 180 consecutive days on 40 out of a random sample of 131 cases and none for almost 18 months on one of them. Although New York paid CSF claimants within two months of discipline, California took an average of 18 months. Between 1984 and 1987 disciplinary complaints took an average of 640 days to complete. President Anderlini responded that the report "looks at a limited number of cases" and "concerns history rather than the present." The problem was the number and complexity of the cases and the scarcity and inexperience of staff.

Looking back on his year as president, Terry Anderlini called passage of SB 1543 "the most massive administrative reform of a state agency ever accomplished in California." As a result, "the California attorney discipline system will be the model for the nation." Senator Presley "hope[d] this all works, and I think it will. The bar now seems seriously concerned about reforming its discipline system." Although incoming President Colin Wied thought it "a little premature to declare victory," it was "not too early for the board to return its attention to the bar's other responsibilities." Optimistically entitling his first president's message "Life after Discipline—1989," Wied congratulated California lawyers "for overwhelmingly supporting the change to (and cost of) a system that will protect the public from the few among us who discredit the profession." [75]

But as Wied began his (unopposed) presidential term, Fellmeth's next report found that the backlog was increasing at all stages and "greater than it has ever been in the bar's history."[76] He voiced new criticisms. A recent survey found that 28 percent of full time private practitioners carried no malpractice insurance; of those who had gone bare, over half had done so since premiums began increasing dramatically in 1985. Although there were few unsatisfied awards, plaintiffs' lawyers discouraged claims against uninsured attorneys. Fellmeth urged that malpractice insurance be mandatory (a reform the State Bar had abandoned under pressure from large urban bars) and an unsatisfied judgment be a disciplinary offense leading to interim suspension until it was paid. Lawyers who were the object of malpractice claims were also more likely to face disciplinary complaints. But the State Bar had successful defeated requirements that plaintiffs filing malpractice claims inform the disciplinary system, attorneys report the settlement of all civil judgments, and courts report serious contempt and non-discovery sanctions. The Bar opposed Fellmeth's proposal that disciplinary proceedings be public when there was a criminal investigation or charge, a high priority investigation, or multiple CWs. The current rejection letter, informing the CW that "the Supreme Court has ruled that the State Bar's decision must be in favor of the attorney" where there was no evidence beyond the CW's word was "somewhat dishonest." Although the Board had rejected mandatory continuing legal education in 1983, it now was sponsoring legislation to require 36 hours every three years, at least eight concerning legal ethics and practice management. Fellmeth also urged specialist certification through additional

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[75] "Beyond Discipline," 8(7) California lawyer 76 (7.88); Colin Wied, "Life After Discipline—1989," 8(10) California Lawyer 100 (10.88); "Bar Has Fee Bill, Discipline Goals," 8(11) California Lawyer 99 (11.88).

[76] Fellmeth (1988b: 1, 5, 13, 17-18, 35-36, 39, 45-46, 50-51, 60, 62-63, 67, 76, 95, 106-08, 110-11, 112-19, 132-34, 147-55, and Ex. I (David Long, "Malpractice Insurance Report" 3.29.88)).

examinations. Although "at least 30% of meritorious disciplinary cases involve some form of chemical dependency," existing programs enrolled a "miniscule" number of lawyers. Despite "substantial evidence that overbilling is common," the requirement of a written agreement was enforceable only when the lawyer sought more than the fair value of services (i.e., a contingent fee). "[C]harging fees beyond those agreed to or consistent with time competently expended" should be 'a very basic part of the disciplinary jurisdiction of the Bar." The client security fund had a 30 percent overhead, did not pay until discipline was final (often 4-5 years), and its backlog was approaching 2,000 claims. Fellmeth urged that it be better publicized, expanded to inadequate professional service, and authorized to grant default judgments up to $1,000 and recover it from the lawyer.

Gert K. Hirschberg (who had been a Bar Governor and presiding referee of the volunteer SBC and represented two of the lawyers in the disciplinary cases described below) passionately defended the old system and attacked the new.[77] "On balance, I trust a lawyer more than a non-lawyer" client. The dues bill imposed "onerous conditions" to promote reforms that "demeaned lawyers." The "whole tenor" of Fellmeth's "demeaning" report was that "attorneys are crooks, clients are honorable, and we the lawyers of California must be watched on a 24-hour basis with the precision of a national anti-nuclear defense system. I don't like the concept that attorneys should be treated like burglars." The elimination of volunteer referees was "devastating" and responsible for "the onslaught of disciplinary filings that we now have in technical and/or Mickey Mouse matters." The volunteer system was "speedier and more efficient." "I believe that only an attorney can evaluate an attorney." "[O]n balance we had the best system." Hirschberg offered examples of "recently enacted changes [that] should be repulsive to any lawyer": "failure to cooperate can be another basis of discipline;" "confidentiality disappears" after issuance of an NTSC; the hypocritical claim that "the function of discipline is protection of the public and not punishment." He ended apocalyptically: "If California lawyers continue to be passive, non-assertive and silent, then read my lips: The State Bar, as we now know it, is bound to die."

In February 1989 the California Supreme Court reversed the Court of Appeal decision in *Keller*.[78] Justice Broussard (writing for just three others) upheld the general authority of the State Bar, as a public corporation, to engage in lobbying and file amicus briefs to promote "the improvement of the administration of justice" but agreed it could not participate in electoral politics. Although Murray's speech crossed that line, the Governors were not personally liable.

At the end of his term, Wied looked back on "a very good year" and called "Discipline, A Done Deal."[79] But Fellmeth's next three reports continued to find "serious problems." The number of complaints opened for investigation had fallen from 7,542 in 1987 to 4,376 in 1988, while the number of communications to the SB had increased from 8,000 to 14,000. The toll-free number still was not adequately listed in telephone directories. Self-reporting of malpractice claims, sanctions, criminal convictions, fraud judgments and discipline in other jurisdictions was a farce. But Fellmeth praised the use of letters of warning (instead of admonitions) and "agreements in lieu of discipline" (ALD), a form of diversion for substance abuse. OI was issuing nearly twice as many

[77] Gert K. Hirschberg, "The State Bar Has Wimped Out on Discipline," LADJ 6 (3.17.89).
[78] Keller v. State Bar, 47 Cal.3d 1152 (1989).
[79] Colin Wied, "President's Report," 9(9) California Lawyer 103 (9.89).

Statements of the Case (SOCs). The dues increase had allowed the Bar to increase disciplinary personnel from 381 to 494.[80] Investigator workload fell from 180 to 40-50 and OI backlog from 4,000 to less than 700. Formal discipline in 1988 was twice the previous seven-year average. That 60-75 percent of respondents had other pending complaints suggested that a "hard core" of 1-2,000 lawyers were responsible for "an extraordinary proportion of consumer complaints.[81] The Bar responded by creating a "Repeaters' Task Force," which "identified just over 50 attorneys responsible for 570 currently open matters." By January 1990, OI had further reduced its backlog to 352 "in the face of an extraordinary increase in the number of new cases filed by a more active public" and without "dumping" cases. Cases classified as complaints and those submitted for formal discipline both had tripled. Median case age had declined to eight months, its lowest level in ten years. The 29 interim suspensions were several times the previous number. Whereas only 10 percent of investigated cases used to lead to discipline, 20 percent now led to informal and 30-40 percent to formal discipline.[82]

In February 1990 SB President Alan I. Rothenberg held a press conference in the Capitol to present the Bar's first annual report on "a reformed, revitalized and rebuilt system that I believe will set new standards in professional discipline" and "serve as a model for all professions and businesses in this country." He praised members for having "footed the bill—more than $100 million over the past three years—to improve their discipline system." Senator Presley agreed that "we're now doing a reasonably good job." Assemblymember Nolan concurred that "the bar has put in place an effective system."[83] But not all lawyers were convinced.[84] A San Francisco lawyer waged an unsuccessful BoG campaign based on dissatisfaction with increased dues, which was not "worth the output." "We are not going to appreciably affect the discipline problem...by simply adding 50 disbarments a year." A lawyer who had quit the OTC found "the emphasis on numbers...very distressing." Another defector said OI "were more concerned with moving numbers than with properly preparing cases to prosecute at trial." Fellmeth conceded that "in the frenzy to reduce the backlog, there very likely were cases that weren't adequately investigated." But defense lawyers praised the SBC for consistency and striking "a good balance between sterner discipline and fairness."

In June 1990 the U.S. Supreme Court unanimously reversed *Keller*.[85] Justice Rehnquist began by listing some of the issues on which the Conference had taken political positions to which the plaintiffs had objected: mandatory polygraph tests for government employees, armor-piercing handgun ammunition, standing to sue for air pollution, the display of drug paraphernalia for sale to minors, individualized education programs for special needs students, gift tax exemptions for the costs of education and medical care, life imprisonment without parole for minors tried as adults and convicted of murder, voter approval for low rent housing, guest worker programs, the constitutionality of a victim's bill of rights, a nuclear weapons freeze, and limitations on federal court

[80] Fellmeth (1989a: 1, 13-14, 20, 24-25, 44-45, 49, 59-61).
[81] Fellmeth (1989b: 2, 13-17, 19, 51, 67).
[82] Fellmeth (1990a: 1-3, 7, 19, 22, 27-28, 57, 61-6, 66-69, 72-73, 75-76).
[83] State Bar of California (1990b: 3, 5, 15, 20); "Rothenberg, Legislators Praise California Lawyers for Revitalization of Discipline System," 10(4) California Lawyer 65 (4.90).
[84] Michael J. Hall and Clyde Leland, "The State Bar Court One Year Later: Is it working and is it worth the cost?" 10(12) California Lawyer 30 (12.90).
[85] Keller v. State Bar, 491 U.S. 1 (1990).

jurisdiction over abortion, school prayer, and school busing. The Court followed its 1997 decision limiting the use of dues from nonunion public employees in agency shops to support political and ideological causes unrelated to collective bargaining,[86] finding that the State Bar was much more like a trade union than a government agency. Although the line between permitted comment on regulation of the legal profession and "activities having political or ideological coloration which are not reasonably related to the advancement of such goals" was "not always easy to discern," gun control and a nuclear weapons freeze were "clear[ly]" at the "extreme ends of the spectrum.

President Rothenberg spun the decision as "a ringing affirmation of the constitutionality of the unified bar and its important relation in the administration of justice." "Since the vast majority of all State Bar funds are in fact dedicated and used for" permissible purposes, "in my view this decision will not affect the bulk of our activity." The president of the conservative Pacific Legal Foundation (which represented the plaintiffs) agreed that "bifurcation was never discussed…." And a member of the PLF Board of Trustees declared: "It would be terrible if the bar were dismantled because of the suit."[87]

Gert Hirschberg used the first anniversary of the reforms to declare that "The New State Bar Court Has Become a Monster."[88] "The new system is a catastrophe and the good lawyers of California have been irreparably damaged." "The immediate past leadership of the State Bar has greatly—very greatly—increased our Bar dues to satisfy the insatiable appetite of the new disciplinary system." He described "a recent case in which my client committed the unforgivably serious, heinous offense of not returning one or two phone calls." "[T]he matter was eventually dismissed bec it turns out that the complaining witness was even more irresponsible than he claimed the respondent attorney to be." "A certain number of investigators, armed with the power of subpoenaing trust accounts, not only uise their power indiscriminately, but wield their atuority as a threat to the attorneys they contact." "Much attorney misconduct was created by the U.S. Supreme Court when it legitimized lawyer advertising."

Fellmeth's last three reports between September 1990 and September 1991 were generally positive. Client calls were leveling off. Warning letters had removed hundreds of cases from OI, and settlement conferences before and after NTSCs resolved 60-65 percent of cases. The Bar was using information on NSF checks and criminal charges and random trust account audits to reduce attorney theft.[89] But the bottlenecks had shifted from OI to the charging stage. And "the vast majority of consumer complaints directed to us now concern the delays and unresponsiveness of the Complainants Grievance Panel." A 1990 letter to all judges from Chief Justice George produced three or four calls a week about attorney misconduct. The entire process had speeded up: 7-9 months from NTSC to decision and another 219 days to the end of an appeal. Fellmeth called the Supreme Court's decision to make Review Department rulings final a "vote of confidence manifested beyond rhetorical support."[90] His final report noted that even though the toll-

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[86] Abood. v. Detroit Board of Education, 431 U.S. 209 (1977).
[87] "The Keller Decision: U.S. Supreme Court Upholds Concept of Unified Bar," 10(8) California Lawyer 67 (8.90); James Evans, "Behind the Keller Case," 10(5) California Lawyer 35 (5.90).
[88] Gert K. Hirschberg, "The New State Bar Court Has Become a Monster," LADJ 7 (20.24.90).
[89] Fellmeth (1990b: 2, 4-5, 7, 23, 29-30, 53-55, 71, 95).
[90] Fellmeth (1991a: 21-22, 25-26, 31-33, 35, 48, 62, 68-75, 78-80, 98).

free number still was not listed in most directories, it received 70,000 calls a year.[91] "Most important, the backlog is gone," and not through "summary closure of cases." But "the elimination of the OI backlog created a backlog in OT as a `bubble' of cases has moved through the system over the past four years. The State Bar Court is now receiving the full brunt of this bubble": an expected 1,800 cases in 1991, forcing it to depend on pro tem judges. The magnitude of the change reflected the "inadequacy of the Bar's discipline system in January 1987."

But the real test was the "impact on the profession," which remained seriously deficient in the two areas most critical to regulatory purpose: "the personal dishonesty and incompetency [sic] of large numbers of licensees...." "The measures undertaken by the Bar over the past four years to address the incompetence problem have been well-intentioned but are grossly inadequate.... The failure of the Bar to establish overall standards of personal honesty is similarly stark." Fellmeth had fundamental doubts about self-regulation: "Political reality makes it difficult for the Bar's governors or its electorate...to burden themselves substantially for the benefit of a larger population or purpose." His own survey of client complaints identified the most common (in descending order): untruthfulness, abandonment, keeping unearned money, not returning calls, failing to investigate, and overcharging. Listening to the toll-free number for two days had been a "deeply troubling" experience. Several callers had "spent half a day looking" for the number, and half still encountered a busy signal. Because so many did not return complaint forms, "the bar should consider capturing oral complaints into its pattern detection system." The State Bar

> must understand that the disrepute of what should be a proud profession is not the product of media bias, and is not curable through public relations campaigns...it is the cumulative impact of thousands upon thousands of these experiences, endured and then shared by word of mouth.

Perhaps regretting some of his earlier praise, Fellmeth told the *Los Angeles Times* that "the State Bar is prone to excessive spates of self-congratulation." It was

> regrettably likely to focus on the deserved acknowledgment of progress to dampen the equally important need for further reform. In point of fact, in terms of bottom-line performance by attorneys, we are still in a state of crisis.

Indeed, SB President John M. Seitman declared that Fellmeth "has now confirmed that the State Bar's turnaround has been truly unique, and that we today have the finest attorney discipline system in the nation." Not all his constituents agreed. One called the disciplinary system "a behemoth that consumes 75 percent of the bar's annual budget" and quoted an even angrier colleague, who denounced the SB as a home for "self-regarding power-mongering, duplicitous punks with ethical standards far beneath those of the lawyers they regularly pillory."[92]

Establishment figures also were critical, if in more measured tones. The ABA Commission on Evaluation of Disciplinary Enforcement (created in February 1989 and chaired by Robert B. McKay until his death in 1990) submitted a draft report in 1991,

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[91] Fellmeth (1991b: 21-22, 28-31, 41-42, 45, 47, 52-53, 56, 61, 63, 67, 69, 94, 119).

[92] Philip Hager, "State Bar Steps Up Disciplining of Lawyers," Los Angeles Times A25 (9.21.91); Michael J. Hall, "Gotcha! The care and feeding of the state's disciplinary watchdog," 12(8) California Lawyer 44 (8.92).

which was adopted by the ABA House of Delegates the following year.[93] Although it found "revolutionary changes" since the Clark Report 20 years earlier, "times...have changed." "The existing system...is narrowly focused on violations of professional ethics" and did not address "complaints that the lawyer's service was overpriced or unreasonably slow" or "incompetence or negligence except where the conduct was egregious or repeated" or situations where "the lawyer promised services that were not performed or billed for services that were not authorized." "Some jurisdictions dismiss up to ninety percent of all complaints," many of which "state legitimate grounds for client dissatisfaction." "Complainants should be permitted a reasonable opportunity to rebut" the respondent's defense and be "notified in writing when the complaint has been dismissed" with "a concise recitation of the specific facts and reasoning upon which the decision to dismiss was made." "The disciplinary system also does nothing to improve the inadequate legal or office management skills that cause many of these complaints." "Every year, millions of dollars of clients' money are stolen by a relatively few lawyers. Yet, most disciplinary systems lack authority to take basic preventive measures such as auditing trust account records or monitoring trust account overdrafts." Unless these deficiencies were remedied, "the public may remove the authority of the judiciary to regulate lawyers." Because "control of the lawyer discipline system by elected officials of bar associations...creates an appearance of conflicts of interest and of impropriety," "the state high court should control the disciplinary process *exclusively*."

SB President Vogel called the report an endorsement of California's disciplinary system. "Virtually all of the recommendations contained in the report already have been implemented...." Indeed, when New Jersey commissioned a comparison with California, the latter looked far better. It investigated a higher proportion of its lawyers (6.6 versus 2.2 percent), imposed discipline on more (0.5 versus 0.1 percent), and concluded the vast majority of simple cases in less time (16 months versus 666 days).[94]

But these figures also could justify criticism of both states. And in December 1993, SB President Margaret M. Morrow appointed a Discipline Evaluation Committee (DEC) chaired by Judge Arthur Alarcon (who had recently taken senior status on the Ninth Circuit) to report on the system's cost effectiveness and fairness in order "to ensure consumer protection and fair process for attorneys." Its August 1994 report found that the Bar's response to the crisis exposed by the *Examiner* was "A Success Story—The Backlog Eliminated—The Delay Reduced."[95] Nevertheless, it suggested numerous changes. Because the Complainants Grievance Panel "raises false expectations" but "recommended discipline in only one percent of cases" it should be replaced with random audits of rejected complaints by the Office of Consumer Advocate. The State Bar should "respond in writing to all written complaints and provide complainant a chance to rebut the respondent's story before the case is closed." Disagreeing with Fellmeth, the DEC supported a pilot SB program "to turn over certain discipline related matters to the local bars." It also recommended reversing Kroeker by placing investigators under OTC supervision (although "total verticalization" was not possible). Ethics School should be

[93] ABA Commission on Evaluation of Disciplinary Enforcement (1992: xi-xx, 14, 33, 43, 48-50, 75).
[94] "State Bar's Discipline System Mirrors Most Recommendations in ABA Commission Report," 11(7) California Lawyer 92 (7.91); Gillers (1993: 26-27, 32-33).
[95] State Bar of California Discipline Evaluation Committee (1994: 16, 24-36, 38-44, 47-48, 50-68); California Legislative Analyst's Office (1991).

part of all formal discipline since only 9 percent of its graduates were recidivists, compared with 62 percent of all respondents. Summary and permanent disbarment should be expanded. The system should investigate billing fraud and publish the names of firms whose attorneys were disciplined.

Making "reducing the cost of the discipline system…a priority" because of the lawyers' "widespread perception" that it "is too high," the report proposed reducing Bar dues from $578 to $450 in 1995 and $399 in 1996. The "first place to look for overstaffing" was "in the supervisory and management ranks," which supervised only 2.7 employees, compared with 7 in other courts. SBC judges also had too many legal and lay assistants. Travel costs were too high, perhaps because at least one employee commuted from San Francisco to Los Angeles at State Bar expense. In a "classic example of Parkinson's Law, the SBC has engaged in practices to make its work expand to occupy the ample time available for its completion." Caseloads were "significantly lower" than in federal and state trial courts despite the fact that SBC judges "specialize in one area of the law." The number of judges should be reduced from six to four and the seventh position not filled. Because of their low caseload, hearing judges "spend one-half of their time writing scholarly twenty-page opinions in every case before them, including default matters." They should limit opinions to the 11 percent of cases appealed and dispense with evidentiary hearings in the 20 percent of cases where the respondent defaulted (since defaulters should lose their right to appeal). Judges should play an active role in settlement to achieve the higher rates found in other courts. The Review Department's low caseload—approximately 40 a year—did not justify three judges and their support staff. (A 1991 review by the Legislative Analyst's Office had reached the same conclusion.) The Department should not review the entire record de novo. Having published more than a hundred opinions, it should publish more only if the case established, altered, modified or clarified a rule, resolved an apparent legal conflict, made a significant contribution to the legal literature, or involved legal or factual issues of special public interest.

An angry State Bar began its rebuttal by noting that "none of the committee Members…ever observed a SBC proceeding."[96] The SBC had underspent its budget by several hundred thousand dollars every year since 1990, reducing staff from 80 to 74 while processing 2.5 times as many cases. The "radical surgery" proposed would "cripple" the SBC to save lawyers only about $2 a year. A recent 81 percent increase in pending investigations would soon cause "a major spike in court filings." Estimates of judicial workload should take account of the fact that one judge was a layperson, while the presiding judge spent half her time on administration. Hearing judges had increased their average dispositions from 100 in 1990 to 190 in 1994 and their settlement rates from 17 to 51 percent. Disciplinary cases were more complicated than other civil matters. The SBC maintained that written opinions were legally required; almost half were less than 15 pages. Publication of Review Department decisions had a prophylactic effect on lawyer behavior, increased public confidence, and encouraged settlement. The Supreme Court required de novo review. The judges unanimously believed "it would be impossible for the SBC competently to perform its mandated functions with only four hearing judges statewide." The recommendation that a single manager execute policies

[96]State Bar of California, State Bar Court (1994: 2-25, 29-30, 37); memorandum from Scott Drexel, Chief Court Counsel (2.9.94) in Id.

set by the Board of Governors was "contrary to the dictates of the key 1988 reforms ensuring separation of powers," as well as the "ABA McKay Commission's recommendations for reducing the role of elected bar officials." The Response concluded: that the "recommended reductions to the SBC [are] both misguided and dangerous to the continued effectiveness and credibility of the California attorney disciplinary system."

Nevertheless, the Bar made some changes. The Office of Intake "formalized use of directional letters as a viable alternative to discipline," "developed a pilot program to refer matters to ADR programs operated by local bar associations," and expanded other diversion alternatives: Ethics and Client Trust Accounting schools, attorney substance abuse programs, a law office management assistance program, ADR camp, civility programs, and agreements in lieu of discipline. The Bar eliminated the Office of Investigations, subordinating investigators to OTC attorneys. The sunsetted Complainants' Grievance Panel was replaced with a volunteer Discipline Audit Panel reporting to the OTC.[97] Declaring that "the time has come for the bar to steer away from a numbers-based system which focuses on the speed of completing cases rather than on the severity of disciplinary offenses," Judy Johnson (the new CTC) created "strike teams" focused on insurance fraud, probate abuses, unauthorized practice of law, uncertified lawyer referral services, workers compensation abuses, billing and bankruptcy fraud, and capping at major disasters (earthquakes, fires, plane, rail and bus accidents). Legislation expanded involuntary inactive status, authorized nolo pleas, and prohibited lawyers from conditioning settlement of malpractice claims on clients withdrawing disciplinary complaints.[98]

In addition to these contradictory pressures for more effective discipline at lower cost, 11 discipline defense lawyers (most of them former SB prosecutors) wrote the president and BoG charging "highly questionable" prosecutorial conduct.[99] They objected to "the withholding of evidence which should have been made available through discovery and also to the withholding of exculpatory evidence favorable to the accused, possible tampering with witnesses, [and] the improper leaking of confidential information to third parties." During the recent disciplinary proceeding against palimony progenitor Marvin Mitchelson, a "deeply disturbed" Judge Langhauser recommended dismissal because of prosecutorial overcharging and failure to comply with discovery requests, the first time that had ever happened. Declaring that the OTC "shoot with a shotgun...they're not officers of the court. They're just interested in winning," Ted Cohen (one of the letter's signatories) urged the BoG to appoint a special prosecutor. SB President John Seitman called this unnecessary. "We just went through about three years of a discipline monitor. Generally, he made a lot of very laudatory comments about the system." At the end of 1992 four defense lawyers appeared at the SB's annual hearing on discipline to press their case.[100]

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[97] CTC Judy Johnson supported this change, arguing that the DGP cost about $1 million a year and only led to discipline in 1-2 percent of cases, mostly a warning or directional letter.

[98] State Bar of California (1995: 1-2, 4, 9; 1996: 3, 21; 1997: 3-5, 12-15); "Bar's chief prosecutor signals new approach to attorney discipline," CBJ 1 (1.95).

[99] William Vogeler, "State Bar Asked To Investigate Discipline Staff," LADJ 1 (8.26.92). The signatories were Ted Cohen, David Clare, Diane L. Karpman, Ken Kocourek, Tom Low, Arthur Margolis, Susan Margolis, R. Gerald Markle, Ellen A. Pansky, Michael J. Rochford, and Erica Tabachnick.

[100] Jean Guccione, "Lawyers Join Consumers in Attack On Discipline System, Profession," LADJ 1 (12.3.92).

Others had personal reasons to resent the disciplinary system. In March 1993 Assembly Speaker Willie Brown Jr. introduced AB 1544 to increase knowingly filing a false complaint from a misdemeanor to a felony and extend the statute of limitations from one year (which made it almost impossible to charge) to three.[101] Brown, who unsuccessfully advocated this before, had been investigated twice, and though no charges were filed the allegations became public. Defense lawyer Ellen Tabachnick (who had helped draft the bill) said it "will cause people filing vindictive complaints to think twice." The bill also would preclude future charges following a decision not to charge (absent new evidence), deny the Bar costs and make it liable for defense costs if prosecutors failed to secure a penalty more severe than what the respondent had accepted, exclude doctors from complaining about unpaid medical liens, mandate settlement conferences before the filing of charges, and require the OTC to produce exculpatory evidence. Fellmeth warned that these changes would "debilitate the discipline system severely and are irresponsible." "You have a consumer already terrified and who has to stand up against someone who is familiar with the legal system. And the first thing you tell them is, 'if what you're saying here is proved wrong, you're going to jail.'" "Prosecutors may have a very good reason for seeking disbarment. This may deter them from doing so." The *San Diego Union-Tribune* editorialized against this "Lawyer Protection Act," which would "nullify many of the improvements the reforms have produced."[102] The perjury threat "would have a chilling effect on many clients...." The newspaper blamed the bill on "howls of protest from a few lawyers" angered by the 300 and 500 percent increases in disbarments and suspensions. But at the Italian American Lawyers Association, Willie Brown implicitly threatened to block the dues bill (which he was carrying) if the Bar did not accept his discipline bill.[103] A few days later, just before the Senate Judiciary Committee was to take up the latter, Brown defended the perjury threat: "those who criticize it are really bordering on being the lynch mob...of a particular group."[104]

It was not just celebrities who attacked the system. Richard Gayer, a gay rights sole practitioner, filed a federal civil rights action alleging that State Bar discipline discriminated against sole practitioners and its use of newspaper stories in investigations violated the First Amendment.[105] The bar was investigating reports that Gayer entered a San Francisco apartment through a window during a 1989 probate dispute between an executor and the decedent's former roommate. Gayer was ordered to pay the defendant in the probate case over $5,000. "My main motivation for filing the lawsuit is the clipping service. I think it is outrageous. They must get enough complaints as it is." "When somebody writes a letter, they go out and find the allegations...why go digging? They had to do a lot of research to even find the case." "There has to be an ulterior motive. Maybe it's as simple as having something for their bloated bureaucracy to do."

If the popular press generally called for more discipline, professional journals sometimes sided with disciplined lawyers. A series of five lead articles in the *Los Angeles*

[101] Tom Dressler, "Bill by Brown Would Modify Bar Discipline," LADJ 1 (3.9.93).
[102] "Kill the 'Lawyer Protection Act,'" *San Diego-Union Tribune*, reproduced in LADJ 6 (4.23.93)
[103] Susan McRae, "Brown to State Bar: I'm Ready for Battle," LADJ 2 (8.20.93).
[104] "Speaker Assails State Bar on Discipline," LADJ 3 (8.25.93).
[105] Michael J. Hall and Jessica Guynn, "S.F. Lawyer Alleges Bias in Bar Discipline," LADJ 3 (6.4.93). Gayer v. State Bar, N.D.Ca C93-2085.

Daily Journal quoted a complaint by an "outspoken consumer advocate" that SB prosecutors "go after the easy fish," which was seconded by former CTC Lily Barry: "the bar goes too far with minor discipline. They see their mission as being out to get the lawyers."[106] Defense lawyers who had signed the letter above agreed: "a great deal of resources [are] being spent on low-level cases" (Ellen A. Pansky); "investigators...don't know the law they are supposed to enforce" and were "heavy-handed" (David A. Clare); "you have got some Dirty Harrys there" (Arthur L. Margolis); and "important and complicated cases get pushed to the back of the file cabinet while the number-crunchers push easier cases that generate better statistics" (Jerome Fishkin). Roberta M. Yang, director of trials, acknowledged that trust account violations "are our bread and butter" and investigators got frozen turkeys for clearing their caseloads at the end of the year. But though complaints had increased greatly, charges were still close to their 1989 level because the system was at capacity, and about half of them settled.

The third article questioned the system's cost, repeating criticisms that the three Review Department judges wrote just 40 opinions a year and hearing judge opinions did not become case law.[107] Judge David S. Ewsley replied: "If I could say, 'Guilty,' and check a box, I would do it," but it would lead to more appeals. The court spent had spent $214,851 on temporary judges in 1992 (at $350/day) and budgeted $72,756 for 1994. A third of their decisions were appealed, compared with 11 percent of those by the six full-time judges. Defense lawyer Theodore Cohen commented: "You would think your death penalty cases—which is what disbarment is equivalent to in this system—would be handled by State Bar Court judges." Full evidentiary hearings were held for the one in five respondents who defaulted but could still appeal. Defense lawyers who had severely criticized prosecutors lavished praise on the SBC: "almost perfect compared to the old system" (Ellen Pansky); "an oasis in the discipline system. Even when we lose, we feel we have been heard" (Arthur Margolis). But prosecutors felt that the court, which dismissed more than a quarter of the cases heard in 1993, was "too lenient" toward lawyers and generally hostile to the OTC. In response to these criticisms, Presiding Judge Lise A. Pearlman decided that the other two Review Department judges would begin working just 60 percent of the time.

Soon after the Supreme Court proposed that each SBC judge would compete with two others for reappointment, SBC Presiding Judge Lise Pearlman and four of the eight others were not reappointed, to the surprise and dismay of prosecutors, defense counsel, and former judges. Although some attributed the action to criticisms of excessive lenience, Pearlman said the Applicant Evaluation and Nomination Committee had been interested only in her relations with the BoG. One committee member had asked "why I should be recommended for reappointment if I couldn't 'get along' with the board." Pearlman had resisted the DEC proposal to strip her of control over staff, which "has severe implications for the independence of the court." Several months earlier Towery (CAD chair and president-elect) had criticized Pearlman for failing to offer a staff reduction plan in response to the DEC report. A DEC member criticized her testimony as "a defense of the status quo." Pearlman called the remark "regrettable," complaining that

[106] Jean Guccione and Michael J. Hall, "Is Too Much Evidence Given to Minor Violations?" LADJ 1 (7.12.94). The first article on July 11 dealt with intake.

[107] Jean Guccione and Michael J. Hall, "State Bar Court Lavish, Wasteful, Critics Claim," LADJ 1 (7.13.94).

her court had been "left out of the loop recently." Eight months after being removed, Pearlman said she initially had been "highly praised by bar leaders for establishing the court's credibility as an independent entity," but in the last two yaers "Bar leaders began giving administrative orders to court staff, bypassing me and the State Bar Court Executive Committee...." She was "vilified by new board members for defending the very same degree of independence with which the court had started." California was "moving in the opposite direction" from the 1991 ABA committee recommendations.[108]

V. Backlash

When Willie Brown introduced a bill in 1992 to abolish the State Bar, President John Seitman persuaded him to withdraw it by agreeing to establish a Commission on the Future of the Legal Profession (a majority of whose 30 members would be appointed by his successor and the rest by Governor Pete Wilson and legislative leaders). Its 1995 report recommended shifting control of the SBC (14-6) but not the entire discipline system (10-11) to the Supreme Court (even though Chief Justice Lucas resisted); it favored keeping the unified bar with its current functions (13-8), including admissions and discipline (17-2), and opposed a voluntary bar to handle all other functions (12-6). A contemporaneous poll of 500 lawyers found that large majorities believed that the bar should remain mandatory (74%) and continue to discipline (76%) and license lawyers (79%). The BoG responded by affirming the status quo over the dissent of two public members, one of whom (Wendy Borcherdt) objected: "we seem to err on the side of the tainted attorney. ...I urge you to consider public protection and not always protecting your own."[109]

But politicians continued to use the Bar as a whipping boy. Contemporaneously with the Commission report, Sen. Quentin L. Kopp (I-San Francisco) introduced SB 60 to reduce bar dues by $100 and require the Bar to conduct yet another plebiscite on its mandatory status. SB President Don Fischbach protested that the reduction would cripple Bar programs. Dues had not been increased since 1991; even the DEC report recommended only a $79 cut over two years. The Bar had responded to that report by cutting expenditures by $700,000, and a budget review ordered by Fischbach had saved another 5%, avoiding a fee increase. A month later Willie Brown. introduced AB 1435 to freeze dues for two years, and Sen. Nicholas Petris (D-Oakland) introduced SB 596 to limit the Bar's power to admissions and discipline. After Brown's bill easily passed the Assembly, Kopp dropped his dues cut but retained the plebiscite and added an annual budget audit. Fischbach objected that the Bar had been audited 71 times since 1986 at a cost of $3 million. Although "we're not afraid of an audit," the plebiscite needed "to let

[108] Michael J. Hall, "S.F. Bar Votes to Oppose Discipline Plan," LADJ 3 (1.13.95); Nancy McCarthy," Tensions rise in discipline overhaul," CBJ 4 (3.95); "Bar committee votes to slash 13 positions from the State Bar Court," CBJ 1 (5.95); Nancy McCarthy, "Presiding judge, 4 others bounced from bar court," CBJ 1 (8.95); Nancy McCarthy, "Five new judges prepare to join bar court; job cuts seen by end of year," CBJ 1 (9.95); Lise A. Pearlman, "Declare Independence," 16 California Lawyer 27 (4.96). Pearlman had been the subject of a glowing profile at the time of her appointment. Michael J. Hall, "Profile: Lise Pearlman," LADJ 1 (6.26.89).

[109] "Lucas: `No' to bar court control," CBJ 5 (1.95); Patricia Phillips, "Commission charts future of bar," CBJ 11 (1.95); "Board votes to keep bar mandatory," CBJ 1 (9.95); Nancy McCarthy, "Where does the bar go from here?" CBJ 1 (7.96).

attorneys know they will continue to be regulated and they'll have to pay for that regulation." President-elect James Towery saw no "groundswell of requests from our rank-and-file that the State Bar go through an extraordinary effort." But Governor Wilson signed Kopp's bill. Although the State Bar did not directly urge a "no" vote, it organized a volunteer Committee to Save the Unified Bar, operating through county committees, which was opposed by Attorneys for a Voluntary Bar. Although Towery initially proposed to reduce bar dues $20 (for the first time ever), he soon withdrew this pledge.[110]

Although the California District Attorneys Association had originally backed Kopp's bill to abolish the State Bar, it remained neutral on the plebiscite. Towery asked a meeting of 200 DAs if "we want to give up control of our profession...ethical standards, discipline and budget and transfer it to some unnamed state agency?" Peter Keane, a former Bar Governor who now led the Lawyers Committee for a Yes Vote, responded that "the State Bar is a sham, a shell game, one large fraud. It exists for the perpetuation of the officers at the top who run an enormous fiefdom." He claimed that $139 of dues went to administration, "$19 more than you would pay to belong to the New Jersey bar." If discipline were transferred to the state "the public would see an entity at arm's length from the bar association and we'd have a much better reputation." Because of limitations imposed in the wake of *Keller*, "we do not have a statewide association to advocate for us as a profession." When a DA called the State Bar irrelevant, Towery boasted that it had "successfully resisted legislative proposals for recertification by [sic—read "of"] lawyers, random audits of lawyers' bank accounts, and expanded roles for unsupervised paralegals." The California Judges Association urged a no vote. Governor Wilson leaned toward a yes vote, accusing trial lawyers of frivolous strike suits and applauding *Keller*'s limitation on advocacy. But h conceded that "the disciplinary side is a serious problem." "I would like to see something that is effective but doesn't require the creation of a new state agency."[111]

The Bar was defended by more than 70 local and specialty organizations, the California Public Defenders association, the 17 Section Chairs, and the Conference of Delegates. Towery insisted that "legislative control of our profession...is not a scare tactic." Keane asserted that "the sole reason for the comparatively high cost of dues in California is wanton inefficiency and gross mismanagement of State Bar finances by its unchecked bureaucracy." The DEC had "found a pattern of waste, overspending, lack of economy of scale and staff indifference to the abuses which were so appalling that...these problems could only be forced to be redressed by measures such as an immediate reduction of $100 in every lawyer's dues." The State Bar was "a timid, bloodless entity which is constantly looking over its shoulder in terror at the legislature."

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[110] "Fischbach says proposal to slash dues would devastate bar programs," CBJ 1 (2.95); "Speaker Brown introduces measure to freeze bar dues at $478," CBJ 1 (3.95); "Key bills affecting the state bar and lawyers advance in Sacramento," CBJ 1 (6.95); "Bar President-elect James Towery opposes plebiscite on State Bar," CBJ 1 (8.95); Nancy McCarthy, "Forces mobilize to decide bar's fate," CBJ 17 (12.95); James Towery, "Ask the President: Towery works toward dues decrease," CBJ 5 (12.95); "Opinion: Budget: Courage or folly?" CBJ 8 (1.96).

[111] "Board backs '96 budget, appoints new NJE chair," CBJ 28 (1.96); "Nancy McCarthy, "Towery, Keane debate bar's future," CBJ 17 (2.96); Nancy McCarthy, "Disciplining errant lawyers is the bar's biggest task," CBJ 1 (3.96); "CJA supports bar," CBJ 6 (3.96); James Towery, "Ask the President: The plebiscite: Why should I care?" CBJ 7 (3.96); Dean Kinley, "The governor reflects on law and the legal profession," CBJ 1 (4.96).

Patricia Phillips warned that "yes" vote supporters included minority members of the Futures Commission (which she had chaired), who wanted "a bar exam for every lawyer every five years," random audits of law office accounts, and mandatory malpractice insurance and pro bono. But Peter Appleton (past Beverly Hills Bar Association president, former Los Angeles County Bar Association trustee, and member of the Conference of Delegates executive committee) urged a yes vote. The BoG "do not represent lawyers and they do not take positions on behalf of lawyers." "Lack of financial accountability is a primary reason why we have the most expensive bar dues in the country," caused by "our `Cadillac' discipline system. Why must we pay for the hotline the bar continues to urge clients to use against lawyers," a "legislatively driven and law professor-designed discipline system" that "last year generated 128,063 calls."[112]

Three days before the ballots went out the legislatively mandated audit praised the discipline system for making changes that increased its "efficiency, effectiveness and reliability" but believed the Bar could reduce dues by recovering costs from disciplined attorneys and charging for voluntary programs. Towery said "no fair reading of this report can support abolishing the bar," adding that 100 bar groups recommended a no vote. When trds of the half of members who returned ballots voted no, Towery claimed "decisive support for an independent profession," and President-elect Thomas Stolpman said it had "validate[d] the legal profession." Kopp retorted that "the State Bar had better seize the opportunity to improve its performance" and threatened a bill to reduce dues $40 the following year. "I think that the State Bar now knows that at least 35 percent is dissatisfied and would like an end to forced conscription." Keane was even more belligerent: "The results show 70 percent of lawyers either voted against the bar or felt it was so out of it it wasn't worth the powder to blow it up." "This was just a dress rehearsal. If the bar thinks it was the final scene, they're kidding themselves."[113]

Senator Bill Lockyer, who had voted no, felt that compliance with *Keller* had softened legislative criticism of the Bar: "It doesn't seem as intensely partisan as it used to be." But he spoke too soon. When President Stolpman defended a $900,000 lobbying contract with Mel Assagai, Vice President Peter Kaye (a public member appointed by Wilson) wondered out loud "if the State Bar is too important an organization to be left in the hands of lawyers." He called the contract "lobbygate...conceived in darkness, nurtured in secret, authorized behind closed doors and executed without discussion or disclosure." A $75,000 bonus for successfully negotiating a multiyear dues bill was excised when it was revealed. Wendy Borcherdt (another Wilson appointee) said her fourth year on the Board was "not...a happy experience." "From the beginning it was

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[112] "Update: Towery, Keane tapped to write arguments for/against SB 60," CBJ 1 (4.96); James Towery, "Ask the President: Scare tactics, or real loss of control?" CBJ 12 (4.96); Peter G. Keane, "Longtime bar opponent says it's time for lawyers to make history by closing down the mandatory bar," CBJ 16 (4.96); Patricia Phillips, "Veteran bar proponent says abolition would lead to lawyers having no hand in governing themselves," CBJ 17 (4.96); Colin W. Wied, "Opinion: Sever the ties that bind," CBJ 13 (5.96); Peter M. Appleton, "For lawyers in California, the time is here to decide between the status quo or taking risks to do better," CBJ 14 (5.96).

[113] Nancy McCarthy, "Update: Kopp says he wrote new bill mostly to dispel `untruths,'" CBJ 1 (6.96); Nancy McCarthy, "Lawyers vote 2 to 1 to keep California's State Bar unified," CBJ 1 (7.96); Nancy McCarthy, "Where does the bar go from here?" CBJ 1 (7.96).

clear that the bar's business was to be run by a small clique of lawyer members" with "disastrous" results.[114]

Senator John Burton (D-San Francisco) introduced SB 1145 to authorize dues for two years. But before it could be voted, the State Bar supported AB 250, which Sheila Kuehl (D-Santa Monica) had introduced to raise the medical malpractice nonpecuniary damage cap. The Association for California Tort Reform, which opposed AB 250, asked legislators to reduce dues from $458 to $160 and said the group was "looking at the broader issue of the politicization of the bar." The State Bar responded that

> the original balance struck in 1975 by MICRA had, by 1997, become skewed. The vast majority of the lawyer board members who voted in support of AB 250 represent business interests or public entities. The Board viewed AB 250 only as a modest step to restore the balance in certain egregious cases, rather than a statement endorsing the expansion or repeal of MICRA.

When Burton limited the dues bill to one year just before the vote, it passed by the bare minimum (21-13). Assemblymember William Morrow (R-Oceanside), vice-chair of the Judiciary Committee, then proposed a $25 reduction. Three Wilson-appointed Governors (Kaye, Borcherdt and Jo Ellen Allen) testified in favor of the reduction and claimed that at least two other Governors agreed. Allen questioned "whether the Bar exercises its authority to influence the legislature in a prudent manner," citing its position on medical malpractice damage caps, funding for "the highly controversial Legal Services Corporation," and the decision to appeal a Court of Appeal judgment holding MCLE unconstitutional. "As long as membership in the State Bar is mandatory and fees are extracted forcibly, the Board is obligated to avoid as much as possible taking positions which are likely to divide attorneys…." But after the Judiciary Committee defeated the reduction (7-7) and passed the one-year dues bill (10-4), the Assembly concurred in September. Morrow and two other legislators had also sued the State Bar in June for violating *Keller*, complaining about State Bar support for four bills (including the medical malpractice damages cap and a gay rights bill). Judge Garland E. Burrell, Jr. dismissed the action in September, holding that the plaintiffs failed to show "they have been forced to make or support politically expressive acts of the State Bar." (The Ninth Circuit affirmed 3-0 two years later.)[115]

Governor Wilson told Wendy Borcherdt he was thinking of vetoing the dues bill. Lunching with her daughter in England several days later, he said "Tell your mom, I'll veto again unless there are some significant changes." California Supreme Court Chief Justice George, Associate Justice Chin, the California Judicial Council, and SB President Marc Adelman (a San Diegan like Wilson) urged the Governor not to do so. But Wilson vetoed the bill on October 11, a day before the deadline. Although he attacked the lobbying contract and supported the $25 dues reduction, he really seemed to be reacting

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[114] "Lockyer supports unified bar, says criticism is diminished," CBJ 2 (1.97); Thomas G. Stolpman, "The Bar's president says the new contract will save money as well as retain the skills of its veteran lobbyist," CBJ 10 (3.97); Peter F. Kaye, "A leading critic says the contract was negotiated in secret, presented as a fait accompli without a vote," CBJ 11 (3.97); Wendy Borcherdt, "Anxious for an unhappy year to end," CBJ 8 (5.97).

[115] "Nancy McCarthy, "Burton agrees to amend fee bill to one year, setting dues at $458," CBJ 1 (6.97); "$458 fee bill goes to Assembly floor," CBJ 6 (8.97); Joe Ellen Allen, "Losers don't forfeit right to dissent," CBJ 8 (8.97); Kathleen O. Beitiks, "Federal judge dismisses lawsuit challenging State Bar activities," CBJ 1 (10.97).

to the dismissal of Morrow's lawsuit. "Last year, a substantial minority of bar members voted to abolish the mandatory bar in favor of a voluntary model embraced in 10 other states." That vote exposed "what might be charitably characterized as an almost chronic disharmony." Some members "believe that the bar cannot function effectively as both a regulatory and disciplinary agency as well as a trade organization." Recent lawsuits "illustrate the long held belief of some members that the bar is partisan...." Although "less favored members were vindicated" by *Keller*, the bar had responded "by conducting business as usual while offering a miniscule rebate to those opposed."[116] "[I]n recent months, as disgruntled members have leveled charges that the bar is bloated, arrogant, oblivious and unresponsive, the bar has promptly done its best to verify each indictment." He cited the $900,000 lobbying contract, which "initially included an illegal $75,000 bonus," and the hiring of a new executive officer for $200,000 plus perks (much more than Wilson was paid). Both the State Auditor and the DEC had "found a significant glut in the bar's budget and called for a substantial reduction" in its dues, which were "more than twice the average of the other 49 states." "None of this appears to be of any consequence to the bar, but then the bar's own small army of staff attorneys pays no bar dues at all."

Wilson accused "delegates" at the annual State Bar conference in his San Diego hometown (actually the separate Conference of Delegates) of adopting resolutions "in favor of legalizing same-sex marriages; to prohibit discrimination against transvestites and transsexuals; to reduce penalties for drug dealers; to reduce penalties for repeat child molesters; to thwart the will of voters relative to affirmative action at state law schools."

> The bar has drifted...and become lost, its ultimate mission obscured. It is now part magazine publisher, part real estate investor, part travel agent and part social critic, commingling its responsibilities and revenues in a manner which creates an almost constant appearance of impropriety. It is time for the bar to get back to basics: admissions, discipline and education standards. I would look with favor upon a bill that required bar members to pay only for functions which were, in fact, a mandatory part of a responsible, cost-efficient regulatory process...to scrupulously heed Thomas Jefferson's admonition that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."

The *San Francisco Examiner*, which had exposed lax discipline a decade earlier, now came to the defense of a Bar that "was all but disbarred by a furious attorney," a "lame-duck Republican," who "happens to be the Governor."

> In effect, the state's legal eagles were told to bow to whatever rules are dictated by whoever happens to be governor. It raises a pertinent question: Why should politicians have this power? ...lawyers, like members of other professional associations and labor organizations, should be allowed to govern themselves without fear of budgetary swings.

Wilson had timed his response so "as to block for at least three months any attempt at compromise." This "punitive action could have a devastating effect on the orderly conduct of the State Bar's most important functions," including discipline. (Indeed, CTC Judy Johnson warned that "the system will come to a grinding halt. We're going to have to dump all but the most serious cases and only try the equivalent of homicide.") Across

[116] Never more than a few dollars.

the Bay the *Oakland Tribune* called Wilson's "spiteful veto" "irresponsib[le]." "[S]ince [the plebiscite] failed, it appears the governor now wants to find another way to kill" the State Bar. "To eliminate a pesky fly that's annoying him, he used a bulldozer." The Bar insisted that its role was "to seek improvements in the administration of justice, and occasionally the issues are political." President Adelman asked Borcherdt and others to seek a compromise with Wilson, but Towery "shudder[ed] to think what the compromise will be." Peter Keane triumphantly declared the Bar dead: "Only a nostalgia for the past or blind intransigence on the part of advocates of a unified bar keeps this organization propped up." Even defenders wondered if it had a future. Former president Fischbach had "to admit the chances" for bifurcation "are much stronger than I ever believed possible before." John McGuckin Jr. (a former Bar Governor and presidential candidate) thought "we need to face up to the fact that the governor and a significant number of legislators feel the bar has to shed some voluntary functions." But the San Diego County Bar Association president urged members to pay their dues voluntarily; Pillsbury Madison & Sutro became the first large firm to do so; by mid-December 76 firms and corporate law departments and 52 nonprofits and public agencies had followed suit. (When the Bar later offered refunds or credits for voluntary donations, very few lawyers took advantage.)[117]

Senator Kopp introduced SB 1371 on the first legislative day of 1998 to abolish the State Bar and transfer admissions, discipline, a minimal MCLE, and the CSF to the Supreme Court. "Let's eliminate lawsuits over that amount of annual dues allocable to political and ideological expenditures, end the `closed shop' and release California's lawyers from conscription." Nine days later Assemblymember Robert Hertzberg (D-Van Nuys) introduced AB 1669 as urgency legislation to divide the Bar into mandatory and voluntary units, set dues at $419 for 1998 and $399 for 1999, require bidding on all contracts over $50,000 and an annual independent audit, prohibit the Bar from spending dues on lobbying for legislation unrelated to the itself, regulation of lawyers or improvement of legal services, and prohibit funding for the Conference of Delegates or the 18 practice sections. The purpose of the voluntary bar was "to insure responsibility over advocacy." He was under pressure to cut dues further because "there's no constituency out there who wants to support lawyers." There also were "problems with Republicans on IOLTA."[118] The governor's office was saying "Let's have lawyers regulated and look like other professions." The BoG split on AB 1669 (10-4 with 4 abstentions). Based on "reading countless letters from members" and "talking to attorneys and consumers statewide," Adelman had found "very few complaints focused on the workings of the discipline system." The emphasis was on the bar's political positions and the dues level.[119]

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[117] Kathleen O. Beitiks, "Wilson vetoes fee bill; bar moves to secure funding," CBJ 1 (11.97); Nancy McCarthy, "The question looms again: Will California's bar remain unified?" Ibid.; Kathleen O. Beitiks, "Bar will assess $77 fee, ask members to pay the remainder voluntarily," Ibid.; "Bulldozing a Pesky Fly," *Oakland Tribune* (11.11.97), reprinted in SBJ 8 (12.97); *San Francisco Examiner* (10.16.97); "77 Law Firms, Corporate Legal Departments Pledge to Pay Voluntary Dues," CBJ 1 (1.98); "Generosity of members adds up to donation of $11 million," CBJ 1 (5.00).
[118] Interest on Lawyers Trust Accounts.
[119] Kathleen O. Beitikis, "Bills vie to restructure bar," CBJ 1 (2.98); "Hertzberg: The option is, `Fix it, or lose it,'" CBJ 1 (2.98); Marc Adelman, "Rebuilding the State Bar," CBJ 8 (2.98); Sen. Quentin Kopp, "Time to end conscription," CBJ 9 (2.98).

Morrow introduced a third bill, AB 1798, to cut dues to $317 ($272 in 1999) and limit expenditures to admissions and discipline. The Bar would no longer be able to certify lawyer referral services, mandate CLE, operate the CSF, evaluate judicial nominees, or use IOLTA to fund legal services. He praised Wilson's "bold step"; "there is too much opportunity for abuse when the State Bar takes political positions on matters its members oppose." The BoG would be subject to the Brown Act (mandating open meetings) and could take positions only after polling the entire membership. Hertzberg was willing to compromise on everything but IOLTA. President Adelman predicted optimistically that when Morrow "starts to take away things that serve the public, I think he'll start to lose allies." The Bar's CFO said it would have to close its doors in May. The Bar's executive director warned that "we couldn't run the discipline system on [$272] in '88, so certainly we can't run it today on less."[120]

Hertzberg dropped his bill's urgency status (which would let it pass by a simple majority but not take effect until 1999) and gained the support of the *Los Angeles Times*, *San Francisco Chronicle*, and *San Jose Mercury News*. Morrow tried (unsuccessfully) to amend Hertzberg's bill to "plug a giant loophole that allows the State Bar to lobby." The CSF created "a whole new class of victims by penalizing all good lawyers." MCLE was a "joke that should be done away with." The Bar was "howling" at dues cuts "like the boy who cried wolf." Although the Bar negotiated with the Association for California Tort Reform about lobbying activities, Hertzberg balked: "they wanted...far too much." But the Joint Legislative Audit Committee approved Kopp's request for an audit of the Bar's admissions operations, which he claimed had generated a $2.2 million reserve.[121]

Without the dues bill, the Bar was authorized to collect only $27 for discipline. In April it laid off nearly 500 employees and rejected any new cases. Left with only three or four of its 65 investigators, the Bar halted all investigations. CTC Judy Johnson warned complainants to "expect years of delay." She would prioritize those of the 1,400 pending matters most likely to lead to suspension or disbarment. All monitoring of the thousand probationers would cease. "It's like the sheriff will have left town on a Saturday night when he knows the cowboys are coming in." Although the SBC had set 121 cases for trial between April 1 and June 26, director Scott Drexel said the other 600 pending cases would be delayed because he had to cut his staff from 52 to seven; the 8 judges agreed to share the salary of three positions. The Bar's executive director warned that failing to authorize dues would "bankrupt the organization and force it to rebuild the discipline system all over again from scratch." The Senate Judiciary Committee approved Hertzberg's bill and rejected Kopp's. Adelman complained that "every good faith effort we've made to restructure has been met with stony silence or with intemperate comments about the bar and attorneys." Morrow gloated: "When you have them by the family jewels, their hearts and minds will follow." In order to get Republican support, Hertzberg accepted amendments requiring user fees for some programs, reducing lawyer

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[120] Kathleen O. Beitiks, "Bar battles against time," CBJ 1 (3.98); Nancy McCarthy, "Whittling away ultimately may harm public," CBJ 1 (3.98); Assemblyman Bill Morrow, "Time for meaningful change," CBJ 8 (3.98).

[121] Nancy McCarthy, "Bill inches to lawmakers," CBJ 1 (4.98); Nancy McCarthy, "Kopp wins audit of admissions," CBJ 1 (4.98); "Serving the Public Interest," *Los Angeles Times* (3.2.98); "Getting Closer to the cliff's edge," *San Jose Mercury News* (3.26.98); "The State Bar and its leaders deserve another chance," *San Francisco Chronicle* (3.25.98).

contributions to the CSF, transferring funding for the Commission on Judicial Nominees Evaluation to the state, and suspending MCLE while it was reviewed.[122]

The *San Francisco Examiner* urged compromise. The "months-long impasse over bar funding could victimize the public by inviting rogue lawyers to see how much they can get away with." The Bar was

> partly responsible for the mess. It has given ammunition to its enemies with a long record of arrogance toward critics and questionable use of dues money for lobbying and liberal-leaning political advocacy with which many members disagree.

Dues had been "twice the average in the other 49 states." But

> the important thing is to retain and improve whatever protections the non-lawyering public can get against professional misconduct, and put the serious offenders out of business. Wilson's grievances about lawyers who have not supported him are trivial compared to the people's stake in the outcome.

The *Los Angeles Times* asked Wilson "to be specific and constructive about solutions to a crisis he created."[123]

By the end of June the Bar had shut most of its operations, retaining only 200 employees. Adelman denounced this as "politics," which "has nothing to do with the administration of justice." Even the concession of an entirely appointed Board (7 by the Supreme Court, 6 by the governor, and 2 each by the Assembly and Senate) failed to win sufficient support. Adelman had vainly sought to meet Wilson during nearly 30 visits to Sacramento. The day before the June 26 layoffs the governor's spokesman said he would not negotiate the issue in public. Hertzberg now introduced AB 1374 as an interim measure authorizing $100 dues exclusively for discipline. On June 22 Adelman wrote the Supreme Court a 19-page letter asking it to authorize $287 in dues. Although the court declined to act, it

> recognize[d] the importance of the core functions relating to the admission and discipline of attorneys carried out by the State Bar and encourage[d] the other two branches of government and the State Bar to resolve this matter as quickly as possible in light of the interest of the public and the potential impact on the operations of the court of the Bar's inability to carry out its disciplinary functions.

Although Chief Justice George offered his good offices, only the Bar accepted. The discipline system staff dropped from 283 to 20, who concentrated on trials, freezing all but 50 of the 700 pending cases. Written complaints (which was all the Bar would accept) fell to half the usual level.[124]

Accusing Wilson of "indulging a long-festering political grudge," whose "main victims" were "people reporting what they believe is lawyerly malpractice or theft," the *San Francisco Examiner* urged both sides to "make a deal...without delay." But the *San Diego Union Tribune* blamed the Bar alone and condemned its "audacious bid to circumvent the legislative process" by appealing to the Supreme Court. Wilson had

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[122] Nancy McCarthy, "Revised bar bill awaits action," CBJ 1 (6.98); Marc Adelman, "Avoiding a bigger problem ahead," CBJ 7 (6.98).

[123] "Raising the bar," *San Francisco Examiner* (5.18.98); "Californians poorly served by the stalemate," *Los Angeles Times* (5.20.98).

[124] Marc Adelman, "The last few gasps of a dues bill," CBJ 8 (10.98); Nancy McCarthy, "Bar operations pared to barest essentials," CBJ 1 (7.98); Nancy McCarthy, "200 remain to navigate 'The Ark,'" Ibid;

"ample justification" for his complaint "that the bar was using its hefty dues for a variety of political purposes rather than for its central mission of enforcing ethical rules and disciplining wayward members." The $295 he proposed was "enough to maintain the bar's exemplary disciplinary system."[125]

The antagonists just moved further apart. Adelman complained that "posturing by many in Sacramento left virtually no chance of a resolution."

> All one hears from Sacramento is that the bar isn't willing to reform. That we are trying to circumvent the governor's wishes. That the shutdown of the attorney discipline system was not motivated by a lack of funds but set in motion for political purposes and effect. That despite the impasse in the legislature, our request to the Supreme Court for relief was nothing more than a "slap in the face of the legislative process."

There were even accusations that Hertzberg's interim bill "was introduced at the insistence of bar leaders in order to circumvent the governor's proposal and resist impending reforms." Two months after the shutdown "the number of calls and correspondence concerning lawyer discipline" reaching Adelman's office was "increasing with each passing day." The California Republican Party chairman responded by accusing the Bar of "arrogance." It had "stolen interest from client trust accounts." MCLE was "replete with politically correct courses." It was "arrogant...to claim that the entire amount of non-mandatory dues spent for political activities was only $1." It "arrogantly abused the JNE...procedures when the governor's nominee to the Supreme Court was not sufficiently liberal." Among its "numerous fiscal abuses" was paying "State Bar officials more than the governor and than the judges." The two state gubernatorial candidates also weighed in. Republican Dan Lungren said the Bar "should concentrate on serving as the guarantor of the quality and integrity of the legal profession." Other activities had become "unacceptably politicized." Democrat Gray Davis noted the 2:1 vote to retain the unified bar two years earlier. "Allowing the executive branch or the legislative branch to appoint a majority of the Board of Governors would effectively transform the bar into an arm" of those branches. Although the Bar must serve "its appointed purposes rather than becoming primarily a lobbying organization," Wilson's veto was "a heinous act."[126]

On September 28 Wilson asked Chief Justice George to take over discipline to "protect the public while giving the legislature time to consider the issues of governance, the scope of legitimate functions, and the membership fee level of the State Bar." He also warned the Bar that "it would be a serious mistake" to ask the court "to take the unprecedented step of imposing a membership fee that the legislature had declined to enact, thereby intruding on the legislative process and raising serious separation of powers questions." But two days later the Bar did just that. At its annual conference (October 1-4), the Chief Justice said "the crisis in bar discipline has had a detrimental impact on the protection of the public." Two weeks later the Court agreed to hear the

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[125] "Time to end the grudge," *San Francisco Examiner* (6.28.98); "Both the governor and bar must compromise," *San Diego Union Tribune* (6.25.98).

[126] Marc Adelman, "Exhausting every conceivable effort," CBJ 12 (7.98); Marc Adelman, "A sad time for public protection," CBJ 7 (8.98); Michael J. Schroeder, "At the mercy of the rebels it created," CBJ 8 (9.98); Nancy McCarthy, "In the race for governor...Lungren, Davis look at the bar, the legal profession and laws," CBJ 1 (9.98).

petition, taking the unusual step of soliciting public input. The same day the *Los Angeles Times* urged the Court to recreate the "vigilant and highly regarded" disciplinary system, blaming Wilson for having "precipitated the crisis" and then having "foiled legislative efforts to fix the problem until it was too late." On November 2 Davis was elected governor, and the Democrats gained five seats in the Assembly and two in the Senate (but not a two-thirds majority in either house). By the time of the November 9 hearing the Court had received 50 written submissions. In oral argument, SB President Ray Marshall described a "crisis situation": a backlog of 7,000 complaints, with 500 more arriving every two months. Dan Kolkey argued for Governor Wilson that levying a fee would "undo" his veto and interfere with a "legislative creation." But Chief Justice George noted that "the legislature hasn't acted and that's why we're here, isn't it." He was "troubled" by the governor's suggestion that his Court take over discipline and "question[ed]" how it would pay the $41 million annual cost.[127]

The Court decided in less than a month, rejecting Wilson's separation of powers argument, as well as the suggestion "that there is no real need for a disciplinary system, and...attorney misconduct should be dealt with exclusively through criminal complaints and civil lawsuits brought by injured clients." Many ethical violations would not interest a plaintiff's attorney or criminal prosecutor. "More generally, the objective of the discipline system is not punishment of the attorney, but protection of the public." "[E]very other licensed profession in the state of which we are aware is regulated by a board that has the power to suspend or revoke the license of an errant practitioner—and practitioners pay a fee for licensure." "An unregulated profession soon may lose its right to call itself a profession." The courts would suffer because doubts would grow about "the integrity of the profession and the legal system." The Court was grateful that the SBC had relieved it of a significant burden of deciding disciplinary cases (40 a year until SBC judgments were granted finality in 1991). The Court unanimously ordered dues of $173, $1.56 of which was dedicated to a special master, Judge Elwood Lui.

> Our action today is intended to respond to an unprecedented emergency threatening the protection of the public, the integrity of the legal profession, and the interests of the courts. In short, the administration of justice is at risk. ... California has had ample reason during the past 10 years to take pride in an attorney discipline system that has been recognized as one of our nation's finest. We anticipate that in the near future, it will again return to normal operation with appropriate funding as determined by the legislature and the governor.[128]

The Bar's executive director warned that restarting the disciplinary system would be slow because it had to "restore our human resources department" and "engage in an intensive effort of recruiting and training dozens and dozens of new people with no experience whatsoever." The Bar sent members a $173 bill on December 31. The hotline reopened on March 1, 1999 for four hours a day (reaching eight hours only in 2004). The OTC would be 25 percent smaller and deal exclusively with cases presenting great risk to clients or likely to result in at least a year's suspension and those involving criminal convictions, failure to perform legal services, misrepresentation to the court, or

[127] "Nancy McCarthy, "Supreme Court to hear petition on discipline," CBJ 1 (11.98); "No bar, no discipline," *Los Angeles Times* (10.14.98); Nancy McCarthy, "Election results give bar backers new hope," CBJ 1 (11.98); Nancy McCarthy, "Supreme Court weighs discipline fate," CBJ 1 (11.98).
[128] In re Attorney Discipline System, 19 Cal.4th 582, 606, 608, 610-14, 623-34 (1998).

unconscionable fees. The SBC cut its staff from 52 to 37. Presiding Judge Obrien felt "the court now is relatively stable" but worried that "there are some aspects of our fundamental role that are very fragile, and the political machinations that have gone on have really exploited that fragility."[129]

Senator Adam B. Schiff (immediate past chair of the Judiciary Committee) introduced SB 144 on January 5 (co-sponsored by Robert Hertzberg). Schiff wanted "more clarity in terms of the functions of the bar and a greater level of confidence that dues are being spent on appropriate functions," but he was "not willing to sacrifice the consumer protection functions" or the "democratic features of the bar." The bill retained the Conference and sections but did not fund them out of the mandatory dues (which increased the deduction for lobbying to $5 and offered hardship reductions for low-income lawyers). There were limitations on bar lobbying. (The following year the BoG required two-thirds votes, first whether the subject matter of lobbying fell within the *Keller* guidelines and then whether to take the position; it also required sections, committees and the Conference to disclaim that they represented the Bar.) Bar contracts over $50,000 had to comply with the public contracts code. Attorneys had to cooperate with investigations. MCLE was extended to retired judges but cut from 36 hours to 25, while law practice management was eliminated and ethics reduced to four hours. A companion bill (SB 143) replaced the only lay Review Department judge with a lawyer and empowered the governor, Senate Rules Committee chair, and Assembly speaker each to appoint one of the five hearing judges. (Three SBC judges unsuccessfully challenged this on separation of powers grounds.)[130] The bill also limited the Review Department to a review of the record. (In later cases the Supreme Court struck this down in order to "relieve [itself] of the burden of intense scrutiny of all disciplinary recommendations" and held that the Review Department's plenary review with a right to petition the Supreme Court satisfied due process.)[131] When Governor Davis signed both bills on September 7, SB President Andrew J. Guildford celebrated this "great day for the bar" but warned it "to be careful not to repeat the mistakes of the past." (The political threat seemed to recede. The Legislature authorized dues of $395 in 2001 by large votes: 63-7 in the Assembly and 23-12 in the Senate; large margins also passed the 2002 dues bill—the first extending over two years—and the 2004 dues bill.)[132]

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[129] Nancy McCarthy, "Supreme Court orders $173 fee," CBJ 1 (1.99); Nancy McCarthy, "Marshall sets eye on new fee bill," CBJ 1 (1.99); "Complaint hotline also up and running," CBJ 1 (3.99); Nancy McCarthy, "Bar starts to rebuild discipline," CBJ 1 (3.99); Nancy McCarthy, "Bar court trimmed by $1 million," CBJ 1 (4.99); Nancy McCarthy, "Opening a new front in discipline," CBJ 1 (5.99); Nancy McCarthy, "State Bar Court bounces back," CBJ 1 (2.01); State Bar of California (2005: 3).

[130] Obrien v. Jones, 23 Cal.4th 40 (2000).

[131] In re Rose, 22 Cal.4th 430 (2000).

[132] Ray Marshall, "From the President: It's time to move on," CBJ 9 (1.99); Nancy McCarthy, "Fee bill fate back to Sacramento," CBJ 1 (2.99); Matt St. George, "Funding the conference," CBJ 9 (3.99); "Board tentatively approves budget based on dues of $384," CBJ 34 (4.99); Nancy McCarthy, "Schiff bill would set dues at $395 per year," CBJ 1 (5.99); Raymond C. Marshall, "From the President: An update on the bar's progress," CBJ 7 (7.99); Raymond C. Marshall, "From the President: A long struggle finally pays off," CBJ 9 (9.99); Nancy McCarthy, "Governor signs $395 fee bill, ending 2-year political battle," CBJ 1 (10.99); "Board mandates two-thirds vote twice, in backing any legislation," CBJ 1 (1.00); Nancy McCarthy, "Supreme Court rejects bar court suit," CBJ 1 (7.00); "Gov. Davis signs 2001 bar fee bill," CBJ 3 (8.00); Nancy McCarthy, "High court reaffirms its ultimate control over discipline cases," CBJ 1 (4.00);

The month Davis signed the 2000 dues bill the Bar won another victory. Lew Warden, who had lost his license in 1993 for refusing to satisfy MCLE, had convinced a Court of Appeal in 1997 that the program violated equal protection by exempting retired judges, full-time law professors, legislators, elected state officers, and federal and state attorneys. The Supreme Court now rejected the challenge 5-2.[133] About half of all lawyers took advantage of the two-year hiatus not to register for courses. President Guilford called MCLE "probably a good thing" but added that "we need to...make it painless." Although a survey found that 60 percent of respondents wanted to cut MCLE hours down from 25, the BoG refused and voted 13-1 to keep an hour each for substance abuse and bias elimination. The new SB President Karen Nobumoto (the first African American) commented: "Two hours in three years? If we can't take the heat on that, we don't belong in this job."[134]

But the Bar lost yet another challenge to its political activity. In 1992, two years after *Keller*, Raymond Brosterhous (Keller's colleague and co-plaintiff, again represented by the Pacific Legal Foundation) challenged the Bar's lobbying, its programs on minority relations and women lawyers, Volunteers in Parole, and the Conference of Delegates. In August 1999 the trial judge found that the Bar had improperly spent dues on political and ideological activities in 1991 and set trial for the amount of the refund (which would go only to the named plaintiffs). When the Court of Appeal upheld the first decision in April 2000, the Bar decided against a further appeal because the $10 refund was so trivial, settling the plaintiffs' lawyers' $2.35 million fee claim for $900,000.[135]

The Conference of Delegates struggled to survive without Bar dues. Only 25,000 members voluntarily checked off $3 on their 2000 dues bill, raising less than a third of its $240,000 target. Lacking staff, the Conference was virtually unable to lobby. In 1999, to avoid further alienating the Legislature, the Conference had confined itself to technical issues: attorneys fees, unemployment insurance, discovery practices, and arbitration. The Bar had refused to let it urge the governor to declare a moratorium on the death penalty. President Nobumoto appointed a commission to resolve the relationship between the two.

> The Conference has a justifiable desire to continue its long tradition of helping shape and analyze legislation in our state. The bar has a justifiable desire not to be dragged continually into political hot water for positions the conference takes and which the bar does not choose to endorse.

"Bar court judge appointments process to be reviewed," CBJ 4 (4.00); "Davis signs diversion bill, nixes more access money," CBJ 3 (9.01); "State Bar fee bill moves through the legislature," CBJ (8.03).

[133] Warden v. State Bar, 62 Cal. Rptr.2d 32 (1st Dist. Ct. of App. 1997), rev'd, 21 Cal.4th 628 (1999).

[134] A second challenge to MCLE as "compulsory governmental propaganda" was rejected in 1996, affirmed in 2000. Nancy McCarthy, "MCLE: A little, a lot, or none at all," CBJ 1 (6.99); Nancy McCarthy, "Supreme Court upholds bar's MCLE program in its entirety," CBJ 1 (10.99); "Reprieved for one year, but lawyers still must comply," CBJ 1 (10.99); Nancy McCarthy, "Appeals judges appear unswayed by new challenge to MCLE program," CBJ 1 (2.00); Nancy McCarthy, "Challenge to MCLE program turned back one more time," CBJ 1 (3.00); Sharon Lerman, "MCLE commission calls for better quality, more hours," CBJ 1 (6.01).

[135] Nancy McCarthy, "Bar's use of dues money scrutinized again in courtroom," CBJ 1 (6.99); "Agreement to avert damage phase, speed bar appeal," CBJ 3 (5.00); Judge grants $10 refund, refuses future preclusion," CBJ 3 (9.00); Nancy McCarthy, "State Bar drops its appeal of dues case after 10-year fight," CBJ 1 (2.01); "Bar hit with $2.35 million fee demand in lawyer dues case," CBJ 7 (4.01); Nancy McCarthy, "State Bar and PLF spar over $2 million for Brosterhous fee," CBJ 1 (8.01); "State Bar settles Brosterhouse case for $900,000," CBJ 1 (9.01).

On the commission's recommendation, the BoG authorized the Conference to reorganize as a separate non-profit; the Bar would continue to provide services (for pay), help the Conference collect donations from members, and meet consecutively in the same venue. The Conference executive committee chair was pleased that "our purview rules will be free of *Keller*." Fewer members donated in the next two years (14,800 and17, 109), but the $10 check-off generated greater resources.[136]

Both sides praised the appointment of Judge Lui as Special Master. Even though he found that the investigations backlog was down to 2,000 (partly because new complaints were half the pre-closure level), he urged the Bar to set priorities and refer less serious complaints to local bar ADR, allowing it to close approximately 1,200 cases. Before filing charges the Bar offered respondents Early Neutral Evaluations (ENEs), about a third of which produced settlement. The SBC had cut its budget from $5.3 million to less than $3 million and its staff positions from 52 to 37, of which it planned to fill only 29. Even with the revival of many abated cases, the hearing department caseload was only about half its former level. To increase efficiency Lui urged standardized pleading, easier default, and an expedited procedure for less serious cases, entailing limited sanctions and less discovery and hearing time. Noting that "the climb to full strength will be long and slow," the *Los Angeles Times* said that "the bar's travails and its slow return present an object lesson for Gov. Davis and his successors: It's easy to tear down a valuable institution but very hard to rebuild it."[137]

The confrontation over dues led to several external reviews of the disciplinary system. The ABA urged the Bar to focus resources on "alternatives" to discipline, especially for "single instances of minor neglect or minor incompetence," whose "summary dismissal...is one of the chief sources of public dissatisfaction with disciplinary systems." But most of the report recommended greater severity. For more than 30 years it had been ABA policy that lawyers who withdrew from practice while under investigation should be treated as disbarred. Similarly, the 35-40 percent of lawyers who defaulted should not receive the present "low level discipline" but be suspended and required to petition for reinstatement. Prosecutors should use subpoenas "to compel recalcitrant respondents to provide information," rather than waiting for the Early Neutral Evaluation or letting respondents use that to delay. No hearing should be required to place lawyers on involuntary inactive enrolment, nor should the bar have to consider "whether the lawyer's clients or the public are likely to suffer greater injury from the denial of the petition than the lawyer is likely to suffer if it is granted." "The interests of clients and the public in cases like these are paramount." Respondents should pay the cost of reinstatement proceedings, as they did of discipline. The legislature should repeal the law making a knowingly false and malicious report to the Bar a misdemeanor and grant complainants absolute immunity.

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[136] Nancy McCarthy, "Targeted by Wilson, conference struggles to get back on feet," CBJ 1 (4.00); Nancy McCarthy, "Bar rebuffs conference death penalty move," CBJ 1 (5.01); "Presidential panel will review role of bar's conference," CBJ 1 (10.01); Nancy McCarthy, "Whither the Conference of Delegates?" CBJ 1 (3.02); Karen Nobumoto, "New era of Bar-Conference cooperation," CBJ 8 (3.02); Nancy McCarthy, "Conference of Delegates and State Bar are likely to divorce," CBJ 1 (5.02); Nancy mcCarthy, "Bar board OKs separation from conference," CBJ 1 (6.02); Karen Nobumoto and Stephen Marsh, "A beneficial split for both parties," CBJ (6.02);

[137] "Lui selection hailed by friend and foe," CBJ 1 (1.99); Lui (1999a; 199b; 1999c; 2000); "Easy to destroy, hard to rebuild," Los Angeles Times (2.23.00); see also State Bar of California (2001).

Noting that "as a result of the 1998 shutdown of the system, the OCTC lost approximately 700 years of collective experience," and the "bulk" of the 14 lawyers in Los Angeles "have 18 months or less experience," the ABA feared that the current system lacked sufficient "stability" to "assure public confidence in the competency and integrity of the bar." It urged transfer of the OCTC and SBC to the Supreme Court, which would either administer them itself or delegate responsibility to an appointed commission and would promulgate "a rule designating the disciplinary budget as a protected fund consisting of a court imposed regulatory fee collected by the bar at the same time as it collects its dues."[138]

The State Auditor praised the Bar for having "reduced costs and improved the effectiveness of its disciplinary process by developing a priority system." Dues were reasonable and used "to support only the State Bar's mandated functions." But the Bar failed to recover the costs of discipline and client security fund payments from the lawyers responsible; indeed, the proportion of disciplinary costs collected fell from 39 percent in 1995 to 29 percent in 2000. (Far lower proportions were collected from lawyers who were disbarred or resigned, or to recoup CSF payments.) Although the Bar expected to reduce its disciplinary backlog to 600 by the end of 2001, it closed more complaints in intake in 2000 than in 1995, and the percentage of cases closed without discipline in intake and enforcement also rose. Declaring that "these numbers tell it all," SB President Jim Herman declared: "The bar is doing a great job as stewards of the members' dues and as protectors of the public interest."[139]

VI. The Chronic Contradictions of Self-Regulation

Although the Bar's separation from the Conference seems to have averted further external challenges to self-regulation, chronic controversies continue to expose basic internal tensions. A study of whether discipline unfairly targeted solo and small firm practitioners (mandated by the companion bill to the 1999 dues authorization) found that prosecutions merely reflected the overrepresentation of those lawyers as complaint targets.[140] Malpractice insurance was another festering problem. In 1992 Senator Presley introduced a bill requiring that clients be told whether lawyers were insured. Over the opposition of the Los Angeles County Bar Association, the Legislature imposed such a requirement in cases where fees were contingent or exceeded $1,000.[141] On behalf of the California Trial Lawyers Association, Willie Brown promptly made an unsuccessful attempt to repeal it, arguing: "If you're going to do it for lawyers, do it for everybody."[142] After the disclosure law sunsetted in 2000, a survey found that one in five California

[138] ABA, 2001: 9, 15-16, 19-22, 24-26, 30-31, 33-34, 36-38, 4-45, 51.
[139] California State Auditor (2001; 2003: 18-21; 2005); Nancy McCarthy, "Audit affirms bar's use of member dues," CBJ 1 (5.03).
[140] Business & Professions Code § 6095.1, SB 143, Chap. 221, Stats of 2001; State Bar (2001b). In fact, solo practitioners were 23% of attorneys, 54% of inquiries, 68% of investigations, and 78% of prosecutions, whereas those in larger firms were 42, 11, 5 and 2. Some of the difference was attributable to the content of client complaints: 23% concerned failure to communicate and 18% failure to perform, delay, or abandonment.
[141] Arleen Jacobius, "LACBA Opposes Pair Of Discipline Proposals," LADJ 2 (4.10.92).
[142] "Speaker Assails State Bar on Discipline," LADJ 3 (8.25.93).

lawyers went bare. When nine underwriters quit within nine months, premiums rose rapidly in 2002: from $8,000 to $30,000 for intellectual property and patent attorneys.

In 2004 the ABA approved a model rule requiring lawyers to tell state licensing authorities whether they had insurance. In response, SB President John Van de Kamp appointed an Insurance Disclosure Task Force in 2005, chaired by former President Towery, which proposed in early 2006 that lawyers make such disclosure both to the Bar (for posting on its website) and in writing to new and existing clients (15 states had such a requirement and seven were considering it). Nearly 80 percent of the more than 100 responses to a request for public comment were opposed, including the Conference of Delegates. Solo and small firm lawyers complained they could not afford insurance. One lawyer called the proposal "nothing less than an open invitation to a dissatisfied client to cut losses by suing the non-insured attorney in the hope of a quick cash settlement." (States adopting the requirement actually found no significant change in the number of malpractice claims or the cost of insurance.) By contrast, the ethics, professional liability, and mandatory fee arbitration committee chairs supported the proposal. The Task Force eliminated the obligations to notify existing clients or obtain a signed acknowledgment of the notification from new clients and again sought public comment. John Dutton, a Bar Governor representing a rural northern California district, many of whose lawyers practiced alone or in small firms, warned that "we're alienating thousands of California lawyers." When the BoG split 7-7, President Sheldon Sloan cast the deciding negative vote because he opposed posting the information on-line.

Towery refused to admit defeat: "strong client protection is in the interest of the bar. It is one of our raisons d'être. ... Clients ought to be empowered with information." Dutton retorted that the Bar did not know how many malpractice judgments went unsatisfied because lawyers were uninsured. Former Bar Governor JoAnn Grace called the proposal "bull pucky."[143] Ed Pohl (former chair of the Law Practice, Management & Technology Section) asked: "Why don't you give [the uninsured lawyers] a yellow armband?" But Jim Penrod (a Bar Governor and Morgan, Lewis & Bockius partner who handled malpractice and insurance cases) said 90 percent of clients "think they ought to know if their attorney carries malpractice insurance." SB President Jeff Bleich, who had voted for the proposal, argued that "the public will feel better protected and better served if we have disclosure."

At its next meeting the BoG voted 10-9 to endorse disclosure in principle but accepted an amendment by Richard Frankel (San Ramon) mandating it only when the rules already required the lawyer to provide the client with a written retainer (fees that were contingent or over $1,000 but not when the client had retained the lawyer in similar matters). When Bleich objected, the BoG sent the proposal to its Committee on Regulation, Admissions and Discipline. Dutton continued to contend that disclosure was impractical when non-clients casually sought advice. "We get those calls on a regular basis," three to five a week. Penrod replied that "any time you give anyone legal advice and someone relies on it, you have an attorney-client relationship." The Committee voted 4-3 for a rule drafted by Dutton, requiring disclosure if it was reasonably foreseeable that the work would take more than four hours, unless it was an emergency or the client previously had been told the lawyer was uninsured. State Bar staff called the four-hour requirement arbitrary and the qualifier ambiguous. John Peterson (Fresno) proposed

[143] A euphemism for "bull shit."

online disclosure as a more effective alternative than "requiring a lawyer to communicate with a client." Dutton strongly objected, warning that angry members would urge legislators to block bar dues. "I can't think of any proposal that will more severely shoot this bar in the foot." The Committee rejected Peterson's proposal 4-3. In May 2008, despite continuing opposition by the Law Practice Management and Technology Section and the Committee on Professional Responsibility and Competence, the Board finally voted 16-4 for disclosure in writing before beginning representation that would take four hours. Peterson condemned this as "an unnecessary irritant to the attorney-client relationship." Dutton called the rule (which he had drafted) "oppressive;" lawyers should only be required to disclose if they had lost a case because of a mistake or been sued for malpractice. By this time 23 states had adopted disclosure requirements (although 18 only in the annual bar registration).[144]

Lawyers also objected to the severity and form of sanctions. In 2000, defense counsel sought to have technical record-keeping errors in client trust accounts diverted from the disciplinary process. Although the Discipline Committee, Conference of Delegates, and former and present SB Presidents agreed, the Bar ethics committee was opposed. So were senior staff lawyers, who noted the Bar got some 4,000 NSF notices from the banks each year.[145] In 2001 the Bar created a drug court in response to the fact that nearly a third of the thousand lawyers on probation at any time were substance abusers. But prosecutors had become concerned that some of the approximately 15 percent of cases diverted to the Alternative Discipline Program (ADP), established in June 2007 for alcohol, drug, and mental health problems, were there inappropriately. CTC Scott Drexel proposed limiting diversion to lawyers whose offenses did not warrant disbarment, were reasonably likely to succeed in the program, and did not seek to participate "as a means of delaying the ultimate disposition of the proceeding or avoiding disbarment." Twenty-one other states limited their diversion programs to minor misconduct not involving misappropriation or significant client harm. Drexel sought other changes: every diverted attorney should be considered for inactive enrolment, lawyers facing serious charges would be able to resign only after admitting or pleading no contest to charges, lawyers seeking diversion would have to offer stronger evidence of the connection between misconduct and substance abuse or mental health, and the OTC could appeal to the Review Department. The Supreme Court shared many of his concerns, but defense counsel resisted.[146]

Drexel also proposed to place disciplinary charges on the State Bar website as soon as an NTSC was filed. The only other ways to obtain such information were to pay

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[144] Nancy McCarthy, "Malpractice premiums skyrocket," CBJ 1 (7.02); "Possible disclosure rule for uninsured lawyers," CBJ (1.06); Diane Curtis, "Malpractice insurance disclosure circulated for public comment," CBJ (7.06); Nancy McCarthy, "Broad opposition to insurance disclosure," CBJ (6.07); Nancy McCarthy, "Bar board will tackle malpractice insurance disclosure again," CBJ (11.07); Nancy McCarthy, "Board ducks malpractice disclosure," CBJ (12.07); "Board committee approves another version of insurance disclosure rule," CBJ (1.08); "Finally, board approves an insurance disclosure rule," CBJ (6.08); State Bar of California (2007: 25).

[145] Nancy McCarthy, "Proposal for diversion class sparks debate," CBJ 1 (10.00).

[146] Nancy McCarthy, "State Bar will open nation's only drug court for lawyers," CBJ 1 (7.01); Nancy McCarthy, "50 sign up for State Bar's new diversion program," CBJ 1 (7.02); Nancy McCarthy, "Prosecutors want tighter rules for diversion programs," CBJ (6.07); Nancy McCarthy, "Prosecutors want tighter rules for discipline diversion program," CBJ (1.08); "Board tightens disciplinary resignation rules," CBJ (4.08).

$.50 a page and wait several weeks or make an appointment to visit the SBC in San Francisco or Los Angeles. Drexel noted that only 10 percent of complaints resulted in charges, more than 90 percent of those charged in 2006-07 were found culpable, and some of the others enrolled in ADP or received informal sanctions. Few were acquitted of all charges: none in 2006, one in 2007, and two in 2008. Most public comment on the proposal was negative, including unanimous votes by the Los Angeles County and Beverly Hills Bar Associations. "It's going to snare up the innocent along with the guilty." David Carr (president of the Association of Discipline Defense Counsel) claimed that the OTC frequently overcharged, and there was "something about" the Internet "that lets people accept what they read" uncritically. Defense counsel Diane Karpman said posting would violate the "presumption of innocence" and be "profoundly destructive" to the lawyers. One Governor called the proposal "an unnecessary blow." "Is what we are doing helping the profession or hurting the profession? ... What we are doing here is to highlight issues, highlight charges." But the Board adopted the proposal 18-4 (all six public members voting in favor), although it would apply only to new charges.[147]

In 1992, 17 years after being disbarred, Ronald Silverton was readmitted on his fourth petition. When he committed additional misconduct two years later the SBC recommended suspension, but the Supreme Court disbarred him a second time in 2004 and asked the Bar to act on a 1996 proposal for permanent disbarment. Each year about a hundred lawyers were disbarred, another hundred resigned with charges pending, and 15-20 sought reinstatement, about half of whom succeeded. Between 1990 and 2005, nearly three-fourths of reinstated lawyers were the subject of grievances; six were disbarred again and another 6-12 resigned. The Committee on Regulation, Admissions and Discipline narrowly approved (3-2) proposals to require disbarred lawyers to wait seven years rather than five before petitioning for reinstatement, compel anyone seeking reinstatement to pass the attorney bar examination, and make disbarment permanent for stealing client funds, crimes of public malfeasance, engaging in unauthorized practice of law while disbarred, or "conduct so egregious that the member should be permanently disbarred." Although comment was evenly split, every nonlawyer favored permanent disbarment. Defense lawyer Joann Robbins objected that most disciplined attorneys are "good people who do bad things" in a crisis. SB President James Heitung was opposed, because of his "personal experience with the idea of getting close to second degree murder" when he severely injured someone while driving drunk. Had the victim died "I would never have had the opportunity to come back here." Nevertheless, the Board approved the last two proposals while refusing to extend the time to petition for reinstatement.[148]

The divisions exposed above did not emerge when the Bar adopted a "civility code." President Sheldon Sloan (who had opposed mandating disclosure of malpractice insurance) made civility the focus of his year in office. But though the task force chair emphasized that the guidelines were aspirational, Joann Robbins warned that they "will inevitably be considered standards that will lead to disciplinary sanctions." In response,

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[147] Misconduct charges may be posted online," CBJ (6.08); Nancy McCarthy, "Lawyer misconduct charges will go online," CBJ (8.08); Mike McKee, "California Bar OKs Posting Discipline Charges Online," Minority Law Journal (7.14.08).

[148] Nancy McCarthy, "Permanent disbarment moves forward," CBJ (4.06); Nancy McCarthy, "Board OKs permanent disbarment," CBJ (9.06).

they were revised to state specifically that they are "not mandatory rules of professional conduct, nor rules of practice, nor standards of care" and cannot be used in disciplinary proceedings.[149]

VII. The Professional Is Political

The lesson of this sorry story is inescapable. Professional self-regulation is always an arena of political contestation, both within the legal profession and between it and outsiders: clients, competitors, politicians, and the media. The professional project is born of self-interest, which and continues to motivate it long after the core of professionalism has been firmly secured. The State Bar dedicated its first four decades to controlling entry (educational requirements, law school accreditation, bar examinations, character and fitness tests) and limiting competition, first from outsiders (unauthorized practice, market division treaties) and then among lawyers (bans on advertising and solicitation, minimum fee schedules). Although Terrence Halliday entitled his superb study of the Chicago Bar Association "Beyond Monopoly," lawyers never transcended monopoly; they simply convinced others to take it for granted.[150] Limitations on monopoly power were imposed on a strongly resistant profession by outside forces, primarily the U.S. Department of Justice and the U.S. Supreme Court, responding to the consumer movement of the 1960s. The profession still seeks to limit competition by adjusting the difficulty of the bar examination, restricting entry by lawyers from other states and countries, and regulating the institutional structures within which lawyers may practice (partnerships with other professionals, non-lawyer equity interests in law firms).

Nascent bar associations faced a classic collective action problem: how to persuade lawyers to participate (join, pay dues, vote, attend meetings, and serve on committees) rather than free ride.[151] Most state bars remained voluntary, accepting free riders as the price of political autonomy. California (perhaps because its size and diversity rendered voluntary associations weak and rural lawyers suspicious of urban dominance) opted for the unified bar's compulsory membership. But this had its own price, which often has been very high (partly because of the historical quirk that the Legislature must approve State Bar dues). Resistance by any dissenter severely constrains the political positions compulsory organizations can take. University public interest groups funded by student fees offer vivid illustrations. For its first few decades, the State Bar pursued policies that united lawyers (the professional project described above), leaving more controversial topics to the voluntary Conference of Delegates. But perhaps because this was California, the Conference took positions on highly volatile issues—the death penalty, law and order, affirmative action, prostitution, abortion, nuclear disarmament—subjects well outside what Halliday describes as the core of lawyers' moral authority.[152] Inevitably, the Conference became a lightning rod for attacks. And because most of the same actors met immediately after and in the same venue as the State Bar, the two were readily conflated.

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[149] "Guidelines for lawyer civility move forward," CBJ (5.07); Board adopts civility code," CBJ (8.07).
[150] Halliday (1987).
[151] Schneyer (1983).
[152] Halliday (1987: chap.2).

Even though a high proportion of state legislators were lawyers, they tended to be suspicious of the State Bar (perhaps because many had graduated from lower status, sometimes unaccredited, law schools and practiced alone or in small firms). Some legislators may have cynically calculated that lawyer-bashing was good populist politics. But others had particular axes to grind. Robert Presley (from the Riverside Sheriff's Department) and Patrick Nolan were law and order champions. Willie Brown was angry about the State Bar's opposition to his mandatory malpractice insurance bill—and perhaps about its treatment of the grievance against him. (Brown was one of the many prominent disciplinary targets who testified on behalf of David Harney: see chapter 3.) Most critically, Pete Wilson had been personally vilified by SB President Anthony Murray (for threatening California Supreme Court Justices who voted against the death penalty) during Wilson's successful U.S. Senate campaign; this may partly explain Wilson's veto of the SB dues bill 13 years later. For all these reasons, the State Bar was under constant attack from the moment of its founding: repeated plebiscites (all which resulted in member endorsements, to the dismay of critics), endless external audits and reviews, numerous lawsuits challenging its authority to take political positions, and two shut-downs when the Legislature or Governor blocked the annual dues bill.

Self-regulation poses its own difficulties. The State Bar had to convince external critics (dissatisfied clients and hostile legislators) that it was more effective than an independent regulatory agency. At the same time, it had to persuade members that it was less stringent and less expensive than an independent agency, whose creation was a real threat.[153] (Some lawyers opposed the mere existence of a disciplinary system as an admission that lawyers might misbehave.) Talking out of both sides of its mouth, the Bar rarely convinced either audience.[154] This is a classic dilemma, whether phrased in Latin (quis custodiet custodes) or English (setting the fox to guard the henhouse). (Think about how the police or military handle misconduct, politicians deal with corruption, corporations set executive compensation, or the Roman Catholic Church covered up sexual abuse by priests.) The Bar told the public that most complaints were unfounded, the dissatisfactions inevitably engendered by an adversary system in which one party's victory is the other's defeat. It warned that reform would only encourage more frivolous grievances. The Bar told its members that refusal to pay dues or accept cosmetic reforms would lead to direct regulation. Bar leaders spun every criticism as praise. They boasted about making "radical" reforms (although—like the answer to the question "when did you stop beating your wife"—this acknowledged the inadequacy of the unreformed system). They claimed perfection—or at least superiority to every other state's bar and every other California profession—and expressed frustration when critics kept asking for more. But the observers could (and did) object that the same criticisms were made decade after decade—the Clark Report, the *Los Angeles Daily Journal* and *San Francisco Examiner* exposés, Fellmeth's detailed semi-annual reports—yet nothing changed.

The Bar constantly dragged its feet in creating and operating an effective regulatory system. It required lawyers to maintain client funds in a trust account only in 1956. It created the Client Security Fund only in 1972. It refused to require lawyers to carry malpractice insurance or even tell clients they did not have it. The Bar mandated

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[153] The Illinois bar voluntarily relinquished regulation to the state in the 1980s. Powell (1986).

[154] Lloyd Fallers (1965) described this difficult intermediate position in the context of British colonial rule in Uganda.

arbitration of fee disputes only in 1972. It successfully resisted making neglect—the single most common complaint—a ground for discipline. It opposed professionalizing the investigation, prosecution, and adjudication of client grievances as long as possible (even though the California Supreme Court was highly critical of decisions by volunteer referees). Its explanations for the extraordinary attrition from client "inquiries" to punishment satisfied few outsiders. It allowed backlogs and delays to reach intolerable levels; and when the public outcry became too vociferous, it focused all its energy on reducing those numbers without regard to the behavior underlying client grievances.

Because the contradictions of self-governance and self-regulation are structural, they are unlikely to be resolved. They generate endless debates over publicity and secrecy, alleged bias, lenience and severity, and recidivism, while failing to address the fundamental problems of lawyer behavior. For all those reasons, adjudicated cases represent only one window into the many ways in which lawyers betray trust. Nevertheless, I hope the following chapters show that the analysis of disciplinary cases is an essential first step in mapping what is still a largely unknown terrain.

Mexican American Bar Association of Los Angeles County

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January 10, 2011

Via Email
Amy Anderson
Office of the General Counsel
The State Bar of California
180 Howard St.
San Francisco, CA 94105

RE: Government in the Public Interest Task Force
Written Responses

Dear Ms. Anderson:

Enclosed are the responses requested by the State Bar to provide "recommendations for enhancing protection of the public and ensuring that public protection is the highest priority in the licensing, regulation, and discipline of attorneys." These answers are being submitted by me on behalf of the Mexican American Bar Association (MABA), of which I am the 2011 President.

1. What do you understand "protection of the public" to mean in the context of governance of the State Bar?
I understand "protection of the public" to mean that State Bar undertakes to ensure that new lawyers entering the profession have the necessary preparation to be legal practitioners. Moreover, that once in practice, that there are protocols in place by which members of the public can seek accountability for the actions of attorney members of the bar that fall short of the minimum standards of professional competence, while at the same time being vigilant against those who engage in the unlicensed practice of law, something that the Latino community knows too well.

2. Who should serve on the board that governs the State Bar?
Because of the nuances involved with the practice of law, including the many professional obligations and ethical duties imposed on attorneys in California, it is necessary that any governing body of the State Bar be made up mostly of attorneys. Only seasoned attorneys can properly reflect upon the merits of a particular complaint against an attorney from the standpoint of understanding the Rules of Professional Conduct as well as the Ethical Cannons that guide every practicing lawyer. Without such a make up, any governing body would run the risk of misapplying legal principles, not understanding the true issues involved, or simply believing that a given outcome is contrary to perceived notions of fairness when in fact certain results might be demanded by the very rules that regulate our practice. I do believe that it is important to include non-lawyers on such a governing body, so long as their tenure is not permanent and so long as their voice is a minority, and not a majority, voice.

3. How should each of these individuals be selected? By whom and by what criteria?
Geographic representation, in a state as vast as California, is extremely critical so that every region and its issues can be properly represented state-wide. The current practice of electing 15 lawyers state wide by practicing attorneys in different geographic regions is something I believe works. Having maybe more than one lawyer in practice less than 5 years might be helpful as well, although both would not have to come through CYLA. I believe the current make up of 6 members of the public might be acceptable if criteria are established to ensure that the members have some familiarity with issues arising from attorney-client relationships.

4. What qualifications should be required for each member of the board?
For attorney members they should be required to be in good standing and should ideally bring to the table a set of experiences different from the rest. However, since they will be elected, it is up to each region to decide what lawyers represent them. At least one lawyer from CYLA seems appropriate. As for the public members, they should not have an agenda. They should ideally be active members of their communities and have some familiarity with issues arising from attorney-client relationships.

5. What size should the board be?
Big enough to handle the work its mandate requires but not too big that is becomes an unmanageable bureaucracy.

6. How long should the terms of the members (and of the president) be?
It depends on whether there are particular issues that the current makeup and terms of office have made impractical and if so, knowing what logical changes could be implemented to meet those particular issues. If the system isn't broken, why fix it?

7. How should the president and other officers be selected?
See answer to #6.

8. What changes or other governance models may enable the board to better serve the interest of public protection?
I believe that changing the institutional structure of any entity as big as the State Bar should not begin with asking these kinds of questions. Rather, it is helpful to be refer to data that deals with the different functions of the State Bar, and then rate how the State Bar has been fulfilling its functions before deciding on a course of action (lest one be accused of putting the cart before the horse). In the particular area of public protection, as long as the State Bar has sufficient resources to address each and every complaint in a competent and timely manner, and holds attorneys accountable when they are in violation of their ethical and/or professional obligations, then the State Bar is seemingly fulfilling its function of protecting the public. Of particular concern to MABA is that the State Bar remains independent of any state agency. The State Bar is self-funded and requires no money from California. Any proposed change to make the State Bar a part of any California agency is likely doomed to fail given the current economic climate. MABA believes it is critical that attorneys from underrepresented groups have a voice on the State Bar so that issues of particular concern to minority attorneys are not lost. Lastly, any effort to centralize the operations of the State Bar should be resisted if that means that being on the State Bar becomes an issue of who one know rather than allowing each geographic area decide for itself who represents them and their interests at the State Bar level. The choice must remain local. Cronyism, or the risk thereof, should be avoided.

STEPHEN L. RAUCHER PRESIDENT, BEVERLY HILLS BAR ASSOCIATION

1. The legislature is interested in receiving "recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys." What do you understand "protection of the public" to mean in the context of governance of the State Bar?

Protection of the Public involves the regulation of the legal profession in discipline and licensing; monitoring the relationship of lawyers with their clients, the courts, and the legal system. We believe that the Board has focused on public protection. In a number of significant policy decisions, the Board has recently acted to protect the public over the objections of voluntary bar associations and contrary to what may be viewed as the more parochial interests of lawyers. For example, the Bar wholeheartedly supported SB 94, which placed prohibitions on lawyers' accepting advanced fees for assistance to clients in obtaining loan modifications. A few years ago, the Board supported the posting of Notices of Disciplinary Charges on their website. Allegations are posted on the Internet prior to any determination of guilt or innocence. This was opposed by many local bar organizations. Further, the Board enacted a new Rule of Professional Conduct requiring that lawyers disclose the absence of legal malpractice coverage. This was opposed by many local bar organizations. Finally, the Board of Governors (September 22, 2010) adopted a revision to the Rules of Procedure that loosens the standards that apply to the admissibility of evidence at the State Bar Court, enacting standards similar to the Administrative Procedures Acts. Now evidence at the State Bar Court need only be "relevant and reliable," and can include hearsay. These recent actions by the Board were almost uniformly opposed by local bar organization, yet the Board determined that they fostered and promoted public protection.

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

When lawyers are admitted to the practice, they swear to abide by the core principles of the legal profession, as are articulated in the Rules of Professional Conduct and State Bar Act. Lawyers are fiduciaries as a matter of law, and officers of the court. Many of the constituent groups (voluntary local bar association) opposed the requirement of disclosure of malpractice coverage, and the posting of Notices. The Board enacted those and other protocols because they believed they promoted and enhanced the core values of the profession. We believe lawyers should constitute the majority of the Board of Governors. According to substantial case precedent, lawyers are within the judicial branch of the government, as opposed to the other professions. Lawyers remain one of the last self-regulating professions because of this critical factor. Public members should continue to serve. They are important because (if properly selected) they represent the voices of the consumers of legal services. During the last decade, the Rules Revision Commission has worked with great diligence to rewrite and articulate the Rules of Professional Conduct. While many lawyer members of the Board have attended those meetings, we are advised that public members have rarely, if ever, attended them. We would like to see public members appointed who have demonstrated a commitment to addressing issues of public concern and who are prepared to devote the time and energy necessary to educate themselves in these matters.

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

We support transparency in the selection of the Board that will govern the profession. Greater transparency is achieved through a democratic process. Thus, we support the continued election of the Governors. However, we also believe in a representational democracy. The recent "redistricting" only exacerbated the unfair distribution of Governors through the state. Up to seventy percent of all California lawyers are located in the Southern California corridor (including Los Angeles and Orange County), yet those counties are "under represented" on the Board. We urge the adoption of direct elections for a new position of President Elect, as the best method to obtain greater transparency and accountability. It has long been required that our State Bar Committees (appointed by the Board of Governors) reflect all types of diversity, yet the appointing Board acutely fails to reflect the diverse population of California.

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

We would like to see greater diversity, which could be a qualification for the Board. For example the Board of Governors of the American Bar Association has certain positions designated or allocated to under represented segments of the attorney population. Thus, a certain number of positions reflect both racial and gender equality. The diversity we would hope to achieve is not limited to race or gender, because we would like to see more government lawyers, lawyers who are involved in the legal aid community, and the small and solo practitioners.

5. What size should the board be?

We are concerned that the Board is too large. We suggest 18 to 20 members is more efficient. We are opposed to changing the relative proportions of lawyer and public members.

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

We believe the current terms are sufficient. The Bar is a complex organization with a multimillion dollar budget that requires a certain level of sophistication, training and experience.

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

The President Elect, should be directly elected by the majority of voting lawyers in California. The current process is flawed. Direct election is democratic and more transparent, and results in greater accountability. We strongly believe a position of President Elect should be established, and that he or she should succeed automatically to become President the next year, without election. This would assure a smooth transition of power, provide a year's opportunity for the President Elect to train for the office, and avoid the necessity of the President Elect to campaign for office the year preceding his or her assumption of office.

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

We would also suggest that the Board meetings be streamed live on the Internet. The American Bar Association's House of Delegates is live streamed, and that leads again to a greater transparency.

9. Would you like to speak at one of the public hearings the Governance Task Force is holding in January? (Please provide your contact information and state whether you would like to speak on January 20, 2011 in Los Angeles, or on January 27, 2011 in San Francisco.)

Yes, on January 20 in Los Angeles. Stephen L. Raucher President, Beverly Hills Bar Association Reuben Raucher & Blum 10940 Wilshire Blvd. 18th Floor Los Angeles, CA 90024 (310) 777-1990 slr@rrbattorneys.com

SAN FERNANDO VALLEY BAR ASSOCIATION

1. The legislature is interested in receiving "recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys." What do you understand "protection of the public" to mean in the context of governance of the State Bar?

"Protection of the Public" means adequate representation of all of the geographic areas in California so that the State Bar can enact rules and regulations to make sure the attorneys representing the public provide services in a proper manner. To ensure this happens, the Board of Governors must be able to hear the various concerns of the public in all of the geographical areas of California. If one particular area is not represented, than the needs of the public, in that geographical area, will be overlooked. Thus to ensure the public is properly protected, each geographical area of California should have local representation on the Board.

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

Individuals who best represent the interest of a diverse bar should serve on the governing board of the State Bar. This is best accomplished with separate districts that allow for local representation.

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

These individuals should be selected in a manner that allows for local representation. They should be selected by the members of the local region they are to represent. If multiple representatives are to be selected from one region or county, that region should be divided into several regions, so the unique interests of the entire region is represented. For instance, five representatives from Los Angeles County currently serve on the Board and each of those representatives works for a private or public law firm in downtown Los Angeles. This has historically been the case because governors from Los Angeles County have been endorsed by the downtown breakfast club organization. This is not representative of the diversity of the community or profession in Los Angeles County.

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

Each board member should be a licensed practicing attorney in good standing with the Bar.

5. What size should the board be?

The number is not important, just as long as each unique region of California is represented.

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

Each board member and the president should serve a two-year term.

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

The President and officers should be voted on by the members of the State Bar.

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

The San Fernando Valley Bar Association proposes that the San Fernando Valley be a separate district for purpose of representation on the State Bar Board of Governors.

9. Would you like to speak at one of the public hearings the Governance Task Force is holding in January? (Please provide your contact information and state whether you would like to speak on January 20, 2011 in Los Angeles, or on January 27, 2011 in San Francisco.)

The San Fernando Valley Bar Association requests that our President, Seymour I. Amster, speak at the January 20 hearing in Los Angeles. Mr. Amster can be contacted through SFVBA Executive Director Liz Post at epost@sfvba.org or (818) 227-0490, est. 101.

DOUGLAS A. CROWDER

1. The legislature is interested in receiving "recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys." What do you understand "protection of the public" to mean in the context of governance of the State Bar?

"protection of the public" should mean protecting the rights of the common man to have legal representation. It's unlikely that the legislature really has that in mind.

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

Lawyers who believe in protecting the rights of the common person to hire attorneys of their choice. Non-attorneys should not serve on the board.

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

Current selection method is OK.

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

Current qualifications are OK.

5. What size should the board be?

Smaller than it is.

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

Current terms are OK.

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

President and other officers should be elected by the State Bar members, not by the board.

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

The board should have a mix of attorneys from small law firms and large law firms.

9. Would you like to speak at one of the public hearings the Governance Task Force is holding in January? (Please provide your contact information and state whether you would like to speak on January 20, 2011 in Los Angeles, or on January 27, 2011 in San Francisco.)

Yes. In Los Angeles, January 20, 2011. Douglas A. Crowder, tel. 800-455-1592

F. TEPEDINO

1. The legislature is interested in receiving "recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys." What do you understand "protection of the public" to mean in the context of governance of the State Bar?

The words do not mean anything. Police, fire; earthquake protection? More specific please.

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

A mix of Lawyers; judges and public members.

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

applicants without conflicts of interests; by a panel of judges and Bar Asociation offcers.

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

Lawyers: no - NONE - history of discipline actions. Judges the same - Public - no politicians.

5. What size should the board be?

12 to 15 members.

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

2 years, renewable maximum 6 years.

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

by the sitting board.

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

The Board should develop these.

9. Would you like to speak at one of the public hearings the Governance Task Force is holding in January? (Please provide your contact information and state whether you would like to speak on January 20, 2011 in Los Angeles, or on January 27, 2011 in San Francisco.)

Yes, E mail: condorgrup@aol.com. 858-569-6454 January 20, 2011; in Los Angeles. F. Tepedino Bar # 64658

Comments of the Legal Aid Foundation of Los Angeles to the Governance in the Public Interest Task Force

The Legal Aid Foundation of Los Angeles (LAFLA) is one of the oldest and largest legal services programs in California. It is the front-line law firm for the poor in Los Angeles, providing assistance to over 30,000 low income individuals each year. These comments are submitted on behalf of LAFLA to address what we see as important issues in addressing the structure and governance of the State Bar.

The State Bar fulfills several functions that relate to public protection. Clearly, admissions and discipline are critical functions. In addition, the Bar has several other functions that enhance public protection in entirely different ways. The effort of the Bar to expand access to justice is an extremely important function which protects a large segment of the public from being denied access to the courts and justice. Through the Access to Justice Commission, the Standing Committee on Delivery of Legal Services, and the staff that support those entities, the low and moderate income members of the public are much better able to have their rights protected. The regulation of Lawyer Referral Services assures the public that lawyers receiving referrals have the experience necessary to assist them, and malpractice insurance to protect them. The Legal Services Trust Fund Commission and its staff assure that services provided to the poor are of the highest quality. The diversity efforts of the bar work to expand the availability of lawyers in minority and other underserved communities. All of these functions are extremely important in protecting the public, and should be a high priority for the State Bar in whatever governance system is created.

The integrity of our system depends on equal access to justice and effective representation for all parties by attorneys whose backgrounds reflect the diversity of California. For these reasons, we feel that the public is best protected by a system which addresses not just the regulatory issues of admissions and discipline, but also the critical issues of access to justice and fairness in the justice system.

Anderson, Amy

From: roy torres [rttorresca@yahoo.com]
Sent: Tuesday, January 11, 2011 10:07 PM
To: Anderson, Amy
Subject: Survey question responses and desire to speak on 1-20-11

Ms. Anderson:

Thank you for your timely response.

With respect to those 9 questions contained on the State Bar's website under surveymonkey.com under the heading "Governance in the Public Interest Task Force Request For Information." I reply as follows:

1. Serious, not just lip service, oversight by Legislative creatures (with true enforcement authority) having the power to sanction, and if need be disbar, and/or bring civil and/or criminal charges against those licensed members of the State Bar that have clearly violated some facet of their oath of the legal profession, and/or as officers of the court.

2. through 7. It would appear based on simple research that there is already a 23 member Board of Governors that is well established and structured by process. These questions, 2 through 7, appear meaningless. Unless I am misunderstanding, these questions are like asking how the Congress of the United States should select its members. These questions are already answered in the text of the Constitution. Certainly, after decades, the State Bar cannot seriously be considering the restructuring of its governing board.

8. Fewer attorneys, more laypersons.

9. I would very much care to speak at the Public Hearing in Los Angeles on January 20, 2011. I can be contacted at rttorresca@yahoo.com. Thank you.

Roy Torres

Anderson, Amy

From: Tonja Jarrett [tjarrett@kcaib.com]
Sent: Thursday, December 16, 2010 10:34 AM
To: Anderson, Amy
Subject: Task Force - Request to Speak

Ms. Anderson,

As a member of the public, I am deeply concerned by the Governance within the State Bar Association. I and my family have been directly impacted by what we perceive to be the deficiencies within the State Bar, and I would very much like to speak at the Los Angeles event.

I have a daughter who is in the Family Law nightmare in Los Angeles County. Numerous complaints to the State Bar go uninvestigated, unheard, and little weight is given when actual irrefutable evidence is given to the State Bar into the misconduct of an attorney who is destroying families.

The establishment of an independent oversight board is critical for the Public Confidence to be restored into the Judicial System, and the way that the State Bar interacts with those who are attempting to bring valid complaints.

I can best be reached on my cell phone: 818-693-2224.

Tonja Jarrett; CIC,CISR
Vice President
Personal Lines Manager

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EILEEN LASHER

1. The legislature is interested in receiving "recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys." What do you understand "protection of the public" to mean in the context of governance of the State Bar?

Attorneys be required to work for their client to the best of their ability without deliberately delaying resolution or failing to provide all of the options available.

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

A variety of previous litigants specifically previous high conflict litigants who have strived to expose deliberately churning of cases which finally has been acknowledged initially by the Elkins Task Force.

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

They need to have no alliance or attachment to the outcome.

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

Qualified should include knowledge of rules and regulations governing moving large sums of money from one place to another.

5. What size should the board be?

10 members

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

3 years

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

They need to have knowledge of the high conflict cases held hostage in San Diego Family Law Court for over 10 years without any issues resolves but litigants were billed over $500,000. No compliance with the California Rules of the Court.

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

Attention to resolving the cases within the 5 year period or provide a trial. When a certain amount of money has been spent and no resolution reached it should go to another step for more assistance. This would prevent the attorneys from working in collusion deciving the Court and deliberately delaying resolution.

9. Would you like to speak at one of the public hearings the Governance Task Force is holding in January? (Please provide your contact information and state whether you would like to speak on January 20, 2011 in Los Angeles, or on January 27, 2011 in San Francisco.)

January 20, 2011 Eileen Lasher 619-847-8094