Sperber, Jill

From: The State Bar of California
Sent: Friday, March 11, 2011 1:52 PM
To: Sperber, Jill
Subject: FW: The State Bar of California e-briefs

From: Dougnewlan@aol.com [mailto:Dougnewlan@aol.com]
Sent: Friday, March 11, 2011 1:33 PM
To: The State Bar of California
Subject: Re: The State Bar of California e-briefs

Tell me why if a lawyer steals there should be a threshold level..thief is a thief !!

Doug Newlan bar number 32250..

In a message dated 3/11/2011 1:29:18 P.M. Pacific Standard Time, BARCOMM@calbar.ca.gov writes:

March 11, 2011

e-briefs

The State Bar of California

MISAPPROPRIATION CONSUMER ALERT --- Public comment is sought for a proposal to post a prominently displayed notice on a lawyer's State Bar web page when the lawyer is accused of stealing $25,000 or more of clients' money.

STATE BAR GOVERNANCE --- Several proposals are being circulated relating to the configuration and numbers of the State Bar's Board of Governors.

ETHICS SYMPOSIUM --- The State Bar's 15th annual ethics symposium, *Ethics Across the Profession*, will take place April 9 at the UC Irvine School of Law.

BOARD OF GOVERNORS --- Nominating petitions for five open seats on the State Bar Board of Governors are due April 1.

SCAM ALERT --- Prompted by the continued targeting of lawyers by unscrupulous online swindlers, the State Bar has issued a new ethics alert.

Sperber, Jill

From: Stuart Flashman [stuflash2@gmail.com]
Sent: Friday, March 11, 2011 2:01 PM
To: Sperber, Jill
Subject: Comment on proposed "consumer alert" for those accused of major appropriation of client funds

While I do not in any way condone misappropriation of client funds, I believe the proposed "Consumer Alert" notice goes well beyond permissible bounds in inflicting punishment on an attorney based solely on an unproven accusation. The "disclaimer" that the attorney is "presumed innocent" is directly contradicted by the large-type headline of "Consumer Alert", which essentially tells a prospective client, "Watch out! This is someone to avoid!" How many prospective clients, seeing a notice like the one proposed, would continue to consider hiring the "suspect" attorney? This would amount to an attempt to put the attorney out of business based solely on an accusation. To my mind, that smacks of a violation of due process.

If any notice is to be given (and I question whether notice should be put up at all unless all accusations of attorney misconduct being considered are also put up in the same format), it should be very low-key and matter-of-fact and should simply indicate that an accusation has been made and is under investigation, and should definitely include a disclaimer that the notice is for information only and that no inference of the attorney's guilt or innocence should be drawn.

Serving public interest and private clients since 1990

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Attorney

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Sperber, Jill

From: Kathy Strong [kathystrong@gmail.com]
Sent: Friday, March 11, 2011 2:09 PM
To: Sperber, Jill
Subject: Public Comment on Posting Online of "Missappropriation Consumer Alerts"

To whom it may concern:

I think the posting online of a major consumer alert regarding allegations of wrongful misappropriation of funds is a VERY GOOD IDEA. Currently, it is my opinion that the bar does not provide the public with enough information regarding wrongdoing by attorneys accused of such conduct. Indeed, with the so-called "alternative discipline program" it seems to me that attorneys -- to the detriment of the public at large -- are able to hide such allegations for a period of years, while participating in that program. To me, that is just plain WRONG. If the bar knows of wrongdoing, it should report it publicly. Specifically, the state bar should (but does not now) seem to hold its duties to protect the public to be of higher importance than its desire to protect the wrongdoer.

Kathleen Strong (SBN 137610)
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KathyStrong@Gmail.com

Sperber, Jill

From: Curtis, Diane
Sent: Friday, March 11, 2011 1:44 PM
To: Sperber, Jill
Subject: FW: Consumer Alert Proposal on Misappropriation Goes Out for Public Comment

fyi

From: John Guerrini [mailto:guerrini@guerrinilaw.com]
Sent: Friday, March 11, 2011 1:43 PM
To: Curtis, Diane
Subject: Consumer Alert Proposal on Misappropriation Goes Out for Public Comment

Is this a bad idea? While I sue "naughty" attorneys all the time for mishandling client money, we are talking about a proposal to place a large sign on an attorney's page at the Cal Bar site when he/she is "alleged" to have stolen, right?

We are all subject to the wrath of a disgruntled client from time to time. If that disgruntled client were to allege that an attorney stole $25,000 or more, then this "sign" would go on the attorney's Cal Bar website, even if the allegation is unfounded?

That sounds dangerous, and surely, harmful to the attorney's business.

John D. Guerrini
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www.guerrinilaw.com

• Commercial and Consumer Debt Collection •
• FDCPA & Rosenthal Defense •

Sperber, Jill

From: Curtis, Diane
Sent: Friday, March 11, 2011 1:46 PM
To: Sperber, Jill
Subject: FW: MISAPPROPRIATION CONSUMER ALERT

fyi

From: Gary Jander [mailto:gary@bjjlaw.com]
Sent: Friday, March 11, 2011 1:45 PM
To: Curtis, Diane
Subject: MISAPPROPRIATION CONSUMER ALERT

I would be absolutely opposed to such a posting. A lawyer like anyone else is innocent until proven guilty and once the door is opened it can't be closed. These types of accusations if placed on an official state agency website will ruin the professional and personal life of any one against whom it is posted, even if the allegations have no merit. It would become a tool of vindictive spouses, political enemies and sensationalist media outlets. It is an easy task to accuse someone of misconduct, it is quit another to prove it.

We should be fair and if an attorney is **convicted** of stealing money, then and only then, should any action be taken by the state.

Gary D. Jander
Brierton Jones & Jones, LLP
1550 Hotel Circle North, Suite 300
San Diego, CA 92108

(619) 696-7066

Sperber, Jill

From: Curtis, Diane
Sent: Friday, March 11, 2011 1:46 PM
To: Sperber, Jill
Subject: FW: The State Bar of California e-briefs

From: Mark E. Saltzman [mailto:businessattorney@yahoo.com]
Sent: Friday, March 11, 2011 1:39 PM
To: Curtis, Diane
Subject: Re: The State Bar of California e-briefs

Dear Ms Curtis:

I am adamantly against publishing a lawyer's misappropriation of funds on the State Bar website. This means of humiliation serves no purpose.

The only message that the State Bar would be sending to the public is one that confesses that a lawyer has engaged in horribly unethical conduct, yet the State Bar allows that lawyer to practice. Nothing positive is gained by this confession.

Presumably, the State Bar's attempt to humiliate the offending lawyer is for the purpose of advising the public to avoid hiring the lawyer. Either a lawyer should be a member of the State Bar, with the dignity and respect that is due an officer of the court, or the lawyer should be eliminated from the State Bar.

Posting discipline of any kind (including the system that is currently in place) is demeaning to the entire legal profession.

Now, the new proposal is just the latest version of the State Bar's *Scarlett Letter.*

Thank you for the opportunity to give feedback.

Sincerely,

Mark Saltzman
SBN 155612

Law Offices of Mark E. Saltzman
Business - Real Estate - Labor - Family - Bankruptcy
18321 Ventura Blvd., Suite 530
Tarzana, California 91356-6445
818-343-0600

Sperber, Jill

From: Curtis, Diane
Sent: Friday, March 11, 2011 3:11 PM
To: Sperber, Jill
Subject: FW: Outing the Lawyers who Steal From Clients

-----Original Message-----
From: Douglas Shaw [mailto:docshaw1@yahoo.com]
Sent: Friday, March 11, 2011 3:11 PM
To: Curtis, Diane
Subject: Outing the Lawyers who Steal From Clients

Dear Ms. Curtis: Frankly, unless a lawyer can establish that any misappropriation of funds is due to pure clerical error, I think that the taking of ANY client funds should get a lawyer this notice on his Bar Profile. Stealing at any level is stealing and shows a total loss of character and ethics by any lawyer. Disbarment would be a better cure. Watch the lawyers clean up their acts if that were the penalty for theft at any level. Draconian, perhaps, but warranted in times where dishonesty has taken on a relativist tone from the highest office in the land to the least profitable lawyer. Misappropriation should never be swept under the carpet at any level. It is just common sense. If they will steal a little their ethics are just as poor as stealing a lot. One leads to the other in most cases. We don't need lawyers like that in our Bar, ever.

Douglas R. Shaw
SBN 67507
Inactive

Sperber, Jill

From: Curtis, Diane
Sent: Friday, March 11, 2011 3:22 PM
To: Sperber, Jill
Subject: FW: Consumer Alert Proposal on Misappropriation Goes Out for Public Comment

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From: Dr. Jonathan Levy [mailto:jonlevy@hargray.com]
Sent: Friday, March 11, 2011 3:22 PM
To: Curtis, Diane
Subject: Consumer Alert Proposal on Misappropriation Goes Out for Public Comment

This is a good idea but violates the attorney's due process rights, the better idea is to wait until the attorney has actually been found to have stolen money and then post the details permanently appended to their public record.

Jonathan Levy, PhD
Norwich University
CSB 158032

Dr. Jonathan Levy
Tel/Fax +1 202-318-2406

Sperber, Jill

From: William Raff [wiraff@flash.net]
Sent: Friday, March 11, 2011 3:20 PM
To: Sperber, Jill
Subject: Posting of Consumer Alert

It seems to me that the proposed rule which provides for the posting of a consumer alert as described in the rule is contrary to our principles that a person is presumed innocent until proven guilty. Why should the State Bar be allowed to ruin a lawyer's reputation simply when that lawyer is accused. False accusations in our society are not uncommon and I think the State Bar has at least as much obligation to protect a lawyer from false accusations as it does to trash a lawyer simply on an accusation. I think this is an improper and dangerous proposed rule.

William F. Raff
Attorney at Law

Sperber, Jill

From: amgrahamlaw@aol.com
Sent: Friday, March 11, 2011 11:19 PM
To: Sperber, Jill
Subject: Proposal re Accusation of Misappropriation

Dear Ms. Sperber:

I think the current proposal of publicly announcing an accusation of an attorney misappropriating over $25,000 is not wise.

It is like making someone wear a Scarlet Letter, without trial or any finding of fact.

Obviously, anyone who would actually do such a thing is despicable. Make whatever rules you wish proclaiming the guilt of such a person, once that guilt has been established.

However, anyone accused of such a thing will be tarred by it, whether the accused is guilty or not. And apparently any disgruntled client can make the accusation.

People accused of committing crimes do not have to proclaim they have been accused. Even an arrest (which is more than an accusation) is not competent evidence because it is prejudicial, and not probative, to introduce evidence of a mere arrest when a person might actually be innocent. A mere accusal is even less significant than an arrest. It is simply one person's word.

You would be putting a ridiculously unfair advantage in the hands of possibly unscrupulous clients to allow such a proposal to become law. Any client who does not want to pay a bill (ie, virtually all clients) would have a terrible weapon to "negotiate" with. You would enable such clients to threaten, intimidate and extort their lawyers. You would potentially harm a lot of good attorneys and you would not add any disincentive to the few unscrupulous ones who would do it anyway.

This proposal should not be adopted.

Thank you for considering my thoughts.

Respectfully,

Alice M. Graham
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4640 Admiralty Way, Ste. 500
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T 310-496-5750 F 310-496-5751
AMGrahamlaw@aol.com
=

Sperber, Jill

From: James Blackstock [jim.blackstock@mac.com]
Sent: Friday, March 11, 2011 8:54 PM
To: Sperber, Jill
Subject: Consumer Alert re Disciplinary Charges

Ms. Sperber: The public is benefited by the truth. But, as any defense lawyer will consistently, repeatedly, and accurately shout to you, accusations and suspicions do not comprise the truth, and in many case never result in directing attention to the truth. I am unalterably opposed to publishing a "consumer alert" (which cannot in any logical analysis result in anything other than labeling the identified attorney as a criminal) before the conclusion of legal proceedings. If an attorney is proven to have committed a criminal act, then incarcerate, require restitution from, and disbar the attorney. The ABA and the CA State Bar would NEVER agree to allow a notice to be posted that "Mr. X is accused of being a Terrorist" (and similarly the lunatic in Arizona who unquestionably shot Rep. Giffords is currently and regularly referred to as the "accused" shooter), so why in any intellectual universe would the State Bar of CA allow any attorney to be branded as a criminal BEFORE a determination of actual guilt? Because such a "Scarlet Letter" label could not fail to result in material and substantial harm to the accused attorney BEFORE any actual guilt or responsibility is proven (and because that is certainly and obviously the intention of such a rule), this appears to me to be one of the most unconstitutional breaches of due process that I could imagine. Do not do it. It is inappropriate and beneath the professionalism of the Sate Bar of California. James F Blackstock # 70181

Sperber, Jill

From: Jim Ward [jim@jward.org]
Sent: Friday, March 11, 2011 5:14 PM
To: Sperber, Jill
Subject: Brief Comment Re Proposed Online Posting of Consumer Alert

Re: Proposed Online Posting of Consumer Alert re Attorneys Charged with Major Misappropriation of Client Funds and Petitions filed under Business & Professions Code section 6007(c) involving Major Misappropriation

The following does not reflect any deep study of your proposal but I wanted to raise the issue.

Provision should be made for the rapid remediation of situations where the "accusation" results from a disgruntled party intending to harm the reputation of complainee without reasonable basis for making such an accusation.

How can I (an innocent attorney) quickly correct an improper and/or malicious accusation without waiting for adjudication? There should be some sort of escape hatch for malicious or negligent accusations that cannot be easily used by guilty attorneys.

Thank you for your good work,

Jim Ward

Sperber, Jill

From: Curtis, Diane
Sent: Saturday, March 12, 2011 12:52 AM
To: Sperber, Jill
Subject: FW: Posting on Webb cite

-----Original Message-----
From: John Tosney [mailto:jtosney8@yahoo.com]
Sent: Fri 3/11/2011 8:42 PM
To: Curtis, Diane
Subject: Posting on Webb cite

This seems extremely dangerous and could be misused by clients with a vendetta or out or unfounded anger.
This is a career killer and should not be posted without a finding of guiltafter a full trial.
97183

Sent from my iPhone

Sperber, Jill

To... Curtis, Diane

Cc...

Bcc...

Subject: RE: PROPOSAL TO POST NOTE IF LAWYER IS MERELY ACCUSED OF TAKING OVER $25,000

Attachments:

From: Curtis, Diane
Sent: Sat 3/12/2011 12:49 PM
To: Sperber, Jill
Subject: FW: PROPOSAL TO POST NOTE IF LAWYER IS MERELY ACCUSED OF TAKING OVER $25,000

-----Original Message-----
From: kirkellis35@sbcglobal.net [mailto:kirkellis35@sbcglobal.net]
Sent: Sat 3/12/2011 11:44 AM
To: Curtis, Diane
Subject: PROPOSAL TO POST NOTE IF LAWYER IS MERELY ACCUSED OF TAKING OVER $25,000

Gee, I thought we were lawyers? I thought we were trained to rely on the judicial system; and that the constitution requires conviction based upon a finding of guilt beyond a reasonable doubt; and that, even in civil cases, the finding must be of guilt/liability by a preponderance of the evidence? Am I missing something? How can we possibly be considering adopting a proposal that requires this sort of website posting based on a mere accusation, before anyone is found guilty of or liable for anything, either beyond a reasonable doubt OR by a preponderance of the evidence. Whomever came up with this idea must have sawdust instead of grey matter in his/her head.

G.Kirk Ellis, Esq.

kirkellis35@sbcglobal.net

Sperber, Jill

From: Jim Cote [jim@jfcotelaw.com]
Sent: Monday, March 14, 2011 1:18 PM
To: Sperber, Jill
Subject: Proposed Online Posting of Consumer Alert

I am not in favor of posting an alert based merely upon charges being filed.

James F. Cote, Esq.
Law Office of James F. Cote
319 East Carrillo Street, Suite 107
P.O. Box 20146
Santa Barbara, CA 93120-0146
Voice: 805/966-1204
Fax: 805/966-1294
Email: jim@jfcotelaw.com
Website: jfcotelaw.com

Sperber, Jill

From: Snook, Terry [Terrence.Snook@goAAA.com]
Sent: Tuesday, March 15, 2011 9:44 AM
To: Sperber, Jill

Subject: RE: Major misappropriation of client funds

My only concern is that a consumer could make a spurious claim as a strategy to leverage civil suit or civil claim, in essence, trying to blackmail a settlement by the threat of Bar action. I would urge consideration of the Bar adopting a clear and convincing evidence standard being found by its investigative arm prior to disclosure to the public of such claims.

Terrence Snook
Cal Bar. No. 114578

Sperber, Jill

From: Debra K. Butler [debrabutler@verizon.net]
Sent: Tuesday, March 15, 2011 1:11 PM
To: Sperber, Jill
Subject: Comment/objection to proposal to post accusations of theft against attorneys

Hi Jill,

This issue came to my attention today when I read the article on the State Bar website from the Journal.

I am writing to object to mere accusations being posted, as we know that disgruntled clients can accuse attorneys of misconduct that is not borne out after investigation.

I do not object to posting a list of attorneys found after due process to have committed theft.

Thanks for your time.

Debra Butler
CSB # 143237
(818) 951-2414

Sperber, Jill

From: mchernis@silverfirm.com
Sent: Tuesday, March 15, 2011 1:02 PM
To: Sperber, Jill
Subject: proposal re: dislcosing persons accused of stealing from clients

Ms. Sperber – I recently heard of this proposal. While it seems well intentioned, it is a bad idea to publicize the names of attorneys accused but not convicted of such unethical and perhaps criminal behavior. Apart from due process considerations, it gives clients who do not pay their bills too much leverage to make threats against the attorney. I think there are better ways to accomplish the Bar's goals. Michael

Michael S. Chernis, Esq.
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Tel: (310) 566-4388
Fax: (310) 382-2541
mchernis@silverfirm.com

Sperber, Jill

From: Greg Royston [greg@groystonlaw.com]
Sent: Tuesday, March 15, 2011 1:21 PM
To: CBJ; Sperber, Jill
Subject: Proposed libel of attorneys by posting alleged misappropriation as consumer alert

As part of the process seeking public comments, my thoughts are as follows:

The proposal to post a consumer alert when an attorney is accused of misappropriating funds is a bad idea.

First, there's an immediate assumption that the attorney is guilty until proven innocent. Last I checked, it's supposed to be the other way around. Just because it's an attorney that is accused doesn't mean he/she isn't entitled to the same rights as anyone else.

Second, simply because someone makes a claim doesn't make it true. While there are few guarantees in life and in law, one of them has to be that clients - past, present and future, have, do and will lie. While attorneys are bound by an ethics code not to lie cheat or steal, our clients most times, with the exception of an internal moral code, no matter how much they have been advised not to, have, do and will lie.

Finally, what if the attorney is innocent and there is simply a disgruntled client with a grudge - by posting the attorneys name on the website the State Bar has effectively put that attorney out of business. So much for due process.

Perhaps a better way would be for the Bar Prosecutor to investigate the claim, determine its validity through the normal course of interviews and examination of evidence, and then once a determination has been made, make the posting.

Every organization has bad apples but there should be a process to root those bad apples out that's both fair an equitable.

Thanks,

Greg Royston

Law Office of Gregory T. Royston
409 North Pacific Coast Highway Suite 608
Redondo Beach, California 90277
Office 310-525-3713
Cell 310-977-1062
Fax 310-943-1472

Sperber, Jill

From: Marilyn M. Smith [trialstar@earthlink.net]
Sent: Tuesday, March 15, 2011 3:08 PM
To: Sperber, Jill
Subject: Possible Proposal to Publicly Post Accusation of Misappropriation

Dear Ms. Sperber:

I just recently learned of the proposal to publish as part of an attorney's online profile a notice that disciplinary charges have been filed against an attorney for misappropriation of $25,000 or more.

I am writing to voice my concern over and objection to this proposal.

Charges can be filed against an attorney for any number of reasons. Sometimes the charges are proven valid, other times not. Other times the charges could be reduced or otherwise altered as a result of negotiations. It is not unusual for investigation, hearings, and compromise resolutions to result either in the dismissal of charges or the re-characterization of charges. Meanwhile, the accused lawyer (accused, not convicted or adjudicated) has been permanently tainted with the charges in the original filing. This seems to be contrary to due process and notions of fundamental fairness.

The second reason I am concerned is that this would give an unwarranted opportunity to disgruntled clients to refuse to pay an otherwise appropriate bill. It is not a stretch to foresee a situation where insisting that the client pay a bill of, say, $30,000 then results in the disgruntled client alleging that the $30,000 was "misappropriated." If charges were filed on the client's allegations, but later proven to be unfounded, the lawyer is permanently damaged.

I am certain that the State Bar's interest in publishing information about "misappropriation" is to protect the public, a goal with which I do not have any qualm. It is the aspect of publishing *charges* not *adjudications* that greatly concern me.

I urge the State Bar to limit any postings on an attorney's profile to matters that have been adjudicated or consensually resolved and to not post mere filings.

Thank you,

Marilyn M. Smith
Law Office of Marilyn M. Smith
301 E. Colorado Blvd., #610
Pasadena, CA 91101
Voice: 626-683-8102
Fax: 626-683-8702

Sperber, Jill

From: Roger Rosen [RRosen@rmrlaw.com]
Sent: Tuesday, March 15, 2011 4:49 PM
To: Sperber, Jill
Subject: Proposal to Publicize Accusations aganist Attorneys

Dear Ms. Sperber,

I am informed that there is a proposal being considered by the State Bar to publicize accusations of attorney theft of client funds in excess of $25,000. This is a bad idea.

My experience over 26 years as a practicing lawyer, and my conversations with other lawyers, tells me that over the course of a career in private practice, an attorney may represent one or more clients who either do not understand what their lawyers have done with their money (either due to ignorance or psychological impairment), or who do understand yet choose to lie about the situation.

Let us assume that less than 100% of the accusations of attorney theft of client funds over $25,000 are unfounded.

Let us further assume that publishing untruthful accusations made against some attorneys will damage their reputations, unfairly, in a way that cannot be completely remedied.

Therefore, If the Bar publishes such accusations, some innocent attorneys' reputations will be tarnished by the publication of accusations that were, in fact, untrue.

There is no justification for this.

If an attorney is found to have stolen client funds in excess of $25,000, the Bar has means to protect the public from such a specific attorney.

Put yourself in the position of an honest attorney who, through no fault of your own, is unfairly accused of the theft of client funds in excess of $25,000. The State Bar publishes the accusation. You go through a process within the State Bar and demonstrate to a complete degree of certainty that the accusation was false. But your reputation has been harmed and you can never completely repair that. How would you feel about this?

Roger M. Rosen
Rosenberg Mendlin & Rosen, LLP
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Santa Monica, CA 90401
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(310) 899-9006 fax
rrosen@rmrlaw.com

You replied on 3/16/2011 4:22 PM.

Sperber, Jill

From: Robert Link [beau@oblios-cap.com] **Sent:** Wed 3/16/2011 4:05 PM
To: Sperber, Jill
Cc:
Subject: Proposed Consumer Alerts
Attachments:

Dear Ms. Sperber:

My three word reply to the Executive Summary of Mr. Towery's proposal to create consumer alerts based on accusation: "Beware unintended consequences". This proposal gives a tremendous club to disgruntled clients, a club that will not always or only be used on arguably deserving attorneys. The good it might possibly do is far outweighed by the potential for casual wrongdoing it creates. These considerations stand quite clear of general principles of "innocent until proved guilty" which are at the core of our profession even when not strictly required by statute.

Yours very truly,

--
Robert Thomas Hayes Link, Esq. | (626) 826-7323
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KLO

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BEVERLY HILLS, CA 90210

KERMANI LAW OFFICE

March 17, 2011

Mr. James Towery
Chief Trial Counsel
State Bar of California
1149 S Hill St
Los Angeles, CA 90015-2299

Ms. Jill Sperber
Special Assistant to the Chief Trial Counsel
State Bar of California
180 Howard St 6FL
San Francisco, CA 94105
jill.sperber@calbar.ca.gov

RE: Posting of Consumer Alert of Major Misappropriation Charges on Member's Profile Page -- Request for Public Comment

Dear Mr. Towery,

I have been a member of the Bar for the past 16 and in good standing, with no complaints ever brought against me. However, I do understand the need to curb attorneys who may violate the law. But should a violation not be "proven" before you post "allegations" on an attorney's profile online?

I do believe that the proposed initiative may be in turn "abused" by any disgruntled client. There seems to be NO due process, or investigation or prosecution prior to posting potentially false and injurious allegations on an attorney's profile. That posting could well irreparably damage an attorney's career all without due process. What is to stop clients from telling us "If you ask me to pay your bill in full, or if you don't do what I say; or settle this case this way, I will report to the Bar that you stole my money!". That would be blackmail and we would be afforded no protection against that.

I would be interested to hear more about due process safeguards. Thank you.

Very truly yours,
Samira Kermani
SAMIRA KERMANI

Sperber, Jill

Subject: FW: State Bar Proposal

From: Linda Fermoyle Rice [mailto:LFR@rbtriallaw.com]
Sent: Saturday, March 19, 2011 01:47 PM
To: Towery, James
Subject: State Bar Proposal

Dear Mr. Towery:

I am a trial attorney, admitted to the Bar in 1979. I am a member of the Board of Governors for the Consumer Attorneys Association of Los Angeles, a member of and active in the Consumer Attorneys of California and AAJ. I am also a proud member of the American Board of Trial Advocates. I speak for none of these organization, however, in writing this letter, but offer this information only as evidence of my extensive involvement in my profession.

I am aware of your recent correspondence with John Blue about the State Bar proposal to publish to the public the names of attorneys accused of misappropriating client funds. I, too, have concerns about the potential ramifications of such action.

As a lawyer who has handled medical negligence claims for more than 30 years, I see this proposal as akin to the State Medical Board publishing the names of doctors who have been accused of injuring or killing a patient before such an allegation has been tested and proven true. Surely, many patients might like to have access to that information and consider it pertinent in deciding whether to receive treatment from the subject doctor. The issue is whether, in fact, it is pertinent. If the accusation is false, neither patient nor doctor is well-served by disclosure of this information. Publication would be misleading and injurious to the reputation of the doctor, without affording any protection to the patient. Doctors don't have to be concerned about this, however, because the Medical Board would never permit it to happen. It is difficult enough for the public to get accurate information about doctors who have been proven to be dangerous to patients.

I am proud that the State Bar seems to take its responsibility to protect the public from the malfeasance of lawyers more seriously than the Medical Board does when it comes to dangerous doctors. But, I agree with Mr. Blue that more data is needed and should be considered before moving ahead with this proposal. As Mr. Blue suggested, if 99% or 100% of accusations filed against lawyers for misappropriation of funds prove to be true, then the premise for the proposal is sound. An accusation is good evidence that the lawyer involved has actually misappropriated client funds and that information should be disclosed so the public can make a reasoned judgment about representation by the lawyer.

If, however, only 5 to 10% of such accusations are proven to be true, then the harm that could be done from the proposal is not justified by the benefit to the public.

I worry, as well, as to what will trigger such a disclosure. A number of years ago, my bank changed hands. When the new bank provided me with my new checks, it placed my general account number on my trust account checks and vice versa. I was unaware of the problem until I got my first statement, which came about the time I got an inquiry from the State Bar about why my trust account was overdrawn. I had a serious problem with my accounting because of the error, but I had not misappropriated anything. It was simply a matter of straightening out what had occurred and transferring the funds from one account to another. Ultimately, my bank took full responsibility for what had happened and so informed the State Bar. Had I been identified as someone who had misappropriated funds, I would have found

that deeply humiliating and patently untrue. My reputation, which I value above all else, could have been irreparably injured and clients whom I could help might have decided not to utilize my services.

The State Bar needs to balance the interest of the public with the right to due process of the attorneys who support it with their dues. Unless and until you are able to justify this proposal with the data Mr. Blue requested, I urge you not to implement this "reform."

Very truly yours,
Linda Fermoyle Rice

Linda Fermoyle Rice, Esq.
RICE & BLOOMFIELD, LLP
5550 Topanga Canyon Boulevard, Suite 200
Woodland Hills, California 91367
(818) 999-2220 fax: (818) 999-2388 LFR@RBTrialLaw.com
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LAW OFFICES OF
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PROFESSIONAL CORPORATION
409 Thirteenth Street, 19th Floor - Oakland, California 94612

Tel: (510) 444-5082 - Fax: (510) 834-0701

March 22, 2011

Via Email & 1st Class Mail

William. N. Hebert, President
California State Bar Board of Governors
CALVO FISHER & JACOB, LLP
One Lombard Street
San Francisco, California 94111

Public Comment on Trial Counsel's Consumer Warning Proposal

Dear Mr. Hebert:

The purpose of this letter is to offer both public and direct comment to the proposal by the State Bar's Chief Trial Counsel James Towery to the effect that the prosecutor's office (they are after all prosecutors) will be allowed to destroy an attorney's livelihood without any finding of wrongdoing by the State Bar Court, and with the effect of the prosecutor's office gaining substantial unfair leverage over the accused attorney in the disciplinary process.

The proposal allows the prosecutor, for attorneys charged with misappropriation of client funds of $25,000 (in a single event or in the aggregate), to place a damning CONSUMER ALERT on the accused attorney's member page and stating that this attorney is accused of "major" misappropriation. There would be a separate disclaimer reminding the public that there has been no actual determination of wrongdoing.

I am suspicious that this kind of proposal comes from the Trial Counsel's office and not from the Board of Governors itself, and that public comment is being vetted by that very same office. I do understand the current Chief Trial Counsel formerly served as President of the State Bar where it was his leadership responsibility to develop and propose policy, as opposed to now, where his job is to enforce rules and leave it to the State Bar Court to impose discipline and to the Board to determine policy. Personally, I favor aggressive (and fair) discipline and while I want the prosecutor/trial attorney's office to have sharp teeth, I do not want them to have the unfettered ability to inflict severe pain and punishment on those they accused of wrongdoing, without a hearing. I myself served as a State Bar Hearing Officer in the "old days" when the hearings were conducted by volunteer lawyers appointed by the Board. I believe that this proposal is egregiously wrong in every way and I believe its application would be UNETHICAL in the deepest meaning of

that concept.

(1) After reading the press release, I contacted the attorney in the prosecutor's office who is gathering public opinion. I asked her for copies of the data that had been collected showing harm to the public during the time period an attorney was accused of so-called "major" misappropriation and the time of final determination of wrongdoing, if any. After all, the prosecutor is asking that an accused attorney be digitally stripped naked and placed in stockades in the State Bar's public square. Surely there must be a substantial body of data compelling the infliction of such humiliation. Instead, I was told that no data was available nor had been collected and it was the "belief" of those proposing this policy that it was necessary. Really? Can that be? This is what is alleged as fact in the proposal:

> A particularly challenging aspect of prosecuting misappropriation of client funds cases is adequately ensuring the protection of unsuspecting current or prospective clients from the risk of continuing harm when a lawyer remains on active status after a major misappropriation charge is filed and pending in the State Bar Court.

It is unthinkable that such a statement of fact would be made, absent the body of data to support it. Just not right. The State Bar would undertake to humiliate an attorney and deprive that attorney of his or her practice without a finding of wrongdoing because someone had the belief (but not the facts) that it was necessary.

(2) I was also told this proposal was necessary because it assists prospective and current clients to make an informed decision regarding representation. It makes no sense to single out misappropriation of $25,000 or more as the only type of accused wrongdoing a potential client would benefit from knowing in order to make an informed decision. Why not an attorney who is accused of taking advantage of her client sexually, or another who has been accused of abandoning his client's interests. Or, potential clients do not need to know that an attorney is accused of only stealing $22,000 from his client. If mere accusations of wrongdoing are enough, then there is no basis for distinguishing between alleged wrongdoings. By this current proposal, the State Bar will open the floodgates of the prosecutor being allowed to punish by accusation alone.

(3) The State Bar cannot escape the fact that the publication of a CONSUMER ALERT is punishment, and under that rubric, you cannot expect the public to make a distinction between guilt and accusation. Such a publication without an

independent finding of fault is simply not right.

(4) Then there is the wee problem of what the prosecutor is going to do when some of the lawyers against whom this policy is applied are found not culpable, or worse, the client was just lying and is now protected by privilege (which the prosecutor well knows has happened and will happen again). What shall the State Bar do then to fix the harm to this lawyer personally, professionally and financially? Perhaps the prosecutor's office will put the following on the innocent member's page: "Oops! We goofed. Sorry!" The State Bar can simply justify the irremediable damages it causes as necessary collateral damage in the pursuit of zealous consumer protection. "Innocent until proven guilty" can be something of an annoyance to prosecutors but it remains a cornerstone of American jurisprudence. Such a proposal gives the power to the prosecutor to crush a lawyer who has been found guilty of nothing.

(5) The use of the word "major" is an inappropriate and meaningless value judgment which should not be included. It is sufficient to say $25,000 or more.

(6) The disclaimer is an obvious sham. The prosecutor's office must know that the words "Consumer Alert" carries much more force than "Disclaimer" and publishing it separately is designed to ensure that the public will give less or no weight to the disclaimer and likely not read it at all. If nothing else, this part of the proposal makes it clear that it is the design of the proposal to punish an accused lawyer with the maximum force before a determination of wrongdoing by the State Bar Court. If this is done at all, "Consumer Alert" should be removed and language regarding the presumed innocence of the accused should be integrated into a single warning.

This is my modest proposal for a warning that would take into account all that this proposal stands for.

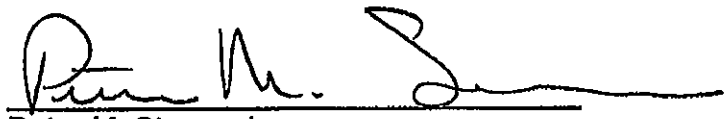
WARNING OF PENDING DISCIPLINARY INQUIRY. The State Bar prosecutor's office (trial counsel) has filed charges against this attorney which alleges that the attorney misappropriated a total of $25,000 or more from one or more clients. The truth of these charges has not yet been determined by the State Bar Court and the attorney has not yet had a opportunity to defend herself or himself. The attorney, like all citizens of the United States, is entitled to the presumption of innocence. The State Bar recognizes that, because of this notice, prospective clients may not hire this attorney and those who are already this attorney's clients may terminate the relationship. The State Bar acknowledges this attorney may well be determined to be innocent of all charges, but that this notice will nonetheless irreparably harm this attorney professionally, personally and financially, and that nothing can be done to correct that, but we do it anyway because we don't give a

damn about such things.

If there is a hearing before the Board of Governors or a sub-committee, I respectfully request to make a statement at such a hearing. Thank you.

Sincerely,

LAW OFFICES OF PETER M. STANWYCK



Peter M. Stanwyck
Email: peter@stanwyckla w.com

copies emailed to:

jim.towery@calbar.cal.gov
diane.curtis@calbar.cal.gov
jill.sperber@calbar.cal.gov
cbj@calbar.ca.gov (Letter to the Editor)

State Bar's Proposal Puts Clients First

Josh King is general counsel and vice president of business development for Avvo Inc. He is a frequent writer and speaker on First Amendment and professional ethics issues in the practice of law. He can be reached at josh@avvo.com

On March 15, the State Bar opened public comment on a proposal to provide the public with more prominent notice when lawyers are accused of stealing significant sums from clients. Under the proposal, the bar would place a prominent "consumer alert" on its profile Web page for attorneys charged with misappropriation of $25,000 or more. It would not apply just because a client made the allegation of theft, but only in cases where the bar's disciplinary counsel chooses to pursue charges. This alert would call out the existence of the charges, while also noting that the attorney is presumed innocent of such charges until they are proven. The alert would be removed as soon as the charges are resolved.

While few attorneys would be impacted - the bar currently has misappropriation proceedings pending against only 55 attorneys - the problems created by this troubled minority have a massive impact on clients and the bar alike. In 2009, the State Bar's Client Security Fund paid out over $2 million to victims of misappropriation, with many victims never made whole. The goal of the consumer alert proposal is a modest one: to inform potential clients that the attorney they are considering hiring is under investigation for fraud.

As someone who has hired a lot of lawyers, I can say this without equivocation: knowing that an attorney had been charged with stealing over $25,000 from another client would be a *highly relevant factor* in my choice of counsel. The bar's proposal is merely an attempt to make it easier for potential clients to have access to this information and make informed choices.

So far, so good - a laudable step toward greater consumer transparency from the bar. However, what of that presumption of innocence? Should we place this prominent "mark of shame" on the profiles of alleged thieves for the entire world to see? Shouldn't we respect that presumption and avoid saddling accused attorneys with this powerfully negative impact on their practices?

In a word, no. While the presumption of innocence is vitally important to an attorney under investigation, you can be sure that any client is equally interested in knowing about the existence of the bar's investigation. Any attempt to hide this fact, or even to make it obscure or hard to locate, is an effort to value the interests of attorneys over those of clients.

We attorneys sometimes have an unfortunate habit of valuing process over substance. And in focusing on the process, it's too easy to lose sight of the fact that our paramount duty is to our clients. For while the presumption of innocence is a key procedural step in the bar's investigation, it's *not important at all* to clients. The presumption is a legal standard, designed to hold the state to its proof. The client doesn't need to respect it. In fact, no right-thinking client *should* respect it. All the client should care about is competent legal representation - and that they aren't at risk of being robbed blind by the person they entrust with their representation.

The bar's proposal is merely an attempt to make it easier for potential clients to have access to this information and make informed choices.

Tuesday, March 29, 2011

Criminal
Judge to Rule on Key Evidence in FCPA Trial
Two U.S. businessmen and their sales agent accused of bribing Mexican government officials for lucrative contracts face trial next week, in a case that could be a litmus test for other FCPA indictments.

Government
Campaign Finance Law Looks Doomed
The five Republican-appointed justices on the U.S. Supreme Court appeared ready Monday to overturn another law designed to limit the influence of private money in electoral politics.

Real Estate
Bank Sues L.A. Developer for Loan Fraud
Pacific Western Bank is suing prominent Los Angeles-area developer Robert Zarnegin for allegedly inflating his worth to receive a loan in a commercial real estate loan gone bad.

Law Practice
State Bar's Proposal Puts Clients First
The State Bar's proposal for consumer alerts on attorneys charged with theft puts the clients first. By **Josh King** of Avvo Inc.

Government
Regulating Third-Party Litigation Dollars
As legislatures across the country take up the issue of third-party financing for lawsuits, California has been slow to the dance. To date, it hasn't entered the debate at all, even as the practice has taken off.

Corporate
Five Tips From a General Counsel on Networking With In-House Attorneys
Five ways lawyers can market themselves to in-house counsel. By **Mark E. Harrington** of Guidance Software Inc.

Intellectual Property
Keyword Advertising: A Click Away from Legitimacy?
Factors to consider when purchasing a competitor's trademark as a paid keyword. By **Andrew M. Abrams** of Fish & Richardson PC.

Law Practice
Wilson Sonsini Loses IP Partners

The consumer alert will give potential clients more information. And based on that information, consumers of legal services will surely avoid contacting attorneys they may have otherwise retained. Clients already represented will have some difficult conversations with their attorneys. None of this will be remotely positive for those under investigation for fraud. However, it will surely be good for their clients and potential clients. My attorney has to explain the injustice of the charges and how he's going to beat the rap? Go ahead, I'm listening. Maybe there are extenuating circumstances. But as the client, I want to be the one to make that call, and not have the matter hidden from me.

But could this be - to borrow the phraseology of my favorite evidence objection - more prejudicial than probative? Is the impact on the attorney's practice greater than whatever benefit the client gains from knowing that the attorney has been charged with stealing? After all, even misappropriation of a large amount of client funds could occur for reasons running the gamut from negligence to out-and-out conversion. Should we trot this warning out where clients can see it and presume the worst?

While the consumer alert would unquestionably be prejudicial to attorneys practicing under its cloud, that really doesn't matter. Clients come first. And our first impulse shouldn't be to ensure that attorneys are treated fairly, but rather to make sure that clients have as much transparency into the attorneys they hire as possible. And this is precisely the kind of transparency that clients crave, need - and so often find lacking - when dealing with legal matters.

It's also true that the consumer alerts will give the bar more prosecutorial power when it comes to pursuing charges of misappropriation writ large. But again, from the perspective of a client, this isn't a bad thing. Theft from clients is serious business. As misconduct charges go, it's also quite binary. Those charged with misappropriation should be able to quickly disprove the charges, show why the misappropriation of client funds was negligent...or leave the practice of law, posthaste. If these consumer alerts can offer more transparency into the pendency of serious misconduct charges while simultaneously giving attorneys more incentive to expeditiously resolve issues with the disciplinary authorities, stay clean and keep meticulous records, that's a win all around for clients and consumers. And the interest of clients is what it's ultimately all about.

Previous **Next**

Latham & Watkins LLP is gaining some heft for its intellectual property litigation practice in Northern California by stealing six partners from Wilson Sonsini Goodrich & Rosati PC.

How Accurate Are Legal Dramas?
Today's legal television shows reflect a disturbing trend in the business of lawyering. By **Jeffrey Spitz** of Greenberg Glusker Fields Claman & Machtinger LLP.

Mergers & Acquisitions
Deal Makers
Fenwick & West LLP advised Facebook Inc. in its acquisition of Israeli startup Snaptu.

California Lawyers Aid in Advantest Purchase
Still rattled by the destruction in Japan, Tokyo-based technology manufacturer Advantest Corp. announced yesterday its plans to purchase Verigy Ltd. for $1.1 billion. California lawyers helped steer the company through the complex deal.

Law Practice
March Madness: Maximizing Your Results
Applying "bracketology" to your legal business can lead to championship results. By **Bradley P. Boyer** of Ropers, Majeski, Kohn and Bentley and **Steve Truitt**.

Litigation
Proactive Attack Through Declaratory Relief
Seeking declaratory relief can help a company avoid the damage that comes from being sued. By **Stephan Milhalovits** of Lewitt, Hackman, Shapiro, Marshall & Harlan.

Mergers & Acquisitions
California Lawyers Feast on eBay Deal
Dewey & LeBoeuf LLP advised eBay Inc. in its $2.4 billion acquisition of Pennsylvania-based GSI Commerce Inc., but it wasn't the only Golden State player at the table. A bevy of California lawyers got a piece of the deal.

Letter to the Editor
In Support of Unlimited Executive Power
Stephen Rohde responds to "Jewish Bar Examines Nazi Judges' Blind Eye."

Environmental
High Court Punts on Garbage Dump Dispute
The U.S. Supreme Court declined Monday to step into the long-running dispute over a plan to transform a spent mine near Joshua Tree National Park into a megadump for Los Angeles' garbage.

WANTED: First year associate, 15 years experience req

LETTERS TO THE EDITOR

For those of you wondering just how bad the economy is and just how hard the legal profession has been hit, it is becoming commonplace for myself and my fellow recent law school graduates to find law firm and in-house counsel job postings for entry level or first-year associate positions requiring anywhere from three to 15 years experience.

How is a recent graduate supposed to compete with that?

Nicole S. Jhonson
Los Gatos

Safety in small numbers

As you reported, the State Bar's chief prosecutor has proposed placing a consumer alert on an attorney's online profile page if he or she is charged with major misappropriation — taking more than $25,000 from one or more clients.

So as long as unscrupulous attorneys keep their misappropriation under $25,000, they have no fear of consumers being able to find out about it! To be fair to consumers, any proven misappropriation of clients' funds should be reported on the offending attorney's profile page (and that attorney should be booted from the bar).

Stephanie Doucette
San Clemente

Why $25,000?

Please tell me why the bar is considering publishing the charges only when the amount exceeds $25,000. In my opinion any misappropriation of client funds is theft, stealing, fraud or whatever other label you wish to apply and any attorney who takes money illegally from his/her client should understand one of the consequences of their actions is public disclosure to their peers. I don't distinguish between a $2,500 thief and a $25,000 thief.

Robert W. Hodges
Walnut Creek

$1 is too much

The public should be alerted if a lawyer steals so much as $1 from clients! That the public alert only kicks in at $25K is absurd. And that this is even up for debate is mind-boggling.

Sherre Sturm
Novato

Posts last a lifetime

What length of time is publicizing a public reproval deemed by the board of governors to be relevant to a member's character? My only disciplinary matter in a career of 40 years is a public reproval posted over 38 years ago in 1973. Is this relevant to my contemporary character and is not relevancy fundamental to due process?

Please consider the constitutionality and the ethics of this question and correct this oversight for all that are similarly situated.

Ted L. Mackey
Memphis, Tenn.

California Bar Journal letters must include full name with a daytime telephone number and complete address. Send letters to cbj@calbar.ca.gov.

Sperber, Jill

From: Damon Swank [damon.swank1685@gmail.com]
Sent: Thursday, April 14, 2011 11:57 AM
To: Sperber, Jill
Subject: Consumer Alert / 6007(c) Petition / Public Comment

The proposed Consumer Alert is well-intentioned, but has serious flaws.

Does the conduct of the lawyer threaten the public at this time? If so, a Petition for Involuntary Inactive Status should be heard on an expedited basis.

If a sound and proper basis exists, the public is better protected by an involuntary inactive finding than by the bar conducting a PR campaign of slurring the attorney with "alerts" reporting allegations which have not been supported by evidence presented to a competent fact-finder. This procedure has the benefit of requiring the bar to act promptly and decisively to conduct a hearing of some sort, rather than immediately damning the condemned with widely-published "alerts" and then, perhaps much later, conducting hearings at its leisure.

The "level of confidence" required should be "the threat of immediate, significant harm." If established by competent evidence, this justifies involuntary inactive status. If not established, it is inappropriate for the bar to smear the practitioner with public "alerts" of allegations which are only that: allegations.

Before an attempt is made to destroy one's livelihood, someone needs to receive competent evidence to justify the effort. This hearing need not be complex or extensive. The finding is preliminary: it is not necessary that every formality be incorporated. The only requirements needed is that the folks must show up, raise their right hands, and explain their grievances. Sounds like Small Claims Court? Perhaps.

Thank you for your attention.

Damon Swank, #37722

April 15, 2011

VIA FACSIMILE AND FIRST CLASS MAIL
STATE BAR OF CALIFORNIA
REGULATION, ADMISSIONS & DISCIPLINE COMMITTEE
Ms. Jill Sperber
180 Howard Street
San Francisco, California 94105

Re: **OBJECTION TO CONSUMER ALERT FOR ATTORNEYS CHARGED WITH MISHANDLING FUNDS**

Dear Regulation, Admissions and Discipline Committee:

I write anonymously as a concerned member of the bar who have colleagues who have confided in me that they have mishandled funds due to various circumstances including undue personal financial hardship and/or medically diagnosed pathological gambling disorder.

(1) If the proposed alert is posted before the completion of the disciplinary proceeding and the attorney is found not guilty of misappropriation of client funds, the alert violates the attorney's due process rights provided for by the Fifth Amendment because it presumes guilt prior to an adjudication on the merits.

(2) The proposed alert is inequitable and shows no compassion because the alert does not acknowledge that the mishandling funds could have been prompted by a documented mental disorder and/or extenuating family hardship circumstances including financial distress as many of us are experiencing in this recession;

(3) The proposal violates the Eighth Amendment of the Constitution prohibition against cruel and unjust punishment if such alert will remain on the member's profile after the attorney practice privileges have been suspended or terminated. It unduly punitively exposes the attorney to everlasting unemployability when an extended suspension or loss of her license would suffice. In almost all fund mishandling cases, the mishandling party must repay the victim. The proposal significantly materially prejudices the attorney's ability to obtain gainful employment, even after she may have recovered from his mental disorder that caused the fund mishandling.

(4) The proposal sets up unwarranted malpractice claims against the attorney by clients who such attorney provides honorable and competent advice and representation immediately prior to the attorney's disciplinary proceeding, particularly in a litigation context where the subject attorney has to withdraw as a result of the disciplinary proceeding and/or alert to shelter her client from any prejudice, as opposing counsel, mediators, arbitrators and presiding judges may act in the case, in a manner they otherwise would based on the alert to detriment of the subject attorney's client or so the client may argue.

(5) In the context of active litigation cases the subject attorney is involved, the alert would detract from the juridical precept that cases should be decided on the merits and admissible evidence and no other extraneous prejudicial factors. See California Evidence Code 352(b) (evidence is excludable if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, and/or misleading the jury). While evidence of the alert could be excluded, the "cow will already be out of the barn" to the extreme prejudice of the innocent client who the subject attorney is representing. If the client loses the case, he may sue the subject attorney for malpractice for providing representation in light of such circumstances, even if the attorney is ultimately adjudicated not guilty of the mishandling by the State Bar.

Your time and consideration of this comment is greatly appreciated. Thank you.

Respectfully submitted,

Member of the State Bar of California

Johnson, Sabrina

From: Sperber, Jill
Sent: Wednesday, April 20, 2011 1:10 PM
To: Johnson, Sabrina
Subject: Fw: Comment: Consumer Alert re Attorneys Charged with Major Misappropriation

Please print this comment as #32 and log into chart on v drive. Thx!

From: David Cameron Carr [mailto:dccarr@ethics-lawyer.com]
Sent: Wednesday, April 20, 2011 12:42 PM
To: Sperber, Jill
Subject: Comment: Consumer Alert re Attorneys Charged with Major Misappropriation

This is my comment concerning the proposed consumer alert regarding attorneys charged with major misappropriation.

The proposal is unfair and should not be approved.

The proposal gives the Office of Chief Trial Counsel a powerful tool that can be used to destroy an accused lawyer's practice without having to prove allegations of misappropriation in State Bar Court. It is obvious that the intent and effect of the "consumer alert" is to warn potential clients and current clients not to do business with this attorney. It is intended to destroy the attorney's practice. It can have no other purpose.

The "disclaimer" is completely meaningless. Everyone who reads the "consumer alert" is going to assume that it is true. Combined with the power of the internet, the consumer alert will have an immediate effect on the accused attorney's practice. While the proposal does provide that the "consumer alert" will be removed when the discipline proceeding, or the involuntary inactive enrollment proceeding. is decided, by that time the attorney's practice will, if the consumer alert is effective, be largely destroyed. Potential clients will no longer call. Current clients will have terminated the lawyer. Opposing counsel will have marched into court on some pretext, waving a copy of the "consumer alert" (as they currently do now with the posted notices of disciplinary charges), to the prejudice of the lawyer and very possibly the lawyer's client in that matter. And judges will never, ever, look at this lawyer the same way again, even if the lawyer is ultimately exonerated of all charges, even if the ultimate discipline is substantially less than disbarment.

This will apparently happen regardless of whether the misappropriation was intentional or negligent, whether the attorney intended to take the client's funds or was negligent in required record-keeping and regardless of any mitigating circumstances that might exist surrounding the conduct. It will happen despite the broad range of misconduct that can be labeled "misappropriation":

We have also recognized extenuating circumstances relating to the facts of the misappropriation. As the term is used in attorney discipline cases, "willful misappropriation" covers a broad range of conduct varying significantly in the degree of culpability. An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception. Although lack of evil intent does not immunize an attorney's conduct from discipline (see *Murray v. State Bar, supra,* 40 Cal.3d 575, 582, 220 Cal.Rptr. 677, 709 P.2d 480), the attorney's good faith is an important consideration in determining the degree of discipline to be imposed. Disbarment would rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of negligent misappropriation, unaccompanied by acts of deceit or other aggravating factors. Thus we have ordered discipline as light as 30 days of actual suspension when the misappropriation resulted from negligence and other mitigating factors were present. (*Schultz v. State Bar* (1975) 15 Cal.3d 799, 803-805, 126 Cal.Rptr. 232, 543 P.2d 600.)

Edwards v. State Bar (1990) 52 Cal.3d 28, 38.

It will apparently happen anytime the discipline prosecutors see conduct that they can label as misappropriation and the amount is in excess of $25,000.

The arbitrariness of the $25,000 threshold shows that the drafters of this proposal are aware of its fundamental unfairness. Is a misappropriation of $24,999 qualitatively different? Of course not. Would the misappropriation of $1 justify the branding of attorney with a "consumer alert". Again, the common sense answer would be "of course not" but misappropriation is a loaded term, synonymous with theft in the minds of both the public and the profession, despite the nuances explained by the Supreme Court in *Edwards*. Line drawing is often a difficult exercise but why only misappropriation? Isn't serial abandonment of clients just as great a threat to consumers, perhaps even greater than a single misappropriation? This exercise in line drawing is a tacit admission that the "consumer alert" is a powerful weapon that could easily be wielded in a unfair way.

The Chief Trial Counsel is on the right track in making misappropriation cases a high priority in the office and utilizing the State Bar's interim remedies to address this conduct in a way consistent with due process. Expeditious litigation of these cases, with a full opportunity given the accused attorney to present their side of the story is the correct approach. The "consumer alert" has no due process and the attorney has no way to rebut it. This proposal resembles the unfortunate trend in some "high profile" criminal prosecutions to try the case in the media before the case is tried in court. This is unfair and should be rejected.

David Cameron Carr
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San Diego, California 92101
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Fax: 619-696-0523

www.ethics-lawyer.com
www.disciplinedefensecounsel.org

Johnson, Sabrina

From: Sperber, Jill
Sent: Wednesday, April 20, 2011 9:17 PM
To: Johnson, Sabrina
Subject: Fw: HALT's Consumer Alert Comments
Attachments: CA Consumer Alert Comments.pdf

Plls print both email and attachment asc omment #33 and log in our chart please

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From: Terri Rudy [mailto:tmrudy@halt.org]
Sent: Wednesday, April 20, 2011 01:13 PM
To: Sperber, Jill
Subject: HALT's Consumer Alert Comments

Dear Ms. Sperber,
Please find attached HALT's comments on the Proposed Consumer Alert for Major Misappropriations of Client Funds. Please feel free to contact us at 202-887-8255 if you have any questions or if we can be of further assistance.

Theresa Meehan Rudy
Deputy Director
HALT
1612 K Street NW, Suite 1102
Washington, DC 20006
202.887.8255
Fax: 202.887.9699
www.HALT.org

HALT Simple · Affordable · Accountable · Justice for All

April 20, 2011

Ms. Jill Sperber
Office of Chief Trial Counsel
State Bar of California
180 Howard Street, 7th Floor
San Francisco, CA 94105-1639

Re: Proposed Consumer Alert for Major Misappropriation of Client Funds

To the Board of Governors:

Thank you for your public invitation to provide input regarding the Chief Trial Counsel's proposal to post a consumer alert that would notify the public when a lawyer has been charged with a major misappropriation of client funds. HALT strongly supports this critical proposal because we believe that it would help safeguard California's client population from one of the gravest forms of lawyer misconduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. Our Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through HALT's Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, our organization has been on the forefront of fights to improve the systems in place to hold unethical lawyers accountable and to provide meaningful recourse to aggrieved clients. In January, we appeared before the State Bar's Governance in the Public Interest Task Force and testified that California should eliminate private reprovals, increase the number of lay person seats on the Board of Governors and encourage the public's input in the Board nomination process.

Recently, HALT released our Lawyer Discipline Best Practices report to draw attention to 10 model procedures currently applied by specific lawyer discipline systems across the country.[1] In addition to conducting our own analysis, we received feedback

[1] We have enclosed a copy of our Best Practices report, which recommends that every attorney discipline system: (1) disclose a lawyer's complete disciplinary history; (2) host a user-friendly Web site; (3) discipline lawyers with public sanctions; (4) permanently disbar lawyers who commit abusive practices; (5) abolish disciplinary gag rules; (6) increase publicity of discipline programs; (7) open hearings to the public; (8) provide citizens with a majority voice on hearing panels; (9) grant clients and witnesses

from disciplinary administrators in 11 states who relied on their own day-to-day experiences to provide us with practical solutions to some of the most critical challenges facing our nation's lawyer discipline system.

The State Bar of California serves as a leader to the rest of the nation in many of the areas that our Best Practices report addresses. In particular, our report praises California for providing the public with ready access to the complete disciplinary history of all attorneys licensed in the state.

Three years ago, the State Bar implemented a policy to post every notice of disciplinary charges (NDC) on its Web site.[2] An NDC represents the filing of formal charges against a lawyer, after a formal investigation has been completed, evidence has been evaluated and reasonable cause exists to believe that a disciplinary violation occurred. The bar's NDC and the attorney's response appear on the lawyer's member profile page, which consumers may open and read online. The notice remains posted until either the State Bar Court finds the attorney guilty of professional misconduct or issues an order otherwise resolving the proceeding, at which point the NDC is replaced with the disciplinary decision. Even if the charges are dismissed, the charges and dismissal determination remain posted for an additional 60 days. Therefore, the State Bar already provides notice of all pending disciplinary charges, including those related to misappropriation of client funds.

Unfortunately, however, the NDC information is hard to locate on a member's profile page. If a consumer were to look up a particular attorney on the State Bar's Web site, she would find the lawyer's name and license number displayed in boldface. Even if the lawyer were facing charges, the lawyer's current status would be marked as "Active" (also appearing in boldface) and the words "This member is active and may practice law in California." Beneath that designation would be the attorney's contact information and educational background. Following that data would be the lawyer's status history, which again is marked as active. Below that would appear a list of any actions affecting the lawyer's eligibility to practice law and, even when charges are pending, it would state, "This member has no public record of discipline," and "This member has no public record of administrative actions." Finally, at the *very* bottom of the member's profile

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immunity for any information given to the agency during a disciplinary investigation; and (10) allow citizens to appeal initial complaint dismissals and hearing panel decisions.

[2] The State Bar is not the only licensing authority in California that posts online notices of pending charges. The California Medical Board is also required to publish, on its Web site, "All current accusations filed by the Attorney General, including those accusations that are on appeal." See Business and Professions Code 2027(c)(4). The Medical Board's Web site (www.mbc.ca.gov) includes not only a "licensee look-up" feature but also an "enforcement public documents" search feature, in which a consumer can read actual accusations and also disciplinary decisions and stipulated settlements.

page, if the consumer were fastidious enough to scroll all the way down to the very bottom of the frame, the consumer *may* (or may not) notice the single word "Pending" (not appearing in boldface). Next to that word are unmarked links (which, when opened, turn out to be the NDC and response pleadings).

The boldfaced text and sheer amount of information (including repeated references to the member's "active" status) that appear above the single "pending" line obscures the consumer's ability to locate critical information about charges against the attorney. This becomes particularly problematic when the charges involve something as serious and harmful as a major misappropriation of client funds.

The Board of Governors' new proposal would visibly enhance its notification message when the charges involve a major misappropriation. In circumstances in which the alleged misappropriation involves at least $25,000 in client funds, the State Bar would provide a more prominent display on the member's profile page. The extra warning would take the form of a "Consumer Alert," informational text and a disclaimer above the attorney's name on his or her profile page. Once the discipline proceeding or involuntary inactive enrollment proceeding has been decided, the Consumer Alert would be removed. In an era that embraces principles of sunshine and transparency, the Chief Trial Counsel's proposal would ensure that consumers receive a clear and noticeable warning about a potentially dishonest lawyer.

The need for heightened notification is evidenced by the frustration that our organization regularly hears from consumers who did not receive sufficient warning about an attorney's past charges and transgressions before they hired the lawyer. In making the difficult choice over which lawyer to retain, consumers should be armed with complete information about the person whom they are trusting with their deepest confidences and critical funds. If a Consumer Alert notified them about misappropriation charges against a prospective attorney, many clients might still choose to hire the lawyer but would likely pay closer attention to the attorney's fee structure and billing methods. In working toward its goal of protecting the public, the State Bar should encourage such vigilance on the part of consumers.

The State Bar of California has always addressed major misappropriations with the most severe consequences. Misappropriation is the only category that the State Bar may not address through a mere warning letter. On the contrary, misappropriation frequently leads to penalties as serious as disbarment. Of the eight disbarments reported in the April, 2011 *California Bar Journal*, six arose out of a misappropriation of client funds.[3] The State Bar specifically established a Client Security Fund to alleviate monetary injuries caused by a lawyer's misappropriation or other dishonest conduct.

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[3] California Bar Journal (April, 2011)
www.calbarjournal.com/April2011/AttorneyDiscipline/Disbarments.aspx

Through these actions, the State Bar demonstrates its particular concern for circumstances in which a lawyer has misappropriated a client's funds. The Consumer Alert notification represents a natural extension of the State Bar's efforts to prevent client harm due to misappropriations by lawyers.

While most lawyers will support measures to safeguard the public and protect the integrity of the profession, some may argue that the proposed Consumer Alert deprives them of due process. However, California courts have long acknowledged that "where the state licenses a person to conduct a business, trade or occupation, the person acquires a privilege, not a right, subject to the state's reasonable restrictions." *Rosenblatt v. Cal. St. Bd. of Pharmacy*, 69 Cal.App.2d 69, 74 (1945) (affirming legislature's authority to enact regulations to protect citizens from consequences of unfitness or incompetence in health profession). Thus, while the attorney does not lose his or her right to due process in a court of law, this same right does not extend to proceedings before the licensing agency that awarded him or her the privilege to practice law.

Further, the Chief Trial Counsel's proposal includes a prominent disclaimer stating: "Any Notice of Disciplinary Charges filed by the State Bar contains only allegations of professional misconduct. The attorney is presumed to be innocent of any misconduct warranting discipline until the charges have been proven." Any concerns about the danger of a Consumer Alert are more than adequately balanced by this strong proviso.

As the Board of Governors works to enhance public protection by the State Bar, we hope that it will approve the Chief Trial Counsel's proposal to post Consumer Alerts for charges of major misappropriations. We would also encourage the Board to support a more prominent display of NDC information on a member's profile page so that consumers can more quickly discern if any disciplinary charges are pending. If HALT could be of any further assistance, please feel free to contact us at (202) 887-8255. Thank you for your consideration.

Sincerely,

Rodd M. Santomauro
Executive Director

Suzanne M. Blonder
Of Counsel
California Bar No. 217873

HALT *Simple · Affordable · Accountable · Justice for All*

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

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

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

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

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

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

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

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

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

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

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

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

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

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[2] *Id.* at 1227.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Johnson, Sabrina

From: Sperber, Jill
Sent: Friday, April 22, 2011 4:25 AM
To: Johnson, Sabrina
Subject: Fw: Public Comment Proposal On-line Posting- Consumer Alert
Attachments: Wong memo.pdf; Westlaw_Document_19_55_08 - statute.doc; Westlaw_Document_19_51_15.doc; Spielbauer.pdf

Copy and Add as comment next in line please

From: Robin Peluso [mailto:robinannpeluso@gmail.com]
Sent: Thursday, April 21, 2011 09:31 PM
To: Sperber, Jill
Subject: Public Comment Proposal On-line Posting- Consumer Alert

Attention Jill Sperber
Office of Chief Trial Counsel
The State Bar Of California
180 Howard St. 7th Fl.
San Francisco, Ca 94105
jill.sperber@calbar.c.gov

Dear Members of the Regulation, Admission and Discipline Committee,

This is being written to voice a strong opposition to the "Proposed online posting of Major Misappropriation Consumer Alert and Petition", which is a further waste of time, money and energy, for you to even consider. Last year, you spent then entire year adopting new procedures that violate the State Bar Act, and will make every Decision suspect.

It is common knowledge that one of the most used jury instructions regarding witnesses states:

"(I)f you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said.

CACI Instruction 5003 Witnesses

The OCTC is now coming to you for more authority to harm respondents, and undermine our system of jurisprudence. Their "concern" for the public, or clients of unscrupulous attorneys, in the public's welfare is a joke, and flies in the face of what they have done in the past and are currently doing.

Last August you adopted new rules of procedure and lowered the level as to how evidence was admitted in Disciplinary proceedings against respondents, to comply with the Administrative Procedures Act. This violates the State Bar Act B&P Code § 6001. Your committee did this at the behest of State Bar Court. [See Colin Wong Memo.] attached

While you may say that is not at issue with this proposal, I beg to differ. What you did last August was done by accepting the Colin Wong Memo as truthful and honest as to how, the proposed new rules were requested,

and, as to the law. If it was, you were within your rights, to adopt the proposal. However, if the Memo, was based on lies and fabrications of the law, and the authority vested in you, [regardless of how many "public" hearings you held], you violated the law, and ratified criminal conduct. Public hearings cannot protect you, nor shield you. I ask you to deny this proposal, and reconsider the action you took last August, before you consider anything the OCTC or the State Bar Court proposes to you. They are untrustworthy of your consideration and your trust. They either are malicious in their conduct, or so grossly incompetent they do not deserve employment

In addition, I ask you to disregard the entire proposal based on malfeasance, of both the OCTC and the State Bar Court, by deliberately lying to you and the public last May, about the rights of respondents during their proceedings. Moreover, they lied to you about the law, circumstances as to why they requested changes to the rules which you approved, and whether a public hearing could even take place. It is irrelevant if you conducted "a public hearing" if the conduct you engaged in, or approved, is prohibited by the State Bar Act. The State Bar Act governs what, and what you cannot do. You, nor the Board of Governors, are the California State Legislature. You are a statutory creature, and therefore limited to what the State Bar Act allows.

The harm they have caused to and will cause respondents, on behalf of disqualified judges, and political vendettas for opposing [losing] counsel, instead of the rightful complaints of injured clients, while seeking to curry favor of monied interests, instead of protecting the public, is reason enough not to allow them this new weapon. They will use and abuse this new weapon against any respondent they choose without any "reasonable cause". So far, without this weapon, they have caused at least one attorney to be arrested, and held over, without any charges being leveled at the attorney. [based on information given to law enforcement by your "crackerjack" investigators] This unfortunate attorney has had articles written about him, while your OCTC brags about how tough they are. Not one charge made it past a preliminary hearing, yet this persons life was destroyed. see http://mandelman.ml-implode.com/2010/04/the-ca-state-bars-task-force-the-oc-district-attorney%e2%80%99s-office-storm-trooper-tactics-and-loan-modificatio

The Entire first paragraph of the Colin Wong memo, is a lie. Never once has the Supreme Court criticized the procedures of the State Bar as to being too "complex" or "cumbersome",. For Colin Wong to say so, is a blatant lie, or, he is having illegal ex-parte conversations with the Supreme Court. The State Bar Act does not allow, nor does the Calif. Constitution, for such communications. CCP Code § 170 et.seq. forbids it. If in fact, the Supreme Court is illegally communicating with Colin Wong, just who among the Justices, are making these comments? All? Some? Are they divided in their comments? That's how ridiculous this statement is. The Supreme Court can only answer these questions through it's review, pursuant to the CRC rules 9.0 et seq.

This concept that any of this could be expressed through a liaison, such as Beth Jay is even more ludicrous. No member of the Judiciary can be a member of the State Bar. You are a public corporation. While the AOC, Judicial Council, and the CJP, have the Chief Justice, and one other member of the Supreme Court as part of their make-up, you cannot. It is conceivable that a representative on behalf of the Chief Justice could serve as a liaison for those other entities, however, since no member of the judiciary can be a member of the State Bar, there is no way she can communicate anything on behalf of the Supreme Court to the State Bar. In addition she does not speak for the Supreme Court. She, at best, can only speak for the Chief Justice. In addition, the Supreme Court would not allow, or order the State Bar Court to review anything in violation of the State Bar Act. B&P Code § 6086.5 forbids the State Bar Court to create rules of procedure, the only thing they can do, is adopt Rules of Practice, and that is limited to the Presiding Judge, and only if done so, with her executive committee. There is no executive committee, or its members listed on the State Bar web site.

This entire memo was to cover-up the damning Audit of the OCTC and how it has mishandled "highly contested cases" and outright lied [concealed] to the Board of Governors, how much they spend on "complex" cases, and the status thereof.

Since when, is a truncated version of the Discovery Act and CCP to "complex" or "cumbersome" for "experts" [state bar court judges] on evidence and procedure? In addition, nothing in the State Bar Act allows the State Bar Court the authority to hold "public hearings" other than disciplinary, or admission, proceedings. [See the Colin Wong Memo.] Have any of you members of the RAD Committee read the State Bar Act?

For those of you who don't know what B&P Code § 6001 prohibits, it's this, the adoption of procedures of the Govt. Code Section 11000 et.seq. without express approval of the legislature. It's known as the Administrative Procedures Act. Just how much money did Colin Wong, along with Joann Remeke authorize to pay B.Garner for something that is prohibited? How much time was wasted on doing things that are prohibited, instead of hearing righteous disciplinary cases? Just how much time, energy and money was wasted in trying to rig the system against respondents [attorneys] rather than learning the Evidence Code, and obtaining findings that comply with due process? Real lawyers and judges do it everyday. How much time did this committee waste on something that is void ab nitio? There is a reason, your OCTC cannot enter many of the "judgments" in the Superior Court as money judgments to collect on behalf of the State Bar. They were taken illegally. California is a non-collateral bar rule state. Do any of you even know what I'm talking about?

By your reliance on the State Bar Court, The OCTC and Colin Wong and B. Garner, you have violated the State Bar Act in conscious disregard of the rights of all the attorneys and respondents in this state. Those rights include US Constitutional, California Constitutional, and statutory rights of all persons in our land. By adopting these rules and policies you have violated and ratified, and thereby created policy that violates and ratifies this illegal conduct. You are all managing agents.

By adopting the above said rules, you violated the State Bar Act, with regards to B&P Code §§ 6001,6049,6050,6051,6068(i),6079.4,6085(e),6086.5,6088. The most glaring statement is what the State Bar published in the Article authored by Manuel Jiminez, which claims that a respondent, or applicant, cannot assert the 5th amendment rights, namely the privilege of asserting the right against self incrimination. Nothing could be further from the truth and the OCTC should be required to fire, Jimenez, and discipline him for the intentional violation of 5-200. You are all on notice of this. What makes matters even worse, is the State Bar authorized MCLE credit for this deceit. They ask the very question, regarding the right to refuse to testify. This is in gross violation of all the laws of this land. These lies violate the very tenants this body is suppose to uphold, the integrity of our legal system, not lie about the law. The Rule of law is what keeps our fabric of this nation together and distinguishes us from other nations. What the OCTC and the State Bar Court is doing and has done is a disgrace to the legal community.

Contrary to the Article, Spevack v. Klein is a US. Supreme Court Opinion which states just that. The California legislature in 1999, adopted the very language from Spevack, as a condition to "reauthorizing" the State Bar. See Attachments. Moreover, the Calif. State Supreme Court reiterated, that Spevack was the law of the land. See Spielbauer v. County of Santa Clara, 45 Cal 4th 704 (2009) attached
Does the OCTC know how to read? Can they comprehend what they read? The rules you adopted violate all of the above. I posit it was done knowingly, and with malice. I recently sent emails to your CEO Senator Joe Dunn, and he is aware of these same legal authorities. Some of which he voted for when he was in the Senate.

In closing, every weapon you have given the OCTC and the State Bar Court, they have abused and in doing so, violated the law to the point of engaging in criminal behavior. It is your responsibility to correct this and report these matters to the appropriate authorities, not embolden them.

Sincerely

Robin Ann Peluso