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APPENDIX 1 – 1

LAW CORPORATION RULES OF THE STATE BAR OF CALIFORNIA

Rules

LAW CORPORATION RULES OF THE STATE BAR OF CALIFORNIA
Adopted November 1968; Amended October, 1971; Amended February, 1975; Amended May, 1986; Amended February, 1991; Amended January, 1994.

I. Citation of Rules
II. Place of Filing
III. Applications; Review of Refusal to Approve
IV. Requirements for Issuance of Certificate of Registration
V. Certificate of Registration; Continuing validity; Revocation at request of corporation; Involuntary revocation proceedings
VI. Reports

See also California Rules of Professional Conduct, Rule 1-400. Advertising and Solicitation.

I. CITATION OF RULES

These Rules may be cited and referred to as "Law Corporation Rules". They are subject to amendment, modification, revision, supplement, repeal or other change by appropriate action in the future.

II. PLACE OF FILING

All applications, reports and other documents required to be filed with the State Bar by these Rules shall be signed and verified by an officer of the applicant and filed at the office of the State Bar in San Francisco, California.

III. APPLICATIONS; REVIEW OF REFUSAL TO APPROVE

A. An applicant for registration as a law corporation shall file with the State Bar an application for Certificate of Registration, on a form furnished by the State Bar, and pay a fee in an amount to be determined by the State Bar.

B. The chief executive officer of the State Bar or a person or persons designated by the chief executive officer shall review each application for registration of a law corporation and within a reasonable time thereafter approve the application or refuse to approve the application and notify the applicant of the reasons therefor. A request for further information or a request that the application be amended may be deemed by the applicant to be a refusal to approve the application. The effective date of the Certificate of Registration shall be the date on which the applicant has filed with the State Bar all material required for approval of the application, provided however, that:

   1. a later effective date may be granted if requested on behalf of the applicant prior to the issuance of the Certificate of Registration, or
   2. in the discretion of the person or persons authorized to approve applications, an earlier effective date may be granted if the interests of justice require and good cause appears therefor.

C. An applicant may request a review of a refusal to approve its application within 60 days of notice of such refusal. The request shall be heard by a committee or committees appointed by the Board of Governors. Such hearing shall be reported and an original and one copy of the transcript of the proceedings shall be prepared. Upon the completion of such hearing the committee shall either (1) approve the application and order the issuance of a Certificate of Registration or (2) request further information or amendments or (3) refuse to approve the application. A request for further information and amendments may be deemed by the applicant to be a refusal to approve the application. The committee shall report in writing its findings of fact and the reasons for its order. Notice of the order and a copy of the report shall be mailed to the applicant.

D. Review of the order relating to refusal to approve the application shall be made by the Board of Governors or a committee or committees appointed for that purpose by it. The Board of Governors or committee conducting such review shall keep a record thereof and enter in its minutes its findings of fact and decision and make such orders as may be appropriate. Notice of such action shall be mailed to the applicant.

E. All proceedings under subsections C and D of this Rule III shall be confidential, unless otherwise requested by the applicant and approved by the Board of Governors or committee. Insofar as applicable, the Rules of Procedure of the State Bar shall apply to such proceedings. For the purpose of applying the Rules of Procedure, the word member therein shall be deemed to mean law corporation. The action by the Board of Governors or committee is subject to review by the Supreme Court pursuant to its Rules.

IV. REQUIREMENTS FOR ISSUANCE OF CERTIFICATE OF REGISTRATION

A. A Certificate of Registration shall be issued if the application shows that:

1. the applicant is organized and exists as a professional corporation certified by the California Secretary of State;
2. (a) each shareholder is an active member of the State Bar or is licensed to practice law in the jurisdiction or jurisdictions in which the person practices, and (b) each director and officer (except as provided in §.13403 of the Corporations Code) is a shareholder of the applicant;
3. if applicant has only one or two shareholders, it complies with §13403 of the Corporations Code;
4. except as provided in §(10)(a) below, each employee of the applicant who will practice law, whether or not a director, officer, or shareholder, is an active member of the State Bar or is licensed to practice law in the jurisdiction or jurisdictions in which the person practices;
5. the name of the corporation and any name or names under which it may practice law complies with the California Rules of Professional Conduct and that the name includes wording or abbreviations denoting corporate existence such as "Professional Corporation," "Prof. Corp.", "Corporation", "Corp.", "incorporated", or "Inc.";
6. applicant has complied with the provisions of Section C of this Rule IV;
7. applicant has provided and will maintain in effect security for clams against it by its clients for errors and omissions arising out of the practice of law as required by Section B of this Rule IV;
8. applicant's affairs will be conducted in compliance with law and the rules and regulations of the State Bar;
9. applicant has included, for each shareholder of the corporation licensed in a foreign country but not in this state or in any other state, territory, or possession of the United States, a certificate from the authority having final jurisdiction over the practice of law, which shall verify the shareholder's admission to practice law in the foreign country, the date thereof, and the fact that the shareholder is currently in good standing as an attorney or counselor at law or the equivalent; and
10. where applicant is incorporated as nonprofit public benefit corporation under the Non-profit Public Benefit Corporation Law that:
    a. all employees and members of the corporation and all members of the corporation's Board of Directors are licensed to practice law in California,
    b. seventy percent of the clients of the corporation are lower income persons as defined on Section 50079.5 of the Health and Safety Code or others who would not otherwise have access to legal services, and;
    c. the corporation does not enter into contingency fee contracts with clients.

B. Security for claims against a law corporation.

1. For a law corporation that applied to the State Bar of a Certificate of Registration prior to October 27, 1971, security for claims against it by its clients for errors or omissions arising out of the practice of law shall consist of:
    a. a policy or policies of insurance insuring the corporation against liability imposed upon it by law for damages arising out of claims against it by its clients for errors or omissions arising out of the practice of law by the corporation in an amount for each claim of at least $50,000 multiplied by the number of its employees who are practicing law and an aggregate maximum limit of liability per policy year of at least $100,000 multiplied by the number of such employees, provided that the maximum coverage shall not be required to exceed $500,000 for each claim and $5,000,000 for all claims during the policy year, and provided further that the deductible portion of such insurance shall not exceed $2,000 multiplied by the number of such employees,

b. a written agreement of the shareholders that they shall jointly and severally guarantee payment by the corporation for claims established against it by its clients for errors or omissions arising out of the practice of law by the corporation up to the minimum amounts specified for insurance under subsection (a) hereof, but without any deductible portion, or

c. a written agreement executed by each of the shareholders, jointly and severally guaranteeing payment by the corporation of all claims established against it by its clients for errors or omissions arising out of the practice of law by the corporation in an amount for each claim of at least $50,000 multiplied by the number of its employees who are practicing law with an aggregate maximum limit liability per year of at least $100,000 multiplied by the number of such employees, provided that the maximum guarantee shall not be required to exceed $500,000 for each claim and $5,000,000 for all claims during the year, and provided further, that such guarantee may provide that any payment required to be made thereunder shall be offset by the amount paid by any insurance company providing errors or omissions insurance coverage for the corporation or any of its shareholders.

d. For the purpose of determining the amount of security for claims to be provided by the corporation, "employees" as used in this Rule IV-B shall include:

1. All persons practicing law on behalf of the corporation or held out by the corporation as being available to practice law on behalf of the corporation as "of counsel" or otherwise.

2. All persons practicing law on behalf of a partnership in which the corporation is a partner or held out by such partnership as being available to practice law on behalf of the partnership as "of counsel" or otherwise.

3. All persons practicing law on behalf of an association with which the corporation has established a relationship of a continuous nature or held out by such association as being available to practice law on behalf of the association as "of counsel" or otherwise.

2. Evidence of the foregoing security shall be furnished to the State Bar in the form of a certificate of insurance issued by the insurer setting forth the nature and extent of the liability as specified under subsection (1)(a) of this Section B or an executed copy of the written agreement specified under subsection (1)(b) or (1)(c) of this Section B.

3. For law corporations that apply to the State Bar for a Certificate of Registration on or after October 27, 1971, security for claims against it by its clients for errors or omissions arising out of the practice of law shall consist of an executed copy of the agreement specified in subsection (1) (c) of this Section B.

4. Until January 1, 1996, a law corporation that is incorporated as a nonprofit public benefit corporation under the Nonprofit Public Benefit Corporation Law shall be deemed to have fulfilled its obligations regarding security for claims if the corporation is the insured for claims against it arising out of the rendering of professional services on an errors and omissions insurance policy, or if no policy exists, if the Board of Directors of the corporation has made all reasonable efforts in good faith to obtain available liability insurance and has provided adequate proof to the State Bar of the efforts.

C. Shares; ownership and transfer.

1. The shares of a law corporation may be owned only by (a) that corporation (b) by an active member of the State Bar or (c) by a person who is licensed to practice law in the jurisdiction or jurisdictions in which the person practices.

2. The shares of a law corporation owned by a person who

a. dies;

b. ceases to be an eligible shareholder, or

c. becomes a disqualified person as defined in §13401(e) of the Corporations Code, for a period exceeding 90 days, shall be sold and transferred to the corporation or its shareholders on such terms as are agreed upon by the corporation and its shareholders. Such sale or transfer shall occur not later than 6 months after any such death and not later than 90 days after the date he ceases to be an eligible shareholder, or 90 days after the date he becomes a disqualified person. The requirements of subsections (1) and (2) of this Section C shall be set forth in the law corporation's articles of incorporation or bylaws, except that the terms of the sale or transfer provided for in said subsection (2) need not be set forth in said articles or bylaws if they are set forth in a written agreement.

3. A corporation and its share holders may, but need not, agree that shares sold to it by a person who becomes a disqualified person for any reason other than disbarment may be resold to such person if and when he again becomes an eligible shareholder.

4. The share certificates of a law corporation shall contain an appropriate legend setting forth the foregoing

restrictions.

5. The income of a law corporation attributable to its practice of law while a shareholder is a disqualified person shall not in any manner accrue to the benefit of such shareholder or his shares.

V. CERTIFICATE OF REGISTRATION; CONTINUING VALIDITY; REVOCATION AT REQUEST OF CORPORATION; INVOLUNTARY REVOCATION PROCEEDINGS

A. A Certificate of Registration shall continue in effect until it is suspended or revoked. Such certificate may be suspended or revoked if a law corporation fails at any time to comply fully with the provisions of these rules, of the State Bar Act, of the Rules of Professional Conduct of the State Bar, of the Professional Corporations Act, and the General Corporations Law as applied to professional law corporations.

B. Upon receipt of a resolution of the board of directors of a law corporation requesting the cancellation of the Certificate of Registration of that law corporation, such Certificate shall be cancelled by the Secretary of the State Bar or by a person or persons designated by him. The cancellation of a Certificate of Registration at the request of a law corporation shall be effective as of the day such request is received at the State Bar office except that:

   1. a later effective date shall be granted upon request of the corporation,
   2. in the discretion of the person or persons authorized to cancel Certificates, an earlier effective date may be granted if the interests of justice require and good cause appears therefor.

C. Except for revocations and suspensions provided for in Section 6163 and 6171.1 of the California Business and Professions Code, when there is reason to believe that a law corporation has violated or is about to violate any of the provisions of Article 10 of the State Bar Act, or Part 4 of Division 3 of Title 1 of the Corporations Code, or any other pertinent statute, rule or regulation, the chief executive officer of the State Bar or a person or persons designated by the chief executive officer may issue a notice directing the corporation to show cause why it should not be ordered to cease and desist from specified acts or conduct, or why its Certificate of Registration should not be suspended or revoked.

D. All proceedings or other actions relating to the revocation of a Certificate of Registration, other than a revocation at the request of the corporation as is provided for in Rule V-B, shall be pursuant to the provisions of Section 6163, 6168, 6169, 6170 and 6171.1 of the California Business and Professions Code.

   Insofar as applicable, and not inconsistent with the foregoing Code Sections, the Rules of Procedure of the State Bar shall apply to such proceedings. For the purposes of applying the Rules of Procedure, the word member therein shall be deemed to mean law corporation.

VI. REPORTS

A. On or before March 31, 1970 and annually thereafter each law corporation shall file an annual report covering the calendar year immediately preceding on a form provided by the State Bar, pursuant to the provisions of Section 6163 of the State Bar Act.

B. Each law corporation shall file a special report on a form provided by the State Bar, within thirty days, of any change relating to the requirements of Rule IV of these rules, including any change in directors, officers, employees practicing law and share ownership, and amendments to its articles of incorporation and amendments to portions of its bylaws required to be filed by these rules. A copy of all notices received by a law corporation from an insurance company of termination or cancellation, or intention to terminate or cancel, insurance provided under Rule IV of these rules shall be filed forthwith with the State Bar.

C. Each report filed pursuant to this Rule VI shall be accompanied by a filing fee in an amount to be fixed by the State Bar.

D. A law corporation that is incorporated as a nonprofit public benefit corporation under the Nonprofit Public Benefit Corporation Law and is a recipient in good standing as defined in Business and Professions Code section 6213, subdivision (c) shall be deemed to have satisfied the reporting requirements of section VI of these Rules.

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APPENDIX 1 – 2

LIMITED LIABILITY PARTNERSHIP RULES & REGULATIONS OF THE STATE BAR OF CALIFORNIA

Rules

(adopted by the State Bar Board of Governors 10/26/95; revised 6/1/97; revised 6/10/00)

- 1.0 Purpose
- 2.0 Definitions
- 3.0 Eligibility for Certification
- 4.0 Application for Certification
- 5.0 Security for Claims Against a Limited Liability Partnership
- 6.0 Denial of Application
- 7.0 Duration of Certificate of Registration
- 8.0 Involuntary Termination of Certificate of Registration
- 9.0 Termination at Request of Partnership
- 10.0 Annual Renewal
- 11.0 Special Reports
- 12.0 Confidentiality

1.0 - PURPOSE

The purpose of the Limited Liability Partnership Rules and Regulations is to provide for the registration of California attorneys to practice law as a limited liability partnership.

2.0 - DEFINITIONS

2.1 - A "Limited Liability Partnership" is a partnership which has a currently effective certificate of registration as a limited liability partnership from the State Bar. It does not include "related" partnerships pursuant to Corporations Code Sections 16101(4)(A)(3) and 16101(6)(A)(iii).

2.2 - The "Rules" are these Limited Liability Partnership Rules and Regulations.

2.3 - The "State Bar" is the chief executive officer of the State Bar, or a person or persons designated by the chief executive officer, who shall have the authority to administer and interpret these Rules.

3.0 - ELIGIBILITY FOR CERTIFICATION

To be eligible to become certified as a limited liability partnership, an applicant must:

3.1 - Be organized and exist as a limited liability partnership certified by the Secretary of State pursuant to Corporations Code Sections 16953 or 16959;

3.2 - Ensure that each partner is an active member of the State Bar or is licensed and entitled to practice law in another jurisdiction, and each partner and employee of the applicant who practices law in California on behalf of the limited liability partnership is a member of the State Bar of California on active status or is otherwise authorized to practice law in California;

3.3 - Agree that the only name under which the limited liability partnership will practice law in California is the name filed with the office of the State Bar responsible for regulating the limited liability partnership program, that the name complies with the California Rules of Professional Conduct, and that the name shall include the words "Registered Limited Liability Partnership" or "Limited Liability Partnership" or one of the abbreviations "L.L.P.," "LLP," "R.L.L.P.," or "RLLP" as the last words or letters of

its name.

3.4 - Have at the time of application, and agree to maintain for the entire period of certification, the security for claims required pursuant to Corporations Code section 16956; and

3.5 - Agree to comply with the laws of the State of California, the California Rules of Professional Conduct, the Rules and Regulations of the State Bar, and these Rules, insofar as they are applicable to partners and employees of an applicant.

4.0 - APPLICATION FOR CERTIFICATION

All Applications for Certification must be submitted:

4.1 - On the form provided by the State Bar;

4.2 - With all the information requested on the form, including any supplemental documentation requested;

4.3 - For each partner of the limited liability partnership licensed in a foreign country but not in this state or in any other state, territory, or possession of the United States, with a certificate from the authority having final jurisdiction over the practice of law, which shall verify the partner's admission to practice law in the foreign country, the date thereof, and the fact that the partner is currently in good standing and currently eligible to practice law as an attorney or counselor at law or the equivalent. If the certification is not in English, there shall be included with the certification a duly authenticated English translation of the certificate;

4.4 - With the appropriate non-refundable processing fee;

4.5 - At the office of the State Bar responsible for regulating the limited liability partnership program; and

4.6 - Signed and verified by a partner authorized to act on behalf of the applicant.

5.0 - SECURITY FOR CLAIMS AGAINST A LIMITED LIABILITY PARTNERSHIP

5.1 - A limited liability partnership shall maintain security for claims against it for acts, errors and omissions arising out of the practice of law as set forth in Corporations Code Section 16956.

5.2 - For purposes of determining the amount of security for claims to be provided by the limited liability partnership, "licensed persons rendering professional services" as used in Corporations Code Section 16956(a)(2) shall include all persons practicing law on behalf of: 5.2.1 - The limited liability partnership or held out by the limited liability partnership as being available to practice law on behalf of it, including "of counsel";

5.2.2 - A partnership in which the limited liability partnership is a partner or held out by such partnership as being available to practice law on behalf of the partnership, including "of counsel";

5.2.3 - An association with which the limited liability partnership has established a relationship of a continuous nature or held out by such association, with the consent of the limited liability partnership, as being available to practice law on behalf of the association, including "of counsel"; and

5.2.4 - A law corporation which is a partner in the limited liability partnership, or any person held out by such law corporation as being available to practice law on behalf of the law corporation, including "of counsel".

6.0 - DENIAL OF APPLICATION

6.1 - If the State Bar determines to deny an application for certification for any reason, the State Bar shall mail a Notice of Denial of Certification to the applicant that sets forth the reasons for the proposed denial. A request for additional information is not a denial of an application. If no response to the request for additional information is received within 60 days, the application shall be deemed to have been abandoned by the applicant. Thereafter, the applicant must submit a new application pursuant to Section 4.0.

6.2 - An applicant may request, in writing, a hearing on the denial to approve its application within 15 days after such Notice of

Denial of Certification is dated.

6.3 - The appropriate Board Committee shall conduct a hearing within 60 days of the State Bar's receipt of the request.

6.4 - Should the outcome of the hearing permitted by Section 6.2 be adverse to the applicant, the applicant may appeal such decision pursuant to the provisions of California Rule of Court 952(d).

6.5 - All proceedings under Section 6.0 shall be confidential, unless otherwise requested by the applicant or ordered by the Board of Governors. Insofar as applicable, the Rules of Procedure of the State Bar shall apply to such proceedings. For the purpose of applying the Rules of Procedure, "member" therein shall be deemed to mean "limited liability partnership".

7.0 - DURATION OF CERTIFICATE OF REGISTRATION

7.1 - The effective date of the Certificate of Registration shall be the date on which the applicant has filed with the State Bar all material required pursuant to Section 4.0. A later effective date may be granted if requested by the applicant prior to the issuance of the Certificate of Registration. An earlier effective date may be granted only to an applicant who has registered as a limited liability partnership with the Secretary of State prior to the effective date of these Rules, but in no case shall the effective date be earlier than the date of registration with the Secretary of State.

7.2 - A Certificate of Registration shall remain in effect until terminated pursuant to the earliest of the following occurrences:
7.2.1 - The Certificate of Registration is terminated by the State Bar without the consent of the limited liability partnership pursuant to Section 8.0; or

7.2.2 - The Certificate of Registration is terminated by the State Bar at the written request of the limited liability partnership pursuant to Section 9.0.

8.0 - INVOLUNTARY TERMINATION OF CERTIFICATE OF REGISTRATION

8.1- The Certificate of Registration of a limited liability partnership shall be deemed to be terminated if:

8.1.1 - The limited liability partnership fails timely to file a completed Annual Renewal;

8.1.2 - There is only one partner in the limited liability partnership; or

8.1.3 - The State Bar is notified that the limited liability partnership has been suspended by the California Secretary of State or by the California State Franchise Tax Board.

8.2 - When there is reason to believe that a limited liability partnership has violated or is about to violate these Rules or any other pertinent statute, rule or regulation, the State Bar shall mail a notice to the limited liability partnership directing the limited liability partnership to show cause why its Certificate of Registration should not be terminated for specified acts. These proceedings shall be conducted in accordance with the process set forth in Sections 6.2, 6.3, 6.4 and 6.5.

9.0 - TERMINATION AT REQUEST OF PARTNERSHIP

To terminate a Certificate of Registration at the request of the limited liability partnership, the State Bar must receive an original document certified by the Secretary of State showing that the entity has ceased to exist as a limited liability partnership. The termination shall be effective as of the date the limited liability partnership is dissolved by the Secretary of State.

10.0 - ANNUAL RENEWAL

Each limited liability partnership shall file an Annual Renewal. Pursuant to Section 8.1.1, failure to timely file a completed Annual Renewal shall result in termination of the limited liability partnership. All Annual Renewals must be submitted:

10.1 - On the form provided by the State Bar;

10.2 - On or before the date set by the State Bar;

10.3 - With all the information requested on the Annual Renewal including any supplemental documentation requested;

10.4 - With the appropriate renewal fee and any penalty for late filing, as appropriate;

10.5 - At the office of the State Bar responsible for regulating the limited liability partnership program; and

10.6 - Signed and verified by a partner authorized to act on behalf of the limited liability partnership.

11.0 - **SPECIAL REPORTS**

Each limited liability partnership shall file a Special Report with the office of the State Bar responsible for regulating the limited liability partnership program, in a form acceptable to the State Bar, signed and verified by a partner authorized to act on behalf of the limited liability partnership, setting forth any changes in the limited liability partnership within 45 days of the change, as follows:

11.1 - Any change in the limited liability partnership's official State Bar address (filing of an address change with Membership Records does not satisfy the requirement set forth in this Section);

11.2 - Any change in the name of the limited liability partnership; or

11.3 - Any change in the designated partner or partners authorized to act on behalf of the limited liability partnership.

12.0 - **CONFIDENTIALITY**

An applicant's or a limited liability partnership's status as it relates to the limited liability partnership program and any other information provided to the State Bar or its representatives pursuant to these Rules is not confidential and shall be disclosed upon request of any interested person, except to the extent that disclosure is prohibited by law. In addition, any partnership agreements provided to the State Bar or its representatives pursuant to these Rules shall be confidential.

For additional information, e-mail LLP@calbar.ca.gov.

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APPENDIX 1 – 3

INTERNAL REVENUE SERVICE REVENUE PROCEDURE 92-59

H

Rev. Proc. 92-59, 1992-29 I.R.B. 11, 1992-2 C.B. 411, 1992 WL 509835 (IRS RPR)

Internal Revenue Service (I.R.S.)
Revenue Procedure

Published: July 20, 1992

26 CFR 601.201; Ruling and determination letters.

(Also Part 1, Section 501; 1.501(c)(3)-1.)

SECTION 1. PURPOSE

The purpose of this revenue procedure is to supersede Rev. Proc. 71-39, 1971-2 C.B. 575, to modify and supersede Rev. Proc. 75-13, 1975-1 C.B. 662, to revoke Rev. Rul. 75-75, 1975-1 C.B. 154, and to amplify Rev. Rul. 75-76, 1975-1 C.B. 154, by setting forth guidelines for public interest law firms, including procedures under which a public interest law firm may accept fees for its services. The Internal Revenue Service will issue rulings and determinations regarding exemption to new public interest law firms and test the charitable character of such organizations already holding such rulings based on the guidelines set forth in this revenue procedure. These guidelines are not inflexible and an organization will be given the opportunity to demonstrate that under the facts and circumstances of its particular program, adherence to the guidelines is not required in certain respects in order to ensure that the operations are totally charitable.

SEC. 2. BACKGROUND

01 In Rev. Proc. 71-39, the Service announced guidelines pursuant to which it would recognize public interest law firms as exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. Section 3.02 of Rev. Proc. 71-39 provides that the public interest law firm does not accept fees for its services except in accordance with procedures approved by the Service.

02 Rev. Rul. 73-74, 1975-1 C.B. 152, provides that the recognition of public interest law firms as charitable is based on their provision of legal representation for the resolution of issues of broad public importance where such representation is not ordinarily provided by private law firms because the cases are not economically feasible.

03 Rev. Rul. 75-75 holds that charging or accepting fees from clients makes the organization indistinguishable from a private law firm. The revenue ruling indicates that the expectation of fees for services might influence which cases are accepted.

04 Rev. Rul. 75-76 holds that the acceptance of fees awarded by a court or an administrative agency and paid by opposing parties does not preclude a public interest law firm that derives most of its support from grants and contributions from exemption under section 501(c)(3) of the Code. However, exemption would only be justified if it is clear that neither the expectation nor the possibility, however remote, of an award of fees is a substantial motivating factor in the selection of cases. In addition, the firm must cease to handle issues with a strong possibility of a fee award if these become economically feasible for private litigants.

05 Rev. Proc. 75-13 sets forth procedures under which a public interest law firm may accept fees for its services. Under these procedures, the organization may not receive or request fees from its clients for the provision of legal services. Attorney fees paid by opposing parties, however, are permissible if awarded by a court or administrative agency in a case or settlement agreement.

06 The procedures of Rev. Proc. 75-13 were published to eliminate the possibility that a decision

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to litigate might rest on the payment the firm receives instead of the economic feasibility for the litigants and thus render a public interest law firm's practice indistinguishable from a private firm's. The Service has reconsidered these procedures and concluded that safeguards sufficient to distinguish a public interest law firm's practice from the private practice of law can be implemented without absolutely prohibiting public interest law firms from receiving client-paid fees.

07 Section 3 below sets forth general guidelines under which the Service will determine whether a public interest law firm meets the test of being exclusively charitable and thus is entitled to recognition of exemption as an organization described in section 501(c)(3) of the Code. Section 4 below sets forth approved procedures for the acceptance of court awarded attorneys' fees. Section 5 below sets forth additional procedures to apply in the case of client-paid fees to assure that the public interest law firm that accepts client- paid fees remains distinguishable from a private law firm. The procedures in Section 5 are not applicable to out-of-pocket costs incurred in litigation.

SEC. 3. GENERAL GUIDELINES

01 The engagement of the organization in litigation can reasonably be said to be in representation of a broad public interest rather than a private interest. Litigation will be considered to be in representation of a broad public interest if it is designed to present a position on behalf of the public at large on matters of public interest. Typical of such litigation may be class actions in which the resolution of the dispute is in the public interest; suits for injunction against action by government or private interests broadly affecting the public; similar representation before administrative boards and agencies; test suits where the private interest is small; and the like.

02 The litigation activity does not normally extend to direct representation of litigants in actions between private persons where the financial interests at stake would warrant representation from private legal sources. In such cases, however, where the issue in litigation affects a broad public interest or will have an impact on the broad public interest, the organization may serve as a friend of the court.

03 The organization does not attempt to achieve its objectives through a program of disruption of the judicial system, illegal activity, or violation of applicable canons of ethics.

04 The organization files with its annual information return a description of cases litigated and the rationale for the determination that they would benefit the public generally.

05 The policies and programs of the organization (including compensation arrangements) are the responsibility of a board or committee representative of the public interest, which is not controlled by employees or persons who litigate on behalf of the organization nor by any organization that is not itself an organization described in section 501(c)(3) of the Code.

06 The organization is not operated, through sharing of office space or otherwise, in a manner so as to create identification or confusion with a particular private law firm.

07 There is no arrangement to provide, directly or indirectly, a deduction for the cost of litigation that is for the private benefit of the donor.

08 The organization does not accept fees for its service except in accordance with the procedures set forth in Sections 4 and 5 below.

09 The organization must otherwise comply with the provisions of section 501(c)(3) of the Code, that is, it may not participate in, or intervene in, any political campaign on behalf of (or in opposition to) any candidate for public office, no part of its net earnings may inure to the benefit of any private shareholder or individual, and no substantial part of its activities may consist of carrying on propaganda or otherwise attempting to influence legislation, (except as otherwise provided in section 501(h)).

10 A public interest law firm may accept reimbursement from clients or from opposing parties for direct out-of-pocket expenses incurred in the litigation. Courts have traditionally distinguished out-of-pocket costs such as filing fees, travel expenses, and expert witness fees from attorneys' fees. These expenses are usually nominal in comparison to the amount of attorneys' fees.

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SEC. 4. ACCEPTANCE OF ATTORNEYS' FEES

01 The organization may accept attorneys' fees in public interest cases if such fees are paid by opposing parties and are awarded by a court or administrative agency or approved by such a body in a settlement agreement.

02 The organization may accept attorneys' fees in public interest cases if such fees are paid directly by its clients provided it adopts additional procedures as set forth in Section 5 of this revenue procedure.

03 The likelihood or probability of a fee, whether court awarded or client-paid, may not be a consideration in the organization's selection of cases. The selection of cases should be made in accordance with the procedures set forth in Section 3 of this revenue procedure.

04 Cases in which a court awarded or client-paid fee is possible may not be accepted if the organization believes the litigants have a sufficient commercial or financial interest in the outcome of the litigation to justify retention of a private law firm. The organization may, in cases of sufficient broad public interest, represent the public interest as amicus curiae or intervenor in such cases.

05 The total amount of all attorneys' fees (court awarded and received from clients) must not exceed 50 percent of the total cost of operation of the organization's legal functions. This percentage will be calculated over a five-year period, including the taxable year in which any fees are received and the four preceding taxable years (or any lesser period of existence). Costs of legal functions include: attorneys' salaries, nonprofessional salaries, overhead, and other costs directly attributable to the performance of the organization's legal functions. An organization may submit a ruling request where an exception to the above 50 percent limitation appears warranted.

06 The organization will not seek or accept attorneys' fees in any circumstances that would result in a conflict with state statutes or professional canons of ethics.

07 All attorneys' fees will be paid to the organization, rather than to individual staff attorneys. All staff attorneys and other employees will be compensated on a straight salary basis, not exceeding reasonable salary levels and not established by reference to any fees received in connection with the cases they have handled.

08 In addition to the information required by Section 3.04 of this revenue procedure, the organization will file with its annual information return a report of all attorneys' fees sought and recovered in each case.

SEC. 5. ADDITIONAL RULES APPLICABLE TO CLIENT-PAID FEES

01 Client-paid fees may not exceed the actual cost incurred in each case, viz., the salaries, overhead, and other costs fairly allocable to the litigation in question. Costs may be charged against a retainer, with any balance remaining after the conclusion of the litigation refunded to the litigant.

02 Once having undertaken a representation, a public interest law firm may not withdraw from the case because the litigant is unable to pay the contemplated fee.

SEC. 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 71-39 is hereby superseded. Rev. Proc. 75-13 is hereby modified and superseded. Rev. Rul. 75-75 is hereby revoked. Rev. Rul. 75-76 is hereby amplified to reflect the position taken in Section 4.05 of this revenue procedure that a public interest law firm is allowed to receive attorneys' fees in an amount not exceeding 50 percent of its expenditures attributable to its legal functions.

SEC. 7. EFFECTIVE DATE

This revenue procedure is effective for taxable years beginning after December 31, 1987.

DRAFTING INFORMATION

The principal author of this revenue procedure is Debra Cowen of the Exempt Organizations

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Technical Division. For further information regarding this revenue procedure contact Ms. Cowen on (202) 566-3586 (not a toll-free call.)

Rev. Proc. 92-59, 1992-29 I.R.B. 11, 1992-2 C.B. 411, 1992 WL 509835 (IRS RPR)
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APPENDIX 1 – 4

RULES & REGULATIONS PERTAINING TO LAWYER REFERRAL SERVICES IN CALIFORNIA INCLUDING MINIMUM STANDARDS

Rules and Regulations of the State Bar of California Pertaining to Lawyer Referral Services Including Minimum Standards for a Lawyer Referral Service in California

Effective January 1, 1997

Rule 1. Purpose of Rules

1.1 The purpose of these Rules and Regulations Including Minimum Standards ("Rules") is to establish minimum standards for the operation of Lawyer Referral Services and facilitate the enforcement of Business & Professions Code §6155 pertaining to Lawyer Referral Services.

Rule 2. Citation of Rules

2.1 These Rules shall be cited and referred to as the Rules and Regulations of the State Bar of California Pertaining to Lawyer Referral Services Including Minimum Standards for Lawyer Referral Services in California ("Rules"). With the approval of the Supreme Court, these Rules are subject to amendment, repeal or other action by the Board of Governors of the State Bar of California.

Rule 3. Policy of the State Bar Regarding Lawyer Referral Services

3.1 It is the policy of the State Bar of California that every community be served by one or more certified Lawyer Referral Service. Where the size of the community or the number of lawyers serving it make the establishment of a separate Lawyer Referral Service impractical, the State Bar encourages the establishment of a regional Lawyer Referral Service embracing two or more such communities, subject to Rule 8.2 which requires separate certification for each county in which a Lawyer Referral Service operates.

3.2 It is also the policy of the State Bar of California that activities in violation of these Rules, the Business & Professions Code, or other authorities pertaining to Lawyer Referral Services, be curtailed.

Rule 4. Definition of a Lawyer Referral Service

4.1 "Lawyer Referral Service" means an individual, partnership, corporation, association, or any other entity, or a service or agency of an entity, which operates for the direct or indirect purpose of referring potential clients to lawyers, whether or not the term "referral service" is used. This definition shall not apply to those entities or persons exempted by Business & Professions Code §6155, subdivision (c) or (h)

4.2 "Entity" means an individual, partnership, corporation, association or any other form of organization.

4.3 A Lawyer Referral Service shall be comprised of these separate parts:

(a) A staff which processes the requests for legal assistance;

(b) A panel of lawyers who provide legal assistance; and

(c) A committee or governing body as defined in Rule 10.1.

Rule 5. Purposes of a Lawyer Referral Service

5.1 The purposes of a Lawyer Referral Service shall be:

(a) To provide a way in which any person may be referred to a qualified, insured lawyer who is able to render and is interested in rendering needed legal services;

(b) To provide information about lawyers and the availability of legal services which will aid the public in their selection of a lawyer;

(c) To inform the public when and where to seek legal and dispute resolutions services;

(d) To provide general, legal and dispute resolution information needed by the public;

(e) To improve the quality of legal services available to the public; and

(f) To provide access to affordable legal services to the public.

Rule 6. Application for Certification to Operate a Lawyer Referral Service

6.1 Application for certification or recertification as a Lawyer Referral Service shall be made on a form supplied by the State Bar which from time to time may be amended by the State Bar. Certification shall be granted only upon a showing that the Lawyer Referral Service has complied with each of these Rules, Business & Professions Code §6155 and other relevant authorities.

6.2 All applications, reports and other documents required to be filed with the State Bar by Lawyer Referral Services shall be signed and verified by the owner or

duly authorized agent of the Lawyer Referral Service and filed at the State Bar's Lawyer Referral Services Certification Program in San Francisco, California.

6.3 Applications for first time certification may be filed at any time during the year. Applications for recertification must be submitted in conjunction with the filing of the annual report to the State Bar pursuant to Rule 15.2

6.4 For the purpose of determining whether an application is timely, the application shall be deemed submitted when actually delivered to the State Bar's Lawyer Referral Services Certification Program in San Francisco or when deposited in the United States mail, first class postage prepaid, addressed to the Lawyer Referral Services Certification Program, State Bar of California in San Francisco.

6.5 The Chief Executive Officer of the State Bar or a person or persons designated by the Chief Executive Officer shall review each application and within a reasonable time thereafter approve or deny the application and notify the applicant of the reasons therefore, or seek additional information regarding an incomplete or insufficient application. If the application is determined to be complete and in compliance with these Rules and other applicable authorities, a certificate of compliance shall be issued. This review may include an investigation and administrative audit as provided in Rule 16.

6.6 The applicant shall be notified in writing if an application is incomplete or deficient. If an applicant fails to complete the application or correct any deficiency within sixty (60) days of written notification, the application shall be deemed withdrawn without a refund of the fee except as provided in Rule 9.

Rule 7. Denial of Application for Certification to Operate a Lawyer Referral Service

7.1 The Chief Executive Officer of the State Bar, or a person or persons designated by the Chief Executive Officer, may deny an application for certification or recertification for failure to submit a complete and sufficient application, for failure to demonstrate full compliance with these Rules and other applicable authorities, or for other good cause. Cause for denial of certification or recertification shall include but not be limited to:

(a) Noncompliance with any provision of the statutes, these Rules or other authorities governing Lawyer Referral Services;

(b) Sharing common or cross ownership, interests, or operations with any entity which engages in referrals to licensed or unlicensed health care providers;

(c) Direct or indirect consideration regarding referrals between an owner, operator or member of a Lawyer Referral Service and any licensed or unlicensed health care provider; or

(d) Advertising or soliciting on behalf of attorneys in violation of the Rules of Professional Conduct.

7.2 Written notice of the denial of the application and of the reason(s) for the denial shall be served by mail upon the applicants. Notice shall also be given to the panel attorneys listed in the application.

7.3 An applicant may request review of the denial of its application within thirty (30) days of the date of the notice of denial. The request must be in writing, set forth the reasons review is sought and include all relevant evidence supporting the position of the applicant. The request shall be considered by a subcommittee appointed for this purpose by the Board of Governors or another committee appointed for this purpose by the Board of Governors. The subcommittee shall provide the Lawyer Referral Service with an opportunity to be heard consistent with due process requirements.

7.4 Upon the completion of such consideration, the subcommittee shall 1) certify the Lawyer Referral Service with or without conditions as the subcommittee determines appropriate; 2) request further information or amendment to the application; or 3) decline to certify the Lawyer Referral Service.

7.5 The subcommittee shall report in writing its findings, determinations and reasons for its determinations. A copy of that report shall be served by mail upon the applicant.

7.6 An applicant may request review of the action of the subcommittee within thirty (30) days of service of the report of the subcommittee. The request must be in writing, set forth the reasons review is sought and include all relevant evidence supporting the position of the Applicant. The request shall be considered by the Board Committee on Legal Services or another committee appointed by the Board of Governors for this purpose. The Board Committee shall review the determinations of the subcommittee. It may hold hearings as it deems appropriate.

7.7 The Board Committee shall record in writing its findings and determinations and make such additional comments as it deems appropriate. Notice of such action shall be served by mail upon the applicant.

7.8 Any further review of the issues shall be in accordance with rule 9.13(d), California Rules of Court.

Rule 8. Certification

8.1 Certification shall be for no more than two years from the date issued or for such shorter periods of time as may be determined by the State Bar. Certification shall be renewed every two years or for such shorter periods of time as may be determined by the State Bar, by the filing of a recertification application.

8.2 If a Lawyer Referral Service operates in more than one county, it shall apply for separate certification for each county in which the Lawyer Referral Service operates and fulfill these Rules for each county. For the purpose of this Rule, a Lawyer Referral Service "operates" in a county if it makes referrals to attorneys in that county.

A Lawyer Referral Service will not be required to establish a separate office in each county in which it operates. For the purposes of this Rule, District 1 will be considered as if it were one county. State Bar District 1 counties: Butte, Colusa, Del Norte, Glenn, Humboldt, Lake, Lassen, Mendocino, Modoc, Nevada, Placer, Plumas, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity and Yuba.

This requirement may be waived if the Lawyer Referral Service presents written evidence to the State Bar that good cause exists for not fulfilling all these Rules for each county in which it operates.

8.3 If an application for recertification is timely completed and filed, the existing certification shall continue in effect until recertification is issued or denied, or until the existing certification is suspended or revoked pursuant to Rule 19.

8.4 If certification is not renewed or is revoked pursuant to Rule 19, it shall expire and terminate. All activities subject to certification must cease upon the expiration of certification, non-renewal of certification or upon notice of revocation of certification, unless certification is extended pursuant to Rule 8.3.

8.5 Denial of an application for first time certification shall not prohibit the filing of a new application. Upon reapplication, the applicant must demonstrate full compliance with all requirements for certification. The fee for reapplication shall be the same as for application.

8.6 Upon the expiration or revocation of certification or following denial of an application for recertification, an applicant may re-apply for certification but must do so in accordance with the Rules pertaining to first time certification.

Rule 9. Fees

9.1 An applicant for certification or recertification shall pay, as a condition to the filing of an application, fees established by the Board of Governors, in such reasonable amounts as may be determined, and from time to time modified, by the Board of Governors.

9.2 Such fees shall be determined, in whole or in part, by a consideration of any combination of the following factors: a Lawyer Referral Service's gross annual revenues, number of panels, number of panel members, amount of fees charged to panel members, or for-profit or non-profit status; provided that such application or recertification fees not exceed ten thousand dollars ($10,000) or one percent (1%) of the applicant's gross annual revenues generated by lawyer referral activity, whichever is less.

9.3 Certification and recertification fees not paid within thirty (30) days after due shall be delinquent and shall be subject to late charges in such reasonable amounts as may be determined, and from time to time modified, by the Board of Governors.

9.4 Written notice of delinquent fees shall state: the amount of the unpaid fee; the amount of any late charges; that failure to pay all fees due including late charges may result in suspension or revocation of certification; and that a certified Lawyer Referral Service may voluntarily relinquish certification in lieu of suspension or revocation.

9.5 Certification maybe revoked due to failure to pay fees after written notice of delinquency.

9.6 If an application is withdrawn in writing within twenty (20) days after submission, fifty percent (50%) of the application fee shall be refunded. There shall be no refund of fees after that period of time.

9.7 An applicant may request in writing a waiver or reduction of fees based on financial necessity. The State Bar shall approve or deny the request for waiver or reduction of fees based on a consideration of, among other factors, the Lawyer Referral Service's gross annual revenues, panel size, geographic area served, and length of time in operation.

Rule 10. Ownership and Supervision

10.1 The Lawyer Referral Service shall be supervised in its establishment and operation by a Governing Committee ("Committee") consisting of a minimum of three (3) members, having authority to make decisions necessary to operate the Lawyer Referral Service. At least 50% of the Committee shall be active members of the State Bar of California, and at least 50% of the Committee shall not receive referrals from the Lawyer Referral Service.

10.2 The Committee shall meet at least quarterly and shall review the annual report submitted by the Lawyer Referral Service pursuant to Rule 15.2

10.3 The Committee shall also conduct and annually review the results of a random sampling of at least 10% of the clients referred to attorneys as to the client's satisfaction with the attorney's handling of the case and whether the client felt the fee charged was reasonable. Based on its review, the Committee shall make such alterations to the operation of the Lawyer Referral Service as it deems necessary.

10.4 A Lawyer Referral Service shall not be owned or operated, directly or indirectly, wholly or in part, by those lawyers to whom, individually or collectively, more than 20 percent of referrals are made. For purposes of this subdivision, a Lawyer Referral Service that is owned or operated by a bar association shall be deemed to be owned or operated by its Governing Committee so long as the Governing Committee is constituted and functions in the manner described by these Rules.

10.5 A Lawyer Referral Service shall establish and provide, to each client referred to an attorney, an address and telephone number in his or her county to which complaints about the Lawyer Referral Service or its attorneys may be directed, and shall inform clients that any unresolved complaints should be addressed to the State Bar of California.

Rule 11. Eligibility & Approval of Panel Attorneys

11.1 (a) Membership on any panel operated by the Lawyer Referral Service shall be open to all active members of the State Bar of California practicing in the geographical area served who are qualified by virtue of suitable experience in conformity with Rule 12.2. Attorney registration and membership fees shall be limited to reasonable amounts and shall encourage widespread attorney membership. Those Lawyer Referral Services with total registration and panel membership fees in excess of $1,000 per month will be required to demonstrate that fees are reasonable and encourage widespread attorney membership. The factors which may be considered in evaluating the reasonableness of membership fees include, but are not limited to, the following:

(1) The number of attorneys in the geographic service area as well as the number of attorneys applying to be members of the Lawyer Referral Service who are accepted and who are rejected;

(2) The cost of advertising, operations and member services;

(3) The panel membership fees of other certified Lawyer Referral Services operating in the same area;

(4) The number of attorneys who are members of the Lawyer Referral Service and the number of clients served by members of the Lawyer Referral Service;

(5) The nature and extent of programs for persons of limited means pursuant to Rule 12.5 undertaken by the Lawyer Referral Service.

(b) Membership on any panel may not be made contingent upon membership in a sponsoring entity; however, a separate, nominal administrative charge may be made to non-members of the sponsoring entity to reimburse the entity for its administrative services.

(c) Any arrangement, promise, agreement or understanding for or purchase by an attorney of more than one contract with the same Lawyer Referral Service or for the same subject matter panel of that Lawyer Referral Service is grounds for denial of certification or recertification or for decertification.

(d) Panel membership fees shall not be set with any representation, promise, agreement, understanding or guarantee to attorneys of a minimum number of contacts, calls, cases, referrals or clients or any arrangement or practice by a Lawyer Referral Service which directly or indirectly produces a guaranteed number of contacts, calls, cases, referrals or clients, including but not limited to: compensation for rejected referrals; free or reduced-fee extension of the attorney's contract with the Lawyer Referral Service; representation of referrals based upon past averages or formulas. Lawyer Referral Services may disclose actual past performance when the information is accurate, complete and not misleading.

11.2 Each attorney member of a Lawyer Referral Service panel shall agree in writing to abide by all rules and regulations of the Lawyer Referral Service including the requirement that each panel member submit any fee dispute arising between such member and a client referred by the Lawyer Referral Service, if the client so elects, to binding arbitration by a Fee Arbitration Committee of a bar association or other established Fee Arbitration Committee established pursuant to Business & Professions Code §§6200 et seq., or by means otherwise acceptable to the State Bar.

11.3 Each Lawyer Referral Service shall require each panel member to possess a policy of errors and omissions insurance in an amount not less than $100,000 for each occurrence and $300,000 aggregate per year. Proof of insurance shall be provided to the State Bar upon request.

11.4 The Governing Committee or its designee shall establish a method of review for continued panel membership. Such review shall be conducted at least

once every two years and shall evaluate the quality of services provided by member attorneys.

11.5 Each Lawyer Referral Service shall establish a uniform procedure to review refusals to admit an attorney to, and decisions to suspend or remove an attorney from, membership on any panel. In every case where a Lawyer Referral Service refuses to admit an attorney to a panel or suspends or expels an attorney from a panel, the Lawyer Referral Service must give the attorney a written statement of the reasons for its decision and offer the attorney a meaningful opportunity to be heard.

11.6 Each Lawyer Referral Service shall provide every panel member with a copy of these Rules.

Rule 12. Organization of Panels

12.1 Each Lawyer Referral Service shall establish such number and variety of panels as it determines will best enable the Lawyer Referral Service to make referrals that are responsive to individual client needs, pursuant to Rule 5.1.

12.2 Each Lawyer Referral Service shall establish one or more specific subject matter panels, and is encouraged to establish moderate and no fee panels, foreign language panels, alternative dispute resolution panels, and other special panels which respond to the referral needs of the consumer public, eligibility for which shall be determined on the basis of experience and other substantial objectively determinable criteria. Any attorney who is certified by the California Board of Legal Specialization as a specialist in a particular field shall be qualified for membership on the subject matter panel for such field by virtue of his or her certification. A Lawyer Referral Service may maintain a general panel.

12.3 For each subject matter panel, the Committee shall establish and file with the State Bar standards and procedure for:

(a) Determining the qualifications for membership on the subject matter panel;

(b) Reviewing the qualifications of a member to remain on or to be removed from the subject matter panel; and

(c) Appealing decisions to suspend or remove a member from the subject matter panel, pursuant to Rule 11.5.

12.4 Each subject matter panel established must have a minimum of four (4) attorney panel members. This requirement may be waived if the Lawyer Referral Service presents written evidence to the State Bar of California that good cause exists to have fewer than four (4) attorney members.

12.5 In an attempt to increase access to the justice system for all Californians, the Lawyer Referral Service shall establish separate ongoing activities or arrangements that serve persons of limited means, unless it can demonstrate that it is unreasonable and impractical to do so. These activities or arrangements may include, but are not limited to programs that: provide free legal services to indigents; provide legal services at a reduced fee; and provide free legal advice and clearing house referral services to the public; or other cooperative efforts with existing pro bono programs.

To determine whether it is unreasonable and impractical for a Lawyer Referral Service to comply with this section, the following factors, among others, may be considered:

The financial resources of the Lawyer Referral Service, size of staff, total number of panel attorneys, the specialty areas of attorney members of the Lawyer Referral Service, the fees charged by the attorney members to clients of the Lawyer Referral Service, and the needs of the community, including the existence and accessibility of other local pro bono or legal services programs able to meet these needs.

12.6 There must be a minimum of twenty (20) attorney members to whom referrals can be made, and at least ten (10) attorney panel members must be from separate and independent law firms. This requirement may be waived or modified if the Lawyer Referral Service presents written evidence to the State Bar that good cause exists based on the local population, the attorney population or the geographic area to be served.

Rule 13. Referral Procedures

13.1 The Governing Committee shall establish rotational procedures to assure that each referral is made in a fair and impartial manner. To the extent feasible, such procedures shall be designed to respond to all circumstances of the client, including the type of the legal problem presented, geographic convenience and language needs.

The Lawyer Referral Service shall not operate so that all referrals from a specific geographical area are made to a single lawyer or law firm.

Failure to rotate sequentially all referrals to lawyers on the panel and/or failure to keep and maintain complete, current and continuous records of all referrals made to attorneys are grounds for denial of certification or recertification or for decertification.

13.2 No referral shall discriminate on the basis of race, color, sex, age, religious creed, national origin, ancestry, sexual orientation, disability, medical condition, marital status, political affiliation or veteran status.

13.3 No referral shall be made which violates any provision of the State Bar Act or Rules of Professional Conduct, including, but not limited to, restrictions against unlawful solicitation and false and misleading advertising.

13.4 The staff persons making the referrals and processing the requests for legal assistance may not be employees of any attorney to whom referrals are made.

13.5 A Lawyer Referral Service shall not be principally operated by a telephone answering service or device.

Rule 14. Publicity

14.1 Any publicity program or advertising developed, maintained or utilized by a Service shall promote the purposes of a Lawyer Referral Services as set forth in Rule 5. A copy of all materials used in publicity programs, advertising or other disseminations to the public shall be filed with the State Bar with any application for certification or recertification, and with the Lawyer Referral Service's annual report upon request of the State Bar.

14.2 The form and content of all publicity of the Lawyer Referral Service shall not be false or misleading and shall comply with the standards for such publicity defined in the Rules of Professional Conduct and Business & Professions Code. For the purpose of public information and evaluation of the Service and its advertising, all advertising shall include the identity of the sponsor(s), the fact that it is a Lawyer Referral Service, the counties in which it operates and the State Bar Certification number of the Lawyer Referral Service.

Rule 15. Records and Reports

15.1 Each Lawyer Referral Service shall maintain and provide to the State Bar, upon request, current records of its operation including at least the following information:

(a) The name, address and pertinent qualifications of each panel member and the number and types of matters referred to each panel member;

(b) The name, address and type of matter presented by each client referred, the name of the panel member to whom the referral was made, and the date the referral was made;

(c) The total fees the Lawyer Referral Service requires of its panel attorneys, including but not limited to: registration fees to join the Lawyer Referral Service; fees paid to belong to each panel an attorney elects to join; referral or consultation fees remitted back to the Lawyer Referral Service; forwarding fees; advertising fees or other miscellaneous fees paid by the panel attorney to the Service.

15.2 The Committee of each Lawyer Referral Service shall file with the State Bar an annual report on the activities of the Service and of the Committee. Such report shall include at least the following:

(a) Statistics derived from the operating records required by Rule 15.1 and what, if any, alterations have been made in the conduct of the Service by the Committee pursuant to Rule 10.3;

(b) A detailed accounting of all sources and amounts of income to the Service, all expenses related to the operations and promotion of the Lawyer Referral Service, the amount of current reserves held by the Lawyer Referral Service, and the specific disposition over the past two years of any reserves and/or surpluses derived from the Lawyer Referral Service; and

(c) The number of cases sampled pursuant to Rule 10.3, together with the results of the random sampling.

15.3 Failure to file the annual report by the recertification due date without a showing of good cause to the State Bar shall result in the immediate withdrawal of certification to operate a Lawyer Referral Service.

15.4 All documents, records, communications, and other materials from or pertaining to a Lawyer Referral Service, including its application for certification, shall become the property of the State Bar and shall be held in confidence and not released except upon prior order of the Board of Governors or by consent of the applicant.

Rule 16. Investigative Audits

16.1 Prior to certification or recertification and/or waiving the application or renewal fee under Rule 9.7, the State Bar of California shall review and conduct an investigation and administrative audit of each Service, as the State Bar deems appropriate and as resources allow, to determine and assure compliance with these Rules.

16.2 The State Bar shall have the right at any time to conduct an audit or investigation of any Service. Any audit or investigation under Rule 16 shall be at the Service's expense. The Service and its sponsoring entity shall have the obligation to cooperate fully therewith.

Rule 17. Fees Charged by a Lawyer Referral Service

17.1 A Lawyer Referral Service may require that:

(a) Each panel member pay to the Lawyer Referral Service a registration fee, "referral" or "percentage" fee (computed on a percentage basis or otherwise), or other like participating fee, or any two or more of such fees, as a condition of panel memberships, provided that such membership fees are reasonable and do not discourage widespread attorney membership;

(b) Each panel member pay the Lawyer Referral Service a referral, initial consultation or similar fee, or any two or more of such fees, as a condition of referral; provided, however, that no Lawyer Referral Service may require any fee that is, or any combination of fees that are, either in conflict with statutory or other legal provisions for the award of attorney fees or unreasonable, whether those fees be required of applicants, panel members or both. A Lawyer Referral Service is prohibited from charging a combination of fees which increases the client's cost for legal services beyond that which he or she would normally pay, or decreases the quantity or quality of services which he or she would otherwise receive, absent involvement of the Lawyer Referral Service.

17.2 The income generated by a non-profit Lawyer Referral Service shall be used only to pay reasonable operating expenses of the Service and/or to fund programmatic public service activities of the Service or its sponsoring entity, including the delivery of pro bono legal services.

Rule 18. Complaints

18.1 Complaints regarding Lawyer Referral Service activity must be in writing and submitted to the State Bar's Lawyer Referral Services Certification Program at the State Bar's San Francisco address. Complaints must provide sufficient factual information for the State Bar to determine if the complaint establishes a violation of these Rules or other applicable authorities.

18.2 The Chief Executive Officer of the State Bar, or a person or persons designated by the Chief Executive Officer, shall review all complaints and within a reasonable time thereafter determine what action, if any, is appropriate. The complainant shall be entitled to notice of what action, if any, is taken in connection with the complaint. The State Bar shall provide the entity complained against with written notice of the complaint and an opportunity to respond when it appears that a violation of these Rules or other applicable authorities is involved.

18.3 Upon receipt, a complaint shall become the property of the State Bar. Complaints and investigations shall remain confidential until service of written notice of intent to revoke or suspend certification.

Rule 19. Revocation or Suspension of Certification

19.1 The Chief Executive Officer of the State Bar, or a person or persons designated by the Chief Executive Officer, may revoke or suspend certification for failure to demonstrate full compliance with these Rules or other applicable authorities, or for other good cause including but not limited to:

(a) Noncompliance with any provision of the statutes, these Rules or other authorities governing Lawyer Referral Services;

(b) Sharing common or cross ownership, interests, or operations with any entity which engages in referrals to licensed or unlicensed health care providers;

(c) Direct or indirect consideration regarding referrals between an owner, operator or member of a Lawyer Referral Service and any licensed or unlicensed health care provider; or

(d) Advertising on behalf of attorneys in violation of the Rules of Professional Conduct.

19.2 Revocation or suspension may include an investigation and administrative audit as provided in Rule 16.

19.3 Written notice of intent to revoke or suspend certification and of the reason(s) for such action shall be served by mail upon the Lawyer Referral Service.

19.4 A Lawyer Referral Service may request review of a determination to suspend or revoke certification within thirty (30) days of written notice of the intent to revoke or suspend. The request must be in writing, set forth the reasons review is sought and include all relevant evidence supporting the position of the Lawyer Referral Service. The request shall be considered by a subcommittee appointed by the Board of Governors or another committee appointed for this purpose by it. The subcommittee shall provide the Lawyer Referral Service with an opportunity to be heard consistent with due process requirements.

19.5 Upon the completion of such consideration, the subcommittee shall 1) revoke or suspend a certificate of compliance; 2) request further information; 3) decline to revoke or suspend a certificate of compliance, with or without conditions as the subcommittee may determine appropriate.

19.6 The subcommittee shall report in writing its findings, determinations and reasons for its determinations. A copy of that report shall be served by mail upon the Lawyer Referral Service, and the affected panel attorneys shall be given notice of any adverse action taken.

19.7 A Lawyer Referral Service may request review of the action of the subcommittee within thirty (30) days of service of the report of the subcommittee. The request must be in writing, set forth the reasons review is sought and include all relevant evidence supporting the position of the Lawyer Referral Service. The request shall be considered by the Board Committee on Legal Services or another committee appointed by the Board of Governors for this purpose. The Board Committee shall review the determinations of the subcommittee. It may hold hearings as it deems appropriate.

19.8 The Board Committee shall record in writing its findings and determinations and make such additional comments as it deems appropriate. Notice of such action shall be served by mail upon the Lawyer Referral Service.

19.9 Any further review of the issues shall be in accordance with rule 9.13(d), California Rules of Court.

19.10 During the pendency of proceedings pertaining to suspension or revocation of certification, the existing certification shall remain in effect, subject to directives from the subcommittee or Board Committee based on appropriate findings.

* * *

APPENDIX 1 – 5

FALCONER, *THE FUTURE OF LEGAL SERVICES: PUTTING CONSUMERS FIRST*, CHAPTER 6: CONFIDENCE AND CHOICE – NEW WAYS OF DELIVERING FOR CONSUMERS, SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS, UNITED KINGDOM (OCTOBER 2005)

dca

Department for
Constitutional Affairs
Justice, rights and democracy

The Future of Legal Services: Putting Consumers First

October 2005

The Future of Legal Services: Putting Consumers First

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by Command of Her Majesty
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Foreword

This White Paper sets out the Government's agenda for reforming the regulation and delivery of legal services, in order to put the consumer first.

Consumers need, and deserve, legal services that are efficient, effective, and economic. They want to have choice, and they want to have confidence in a transparent and accountable industry.

Legal services are crucial to people's ability to access justice. They must therefore be regulated and made available in such a way as to meet the needs of the public – individuals, families, and businesses.

The professional competence of lawyers is not in doubt. The calibre of many of our legal professionals is among the best in the world. But despite this, too many consumers are finding that they are not receiving a good or a fair deal.

In 2001, the Office of Fair Trading found that many of the rules of the legal professions were unduly restrictive, resulting in consumers receiving poorer value for money than they would have done under more competitive conditions.

In 2002 my department carried out a wide-ranging public consultation exercise. Consumers told us clearly that their needs were not being met. They felt legal services lacked sufficient orientation towards the consumer; they did not have confidence in self-regulation alone; and experiences of poor complaints handling had undermined confidence.

Subsequently, in 2004, Sir David Clementi completed a report to me on reforming the regulatory framework. His report confirmed that the case for reform is clear, and reform is overdue.

The Government's policy is to create a regulatory framework that directs regulation at those areas where it is needed. The proposed regulatory framework sets the parameters within which firms can deliver consumer focused legal services. If those services are provided, both the consumer and the profession will benefit, with individual lawyers providing high quality services that meet individual client needs.

We will create a Legal Services Board, an Office for Legal Complaints, and we will take steps to enable firms to provide services under alternative business structures to those presently available.

Our vision is of a legal services market where excellence continues to be delivered; and a market that is responsive, flexible, and puts the consumer first. This paper sets out the steps we will take to achieve it.

Lord Falconer of Thoroton

Secretary of State for Constitutional Affairs
and Lord Chancellor

Executive summary

This White Paper sets out the Government's proposals for reform of the regulatory framework for legal services in England and Wales. The purpose of the changes is to put the consumer first. The Government has set up a Consumer Panel to advise it as it takes forward reform.

The changes will mean an end to the current regulatory maze. The aim is a new regulatory framework, which better meets the needs of consumers and which is fully accountable.

The current system involves Front Line Regulators, like the Bar Council and the Law Society, as well as higher level regulators, such as the Secretary of State for Constitutional Affairs, the Master of the Rolls and the Office of Fair Trading. The front line legal professional bodies generally seek to regulate their members and represent their interests at the same time. This can lead to concerns that they are not putting the interests of consumers first, particularly in handling complaints.

The anti-competitive effects of some of the rules of the legal professional bodies have also caused concern.

In July 2003, the Government appointed Sir David Clementi to carry out an independent review of the regulatory framework. He recommended:

- the creation of a new Legal Services Board (LSB) to provide oversight regulation
- statutory objectives for the LSB
- that regulatory powers should be vested in the LSB, with powers devolved to Front Line Regulators where they meet its standards
- that Front Line Regulators should be required to separate their regulatory and representative functions
- the establishment of a new Office for Legal Complaints to handle consumer complaints
- the facilitation of legal disciplinary practices, to allow different kinds of lawyers and non-lawyers to work together.

The Government has accepted Sir David Clementi's recommendations. The Government's main proposals cover:

- **putting consumers first:** the objectives of the regulatory framework and principles of the legal profession will be set out in legislation. Consumers will be clear about the system, and will be able to hold all partners in the framework to account for delivering these commitments. Front Line Regulators will be required to separate their regulatory and representative functions. These steps will increase confidence in the regulatory system and in legal professionals.

- **simplifying regulation:** the new structure will be simpler, ensure consumers are protected and ensure that regulation is proportionate. A new **Legal Services Board** will have clear powers and responsibilities. It will authorise **Front Line Regulators** to carry out day to day regulation where they meet its standards. Sector expertise will be maintained in the regulatory system through the Front Line Regulators.
- **new ways of delivering for consumers:** the White Paper sets out how consumers will benefit from the development of **alternative business structures**. These will enable legal and certain other services to be provided to high standards and in ways that suit different consumers. The arrangements will ensure competition and innovation can continue to flourish.
- **protecting consumers:** because the legal services market will continue to change, the White Paper describes how safeguards for consumers will quickly be put in place where new gaps in protection open up.
- **complaints:** a new **Office for Legal Complaints (OLC)** will be created. This will enhance consumer confidence by creating a single, independent complaints handling service. The OLC will provide quick and fair redress where things go wrong.
- **costs:** the costs of the new system will be met by the sector.

Legislation will be needed to make most of these changes. The Government will publish a draft Legal Services Bill for pre-legislative scrutiny in the current Parliamentary Session. After that, legislation will be introduced as soon as Parliamentary time allows.

These changes will deliver a simpler, more consistent regulatory framework that puts the needs of consumers at the centre of the system.

Chapter 6: Confidence and choice – new ways of delivering for consumers

6.1. The new arrangements

Chapter 3 set out what the Government aims to achieve for consumers by liberalising the way in which legal services can be delivered. It described the benefits for consumers of **alternative business structures (ABS)** and the safeguards that will be put in place.[20] This chapter deals in more detail with the regulation of alternative business structures. It sets out how the safeguards will work in practice.

> "It's an opportunity to create a dynamic legal market which offers a better deal for consumers, and also better opportunities for the legal profession."
>
> *Edward Nally, Law Society, speaking at DCA Conference 'Future of Legal Services – Putting Consumers First' conference 21 March 2005.*

The objectives and principles of the regulatory framework apply here too and regulation will be proportionate and risk based.

The key features of the new system are that:

- safeguards for consumers will ensure high standards of quality, propriety and independence in the delivery of all services;
- prospective ABS firms will have to be licensed by an authorised ABS regulator (or by the LSB itself in the absence of an ABS regulator);
- different types of lawyers (eg solicitors and barristers) and lawyers and non-lawyers will be able to work together on a level footing in ABS firms;
- ABS firms will be able to raise external investment;
- existing Front Line Regulators will be able to apply to the LSB for permission to regulate ABS firms;
- if things do go wrong, consumers will be able to complain in the usual way – first through the firm's in-house complaints arrangements, and if necessary to the new Office for Legal Complaints.

Consumer bodies are in favour of greater flexibility, combined with protection for consumers. The Law Society is keen to relax its restrictions on partnerships with non-lawyers and external investment, and has pressed for the changes necessary to ensure consumer protection to enable them to do so. Potential investors in law firms are also seeking change.

[20] The term 'alternative business structure' or 'ABS firm' refers to any structure that could potentially deliver a reserved legal service, other than the structures currently used to do so in private practice. Possible examples include: multi-disciplinary partnerships, limited liability partnerships, unlimited liability incorporated practices, private limited companies, public limited companies and mutual societies.

Different consumers and providers will look for different benefits from alternative business structures. The potential benefits are set out below in more detail.

Potential benefits for consumers:[21]

- **more choice:** consumers will have greater flexibility in deciding from where to obtain legal and some non-legal services.
- **reduced prices:** consumers should be able to purchase some legal services more cheaply. This should arise where ABS firms realise savings through economies of scale and reduce transaction costs where different types of legal professionals are part of the same firm.[22]
- **better access to justice:** ABS firms might find it easier to provide services in rural areas or to less mobile consumers.
- **improved consumer service:** consumers may benefit from a better service where ABS firms are able to access external finance and specialist non-legal expertise.[23]
- **greater convenience:** ABS firms can provide one-stop-shopping for related services, for example car insurance and legal services for accident claims.
- **increased consumer confidence:** higher consumer protection levels and an increase in the quality of legal services could flow from ABS firms which have a good reputation in providing non-legal services. These firms will have a strong incentive to keep that reputation when providing legal services.[24 25]

Potential benefits for legal service providers:

- **increased access to finance:** at present, providers can face constraints on the amount of equity, mainly debt equity, they can raise. Allowing alternative business structures will facilitate expansion by firms (including into international markets) and investment in large-scale capital projects that increase efficiency.[26]

[21] Many of the consumer benefits we would expect to see result from increases in market efficiency. Brealey and Franks, 2005, and Dow and Lapuerta, 2005, show, the current restrictions impinge on efficiency, and correspondingly the relaxing of those restrictions would be expected to lead to an increase in market efficiency.

[22] Love, and Patterson, 1994, have noted that a combination of technology, regulatory change and the removal of the ban on advertising has resulted in reductions in the prices of conveyancing services.

[23] Dow and Lapuerta, 2005, have argued that permitting external financing of law firms would be key to the introduction of more information technology to reduce the costs of personal legal services that involve relatively small but numerous transactions of a similar nature, and that under the current rules similar transformation would be unlikely to take place. Washington State Bar Association, 2001, discusses the example of a US law firm that created a technology department to manage its clients' multi-district mass tort litigation, and to assist creditors and collection agencies cut the cost of recovering on bankruptcy claims.

[24] Blanes i Vidal, Jewitt and Leaver, 2005.

[25] Grout, 2005, using data provided by The Law Society, shows that claims of "dishonest practice" are disproportionately generated by smaller law firms measured by number of partners. If size of law firms is related to good consumer outcomes, at least on one measure, then facilitating mechanisms that would make it easier for firms to expand, and thus benefit from scale economies and greater division of labour, could deliver significant consumer benefits.

[26] Dow and Lapuerta, 2005.

- **better spread of risk:** a firm could spread its risk more effectively among shareholders.[27] This will lower the required rate of return on any investment, facilitate investment and could deliver lower prices.
- **increased flexibility:** non-legal firms such as insurance companies, banks and estate agents will have the freedom to realise synergies with legal firms by forming ABS firms and offering integrated legal and associated services.[28]
- **easier to hire and retain high-quality non-legal staff:** ABS firms will be able to reward non-legal staff in the same way as lawyers.
- **more choice for new legal professionals:** ABS firms could contribute to greater diversity by offering those who are currently under-represented more opportunities to enter and remain within the profession.[29]

There will be a robust licensing regime under which Front Line Regulators (FLRs), which have been approved to do so by the Legal Services Board (LSB), will license ABS firms. In these firms, it will be possible for non-lawyers and lawyers to be partners or directors. External investment in alternative business structures will be permitted and will benefit consumers and providers.

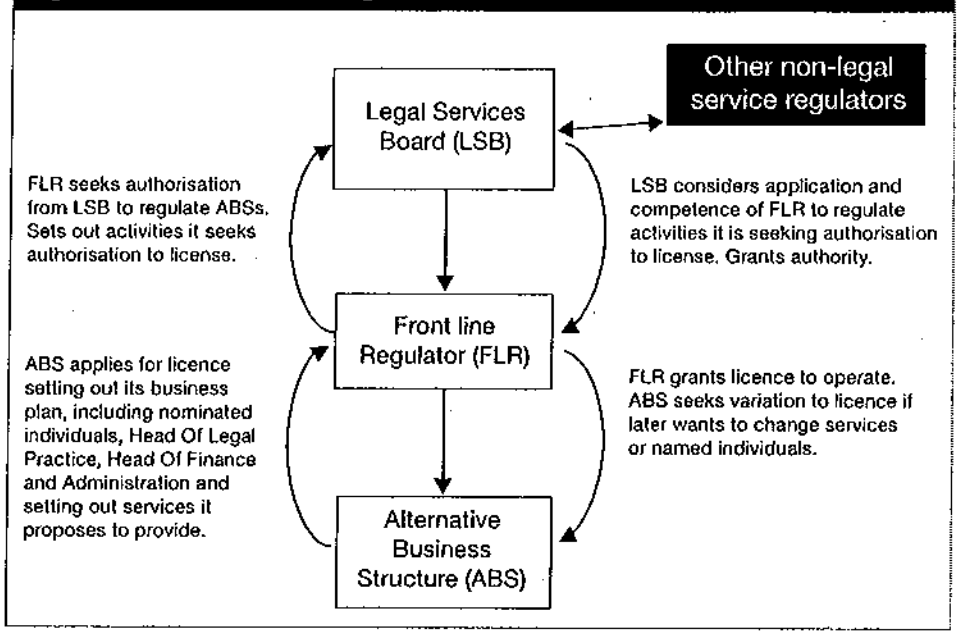
The LSB and the ABS regulators will exercise their judgement in awarding licences to firms. They will need to consider the business proposals and the risks and the safeguards in place to protect consumers.

[27] Brealey and Franks, 2005.

[28] Brealey and Franks, 2005, have argued that the strong competitive position of English law firms is likely to be maintained only if the legal profession is adaptable.

[29] Blanes i Vidal, Jewitt and Leaver, 2005, show that in the Bar as a whole, women are under-represented, and that once in the Bar, women are more likely to practice from the employed Bar. Amongst solicitors, again women are under-represented in the profession as a whole, and of those that do enter, women are more likely to be in employment rather than acting as a partner or a sole practitioner than men.

Figure 3: How the new arrangements will work



Legislation will provide for a flexible and robust licensing scheme for alternative business structures. This will allow lawyers and non-lawyers to work together to provide legal and certain associated services. External investment will be permitted.

6.2 Regulators of Alternative Business Structures

The LSB will need to be satisfied about a Front Line Regulator's competence and standing before authorising it to license ABS firms (and also if the regulator later applies to extend its licence).

The Government expects that the Legal Services Board will want to be satisfied that a Front Line Regulator that wants to be authorised as a regulator of an ABS firm:

- is already authorised by the LSB to regulate one or more reserved legal services
- has the competence to regulate an ABS firm
- has proper governance arrangements
- has proper rules to regulate an ABS firm. These might include procedures for handling clients' money and dealing with complaints
- has rules that do not restrict different kinds of lawyers (e.g. solicitors and barristers), and lawyers and non-lawyers, working together on an equal footing
- has rules that are consistent with the LSB's decision on external investment
- has the ability to take enforcement action
- has arrangements for ensuring appropriate indemnity insurance
- has compensation fund arrangements as a last resort for consumers.

Front Line Regulators that want also to regulate ABS firms may need to have their existing powers extended to enable them to provide effective regulatory control. Additional powers will be granted by the LSB as part of its authorisation of an FLR to act as a regulator of alternative business structures. Additional powers will include the power to:

- direct an ABS firm to alter its management or ownership arrangements
- fine the ABS firm
- alter a licence
- remove a licence if the firm subsequently fails.

As with existing law firms, all of the services provided by ABS firms will be subject to regulatory control by the ABS regulator whether they are reserved legal services or not.

Legislation will provide for the modification of Front Line Regulators' powers by secondary legislation proposed by the Secretary of State for Constitutional Affairs, following a proposal from the LSB.

6.3 Licensing alternative business structures

Potential ABS firms will need to seek a licence to operate from an FLR that has been authorised by the LSB to regulate ABSs. If no FLR has been authorised by the LSB, the LSB will be able to license ABS firms directly.

The LSB will decide what information it expects applications from prospective ABS firms to contain. The Government considers that applications from firms should include the following information:

- details of their proposed management structure, including a nominated Head of Legal Practice and a nominated Head of Finance and Administration
- information on the proposed ownership structure, including type of ownership entity and, where appropriate, details of the owners
- details of the equity (i.e. shareholdings of the investors) to be invested
- information on all the services that they propose to provide: these must include one or more reserved legal service.[30]

Firms will be able to apply to **any** Front Line Regulator authorised to grant the relevant licence. This will provide an element of competition between regulators. LSB oversight will ensure appropriate standards of protection are provided by all Front Line Regulators.

"Changes in delivery of legal services will produce an improved market where legal professionals compete on a level playing field and where consumers are properly addressed. But such developments must not be at the expense of standards and safeguards."

Guy Mansfield, Bar Council, speaking at "Future of Legal Services – Putting Consumers First" conference 21 March 2005.

6.4 Safeguards: the Head of Legal Practice and Head of Finance and Administration

Front Line Regulators will assess the proposed management structure of ABS firms to ensure they meet the standards required by the LSB.

Legislation will require that the Front Line Regulators of ABSs ensure that firms identify a Head of Legal Practice and a Head of Finance and Administration

The Head of Legal Practice (HOLP) will be a lawyer responsible for ensuring that the ABS firm adheres to the rules of the FLR; that services are provided only by those properly qualified; and that the ABS firm operates within the terms of its licence. The HOLP will also be required to report to the regulator any violation or attempted violation of rules.

The HOLP will have to demonstrate appropriate competence to perform the role. It will not be possible for the firm to remove the HOLP without the consent of the regulator.

The Head of Finance and Administration (HOFA) will be responsible for maintaining appropriate accounts, ensuring that the required administrative systems are in place and ensuring separation and management of client funds.

This role will not necessarily have to be conducted by a lawyer. The HOFA will need to demonstrate to the regulator appropriate competence.

[30] see Appendix B.

Provided the ABS regulator is content, the HOLP and HOFA should not automatically be prevented from having other roles in the practice. In smaller firms the same person, subject to the approval of the regulator, could hold the two roles.

6.5 Safeguards: lawyers in the majority?

In addition to the HOLP and HOFA, the regulator will need to consider the wider arrangements for control of the ABS firm. It will take a decision on a case-by-case basis on whether lawyers should be in the majority.

Consumers can benefit from the provision of legal services where non-lawyers are permitted to have positions of control[31] in ABS firms (i.e. partner or director). ABS firms will provide greater opportunities for high calibre non-legal professionals, leading to new ideas and skills being brought into the legal sector. Non-lawyers will also bring other specialist skills such as IT, HR and finance expertise to enhance the operation of ABS firms. These developments will create wider opportunities for better quality and cheaper services for consumers.

Some argue that lawyers should be in the majority to prevent non-lawyers from bringing too much commercial influence. But this would unduly restrict the potential for development of ABS firms.

It has also been suggested that lawyers should be in the majority at the start, and that this restriction could be removed at a later date if it became unnecessary. But this would still restrict the potential for development of alternative business structures. This would not be in consumers' interests.

There will be no requirement for an overall majority of lawyers in all ABS firms. The LSB will decide whether the services provided by some ABS firms require a certain level of lawyer control.

6.6 Safeguards: preventing investment by undesirable individuals

Allowing external investment in legal practices will give consumers greater flexibility when purchasing legal services. ABS firms will have access to low cost capital that could be used for upgrading infrastructure, and expanding the business, potentially resulting in more choice and better service for their customers. Investment from other sectors such as retailing or banking could bring increased customer service and information technology skills.

[31] In this context control is meant as in the Companies Act 1985, i.e. it is the directors who control the direction of a company, not necessarily its owners/shareholders. Under the partnership model however, the owners are also a firm's directors.

However, consumers must be confident that investors in ABS firms are suitable. Authorised ABS regulators will therefore apply a robust fit and proper test to external investors in ABS firms.

The focus of an ABS regulator will be on the prospect for conflict of interest and investor influence over the firm's management. An assessment will be triggered if the sum to be invested is above particular thresholds.

So that regulation of external investment is proportionate and risk based, ABS regulators might want periodically to review share movements in particular listed companies. But generally they would not want to screen smaller investors and/or those transactions likely to have a negligible effect on a firm's management.

External investment in ABS firms will be permitted, and will be based on a fitness to own test, covering:

- **honesty, integrity and reputation**
- **competence and capability, and**
- **financial soundness**

6.7 Safeguards: the amount of external investment allowed

Stakeholders have different views on whether a limit should be placed on external investment. The Government's view is that a flexible, risk-based approach is necessary. It is not clear that a particular level of external investment would offer more or less consumer protection than any other.

> "We think that with suitable regulatory oversight by the Legal Services Board, concerns about external investors can be overcome."
>
> *Diane Burleigh, Secretary General, Institute of Legal Executives, speaking at 'Future of Legal Services – Putting Consumers First' conference, 21 March 2005.*

This is also necessary to take account of differences in firms. Partnerships, typically firms of solicitors, can find it difficult to raise equity for expansion, diversification, or for large-scale investment in information technology.[32] Limiting external investment could prevent the development of new ways to deliver legal services. If we adopted a one-size fits all approach, we would risk reducing competition and not realising some potential consumer benefits.

The LSB will determine the extent of external investment in ABS firms according to the type of business and acting in line with its regulatory objectives.

[32] Brealey and Franks, 2005, and Dow and Lapuerta, 2005.

6.8 Safeguards: sanctions

If things go wrong, consumers must be confident that regulators of ABS firms have powers to act. Consumers will be able to complain to the new Office for Legal Complaints (OLC) just as they will be able to for other legal services. The OLC will investigate all complaints and refer any issues of misconduct to the FLR concerned, monitoring the decisions. This is set out in more detail in Chapter 8.

Legislation will provide for consumers to complain to the new Office for Legal Complaints.

ABS regulators will pass cases of misconduct to the relevant disciplinary body.

In addition:

ABS regulators will be able to require the removal of a director or partner in an ABS firm and to prohibit them from holding any position of control in an ABS firm, either for a fixed period, or indefinitely.

ABS regulators will be able to alter or remove an ABS firm's licence to offer services.

6.9 Safeguards: dealing with conflicts of interest

Conflicts of interest can arise within law firms even with the current restrictions on business structure. Law firms have to put in place arrangements to deal with potential and actual conflicts. The LSB and Front Line Regulators will put in place rules so that consumers using ABS firms have appropriate assurances.

The potential leverage that owners may have on an ABS firm will depend on the size of their stake in it. If a bank owns, or is a major investor in, an ABS firm, there is likely to be a higher risk in allowing the firm to act for a client where the bank has an interest. An example might be advising a client on loan documentation to which the bank was a party.[33]

It may be possible for the LSB to determine a percentage level of ownership where a conflict of interest is not significant. For example, there are many publicly listed companies with a large number of different investors, each with a small stake, who have very little effect upon the company. The LSB could consider applying a specific percentage of ownership as a limit beyond which it considers a conflict of interest is likely to become a concern. This could be determined on a case-by-case basis or be a universal level.

[33] Brealey and Franks, 2005, and Blanes i Vidal, Jewitt and Leaver, 2005.

The LSB will provide clear rules relating to the prevention of conflicts of interest in respect of services provided by ABS firms.

6.10 Safeguards: ensuring that inappropriate services cannot be provided

Once the Front Line Regulator of an alternative business structure has satisfied itself that the business plan of the prospective ABS firm is acceptable, it will need to ensure that the combination of services proposed are not incompatible with or inappropriate for the delivery of legal services.

Decisions of the Solicitors Disciplinary Tribunal inform the Law Society in determining which services it is inappropriate for a law firm to provide. The LSB will need to ensure that ABS regulators develop systems to ensure that they do not allow inappropriate services to be delivered by an ABS firm which they licence.

ABS regulators must not permit ABS firms to provide any service likely to be incompatible with the principles of the legal profession.

6.11 Safeguards: ensuring access to justice

Outside ownership may enable large firms to realise efficiency gains that smaller firms cannot compete with. This could run the risk of reducing consumer choice. In particular, some argue that this could have implications for access to justice in rural areas. Others argue that it could increase rural access as large firms could utilise a range of new business services to satisfy their customers' needs (such as in telephone and internet services). New business techniques could result in lower prices that would also increase access to justice.

The Government recognises the potential risk of diminished access. The LSB and ABS regulators will have a duty to consider the impact of their decisions on their statutory objectives (see Chapter 4), and in particular the objective of improving access to justice.

Legislation will require the LSB to monitor the provision of legal services across different sectors and geographically, and use the results of that work to inform its regulatory decisions. This will include the authorisation of, and imposition of any conditions upon, ABS regulators.

6.12 Flexibility in ownership structures

Providers need to have flexibility to respond to different consumers' needs, and new demands from consumers. Permitting different ownership structures for ABS firms will help to achieve these. These could include limited liability partnerships, unlimited liability incorporated practices, private limited companies, public limited companies, and mutual societies.

Allowing flexibility in the forms of ownership structure could result in increased benefits to consumers. These could include increased transparency and consistency as required by the Companies Act 1985, easier access to capital (especially for a public limited company that can issue shares), greater scrutiny of the legal services market and individual firms by investors, and – for public listed companies – further control coming from the rules of their chosen stock exchanges and the FSA.

In practice, those providing legal services may find some structures more efficient for providing some legal services than others.[34] The LSB may also decide that some business structures are inappropriate for the delivery of some legal services.[35]

The Government does not want unduly to restrict the ownership structures available to alternative business structures.

The FLR will be able to exercise discretion in deciding whether to issue a licence in all the circumstances, including the type of ownership model.

6.13 Legal Professional Privilege

Consumers will not distinguish between the professional backgrounds of individuals in ABS firms: they simply want the right service. But they need to be clear about how the information they give will be treated within the firm.

[34] Breatey and Franks, 2005, and Dow and Lapuerta, 2005, argue that there is no reason to believe that different structures might not co-exist within the same market with, for example, both partnerships and plc structures co-existing in the legal services market, with plc status more attractive the more commoditised the legal services being delivered are, and the more easily observable quality is. Partnerships become more attractive the more specialised the services being delivered.

[35] Dow and Lapuerta, 2005, argue that specific ownership structures should only be prohibited if they can reasonably be anticipated to persist in the market over time while simultaneously delivering services at a quality below an accepted level.

Within an ABS firm lawyers and non-lawyers will be able to work together to provide a variety of services to the same consumers. So lawyers working under legal professional privilege (LPP) constraints could work with those who have a professional duty to disclose information.[36]

At this stage the Government does not propose to extend LPP to include communications between a particular client and non-lawyer members of ABS firms. Current arrangements regarding LPP should remain.

Where an ABS firm includes non-lawyers, the LSB will need to ensure that ABS regulators and the firms concerned have appropriate arrangements in place to ensure that the consumer's interest in respect of their right to legal professional privilege is maintained and safeguarded.

LPP should not be used inappropriately to obstruct investigations.

6.14 The Not for Profit sector

The Not for Profit (NFP) sector will be brought within the regulatory scope of the LSB and the ABS licensing scheme. This will ensure the same level of protection for consumers no matter where they obtain their legal services. The LSB will keep the level of services in this sector under review, with particular regard to access to justice.

The NFP sector has different priorities and fewer resources than the private sector. The LSB and Front Line Regulators may exercise flexibility in applying the usual ABS licensing arrangements to this sector, if that would be in the public interest. This will help to maintain and enhance access to justice, while ensuring that high standards of service are delivered. These options could include:

- **group licensing:** instead of issuing a licence to each business unit, a national organisation (such as Citizens Advice) could be licensed. The licence would be granted to the umbrella organisation, which would then be responsible for ensuring that individual business units complied with it. Citizens Advice currently operates under an arrangement of this kind in relation to the licensing of their debt advice by the Office of Fair Trading.

[36] LPP is essentially an element of common law, but statutory provisions and court decisions shape its scope and interpretation. Against this background LPP is an absolute privilege against disclosure of a document to a third party. It encompasses two distinct privileges: litigation privilege and legal advice privilege. Litigation privilege is restricted to proceedings or anticipated proceedings in a court of law. Legal advice privilege covers assistance and advice in relation to public law rights, liabilities and private law rights. Legal advice privilege is not confined to telling the client the law and includes advice as to what should prudently and sensibly be done in the relevant legal context. Where LPP exists and is not waived by the client, it is paramount and absolute and not subject to the balancing exercise of weighing competing public interests against each other.

- **waiving the licence on competency grounds:** where the criteria demonstrated by quality assurance schemes, such as the Legal Service Commission's Quality Mark, overlap with those sought by regulators, it will be possible to waive the requirement to re-submit information. The Immigration Services Commissioner uses a similar approach when authorising LSC-accredited organisations to provide immigration advice.
- **waiving the licence to increase access to justice:** regulators will be able to waive the normal requirement for a licence where this would impose such a burden on an organisation that it would not be able to provide services. This might be the case, for example, with a very small organisation. Or it might arise in the case of a charity for which legal services are ancillary to their main business and rarely called for.

The Not for Profit sector will fall within the regulatory scope of the LSB and the ABS licensing scheme. The LSB and Front Line Regulators will have the power to waive or alter ABS licensing requirements in specific cases where it is in the public interest.

APPENDIX 2 – 1

SURVEY TOOLS

SURVEY FOR NON-PROFIT PROVIDERS OF LEGAL SERVICES ON REGULATION OF NON-PROFIT LEGAL SERVICES PROVIDERS

On March 9, 2006, the California Supreme Court ruled in Frye v. Tenderloin Housing Clinic, Inc., 38 Cal.4th 23, 40 Cal.Rptr.3d 221 (2006), that non-profit corporations providing legal services in California are not subject to State Bar registration requirements and other regulations that govern for-profit professional law corporations. In doing so, the Supreme Court directed the State Bar to conduct a study to determine if regulation of non-profit legal service providers (like legal aid societies, public interest entities, and membership organizations that provide legal services to the public) is needed.

As a result, the State Bar is seeking information from the legal community, members of the public, legal service providers and others regarding their knowledge of and experience with non-profit legal services. The attached Agenda Item from the State Bar's Board of Governors describes in further detail the purpose of this survey.

You have been selected to receive this survey in light of the fact that you are affiliated with a non-profit legal service entity. The State Bar is very interested in receiving and considering the perspective of legal services providers on this subject, as they are the focus of the Frye decision and of this survey.

Please take a moment to review the short questionnaire below and provide any relevant data that may be of assistance to the State Bar on this subject. If you prefer, please provide your comments in narrative or any other form to the address below.

1. What type of organization are you affiliated with:

___IOLTA-funded program ___LRS ___local bar association

___court-based self-help center ___domestic violence clinic ___faith-based program

___small claims program ___legal services clinic ___community-based mediation program

___other non-profit (please describe)

2. Number of Staff: ___; Number of Office Locations:___; Annual Budget: $_____

Range of salaries for staff attorneys (annually): $_____to_____$

Number of Clients Served Annually:_____

3. Service Areas (check all that apply):

___Family law ___Consumer issue ___Immigration

___Housing ___Elder/senior law ___Health

___Bankruptcy ___Domestic violence ___Public assistance programs

___Other (please describe)

4. If your organization charges fees, other than reimbursement for out-of-pocket expenses, please check all that describe your fee practices: ___flat fee ___sliding scale fee ___contingency fee ___percentage fee ___other (please describe)

5. a.) Does your agency use a client satisfaction questionnaire or any other method of measuring client satisfaction? ___YES ___NO
b.) If NO, how does your agency assess the quality of services provided?

6. How are client complaints handled? (Please attach a client grievance procedure and or other relevant forms.)

7. In the last 3 years, how many clients have filed complaints with your organization?

Year	# of complaints	General nature of complaints
2003		
2004		
2005		

8. a.) Has your organization, or any of your staff attorneys or volunteer attorneys, involving their work with your program, ever been sued by a client? ___YES ___ NO
b.) If YES, please provide year, nature of lawsuit and outcome:

9. Briefly describe the internal controls that your non-profit organization has in place to ensure that the interests of the clients who receive legal assistance are protected (please feel free to attach an explanation, if that is available in another document.)

10. What does your organization do to assure that there is no non-attorney interference with the exercise of independent judgment exercised by attorneys serving the program?

11. a.) How many members are there on your board of directors? _____
b.) How many are lawyers? _____ How many are non- lawyers? _____

12. a.) Do your board members receive any stipend or other compensation for serving on the board? ____ YES ____ NO
b.) If YES, please describe:

13. Please describe the involvement of your board or individual board members in the legal work of your office, including the process of selecting cases, directing representation, agreeing to settlements, etc:

14. a.) Do you take fee-generating cases? _____ YES _____NO
b.) Please describe.

15. When attorney fees are awarded to your program, how are they handled? How do you decide how to allocate fees?

16. Describe the primary difference between the legal services provided by your agency and the services provided by a for-profit law office.

17. a.) Currently, an attorney who provides legal representation to anyone in California must be licensed to practice law by the State Bar of California. Additionally, legal entities like corporations and limited liability partnerships that are legal entities under California law, must also be certified to practice law, separately from the individual attorneys within the organization.

Do you have any opinion, based on your experience, as to whether non-profit public benefit corporations formed under California law that employ attorneys to represent members of the public should also be registered or certified by the State Bar of California to practice law as entities?

_____ YES, they should be registered or certified by the State Bar of California

_____ NO, these entities should be exempt because of their non-profit status

_____ NO opinion or don't know

b.) Please explain your thoughts on this subject and provide factual examples if you can.

18. a.) In a for-profit corporate entity legal practice, it is assumed that the profit motive pushes toward the margins of ethical behavior and thus regulation of the entity is necessary. In the non-profit model, do ideological and/or profit motives do the same, warranting the same type of regulation for non-profit entities as for-profit legal practices? _____YES _____NO

b.) Please explain your thoughts on this subject and provide factual examples if you can.

19. What, if any, benefits do you see in a registration system for providers of non-profit civil legal services?

20. Please describe an effective registration/regulatory system for non-profit law practices in California from your perspective.

21. What do you see as the potential detriments of or barriers to some kind of registration system for non-profit providers of civil legal services?

22. Additional Comments:

In case we would like to verify or discuss your answers with you in further detail, we request the following information. This is entirely voluntary and not necessary for your response to be counted.

Name of organization_____

Address_____

Name of respondent_____Title_____

Preferred Contact Phone Number_____E-mail_____

Thank you very much for taking the time to respond to this survey. Your response is greatly appreciated.

Please return this survey by mail, facsimile or e-mail by January 31, 2007 to:

Robert A. Hawley
Deputy Executive Director
The State Bar of California
180 Howard Street, 10th Floor
San Francisco, CA 94105
Robert.Hawley@calbar.ca.gov
415-538-2277 (tel) 415-538-2305 (fax)

SURVEY FOR CONSUMERS OF LEGAL SERVICES ON REGULATION OF NON-PROFIT LEGAL SERVICES PROVIDERS

On March 9, 2006, the California Supreme Court ruled in Frye v. Tenderloin Housing Clinic, Inc., 38 Cal.4th 23, 40 Cal.Rptr.3d 221 (2006), that non-profit corporations providing legal services in California are not subject to the State Bar registration requirements and other regulations that govern for-profit professional law corporations. In doing so, the Supreme Court directed the State Bar to conduct a study to determine if regulation of non-profit legal service providers (like legal aid societies, public interest entities, and membership organizations that provide legal services to the public) is needed.

As a result, the State Bar is seeking information from the legal community, members of the public, legal services providers and others regarding their knowledge of and experience with non-profit legal service providers.

Please complete the survey below and return it to the State Bar of California at the address below. Thank you for your assistance with this project.

1. a.) Have you ever had contact with a non-profit organization that provides legal services to the public? (For example, a legal aid society, a public interest association, a union or other membership organization or society) ___ YES ___ NO

   b.) If NO, please provide any other information you wish on survey, and share this survey with anyone who has had such contact.

   c.) If YES, please fully complete the survey.

2. What kind of organization was it?

   ___Legal Aid Program
   ___Lawyer Referral Service
   ___Bar Association
   ___Court-Based Self-Help Center
   ___Domestic Violence Clinic or Agency
   ___Faith-Based Program
   ___Small Claims Program
   ___Public Interest Organization
   ___Membership Organization (like a union)
   ___Community-based mediation program
   ___Other Non-Profit Entity (please specify)

3. What was your contact?

   ___Client/Customer
   ___Opponent
   ___Member or Employee of the Organization
   ___Regulatory Agency
   ___Other

   Please describe further your contact/relationship with the Organization:

4. In what city did this occur?

5. What were the dates of your contact?

6. What was the subject involved?

   ___Family law
   ___Housing
   ___Bankruptcy
   ___Consumer issue
   ___Elder/senior law
   ___Domestic violence
   ___Immigration
   ___Health
   ___Public assistance programs
   ___Other (please describe)

7. a.) Were fees charged to you as a result of your contact? ____ YES ____NO
   b.) If YES, how much in fees were charged?

8. How was the fee set? : ___flat fee ___sliding scale ___contingency ___percentage fee
   ___ hourly fee ___other (please describe)

9. a.) Were you satisfied with how this matter was handled? ___YES ___NO
   b.) If NO, please explain.

10. a.) Did you file any complaints with anyone regarding any dissatisfaction you had?
    ___YES ___ NO
    b.) If YES, please explain to whom you complained and what happened.

11. a.) Every attorney who provides legal services to the public in California must be licensed by the State Bar of California. Do you have an opinion on whether there is a need for the State Bar to license or regulate the organization employing the attorney as well as the attorney individually?
    ____YES ____NO opinion
    b.) If YES, please discuss your opinion:

12. Is there any place else that you would direct the State Bar to locate further information on this subject?

In case we would like to verify or discuss your answers with you in further detail, we request the following information. This is entirely voluntary and not necessary for your response to be counted.

Name _____ Preferred Contact Phone Number_____

E-mail_____ Other_____

Thank you very much for taking the time to respond to this survey. Your response is greatly appreciated.
Please return this survey by mail, facsimile or e-mail by January 31, 2007 to:

Robert A. Hawley
Deputy Executive Director
The State Bar of California
180 Howard Street, 10th Floor
San Francisco, CA 94105
Robert.Hawley@calbar.ca.gov
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GENERAL SURVEY ON REGULATION OF NON-PROFIT LEGAL SERVICES PROVIDERS

On March 9, 2006, the California Supreme Court ruled in Frye v. Tenderloin Housing Clinic, Inc., 38 Cal.4th 23, 40 Cal.Rptr.3d 221 (2006), that non-profit corporations providing legal services in California are not subject to State Bar registration requirements and other regulations that govern for-profit professional law corporations. In doing so, the Supreme Court directed the State Bar to conduct a study to determine if regulation of non-profit legal service providers (like legal aid societies, public interest entities, and membership organizations that provide legal services to the public) is needed.

As a result, the State Bar is seeking information from the legal community, members of the public, legal service providers and others regarding their knowledge of and experience with non-profit legal service providers. The attached Agenda Item from the State Bar's Board of Governors describes in further detail the purpose of this survey.

You have been selected to receive this survey in light of the public nature of your position and the possibility that you might have information relevant to the State Bar's study. Please take a moment to review the short questionnaire below and provide any relevant data that may be of assistance to the State Bar on this subject. If you prefer, you may provide your comments in narrative or other form to the contact information below.

1. What is the name of the agency you work for and your current position?

2. a.) Have you had the opportunity to observe or hear about non-profit legal service providers (like legal aid societies, public interest organizations, membership associations like unions) providing legal services and/or representation to members of the public? ____ YES ____ NO

   b.) If YES, please describe the circumstances.

   c.) What was the subject matter involved?

   d.) What was the nature of the organization providing the legal services?

3. a.) Have you received or heard of any complaints or issues involving the representation provided to the public by nonprofit legal service providers? ____ YES ____ NO

   b.) If YES, please describe.

4. Is there any other information source on this subject that you would suggest the State Bar contact? If so, please provide the contact information for this resource.

5. a.) Currently, an attorney who provides legal representation to anyone in California must be licensed to practice law by the State Bar of California. Additionally, legal entities like corporations and limited liability partnerships that are legal entities under California law, must also be certified to practice law, separately from the individual attorneys within the organization.

Do you have any opinion, based on your experience, as to whether non-profit public benefit corporations formed under California law that employ attorneys to represent members of the public should also be registered or certified by the State Bar of California to practice law as entities?

_____ YES, they should be regulated or certified by the State Bar of California.

_____ NO, it is sufficient that the individual attorneys within the non-profit are licensed and regulated.

_____ No opinion or don't know.

b.) Please explain your thoughts on this subject and provide factual examples if possible.

6. a.) In a for-profit corporate entity legal practice, it is assumed that the profit motive pushes toward the margins of ethical behavior and thus regulation of the entity is necessary. In your opinion, in the non-profit model, do ideological and/or profit motives do the same, warranting the same type of regulation for non-profit entities as for-profit legal practices? _____ YES _____NO

b.) Please explain your thoughts on this subject and provide factual examples if possible.

7. What, if any, benefits do you see in a registration system for providers of non-profit civil legal services?

8. Please describe an effective, registration/regulatory system for non-profit law practices in California from your perspective.

9. What do you see as the potential detriments of or barriers to some kind of registration system for non-profit providers of civil legal services?

In case we would like to verify or discuss your answers with you in further detail, we request the following information. This is entirely voluntary and not necessary for your response to be counted.

Name _____ Preferred Contact Phone Number_____

E-mail_____ Other_____

Thank you very much for taking the time to respond to this survey. Your response is greatly appreciated.

Please return this survey by mail, facsimile or e-mail by January 31, 2007 to:

Robert A. Hawley
Deputy Executive Director
The State Bar of California
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APPENDIX 2 – 2

SURVEY RESPONSES FROM PROVIDERS

The State Bar of California

Data Compilation on the regulation of non-profit legal services providers

Explanation of Data Compilation

Three surveys, one for non-profit providers of legal services, one for consumers of legal services and one for the general public were distributed to over 2,000 targeted individuals and agencies. Respondents also had the opportunity to contribute comments by letter, e-mail, and/or fax during the public comment period from October 2006 to January 31, 2007. That compiled input is provided here.

Information is presented according to category of respondent in three sections:

Section 1.0 – Providers;
Section 2.0 – Consumers;
Section 3.0 – General

Each respondent group's section contains:

a.) a brief narrative overview of survey results;
b.) an "at-a-glance-summary" of survey results by question;
c.) a brief narrative overview of public comments submitted.

Totals of responses and input received are as follows:

Providers: 67 total (61 surveys; 6 public comments submitted).
Consumers: 15 total (13 surveys; 2 public comments submitted);
General: 127 total (119 surveys; 9 public comments submitted);

It should be noted that for all surveys not all respondents answered all questions. Additionally, with some questions, respondents had the opportunity to select more than one option. Therefore the total number of responses to the survey questions will not always equal the total number of respondents overall within their respondent's group.

Comments in *italics* are direct quotes from survey respondents and have only been modified when a specific organization or individual was referenced. Not all comments (or direct quotes) to survey questions are included due to volume but those presented accurately reflect responses submitted.

Section 1.0: -PROVIDER'S SURVEY RESPONSES-

I. Brief Narrative Overview of Survey Responses

Comments from provider's survey on-line largely represent IOLTA-funded legal services providers and legal services clinics.

Approximately 66% of respondents are in opposition to both a potential registration or regulation system; 20% of respondents have no opinion or "don't know" and 12% support further regulation of non-profit legal services providers.

The underlying arguments against regulation include:

- no evidence of harm;
- the existing licensing of attorneys by the Bar is sufficient;
- potential constitutional and freedom of speech/association issues;
- an increase in cost, bureaucracy, and resources that would take away from services available to assist the low-income.

Many respondents also felt strongly that any requirement to have an all-attorney Board would conflict with funding requirements from donors to have a diverse Board and would also limit the scope and quality of services provided.

Four respondents support registration or regulation on the basis of consistent standards for all attorneys.

II. At-A-Glance Summary of Survey Responses

Total survey respondents: 61
Not all respondents answered all questions

Question 1: **RESPONDENT'S AFFILIATION**

- **50% of respondents are affiliated with IOLTA-funded programs**
- **36.7% other (see below)**
- **21.7% legal services clinic**

	Response Total (Some respondents indicated more than one affiliation.)
IOLTA-funded program	31
Other (see below)	22
Legal services clinic	13
Lawyer referral service	6
Domestic violence clinic	6
Court-based self-help center	5
Small claims program	2
Local bar association	2
Community-based mediation program	1

- Other: law school clinics or non-profit university-based advocacy organizations run by law schools; county law libraries; public interest impact litigation organization; support center; public interest organization; consulate office; family law facilitator; refugee and immigrant service agency; paralegal service for seniors.

Questions 2 (a) – (d): RESPONDENT'S ORGANIZATIONAL OVERVIEW: BUDGET; SALARIES; CLIENTS; STAFF; OFFICES

All information included is approximate and only reflects the limited group of respondents to the survey. Note that not all respondents may have answered the questions consistently thus reflecting impure data analysis. For example, some respondents may have provided salary ranges for ALL employees not exclusively staff attorneys, some respondents may have included the number of they serve indirectly and directly while other respondents did not; some respondents did not maintain or know the statistics requested.

- Annual budgets range from $2,000 to $9 million (average budget = $1.5 million)
- Annual staff attorney salaries range from $35,000 to $135,000 (average staff attorney salary = $62,000)
- Clients served annually range from 0 to 108,000 (average number of clients served = $8,500)
- Number of staff ranges from 1 to 125 (average number of staff = 19)
- Number of office locations ranges from 1 to 22 (average number of office locations = 2)

Question 3: SERVICE AREAS

Legal services provided are varied. Most respondents provide legal services in three or more areas.

	Response Total
Other (see below)	37
Family law	31
Consumer issue	33
Housing	33
Domestic violence	30
Public Assistance Programs	29
Health	23
Elder/senior law	23
Immigration	21
Bankruptcy	15

- Other: business law; class action litigation; civil rights/civil liberties; constitutional rights; privacy; free speech; criminal justice; death penalty; debt; fair housing; labor; education; employment; environmental; estate planning; endangered species; juvenile; legislative advocacy; international human rights; intellectual property; insurance; Medical; medical directives; children's advocacy; disability; community economic development; public policy advocacy; small claims court mediations; probate; traffic; tax preparation; veteran's issues.

Question 4: FEE SYSTEM

The majority indicated that they do not charge any fees for services or described fees as nominal or administrative and on a sliding scale. A small set of respondents charge flat fees, contingency fees or percentage fees.

Question 5: CLIENT SATISFACTION

- **61% use a client satisfaction questionnaire or other means to measure client satisfaction**
- **39% do <u>not</u> use a client satisfaction questionnaire or other means to measure client satisfaction**

Those that do not use a client satisfaction questionnaire or other means to measure client satisfaction provided these additional comments.

- *Alternative client satisfaction measurements:*
- *Evaluation sheet included in materials sent to clients*
- *Senior management reviews all applications and requests for assistance*
- *Dissatisfied clients can speak with the executive director*
- *Board review*
- *Exit interview*
- *Peer review, outside review*
- *Audits*
- *Faculty attorneys and law students meet weekly to discuss case status, progress and quality of service*
- *Feedback from judges*
- *Client feedback, feedback from cooperating counsel, opposing counsel and the courts*
- *Victories in court or favorable settlements*

Question 6: HANDLING CLIENT COMPLAINTS

Most have an internal process or policy to handle client complaints – first to encourage a solution between the individual attorney and client, then to the legal director or supervising attorney, Executive Director and finally to the Board for resolution.

- *Client grievance procedure*
- *Client is contacted by supervising attorney*
- *Neutral party follows up with the client and nature of complaint shared with office for improvement*
- *Agency will call LRS attorney and attempt to resolve*
- *Complaints referred to Chief Counsel and/or President for resolution*
- *Through customer satisfaction questionnaires or through program supervisory personnel and Court Administration*
- *Telephone call and letter of apology*
- *Complaints sent to panel attorneys who are required to respond within 20 days; two complaints in one year or three within eighteen months require appearance before Peer Review Committee of LRIS Advisory Committee*
- *Complaints referred to Board Member who reports to Board of Directors and mediates with client*
- *Each case handled individually by the Director of the law library*
- *Consultation off-site at client's location or at meeting site*
- *Letters sent to presiding judge*
- *Multi-level process – complaints are reviewed and resolved if possible by Executive Director; unresolved complaints are forwarded to Program Committee of Board of Directors for review and resolution; complaints not resolved at Board level can be appealed to government funding source (Area Agency on Aging)*
- *Clients may complain to funders and are given information on how to do so*

- *Our "clients" are legal services programs; if a program has a complaint the program's co-directors address it; the legal services program can contact us or speak to someone at the State Bar who handles IOLTA programs*

Question 7: NUMBER AND NATURE OF COMPLAINTS FILED

Out of 57 respondents, half reported zero complaints filed in 2003 to 2006, slightly less than half reported minor complaints and a small group of respondents reported the number and nature of complaints as unknown.

The mass majority of client complaints were based on client's ineligibility for services followed by complaints regarding resources (or lack thereof) available; e.g. not enough staff. A few complaints were about the attorney (didn't like or didn't do as much as client wanted) and a small number of complaints were about failure to communicate or rudeness.

Question 8: LAWSUITS AGAINST STAFF OR VOLUNTEER ATTORNEYS

- **84.2% have never been sued by a client**
- **15.8% have been sued by a client** (9 out of 59 respondents, 8 provided details below)

1.) *2005, General Negligence, Intentional Tort: ongoing*
2.) *2004, a former client filed a claim against our office in Small Claims Court based on denial of services after he moved out of the county. He later dismissed the claim.*
3.) *2001, Breach of Fiduciary Duty, Breach of Contract, Fraud, Constructive Trust, Professional Negligence: case dismissed*
4.) *2001, Failure to pursue a claim for Case dismissed*
5.) *1999, Motion to Recuse, Motion granted*
6.) *1990, Panel attorney was not sued by client but by opposing counsel. The case closed in 1990.*
7.) *Frye v. Tenderloin Housing Clinic*
8.) *The only time our project was actually sued was about ten years ago. The client, who was severely mentally ill, handwrote a complaint that she attempted to file in federal court. Although she hand-delivered a copy of the complaint to our office, I don't believe that it was ever actually filed, and nothing ever came of it.*

Question 9: INTERNAL CONTROLS IN PLACE TO PROTECT CLIENT'S INTEREST

Responses about internal controls used to protect clients' interests varied although nearly all respondents indicated existing case management policies and procedures, various levels of supervision and review of staff and cases (from supervising attorney, legal director, and board) as well as a conflict of interest database.

- *Weekly case review meetings; monthly legal staff meetings; legal staff training plans; standardized forms and procedures; case file standardization; client database for conflicts check and client profile tracking; organization-wide client complaint policies; annual client satisfaction surveys with staff and Board review/recommendations; third party monitoring of randomly selected client case files on annual basis*
- *Non-attorney staff supervised by attorneys; attorneys supervised by managing attorney; monthly review of all cases with all staff and attorneys; careful data collection and case management*
- *All cases except routine office cases and physical abuse cases are brought to a weekly case acceptance meeting for decisions*

- *Board supervision of staff attorneys*
- *Case reviews; internal and external audits; annual self-inspections*
- *Training to intake staff; review of all cases; supervision of all staff and volunteers handling cases; on-going trainings; client feedback forms*
- *Supervision of staff; review of case files; monitoring by various funders*
- *Legal department procedures manual; case management review; client contracts; information/release forms; limited scope agreements; weekly meeting with Executive Director and all supervising attorneys*
- *Written and electronic copies of files; weekly case review; quarterly case reports; yearly audits; random audits*
- *Staff follows up with client periodically about client satisfaction. Random selection of cases and clients are polled for opinions about the referred attorney*
- *LRS – all clients referred to the private bar. According to our rules, they can contact staff, who will follow-up on complaints. If not resolved, clients can complain to the Board LRS Committee. Clients are informed of the State Bar complaint line and local bar arbitration program.*
- *We help self-represented individuals in their cases and our work appears before the Family Court Commissioner, Family Law Judges as well as the Clerk of the Court; if a problem arises, the clerk contacts me*
- *Attorneys are trained annually in professional responsibility duties; all litigation reviewed by principal attorney*
- *Attorneys only advise and represent tenants; no involvement or advice is provided to any landlord; conflicts check done upon initial contact with client; all attorneys covered by errors and omissions insurance; retainer agreements spell out client's rights; attorneys discuss amongst themselves and with the affected clients any potential conflicts and call the State Bar ethics hotline when needed*
- *Conflicts checks; case management; case closing procedures*
- *Conflicts database; we only represent one party; procedures for handling domestic violence cases; intake forms; maintenance of client files; representation of clients mostly done in court; satisfaction surveys sent to all clients*
- *Tickler system for deadlines/statute of limitations; computerized intake system; supervisory case strategy meetings and reviews*
- *Our co-counsel agreement with local programs and our agreement require that the client be kept fully informed of developments and needs in their case*
- *We unbundled services and outline a service agreement; file management database with a tickler system; send closing letters that include pending information and referrals*
- *Director reviews each case; all cases are put into a password protected database in order to catch any conflict of interests; all client information is kept highly confidential*
- *Board must approve all affirmative litigation*
- *Assessment; legal strategy on all legal issues faced by victims of domestic violence; scope of services signed at each appointment; attorneys participate in large number of legal trainings*
- *All files and records of legal clients are held within legal department and locked; all records and files only accessible to legal department; policy in place that no non-attorney/legal personnel can dictate any client legal assistance; conflict of interest and confidentiality policy; clients wishing to arrange some form of charitable donation are sent outside of agency to arrange their wills or trusts*
- *Law school clinic – model high quality, client-centered lawyering; retainer agreement informs clients of expectations; clinical faculty are experienced lawyers who mentor and monitor all students assuming lead responsibility for client representation; students are supervised per the Practical Training for Law Students state rules*
- *All cases discussed internally before and during representation; attorneys work in teams overseen by Legal Director; clients kept informed about case and usually involved in many*

case decisions; clients always involved in big decisions such as settlement, major motion strategy, etc.; retainers and disengagement letters

- *Intense hiring process and review of applicants; supervision by experienced managing attorneys; weekly case acceptance meeting; regular random review of open cases; review of every manager at closing; all paralegal work reviewed; annual job performance evaluations include random case review; observation of staff at hearings; organization is MCLE Provider of in-house trainings; CEB passport for legal staff; regular attendance at external trainings; every client grievance investigated; managing attorneys have open door policy; substantive law teams to promote communications among advocates*
- *Fulfillment of all requirements of State Bar Minimum Standards for certified Lawyer Referral Services*
- *Do not represent individual clients but engage in legislative advocacy before regulatory agencies*

Question 10: NON-ATTORNEY INTERFERENCE WITH THE EXERCISE OF INDEPENDENT JUDGEMENT

Most respondents commented on the lack of or limited role of their Board in individual cases with respect to how their organization ensures non-attorney interference with the exercise of independent judgment. Other comments are grouped on responses based on established internal guidelines, staff attorney's role, and other means used to ensure non-attorney interference with the exercise of independent judgment.

Board related

- *Decisions and actions regarding client representation carried out by attorneys only; no board member makes any decisions regarding a represented client as per board resolution; reports are made to board but no control over legal representation is exercised by the board*
- *All legal decisions made by counsel; board role limited to approving initial decision to become involved in case*
- *All board members and co-directors of the program are attorneys; only staff member who is non-attorney is an administrator who is not involved in legal decisions or case review*
- *Board oversight is limited in so far as individual client's cases are concerned;*
- *Board does not supervise day to day activities, only attorneys*
- *Board has been trained on non-interference*
- *Issue has not come up – a number of board members must be attorneys*
- *Our Board (14 members) governs our program; all legal decisions are under the purview of the 7 attorneys on our Board*
- *Non-attorney members of the Board are not involved in case decisions; non-attorneys on staff (media, fundraising, activists) are not given any authority in cases; cases are run by attorneys only and non-attorney staff roles are strictly supportive*
- *Interpretation of the Rule of Professional Conduct 1-600 to prohibit interference by board members or other non-lawyers in the organization*
- *Inform all callers that we are not attorneys; if an attorney tells us they can not assist a client, we try and refer the clients elsewhere; we would never interfere with an attorney; if attorney is not performing their job the Board LRS Committee will review the issue and the attorney could be dropped from our service*
- *Case selection by staff attorneys at weekly meetings then discussion strategy and recommendation to the Board, which includes attorneys and non-attorneys; however, Board is not involved in strategic or tactical decisions about a case once it is litigated; all decisions are made by attorneys in consultation with clients and their best interest*
- *Organization is part of law school headed by a Dean who is an attorney (not licensed in California), which is in turn part of a larger university headed by a non-attorney President and Board of Trustees; with exception of conflicts clearance approval process administered*

by the Dean's Office for any litigation we file there is generally no interference by non-attorneys in any aspect of our work. Any such interference would constitute a breach of academic freedom.

- *Board and board grievance committee consists of 2/3 board members are attorneys, 1/3 eligible client; board addresses policy issues and only involved in client grievance appeals; Executive director and all supervisors are licensed California attorneys; every client case including those handled by a paralegal have an assigned attorney responsible; at initial client intake, client is given written Notice of Paralegal Assistance with name of paralegal and supervising attorney.*

Established internal guidelines/policies

- *Policy and guidelines clear that non-attorney staff has no input into legal decisions*
- *Strict internal rules about discussion or even confirming/denying which cases we have; very few people seek to exercise influence over our case because: 1.) they do not know who we see and 2.) they have little interest in the nature of our clients' problems*
- *Protocols governing our multidisciplinary approach to client services; the legal department does not consult with any other department on any client legal matter*
- *Strict internal guidelines – no information shared about legal clients to any personnel outside legal department without client's written consent; non-attorneys can not dictate how clients issues are to be resolved or what types of clients can be assisted; guidelines used are the California Department of Aging statewide guidelines implementing the Older Americans Act from which receive partial funding for the program.*

Staff Attorney

- *Attorney's assign and supervise all work performed on cases by non-attorneys*
- *Attorneys only answer to Chief Counsel and President of the organization (who is an attorney)*
- *All case acceptance decisions and course of action are determined at weekly case review attended only by attorneys*
- *Managing attorney is VERY client protective*
- *Non-attorneys not permitted to exercise any control over case handling, strategy or outcome; only redacted files of closed cases available for third party review;*
- *Each attorney is in charge of their own caseload and with the exception of managing attorney supervision there is no other input on cases*
- *Legal work and professional decisions and judgment are made by attorneys*
- *Our Executive Director and all legal staff are attorneys so this issue would not arise in our organization; in the past when the ED was a non-attorney we had a legal director who handled all legal issues*
- *Once referred to panel attorney there is no interference from organization; cases handled by organization are all under direction of staff attorneys- no non-attorneys involved with exception of law clerk doing intake*
- *When or if the client knows the attorney personally, another attorney is assigned to the case; we do not review each other's work*
- *Do not have non-attorneys involved in operation of our program*

Other

- *Continuing education; seminars; regular contact among three facilitators and Family Court Commissioner*
- *Case acceptance decisions maybe by Clinic's attorney/teacher in consultation with students providing direct representation; no outsiders within or outside of the law school are involved*
- *Law clinic is overseen by Law School Dean and law faculty who understand requirements for non-interference and have made such requirements clear to university officials*
- *Ensure lawyers understand ethical requirements of the State Bar of California*

- *Resist LSC efforts to interfere*
- *Efforts made to keep identity of donors concealed from the legal department*
- *Precisely for the purpose of preventing any non-attorney interference, in 2000 we became a separate nonprofit agency with an executive director who is also an attorney.*
- *Organization run by disability advocates professionally trained in the law; licensed attorneys are not involved*
- *Do not have clients – support center*

Question 11: BOARD OF DIRECTORS – ATTORNEYS & NON ATTORNEYS

- Total members on Boards of Directors ranges from 2 to 84 members (average Board of Directors = 16 members)
- Attorneys to non-attorney members on Boards of Directors ranges from an all attorney member Board to a non-attorney Board
- Average number of attorneys per Board = 7.75; Average number of non-attorneys per Board = 7.45 or (51% are attorneys, 49% non-attorneys)

A few respondents did not know the attorney to non-attorney representation of their Board. Additionally, law school clinics, reported that they do not have a separate Board as their clinic is part of the educational curriculum of the law school. (The Board of the school has no involvement in the Clinic's client representation but most of the school's Board members are lawyers.)

Question 12: BOARD MEMBER STIPENDS

One out of 50 respondents reported that their board members receive a stipend or other compensation for serving on the board. That stipend was described as "out of pocket expenses". It's possible that the respondent meant travel or other reimbursement but did not elaborate or choose to self-identify.

Question 13: BOARD INVOLVEMENT IN LEGAL WORK OF ORGANIZATION

The majority of Board of Directors described are not involved in the process of case selection, directing representation or agreeing to settlements. Most Boards are tasked with the general duties of strategic planning, setting policy and program priorities for case acceptance, resolving client complaints through an established grievance policy, assisting with finances and grant writing, and review of litigation and cases with no direct input. Some Boards may strategize with their executive committee regarding large-scale litigation but not for the process of seeking approval.

In general, Boards described are not involved in the legal work of organizations, day to day operations or in individual cases once litigation begins but are involved in a litigation review procedure where the process and the authority of the Board to accept or deny cases varies by organization.

- *Board has final authority to authorize or ratify which cases are done – staff attorneys after much discussion and research write up recommendations for the cases they would like to do, this selection is reviewed by the Legal Committee of 12 attorneys and their recommendations are submitted to the Board monthly for review; other than initial selection process, Board does not direct representation and are not involved in settlement cases*
- *There is a group of board members, each of whom is a lawyer who sit on the Executive Legal Committee. The legal staff brings potential cases to that Committee for approval of cases that fall under established and set policy for case acceptance*
- *Board has a litigation review committee*

- *Board approval required before any client relationship is formed or any litigation filed; approval is based on staff recommendations; no board participation in litigation of any matter*
- *Board selects priority areas of service unless client wishes to have confidentiality*
- *Approves goals and objectives of impact advocacy only*
- *Board members have nothing to do with individual clients; attorney members from LRS Committee review general agency operations and any client complaints*
- *Monthly review of litigation reports; they ask for reports on certain issues or cases that have been presented; they often ask if we are involved in differing cases; decisions regarding specifics of settlements, dismissals, etc. are left to the attorney and client*
- *Board acts as litigation review committee; before the program attorneys agree to co-counsel with local programs in litigation, they must seek committee approval; the board receives major advocacy reports at each board meeting (four times per year)*
- *At Grievance Appeal stage, client required to sigh a waiver of client confidentiality to permit the discussion of the case facts with the Board Grievance Committee*
- *Attorney board members review written legal work including amicus briefs, training materials, manuals, etc.; board members with substantive expertise in occupational safety and health will conduct technical reviews; we do not directly represent any clients*
- *Our office is funded to support Pro Se litigants, funding for direct representation is very limited; of the few clients directly represented, case selection and work is handled first by the attorneys and volunteer attorneys with oversight and review of the supervising attorney who is a board member and his/her work is reviews by the legal committee under the direction of the board*
- *Other than a 'conflicts clearance' approval process by the Law School Dean's Office for any litigation filed, no involvement by Law School Dean or the University President/Board of Trustees*
- *Trained disability advocate attorney directs case selection*
- *Board has no direct or indirect involvement on any legal decision and/or involvement; legal department only reports to funding coordinating agency that monitors the contract goals for the legal program.*
- *Agency does not provide direct representation; incarcerated clients who may be prospective clients for habeas relief are selected after review by habeas project supervising staff attorneys.*

Question 14: **FEE GENERATING CASES**

- **53.8% take fee generating cases**
- **46.2% do <u>not</u> take fee generating cases**

These results may not be reflective as some respondents may have interpreted "yes" as an absolute (fee generating cases are taken) but in actuality fee generating cases are only taken under certain circumstances, not routinely. Many chose to elaborate with the selected comments below.

- *In addition to our Trust Department, which offers low-cost trusts to clients on a sliding scale basis, we also accept 2-3 fee based cases against nursing homes involving serious elder abuse allegations, with private bar co-counsel, and a W&I sec. 1430(b) cases on behalf of nursing home residents. All fees generated are used to support the organization's legal services programs.*
- *We do not charge for services but our panel attorneys may charge depending on the nature of the case and the income of the client according to our fee protocol.*
- *Court appointments on probate and juvenile dependency cases. Fees are paid to agency and offset attorney salary.*
- *Very, very rarely. Occasionally, there are cases in which attorney's fees could be awarded - for example eviction cases where the lease provides for attorneys fees for the prevailing party.*

- *If attorney's fees are available to a prevailing party, the organization's attorney will file a motion for said fees.*
- *In all of our cases, there is a statutory right to attorney's fees if we prevail.*
- *These cases are statutory fees cases such as allowed under the Clean Water Act. To obtain fees, a court must approve, and the U.S. Justice Department can comment.*
- *We are appointed by the court in conservatorship cases and receive attorney's fees paid by the conservatee's estate.*
- *We do not do any personal injury or civil lawsuits. We do take family law, criminal, and similar cases where clients pay a sliding scale fee to attorneys. We collect a percentage fee from any case over $100, according to usual LRS procedures.*
- *We do some work in Federal District Court that generates EAJA fees.*
- *We have occasionally handled cases where fees were available under federal or state law. These are fairly rare -- there have been fewer than 5 in our 16 year history -- and the possibility of fees in the case is not a major factor in our consideration of whether to take a case. To the contrary, if the availability of fees is strong, this will be a reason for us to refer the case to commercial counsel rather than take it on ourselves. However, in situations like 17 USC 512(f) (a provision that provides for fees for misuse of copyright notices to censor speech online) we take cases because we want to see the law developed and it is not occurring by commercial counsel yet. Our goal is to help get some favorable precedent set so that commercial counsel will take up these cases more often and our role can then be reduced.*
- *We take some consumer cases in which attorneys' fees may be available by statute, usually co-counseling with a private consumer law firm. We occasionally file a petition for writ of mandate for which statutory fees may be available.*
- *Will take cases where fee awards by courts or agencies may be made and will pursue such awards. No fees taken from damage awards to clients.*
- *Many of our cases could result in attorneys' fees awards if we represent the prevailing party under the federal and state attorneys' fees statutes for public interest cases.*
- *Most cases under the Fair Housing Act, FEHA, Civil Code Section 1942.4 and 1942.5, and the local rent control ordinance have provisions awarding attorneys fees to the prevailing party. Some leases also have attorneys' fees provisions. This covers a large segment of housing law and therefore we have a significant number of fee generating cases.*
- *Most of the cases in which we co-counsel are cases where the attorneys are entitled to attorneys' fees under California's fee-shifting private attorney-general statutes, including CCP 1021.5, for enforcement of important public rights if they are successful.*
- *The only fees that we receive from litigation are fees pursuant to fee-shifting statutes..*
- *Occasionally, we litigate test cases that may generate CCP 1021.5 private attorney general fees if we prevail..*
- *Only as allowed by IOLTA rules. Primarily when injunctive relief is sought or when private attorneys will not take the case.*
- *LRS - Panel attorneys who receive referrals only accept potentially fee-generating cases; panelists take the cases, the service receives a percentage of the fees the panelist earns in order to run the program.*
- *Some landlord-tenant; very infrequently other kinds of fee-generating litigation.*
- *We take some employment based and consumer based fee-generating cases.*
- *We have a modest fee for service program, which to date has resulted in no more than $2,000 in revenue for the agency. 1.) SSI cases: (a) private bar won't take and (b) referred by county under fee-for-service contract; 2.) Occasionally, when the principal object is not money damages, but other relief (injunctive) and two private attorneys have rejected the case in writing.*
- *The agency changes nominal fees for a small variety of straightforward immigration procedures.*

Question 15: ALLOCATION OF FEES AWARDED

The majority of respondents does not receive or accept attorney's fees and many are prohibited under Legal Service Corporation (LSC) restrictions from seeking or accepting fees.

Of those that do accept awarded fees, most allocate fees back into the **program**, **general fund** or **legal department**. Most awarded fees are budgeted and allocated annually.

Program

- *Fees are allocated 100% to program.*
- *Fees generated are budgeted and allocated to the legal services programs on an annual basis.*
- *Fees are put into an internal segregated account for Clinic purposes only by written agreement with the University. Funds are allocated as needed for Clinic legal activities only.*
- *Our co-counsel agreement divides up fees between our organization and any co-counsel based on the time and lawyer rates of each firm. All fees received based on this agreement belong to our program.*
- *They are handled as program income and applied to our general budget for program costs, as needed.*
- *They are use to cover the cost of providing the service we provided to the client for free.*
- *They are used to support program work just as any other unrestricted support.*

General Fund

- *They are put in the law office general fund to further our legal services, including representing clients in non-fee generating cases, education, outreach and organizing tenants to further their rights.*
- *We allocate attorney fees according to an approved budget. Generally we use them to fund salaries.*
- *Our volunteer attorneys are given fees in proportion to the work performed. The in-house attorney time is also factored and the proportionate share goes into the organization, but not the individual in-house attorneys.*
- *Fees are allocated to our general fund. Expenditures from the fund are determined by our annual budget and actual expenses*
- *Any fee award to goes to general bank account. We only have one. Fees that are jointly awarded to us and commercial co-counsel are negotiated among co-counsel just as if we were a commercial firm.*
- *Fees are paid to the organization and deposited in the general fund for program use.*
- *Fees generated are deposited to legal services general fund.*
- *They are deposited into an unrestricted account controlled by our organization. They are spent on our charitable operation and do not inure to individual employees (who work on pre-set salary).*

Legal Department

- *If attorney fees are awarded these fees are allocated to the legal department.*
- *The fees are put into a special account and are used to support our litigation program.*

Board Decision

- *The board decides what to do with attorney fees.*
- *Court awarded attorneys fees in modest amounts are considered income in the fiscal year that they are received and are used to support existing legal services. The Board reviews fees at various times each fiscal year, including projected fees at the beginning of the fiscal year, actual fees received during periodic financial reviews and ultimately all fees received*

in the context of our annual audit. In the event of extraordinary fees, the Board decides whether to use the fees to enhance program or to build a reserve.

Other

- *We reimburse client for fees paid pursuant to sliding scale.*
- *Not applicable at this time. We have not yet requested attorney fees in any case to date. In the future, such fees will be handled according to the same procedures under which we allocate donations to our nonprofit public benefit entity -- 100% for the services and programs of the agency to benefit persons with disabilities, particularly those with communication-related disabilities of vision, hearing, and/or speech.*
- *On the extremely rare occasion that attorney's fees would be awarded, they would be considered a form of miscellaneous revenue. This has actually never happened that I recall, but it is a theoretical possibility.*
- *Panel attorneys are expected to tithe back to us 10% of any fees they receive from an our referral. The revenue from the tithes is unrestricted income.*
- *Fee allocation only occurs between co-counsel and is pursuant to co-counsel* agreements. Fees are typically allocated on the basis of attorney time records.
  To date we have not had any attorney fees awarded because we have not had any cases where we do direct representation.
- *To date, we have never been awarded fees; as it represents victims of domestic violence, often the pursuit of attorney's fees could result in placing the victim in further danger. On the other hand, should it ever be awarded fees, the fees would be allocated according to OMB Circular A-122.*

Question 16: PRIMARY DIFFERENCE BETWEEN LEGAL SERVICES PROVIDED BY FOR-PROFIT

A wide variety of responses were received regarding the primary difference between legal services provided by non-profits and for-profits. Highlights include different types of clients served, different types of cases, resources, and fees (or lack thereof) charged to clients.

- *No difference from a legal or attorney's perspective with respect to quality and provision of services. Practice of law is the same.*
- *Clients of non-profits lack resources, generally are less educated and have significant barriers to accessing the courts.*
- *We mostly represent those tenants that are not represented by for-profit law offices including tenants who are poor, mentally and physically disabled, or have complex legal problems that are too expensive for private law firms to take.*
- *The primary difference is type of cases. We take cases in which there is little or no money so that for-profit law offices are not interested; types of cases non-profits handle do not produce revenue.*
- *Services cluster in certain substantive areas including: housing; public benefits; abuse prevention and consumer and debt collection issues.*
- *Non-profits have limited resources and must exercise more efficient use of resources where the private bar may have in certain cases the ability to heavily litigate claims.*
- *Non-profit services are provided more quickly and more affordably with more client access to staff.*
- *Free - no client fees; Neither clients nor co-counsel must pay for our representation or assistance; We do not use the possibility of recovery of fees as a criterion in the selection of our cases; Services provided are not driven by client's ability to pay; We do not charge and know more about the programs serving the low-income community; We try to help everyone who contacts our office either through an in-house consultation or by telephone, even if they do not qualify for our free services.*

- *We never turn down a client based on inability to pay. Our fees are generally collected at the end of the case and there is no large retainer charged up front. The vast majority of our services are provided free of charge. We charge in less than 3% of our cases.*
- *None of the clients we serve could get representation from private attorneys; we are objective and serve all.*
- *There are no known for-profit law offices providing the types of services provided by our agency. We are unique.*
- *Our services only provide to low income and indigent members of the immigrant community. We know more about the programs serving the low-income community.*
- *One is a community service the other is driven by profit. Our mission is not to make money, but to provide quality free or low-cost legal services to make a difference in client's lives.*
- *Our mission is to provide access to legal services to those that cannot otherwise afford an attorney. Our approach is focused on education and advocacy to resolve the matter. Rarely do our cases have attorney's fees available and while they often result in a positive resolution for the client (a dismissal of a debt or reinstatement of an employment certificate) they rarely result in a cash award to the client.*
- *Our services afford access to justice to over 4,000 Pro Se litigants per year. No for-profit law office could adequately address the extreme need for our services since our clients are indigent and could not cover the for-profit fees.*
- *Our agency provides advocacy and referral and does not provide direct representation.*
- *Our attorneys are salaried staff. Thus, for example, as executive director, my salary is fixed and not tied to attorney fees received in any case. We select cases that are consistent with our non-profit charitable mission, not based on likely fee recovery.*
- *Our clinic is set-up to be part of the law school's educational curriculum. It differs totally from any for-profit office and significantly from the chief organizing purposes of standard non-profit legal services providers.*
- *The cases we decide to take are determined solely on the basis of the issues presented and their importance to our mission of protecting civil liberties and civil rights. The client's ability to pay is not considered. The most important questions turn on how the case fits into our overall program and whether we have the resources to pursue the litigation.*
- *Two things: 1.) A significant amount of legal advice is provided by phone or email to the general public; 2.) free legal seminars and printed materials are available to the public.*
- *We are not attorneys or paralegals. We are an LRS only. The only fees besides a small referral intake fee are attorney percentage fees that the attorney forwards to us.*
- *We assist parties with completion of forms and civil processing. We refer to other agencies and to the local bar. We do not give case-specific strategy. We do not represent clients and do not appear in court with them or on their behalf.*
- *We charge by the appointment (sliding scale $0 to$150) and offer package prices for basic types of actions. If we must do work when client not in appointment, we discuss charges in advance, and request payment. We do not bill for incidentals (copying, faxing, etc.). We prepare all pleadings in pro per, but then substitute in for hearings etc. However, most private attorneys in our County are willing to negotiate and communicate with us.*
- *We do not do any litigation or legal representation at court hearings. Our service provides advocacy through telephone calls and letters on behalf of clients and document preparation such as simple wills, powers of attorney. Through contracts with Adult Protective services we do prepare court documents for suspected elder abuse temporary restraining orders. No fees are charged.*
- *We do not represent clients, we do not give advice and we cannot talk to anyone who is represented by an attorney.*
- *We engage in litigation, regulatory, standard-setting, legislation that for-profit law offices would be unlikely to take on. We represent two individuals on death row; we have represented various individuals and groups of individuals domestically and internationally that have experienced human rights abuses, and we represent non-profits and individuals seeking to protect individual privacy, balance intellectual property policy and freedom of*

expression in issues involving technology policy. The clinics function as teaching vehicles, immersing students in the practice of law in a safe and reflective setting.

- *We primarily engage in legislative, budget, and regulatory advocacy. We rarely have individual clients. Our program is funded by the University, a private endowment, and externally raised funds (gifts, grants, contracts). When we do engage in impact litigation it is because it will benefit children in general, and not because there is the possibility of remuneration (ie. the cases we handle are not like the personal injury cases).*
- *We provide technical assistance, training and advocacy assistance to other legal services programs in the area of occupational safety and health and workers' compensation. We know of virtually NO individual attorneys who advocate for workers in the OSH area. In the workers' comp area, we focus on assistance in matters where no private attorney is likely involved.*
- *We take cases that are aimed at advancing the law to protect civil liberties, privacy and innovation online. We take cases that commercial firms won't, because they are either purely pro bono or, if fees are available, they aren't likely. We take cases that are on the cutting edge, both legally and often technologically -- presenting new technologies to the courts for the first time and trying to explain to courts how the new technologies are (or are not) like previous technologies they have encountered.*
- *Our agency handles cases for elder clients who are generally very low-income. Our clients also have physical and mental limitations that make them difficult to represent. Due to their ages, and lack of ability to travel, our staff attorneys go to 40 community sites to meet with these clients in senior centers, nursing homes, and nutrition sites; many can no longer drive. Legal matters presented to our staff attorneys most often involve no, or very small potential monetary recovery; the majority of the cases presented by our elder clients would not be accepted by the for-profit bar either because the monetary recovery would be small or non-existent, or the client would not have the ability to pay for legal services. Any and all cases that may be accepted by the for-profit bar are referred to the local bar association's lawyer referral services.*

Question 17: **REGULATION OF NON-PROFIT LEGAL SERVICES PROVIDERS**

- **66.7% - No further regulation needed**
- **12.5% - Support regulation or certification by the State Bar**
- **20.8% - No opinion or don't know**

NO

- *Refer to arguments against registration in FRYE*
- *No evidence of abuse*
- *I have not seen my organization or any other whose Boards interfere in litigation; not aware of non-profits or their staff choosing cases based on revenue or taking large contingency fees and using that money to pay excessive salaries and staff*
- *Burdensome with no benefit; will especially burden many of the small non-profits, especially in rural areas*
- *Unnecessary; attorneys are already licensed and regulated as individuals*
- *Regulation by the State Bar and other entities already exists, e.g., Rules of Professional Conduct; California Attorney General's Office; Income Tax authorities; and by regular accreditation audits by the ABA*
- *Non-profits provide services in addition to legal services and are subject to regulation by funders; many legal services providers receive IOLTA funding and are under intensive monitoring and reporting criteria*
- *Would create more barriers and reduce availability of legal services to the poor*

- *Following the ABA's recommendations for legal services to have community members (non-attorneys) on the board of directors would contradict certification of a non-profit by the State Bar as a law firm. Community representation on Boards is very important.*
- *Non-attorney membership, typically client constituency representation, is beneficial to promoting the mission of non-profit public benefit corporations*
- *Would interfere with First Amendment Rights*
- *Less government not more*
- *It is the individual attorney's responsibility to comply to the law, not the agency's responsibility – although the agency should oversee the attorney's work and ensure appropriate behavior*
- *Require out of state non-profits providing legal services to have at least one licensed California attorney on staff*
- *Registration would not provide additional protections for the public*
- *Focus of Bar should be on ensuring that individual attorneys live up to their professional responsibilities and obligations*
- *The Bar has been a target of litigation by non-profit public interest organizations, a registration requirement could pose issues of conflict and potential for abuse*
- *No objection to simple registration but not possible or realistic for a university based child advocacy group such as ours to be overseen by an all attorney board of directors; non-profits should be exempt of any such requirements*
- *For purposes of liability they should be registered; clients may wrongly assume that their representative is a certified California attorney and deserve to know; however, in many areas, such as public benefits cases which use the assistance of non-registered attorneys, registration may be detrimental and may result in the loss of essential services without them.*
- *Any requirement to certify or register law school clinics would create enormous complications and undermine or primary educational mission. It has been a struggle within legal education to integrate real-client clinics into mainstream curriculum. The clinic is part of a state law school, it is not organized as a non-profit public benefit organization. If there were a requirement that legal services programs be structured as such entities, we would have to separately organize the clinics, which would erode efforts made to make hands-on learning an important part of law school curriculum. Clinics would be at the margins of legal education which would undermine the interest of the bar in preparing law students to become responsive problem solvers and practitioners. Law schools play a small part in providing legal services but across-the-board registration for non-profit providers will result in unintended consequences.*
- *We have never had a formal client complaint – on the contrary, our clients are overjoyed to get the help we provided. We also maintain malpractice insurance, which provides the most ready form of protection for our clients. Another layer of regulation would take resources away from our main goal – helping our clients. It would be a shame to reduce our legal team to increase our administrative personnel to keep up with the regulatory burden.*
- *All attorney-board and membership requirements modeled off of for-profits would destroy the diversity of non-profit legal providers as well as limit the effectiveness of non-profit's outreach and educational efforts.*
- *State Bar should follow it's own regulations, which were written in regard to protecting the general public from overzealous licensed attorneys in for-profit settings.*
- *The Bar is not competent to regulate persons who may have law degrees from law schools but who wish to serve the disabled and/or indigent without regard to greed or extensive personal gain; the issues involved in non-profit public benefit corporations are mostly in regard to federal programs, poverty law and other matters not usually taught in law schools as a specialization.*
- *Some organizations provide a host of other services beyond legal services; the overall effect is that a wide variety of services are available for clients without them having to go to*

multiple agencies to receive assistance; as long as strict internal procedures and policies are in place to protect legal clients privacy, rights and needs, these types of organizations benefit clients (e.g. seniors) who may be unable to got to multiple places or make multiple phone calls for assistance.

YES

- *Organizations serving under-served populations should be held to the same standards to ensure quality of services and be treated like law firms; clients should be represented by and receive legal advice from licensed California attorneys.*
- *It would be nice but provisions need to be made for non-attorney board members.*
- *Attorneys should maintain the same ethical standards regardless of where they work; the same continuing education requirements should apply to all California lawyers.*
- *Many agencies claim that they are non-profit and public interest but their practices give lie to that claim.*

Question 18 **IDEOLOGICAL AND/OR PROFIT MOTIVES**

- **91.1% - NO – Ideological and/or profit motives of non-profits do <u>not</u> push toward the margins of unethical behavior warranting regulation**
- **8.9% - YES – Ideological and/or profit motives of non-profits DO push toward the margins of unethical behavior warranting regulation**

NO

- *Not in our experience or with any of the other programs we are familiar with; persons in non-profits are not seeking profit; not aware of anyone pushing ethical margins for one client*
- *One is community service, one is driven by profit*
- *Non-profit representation is extremely ethical in their representation of individual clients, especially when the non-profit entity has clear guidelines, policies and support about appropriate litigation tactics*
- *Incentives are different as is constitutional protection*
- *Non-profit attorneys are highly motivated to maintain a positive public reputation with the private bar who often helps fund them, and the courts*
- *Ideological motives to not conflict with client objectives because clients seek the assistance of non-profit legal organizations because their interest are parallel, not in conflict*
- *Non-profit entities are subject to checks with are not present in for profits, especially review of funding sources such as Legal Services Trust Fund Program and government funding sources*
- *Non-profits exist to serve clients, not make money. Many of us do charge fees but the motivation is to fund the services. We can't make a profit that doesn't go back into expanding services.*
- *The concern relative to regulation is that the State Bar's ideology could be such that is censors the non-profit*
- *Attorneys in non-profits earn a set amount not directly based on revenue from legal work; for-profit legal corporations share their profit with partners;*
- *This survey's implicit critique of non-profit legal work applies more fully to the legal work performed in-house by every major U.S. corporation; general counsel of every major U.S. corporation should be first in line for regulation*
- *Ideology may drive case selection but not case representation once the case is accepted*
- *The greater pressure is trying to counter tactics and keep pace with for-profit entities who are the opposing counsel*
- *Profit motives would and are already subject to reviews by both the IRS and State Attorney General; law school clinics are subject to their school's reviews and performance of the*

clinical faculty with appropriate deference to independent judgment as protected not only by bar ethical rules but also academic freedom standards.

- *Reviewing legal services programs for ideology has been a historically highly politicized and politically manipulated issue instead of a response to the practical problem affecting the actual quality of legal services provided*
- *Profit is not a consideration because we do not charge clients – however, funding may be effected by the number of clients we see or the specific nature of the legal action or issue addressed*
- *Legal services clients are motivated by principle not economic concerns and we work hand in hand with clients using litigation as one of our tools for social change, the kinds of conflicts of interests that arise when the profit motive of a firm conflicts with the client's best interest are not a concern in the type of litigation we undertake.*
- *Non-profit attorneys are very cognizant of the need to do things ethically, we often turn away clients because they want us to do something to which they have no legal recourse; we do not push the envelope although we zealously advocate within the bounds of ethics.*
- *Individual attorneys could push the envelope on ethical behavior due to ideological reasons or simply due to their own personality but I am not aware that this is a significant enough problem to warrant increased regulation.*
- *Do not accept fees so no profit motive; all clients are serviced regardless of their ability to pay; ideologically we consistently provide services for all types of people no matter their background or our ideological stance on their life choices, e.g., we provided the same effort to help a drug-addicted woman avoid eviction as a sober single mother of three experiencing hard times.*
- *The mission of legal services programs are to provide high quality legal assistant to indigent persons who otherwise would not have access to the justice system to resolve their legal problems; once access is achieved, non-profit attorneys have the same ethical requirement to zealously advocate on behalf of their clients consistent with professional ethics.*
- *Profit motive in not a realistic concern for our non-profit attorneys as they could easily move to a for profit firm and make much more money; ideological motive is something we're very careful about; we have discussions with potential clients about their motivations and goals before we sign on as counsel, we are counsel, they are the clients and it's their decision every step of the way. For example, we have recently started several cases based on the misuse of copyright claims to ISPs aimed at censoring speech online rather than based on legitimate copyright interests. In 2 recent ones our clients started out wanting to take the case to a decision, but after a few weeks, decided they just wanted to keep the speech down off of the Internet rather than fight it out. In each case we quickly settled with the defendants, garnering releases for our clients, rather than go forward with strong motions that would have set precedent.*

YES

- *Ideological or resource needs of nonprofits sometimes drive their decision making but generally to a much lesser extent because those two needs tend to balance each other. A non-profit law program must either maintain its qualification for grants or place limits on case acceptance to ensure that its litigation benefits the public in general and therefore entitles the nonprofit to attorneys fees under California's fee shifting statutes, CCP 1021.5 in particular. Our program is an example. While we receive IOLTA funds from the State Bar, these funds only provide only one portion our operating expenses. Court-awarded attorneys fees and some small grants provide the balance of our budget. Consequently, not only must we qualify under the State Bar Rules for IOLTA funds, we must also prove the benefit and value of our legal representation to other funders and to the courts.*
- *Inter-organizational politics and competition for funds can twist the mission away from service and toward funding preservation*

Question 19: BENEFITS OF A REGISTRATION SYSTEM

The majority of respondents do not see benefits of any kind of registration system. Others cited the following benefits.

- *A statewide referral system*
- *Setting minimum standards and uniformity of practice*
- *Could help to identify phony non-profits*
- *Regulate out of state non-profits; California non-profits will have individual attorneys subject to Rules of Professional Conduct; out of state non-profits generally do not*
- *Registration for non-profit providers that are not IOLTA; State Bar's oversight of IOLTA recipients effectively results in more vigorous regulation than what exists for for-profit firms*
- *Added credibility for the non-profit organization as well as the State Bar of California*
- *Oversight by the State Bar*

Question 20: EFFFECTIVE REGISTRATION/REGULATORY SYSTEM

The majority of respondents do not think that any registration or regulation system is required. Others cited existing systems to model or elements they believe are necessary for any effective registration/regulation.

- *Attorney General registry of Charitable Trusts – basic guidelines for following ethics guidelines; annual registration with names, bar numbers of attorneys working for agency; responding to client's complaints with an understanding of the legal services world*
- *Overview of types of cases is sufficient*
- *Similar system to for-profit regulation with the exception of a non-attorney board*
- *Similar system to the State Bar Certified Lawyer Referral Service Program*
- *Same system as system for other lawyers*
- *Convert existing grant requirements and standards necessary for IOLTA funding and Equal Access funding into effective regulatory structures*
- *Registration listing only and description of services for the public to access*
- *Peer review*
- *System should scrutinize out of state non-profits*
- *Attorneys who violate the Rules of Professional Conduct should be sanctioned by the State Bar*
- *Any regulatory system should not interfere with the ability of the organization to accomplish its mission using litigation as a means of social change*
- *State Bar must be ideologically neutral to gain non-profit's trust*
- *Our grantors audit our programs, another grantor requires two report summaries yearly. This is a major check for our agency because we have to refer back to what we have promised and what we have fulfilled*
- *If any registration, it should be simple and affordable, e.g. a checklist of required characteristics signed off on by Board Presidents and updated regularly; should not take more than 2 hours of attorney time*
- *Do not recommend this but could envision a requirement that non-profits certify they have malpractice insurance or something similar, those that don't would have more regulatory oversight; must ensure that any required information protects the client's privacy.*

Question 21: DETRIMENTS OF AND/OR BARRIERS TO REGSITRATION/REGULATORY SYSTEM

- *Little to no potential for protecting the public*

- *Too costly for both providers and regulators*
- *Resources (time, money) diverted away from legal services for clients*
- *Bureaucracy; another administrative task for non-profits that are already stretched too thin*
- *Censorship –State Bar must demonstrate it is ideologically neutral*
- *Deter new non-profits from starting*
- *Shut down existing non-profits that do not have existing resources to deal with additional barrier*
- *Rural areas with very small agencies (e.g. battered women's shelter) that offer legal services may be forced to drop legal services thus pushing clients to go pro per*
- *Non-profit law school clinics would cease to exist with an all attorney board – universities are required by non-profit tax rules to diversify and represent a broad spectrum of their communities*
- *Inability to have community members on the board and non-profit funding source requirements*
- *Would need to provide training to non-attorney board members if all attorney board required*
- *State Bar lacks professional knowledge and experience to set standards or registration requirements;*
- *Diversity of services offered would be reduced or limited by a "one size fits all" requirement*
- *First Amendment issues*
- *See FRYE arguments*
- *Organizational reluctance from providers to surrender autonomy and open books and practices to outside scrutiny*
- *None – as long as they are not cumbersome or limit services to the disadvantaged*
- *Minimal – must be realistic, practical and affordable; IOLTA recipient requirements are likely to be more rigorous than any registration requirement*

Question 22: **ADDITIONAL COMMENTS**

- *I do think we should be required to have only attorneys sitting on our board.*
- *I see no necessity for regulating the practice of law by non-profit California Corporations.*
- *If the Bar cannot prove that it is an honest broker, then in must not regulate nonprofits.*
- *It seems that impact litigation nonprofits like ours are not really included in your survey questions, but please don't forget about us. We have different needs sometimes. For instance my Board has technologists on it rather than just attorneys because of our tech focus and that should be supported, not undermined by any regulatory scheme you devise. Too narrow a view of nonprofits could have unintended consequences.*
- *The extent of poor or compromised representation attributable to not-for-profit legal service providers is not a significant problem warranting a new system of registration or certification.*
- *The general counsel of Dupont may get a large bonus based on his legal work from his non-attorney boss who is directing his legal work. That-- not nonprofits lacking such profit opportunity -- may be of some concern to the Bar in lieu of wasting time with the very cash-strapped charitable legal venture extant in the state. Note that the FRYE case dealt with a fee dispute, where there are remedies in place for fee arbitration and existing standards for unconscionability which should and do apply.*
- *There is a great shortage of attorneys willing to do this type of work. I think it's fair to hire licensed attorneys from other states if the matters they deal with are federal issues. For example, the women who advise our clients on public benefits are licensed in MD, not CA.*

VOLUNTARY CONTACT INFORMATION OF RESPONDENTS

Thirty-seven respondents provided contact information.

III. Brief Narrative Overview of Public Comment Response

Six general public comments were received from non-profit legal services providers.

Five respondents oppose regulation. The level of detail and extent of their arguments vary and include: no evidence of harm or client abuse exists; lack of any profit motive by legal services programs as reinforced by existing state and federal regulations; client protections are already afforded by the ethical rules applicable to the individual attorneys and IOLTA-funded organizations; non-profit providers are highly monitored by their funders; the substantial risk of impairing First Amendment rights; and the cost and difficulty of imposing any additional effective regulation on a broad group of legal services providers. Of those opposed to regulation, most felt strongly that any proposed regulations must exempt IOLTA-funded non-profit corporations.

One respondent supports regulation of those non-profit legal services organizations that do not have the delivery of legal services as their primary purpose. As a starting point for regulation, he supports the adoption of the ABA's voluntary guidelines for the delivery of indigent legal services by traditional legal aid programs as well as the ABA's guidelines for pro bono programs using volunteer attorneys.

APPENDIX 2 – 3

SURVEY RESPONSES FROM CONSUMERS

The State Bar of California

Data Compilation on the regulation of non-profit legal services providers

Explanation of Data Compilation

Three surveys, one for non-profit providers of legal services, one for consumers of legal services and one for the general public were distributed to over 2,000 targeted individuals and agencies. Respondents also had the opportunity to contribute comments by letter, e-mail, and/or fax during the public comment period from October 2006 to January 31, 2007. That compiled input is provided here.

Information is presented according to category of respondent in three sections:

Section 1.0 – Providers;
Section 2.0 – Consumers;
Section 3.0 – General

Each respondent group's section contains:

d.) a brief narrative overview of survey results;
e.) an "at-a-glance-summary" of survey results by question;
f.) a brief narrative overview of public comments submitted.

Totals of responses and input received are as follows:

Providers: 67 total (61 surveys; 6 public comments submitted).
Consumers: 15 total (13 surveys; 2 public comments submitted);
General: 127 total (119 surveys; 9 public comments submitted);

It should be noted that for all surveys not all respondents answered all questions. Additionally, with some questions, respondents had the opportunity to select more than one option. Therefore the total number of responses to the survey questions will not always equal the total number of respondents overall within their respondent's group.

Comments in *italics* are direct quotes from survey respondents and have only been modified when a specific organization or individual was referenced. Not all comments (or direct quotes) to survey questions are included due to volume but those presented accurately reflect responses submitted.

Section 2.0: -CONSUMER SURVEY RESPONSES-

III. Brief Narrative Overview of Survey Responses

Comments from consumers via the on-line survey are very limited. While efforts were made through legal services providers and other constituents to assist in gathering consumer responses, this target group typically has limited on-line access.

Thirteen on-line surveys were received with much inconsistency. For example, when asked if non-profit providers of legal services should be regulated, one respondent indicated yes but further elaborated that they do not believe there is a need for regulation. Some responses in general do not appear relevant to the questions asked or provide comprehensible elaboration.

Based on the responses of the on-line survey, the most detailed complaints (2) involve union representation comments raised about conflict of interest questions about the structure and quality legal services.

Another consumer, who was a former legal services professional, commented on the lack of concern from senior and managing attorneys with regard to paralegals engaged in the unauthorized practice of law.

With the exception of these complaints, there does not appear to be widespread evidence of consumer abuse based on the on- line responses - despite the dissatisfaction of some of the consumers with the handling or outcomes of their cases. The majority of responding consumers favor regulation of non-profit legal services providers.

IV. At-A-Glance Summary of Survey Responses

Total survey respondents: 13
Not all respondents answered all questions

Questions 1 – 3: **CONTACT WITH NON-PROFIT ORGANIZATIONS PROVIDING LEGAL SERVICES**

The majority of consumers of legal services had contact as a client/customer or a member/employee of membership organizations (unions), legal aid programs, and lawyer referral services.

Questions 4 & 7: **RELATIONSHIP AND SUBJECT MATERIAL**

Subject matter generally identified from most contact to least contact included consumer, housing, domestic violence, health, public assistance, employment and education code, immigration, labor law (union), elder/senior law, international conventions and disability law.

Calls for contacts and referrals, inquiries about services provided, employee union group legal services, restraining orders, witness protection type issues, wage and financial aid collection, divorce and child custody, contesting eviction/unlawful detainer, retaining a free legal services office, and proper completion of forms filings and paperwork.

Questions 4 – 5: **CITIES AND DATES OF CONTACT**

Cities identified most: Los Angeles, Sacramento and San Francisco. Dates of contacts ranged from 1987 (one case) to current time of survey (December 2006).

Questions 7 – 9: **FEES**

One respondent reported being charged a fee though not directly. Two respondents identified (1) sliding fee, (1) hourly fee but provided no further elaboration on amount.

Question 11-12: **DISATISFACTION & COMPLAINTS**

Six respondents reported being dissatisfied. Out of those six, complaints were identified by 5 respondents:

1.) case not resolved to client's satisfaction so client dropped the matter;
2.) client "won" case but was dissatisfied with representation;
3.) client claimed legal services providers seemed corrupt, lied about the law, type of assistance and gave detrimental advice thus making client feel intimidated and discouraged from seeking redress;
4.) client claimed attorney was ignorant about the law and that attorney's interests and the organization that the attorney worked for were at odds with client's interests**;**
5.) client dissatisfied outcome of the case.

Question 13: **COMPLAINT FILING**

Two dissatisfied clients filed a complaint with one or more enforcement agencies.

Question 14: **REGULATION OF NON-PROFIT LEGAL SERVICES PROVIDERS**

Majority of respondents indicated they favored regulation but provided little elaboration as to why. Also, a few respondents who indicated they favored regulation provided further comment that they did not see the need for regulation.

YES

- *Non-profit corporations are prone to corruption and should be recognized as entities under the law*
- *Public is entitled to "regulated" professionals*
- *Attorneys ignore concerns of paralegals engaged in unauthorized practice of law*
- *Public interest attorneys tend to be generalists with limited resources engaging in areas where they have little expertise*
- *Legal services group represented organization's ideological*

NO or no opinion

- *Not necessary as attorney is licensed and could get fired if they "don't do a good job"*
- *Individual attorneys and paralegals are responsible as individuals for their own actions*

Question 18: **CONTACT INFORMATION OF RESPONDENTS**

Eight respondents self – identified and provided contact information.

V. Brief Narrative Overview of Public Comment Response

Two consumers provided comments by e-mail or post. One supports regulation and the other is unclear on the issue of regulation of non-profits. No abuse of clients by non-profit legal services providers was presented.

APPENDIX 2 – 4

SURVEY RESPONSES FROM GENERAL COMMENTERS

The State Bar of California

Data Compilation on the regulation of non-profit legal services providers

Explanation of Data Compilation

Three surveys, one for non-profit providers of legal services, one for consumers of legal services and one for the general public were distributed to over 2,000 targeted individuals and agencies. Respondents also had the opportunity to contribute comments by letter, e-mail, and/or fax during the public comment period from October 2006 to January 31, 2007. That compiled input is provided here.

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Section 3.0: - GENERAL SURVEY RESPONSES-

VI. Brief Narrative Overview of Survey Responses

Comments from general survey respondents represent a wide group of constituents. A few providers of non-profit legal services and consumers responded to this questionnaire instead of the corresponding questions for their target group. Their input is captured here and identified as such.

Overall, there appears to be a majority in opposition to both a potential registration or regulation system. The underlying arguments against regulation include: no evidence of harm; the existing licensing of attorneys by the State Bar is sufficient; potential constitutional and freedom of speech/association issues; and an increase in cost, bureaucracy, and resources that would take away from resources and services available to assist the low-income.

Those supporting registration or regulation felt that no oversight invites abuse. Oversight will help to protect the public and give clients opportunity for recourse against a non-profit entity – as opposed to an individual attorney. The majority of those supporting some type of registration or regulation indicated that it should be user friendly and of low-impact to the non-profit legal services organization.

VII. At-A-Glance Summary of Survey Responses

Total survey respondents: 118
Not all respondents answered all questions

Question 1: **RESPONDENT'S AGENCY & POSITION**

16 Law school related (deans, clinical professors, career placement advisors)
13 Private law firm, self-employed (Pro bono coordinators, Counsel of record in FRYE, current or former volunteers)
10 Court related (judges, court executive officers)
10 Family law facilitators
12 Legal services related agencies
8 Public Libraries (directors, branch managers)
6 Bar Associations and Special Member Bars (presidents)
6 Social services and human services agencies
5 Miscellaneous
4 Housing/Real Estate
4 Senior/Aging related State agencies/non-profits
3 Lawyer Referral Services
3 District Attorneys
3 State Bar Volunteer Entities
2 non-profits
2 Education
1 Legislator
1 Deputy Attorney General

Questions 2 (a) – (d): **CONTACT WITH OR EXPOSURE TO NON-PROFIT ORGANIZATIONS PROVIDING LEGAL SERVICES, NATURE OF ORGANIZATIONS, SUBJECT MATTER**

The majority of on-line respondents have had or continue to have a high level of knowledge of or exposure to some type of non-profit legal services agency. The nature of most non-profit organizations providing legal services included legal aid/services organizations and law school

clinics. Subject matter that respondents were familiar with in relation to their exposure to non-profit legal services agencies varies but remains fairly consistent within major "categories" of respondents including but not limited to family law, landlord/tenant disputes, elder law and general civil matters.

A majority of respondents to the General Survey on-line tend to be long standing **former legal services employees or current or former volunteers**. Most continue to interact with non-profit legal services groups by contributing pro bono services, financial aid, organizational and ethical advice and counsel. They collaborate on and participate in clinics sponsored by non-profit legal services agencies and are active in referring clients to these agencies. Many former legal services employees work for other non-profits, state or local government agencies or as **private attorneys**.

Court executives, judges and family law facilitators accounted for a large group of the respondents. Almost all reported an extremely high exposure to (daily basis) and knowledge of legal services providers. Several courts contract with legal services providers for self-help services where providers conduct court-based clinics in the areas of family law, unlawful detainers, guardianships, small claims and domestic violence. **Family law facilitators** work closely with non-profit legal services providers to complement efforts on court-based programs and make referrals to providers on a daily basis. The majority of **judges** who responded reported nearly daily exposure to legal aid attorneys representing indigent clients mostly involving landlord/tenant and public benefit issues.

Human and social services agencies tend to cooperate on a referral and advocacy basis with providers. A handful of these respondents subcontract to and fund legal services providers. One respondent has analyzed and monitored non-profit legal service providers for the past six years.

The majority of **public and law library** respondents reported organized and on-going collaboration with local legal services providers and or local bar associations with legal services programs. Most included seminars and free clinics on issues related to conservatorship, guardianship, bankruptcy and immigration. Libraries from smaller counties had minimal general awareness of providers and their contact tended to be on an information referral basis only.

Nearly all **lawyer referral service** (LRS) representatives that responded cooperate with local legal aid offices and other non-profit legal services agencies for pro bono services in the areas of landlord/tenant, elder law and bankruptcy. Those LRS's not already cooperating or involved with non-profit legal services providers have a general knowledge of these providers through publications and seminars provided by non-profit legal services entities.

The majority of **Bar Association Leaders** who responded are involved with and support their local legal aid organizations. They work with legal service providers to get more funding, provide management support, collaborate on joint programs, provide volunteers and serve as board members. Subject includes but not limited to landlord/tenant, family law, and health care advocacy.

Law schools, deans, clinical and ethics professors, and career advisors that participated in the survey had varied contact and knowledge of non-profit legal services providers. While some schools operate clinics with non-profit providers and connect students to these organizations for pro bono opportunities – smaller law schools tended to have only a general awareness of non-profit legal services providers through the media and other law school clinics. A number of deans sit on local boards or used to volunteer with providers. Areas of subject matter identified were landlord/tenant, family law, domestic violence, children's advocacy and immigration.

Three **deputy district attorneys** responded to the survey; one has exposure to non-profit legal services providers who defend indigent defendants in misdemeanors and infractions on quality of life crimes or protests; one did not elaborate; and one has served in State Bar leadership roles involving legal services.

One **Deputy Attorney General** responded to the survey. He appeared in cases as opposing counsel from public interest and a legal services entity.

One **legislator** responded to the survey. He was a former employee of a legal services organization for five years and continues to observe and support local legal aid organizations and efforts on issues regarding poverty law.

Two **consumers** responded to this survey instead of the "consumer survey". One consumer's interaction with non-profit legal services was as a teacher and a union representative. She used her union's group legal services. The other consumer was a student who took a legal aid clinic through her student union in an attempt to address a dispute with her employer.

A few **legal aid staff attorneys** responded to the "general" survey instead of the "non-profit provider survey". Their responses to the general questions are included.

Private attorneys tended to be former legal services employees or volunteers in addition to practitioners with general awareness of non-profit legal services providers.

Question 3: COMPLAINTS

- **64% have <u>not</u> received or heard of any complaints**
- **36% have received or heard of any complaints**

The majority of those who stated receiving or hearing of complaints provided mostly anecdotal explanations and no specifics. Few if any specific complaints indicating consumer harm seem to be presented. The overriding complaints centered on clients wanting *more* legal services than the system is currently providing (or able to provide) – not complaints about actual *quality* of services received.

- Ineligibility guidelines (income test for pro bono services often excludes services for working poor)
- Limited assistance/services available from providers (lack of resources, volunteer attorneys, rarely full representation or coverage of complex cases, providers under grant and legal restrictions)
- Not enough quality time given to cases because case loads already too large
- Not enough volunteer lawyers or paralegals available - litigants are turned away due to staffing shortages – lack of funding
- Difficulty in scheduling appointments, long waits, getting "run around"
- Law library – consumer complaints/distress on how to fill out forms
- Legal aid attorney was listed as attorney of record but failed to go to the trial
- Legal aid and volunteer lawyers in the courthouse give legal representation and only help one party in a case (in contrast to Family Law Facilitator program that does not give legal 'representation', is neutral, and helps both parties)
- Legal aid providers do not seem as experienced, skilled or dedicated as those acting for-profit, may get substandard assistance
- Adequacy of legal advocacy

Question 4: SUGGESTED ADDITIONAL INFORMATION SOURCES

All appropriate suggestions were followed up on or already targeted by the State Bar as an information source.

Question 5: **REGULATION OF NON-PROFIT LEGAL SERVICES PROVIDERS**

- **57% - No further regulation needed**
- **29% - Support regulation or certification by the State Bar**
- **14% - No opinion or don't know**

NO

- *There have not been abuses*
- *There were many amicus briefs supporting the Tenderloin Housing Clinic at the Supreme Court*
- *Attorneys are already licensed and regulated as individuals*
- *Rules of Professional Conduct, Business and Professions Code, Rules of Court and decisional law are adequate*
- *Non-profit legal services providers are already regulated by funders & non-profit corporate law*
- *Non-profit legal services providers are required by multiple contracts, statutes and regulations (state and federal) to hire auditors who review cases, compliance with contracts, financial activities and management functions*
- *Supervising attorneys are responsible*
- *Clients have the recourse of filing a complaint against an individual attorney with the State Bar*
- *Most non-profit legal services organizations already have boards consisting of an attorney majority*
- *Regulation would be onerous and reduce assistance available to the public*
- *Regulation would be too costly and bureaucratic - most providers already operating on few resources*
- *Faith based organizations providing legal services have a first amendment right to free exercise of religion, regulation would interfere with the provision of those legal services*
- *Some non-profit corporations (e.g. domestic violence and sexual assault agencies) have a greater focus to serve clients in addition to providing limited legal services*
- *Non-profit legal services providers tend to work in more ethical environments than a for profit and are motivated by higher principles*
- *Sometimes the absence of evidence is evidence of absence - no public servants came forward with any complaint at State Bar hearings*
- *Those who pushed for regulation are those who would most benefit from reducing, or eliminating legal services to the poor – landlords against tenants of largely impoverished neighborhoods*

YES

- *Lack of regulation and oversight invites abuse and lowers quality of legal services and avenues of recourse*
- *Unauthorized practice of law is a problem with paralegals – no control or accountability*
- *Non-profit providers should be held to the same standards as private entities but at little or no cost*
- *Regulation should be less strict and limited for non-profits*
- *Individual attorney for non-profit may not be licensed in California so no oversight*
- *Registration and/or certification would set standards for organizations*
- *Attorneys of non-profit legal services providers are directed by non-attorneys*
- *Attorneys of non-profit legal services providers enable tenants to bring legal action without merit*

Question 6: **IDEOLOGICAL AND/OR PROFIT MOTIVES OF NON-PROFITS**

- **60% - NO - Ideological and/or profit motives of non-profits do NOT push toward the margins of unethical behavior warranting regulation**
- **40% - YES - Ideological and/or profit motives of non-profits DO push toward the margins of unethical behavior warranting regulation**

NO

- *No evidence of influence or ideological or profit motives influencing client representation*
- *Attorneys are required to be members of the State Bar – this provides fully adequate protection*
- *Non-profits are not driven by profit but to assist those in need, staff is poorly paid, volunteers unpaid*
- *Those working in non-profits are highly ethical and professional -- motivated by doing good work and getting positive outcomes for clients*
- *Attorneys of non-profits do not retain legal fees from awards*
- *Profit is not the motive, not losing money during operations is*
- *What profit? Who is making money in the non-profit model?*
- *Motives of non-profits and profit driven are different – no "rain making" in the non-profit environment*
- *Regulating ideological motives is tantamount to a dictatorship and oppression*
- *Constitutional law makes a clear distinction between commercial and non-commercial speech and rights*
- *Competition exists between non-profits but tends to produce more, not less ethical behavior*
- *Ideological concerns can be handled more effectively in the political - not legal sphere*
- *This is not a reason for regulation but for holding supervisory or management personal responsible – for example criminal charges brought against executives for fraud are more effective than actions taken against the entity*
- *If clients are not happy with the ideological motives of the non-profit they do not have to work with that non-profit*
- *In a non-profit – there are two clients: the funder and the client. Most clients are one-time clients so there is no profit motive. Funders provide funding based on the quality and range of services provided so there is no incentive to commit ethics violations but there is incentive to meet the goals of improving access to the legal system.*
- *Behavior should be monitored, not motives*

YES

- *Entities solicit clients to pursue their ideological agenda*
- *For-profits must be more concerned with ethical behavior because misconduct can destroy the business – non-profits have no limitations or consequences for misconduct*
- *Ideological and political interests can create conflicts of interest*
- *Non-profits need to demonstrate results to their funders and to additional potential funders – more pressure to focus on numbers served not quality of services*
- *Money still matters in non-profits*
- *A strongly held belief system pushes as hard as a financial motive*
- *Both should be regulated in the same manner*
- *With no "checks" in place and huge caseloads, bad lawyering could take place*
- *Attorneys at non-profits are less motivated and just do the minimal*
- *Attorneys at non-profits don't have to carry errors and omissions insurance*
- *There is always a possibility of misconduct by a few, so all should be regulated*

- *Zealots require regulations as much as plutocrats*
- *Fiscal oversight is needed*
- *Non-attorney board members can make decisions about legal actions which may not be appropriate*
- *If any monetary gains can be retained by the non-profit there should be regulation*
- *Regulation might be necessary for non-profits funded by non-governmental funds*

Question 7: **BENEFITS OF A REGISTRATION SYSTEM**

- *Little or none*
- *Benefit to the Bar only – more fees charged, more jobs to do the registration*
- *Centrality of information for identification of and referrals to legal resources available for clients and other providers*
- *Benefit to centralized listing of providers but registration is not necessary to accomplish that – could be a directory*
- *The Bar already publishes a legal services directory like this*
- *Not opposed to a simple registration that is free, simple or voluntary*
- *Accountability*
- *Consistency – could help to set regulatory standards*
- *Consumer protection – renewed awareness of ethical rules*
- *Depends on what type of registration system*
- *Registration is not the issue, regulation is*
- *Legitimacy of the providers and opportunity for clients to have recourse*
- *Maybe for unions*
- *Benefit only if way to check for and site violations*

Question 8: **WHAT WOULD BE AN EFFECTIVE REGISTRATION/REGULATORY SYSTEM?**

- *None (the current system of individual attorney regulation is adequate)*
- *A centralized list showing services, locations and limitations of services provided that can be accessed on the internet and is of little or no cost to non-providers*
- *If any registration at all should be simple*
- *Voluntary registration*
- *State Bar already has a legal services directory with necessary registration information*
- *A system on the internet – easily accessed and monitored by a panel of attorneys and non-attorneys*
- *Enhancing the current system of regulation of individual attorneys – client awareness*
- *Technical support from the Bar to programs that may have staff disciplinary issues*
- *A state license giving the state the right to monitor and receive complaints*
- *Same or similar oversight and registration as for-profits– all corporations register, provide names of attorneys, proof of insurance and certificate from the Secretary of State*
- *Annual registration that includes name, address, supervisors, practitioners, cases handled, courts in which agency appears. No information should abridge freedom of speech and association*
- *Regulatory issues should be identified – only those non-profits not already covered by these regulatory issues through another source (government or other funders, reporting requirements) should be regulated.*
- *A more effective regulation would be greater controls on the unauthorized practice of law by non-attorneys*
- *Annual report to the State Bar including financial, conflict of interest and other information*
- *Charge a fee, submit all licensing material and attorney information*
- *Assign an attorney to oversee the non-profit*

- *Regulation of the amount charged to clients*
- *Permit recovery against attorneys and insurance coverage if rules are broken*
- *Make it part of the 1994 State Nonprofit Integrity Act System*
- *Use the Lawyer Referral Services Minimum Standards Model – attorneys insured, oversight for how attorneys are chosen and their qualifications, financial oversight*
- *Registration should require minimal information but also identify a "Responsible Managing Officer" for the delivery of legal services who is ultimately responsible*
- *Regulations that determine how much staff must be available to clients in order to receive a certain amount of funding*
- *An anonymous tip line to contact regulators*

Question 9: **DETRIMENTS OF AND/OR BARRIERS TO REGISTRATION/REGULATORY SYSTEM**

- *Cost and bureaucracy for providers would take away time and resources from clients*
- *A decrease in non-profit legal services organizations - especially those providing any legal services as a component of their organization or smaller organizations who may not have the administrative support necessary*
- *Added cost for regulatory agency – who pays?*
- *Political barrier – government officials or those in power may have other agendas that do not support certain non-profit providers point of view*
- *Creation of a two-tiered system – one for private attorneys and one for non-profits. Practice of law should be regulated not who provides it*
- *The U.S. and California Constitutions*
- *Impingement of client's rights, unnecessary investigation of non-profit*
- *Privacy issues, influence of the media and public opinion on cases*
- *Effectively communicating with all providers of non-profit legal services*
- *Non-cooperation from non-profit legal services organizations (intentional or just not knowing they are required to register)*
- *Enforcement – if the registration system is not adequately enforced the general public will be skeptical about its worth*
- *Rural communities may be denied access to legal services*
- *No barriers or detriments only if the administrative requirements are not burdensome*

Question 10: **VOLUNTARY CONTACT INFORMATION OF RESPONDENTS**

Seventy-four respondents provided contact information.

VIII. Brief Narrative Overview of General Comment Response

Nine public comments were received from the general public (not a consumer or a direct provider of non-profit legal services). Four respondents oppose regulation and two support regulation. The remainder of respondents' comments is mixed and/or unclear on the issue of regulation.

Major arguments against regulation include existing regulation by other entities of providers and the potential detriment to clients of non-profit legal services. Arguments supporting regulation include the necessity for consistency and accountability of non-profit legal services providers as well as the need to protect the public.

APPENDIX 2 – 5

TRANSCRIPT LOS ANGELES PUBLIC HEARING*

***** Please note that a reference in the report to the transcript reflects the page number and line number where the reference is found in the transcript (e.g. Appendix 2-5, 8:2-5 is page 8, lines 2 through 5)

ORIGINAL

1 STATE BAR COURT

2 OF THE STATE OF CALIFORNIA

3 PUBLIC HEARING

4 REGARDING PRACTICE OF LAW BY NON-PROFIT CORPORATIONS

5 December 6, 2006

6 11:30 a.m.

7

8

9

10

11 State Bar of California

12 1149 South Hill Street

13 Board Lounge

14 Los Angeles, California

15

16 APPEARANCES:

		PAGE
17 ROBERT HAWLEY	Chair	2
18 DANNI MURPHY	Panelist	24
19 SHARON NGIM	State Bar Staff	--
20 TOBY ROTHSCHILD	Speaker	5
21 PETER ELIASBERG	Speaker	25
22 BRIAN CHASE	Speaker	46
23 ADRIAN MARTINEZ	Speaker	51

24

25

1 P R O C E E D I N G S

2 MR. HAWLEY: On the record.

3 Good morning and welcome to this public hearing.
4 My name is Robert Hawley, H-A-W-L-E-Y. I am Deputy
5 Executive Director of the State Bar of California, and am
6 serving as the coordinator of this public hearing.

7 I am joined by Danni Murphy, who is a member of
8 the State Bar's Board of Governors and a member of the
9 Board's Regulations, Admissions, and Discipline Committee,
10 which is overseeing what we will refer to as the Frye,
11 F-R-Y-E, v. Tenderloin Housing Clinic case and study of
12 which this public hearing is a part.

13 The purpose of the hearing responds to the
14 directive the California Supreme Court gave the State Bar in
15 the Frye case, that is, Frye, F-R-Y-E, v. Tenderloin
16 Housing Clinic, Incorporated, 38 Cal.4th 23. That case
17 raised and examined the issue of nonprofit entities engaged
18 in the practice of law, and the extent to which those
19 entities should be registered or regulated by the State Bar
20 in a similar way that for-profit corporations and limited
21 liability companies are registered and regulated.

22 Currently, the regulation of various entities that
23 practice law in the nonprofit forum are not registered, and
24 the Frye case addressed that, and then posed the question to
25 the State Bar, "Should there be some kind of greater

1 regulation, oversight, registration process?"

2 In the fact-gathering process the State Bar has

3 undertaken to respond to this inquiry, we have scheduled

4 this public hearing here in Los Angeles, and we'll repeat

5 this process in San Francisco on Friday, December 8th. That

6 hearing is set for 11:30 a.m. at the State Bar in San

7 Francisco office at 180 Howard Street.

8 The purpose of this hearing is to hear from

9 interested parties in this area. The State Bar is

10 undertaking its responsibility here as a fact gatherer

11 seriously. We do not have a predetermined disposition or

12 perspective. We filed a brief. The Board of Governors

13 directed the State Bar to file a brief in the Frye case.

14 That was nonpartisan and noncommittal.

15 We provided background to the Supreme Court, and

16 the history on what the practices had been in this area,

17 and, in actuality, the Supreme Court adopted a great deal of

18 the State Bar's briefing in its decision, but ultimately the

19 State Bar has not staked out a territory here as to whether

20 there should be registration or regulation or not, and we

21 are seeking information from those people who are more

22 informed on the subject than the State Bar may be, and so

23 the speakers who appear today, hopefully, will be able to

24 educate us and inform us.

25 We have provided questionnaires as a mechanism for

1 gathering data. We have distributed questions that the
2 State Bar has that we hope to get answers to, in one way or
3 the other. As the speakers present here, I may well ask
4 questions to gather further information, and, in that
5 regard, I want to make an important point for those people
6 who are here speaking.
7 You are taking time out of your busy schedules to
8 come and assist us, and we thank you for doing that, and we
9 are dependent upon the information that you're going to be
10 giving us. I am going to, more than likely, pose questions
11 to you, because you spend your daily lives in this world,
12 and I don't.
13 In asking my questions, I don't wish to put you on
14 the spot. You are not under oath. You're not being cross-
15 examined. This is not an inquisition. If I should fall
16 into the bad habits of a lawyer who cannot civilly ask a
17 question, you are free to tell me that you do not wish to
18 answer, or you decline to answer, or that I should rephrase
19 the question in a more civilized manner.
20 That, of course, is not going to happen, but I
21 want to put you at ease that you all work for a nonprofit,
22 more than likely, or have had some experience, and I do not
23 want to put you or your employer in any uncomfortable
24 setting. However, I'm very inquisitive, and I've got lots
25 of questions, and my mission is to find as much information

1 as I can.

2 So, in that regard, if we do pose questions, I

3 want you to be perfectly comfortable in saying, you know, "I

4 don't know" or, you know, "I'd rather not answer that," or

5 whatever, and that's perfectly fine, too, because, you know,

6 as I said, you're not here under force of subpoena, and I

7 have absolutely no ability to get information out of you,

8 other than what you're willing to share.

9 So, with that, we'll begin with our first

10 scheduled speaker, who I believe is Toby Rothschild. Would

11 you please introduce yourself in a customary way, so the

12 record can reflect who you are and why you have chosen to

13 come and share your time with us today.

14 MR. ROTHSCHILD: Thank you very much. My name is

15 Toby Rothschild. I am the general counsel of the Legal Aid

16 Foundation of Los Angeles. For some background, I have

17 spent the last 37 years of my life working for legal

18 services programs, having served 27 of those years as

19 executive director at the Legal Aid Foundation of Los

20 Angeles -- of Long Beach, rather, and then, six years ago,

21 the two organizations merged, and I became general counsel

22 at Legal Aid Foundation of Los Angeles.

23 I also have served as the founding chair of the

24 Legal Aid Association of California, which is sort of a

25 trade association of legal aid programs statewide, and also

1 as founding chair of the Management Information Exchange,
2 which is a national organization that attempts to increase
3 the quality of management in legal services programs, and I
4 serve on the board of the National Legal Aid and Defenders
5 Association, which is the national organization of legal aid
6 and public defender programs.
7 When I first heard that these hearings were being
8 held, I thought that this would be very simple, that I would
9 come -- and the question is whether there are any problems
10 that would justify additional regulation -- come and tell
11 you that the answer is no, and then I could sit down. But
12 then I got this list of questions, and it was indicated that
13 I might want to be a little more factual and complete in my
14 discussion than that.
15 So I will try to walk through the questions, I
16 think is probably the best way to organize things, since
17 you've provided that nice organizational structure, and
18 indicate my thoughts on each of the questions that you've
19 posed, the nine questions.
20 The first question relates to individuals who have
21 been seriously -- or, in your terms, "legitimate and extreme
22 dissatisfactions, complaints, or other issues." Clearly, I
23 have dealt with clients who were dissatisfied and who had
24 expressed complaints. I don't believe, in my 37 years, that
25 any of them have risen to the level even of serious, much

1 less extreme. Virtually all of them are resolved within the
2 program.
3 Any program funded by the Legal Services
4 Corporation is required to have a formal grievance
5 procedure, which includes an appeal to a board committee, if
6 the client so desires, and in the 37 years, I think I've
7 seen two, before this year, that got as far as to the board
8 of directors and didn't get resolved at the staff level.
9 One of those two was -- both of those two were just in the
10 last few weeks, and are currently in process, but neither of
11 them is of a magnitude that would qualify as serious, or
12 certainly not extreme.
13 MR. HAWLEY: Mr. Rothschild, this is up to you.
14 As you go through these questions, if I've got a follow-up,
15 would you prefer me to be on subject and ask you then?
16 MR. ROTHSCHILD: Yes. Let's do it as it comes.
17 MR. HAWLEY: And I'm drawing here upon your deep
18 and wide experience in the legal services world. I mean,
19 based on your introduction of yourself, you have been in
20 this field for quite a long time, and have a great deal of
21 experience, and it's valuable to hear, you know, that,
22 within the legal services world, it is a norm to have, you
23 know, client grievance procedures that have a process.
24 Could you speak for a moment about malpractice
25 insurance, and what that reality is in the legal services

1 world?

2 MR. ROTHSCHILD: To the best of my knowledge, all
3 of the legal aid programs, which would include both the
4 LSC-funded programs as well as the IOLTA-funded programs, do
5 carry malpractice insurance.

6 There are three primary providers that offer a
7 special legal services package that insure virtually all of
8 the programs, not just locally, but nationally. They
9 include not only coverage for the attorneys and other
10 employees of the organization, but they include management
11 D and O, they include board member liability, and they also
12 include coverage for volunteer lawyers.

13 So, when a pro bono lawyer works on a case
14 assigned by our organization or any of the others insured by
15 these groups, our insurance is primary, actually, to their
16 own, and that's one of our major selling points for getting
17 pro bono lawyers to come volunteer for us. So, yes, I think
18 virtually all of the organizations do carry malpractice
19 insurance for both the organization and the individual
20 staff.

21 MR. HAWLEY: And one follow-up there. You know,
22 based on our research, it is a rare or nonexistent reality
23 that you would ever see a reported case involving a client
24 suing a legal service provider in a malpractice instance,
25 you know, and a lot of cases happen that don't get up into

1 the published appellate reports.

2 Do you have any general observation as to whether

3 that's a common occurrence, I mean, in terms of an actual

4 claim being brought forward, a rare occurrence, a common

5 occurrence, you know, hardly ever happens, any general feel?

6 MR. ROTHSCHILD: It's rare, but it certainly

7 happens.

8 MR. HAWLEY: It does.

9 MR. ROTHSCHILD: One of the other hats I wear is

10 that I do a lot of ethics work. I'm vice-chair of the L.A.

11 County Bar Ethics Committee, and liaison from the Access To

12 Justice Commission to the commission that's currently

13 rewriting the rules in California.

14 As a result of that, I've done some work

15 nationally with -- the National Legal Aid and Defenders

16 Association has an insurance subsidiary that is one of the

17 primary insurers, and I've done a lot of risk management

18 work with them. So I've been involved -- I've seen some of

19 the claims history and stuff nationally on that.

20 The numbers of claims, particularly on the civil

21 side, because they also insure defender programs, is

22 extremely low, which is why the rates are very low. I'm

23 personally aware of maybe half a dozen cases over all those

24 years that have resulted in either judgments or significant

25 settlements, more than nuisance settlements.

1 You know, as I say, it's not a common occurrence,
2 partly, I think, because the amounts involved in the cases
3 tend to be low, and, therefore -- I mean, I'm certainly not
4 going to suggest that we never make mistakes in the handling
5 of our cases, but the ability for clients to receive
6 remedies through the insurance mechanism, with the
7 litigation that it requires, is I'm sure limited because of
8 that. But it is a small number that ever get to even filing
9 a claim, much less getting any kind of result.
10 MR. HAWLEY: Thank you for that information on
11 that subject.
12 MR. ROTHSCHILD: The second question relates to,
13 how do we keep the ideological commitment of the nonprofit
14 and its board influencing the independent legal judgment?
15 We have in California Rule 1-600 of the Rules of
16 Professional Conduct that basically prohibit a lawyer from
17 being influenced by others in the way they handle the case,
18 that and the general rule that boards of directors are not
19 allowed to get involved in the cases.
20 There's an opinion by the L.A. County Bar Ethics
21 Committee in the early '70s -- I only remember it so well
22 because I was the one that requested it -- that says,
23 basically, that the board of directors is not a part of the
24 attorney-client relationship and is not privy to, not
25 allowed to be privy to, any of the confidential attorney-

1 client information, and programs regularly adhere to that
2 restriction.
3 The role of the board -- and this really gets to
4 the next question, or one of the other questions. The role
5 of the board really is setting broad policies, and the board
6 may say, "We want you to handle housing cases, and we want
7 you to handle consumer problems," or "We want you to handle
8 civil liberties cases," or whatever that range of issues may
9 be that the board decides is the appropriate policy for the
10 organization.
11 It's not the board's decision, in any organization
12 I've been involved with or been aware of, to say, "You
13 should take this case and not that case," or "Here's how you
14 should handle the case." Those are decisions made by the
15 staff, by the individual lawyers and their lawyer
16 supervisors within the organization.
17 The ABA ethics opinions came to that conclusion as
18 well, in the early '70s, in the early days of legal
19 services, and have held that. I think it's 8.3 in the ABA
20 Model Rules that restrict the board, and the counterpart of
21 that is, because the board doesn't have access to any of the
22 information, they also don't face conflict of interest
23 issues by serving on the board.
24 So the fact that we're suing one of their clients
25 doesn't create a legal conflict for them that would require

1 them to either recuse the firm or recuse the legal aid
2 program, but that's because they don't have that access to
3 the client information, that their role is totally sort of
4 policy level.
5 MR. HAWLEY: In that regard, you've answered this,
6 but I want to pose kind of a hypothetical on this ideology
7 issue, taking nonprofit -- you're in the legal services
8 world, so we can put it in that environment.
9 The board is involved in fund-raising activities,
10 and the entity may even have as its sort of cornerstone some
11 ideological commitment, you know, to a particular area,
12 whether it's disability rights or, you know, whatever it
13 might be, and there is a case that has come in that has
14 incredible public relations, ideological fervor associated
15 with it, but it simply lacks legal merit, you know, in terms
16 of its initial filing or its appeal, but pushing it through
17 the legal system is going to get a big payoff in terms of
18 the publicity, although it's so without merit that it would
19 be deemed frivolous.
20 I mean, what I'm hearing from you is that there
21 are those divisions, so that the board's, you know,
22 potential excitement over the case is not going to influence
23 the lawyer's judgment. I mean, I don't want to put words in
24 your mouth, but is that --
25 MR. ROTHSCHILD: That's absolutely true, and in

1 the case you've indicated, the lawyer knows that it's his or
2 her individual ticket that's on the line, not the board's
3 ticket, if they bring a frivolous case. It's the lawyer
4 that's going to be sanctioned, that's going to be, you know,
5 reported to the State Bar or whatever, not the board
6 members, and the lawyers I know, and have known over the
7 years in legal services, take that very seriously.
8 MR. HAWLEY: Thank you.
9 MR. ROTHSCHILD: The next question relates to the
10 so-called profit motive, or nonprofit motive, and whether
11 the ideology creates a motive for the organization to pursue
12 a case maybe to the disadvantage of the individual client
13 because of the broader benefits.
14 Again, my experience is that programs, once they
15 decide to take the case -- now, they may consider that in
16 taking that case in the first place, "Is this a case that's
17 going to have a broader impact beyond this individual
18 client? Is it a case that's going to, you know, make some
19 new law or clarify the law on a point?" But once that
20 decision is made, that the case is going to be accepted for
21 handling, if the client's best interests then says, "We
22 ought to settle this case with a confidentiality agreement,
23 so nobody will ever know that this client was injured, or
24 how they were recompensed, or how horrible and terrible the
25 other side was," the organization is going to do that.

1 They may try to discuss with the client whether
2 that's in their long-term best interests, but, in terms of
3 the bottom line, if the client says, "We want to settle on
4 this basis," they will do that, even if it means one of the
5 issues is waiving attorneys' fees, which is often raised by
6 our opponents to say -- and it doesn't apply, I should say,
7 to Legal Services Corporation-funded programs, who can't get
8 attorneys' fees, but for other nonprofit providers.
9 The next question relates to whether there are
10 changes in the existing statues if you were to decide to
11 implement a system. Are there problems in the existing
12 rules that would cause problems for nonprofit providers?
13 And the answer is, absolutely. If I look at the statute,
14 first of all, I think the statute is badly constructed, but,
15 getting to the professional law corporation statute, Section
16 13406B, it has a series of requirements for what a nonprofit
17 law corporation has to do.
18 One of those is that all members of the
19 corporation, if it's a membership organization, are persons
20 licensed to practice law in California. That's problematic
21 for a number of membership-based organizations. Most of the
22 legal services programs are not membership organizations,
23 but a number of the non-IOLTA recipients are membership-
24 based organizations, and it would be very problematic, and
25 probably unconstitutional, to say that, you know, you can

1 only practice law as a corporation, as a nonprofit
2 corporation, if all of your members are lawyers, so that the
3 NAACP, for example, would have a problem, or ACLU, or other
4 organizations that are membership-based.
5 All of the members of the board are licensed to
6 practice, again problematic. In LSC-funded, Legal Services
7 Corporation-funded, organizations, we are required to have
8 one-third of our board members as eligible clients. It's
9 unusual to find one of those that's a lawyer.
10 In other organizations -- in addition, we can have
11 a small number that are not lawyers and not clients. The
12 requirement is 60 percent lawyers, one-third clients. So
13 there's a small percentage that we use for other purposes.
14 We have a banker or a marketing person, or a newspaper
15 editor, or something like that, that fills other needs in
16 the organization. A number of the other organizations,
17 particularly some of the membership-driven organizations,
18 being a lawyer is not a major part of being on the board of
19 directors.
20 I mean, I think they try to have lots of lawyers,
21 but I don't know that it's a requirement on any of them that
22 they even be a majority, and, again, it gets to their
23 mission and their focus of their organization, but they
24 would be better responding to that than I, because my
25 experience is all with legal services programs that are

1 primarily lawyer boards, but also have substantial -- and in
2 my years of doing this, serving as executive director, I
3 have had numerous occasions where having a client on the
4 board, or a number of clients, particularly clients who
5 could articulate the needs of the client community, has had
6 a major impact on how the organization functioned, on how
7 the lawyers on the board understood what the needs of the
8 community are, and what the priorities should be, and how
9 the organization could best function to address those needs.
10 So it's really been a very valuable function to
11 have clients on the board, and it would be, I think, a
12 disaster -- putting aside the fact that we're legally
13 required to have clients on the board, it would be, really,
14 a disaster if we weren't allowed to.
15 The third requirement, which is the 70 percent of
16 the clients are lower-income persons or persons who would
17 not otherwise have access to legal services, for my
18 organization, that's not problem. A hundred percent of our
19 clients fit that category. But there's a number of other
20 organizations that are not legal services programs, but that
21 are nonprofit law corporations, for whom that would be death
22 to their organization.
23 Again, you're better off hearing that from them,
24 but I would suspect the ACLU, the Pacific Legal Foundation,
25 a number of organizations that are constitutionally

1 practicing law, that would be really problematic, to say 70
2 percent of the clients have to be low-income.
3 The last is the contingency fee restriction.
4 Again, that doesn't really impact any of the people I work
5 with, and whether there are other organizations out there
6 that still use contingency fees in these cases, I really
7 can't answer that one.
8 In addition, as I recall, looking at the State
9 Bar's registration form, it really requires, beyond that --
10 and some of the insurance requirements, and some of the
11 other things, again, are problematic, not because we don't
12 have insurance -- we do -- but because of the way that the
13 structure of the insurance requirement doesn't fit the way
14 our insurance programs function, in terms of so much per
15 lawyer and the other restrictions that are in that
16 discussion.
17 MR. HAWLEY: If you're going down the list, number
18 five has to do with fees, and the question, actually, is
19 overly broad. To try to focus it, you know, again, it has
20 to do with the division between the ideology or business
21 needs of the entity and the restrictions and regulations on
22 lawyers in the environment where, number one, legal fees
23 might be used -- cases may be taken on a basis to generate
24 fee awards, through a fee shifting or contingent fee or
25 other kind of mechanism, so that there is a high potential

1 for fee revenue into the organization that is then used to
2 fund other aspects of the entity.
3 You know, it's a multifaceted entity. Only one
4 portion of it is legal representation, and it may have
5 social services or other kinds of activities. So you are
6 picking cases specifically for high generation of revenue as
7 a funding mechanism for these other kinds of activities,
8 whether that's a reality in your experience in the legal
9 service world or not, and the other kinds of circumstances
10 where a nonprofit becomes driven, potentially, you know, by
11 fees, because nonprofits are condemned to not making money.
12 I mean, they are profitable, in many instances, even though
13 they are in a nonprofit forum. So that's kind of the
14 issues, if you have any comment on that.
15 MR. ROTHSCHILD: There clearly are nonprofits who
16 use the availability of fee-shifting awards as a criteria in
17 the selection of their cases. Many of them, that is their
18 primary funding mechanism, to keep the organization alive,
19 is fee-shifting statutes. I mean, I shouldn't say "many."
20 I am aware of some that were set up, essentially, in that
21 model, particularly following the restrictions on Legal
22 Services Corporation programs that said that we are not
23 allowed to obtain fees in our cases, with a very limited
24 exception. Contractual fees we can get, but not statutory
25 fees.

1 Because of that, all of the major fee-shifting
2 statutes, if we take those cases, we can't recover the fees,
3 but there are organizations that were, as a result of that,
4 set up, and their primary mechanism to fund the organization
5 was the expectation of fee-shifting awards. I'm not sure I
6 could point to one specifically in California, but I know
7 nationally that's been the experience.
8 MR. HAWLEY: And that's not inherently wrong. I
9 mean, it's just --
10 MR. ROTHSCHILD: I was just going to say, that's
11 an important thing, and, as I say, it's a selection
12 criteria. That doesn't mean the case is handled in a way to
13 maximize the fees.
14 MR. HAWLEY: Right, and that's kind of the
15 question.
16 MR. ROTHSCHILD: That gets back to my earlier
17 comment that, once the case is accepted, it's handled -- the
18 client is the control of the case, in the sense that, you
19 know, if there's a proposed settlement, if it turns out the
20 case is a dog, you know, it's pursued on behalf of a client,
21 or a class of clients. I think we put class actions aside,
22 because they have their own special rules on fees, and
23 courts approve them, and those kind of things. But in terms
24 of just standard fee shifting, other than class actions,
25 lawyers are still bound by their ethical rules, and know

1 that that's what they have to do, is follow those rules.
2 I know of at least a couple of nonprofits that
3 were built on that model that found that it didn't work, and
4 they ceased functioning, they ceased existing, because they
5 found they couldn't make it just on fee-shifting statutes,
6 and they didn't have any other source of income.
7 MR. HAWLEY: I think you've addressed already
8 questions six and seven.
9 MR. ROTHSCHILD: Yes.
10 MR. HAWLEY: And jumping down, you know, to the
11 end, and this has to do with sort of the global benefits and
12 detriments, you know, of the State Bar doing something in
13 this area, and in that, I'd like to focus your response in
14 one respect.
15 The Frye case recognized, judicially recognized,
16 what we'll call safe harbors in this area. I mean, if
17 you're a nonprofit, and you fit the public interest model,
18 the legal services model, or the membership association
19 model, then you have now judicially recognized common law of
20 safe harbors, and if you're in there, you're safe.
21 There are entities -- and Tenderloin Housing
22 Clinic -- even at the end of the case, there was still an
23 open question as to whether they fit in one of those safe
24 harbors, and, rather than remanding the case and going off
25 on that, the Supreme Court kind of said, "Enough is enough,"

1 and put it --

2 MR. ROTHSCHILD: And it doesn't matter whether

3 they do or not, because the remedy is wrong. Yes.

4 MR. HAWLEY: There's two approaches to

5 registration regulation, if the State Bar was going to

6 approach it, and that is, one, to have a mandatory program

7 that would require you to register and be certified if

8 you're going to practice in this format, and the other is to

9 have the option, you know.

10 The idea of the option is that currently, you

11 know, if you are on the brink of one of those safe harbors,

12 you know, you may be subject to ongoing challenges, as we

13 saw in the Frye case, whereas, if the State Bar had a

14 registration certification program that was optional, it

15 would give entities the ability to get the guarantee. You

16 know, they could fit that model, and they would have it

17 nailed, as opposed to the common-law harbors that can ebb

18 and flow and change with court decisions and other things.

19 I guess, from your standpoint, you know, in

20 talking about the benefits and detriments of the State Bar

21 getting into this business, do you have any thoughts, you

22 know, with respect to the benefits and detriments of a

23 mandatory program, and whether the Bar should even consider

24 this optional program, and would that be a benefit, I guess?

25 That's the question, is that a benefit or not?

1 MR. ROTHSCHILD: In terms of a mandatory program,
2 I go back to my first comment, and that is I don't think
3 it's necessary. I don't think it's useful. I don't think
4 there's a need for it, particularly -- I mean, not only in
5 those three safe harbors, but even in related ones.
6 The fact that only five organizations thought it
7 useful, over the last however many years, to bother
8 registering tells me that maybe programs don't see that as a
9 benefit, and the kinds of restrictions, unless they were
10 substantially revised, would make it even less of benefit to
11 say -- you know, I look at some of the other organizations
12 that I know do have, you know, law staff, legal staff
13 providing legal assistance to their members, like domestic
14 violence shelters, who will have a lawyer either on staff or
15 volunteer lawyers, sometimes on staff, who provide
16 assistance to women with getting restraining orders and
17 things like that, but their primary mission is providing a
18 shelter, and providing counseling and job search, and all
19 the other benefits that go to the domestic violence victims.
20 I don't see that they have a benefit of being
21 regulated by the State Bar in doing that kind of work. I
22 just don't see that it helps them in any significant way.
23 MR. HAWLEY: You've more than addressed our
24 questions, and I don't want to -- I mean, you are very kind
25 to have actually gone through it in that format, but if you

1 have, you know, any further comments that you want to offer
2 up, you know, on your own, you should feel free to do so.
3 But thank you. This has been very helpful, from your
4 perspective.
5 MR. ROTHSCHILD: And I know that there will be
6 some other people up in San Francisco who will more
7 extensively address the constitutional issues and some of
8 the other issues that are addressed here that I haven't
9 addressed.
10 I guess my only closing would be to say that in
11 the Supreme Court's mandate it talks about to find out
12 whether there is evidence of actual abuse or client
13 endangerment, and consider whether the potential for harm to
14 clients warrants regulation of the nonprofit entities. My
15 sense is there is no evidence of actual abuse or client
16 endangerment.
17 To the extent that there is even the likelihood of
18 it or the possibility of it, the Rules of Professional
19 Conduct address enough issues to take care of that problem,
20 and I think that maybe, if there are some recommendations
21 that need to go to the commission revising the Rules of
22 Professional Conduct to suggest, "Here's an issue you might
23 want to look at in how you structure the rules to make sure
24 that that's not a problem," that would be a better way to
25 deal with it than any kind of regulatory scheme.

1 MR. HAWLEY: Thank you for your time and your
2 comment.
3 MR. ROTHSCHILD: Pleasure.
4 MR. HAWLEY: Our next schedule speaker?
5 MS. MURPHY: It's Peter Eliasberg.
6 MR. HAWLEY: Mr. Eliasberg, we provided some
7 opening comments, and I wanted to give you the benefit of
8 sort of a nutshell version. We thank you for taking your
9 time. I mean, this is a fact-gathering process, so we are
10 here, you know, really to hear from the people who are in
11 the field and know the business at hand, and very much
12 appreciate, you know, the time that you've taken.
13 As you heard Mr. Rothschild, we have posed some
14 questions, and we have questions, you know, but I wanted to
15 make it clear that this is your opportunity, you know, to be
16 heard on this. I may ask questions. You are free to answer
17 those or not as you may wish. You're not under oath. This
18 is not an inquisition. You're not being cross-examined, and
19 you should not feel that way.
20 So you are here, you know, to share the
21 information that you have individually or from the
22 constituency that you represent, and the point of my
23 questioning is not to put you on the spot, nor them, you
24 know. So I want to make it very clear that you should never
25 feel on the spot, and if there is an area that you would

1 rather not discuss, or a question that I pose that you don't
2 want to answer, there is no inference taken from that, and
3 this is truly a fact-gathering process.
4 So, you know, with that, if you would please
5 identify yourself for the record, and then proceed.
6 MR. ELIASBERG: I'd be happy to do so. My name is
7 Peter Eliasberg. I'm the managing attorney of the ACLU of
8 Southern California, and I appreciate the opportunity to be
9 here, and appreciate the fact that the Bar is going through
10 this process of fact gathering, as opposed to just simply
11 saying, "Well, Frye suggests that maybe there's some
12 regulation we can put in, so let's just do it," you know,
13 "Let's fill a vacuum and go ahead and do it."
14 Let me just make a few general comments, and then
15 I'll try to at least address some of the specific questions,
16 and, obviously, to the extent that I don't answer any of
17 your questions, it would only be because I don't know the
18 answer. I don't get the impression you're going to put me
19 on the spot.
20 I do feel quite strongly, based on my
21 experience -- and I have been at the ACLU for 10 years. I
22 do not have experience other than working as co-counsel with
23 other organizations, both legal services and law school
24 clinics and so on. I haven't worked at those other
25 organizations, but I do think I know something about them,

1 just based on co-counsel experience.

2 My sense, from our perspective as an organization,
3 is I would be very concerned about regulation in this area,
4 particularly mandatory regulation, for a couple of reasons.
5 One, obviously, I do think that there are very important
6 First Amendment interests that the courts have recognized in
7 what organizations like ours do, and I worry that the kind
8 of regulation, whether it was the specific provisions that
9 were at issue with Frye or similar regulation, would be
10 dangerous and entrench on our First Amendment interests and
11 the kind of work we're trying to do.

12 Specifically, when I've talked to various people
13 about "What do you" -- trying to come from the perspective
14 of the Bar, people say, "Well, what are the dangers that
15 might be addressed through regulation?" One I've heard more
16 often than any other is, somehow or other, the board member
17 of an organization like ours would somehow have -- his or
18 her ideological interest would be similar to the financial
19 interests that a board member or a shareholder in a private
20 for-profit law firm would bring, and since we certainly
21 don't want lawyers saying, "Well, gee, I'm being pressured
22 to do this case," or "to do this case on the cheap in order
23 to maximize the profits for the shareholder," the fear is
24 that the nonlawyer board member might somehow or other drive
25 our organization, or try to influence the lawyers the same

1 way.

2 First, let me say, from my experience, nothing

3 like that has remotely happened, both, I think, because, A,

4 the lawyers in our organization are intimately familiar with

5 their obligations and Rule of Professional Conduct 1-600

6 specifically, which I think very specifically addresses that

7 situation for the nonprofit, which says, "You can't, as a

8 lawyer, work at a place where you're being pushed to do

9 things other than in the best interests of the client."

10 I also think that, to the extent that anyone in

11 our board may have ever suggested, not to a lawyer directly,

12 but at a board meeting, like, "Well, gee, maybe we should

13 talk to the lawyers about how this case is going, and do

14 this kind of thing," we certainly -- the vast majority of

15 our members are not lawyers, our board members, but the

16 members who are, to the extent that issue has ever come

17 up -- and I've only been aware of it once, and I don't think

18 anyone was saying, "Gee, I really want to pressure the

19 lawyers," but even suggested something that might have been

20 something, and a lawyer would say, "Gee, I really can't have

21 that conversation with you," board members who were lawyers

22 immediately said, "You know what? We, as board members,

23 can't do that. You know, we can be involved in setting

24 policy for this organization, in defining the kinds of

25 issues and areas that the ACLU should be involved with, but

1 once the case selection is made, we simply can't do anything
2 as board members. Whether we are lawyers or nonlawyers, we
3 shouldn't be directing. It has to be the lawyer's judgment
4 as to what's in the best interests of the client."
5 To the extent that there are other concerns, I do
6 think that, in large part, although it is true that it's not
7 as if we cannot bring in any money, even though we are a
8 nonprofit, I do thing that we are subject, in effect, from
9 my perspective -- and I don't want to claim to be an expert
10 on the regulations that a law firm, a private law firm, is
11 subject to, but we do have obligations that the Secretary of
12 State enforces as us (sic) because we're a nonprofit
13 corporation, and obligations that we have to meet in order
14 to be a nonprofit corporation under -- that the IRS
15 enforces, too.
16 So I think that there already is a fairly robust
17 set -- in addition to the Rules of Professional Conduct -- a
18 fairly robust set of regulations that govern us. So, for
19 example, if the fear is "Let's take contingency fee cases so
20 we can start paying our lawyers private-firm salaries" --
21 and I'm not aware of any nonprofit corporation that's
22 practicing law where that's even close -- I don't think that
23 that really -- I think that that would be a major problem
24 under the IRS, and I think that that eventually -- that
25 would be dealt with through that mechanism.

1 So I worry very much about the First Amendment
2 interests that an organization like ours has, and my sense
3 is the primary fear that is put forward is not one that I've
4 ever seen in practice realized, and I also do think that the
5 Rules of Professional Conduct and the Bar's role -- I mean,
6 certainly, if the Bar were to get information that somehow
7 or other a client's case had been handled because of
8 interference from the board as to how it should be handled,
9 as opposed to being handled in the way that the lawyer
10 thought was the proper way to handle it, it would, I
11 believe, be totally an appropriate are for the Bar to be
12 involved in, in disciplining, but I think that that's
13 already something that you can do under the current Rules of
14 Professional Conduct.
15 The only other general comment I'd like to make,
16 and then I'll talk a little bit about -- and, as I said,
17 happy to answer specific questions, because I'd like to be
18 as useful to you all in your fact gathering as I can -- is
19 that I think that there are a lot of different entities that
20 are set up in a lot of different ways. There are law school
21 clinics. There are organizations like ours. There are
22 IOLTA programs. There are the membership organizations that
23 you were talking about. I mean, we are a membership
24 organization, but I think you were talking a little bit
25 differently, about specifically the provision of legal

1 services.

2 I actually, as Frye was going, and the Supreme

3 Court granted review in that, had some conversations with a

4 number of other people, talking about "Well, beyond filing

5 an amicus brief" -- which we did, and I think you all are

6 aware that at least the ideological spectrum of the amicus

7 briefs was from the PLF to the ACLU and the NAACP, and

8 everyone in between. There was pretty much uniformity.

9 MR. HAWLEY: It was the only time you've all been

10 on the same side.

11 MR. ELIASBERG: Maybe not the only time, but very

12 close. That's very close to being the case. But beyond

13 talking about doing that, we also said, "Well, you know,

14 let's think of the worst case. Let's think if the Court

15 says that, you know, 'Yes, you all are subject to this.'"

16 We felt that this would be just incredibly detrimental to

17 our interests and our ability to practice law, and all the

18 groups started saying, "Well, should we at least think about

19 what kind of legislative response we might have to this?"

20 We had some preliminary discussions, but one of

21 the things that was so difficult was that there were so many

22 entities that were set up in so many different ways, all

23 doing very good work, but from the law school clinic to the

24 ACLU and everything else in between, we started thinking,

25 "How do you do this?" And that's why your suggestion about

1 the benefit, or what if we were to pursue an optional route
2 that might be beneficial for certain organizations -- I
3 don't know if there's a strong need out there. I don't
4 really think I'm the right person to answer that.
5 I don't know if the fact that five organizations
6 registers really is a true indication of that, because I
7 think Frye brought into the forefront the idea that "Wait a
8 minute, here. You could have a client suing you over issues
9 like this. It might be beneficial to be sure that you
10 have -- if it's not clear that you fall under the safe
11 harbors, it might be nice to have the imprimatur of the
12 Bar."
13 So I would say that I'm agnostic about the idea of
14 optional regulation, but I would hope that this fact-finding
15 process might enable you to find out whether the
16 organizations say, "Gee, we've been very nervous, and we're
17 even still nervous after Frye, and so we would love to have
18 that ability to come to you and say, 'This is the kind of
19 work we do. We think it's totally above board, and we think
20 that, you know, it would be helpful to have your seal of
21 approval.'"
22 I think mandatory regulation I'm extremely nervous
23 about, and it's really going to be -- I will try not to be
24 at all in depth, because it would be basically repetitive of
25 the previous speaker. I mean, for example, forcing a large

1 percentage, or exclusively, your board to be lawyers, that
2 would be devastating to us, because what we are trying to do
3 is reflect a variety of interests, not all interests, but a
4 variety of interest, and we don't feel that we're going to
5 be informed about the issues in certain communities if the
6 requirement is you need to be a lawyer.
7 Now, can you find lawyers in the gay and lesbian
8 community? Yes. But do we feel that we want to have
9 members of the gay and lesbian community on our board? We
10 want to have a variety. We want to have disability rights
11 advocates on our board. We want to have a variety of
12 different people on our board, and to restrict it such that
13 you have to be a lawyer, I think, would be devastating to
14 our mission and the way we're set up, much less, I also
15 think it would be improper under the First Amendment, but
16 even if that weren't an issue, I think it would not be good.
17 The other thing I would say is, we are talking
18 about organizations that, in some form or other, serve an
19 under-served community. Now, we don't serve only poor
20 clients. I would say the vast -- we don't ask, but, in my
21 experience, the vast majority of the people whom we do serve
22 aren't able to afford private lawyers, and certainly one of
23 the criteria I use in deciding is "Well, is this person in a
24 position to find legal representation elsewhere?"
25 There are certainly cases where I think the answer

1 is yes, and we've still taken it on. There are also reasons
2 why the L.A. Times -- we've done amicus briefs in cases
3 they've been involved in, but they can afford private
4 lawyers, at least -- in recent stories, you start to wonder
5 for the future, but at least for now, you know, they have a
6 private law firm.
7 Would we not represent them if they came to us? I
8 don't know, but we might very well say, "You know what? We
9 have a lot of First Amendment cases on behalf of people who
10 are not seeking damages, who will never be represented if we
11 don't do it. So, in balancing things out, we're confident
12 that you're going to find representation on your case."
13 So it worries me, and you all are intimately
14 aware, far more than I do, about how under-served varieties
15 of populations are in California in getting legal services.
16 I worry that restrictions could, in effect, push some people
17 who may be providing those services out, because you're
18 basically saying, "Well, the way you're set up, you can't do
19 it any longer," and, therefore, you know, I think, from a
20 cost/benefit perspective, you have to be really concerned
21 about saying groups that already don't get the
22 representation that I know the Bar would like them to get
23 are going to be even further challenged.
24 So, as far as, you know, the kinds of restrictions
25 in Frye, the board setup, I think, would be very

1 problematic. Again, probably -- I don't know whether it's
2 70 percent or not, but I don't even want to be in the
3 business of trying to figure out, do we -- or 70 percent of
4 our clients, poor or not, because we don't take cases on
5 that basis, or that's only one very small issue. We take
6 cases as to whether they fit in with our mission, and the
7 policy statements, and the policies that are set by our
8 board.
9 The last issue, about contingency fees, we don't
10 do contingency-fee cases. I don't have a strong opinion,
11 but I -- well, I shouldn't say that. I have a fairly strong
12 opinion. It is not as strong, because I'm not personally
13 vested in it in the same way, because I don't think it would
14 directly affect our organization, but we have thought about,
15 certainly, cases where -- you know, to get in a little bit
16 of doctrine, Lyons (phonetic) makes it far more difficult to
17 bring injunctive cases, the Supreme Court's decision in
18 Lyons, than was true before Lyons.
19 There are times when it appears to us that the
20 only way to do an institutional reform case is by bringing a
21 damages case, because you are going to have standing
22 problems for injunctive relief, and we certainly have
23 considered that the expertise and the person-power that we
24 would need to do a case like that would be with a firm that
25 is experienced in doing that kind of a damages case, that we

1 would share our talents to co-counsel on that, and certainly
2 a restriction on our ability to do a case with an
3 organization that does charge contingencies would be
4 extremely problematic to us, although we haven't yet done
5 it, but we've certainly thought about it.
6 My inclination is I don't think there's anything
7 wrong with contingencies, and I don't think that nonprofits
8 shouldn't be able to do them, as long as they are not doing
9 what the tax code wouldn't appear to allow them to do, which
10 is to say, "Let's just keep amassing money so we can, in
11 effect, pay ourselves the same kind of salaries we would be
12 earning if we worked at, you know, Skadden, Arps." So I
13 would be quite chary of any kind of flat bar that said, "You
14 can't do contingency-fee cases if you're a nonprofit
15 corporation."
16 So those are the statements, and I hope some of
17 them were responsive to specific questions, but I'm happy
18 now to answer any questions that you have.
19 MR. ELIASBERG: Rather than have you go through
20 the list, let me focus you, for your time and mine, on just
21 a couple of areas. You have touched on may of these
22 already.
23 One is with respect to individual client matters,
24 and the recourse a client would have in the event of
25 dissatisfaction, you know, either in expressing, you know,

1 their dissatisfaction, or in bringing, actually, a
2 malpractice action, you know, in terms of what your
3 experience is with the availability of malpractice insurance
4 to an organization like yours, and, secondly, whether you
5 have any internal mechanism for dealing with a dissatisfied
6 client, or have you ever -- or are you in the fortunate
7 position of never having dissatisfied clients, which is one
8 of the benefits of serving the under-served and disserved?
9 MR. ELIASBERG: Yes, although, in all fairness,
10 it's also one of the -- it's a concern to me because you
11 don't want your clients, just because they don't have money,
12 to say, "Well, I couldn't get it anywhere else. So it's
13 okay for you to abuse me, as long as you provide me some
14 service." That's not the way it should be. That's
15 certainly not the way I think about my clients.
16 MR. HAWLEY: Quite said.
17 MR. ELIASBERG: Well, a couple of things. We have
18 the luxury of being an organization that is better funded
19 than I think a fair number of nonprofit entities that are
20 providing legal services. We're an 80-year-old
21 organization, we have a fairly solid fund-raising base, and
22 so on. So we have malpractice insurance.
23 Nobody has ever come to me and said -- and there
24 have been times when our budget has been better and worse,
25 and no one has ever said, "This is one of the items I think

1 we're thinking about cutting." So, from my personal
2 experience, we have it. I feel better about having it, but
3 I also know that there are organizations that don't have it,
4 and I also know that there are lawyers, private lawyers, who
5 don't have it.
6 MR. HAWLEY: Quite true.
7 MR. ELIASBERG: And so I guess my instinct would
8 be to say I wouldn't see a justification for saying, "Well,
9 nonprofit law corporations have to have it, but we don't
10 require it for others."
11 As far as mechanisms for dissatisfaction, as I
12 said, having been there 10 years, I know we've never been
13 sued, and I'm, I think, 100 percent certain we've never had
14 a -- well, I don't know if there's any mechanism for a
15 complaint to be brought where we wouldn't hear about it,
16 it's deemed unfounded, and it never gets to us. If there is
17 such, then it's possible someone has brought a claim. To
18 the extent we've ever been notified that a client has gone
19 to the Bar and said, you know, "He did me wrong," or "The
20 ACLU did me wrong," hasn't been one in the 10 years that
21 I've been there.
22 As far as a mechanism is concerned, yes, we have a
23 person who would receive that, or, if she didn't actually
24 get it directly, it went to somebody else in the office,
25 everyone would know that it has to go to her. I don't think

1 we have a rigid set of policies as to what would happen
2 then, because we haven't done it, but I know the answer
3 would be she would look at it, she would bring it to the
4 executive director, she would bring it to me, and we would
5 talk about what the response needed to be.
6 If it was about me, then, you know, there is
7 another attorney in the office who it would be brought to,
8 because I shouldn't be really -- I mean, I would be brought
9 in, in the sense that they would ask me questions about what
10 happened, but I wouldn't be passing judgment on my own
11 performance.
12 My sense is that, you know, this concern about
13 clients being mistreated is, again, probably equally
14 applicable to the profit and the nonprofit world, and except
15 to the extent that you might say, "Well, the poor are less
16 likely to complain," I guess I don't feel that the
17 regulation should be different. I mean, there is a robust
18 State Bar process. You know, you have the ability to bring
19 discipline, and my feeling is that I don't see a reason that
20 would say there is something about the way nonprofits are
21 set up that would require that they be subject to different
22 rules.
23 MR. HAWLEY: This is something that the State Bar
24 needs itself to explore more, and will be part of our
25 process, but you alluded to it in terms of the existing

1 regulation that you have through your IRS status and the
2 state nonprofit status that you have, but just what I'm
3 hearing from you, and I just want kind of a broad-based
4 confirmation if I've gotten this right, is that focusing
5 upon the use and abuse of revenue generated by cases -- you
6 know, if that were used by an entity, if picking cases for
7 revenue flow, and maximizing, you know, income through
8 litigation and such were a goal of an entity, you're saying
9 that the flow of money through an organization, that is, a
10 nonprofit, is going to be a point of examination, you know,
11 by the IRS and the Attorney General's Office or the
12 appropriate -- Secretary of State, I guess -- that monitor
13 and currently regulate nonprofits. Is that generally true?
14 MR. ELIASBERG: Well, I may have overstated it, in
15 the following sense. I'm not sure whether this is a -- you
16 know, as with IRS audits, you know, everyone doesn't get
17 audited. So I don't want to say, necessarily, that,
18 automatically, every entity is going to be looked at yearly
19 to make sure, but I think that there is a process by which
20 the regulating entities do believe that they do sufficient
21 number of audits, and that there are enough other controls
22 that this would be -- you know, that there is the deterrence
23 out there to prevent that.
24 The other thing I'd say is -- and I didn't hear
25 you saying this. We don't do this. In fact, as --

1 MR. HAWLEY: No, I understand.

2 MR. ELIASBERG: No, but, just to be very clear, we
3 specifically have been told from -- whether it's policy or
4 not, it's certainly the practice of our office that, you
5 know, it's wonderful to win a fee-shifting case. We do a
6 number of cases in which -- but we have been told that
7 that's never to be a criterion. But I don't think that it
8 would be improper for it to be a criterion, if the
9 organization did differently, you know, because I think, the
10 way it's set up, the fee-shifting statutes are to vindicate
11 certain kinds of rights.

12 So, if you pick them, and you say, "I'm only going
13 to get the ones that win," I don't think there's anything
14 wrong with that. I think it would only be a question about
15 whether, then, the way that money is used, or somehow or
16 other that influences the way you actually practice, but, in
17 fact, your incentive should be to win the case, and,
18 therefore, to do it as well as possible.

19 The only thing I could think is, somehow or other,
20 you'd think, "Well, we think we can win it, even if we do a
21 shoddy job, so somehow we'll cut corners, but we'll still
22 get the money," but I guess I'm not -- the fact that fee
23 shifting is out there, to my mind, I don't identify quite
24 how that creates -- where that leads to the lack of ethics.
25 I'm not suggesting that someone couldn't come to me and say,

1 "Well, here's, actually, what I'm worried about," and if you
2 have specific examples, I'd be happy to talk about them.
3 MR. HAWLEY: I think you're right that, you know,
4 of course there is nothing inherently wrong with using
5 litigation or cases to generate revenue. I mean, that's
6 what every law firm does on the for-profit side, and
7 Mr. Rothschild indicated earlier that there are some
8 nonprofits that depend heavily, you know, upon fee-
9 generating aspects of cases to survive.
10 I guess one of the points -- I guess there's two
11 points, you know, in terms of questions, and I pose this
12 really to clarify, and don't necessarily need a further
13 response from you, but one is, you know, how the money that
14 comes in from the practice of law is distributed throughout
15 the organization.
16 The other is the issue that I think you've already
17 addressed, about the board including, you know, lawyers or
18 nonlawyers who are in a board member capacity, who may be
19 overly enchanted with the fee revenue-generating aspects of
20 a case or the high-profile nature or publicity of a case, so
21 that the board's view of what it might get out of this is
22 disconnected with the actual merits of the case, and so you
23 end up imposing your ideological or financial needs upon the
24 lawyers to make decisions about pursuing or appealing a case
25 that really is without merit, you know, and I heard you say

1 that there's a clear recognition that the board member's
2 role is to be the policy maker or policy setter, and that
3 there is a division between that and the actual practice of
4 law that exists, at least in a practical way, if not a
5 regimented procedural way, in your business, so to speak.
6 MR. ELIASBERG: I think that's right. I have
7 never seen anything that comes close to that in my
8 organization. I certainly have knowledge of other
9 organizations, as I said, both from co-counseling with them
10 and also some of the lawyers who have come to the ACLU have
11 worked at other nonprofits. I've never heard any of them
12 say that that is a problem.
13 I don't mean to say that what you're throwing out
14 is a virtual impossibility. It is not anything that I've
15 heard about as being a problem, and I would be nervous about
16 regulating on the idea that, hypothetically, there is this
17 concern, but not evidence of it, and then where -- because
18 there are, I think, potentially large downsides to
19 regulation, in terms of, as I said, cutting the amount of
20 legal services available to under-served communities and a
21 variety of others, constitutional included.
22 MR. HAWLEY: The Supreme Court, in its directive
23 to us, was very clear in the fact that they did not want
24 hypotheticals from us generating a regulatory scheme. So
25 your commentary here -- and that's what I'm trying to get,

1 as to whether there is anything that's tangible, you know,
2 out there, and you have a, you know, perspective and
3 experience that's very valuable in what you can bring here.
4 I'm looking here quickly to see if there's any
5 other issues that I could address through you, but I think
6 you have pretty much addressed the things.
7 One question, because you are -- the legal aid
8 world that Mr. Rothschild addressed in many respects is kind
9 of dedicated at legal representation. I mean, that's kind
10 of their core business. What I'll call the public interest
11 world, like the ACLU and the Pacific Legal Foundation and
12 others, you know, oftentimes have a much broader base of
13 business, if we'd call it, and legal representation or
14 litigation is just one component of that.
15 In terms of the ACLU, I'm assuming that your
16 activities and your business is much broader than simply
17 legal practice. Is that correct?
18 MR. ELIASBERG: Yes, and actually I'm glad you
19 asked that, because that's actually a point I wanted to make
20 myself. To the extent that there -- and I'm not necessarily
21 sure it's inherently improper, but to the extent one worries
22 about bringing cases not just to generate fees to continue a
23 legal program, but that there is some greater danger if
24 you're bringing cases that -- or you're at least looking at
25 the financial possibilities of winning those cases, and what

1 that means, and then using that to fund some other program,
2 I would say the largest other component of our organization
3 is a public education and lobbying, but, the way we're set
4 up, again, because of IRS regulation, in fact, we are two
5 organizations. The ACLU Foundation is -- I never can
6 remember which is which. I think we're a C3, and we are not
7 allowed to use lobbying.
8 MR. HAWLEY: Of course.
9 MR. ELIASBERG: We're not allowed to do lobbying
10 except in, you know, some minor percentage of our time, and
11 we're very rigorous about that, and then the C4, I believe
12 is. So what happens is we're actually -- I mean, people
13 just think of the ACLU of Southern California, but actually
14 we are technically two organizations, and we are very strict
15 about the legal money goes back into the legal program, and
16 the fund raising for the group that can do lobbying stays
17 there, and so, at least with respect to that, there is no
18 flow through.
19 Now, if we also were providing, let's say, other
20 services -- and you've correctly identified, you know -- we
21 were providing counseling services to battered women, you
22 know, I don't know what the IRS would do, whether it would
23 be a bar to use monies raised from legal services to do that
24 counseling, as opposed to lobbying, but I'm not sure,
25 inherently, that there is a problem with that.

1 As far as what our major other business is, as it
2 were, it is one that is really kept separate from our legal,
3 and our legal program -- the money from the legal program
4 goes back into the legal program.
5 MR. HAWLEY: And that's another example where it's
6 part of our charge to look at the IRS' standards and
7 regulations in this world to see what already exists, you
8 know, and what you've just illustrated is an example of
9 where some other agency is providing some oversight and
10 protection in that area.
11 I don't have anything, you know, further here.
12 You're welcome to add anything further. I really do want to
13 express our appreciation for your taking the time to come
14 down here and to participate in this, because we really are
15 dependent on this kind of input, you know, to assist us in
16 deciding where we go, you know, with this project that we've
17 been assigned.
18 MR. ELIASBERG: Right. Other than the comments
19 that I made at the beginning, just to reiterate, I do
20 appreciate, and I would hope that any decision that's made
21 would be made in this way, thoughtful and with facts
22 gathered, but my experience and so on is that I really
23 basically don't see a need for greater regulation, and worry
24 a lot about what greater regulation might provide. But I
25 think your optional idea, you know, if there is an interest

1 in it -- and there are organizations that are uncertain. I
2 think that could be a very valuable program, but I think it
3 would just be an expression of "Is there really an interest
4 in that program?"
5 MR. HAWLEY: Thank you.
6 MR. ELIASBERG: Thank you very much.
7 MR. HAWLEY: Thank you very much.
8 I think we have completed the hearing from those
9 folks who let us know in advance that they were interested
10 in speaking. Let us go off the record now for a moment, and
11 I know that we have more folks in the audience who may
12 simply be observers, or may wish to address the process. So
13 let's go off the record, and Sharon Ngim, you know, is
14 available if anyone does want to speak, to let her know, and
15 then we'll go back on the record at some point, and either
16 conclude or hear further from anyone that wishes to be heard
17 further from. So, with that, let's go off the record.
18 (Proceedings recessed briefly.)
19 MR. HAWLEY: Let's resume, going back on the
20 record.
21 We've had two additional speakers request for an
22 opportunity to be heard, and we of course grant those
23 requests. So first is Mr. Brian Chase from LAMBDA Legal.
24 Mr. Chase, thank you.
25 MR. CHASE: Thank you very much. Just a couple of

1 brief comments, one organizational and one personal.
2 Organizationally, I wanted to point out that
3 LAMBDA Legal Defense and Education Fund, which is a national
4 organization representing lesbians, gay men, bisexuals,
5 transgendered people, and people with HIV and AIDS, we
6 practice across the entire country. We have five offices
7 nationally, and we're incorporated as a 501C3. Our
8 headquarters is in New York, but we have offices in Chicago,
9 in Atlanta, in Dallas, and here in Los Angeles.
10 For a national organization that practices
11 national but has satellite offices, a registration scheme or
12 a regulation by one State Bar could be extremely
13 problematic. So I would ask you to take that into
14 consideration, that there are a number of organizations that
15 are similarly structured, and that might encounter problems
16 with state-specific regulations.
17 Also, on a personal note, I wanted to say I am a
18 recent transplant to L.A. I moved here two years ago, and I
19 did most of my practice in the city of New Orleans. While I
20 was a very young attorney in New Orleans, I began
21 volunteering with a program for homeless youth that
22 provided -- New Orleans has a huge population of runaway
23 teens. The organization provided a place for kids to get a
24 shower, where they could get clothes.
25 I was on their advisory board, and a lot of the

1 kids had legal problems, and I decided that it would be very
2 helpful, through the center, to have a legal advice clinic,
3 and this was basically established by the center giving me a
4 desk, with a little sign that said, "The lawyer is in," and
5 me getting some of my friends to volunteer to help kids out
6 and take some pro bono cases.
7 I'm not sure that kind of entrepreneurial legal
8 help would be possible if there was any kind of
9 comprehensive regulation or registration scheme, because
10 sometimes those little start-ups -- you know, it was funded
11 out of my checkbook. So trying to good in that fashion
12 wouldn't necessarily be possible if there was some
13 additional burden and some additional expense. So I would
14 also ask you to take that into consideration as well.
15 MR. HAWLEY: Do you mind if I ask you just a
16 couple questions? Because, as I said, I'm kind of a sponge
17 here, and hope to get as much information as possible.
18 You alluded to the fact that you do business kind
19 of across the country, I mean, frankly, as does the ACLU,
20 but, just for the record, in terms of your experience
21 elsewhere, outside of California, I mean, have you
22 encountered, in any other state, any kind of regulatory
23 issues such as those that we're exploring here?
24 MR. CHASE: None whatsoever, no. When we practice
25 in other states, we come admitted pro hac, or we find an

1 attorney within the organization who is admitted in that
2 state. So, for example, I am the only attorney at LAMBDA
3 who is licensed in Louisiana and Florida. So, if there are
4 needs specific to those two states, even though I'm based
5 out of Los Angeles and those states are out of my region, I
6 might be brought into those cases, but no, there has not,
7 and I'm not aware of any state that separately regulates
8 nonprofit entities differently than they would other
9 entities that are providing legal services.
10 MR. HAWLEY: Okay. Just a couple of other
11 questions, repetitive of what I've asked other people. In
12 terms of your -- LAMBDA's major part of its business is
13 actually representing clients, you know, within the criteria
14 that you have for your entity. What, if any, procedures do
15 you have, including, you know, malpractice insurance, for
16 dissatisfaction clients?
17 MR. CHASE: And we maintain malpractice insurance
18 not only for our practicing attorneys, but for any attorneys
19 on staff. So, if you are licensed to practice law, you are
20 on our E and O policy.
21 MR. HAWLEY: Okay. The other issue has to do with
22 the separation between the role of the board, you know, and
23 the legal representation, both from an economic drive, in
24 terms of the board's need to fund-raise, you know, as well
25 as the ideological commitment that many nonprofits are

1 formed around, and what protections you're aware of keeping
2 that separation clear, so that the lawyer's independent
3 judgment with respect to the handling the best interests of
4 the client are not interfered with or influenced by either
5 the economic or ideological needs of the business policy
6 side of the organization. Can you address that issue?
7 MR. CHASE: Of course. Much like the ACLU, we
8 keep the issue of case selection very, very separate from
9 other administrative matters that go on within LAMBDA. It
10 is attorneys who decide what cases were are taking. Now, of
11 course, we are an ideologically based organization, so any
12 conflict of interest is taken care of at the intake stage,
13 not, you know, two years down the road, when we're
14 representing them, when we realize that a conflict arises.
15 If there is a potential conflict -- and I can
16 speak to this. We have actually taken action against a
17 corporate entity whose general counsel was the chairman of
18 our board of directors, but a client came to us with a
19 legitimate claim against this entity, and we pursued it.
20 The fact that he was on our board of directors had no
21 bearing whatsoever on the decision.
22 MR. HAWLEY: And then, also, with respect to --
23 and, again, this is just a point of factual inquiry. In
24 terms of the way you're set up, are you created, you know,
25 as a qualified nonprofit entity for IRS purposes?

1 MR. CHASE: Yes. We are a 501C3, and, much like
2 the ACLU, any money that we would get through fee-shifting
3 arrangements or through Section 1988 would go into things
4 like education, which is the other activity that we engage
5 in quite a bit of.
6 MR. HAWLEY: I don't have anything further. I
7 mean, did you have anything that you would like to add?
8 MR. CHASE: I do not. I appreciate the
9 opportunity. Thank you.
10 MR. HAWLEY: Right, again, and I thank you very
11 much for taking the time to come down here, because this is,
12 you know, a process of fact gathering, and the information
13 that we're gathering is coming right out of the trenches,
14 and that's what we wanted to hear. So thank you very much.
15 MR. CHASE: Thanks.
16 MR. HAWLEY: Our next speaker is Adriano Martinez.
17 Hi.
18 MR. MARTINEZ: Hi.
19 MR. HAWLEY: Please identify yourself for the
20 record, so we have a complete history of who all of our
21 speakers are.
22 MR. MARTINEZ: My name is Adriano Martinez, and
23 I'm an attorney for the Natural Resources Defense Council.
24 We're a national organization, and we have one international
25 office. We're based out of New York. We have offices in

1 D.C., San Francisco, Los Angeles. We just opened up an
2 office in Beijing. We work on a wide range of environmental
3 issues, from global warming to protection of endangered
4 species, to protection of wildlands such as the Arctic
5 Wildlife Refuge, other issues like that. So we have a very
6 broad-based, you know, mission.
7 I must admit that, you know, I'm pretty new to the
8 organization. I've been there a little over two years, and
9 I rely a lot on my direct supervisors for a lot of
10 institutional issues, some of the questions you've asked,
11 but I can answer to the extent of my knowledge.
12 One issue that I think needs to be raised,
13 especially from our perspective, on membership of our board,
14 is the role of science in environmental nonprofits, and it's
15 very important that we have membership on our board from
16 scientists, and we have scientists on staff, because that is
17 a crucial component, as good science really helps us in our
18 practice of law, making sure that we understand the
19 connections between, for example, air pollution and impacts
20 on children with asthma in Long Beach, et cetera, other
21 issues like that.
22 Like the previous speakers, we are concerned about
23 mandatory regulations, depending on the -- it concerns us,
24 without seeing the exact form, but also we are just
25 concerned because, you know, we do have a board that, you

1 know, some are lawyers, some are -- you know, we even have
2 actors. We have, you know, other longstanding activists.
3 We have academics. We have a wide range of people on our
4 board, and also our membership base is quite broad. We have
5 approximately 1.2 million members throughout the nation, and
6 a lot of those members are in California. So I think we
7 have about 250,000 throughout the state.
8 Other than that, some of these questions -- client
9 dissatisfaction, I haven't had any experiences. Our clients
10 are generally appreciative of our work, and we work with
11 low-income clients, sometimes. We also work with clients
12 who have plenty of income, because we work on such a broad
13 range of issues.
14 Then, as previous speakers, we do have ways that
15 we screen for conflicts, and we do a lot of work up front to
16 identify the proper cases to bring, and we do a lot of
17 research into the merits of the case. So we aren't
18 bringing -- you know, I haven't heard of any claims of NRDC
19 bringing frivolous lawsuits, but, as I said, I'm new to the
20 organization. So I don't know if you have any other
21 questions.
22 MR. HAWLEY: I mean, that's fine. I mean, I
23 respect the fact that you're -- you know, your place in the
24 organization, you know, and you've heard the preexisting
25 questions, and if there's anything you wanted to add on

1 that, you know, it is fine, but otherwise the information
2 you've provided has been helpful, and hearing from yet one
3 other nonprofit sort of advocacy organization.
4 That's an important area for us to hear from,
5 because the State Bar, by its nature, is quite familiar with
6 the legal aid world, and the legal aid society world, and we
7 have a great deal of information about how that area
8 operates. So it's particularly beneficial to hear from what
9 we call sort of the public interest sector, you know, that
10 represents a certain area, you know, of society, so to
11 speak, in that regard. So hearing from you and the ACLU and
12 the other folks in that business, if we might call it that,
13 is very much appreciated.
14 MR. MARTINEZ: Thank you.
15 MR. HAWLEY: Thank you.
16 Anyone else that would like to comment?
17 (No response.)
18 MR. HAWLEY: With that, I'll conclude. We will be
19 conducting a similar hearing on Friday in San Francisco,
20 commencing at 11:30. There are a number of folks who have
21 requested an opportunity to be heard, very reflective of
22 what we've heard here today, so we're quite anxious to hear
23 from them.
24 In terms of the process, we are in our fact-
25 gathering mode, and will continue to be. Many of you have

1 seen the questionnaires that we've disseminated, and that
2 has a January 31 cut-off date, although that is, you know,
3 arbitrary. You know, we simply needed a point to stop that
4 process, so that we can begin a more targeted approach. We
5 already plan to talk to the Internal Revenue Service and the
6 Secretary of State regarding their various policies and
7 procedures, so that we know what they do, so that we needn't
8 duplicate it. So what we've heard here will only energize
9 us in making sure that we get that covered.
10 So, with that, we thank you all for your time, and
11 we've benefitted greatly from your input, and with that, we
12 can conclude the record.
13 (Proceedings concluded.)
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1 CERTIFICATION OF TRANSCRIBER

2 I, Holly Martens, do hereby certify that the
3 foregoing 55-page transcript of proceedings, recorded by
4 electronic recording, represents a true and accurate
5 transcript of the Public Hearing Regarding Practice of Law
6 by Non-Profit Corporations held on December 6, 2006.
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8 12/18/06 Holly Martens
Date Transcriber
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APPENDIX 2 – 6

TRANSCRIPT SAN FRANCISCO PUBLIC HEARING*

***** Please note that a reference in the report to the transcript reflects the page number and line number where the reference is found in the transcript (e.g. Appendix 2-6, 23:10-14 is page 23, lines 10 through 14)

STATE BAR COURT OF NORTHERN CALIFORNIA

STATE OF CALIFORNIA

ORIGINAL

FRYE

Applicant,

vs.

TENDERLOIN HOUSING
CLINIC, INC.,

Defendant.

_____/

PUBLIC HEARING REGARDING PRACTICE OF LAW
BY NONPROFIT CORPORATIONS

Friday, December 8, 2006

Reported by:
LISA VALLERGA
CSR 9527, RPR

NANCY SORENSEN
Court Reporting Services
41 Sutter Street, Suite 505
San Francisco, California 94104
(415) 986-4624

1 APPREARANCES

2

3 The State Bar of California
180 Howard Street
4 San Francisco, California 94105

5 BY: ROBERT A. HAWLEY
Deputy Executive Director
6

7 PUBLIC SPEAKERS

8

9 BRAD SELIGMAN

10 STEVE COLLIER

11 CINDY COHN

12 MARK AARONSON

13 ANTHONY CASO

14 JULIA WILSON

15 DARA SCHUR

16 PAUL UTRECHT

17 ANDREW ZACKS

18 JOSHUA ARCE

19

20

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22

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1 --oOo--

2 MR. HAWLEY: We are going to commence the
3 hearing. I'm going to be begin by laying out sort of some
4 guidelines that we will apply as we go forward, but first
5 let me introduce myself.

6 My name is Robert Hawley, H-a-w-l-e-y. I'm
7 Deputy Executive Director of the State of California. I
8 have been assign the responsibility for -- not taking --
9 the responsibility to gather facts, conduct the study that
10 will be used to report back to the Supreme Court in
11 accordance with the Frye versus Tenderloin Housing Clinic
12 case.

13 We have given formal notice of this hearing for
14 today here in San Francisco previously this past Wednesday
15 in Los Angeles. Interested parties have been invited to
16 come share with us their perspective on the subject.

17 If anyone has not yet requested an opportunity to
18 be heard and chooses to during the time of the hearing,
19 please let Sharon Ngim, N-g-i-m, over here know, or Kate
20 O'Conner, both of whom are assisting with this.

21 This is an open process and our goal here is to
22 gather as many facts as possible. The more information
23 that we can have from interested parties the better. The
24 Supreme Court was very explicit in its assignment to us as
25 to what it wished us to do was to conduct a factual study

1 or inquiry. So the guidelines I'm going to offer to you
2 are there to assist you in making what you say most
3 helpful to us.
4 This is your moment. You are free to say
5 whatever you wish. I am sharing with you the information
6 or the guidelines that will be most helpful to us in your
7 approach.
8 In that respect, the Bar's responsibility is not
9 to make any legal determination as to what is or is not
10 constitutionally protected. That was already discussed I
11 think in oral argument and in the decision.
12 We are here to assess the potential need for a
13 certification registration program governing nonprofit
14 legal practices like that which currently govern for
15 profit law corporation and limited liability companies or
16 partnership, excuse me, LLPs. That's our mission.
17 The Supreme Court was very explicit in asking us
18 to determine whether in the nonprofit practice world there
19 are issues of a client endangerment or misconduct or
20 threats to rules of professional conduct and attorney
21 responsibilities that occur out there in such a way that
22 would warrant that same type of registration certification
23 program that exists for the -- for profit law practice
24 corporate world carrying over into the nonprofit world.
25 That is -- those are the facts that we are

1 seeking to gather here. The State Bar does not have
2 expertise in the nonprofit practice world. Therefore, you
3 really are valuable to us in sharing with us what you see
4 and know in the various areas that you do business.
5 We have circulated, previously provided a set of
6 questions that we are particularly interested in. That
7 again is to help you focus your comments to the extent you
8 choose to address those questions. I may well anticipate
9 asking questions of speakers as they move forward through
10 their presentations.
11 In that respect, I want to make a very important
12 point. One is to alert you that because this is a
13 fact-gathering process, I anticipate asking questions.
14 You are not under oath. This is not an inquisition. You
15 are not being cross-examined.
16 I am asking questions to try to gather
17 information that we believe is helpful. You are free to
18 decline to answer those questions, to choose not to, and I
19 hope that my demeanor doesn't indicate that I'm engaging
20 in a cross-examination, but old habits die hard. And I
21 have never heard a lawyer ask a question in a civil
22 manner.
23 So if -- in that regard, I will apologize in
24 advance. But the point here is to truly gather as much
25 data as we can from you folks who are the experts in the

1 field. That is the point of this.

2 We have a schedule of speakers. You have been
3 assigned times. We are going to try to keep with that as
4 much as possible. As the day goes on, points will be
5 made, later speakers will hear you. You may be able to
6 just kind of adopt the earlier statements because the
7 point is to try to get through this as efficiently,
8 effectively as possible.

9 I want to emphasize if there is anyone here that
10 chooses to add themselves on to the list before the end of
11 the session, please let Sharon or Kate know.

12 With that, I'm going to begin. Remember, we are
13 on the record with the court reporter here. So when you
14 begin, please identify yourself by name, the entity that
15 you represent, if you do, and give us an idea as to the
16 nature of that entity's practice or your experience in
17 terms of what expertise or interest you bring to the
18 subject.

19 With that, our first speaker is Mr. Brad Seligman
20 from Impact Fund, so I invite you to the lectern and turn
21 the floor over to you for your comments.

22 MR. SELIGMAN: Thank you very much. I am Brad
23 Seligman executive director of the Impact Fund. The
24 Impact Fund is a legal service trust fund support center.
25 We have particular expertise in complex litigation and

1 often get involved in providing advice in representation,
2 attorney fees and expense matters as well as focus
3 representation in that regard. The Impact Fund
4 represented a coalition of nonprofits in the Frye case.
5 I actually argued part of it and kept an interest
6 in what has happened to Frye. I recognize that the State
7 Bar, as with any agency, is not empowered to make
8 constitutional decisions. We start here with a
9 constitutional framework.
10 What I'd like to do briefly today is talk about
11 what the focus of any regulation needs to be and describe
12 what I believe are the inherent legal and practical
13 safeguards against potential client abuse. Then spend a
14 bit of time talking about some of the practical realities
15 of nonprofit governing, which that may not be clear or
16 apparent from the outside.
17 What I am not going to spend time making a point,
18 which I think most of us in legal service take for
19 granted. There are tremendous unmet needs out there for
20 legal representation. It's unmet needs not nearly
21 although very significantly for people who are indigent,
22 but various types of unrepresented constituents.
23 Traditionally nonprofit organizations have taken
24 up that slack. We do it in legal service organizations,
25 we do it in civil right advocacy organizations. We do it

1 in other forms of nonprofit representation. It's a very
2 long and I think noble tradition of public interest
3 representation going way back.
4 It's also one that the United States Supreme
5 Court requests. Now, our State Supreme Court has
6 recognized and recognized that this kind of representation
7 not only is entitled to the 1st Amendment protection, but
8 that the kinds of things that 1st Amendment protects are
9 not nearly political expressions. In fact, the great
10 secular causes, along with small ones, are protected by
11 the 1st Amendment.
12 The 1st Amendment also protects folks when
13 they're dealing with poverty issues or indigence, as well
14 as a whole range of constituencies may not have a direct
15 economic state or interest in the lineup of applicants in
16 the Frye case as well as the lineup today indicates that.
17 There were organizations representing
18 environmental concerns, consumer concerns, gay lesbian
19 right concerns, disability right concerns, economic
20 concerns on all ranges of the political spectrum.
21 The Supreme Court made clear that the protection
22 of the 1st Amendment is not something that we should hand
23 out in a miserly way. But it's intended to be broadly
24 embraced, broadly protected.
25 Accordingly, both the U.S. Supreme Court and now

1 our court has said that in order to regulate where you
2 have this area of 1st Amendment speech associational
3 freedom is there must be evidence of actual danger, not
4 merely at theoretical risk. But one of my favorite quotes
5 that I came upon what the actually means is something the
6 justice makes in United Transportation Union versus
7 Michigan.
8 He said jurisdiction over temptation has
9 heretofore been reserved to the churches. So what we are
10 talking about here is not a theoretical possibility, but
11 is there evidence of harm.
12 I would suggest, as I suggested to the Supreme
13 Court, the standard should be an "If it ain't broke, don't
14 fix it." There's absolutely no evidence of any pervasive
15 harm out there. I don't think that is surprising. I want
16 to suggest there are at least four separate legal
17 safeguards in place today that apply, most of which don't
18 apply for profit firms.
19 The first of course is the State Bar adopted a?
20 Rule of professional conduct directly applicable to us.
21 That is ruling 1600. 1600 which parallels the rules the
22 New Jersey Supreme Court suggested specifically applies to
23 legal services programs says that any lawyer working for
24 those programs has an obligation to represent their
25 clients and not allow aboard or any third party interfere

1 with the exercise of their professional judgement or the
2 client-attorney relationship.
3 That rule applies to every lawyer working in
4 every nonprofit. I think it's very explicit there are
5 other rules of professional conduct which also apply to us
6 which I think are very important. Rule 3100 maintains all
7 lawyers maintain client confidence.
8 Rule 3-300 requires us to ensure the adverse
9 interest or interests adverse to the client do not
10 interfere with the relationships and various obligations
11 of coming through that.
12 Rule 3-310 F addresses specifically the situation
13 where your compensation for a lawyer comes from the third
14 party. So there is existing State Bar rules which apply
15 to us which limit the risk. But that applies to all
16 lawyers.
17 I want to now talk about other requirements that
18 apply solely to nonprofit, which I think limits
19 dramatically the risk of danger. First, of course, is any
20 nonprofit must have a nonprofit charitable mission.
21 There are several specific statutes that deal
22 with that. Corporation Code 5111 specifically says that
23 you must have a charitable mission, a nonprofit charitable
24 mission under California law. Section 5130 of the
25 Corporation Code prohibits private gain by anybody

1 associated with the nonprofit and then a series of
2 provision highly regulate nonprofits to avoid self
3 dealings in transfer assets of leases, sales, et cetera.
4 Corporation Code Section 5227, 5233, 6010, and 7913. So
5 we are organized as nonprofit entities heavily regulated
6 under the Corporation Code.
7 Second, we are required to register with two
8 separate public agencies. We must register with the
9 Secretary of State. We must register with the State
10 Attorney General. Moreover, we are required to file a
11 detailed annual report with the State Attorney General,
12 provide financial information about our transactions and
13 provide a wealth of information.
14 However, the Attorney General is specifically
15 authorized to institute proceedings against any of us if
16 we stray from our charitable mission or engage in any kind
17 of financial irregularities. The State Attorney General
18 can literally shut us down. They can audit our records.
19 They can subpoena our reports. They can get restraining
20 orders against us. These are regulations that apply
21 specifically to any nonprofit.
22 Now, in addition to the state regulation we are
23 subject to federal regulation most particularly through
24 the Internal Revenue Service. The Internal Revenue
25 Service treats us as tax exempt only if we have recognized

1 nonprofit charitable purposes.

2 We are prohibited from paying excessive

3 compensation to our staff board of members or board

4 members, too, for that matter. The IRS scrutinizes

5 carefully attorney fees that we receive, which have to be

6 separately disclosed. So we are subject to a range of

7 regulations at the state and federal level that for profit

8 law firms are not subject to and protect, I think, our

9 clients from any overreaching.

10 But there's a very practical limitation here.

11 It's not strictly a legal system. We are public entities.

12 Our filings with the Secretary of State and the State

13 Attorney General are available to the public. Anybody can

14 go in, take a look at the financial report that we produce

15 every year to the State Attorney General.

16 Moreover, in order to retain public standing as a

17 nonprofit, we are required to have a diverse source of

18 funding that could be a public foundation. At Impact Fund

19 you have to make a showing to the IRS every five years.

20 The -- my understanding is it comes from a range of

21 donations. I can't get all of the money from one source.

22 I can't be financed by a single attorney fee. I have to

23 show there's a range of funding that is out there.

24 Which means I have got to go out, as does every

25 other nonprofit, into the market base of nonprofit, raise

1 money. To do that, we have to report to the world. We
2 prepare annual reports. We make financial disclosures.
3 We have to convince people that we are nonprofit and serve
4 charitable duties.
5 If in fact we are not, I suggest it's going to be
6 extremely difficult for us to meet the funding
7 requirements of the Internal Revenue Service. It's also
8 going to be extremely difficult for us to remain in
9 business for any length of time.
10 So there are legal and practical limitations to
11 protect or line not clients.
12 Having said that, I think it's important to talk
13 for a moment about what is an appropriate role for a
14 board. We all acknowledge, as rule 1600 states, that a
15 board should not be involved in interfering with the
16 attorney/client relationship. It should not be making the
17 legal decisions. But I think there is some implication
18 that some of the discussion here which I need to address.
19 There are appropriate rules for a board involving
20 litigation.
21 I think it's important they're not abusive. The
22 fact that it's something that you expect a board to do.
23 Obviously, a board should set policy, should determine
24 what kinds of cases they should take, should exercise
25 fiscal prudence, which is talking about a litigation

1 budget, how much money should go into it.
2 Moreover, a board appropriately considers the
3 financial implications of litigation. In today's society
4 litigation is extremely expensive particularly if you are
5 going to get involved with the capital P type cases,
6 lengthy proceedings and class action. So a board needs to
7 consider how they will pay for the litigation that will
8 serve its financial mission.
9 So I want to make it very clear there is nothing
10 inappropriate for a board asking the question will this
11 case be a net positive or negative to our budget, is there
12 a potential for recovering fees or not. Those are
13 appropriate and prudent policy questions that a board
14 needs to determine.
15 Likewise, it's completely appropriate for the
16 board to say we are going to do this type of case, not
17 that. One that we represented was the ACLU have very
18 specific type cases. They bring -- they limit their
19 representation to civil liberty, primarily under the Bill
20 of Rights and the Constitution. They generally do not do
21 damage cases, although sometimes they do if that's the
22 only way to present an issue.
23 Likewise, my organization, we only do class
24 action organization at Impact Fund, so we only do class
25 action civil rights litigation. We reject a whole range

1 of cases that are there.

2 I want to talk specifically attorney fees.

3 There's a suggestion that where an entity may recover

4 attorney's fees that somehow will result in abuse or a

5 waiver of 1st Amendment protection while the U.S. Supreme

6 Court made clear the fees might be recovered does not

7 strip an entity of 1st Amendment protections that is not,

8 per se, a problem. It's also not an inappropriate factor

9 as I said for a board to look at.

10 Let me talk about four scenarios what a board

11 appropriately asks. Number one, in any litigation a board

12 can appropriately ask how are we going to pay for it. You

13 look at what the sources of funding are. It's an

14 unfortunate reality today there are very few foundations

15 that will fund litigation.

16 Which means unless a board is sitting on a pile

17 of money in their budget for no purpose, most litigation

18 needs to pay for itself in order to be financially viable.

19 That doesn't mean the purpose of litigation is to make a

20 profit.

21 We are talking here about prudent budgeting.

22 That if the litigation does not pay for itself, some

23 funding is going to have to be found.

24 Number two, board appropriately asks are there

25 cocounsel that can share the burden of expense of

1 litigation, that often cases come to you with cocounsel,
2 sometimes public entities make arrangements where they
3 share a case with a private attorney.
4 In fact, the Level Services Corporation mandates
5 relationships with private attorneys and many of us to do
6 the same. Pro bono counsel is a very common practice out
7 there.
8 Sometimes those private attorneys come to you
9 with a client where there is already an existing retainer
10 agreement. That retainer agreement may require for
11 contingency.
12 The third question that may arise is a very
13 important one. Does the cause of action you wish to sue
14 under have a right to statutory attorney fees if you
15 prevail.
16 Now, some types of cases, primarily civil rights
17 cases, there's a federal often state statute that says the
18 prevailing may recover attorney fees. But sometimes the
19 litigation that you wish to conduct has no statutory right
20 to attorney fees, or if it does that right is at most very
21 distance or uncertain.
22 Under those circumstances a nonprofit in order to
23 make a litigation viable may wish to examine other forms
24 of relationships to fund it. One form of course is
25 whether to be a contingent contract, a percentage.

1 Now, contingency contracts are common place in
2 our local world. But I want to make a very important
3 legal point, they are not prohibited from having
4 contingency contracts. It's not common, most of us don't
5 do it, but unlike the specific statute that the Supreme
6 Court addressed in Frye, there is no general ban against
7 contingency contracts with no indication in case law that
8 there is anything abusive.
9 I want to give one last example of something a
10 board may consider where contingency contracts may in fact
11 be in, very much in the interest of clients. Those of us
12 who do public interest litigation, particularly where we
13 seek injunctive relief, have been faced for many years
14 with implication of extreme in re: Jeff D.
15 What the decision basically says, it's not
16 unethical or inappropriate for defense to say I will give
17 you the relief you seek, if you screw the lawyers, don't
18 pay attorneys, seek a fee, negotiate.
19 Defendants are interested in the bottom line. I
20 understand that, but I have to protect myself, the client,
21 in order to remain in this business. If fees are waived
22 in every case, we are not going to be able to use
23 litigation for political expression. It won't be
24 financially viable.
25 There are many alternatives to retain that. Some

1 folks put a language if they're retained in the agreement
2 they won't waive fee. We all say that. I don't know if
3 that is enforceable, nor do I know that I would try to
4 enforce it.
5 Again, the client is the better course. I teach
6 lawyers this in trainings and to find a way so clients'
7 interests are not in conflict or that lawyers' interests
8 are not in conflict with the client. So there is
9 basically a win, win situation.
10 Sometimes that means on a contingency agreement,
11 if a retainer agreement says the lawyers will be paid X
12 percentage of total recovery and there is no conflict with
13 the client, that arises when a defendant attempts to waive
14 attorney's fees. Both the lawyer and the client have the
15 same interest in maximizing the recovery, so Jeff D.
16 represents many complicated problems.
17 Still I want to point out some that Jeff D. the
18 more prudent way to avoid a conflict with the client might
19 be a contingency agreement.
20 The last point that I want to make is I want to
21 address so what is problem. What is so bad about having
22 some regulation. At least if we don't have the -- some of
23 the aspects of the Supreme Court questions -- let's say
24 the regulations don't say anything about board
25 compensation or doesn't say who you have to represent, I

1 think those would be valid anyway, what's the problem.
2 I believe there are several problems. On one
3 level, to the extent the registration is anything other
4 than a hollow pro forma signing of a piece of paper.
5 There's always the risk that will interfere with our
6 mission, with our means of self-governing.
7 This is also -- it's not a negligible factor to
8 the cost and hassle of additional regulation.
9 We accept that additional regulation already
10 right now from the IRS, for the Attorney -- State Attorney
11 General, from the Secretary of State.
12 To the extent we are legal service trust fund
13 entities, to the extent that we seek funding from any
14 foundation, we accept those levels of regulation, but
15 those levels of regulation are expensive.
16 I have a bookkeeper in my office who spends full
17 time dealing with those levels of regulation. Any time an
18 additional level is there, it's an expense to us.
19 But there is another risk that is there. To the
20 extent the State Bar of California decides to regulate us,
21 there is an increased risk. Many nonprofits of California
22 are affiliated with national organizations or operate in
23 more than one state. California decides to impose a
24 regime of regulations that may or may not be consistent
25 with other states.

1 Most states frankly don't regulate nonprofit.
2 There are a few cases out there, but most of them do not
3 regulate the nonprofit cases of law.
4 If California starts doing it, that could lead to
5 some issues. A good example of why there could be, a
6 consistent came up in the Frye case which is that legal
7 service corporation grants are required to have diversion
8 boards which includes nonlawyers which would have created
9 a direct conflict with the requirements of the statute in
10 question there.
11 So I just caution if regulation is to have any
12 meaning at all and -- other than -- not just a pro forma
13 requirement, there is a risk of inconsistency and expense
14 that arises from that.
15 So I end where I began. I don't think there is
16 any evidence of persuasive problem. It's not surprising
17 given our mission the way we are heavily regulated right
18 now. So I would urge the State Bar to not go where they
19 don't need to go unless there is really strong evidence of
20 a problem.
21 MR. HAWLEY: Thank you, Mr. Seligman.
22 I do have a couple of questions. You have been
23 incredibly informative on areas. We have learned and are
24 aware of oversight committees, Attorney General Office,
25 the IRS. These are agencies that we have not yet, but

1 will be, following up with to get a grasp of the
2 completeness of their regulation with your citations of
3 authority. Very helpful.
4 I'd like to focus very briefly, you have already
5 addressed likewise some key elements that the State Bar is
6 interested in, in distinguishing nonprofit practice from
7 for nonprofit corporate practice from for profit regulated
8 practice.
9 We regulate the one and not the other. What is
10 the distinction fundamentally between those in terms of
11 why we would regulate one at all.
12 One has to do with the fact that as you pointed
13 out, the LES requires it's not uncommon for these entities
14 to have nonlawyers on their boards or mostly nonlawyers,
15 depending upon the nature of the entity, and the concern
16 there is that the extent there is then somehow nonlawyer
17 oversight or involvement in directing the legal practice.
18 And that issue is one that is a broad issue of
19 the board's involvement in the decision that should not be
20 involved in the board retaining in its right to set its
21 policies where it's supposed to, and we drew that line.
22 But my question to you is, I want to reconfirm
23 from your knowledge the problem of a board because of a
24 ideological or financial or reasons of any board member
25 interfering with the independent legal judgement of

1 lawyers, in entities, is something that from your
2 experience you don't see or you do not see a need to be
3 concerned about?
4 MR. SELIGMAN: That is precisely right. I think
5 part of the reason is all of the limitations that I have
6 described, but part -- even if you accept the premise that
7 ideological concerns might be an issue, the ideological
8 concerns that are expressed are not interference in
9 ongoing cases. They are appropriately expressed in the
10 type of cases, whether to take a case in the first
11 instance, that is where you'll see an ideological, that is
12 core 1st Amendment protection.
13 MR. HAWLEY: That is correct. There are lawyers
14 specialized in a number of different things to retain
15 clients occasion.
16 The other area is in client protection. In terms
17 of entities of what resources the clients have, if they
18 are dissatisfied or disserved and what your experience and
19 knowledge with entities to provide this nonprofit world,
20 carrying malpractice insurance and/or having internal
21 client grievance mechanisms that address the client's
22 dissatisfaction with the representation.
23 MR. SELIGMAN: My impression and I -- my
24 impression is based partly from work in the legal service
25 fund from -- partly from being on a number of boards over

1 the years, talking to people is certainly the norm. Most
2 of us carry malpractice insurance because it is physically
3 imprudent not to do it otherwise. That is market
4 accessible, it's available to nonprofit.
5 It is as with anything else, it's never cheap.
6 But there is, for example, I -- many of us kept
7 malpractice coverage from NLADA, which has I think
8 relatively inexpensive limited to nonprofit entities to do
9 that. So there is insurance that is out there.
10 Most organizations either formally or informally
11 have internal mechanisms for clients to complain. And of
12 course if there is a case of substantial abuse or alleged
13 abuse, clients can go to the State Bar because the lawyers
14 are State Bar members. Of course they can go to the State
15 Attorney General if they think there has been
16 inappropriate action.
17 MR. HAWLEY: Thank you. Thank you for your
18 information it's been very helpful. The next speaker is
19 Mr. Collier from the Tenderloin Housing Clinic which for
20 some reason is a familiar name.
21 MR. COLLIER: Thank you. My name is
22 Steve Collier, I'm a staff attorney in the Housing Clinic.
23 My name came up in that opinion that we have all read a
24 number of times as I was the lead attorney in the case
25 representing Mr. Frye against his landlord that resulted

1 in then Frye turning around, suing us again.
2 I'm here to speak like Mr. Seligman to urge you
3 not to regulate nonprofits. My points in my talk will
4 touch on your -- the preprinted questions you have put
5 out, and they'll address questions two and four through
6 nine, I think.
7 I don't think there is any real need for
8 regulation here. I think this is really a solution in
9 search of a problem. The reasons are because as
10 Mr. Seligman said, nonprofits are regulated by various
11 entities and licensed attorneys are also regulated
12 specifically in the nonprofit context pursuant to rule
13 160, plus by the State Bar, and also with the various
14 rules regarding clinics of interest that Mr. Seligman
15 reiterated.
16 I think Frye court also directed there must be
17 determination if there is actually demonstrated harm
18 before we want to see the State Bar enter into the field.
19 I think there really isn't any harm here or
20 certainly not any harm that has been demonstrated.
21 First of all, in the Frye case itself I think
22 there were about 70 AMICI that signed on to the Tenderloin
23 Housing Clinic side. All of them were opposed to the
24 concept that the Corporation Code regulated nonprofits in
25 the practice of law. Now, one of -- all of those AMICI

1 suggested that any regulation was appropriate.

2 The only case that I have that there is any is

3 the Frye case itself that was brought by a ideologically

4 motivated attorney that wanted to shut down an

5 organization, not because of any concern about Mr. Frye or

6 any of our clients.

7 We do have a number of practices that I think

8 this might be helpful to that guard against conflicts with

9 our clients or the kinds of things that this -- that your

10 committee is concerned about.

11 Our attorneys exercise entirely independent from

12 the board of directors or for that matter any aspect of

13 the organization with regards to independent legal

14 judgement.

15 While the board sets general policy for the

16 organization, it is not involved in a decision about even

17 whether to represent a particular client. It does not get

18 involved in those decisions.

19 In a general sense of outlined policies in with

20 regard to our charitable purpose about the type of client

21 that we will have low income tenants in San Francisco, but

22 they don't make any further decision about any particular

23 case. They are not involved in any aspect of

24 representation at all.

25 As a matter of fact, we have a formal board

1 resolution affirming that. The other thing I think is
2 unique to the organization, but makes us a little
3 different than some other nonprofit businesses that
4 practice law, is that we have a substantial nonlaw
5 practice in our organization.
6 Our organization was founded a law office, but
7 then saw a real need for affordable housing in
8 San Francisco and set up a housing program years ago which
9 is now grown into the best ever.
10 Government contracts is actually a much larger
11 part of our organization than the law office that
12 practices law. In fact, that law, that organization is a
13 landlord under common law under the local regulations.
14 But we have a wall between our law office that represents
15 tenants and the housing program that acts as a landlord
16 towards low income tenants.
17 The lawyers in the law office representing
18 tenants do not represent the organization, the
19 organization as a landlord. The organization hires
20 outside counsel to do that. When there is litigation
21 against the organization as a landlord outside usually
22 insurance defense counsel are usually retained.
23 We do not coun -- the "we" being myself and the
24 law office, do not counsel housing law program with
25 regards to its rights or it's obligations. We do not

1 advise them, we do not represent them, and we don't even
2 share information because we really want to remain
3 separate, not be at all impacted by any potential conflict
4 even though we think as attorneys very experienced
5 attorneys we would not let any of those conflicts
6 influence our representation.
7 I think what is important is that the development
8 of nonprofit practice, nonprofit in general are expanding
9 beyond just providing legal services. I think many
10 nonprofits as a matter of fact, our Bar association here
11 in San Francisco, remains a more holistic approach.
12 So nonprofit law organizations are looking at
13 other things like Social Security service, other functions
14 besides the practice of law. Similarly, other nonprofits
15 that don't practice law are looking towards hiring lawyers
16 maybe one or two is due to aid them in their advocacy or
17 provisions of services.
18 So for example organization that may provide
19 social services for immigrant population may hire
20 immigration attorneys in order to advise the clients about
21 immigration law. Because of that great diversity in
22 developing the nonprofit organizations probably I think
23 one of the largest reasons not to regulate it because you
24 are not going to be able to find a one size fits all type
25 of regulation that won't in the way impair the nonprofit

1 mission.

2 I think a lot of practices that we use in our
3 organization in order to protect against clinics are
4 basically same type of protection that for profit use.

5 So I think that even though there's not a
6 specific regulation, for example, for profit agency that
7 have to create a wall division in order to -- a firewall
8 to prevent conflicts within the law firm, they do it
9 anyway because it's in compliance with the various rules
10 against conflict of interest.

11 So I think similarly with nonprofits, we can look
12 at existing practices both the nonprofit and for profit
13 field in order to develop that kind of protection.

14 I think in the Frye case it was very much stated
15 that the all attorney board or even the all attorney
16 membership requirement that currently exists in the for
17 profit regulation would be extremely detrimental, not only
18 to nonprofits mission but to nonprofits ability to
19 survive.

20 Nonprofits do rely on expertise outside of
21 lawyers in order to obtain fund raising or in order to
22 promote their mission. The environmental organization
23 could not probably exist in a successful manner without
24 having scientists and others on their boards.

25 So I think -- obviously I think that requirement

1 in the for profit sector is -- would be a disaster if it
2 was imposed in a nonprofit sector. Again, there is a
3 concern about the for profit motive and whether nonprofits
4 have that motive. That's traditionally been the reasons
5 one of the reasons why nonprofit have not been regulated
6 in the manner of for profit.
7 I just want to say one thing about that, is that
8 while I believe all nonprofit do share a nonprofit motive
9 as our motive, their mission is to profit. That doesn't
10 mean that nonprofit can exist or be successful in its
11 mission if it doesn't watch the bottom line. We all have
12 to make decisions, be prudent about how we use resources.
13 It's essential for any organization's survival.
14 So I think it is nieve to believe that nonprofit can
15 survive without an eye toward self-preservation. That eye
16 towards self-preservation I think impacts the questions of
17 fees.
18 For example, we provide free legal services and
19 generated cases primarily in eviction defense. There are
20 certain aspects of eviction that perhaps is essentially no
21 one but our organization really handles on a large scale
22 because it's extremely complicated, it requires a very
23 high level of expertise.
24 The private Bar since they are entirely generally
25 nonfee generating primarily targeted towards low income

1 people. Nobody in the private Bar will take them so we
2 take them. We take them for free. We make no money on
3 those cases.
4 We do it because it's serves our mission to
5 provide and preserve housing for low income people in
6 San Francisco. However, because we do that, we have to
7 look towards taking other cases that create fees.
8 And luckily in San Francisco and in state law as
9 well, we do have status that provides a fee shift for
10 prevailing party. Therefore, we have to have an agreement
11 with our client that if we win, the fees are paid to us.
12 We disclose in our contracts with our client that
13 the money will go to the clinic even though the attorney
14 discloses who they are, will be representing the client as
15 attorneys, that any fees from the -- generated from the
16 case, will go to the clinic.
17 So I think clients understand entirely what's
18 going on in those situations. But we need to have a mix
19 of fee and nonfee generated cases in order to survive. I
20 don't think it effects the level of representation or we
21 represent clients with the same level and the same
22 expertise regardless of the nature of fee agreements with
23 the client. Then because we disclose that the fee goes to
24 the clinic, I don't think there is any danger. The client
25 realizes that that fee is going -- the fee is not going to

1 the attorney.

2 I wanted to speak against any regulation that

3 would prohibit a contingency fee arrangement for the

4 nonprofit. Because of the Frye case we actually had

5 experience like you said we do nonfee generating cases

6 where we have no payment forward. We have done

7 contingency fee cases. The Frye case exemplified that.

8 We also had experience with agreements of my

9 clients where the attorney fee will be paid to the

10 attorney and that in agreement with the client the

11 attorney fee award.

12 My experience is that from my point of view there

13 is a greater potential conflict when we have any agreement

14 with the client that provides that fees will be, if

15 awarded, will be paid to us, and it be only method of

16 recovering money so through an hourly fee award I think it

17 results in greater problems I think for the client because

18 that is where interests can diverge.

19 The cases that are heavily litigated, there a

20 small payout for the client. The client feels like that

21 the attorney is getting all of the money. Wherein a

22 contingency fee situations, interest tend to coincide

23 because the attorney is getting -- is sharing the risk

24 with the client of a lower award or if there's a higher

25 award they both benefit.

1 I think also clients even especially our clients,
2 although are often -- don't have a lot of experience with
3 the legal system, all understand contingency fee
4 agreements. They understand it. It's not uncommon. It's
5 not confusing to them.
6 Where the other type of agreement where there's a
7 shift, a fee, a fee award and a shift from the losing
8 party to prevailing, party tends to be more complicated
9 for the client and harder to understand and also raises
10 clients concerns of well, you know, we don't want you, you
11 know, getting all of the money out of this litigation.
12 The last thing that I wanted to address was I
13 think a question about whether -- sort of, some sort of
14 voluntary safe harbor registration. In other words, for
15 nonprofits that don't fit into the various exceptions that
16 were outlined in the Frye decision.
17 I think our organization fit pretty clearly into
18 1st Amendment decision, at least as far as the law office
19 is concerned. However, I think because of the diversity
20 of nonprofits there is a lot of other organizations that
21 may not fit into these sort of categories.
22 I think a lot of these categories are created
23 from historical exception that are sometimes 50, 70 years
24 old and seen as an antique, antiquated compared to the
25 current practice of law.

1 The danger of sort of voluntary registration is
2 that what does that entail. In other words, does it, as
3 Mr. Seligman said, if it's more than putting your name on
4 a piece of paper and a fee, it's going to have some sort
5 of restriction on some sort of practice, and it's going to
6 be difficult to have the one size fits all regulation.
7 It will have -- if it has any significant impact,
8 it will have both cost and restrictions on the nonprofit.
9 And there are nonprofits that get a substantial amount of
10 energy towards dealing with regulation that would be less
11 energy and resources devoted towards serving our client.
12 The other thing with the voluntary regulation, I
13 could see the court saying if it's there, you need to use
14 it. And that if you do not, it somehow implies that you
15 are not practicing in conformance with the regulation and
16 law. I think after Frye, it's not at all clear, that
17 there really is a difference.
18 I think Frye clearly states there isn't a
19 requirement for nonprofit to register. To have this sort
20 of voluntary registration could be, I think, argued
21 possibly successfully that it's essentially required since
22 it's there. It would be hard to convince the court that
23 registration is not required if a registration -- if
24 there's a regulation that permits registration. That is
25 all I have to say.

1 Do you have any questions?

2 MR. HAWLEY: I did have one question this draws

3 upon your knowledge and experience if you have it, wish to

4 share it.

5 You referred to the fact that your entity has

6 gone through somewhat of a transformation where you are

7 not solely in business of practicing law, but you have

8 other business as swell which is quite common in a

9 nonprofit public advocacy world.

10 I just wondered, you may or may not know the

11 answer to this, but you talked about the sort of wall

12 division that keeps one piece of business from the other,

13 and the information and everything.

14 Are you aware of whether the IRS standards or

15 nonprofit registration standards that currently exist also

16 have wall requirements with regard to the use of funds so

17 that money coming into the law practice needs to be

18 maintained on one side of the wall or, you know, whether

19 there's a legitimate mix of those founds or not?

20 A. My understanding is that there is no IRS

21 requirement that the funds not be -- that we can't use for

22 example money generated from attorney fee awards if there

23 is a surplus towards other uses. And so I'm not aware

24 that there is any limitation on that.

25 Obviously, there would be money, grant, donations

1 way.

2 First, let me say, from my experience, nothing

3 like that has remotely happened, both, I think, because, A,

4 the lawyers in our organization are intimately familiar with

5 their obligations and Rule of Professional Conduct 1-600

6 specifically, which I think very specifically addresses that

7 situation for the nonprofit, which says, "You can't, as a

8 lawyer, work at a place where you're being pushed to do

9 things other than in the best interests of the client."

10 I also think that, to the extent that anyone in

11 our board may have ever suggested, not to a lawyer directly,

12 but at a board meeting, like, "Well, gee, maybe we should

13 talk to the lawyers about how this case is going, and do

14 this kind of thing," we certainly -- the vast majority of

15 our members are not lawyers, our board members, but the

16 members who are, to the extent that issue has ever come

17 up -- and I've only been aware of it once, and I don't think

18 anyone was saying, "Gee, I really want to pressure the

19 lawyers," but even suggested something that might have been

20 something, and a lawyer would say, "Gee, I really can't have

21 that conversation with you," board members who were lawyers

22 immediately said, "You know what? We, as board members,

23 can't do that. You know, we can be involved in setting

24 policy for this organization, in defining the kinds of

25 issues and areas that the ACLU should be involved with, but

1 once the case selection is made, we simply can't do anything
2 as board members. Whether we are lawyers or nonlawyers, we
3 shouldn't be directing. It has to be the lawyer's judgment
4 as to what's in the best interests of the client."
5 To the extent that there are other concerns, I do
6 think that, in large part, although it is true that it's not
7 as if we cannot bring in any money, even though we are a
8 nonprofit, I do thing that we are subject, in effect, from
9 my perspective -- and I don't want to claim to be an expert
10 on the regulations that a law firm, a private law firm, is
11 subject to, but we do have obligations that the Secretary of
12 State enforces as us (sic) because we're a nonprofit
13 corporation, and obligations that we have to meet in order
14 to be a nonprofit corporation under -- that the IRS
15 enforces, too.
16 So I think that there already is a fairly robust
17 set -- in addition to the Rules of Professional Conduct -- a
18 fairly robust set of regulations that govern us. So, for
19 example, if the fear is "Let's take contingency fee cases so
20 we can start paying our lawyers private-firm salaries" --
21 and I'm not aware of any nonprofit corporation that's
22 practicing law where that's even close -- I don't think that
23 that really -- I think that that would be a major problem
24 under the IRS, and I think that that eventually -- that
25 would be dealt with through that mechanism.

1 So I worry very much about the First Amendment
2 interests that an organization like ours has, and my sense
3 is the primary fear that is put forward is not one that I've
4 ever seen in practice realized, and I also do think that the
5 Rules of Professional Conduct and the Bar's role -- I mean,
6 certainly, if the Bar were to get information that somehow
7 or other a client's case had been handled because of
8 interference from the board as to how it should be handled,
9 as opposed to being handled in the way that the lawyer
10 thought was the proper way to handle it, it would, I
11 believe, be totally an appropriate are for the Bar to be
12 involved in, in disciplining, but I think that that's
13 already something that you can do under the current Rules of
14 Professional Conduct.
15 The only other general comment I'd like to make,
16 and then I'll talk a little bit about -- and, as I said,
17 happy to answer specific questions, because I'd like to be
18 as useful to you all in your fact gathering as I can -- is
19 that I think that there are a lot of different entities that
20 are set up in a lot of different ways. There are law school
21 clinics. There are organizations like ours. There are
22 IOLTA programs. There are the membership organizations that
23 you were talking about. I mean, we are a membership
24 organization, but I think you were talking a little bit
25 differently, about specifically the provision of legal

1 services.

2 I actually, as Frye was going, and the Supreme

3 Court granted review in that, had some conversations with a

4 number of other people, talking about "Well, beyond filing

5 an amicus brief" -- which we did, and I think you all are

6 aware that at least the ideological spectrum of the amicus

7 briefs was from the PLF to the ACLU and the NAACP, and

8 everyone in between. There was pretty much uniformity.

9 MR. HAWLEY: It was the only time you've all been

10 on the same side.

11 MR. ELIASBERG: Maybe not the only time, but very

12 close. That's very close to being the case. But beyond

13 talking about doing that, we also said, "Well, you know,

14 let's think of the worst case. Let's think if the Court

15 says that, you know, 'Yes, you all are subject to this.'"

16 We felt that this would be just incredibly detrimental to

17 our interests and our ability to practice law, and all the

18 groups started saying, "Well, should we at least think about

19 what kind of legislative response we might have to this?"

20 We had some preliminary discussions, but one of

21 the things that was so difficult was that there were so many

22 entities that were set up in so many different ways, all

23 doing very good work, but from the law school clinic to the

24 ACLU and everything else in between, we started thinking,

25 "How do you do this?" And that's why your suggestion about

1 the benefit, or what if we were to pursue an optional route
2 that might be beneficial for certain organizations -- I
3 don't know if there's a strong need out there. I don't
4 really think I'm the right person to answer that.
5 I don't know if the fact that five organizations
6 registers really is a true indication of that, because I
7 think Frye brought into the forefront the idea that "Wait a
8 minute, here. You could have a client suing you over issues
9 like this. It might be beneficial to be sure that you
10 have -- if it's not clear that you fall under the safe
11 harbors, it might be nice to have the imprimatur of the
12 Bar."
13 So I would say that I'm agnostic about the idea of
14 optional regulation, but I would hope that this fact-finding
15 process might enable you to find out whether the
16 organizations say, "Gee, we've been very nervous, and we're
17 even still nervous after Frye, and so we would love to have
18 that ability to come to you and say, 'This is the kind of
19 work we do. We think it's totally above board, and we think
20 that, you know, it would be helpful to have your seal of
21 approval.'"
22 I think mandatory regulation I'm extremely nervous
23 about, and it's really going to be -- I will try not to be
24 at all in depth, because it would be basically repetitive of
25 the previous speaker. I mean, for example, forcing a large

1 percentage, or exclusively, your board to be lawyers, that
2 would be devastating to us, because what we are trying to do
3 is reflect a variety of interests, not all interests, but a
4 variety of interest, and we don't feel that we're going to
5 be informed about the issues in certain communities if the
6 requirement is you need to be a lawyer.
7 Now, can you find lawyers in the gay and lesbian
8 community? Yes. But do we feel that we want to have
9 members of the gay and lesbian community on our board? We
10 want to have a variety. We want to have disability rights
11 advocates on our board. We want to have a variety of
12 different people on our board, and to restrict it such that
13 you have to be a lawyer, I think, would be devastating to
14 our mission and the way we're set up, much less, I also
15 think it would be improper under the First Amendment, but
16 even if that weren't an issue, I think it would not be good.
17 The other thing I would say is, we are talking
18 about organizations that, in some form or other, serve an
19 under-served community. Now, we don't serve only poor
20 clients. I would say the vast -- we don't ask, but, in my
21 experience, the vast majority of the people whom we do serve
22 aren't able to afford private lawyers, and certainly one of
23 the criteria I use in deciding is "Well, is this person in a
24 position to find legal representation elsewhere?"
25 There are certainly cases where I think the answer

1 is yes, and we've still taken it on. There are also reasons
2 why the L.A. Times -- we've done amicus briefs in cases
3 they've been involved in, but they can afford private
4 lawyers, at least -- in recent stories, you start to wonder
5 for the future, but at least for now, you know, they have a
6 private law firm.
7 Would we not represent them if they came to us? I
8 don't know, but we might very well say, "You know what? We
9 have a lot of First Amendment cases on behalf of people who
10 are not seeking damages, who will never be represented if we
11 don't do it. So, in balancing things out, we're confident
12 that you're going to find representation on your case."
13 So it worries me, and you all are intimately
14 aware, far more than I do, about how under-served varieties
15 of populations are in California in getting legal services.
16 I worry that restrictions could, in effect, push some people
17 who may be providing those services out, because you're
18 basically saying, "Well, the way you're set up, you can't do
19 it any longer," and, therefore, you know, I think, from a
20 cost/benefit perspective, you have to be really concerned
21 about saying groups that already don't get the
22 representation that I know the Bar would like them to get
23 are going to be even further challenged.
24 So, as far as, you know, the kinds of restrictions
25 in Frye, the board setup, I think, would be very

1 problematic. Again, probably -- I don't know whether it's
2 70 percent or not, but I don't even want to be in the
3 business of trying to figure out, do we -- or 70 percent of
4 our clients, poor or not, because we don't take cases on
5 that basis, or that's only one very small issue. We take
6 cases as to whether they fit in with our mission, and the
7 policy statements, and the policies that are set by our
8 board.
9 The last issue, about contingency fees, we don't
10 do contingency-fee cases. I don't have a strong opinion,
11 but I -- well, I shouldn't say that. I have a fairly strong
12 opinion. It is not as strong, because I'm not personally
13 vested in it in the same way, because I don't think it would
14 directly affect our organization, but we have thought about,
15 certainly, cases where -- you know, to get in a little bit
16 of doctrine, Lyons (phonetic) makes it far more difficult to
17 bring injunctive cases, the Supreme Court's decision in
18 Lyons, than was true before Lyons.
19 There are times when it appears to us that the
20 only way to do an institutional reform case is by bringing a
21 damages case, because you are going to have standing
22 problems for injunctive relief, and we certainly have
23 considered that the expertise and the person-power that we
24 would need to do a case like that would be with a firm that
25 is experienced in doing that kind of a damages case, that we

1 would share our talents to co-counsel on that, and certainly
2 a restriction on our ability to do a case with an
3 organization that does charge contingencies would be
4 extremely problematic to us, although we haven't yet done
5 it, but we've certainly thought about it.
6 My inclination is I don't think there's anything
7 wrong with contingencies, and I don't think that nonprofits
8 shouldn't be able to do them, as long as they are not doing
9 what the tax code wouldn't appear to allow them to do, which
10 is to say, "Let's just keep amassing money so we can, in
11 effect, pay ourselves the same kind of salaries we would be
12 earning if we worked at, you know, Skadden, Arps." So I
13 would be quite chary of any kind of flat bar that said, "You
14 can't do contingency-fee cases if you're a nonprofit
15 corporation."
16 So those are the statements, and I hope some of
17 them were responsive to specific questions, but I'm happy
18 now to answer any questions that you have.
19 MR. ELIASBERG: Rather than have you go through
20 the list, let me focus you, for your time and mine, on just
21 a couple of areas. You have touched on may of these
22 already.
23 One is with respect to individual client matters,
24 and the recourse a client would have in the event of
25 dissatisfaction, you know, either in expressing, you know,

1 their dissatisfaction, or in bringing, actually, a
2 malpractice action, you know, in terms of what your
3 experience is with the availability of malpractice insurance
4 to an organization like yours, and, secondly, whether you
5 have any internal mechanism for dealing with a dissatisfied
6 client, or have you ever -- or are you in the fortunate
7 position of never having dissatisfied clients, which is one
8 of the benefits of serving the under-served and disserved?
9 MR. ELIASBERG: Yes, although, in all fairness,
10 it's also one of the -- it's a concern to me because you
11 don't want your clients, just because they don't have money,
12 to say, "Well, I couldn't get it anywhere else. So it's
13 okay for you to abuse me, as long as you provide me some
14 service." That's not the way it should be. That's
15 certainly not the way I think about my clients.
16 MR. HAWLEY: Quite said.
17 MR. ELIASBERG: Well, a couple of things. We have
18 the luxury of being an organization that is better funded
19 than I think a fair number of nonprofit entities that are
20 providing legal services. We're an 80-year-old
21 organization, we have a fairly solid fund-raising base, and
22 so on. So we have malpractice insurance.
23 Nobody has ever come to me and said -- and there
24 have been times when our budget has been better and worse,
25 and no one has ever said, "This is one of the items I think

1 we're thinking about cutting." So, from my personal
2 experience, we have it. I feel better about having it, but
3 I also know that there are organizations that don't have it,
4 and I also know that there are lawyers, private lawyers, who
5 don't have it.
6 MR. HAWLEY: Quite true.
7 MR. ELIASBERG: And so I guess my instinct would
8 be to say I wouldn't see a justification for saying, "Well,
9 nonprofit law corporations have to have it, but we don't
10 require it for others."
11 As far as mechanisms for dissatisfaction, as I
12 said, having been there 10 years, I know we've never been
13 sued, and I'm, I think, 100 percent certain we've never had
14 a -- well, I don't know if there's any mechanism for a
15 complaint to be brought where we wouldn't hear about it,
16 it's deemed unfounded, and it never gets to us. If there is
17 such, then it's possible someone has brought a claim. To
18 the extent we've ever been notified that a client has gone
19 to the Bar and said, you know, "He did me wrong," or "The
20 ACLU did me wrong," hasn't been one in the 10 years that
21 I've been there.
22 As far as a mechanism is concerned, yes, we have a
23 person who would receive that, or, if she didn't actually
24 get it directly, it went to somebody else in the office,
25 everyone would know that it has to go to her. I don't think

1 we have a rigid set of policies as to what would happen
2 then, because we haven't done it, but I know the answer
3 would be she would look at it, she would bring it to the
4 executive director, she would bring it to me, and we would
5 talk about what the response needed to be.
6 If it was about me, then, you know, there is
7 another attorney in the office who it would be brought to,
8 because I shouldn't be really -- I mean, I would be brought
9 in, in the sense that they would ask me questions about what
10 happened, but I wouldn't be passing judgment on my own
11 performance.
12 My sense is that, you know, this concern about
13 clients being mistreated is, again, probably equally
14 applicable to the profit and the nonprofit world, and except
15 to the extent that you might say, "Well, the poor are less
16 likely to complain," I guess I don't feel that the
17 regulation should be different. I mean, there is a robust
18 State Bar process. You know, you have the ability to bring
19 discipline, and my feeling is that I don't see a reason that
20 would say there is something about the way nonprofits are
21 set up that would require that they be subject to different
22 rules.
23 MR. HAWLEY: This is something that the State Bar
24 needs itself to explore more, and will be part of our
25 process, but you alluded to it in terms of the existing

1 regulation that you have through your IRS status and the
2 state nonprofit status that you have, but just what I'm
3 hearing from you, and I just want kind of a broad-based
4 confirmation if I've gotten this right, is that focusing
5 upon the use and abuse of revenue generated by cases -- you
6 know, if that were used by an entity, if picking cases for
7 revenue flow, and maximizing, you know, income through
8 litigation and such were a goal of an entity, you're saying
9 that the flow of money through an organization, that is, a
10 nonprofit, is going to be a point of examination, you know,
11 by the IRS and the Attorney General's Office or the
12 appropriate -- Secretary of State, I guess -- that monitor
13 and currently regulate nonprofits. Is that generally true?
14 MR. ELIASBERG: Well, I may have overstated it, in
15 the following sense. I'm not sure whether this is a -- you
16 know, as with IRS audits, you know, everyone doesn't get
17 audited. So I don't want to say, necessarily, that,
18 automatically, every entity is going to be looked at yearly
19 to make sure, but I think that there is a process by which
20 the regulating entities do believe that they do sufficient
21 number of audits, and that there are enough other controls
22 that this would be -- you know, that there is the deterrence
23 out there to prevent that.
24 The other thing I'd say is -- and I didn't hear
25 you saying this. We don't do this. In fact, as --

1 MR. HAWLEY: No, I understand.

2 MR. ELIASBERG: No, but, just to be very clear, we
3 specifically have been told from -- whether it's policy or
4 not, it's certainly the practice of our office that, you
5 know, it's wonderful to win a fee-shifting case. We do a
6 number of cases in which -- but we have been told that
7 that's never to be a criterion. But I don't think that it
8 would be improper for it to be a criterion, if the
9 organization did differently, you know, because I think, the
10 way it's set up, the fee-shifting statutes are to vindicate
11 certain kinds of rights.

12 So, if you pick them, and you say, "I'm only going
13 to get the ones that win," I don't think there's anything
14 wrong with that. I think it would only be a question about
15 whether, then, the way that money is used, or somehow or
16 other that influences the way you actually practice, but, in
17 fact, your incentive should be to win the case, and,
18 therefore, to do it as well as possible.

19 The only thing I could think is, somehow or other,
20 you'd think, "Well, we think we can win it, even if we do a
21 shoddy job, so somehow we'll cut corners, but we'll still
22 get the money," but I guess I'm not -- the fact that fee
23 shifting is out there, to my mind, I don't identify quite
24 how that creates -- where that leads to the lack of ethics.
25 I'm not suggesting that someone couldn't come to me and say,

1 "Well, here's, actually, what I'm worried about," and if you
2 have specific examples, I'd be happy to talk about them.
3 MR. HAWLEY: I think you're right that, you know,
4 of course there is nothing inherently wrong with using
5 litigation or cases to generate revenue. I mean, that's
6 what every law firm does on the for-profit side, and
7 Mr. Rothschild indicated earlier that there are some
8 nonprofits that depend heavily, you know, upon fee-
9 generating aspects of cases to survive.
10 I guess one of the points -- I guess there's two
11 points, you know, in terms of questions, and I pose this
12 really to clarify, and don't necessarily need a further
13 response from you, but one is, you know, how the money that
14 comes in from the practice of law is distributed throughout
15 the organization.
16 The other is the issue that I think you've already
17 addressed, about the board including, you know, lawyers or
18 nonlawyers who are in a board member capacity, who may be
19 overly enchanted with the fee revenue-generating aspects of
20 a case or the high-profile nature or publicity of a case, so
21 that the board's view of what it might get out of this is
22 disconnected with the actual merits of the case, and so you
23 end up imposing your ideological or financial needs upon the
24 lawyers to make decisions about pursuing or appealing a case
25 that really is without merit, you know, and I heard you say

1 that there's a clear recognition that the board member's
2 role is to be the policy maker or policy setter, and that
3 there is a division between that and the actual practice of
4 law that exists, at least in a practical way, if not a
5 regimented procedural way, in your business, so to speak.
6 MR. ELIASBERG: I think that's right. I have
7 never seen anything that comes close to that in my
8 organization. I certainly have knowledge of other
9 organizations, as I said, both from co-counseling with them
10 and also some of the lawyers who have come to the ACLU have
11 worked at other nonprofits. I've never heard any of them
12 say that that is a problem.
13 I don't mean to say that what you're throwing out
14 is a virtual impossibility. It is not anything that I've
15 heard about as being a problem, and I would be nervous about
16 regulating on the idea that, hypothetically, there is this
17 concern, but not evidence of it, and then where -- because
18 there are, I think, potentially large downsides to
19 regulation, in terms of, as I said, cutting the amount of
20 legal services available to under-served communities and a
21 variety of others, constitutional included.
22 MR. HAWLEY: The Supreme Court, in its directive
23 to us, was very clear in the fact that they did not want
24 hypotheticals from us generating a regulatory scheme. So
25 your commentary here -- and that's what I'm trying to get,

1 as to whether there is anything that's tangible, you know,
2 out there, and you have a, you know, perspective and
3 experience that's very valuable in what you can bring here.
4 I'm looking here quickly to see if there's any
5 other issues that I could address through you, but I think
6 you have pretty much addressed the things.
7 One question, because you are -- the legal aid
8 world that Mr. Rothschild addressed in many respects is kind
9 of dedicated at legal representation. I mean, that's kind
10 of their core business. What I'll call the public interest
11 world, like the ACLU and the Pacific Legal Foundation and
12 others, you know, oftentimes have a much broader base of
13 business, if we'd call it, and legal representation or
14 litigation is just one component of that.
15 In terms of the ACLU, I'm assuming that your
16 activities and your business is much broader than simply
17 legal practice. Is that correct?
18 MR. ELIASBERG: Yes, and actually I'm glad you
19 asked that, because that's actually a point I wanted to make
20 myself. To the extent that there -- and I'm not necessarily
21 sure it's inherently improper, but to the extent one worries
22 about bringing cases not just to generate fees to continue a
23 legal program, but that there is some greater danger if
24 you're bringing cases that -- or you're at least looking at
25 the financial possibilities of winning those cases, and what

1 that means, and then using that to fund some other program,
2 I would say the largest other component of our organization
3 is a public education and lobbying, but, the way we're set
4 up, again, because of IRS regulation, in fact, we are two
5 organizations. The ACLU Foundation is -- I never can
6 remember which is which. I think we're a C3, and we are not
7 allowed to use lobbying.
8 MR. HAWLEY: Of course.
9 MR. ELIASBERG: We're not allowed to do lobbying
10 except in, you know, some minor percentage of our time, and
11 we're very rigorous about that, and then the C4, I believe
12 is. So what happens is we're actually -- I mean, people
13 just think of the ACLU of Southern California, but actually
14 we are technically two organizations, and we are very strict
15 about the legal money goes back into the legal program, and
16 the fund raising for the group that can do lobbying stays
17 there, and so, at least with respect to that, there is no
18 flow through.
19 Now, if we also were providing, let's say, other
20 services -- and you've correctly identified, you know -- we
21 were providing counseling services to battered women, you
22 know, I don't know what the IRS would do, whether it would
23 be a bar to use monies raised from legal services to do that
24 counseling, as opposed to lobbying, but I'm not sure,
25 inherently, that there is a problem with that.

1 As far as what our major other business is, as it
2 were, it is one that is really kept separate from our legal,
3 and our legal program -- the money from the legal program
4 goes back into the legal program.
5 MR. HAWLEY: And that's another example where it's
6 part of our charge to look at the IRS' standards and
7 regulations in this world to see what already exists, you
8 know, and what you've just illustrated is an example of
9 where some other agency is providing some oversight and
10 protection in that area.
11 I don't have anything, you know, further here.
12 You're welcome to add anything further. I really do want to
13 express our appreciation for your taking the time to come
14 down here and to participate in this, because we really are
15 dependent on this kind of input, you know, to assist us in
16 deciding where we go, you know, with this project that we've
17 been assigned.
18 MR. ELIASBERG: Right. Other than the comments
19 that I made at the beginning, just to reiterate, I do
20 appreciate, and I would hope that any decision that's made
21 would be made in this way, thoughtful and with facts
22 gathered, but my experience and so on is that I really
23 basically don't see a need for greater regulation, and worry
24 a lot about what greater regulation might provide. But I
25 think your optional idea, you know, if there is an interest

1 in it -- and there are organizations that are uncertain. I
2 think that could be a very valuable program, but I think it
3 would just be an expression of "Is there really an interest
4 in that program?"
5 MR. HAWLEY: Thank you.
6 MR. ELIASBERG: Thank you very much.
7 MR. HAWLEY: Thank you very much.
8 I think we have completed the hearing from those
9 folks who let us know in advance that they were interested
10 in speaking. Let us go off the record now for a moment, and
11 I know that we have more folks in the audience who may
12 simply be observers, or may wish to address the process. So
13 let's go off the record, and Sharon Ngim, you know, is
14 available if anyone does want to speak, to let her know, and
15 then we'll go back on the record at some point, and either
16 conclude or hear further from anyone that wishes to be heard
17 further from. So, with that, let's go off the record.
18 (Proceedings recessed briefly.)
19 MR. HAWLEY: Let's resume, going back on the
20 record.
21 We've had two additional speakers request for an
22 opportunity to be heard, and we of course grant those
23 requests. So first is Mr. Brian Chase from LAMBDA Legal.
24 Mr. Chase, thank you.
25 MR. CHASE: Thank you very much. Just a couple of

1 brief comments, one organizational and one personal.
2 Organizationally, I wanted to point out that
3 LAMBDA Legal Defense and Education Fund, which is a national
4 organization representing lesbians, gay men, bisexuals,
5 transgendered people, and people with HIV and AIDS, we
6 practice across the entire country. We have five offices
7 nationally, and we're incorporated as a 501C3. Our
8 headquarters is in New York, but we have offices in Chicago,
9 in Atlanta, in Dallas, and here in Los Angeles.
10 For a national organization that practices
11 national but has satellite offices, a registration scheme or
12 a regulation by one State Bar could be extremely
13 problematic. So I would ask you to take that into
14 consideration, that there are a number of organizations that
15 are similarly structured, and that might encounter problems
16 with state-specific regulations.
17 Also, on a personal note, I wanted to say I am a
18 recent transplant to L.A. I moved here two years ago, and I
19 did most of my practice in the city of New Orleans. While I
20 was a very young attorney in New Orleans, I began
21 volunteering with a program for homeless youth that
22 provided -- New Orleans has a huge population of runaway
23 teens. The organization provided a place for kids to get a
24 shower, where they could get clothes.
25 I was on their advisory board, and a lot of the

1 kids had legal problems, and I decided that it would be very
2 helpful, through the center, to have a legal advice clinic,
3 and this was basically established by the center giving me a
4 desk, with a little sign that said, "The lawyer is in," and
5 me getting some of my friends to volunteer to help kids out
6 and take some pro bono cases.
7 I'm not sure that kind of entrepreneurial legal
8 help would be possible if there was any kind of
9 comprehensive regulation or registration scheme, because
10 sometimes those little start-ups -- you know, it was funded
11 out of my checkbook. So trying to good in that fashion
12 wouldn't necessarily be possible if there was some
13 additional burden and some additional expense. So I would
14 also ask you to take that into consideration as well.
15 MR. HAWLEY: Do you mind if I ask you just a
16 couple questions? Because, as I said, I'm kind of a sponge
17 here, and hope to get as much information as possible.
18 You alluded to the fact that you do business kind
19 of across the country, I mean, frankly, as does the ACLU,
20 but, just for the record, in terms of your experience
21 elsewhere, outside of California, I mean, have you
22 encountered, in any other state, any kind of regulatory
23 issues such as those that we're exploring here?
24 MR. CHASE: None whatsoever, no. When we practice
25 in other states, we come admitted pro hac, or we find an

1 attorney within the organization who is admitted in that
2 state. So, for example, I am the only attorney at LAMBDA
3 who is licensed in Louisiana and Florida. So, if there are
4 needs specific to those two states, even though I'm based
5 out of Los Angeles and those states are out of my region, I
6 might be brought into those cases, but no, there has not,
7 and I'm not aware of any state that separately regulates
8 nonprofit entities differently than they would other
9 entities that are providing legal services.
10 MR. HAWLEY: Okay. Just a couple of other
11 questions, repetitive of what I've asked other people. In
12 terms of your -- LAMBDA's major part of its business is
13 actually representing clients, you know, within the criteria
14 that you have for your entity. What, if any, procedures do
15 you have, including, you know, malpractice insurance, for
16 dissatisfaction clients?
17 MR. CHASE: And we maintain malpractice insurance
18 not only for our practicing attorneys, but for any attorneys
19 on staff. So, if you are licensed to practice law, you are
20 on our E and O policy.
21 MR. HAWLEY: Okay. The other issue has to do with
22 the separation between the role of the board, you know, and
23 the legal representation, both from an economic drive, in
24 terms of the board's need to fund-raise, you know, as well
25 as the ideological commitment that many nonprofits are

1 formed around, and what protections you're aware of keeping
2 that separation clear, so that the lawyer's independent
3 judgment with respect to the handling the best interests of
4 the client are not interfered with or influenced by either
5 the economic or ideological needs of the business policy
6 side of the organization. Can you address that issue?
7 MR. CHASE: Of course. Much like the ACLU, we
8 keep the issue of case selection very, very separate from
9 other administrative matters that go on within LAMBDA. It
10 is attorneys who decide what cases were are taking. Now, of
11 course, we are an ideologically based organization, so any
12 conflict of interest is taken care of at the intake stage,
13 not, you know, two years down the road, when we're
14 representing them, when we realize that a conflict arises.
15 If there is a potential conflict -- and I can
16 speak to this. We have actually taken action against a
17 corporate entity whose general counsel was the chairman of
18 our board of directors, but a client came to us with a
19 legitimate claim against this entity, and we pursued it.
20 The fact that he was on our board of directors had no
21 bearing whatsoever on the decision.
22 MR. HAWLEY: And then, also, with respect to --
23 and, again, this is just a point of factual inquiry. In
24 terms of the way you're set up, are you created, you know,
25 as a qualified nonprofit entity for IRS purposes?

1 MR. CHASE: Yes. We are a 501C3, and, much like
2 the ACLU, any money that we would get through fee-shifting
3 arrangements or through Section 1988 would go into things
4 like education, which is the other activity that we engage
5 in quite a bit of.
6 MR. HAWLEY: I don't have anything further. I
7 mean, did you have anything that you would like to add?
8 MR. CHASE: I do not. I appreciate the
9 opportunity. Thank you.
10 MR. HAWLEY: Right, again, and I thank you very
11 much for taking the time to come down here, because this is,
12 you know, a process of fact gathering, and the information
13 that we're gathering is coming right out of the trenches,
14 and that's what we wanted to hear. So thank you very much.
15 MR. CHASE: Thanks.
16 MR. HAWLEY: Our next speaker is Adriano Martinez.
17 Hi.
18 MR. MARTINEZ: Hi.
19 MR. HAWLEY: Please identify yourself for the
20 record, so we have a complete history of who all of our
21 speakers are.
22 MR. MARTINEZ: My name is Adriano Martinez, and
23 I'm an attorney for the Natural Resources Defense Council.
24 We're a national organization, and we have one international
25 office. We're based out of New York. We have offices in

1 D.C., San Francisco, Los Angeles. We just opened up an
2 office in Beijing. We work on a wide range of environmental
3 issues, from global warming to protection of endangered
4 species, to protection of wildlands such as the Arctic
5 Wildlife Refuge, other issues like that. So we have a very
6 broad-based, you know, mission.
7 I must admit that, you know, I'm pretty new to the
8 organization. I've been there a little over two years, and
9 I rely a lot on my direct supervisors for a lot of
10 institutional issues, some of the questions you've asked,
11 but I can answer to the extent of my knowledge.
12 One issue that I think needs to be raised,
13 especially from our perspective, on membership of our board,
14 is the role of science in environmental nonprofits, and it's
15 very important that we have membership on our board from
16 scientists, and we have scientists on staff, because that is
17 a crucial component, as good science really helps us in our
18 practice of law, making sure that we understand the
19 connections between, for example, air pollution and impacts
20 on children with asthma in Long Beach, et cetera, other
21 issues like that.
22 Like the previous speakers, we are concerned about
23 mandatory regulations, depending on the -- it concerns us,
24 without seeing the exact form, but also we are just
25 concerned because, you know, we do have a board that, you

1 know, some are lawyers, some are -- you know, we even have
2 actors. We have, you know, other longstanding activists.
3 We have academics. We have a wide range of people on our
4 board, and also our membership base is quite broad. We have
5 approximately 1.2 million members throughout the nation, and
6 a lot of those members are in California. So I think we
7 have about 250,000 throughout the state.
8 Other than that, some of these questions -- client
9 dissatisfaction, I haven't had any experiences. Our clients
10 are generally appreciative of our work, and we work with
11 low-income clients, sometimes. We also work with clients
12 who have plenty of income, because we work on such a broad
13 range of issues.
14 Then, as previous speakers, we do have ways that
15 we screen for conflicts, and we do a lot of work up front to
16 identify the proper cases to bring, and we do a lot of
17 research into the merits of the case. So we aren't
18 bringing -- you know, I haven't heard of any claims of NRDC
19 bringing frivolous lawsuits, but, as I said, I'm new to the
20 organization. So I don't know if you have any other
21 questions.
22 MR. HAWLEY: I mean, that's fine. I mean, I
23 respect the fact that you're -- you know, your place in the
24 organization, you know, and you've heard the preexisting
25 questions, and if there's anything you wanted to add on

1 that, you know, it is fine, but otherwise the information
2 you've provided has been helpful, and hearing from yet one
3 other nonprofit sort of advocacy organization.
4 That's an important area for us to hear from,
5 because the State Bar, by its nature, is quite familiar with
6 the legal aid world, and the legal aid society world, and we
7 have a great deal of information about how that area
8 operates. So it's particularly beneficial to hear from what
9 we call sort of the public interest sector, you know, that
10 represents a certain area, you know, of society, so to
11 speak, in that regard. So hearing from you and the ACLU and
12 the other folks in that business, if we might call it that,
13 is very much appreciated.
14 MR. MARTINEZ: Thank you.
15 MR. HAWLEY: Thank you.
16 Anyone else that would like to comment?
17 (No response.)
18 MR. HAWLEY: With that, I'll conclude. We will be
19 conducting a similar hearing on Friday in San Francisco,
20 commencing at 11:30. There are a number of folks who have
21 requested an opportunity to be heard, very reflective of
22 what we've heard here today, so we're quite anxious to hear
23 from them.
24 In terms of the process, we are in our fact-
25 gathering mode, and will continue to be. Many of you have

1 seen the questionnaires that we've disseminated, and that
2 has a January 31 cut-off date, although that is, you know,
3 arbitrary. You know, we simply needed a point to stop that
4 process, so that we can begin a more targeted approach. We
5 already plan to talk to the Internal Revenue Service and the
6 Secretary of State regarding their various policies and
7 procedures, so that we know what they do, so that we needn't
8 duplicate it. So what we've heard here will only energize
9 us in making sure that we get that covered.
10 So, with that, we thank you all for your time, and
11 we've benefitted greatly from your input, and with that, we
12 can conclude the record.
13 (Proceedings concluded.)
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1 CERTIFICATION OF TRANSCRIBER

2 I, Holly Martens, do hereby certify that the
3 foregoing 55-page transcript of proceedings, recorded by
4 electronic recording, represents a true and accurate
5 transcript of the Public Hearing Regarding Practice of Law
6 by Non-Profit Corporations held on December 6, 2006.
7
8 12/18/06 Holly Martens
Date Transcriber
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1 of certain kinds that do -- like I say, I have got the
2 contract including some for the provision of legal
3 services. Those are restricted but that sort of attorney
4 fee is a nonrestricted fund that we could use for
5 charitable services.
6 MR. HAWLEY: I have nothing further. Thank you
7 very much.
8 Our next speaker is Miss Cindy Cohn from the
9 Electronic Frontier Foundation. That sounds exciting
10 CINDY COHN: I like it. Well, I wanted to come
11 speak with you today because I think that you know I agree
12 second heartedly with everything that Brad and Mr. Collier
13 have said about the legal requirements and that there is
14 no need for the regulation.
15 I have to say I practiced law commercially for
16 ten years before I came over to work for nonprofit. And
17 the complaint level of my clients has dropped to zero from
18 what I would say would be a little higher from the paying
19 clients. Everyone is extremely happy when we step forward
20 to help them with their problems.
21 I have never had a formal or informal complaint
22 from a client. If there are issues, we have worked them
23 out internally. Again, that wasn't always the case for me
24 in private practice I have to say.
25 So I think that there isn't a need for regulation

1 here and certainly from my personal experience it's really
2 just the opposite to people that are doing the nonprofit
3 work and providing legal service work like our
4 organization does or generally our clients are over the
5 moon that they have people helping them with these
6 problems that they normally would get no help with.
7 I worry about cookie cutter registration and
8 regulation requirement if the -- even if you decide to go
9 this way because my organization doesn't look like the
10 we -- have a very vibrant and active here and across the
11 country. I think there is a rising of unintended
12 consequences. I. -- when I filled out the form on line, I
13 kept having to kind of say none of the above and explain
14 how.
15 MR. HAWLEY: Did you explain what your business
16 is.
17 MS. COHN: Yes. So we are a member support to
18 California nonbased profit. We are dedicated to provide
19 civil liberties, rights of the people. We have over
20 12,000 dues paying members.
21 Our focus is generally on people engaged in new
22 technology one way or the other. Right now we are
23 involved in litigation with Florida rising from problems
24 with electronic voting machines that resulted in a problem
25 in that county.

1 We were landmark in the United States concerning
2 the Internet that 1st Amendment applied equally to the
3 Internet as to other technology, Reno versus ACLU 1977.
4 We were cocounsel to U.S. Supreme Court case dealing with
5 the MGM versus Grogsters (sic) which was dealing with the
6 property rights innovators on line versus regular property
7 issues. Although when technologies interact with that,
8 the case involving for of computers in, by the government
9 case called Steve Jackson Games versus U.S. Secret
10 Services.
11 We have been involved in landmark annonymous
12 speech on line first amendment protection for computer
13 codes. And right now we are cocounsel telecommunications
14 companies the UDS government involving from warrantless
15 wire tapping of Americans under the program that the
16 government amended last year about this time. Which
17 involving both 11 wire tapping and E-mail and digital
18 communication wire tapping as well.
19 So that gives a flavor of the context in which we
20 go. I think we are very clearly under the 1st Amendment
21 exception that has been kind of a core of NAACP that
22 people can gather together to use litigation to achieve a
23 nonprofit goal. But also to use litigation as a 1st
24 Amendment offering not only is the litigation itself a 1st
25 Amendment, we are often litigating 1st Amendment rights in

1 our cases. So I think that is where we fit in the current
2 structure.
3 So I wanted to talk a little bit about the kinds
4 of unintended consequences that I'm afraid of, having
5 watched the Frye case. We joined in the amicus group.
6 Also in the things I have seen on line, on your online
7 discussions about this is the first and the most, I think,
8 important one has already been touched on by the other
9 speaks to the nonlawyers on the board of directors.
10 Electronic Frontier Foundation was founded by
11 nonlawyers, founded by technologists, realize with the
12 coming digital revolution or soon restitution and civil
13 rights were going to get rethought.
14 It was important to have people there on the
15 front line making sure that our rights made it in tact
16 through cyber space. We were technologist first then
17 hired lawyers to go forward with that I think that is very
18 much in line with the NAACP in building or saying you can
19 use litigation to protect people's rights.
20 We now have eight members on our board of
21 directors. Two of them are attorneys and two law
22 professors. Pam Sanderson from Bolt Law School, Larry
23 Letsic from Stanford are on our board. But we have six
24 nonattorneys, they include technologists. We just
25 recently added a prominent computer scientist from

1 Princeton named Felton.

2 On our board our nonlawyers serve a critical

3 purpose in our board to identify issues that are coming

4 up. Our belief from our Board of Directors as to look for

5 the issues that are coming down the road that people don't

6 see yet.

7 And our technologists on our board are -- we

8 couldn't do what we do without them because they're the

9 ones that say, you know, there is this new technology. We

10 think it's going to have your ISP to sensor your speech

11 ahead of time.

12 The government recently as yesterday suggesting a

13 database of files that would be given ISP they would

14 search the network as traffic filed over it.

15 I wouldn't have known about this database had it

16 not been for technologists on our board. It's

17 tremendously important to our purpose and really would be

18 a tremendous burden, not only in our doing of our jobs and

19 moving forward with our corporate purpose, but I think or

20 fund raising, too.

21 If we had all lawyers trying to figure out what

22 next new technological issues were, I think I would lose a

23 significant portion of my funding base that comes from

24 those technologists. They trust the as you -- because we

25 have technologists on our board that we are not the kind

1 of lawyers who are still using the fax machine. We
2 understand about digital technologies.
3 The second issue that I think has been put
4 largely to rest is the question needs testing of clients.
5 As a 1st amended organization, we are a legal service
6 organization. I would say that -- I did a rough count of
7 our clients. I think that you know that it's likely that
8 closer to 90 to 100 percent of our clients would fall into
9 the kind of Frye decision.
10 We just -- it's not how impact litigation works
11 and you know especially because we are in area of
12 technology. While I care very much about it, the people
13 that need testing are not usually the testing needs or
14 kind of help, so I want to -- so those are two things that
15 is a most concern to me about this.
16 I think the fact that the electronic Frontier
17 Foundation, there's a large ecosystem of nonprofit out
18 there and any kind of regulation that kind of takes them
19 to what an organization looks like, could very easily
20 maybe not leave us out, but somebody else who is doing
21 something very different.
22 I think that California is the place where you
23 see a lot of these things. First is, well, to use a
24 technological term is a feature not a bug of our system
25 and we shouldn't be trying to rid it out. I want to touch

1 on a couple of things about fees.
2 I'm happy to answer questions about how we work
3 any of them. I don't think we are all that different in
4 terms of separating out the board role from lawyers rules.
5 The board of directors sets policy for us, they never pick
6 cases for us. They don't have anything to do with it.
7 We usually engage pretty significant process with
8 potential clients about talking about what is there
9 expectation there is what they like. Once we sign it, we
10 are regular lawyers that suddenly decided they would like
11 to go back, not be a Plaintiff in a lawsuit any more, they
12 want to settle. We settle, or they want to send the case.
13 I say that is one of my biggest problems or
14 frustrations that what you deal with is that people often
15 think they want to do impact litigation. Then a couple of
16 years down the road that is just the way it works.
17 For us our task is clear that comes from our
18 individual responsibilities as lawyers under the State Bar
19 rules. We take those very seriously. They don't waive to
20 me non profit or for profit. I don't think an extra level
21 of regulation is needed to keep us focused on that.
22 In terms of fees, we generally -- we never charge
23 for our services, not even any fee whatsoever. I would
24 say the vast majority of our cases are just straight pro
25 bono. We just have law firms work with us on, cocounsel

1 on the big tech firms in the Bay Area, across the country
2 work with us on cases on a regular basis. But
3 occasionally we do enter -- we have got a couple of cases
4 where we have entered into contingency arrangements. It
5 was also already a contingency case when we were asked to
6 be cocounsel because they're so close to ours, the issues,
7 I don't think it's appropriate to I think call and ask the
8 client to renegotiate the fee arrangements when you come
9 on.
10 A lot of the big firms can do pro bono cases, but
11 actually quite often you would work with one or two
12 attorney firms. We really like working with them. It's a
13 chance for them to do cutting edge digital work.
14 If it's strictly a pro bono matter, that is
15 another situation in which we have in full consultation
16 with the client, gone to a contingency sort of arrangement
17 so we can get good counsel for the case. Counsel for in
18 that it takes a long time.
19 So if I'm going to a attorneys firm to sign up
20 for me to do a ten-year long case, I think it's only fair
21 to try to think about a way that could be financially
22 feasible for them because the truth is they won't do it
23 otherwise.
24 I have never driven cocounsel through bankruptcy.
25 I will never do it. I also think that there are a few

1 cases where you have been able to get statutory fees.
2 Again, one of our reason for whether or not to take a case
3 or not whether there are fees available such as a
4 commercial firm will step the take the those cases.
5 We won't take those cases if they're appropriate
6 for commercial firms where we send people out where they
7 can have the resources to pay or the case is a easy fee
8 generator. Maybe we will take aim in a customary role,
9 but occasionally there are situations where there are fee
10 provisions that haven't been utilized yet. We'd like to
11 set an example that we can use through demonstrate how the
12 few provisions can be used in a new set of cases.
13 We like to take the first couple of cases then we
14 can encourage commercial firms to do this. We have done
15 this in two instances. One, a provision of copyright law
16 that makes it, provide for people for fee sending, plus
17 using copyright law sending in proper noises.
18 We undertook the first case. It's called the
19 Digital Legal Copyright Act, Section five where a company
20 was unhappy with some criticism that some people put up on
21 their website. Whether that addresses the criticism, they
22 claim that was copyright protected by them, used a process
23 by federal law to get the information taken down very
24 quickly.
25 We brought the first case online. It was decided

1 by Judge Fogle in San Jose. We have seen several follow
2 cases where it laid quiet for about six years. Since we
3 brought the first case, we have opened up a field that now
4 commercial lawyers are starting to step in to.
5 Similarly, there has been some questions with the
6 use of California slap law for anonymous speech cases.
7 And there are a couple of tricky things about trying to
8 use the California slap law anonymous speech cases. The
9 most recent one that we have taken on where the underlying
10 case is in another state, but the subpoena gets issued in
11 the State of California against Yahoo or Google or the
12 other intermediary, make sure the slap law applies to
13 those cases.
14 Well, again, we have -- now we have started to
15 get a couple of good decisions out of the court that are
16 applicable, commercial firms can come in. But I would not
17 want to be limited to the kind of cases that we can take
18 on based upon whether they're fee generating or not
19 because we have the reason to take on those cases in order
20 to open the door for the commercial firms to undertake
21 those issues.
22 That is my goal for most of what we do, to create
23 a situation in which you don't need us anymore. We can go
24 on to do the next thing. I'm happy to answer any other
25 questions.

1 MR. HAWLEY: I think you addressed the focus of
2 my questions with respect to one thing you have heard the
3 prior speakers talk about client protection malpractice
4 insurance dealing with client dissatisfaction.
5 In your experience, what you have heard, is that
6 for nonprofits like yourself and others their malpractice
7 insurance is available as far as you know, it's generally
8 obtained by folks in your business?
9 MS. COHN: I think it is. We certainly carry
10 malpractice insurance. I would not set foot in the
11 organization until they had it.
12 I was the first practicing lawyer to come in
13 start representing people outside the organization. When
14 I took over they really only represented themselves before
15 in most cases. We are not in a legal aide pool. We don't
16 get those easy things. So I have to make my case to the
17 malpractice insurancer that it's okay, we can -- they can
18 insure us.
19 I think I would have a smaller field to choose
20 from than commercial lawyers do, but we have managed to
21 get it every year. While I like it to be cheaper, it
22 isn't.
23 We do -- again, we have never had a claim. I'm
24 not aware of any other nonprofits that have and certainly
25 my -- it's really just the opposite. We get cookies and

1 all sorts of gifts all of the time from our clients that
2 are pretty overjoyed.
3 Because of the kind of technical issues that we
4 deal with, it's very difficult for our clients to find a
5 commercial lawyer who knows what they are talking about,
6 and the complicated reserve engineering questions about
7 this code and that code, which are coming up more and
8 more.
9 It's really not the case that you can call your
10 local Bar association get referred to somebody who has got
11 the expertise. Very often, we are often the first step
12 for people like that. If it's a case appropriate for
13 impact litigation, we take it. If not, we have other
14 lawyers that we can send people to. That is probably more
15 of the people help that I give, more people than the
16 actual litigation.
17 MR. HAWLEY: I don't have anything further.
18 Thank you very much for sharing your expertise.
19 Let's take a five minute break.
20 (A recess was taken.)
21 MR. HAWLEY: Okay. Let's resume. Just a
22 reminder, the court reporter diligently is trying to get
23 all of this down so please keep your voice up. And I am
24 regularly faulted for talking way too fast. So keep in
25 mind that we do have a court reporter. And again, just to

1 remind folks that may have come in late, the Bar's role
2 here is to fact gather. Our focus is upon getting as many
3 facts from you who are highly experienced in this area.
4 You know it.
5 As you have seen, I may ask questions I want to
6 remind you that merely our goal is to fulfill our mandate
7 to gather facts. You are free to provide the information
8 or not provide it in a more generalized form if you choose
9 to.
10 Our next speaker is Mr. Aaronson from Hastings
11 Civil Justice Clinic. Welcome.
12 MR. AARONSON: Good afternoon, I am
13 Mark Aaronson. I'm a tenure professor of law director of
14 Hastings Civil Justice Clinic, which I founded 14 years
15 ago. The Hastings Civil Justice Clinic has six
16 supervising attorney/faculty members, including myself.
17 I am here actually speaking on behalf of myself,
18 but also I have been delegated to speak on behalf of the
19 institution by our chancellor and the dean at the
20 University of California Hastings College of the Law.
21 My own background, I have been a practicing
22 lawyer for 37 years. Most of it in legal service civil
23 rights work. For thirteen years I worked at the
24 San Francisco lawyers committee, which is a civil rights
25 anti-poverty organization using pro bono attorneys as its

1 executive director in the early'80s.

2 I was the vice chair, then chair of the old State

3 Bar legal service section during the period in which we

4 developed and then got enacted, implemented the IOLTA

5 program.

6 I drafted an amicus letter on support of clinical

7 director at law school throughout California specific law

8 schools. In addition to Hastings were Stanford, Bolt

9 University of San Francisco, Golden Gate and University of

10 Southern California. I'm sure if I contacted them, I

11 would have been able to get the other main law schools in

12 California as well.

13 The theme of my talk today or my remarks is the

14 continuation of the theme of unintended consequences as a

15 result of an effort to regulate by the State Bar the not

16 for profit law law. My case in point obviously is law

17 school clinics. Real client assistant representation

18 provided by law students under close supervision, part of

19 legal education in the United States.

20 At law schools that are accredited by the

21 American Bar Association one forum of a real client

22 clinical legal education, is in-house clinic. The example

23 of Hastings is where the supervising attorney, the full

24 time faculty member who also teaches a companion seminar

25 which emphasizes lawyers in school perspective on being a

1 lawyer as well as a knowledge in the subject matter of the
2 particular clinic.
3 The result is an intense, invaluable learning
4 experience for students based on their actual lawyering
5 experiences, and most importantly their self reflections
6 on those experiences as additionally augmented by relevant
7 classroom discussion, one-on-one-discussions with the
8 supervising faculty member.
9 The clinics by in large tends to have limited
10 caseloads and emphasize the mentoring of law students to
11 meet the highest standard of professional practice and
12 client responsiveness.
13 To my knowledge, none of the California in-house
14 clinics at law schools there are other forms that provide
15 clinical legal education and separately incorporated it's
16 a public benefit nonprofit corporation.
17 Instead they are a unit of their parent
18 educational institution, which in turn is subject to the
19 usual oversight provisions of either tax exempt nonprofit
20 organization or public institution as in the case of
21 University of California.
22 In addition, this is important for ABA accredited
23 law schools there are further oversight protection
24 provided by the ABA standard of approval of law schools
25 and accreditation site visits every five years to further

1 govern and review the operation of law schools.
2 There is a parallel system for those law schools
3 that are accredited in California only. As a unit of
4 larger education institution, the caseload operations of
5 the clinic are managed internally within the clinic.
6 There is law school oversight as to the quality of
7 teaching, but not interference in specific case handling.
8 To the extent there have been attempts at outside
9 interference, which I know of none, in my 14 years in
10 Hastings regarding California law schools they are almost
11 always resisted very strongly by the law schools
12 themselves and by the individual clinics and their
13 attorneys.
14 What is encouraging this kind of resistance is
15 not only the kind of safeguard of valuing the independent
16 judgement of attorneys, but also the very important
17 emphasize the colleges and graduate schools and
18 professional schools of higher education on academic
19 freedom.
20 These provisions regarding academic freedom
21 extend very much to clinical teachers in-house clinics at
22 law schools. These are most specifically codified as part
23 of ABA accreditation standard 405 C and interpretation
24 405-6 which further flushes out.
25 So we have a situation where lawyers operating in

1 in-house clinics not only are mandated to operate
2 independent of judgement in handling of cases, they are
3 also further protected by principle standards regarding
4 academic freedom.
5 In terms of the operation of law school clinics,
6 there is no need for additional regulation. Indeed this
7 goes to my theme of my brief remarks is that state wide
8 regulations or regulation is highly likely to be
9 unintentional and seriously detrimental.
10 With respect to the big picture of legal
11 education itself, it's apt to require the separate
12 incorporation of in-house law school clinics.
13 That separation will pose new obstacles in the
14 effort to integrate law school clinics into the main
15 stream of legal education. Something very much pushed by
16 the organized Bar, strongly supported by the courts
17 through provisions like law student certification rules.
18 The bringing together of academic excellence and
19 the real practice of law lies at the heart of a sound
20 clinical legal education. Any development which begins to
21 erode the progress made in the last several decades within
22 our law school faculties and enrich the law school
23 curriculum by having well supervised academically strong
24 real client learning experience for law students is most
25 unwelcome.

1 At the operational level, such regulation is
2 likely to aggravate the problems of funding for law school
3 clinics. At Hastings, for example, the in-house civil
4 justice clinic is on hard money. It's part of the same
5 budget that supports the rest of the academic curriculum.
6 Separate incorporation over time is likely to make full
7 funding more problematic.
8 Moreover, there are very substantial benefits of
9 being part of a large educational institution in terms of
10 not being directly responsible for overhead cost and much
11 better fringe benefit kind of practices.
12 Moreover at some schools, like Stanford, there are
13 additional savings attributed to the fact on something
14 like malpractice, an issue of concern to you, they are
15 self-insured I think.
16 At Hastings we very much carry malpractice
17 insurance. It's the same policy that most California
18 legal service providers have.
19 While law school conflicts may play a relatively
20 small part, though at times an important part, in delivery
21 of needed legal services to unrepresented and under
22 represented interests, they continually play a major role
23 in education and change of California future lawyers.
24 Especially in ways that encourage high quality to
25 responsible lawyering there is no need for State Bar

1 regulation.

2 In my time at Hastings, there have been

3 reoccurring accolades, no complaints from clients

4 regarding the quality of service provided.

5 In short, the advent of any new state regulation

6 is apt to have a negative impact on continuing development

7 of law school clinical programs and for no discernible

8 reason.

9 I'd be happy to answer any questions.

10 MR. HAWLEY: Thank you, Mr. Aaronson. I have one

11 question. I was able to cross off the others as you

12 answered them.

13 Are you -- in talking about your general

14 knowledge of clinics, do you know if there's a practice

15 general with respect to whether the clinic takes

16 fee-generating cases or are they pro bono?

17 MR. AARONSON: I don't think they take generally

18 contingency cases. But if in terms of taking cases where

19 there would be statutory awarded fees, yes, our clinic --

20 the one area not picked for that reason there are

21 available statutory fees if we prevail and we have

22 collected fees. I do know of circumstances.

23 MR. HAWLEY: Thank you very much for your

24 insight. Thank you.

25 MR. AARONSON: Thank you.

1 MR. HAWLEY: Our next speaker Mr. Anthony Caso
2 from the Pacific Legal foundation.
3 MR. HAWLEY: Welcome.
4 MR. CASO: Good afternoon. My name is Anthony
5 Caso. I'm the senior vice president at Pacific Legal
6 Foundation where I have managed the legal program there
7 for 15 years now.
8 I have employed their public interest work for
9 nearly 28 years in my role. I work with the attorney on a
10 daily basis to make sure these issues don't come up.
11 Also of interest to this hearing I'm a professor
12 for the University of San Francisco a legal issue
13 affecting nonprofit organization. Now, PLF has different
14 policy viewpoint than many of the organizations that have
15 testified here today.
16 Nonetheless, we are on the same side of the table
17 with them because we think further regulation is
18 unnecessary and fraught with constitutional concerns.
19 Pacific Legal Foundation it's public policy
20 organization, much like I think Electronic Frontier
21 Foundation, probably similar, that are not -- we are
22 trying to accomplish public policy to do it through. PLF
23 has done this, litigate nation wide, not just in
24 California. We have had several appearances before the
25 U.S. Supreme Court. We are governed by a board of

1 directors half of whom are attorneys. That is more as a
2 matter of informal policy than a by law requirement.
3 The foundation does carry malpractice insurance and
4 so far as I have been able to determine there has never
5 been a claim against it. Whether we are applying for
6 malpractice insurance, filling out the normal form they
7 send to other law firms, the carriers ultimately determine
8 that we are very odd birds.
9 They have a difficult time figuring out how much
10 to charge us. If we get together with all of the other
11 nonprofit in the world, maybe we can come up with a better
12 solution to that.
13 Our board does make the decision which cases we
14 will handle. But after that point they have no
15 involvement in the litigation. And it's my job to make
16 sure that that happens.
17 Frankly, the board has no interest in managing
18 the litigation. Their interest is making sure we are
19 picking the right case to go forward with. After that
20 happens, it's up to the lawyers. And all of the lawyers
21 in this room will tell you they have had cases go sideways
22 in which case your professional obligation as an attorney
23 kicks in. You continue to represent them notwithstanding
24 the fact that the case is no longer what you thought it
25 was.

1 There are a couple of ways that clients can
2 express their dissatisfaction and probably easier for them
3 to do it with a nonprofit group than it is with a
4 traditional law firm. They already have an arrangement
5 with a partner, a billing partner on the case, though that
6 is perhaps the only person they think they can go to with
7 a complaint because of information disclosures that we are
8 required to make.
9 With a nonprofit, the clients all know who the
10 officers of the corporation are and know who the members
11 of the board of directors are. So there's a pipeline to a
12 number of different people. If that is ever triggered, it
13 certainly would hit my desk. Let me give you just a brief
14 overview.
15 Mr. Seligman did a great job talking about by
16 state rules, but I want to give a brief overview from
17 federal view. When you set out to talk with the Internal
18 Revenue Service, make sure you get copies of revenue rules
19 and revenue procedures that they have that specifically
20 govern whether or not they will register a legal advocacy
21 organization as a public majority.
22 So under the IRS regulation they have to make
23 sure that you are actually performing a charitable
24 service. They're looking at a couple of different ones
25 there. One are you engaged in registering of a private

1 benefit rather than a public charitable benefit. This is
2 different from compensation.
3 They're looking at whether the litigation that
4 you are engaged in is actually advancing a charitable
5 purpose, rather than just displacing a commercial lawyer.
6 Some of the things that the IRS will look at are
7 you taking the case just to get attorney's fees. Is this
8 a case where the client has both the economic stake in
9 controversy sufficient to just hiring private counsel and
10 the means to do so.
11 If so, the nonprofit should be handling that
12 case. It should not be going over to the private Bar with
13 a nonprofit perhaps sitting in as a expert amicus.
14 Private inurement is also forbidden. That's siphoning off
15 of money due to an inside status. It could be through
16 executive compensation or through an insider transaction.
17 Those are heavily regulated by the IRS and the California
18 Attorney General.
19 That can be enforced by going directly after the
20 personal pocket books of our board member so it's an issue
21 they want to pay attention to as well.
22 There is also the rule on public support. Your
23 [SWRAEUGS] can be entirely supported by attorney fees. It
24 that is demonstrated a certain percentage of its support
25 comes from public diversion set of public sources

1 otherwise it loses it's substitute as to as a public
2 charity becomes a public foundation with much more
3 stringent regulation imposed by the IRS that would make it
4 very difficult to operate as we do.
5 Finally, all of this information has to be
6 publicly disclosed. It all goes into your annual form
7 that we file with the IRS, form 990. Which then has to be
8 available to the public. It is to be filed with the
9 Attorney General. In fact, anybody can go on the Internet
10 site guide, star dot com, look up any form. It's
11 available to the public. It has to be available at the
12 office of the charity, it has to be available to send out.
13 Let me just hit a couple points on why we believe
14 further regulation is not necessary given this overview
15 that Mr. Seligman gave of the State Attorney General, what
16 I have just covered on the IRS, the ideological goal of
17 the organization generally going to the industry's
18 commitment to the client's interest.
19 The reason that they're taking the client's case
20 is they believe that the client's case and their interest
21 align, they're going to push it forward that way. Second,
22 the attorney under California Rules of Professional
23 Conduct are already forbidden from allowing interference
24 by a third party.
25 As you know, the thing to consider is that if the

1 State Bar attempts to regulate the organization and it
2 doesn't take the steps of banning nonlawyers from the
3 board, which we don't think it can do under the
4 constitution it will then be putting the board in the
5 position of mandating nonthird party interference with the
6 lawyer because it's the board that has to answer for the
7 corporation. So it's going to end up with a fundamental
8 conflict with that particular rule.
9 Generally the individual duty of an attorney is
10 the best protection for the client. The attorney has a
11 professional -- he's an officer of the court. And I
12 haven't encountered any situation where I have even seen
13 the need for further education for attorneys working the
14 nonprofit world no matter which side of the spectrum they
15 work on.
16 They all seem to understand that the client's
17 interests have to come first once the case is taken. I
18 haven't seen any issue regarding a client complaint with
19 my organization or any of the other organizations that I
20 work with. Therefore, we urge, of course being from a
21 conservative libertarian point of view, no further
22 regulation is necessary. If you have any questions.
23 MR. HAWLEY: No. You have answered the questions
24 that I had. Thank you very much.
25 For further detail of IRS standards, that just

1 gives a jump start focus when we go to seek the data.
2 That's exactly the goal of this process is to get that
3 kind of information.
4 Thank you again.
5 Our next speaker is Julia Wilson Legal Aid
6 Association of California.
7 MS. WILSON: Hi. So good afternoon. My name is
8 Julia Wilson. I'm director of Legal Aid Association of
9 California or Los Angeles, as we now commonly go by.
10 I first want to take a moment on behalf of the
11 Los Angeles board. All of our member programs want to
12 just commend the State Bar for the clearly careful,
13 thoughtful process that it's doing in response to the
14 Supreme Court decision in Frye vs. Tenderloin Housing. I
15 want to thank you for this opportunity to come forward on
16 behalf of our member program, go over some of these issues
17 with you.
18 As you know, Los Angeles is a statewide
19 membership organization for nonprofit organizations around
20 the state providing legal services primarily to low income
21 and other disadvantaged individuals. Our membership
22 really focuses on programs that are financed through the
23 Legal Service Trust Fund.
24 We were founded in 1982 by the legal service
25 organization for purpose of ensuring the most effective

1 efficient system statewide. Our membership this year
2 consists of 74 legal service nonprofits and then over 90
3 individual members which are made up of staff at those
4 programs or other state leaders that access the community,
5 the vast majority. So we have only two member program
6 this year that do not receive IOLTA funding through the
7 trust fund.
8 Los Angeles did file amicus brief before the
9 Supreme Court in this case, and I am here really on behalf
10 of those 74 nonprofit corporations to unequivocally state
11 their opposition to the need for the State Bar to
12 undertake any additional regulation of nonprofit
13 corporation that have to provide legal services.
14 You have been checking off boxes as the previous
15 people have spoken, so I hope to not take very much of
16 your time belaboring points that have been made. But just
17 to give you a bit of perspective coming from a collection
18 of nonprofits talking about these issues.
19 I think it's important -- it's been touched on,
20 but to take a step back, reflect on the larger context of
21 why we are talking about these issues. We have also the
22 sort of various contexts that are not bringing us here
23 today.
24 We are not here to discuss not these issues
25 because there has been a rash of phone calls to the State

1 Bar from actual legal service clients complaining about
2 conflict of interest or board interference of their cases.
3 We are not here because we have seen a threat,
4 there was a discipline hearing against attorneys working
5 in these nonprofits on these issues. And very fortunately
6 we are not here in the context where New Jersey was facing
7 this issue with the Supreme Court decision that there was
8 actually no way for these nonprofits to practice law.
9 We are in a very comfortable setting saying yes,
10 there are these safe harbor provisions or many type of
11 nonprofits that provide legal service. We already have
12 overachieving layers of regulation including the rules of
13 professional conduct. We are here in a very luxurious
14 position lacking the situation deciding whether it needs
15 to be squeaked at all.
16 I can tell you our resounding answer from our
17 community is absolutely not. I think it's extremely
18 important to remember that the Supreme Court asked the
19 State Bar to investigate that given the current setting
20 whether they actually demonstrated harm to clients.
21 I can tell you in my comment with our member
22 program almost all of whom -- most of whom have very
23 firmly established client grievance procedure, the
24 grievance that we hear, you didn't take my case because
25 you couldn't. You could only offer me brief advice

1 because that is how your clinic is set up.

2 And the reality of funding, you know, is that we

3 are funded currently to only meet about a third of the

4 legal need of potential clients. We are all frustrated,

5 dissatisfied with that.

6 So this determination, this process is not about

7 client satisfaction or dissatisfaction. It's a very

8 narrow issue of whether there is harm to clients posed by

9 nonprofit corporate entity. Given that sort of

10 environment of lack of harm to clients, we have to counter

11 balance that with many public policy grounds for

12 encouraging these nonprofits to provide legal service,

13 which I think are laid out in the Supreme Court case. I

14 won't belabor that here.

15 Even in this absence of demonstrated harm, I

16 think it's a wonderful exercise for us to talk about some

17 of these sort of theoretical potential conflicts that are

18 raised in the Supreme Court decision have also been looked

19 at by other jurisdictions including New Jersey.

20 I think again we are very fortunate here in the

21 State of California that we have addressed those issues

22 completely, adequately so as Mr. Seligman was discussing,

23 the professional role of conduct 1600 was specifically

24 articulated and apply named Legal Service Program to look

25 exactly at that potential ideological motive which State

1 Bar raised in this, it's question for this hearing.
2 As we know, this rule prohibits from
3 subordinating any client interest. This is basically what
4 the court was concerned about in the New Jersey case where
5 apparently no similar rule existed. So we have already
6 basically taken care of the experience of it's logical
7 motive pushing to something that would look more like a
8 for profit motive.
9 Clearly, the other speakers -- I have this other
10 list of -- I won't go through all of them because I think
11 the other speakers have done a much better job than I can
12 do.
13 The theme of nonprofit is important both in terms
14 of their funding sources, their charitable purpose and how
15 they conduct their business. I think that is the primary
16 difference between the practice of law and a for profit
17 setting.
18 And I know that other speakers coming after me
19 will talk in more detail about some additional federal
20 regular restructure that exists from nonprofit receiving
21 those kind of funds.
22 I can tell you from our membership organization
23 perspective these nonprofit corporations have built in the
24 internal policies procedures and specifically address the
25 sort of attorney and board involvement in cases. Both in

1 the case selection, which I think is different, as opposed
2 to ongoing case direction as well as nonattorney
3 involvement.
4 I don't have any sort of facts and figures for
5 you on that because we have actually been encouraging our
6 member program to respond to the survey. So I assume
7 those specific examples, concrete details about how
8 programs are structured themselves internally coming to
9 you in that process.
10 I will just say should, which I don't think it
11 will, should the State Bar come to the conclusion that
12 some form of regulation is necessary on behalf of our
13 program that are funded through the trust fund, clearly
14 those programs are already undergoing such significant
15 oversight from the State Bar including annual reporting,
16 on-site visits and quality controls.
17 Absolutely that would be the limits at which
18 those programs should face any additional regulation by
19 the State Bar.
20 So that is really -- I'm just really here on
21 behalf of those 74 programs to convey their very strong
22 opposition to the idea that any regulation is needed to
23 protect their clients, or that it would in any way benefit
24 the very important work they do on acts of justice in our
25 state. I hope that is helpful to State Bar in this

1 process.

2 MR. HAWLEY: I'm going to ask you a couple of

3 questions because you are in a unique position of being

4 familiar with a whole sector, so-to-peak, and it's a

5 sector the State Bar is very familiar with as well because

6 of the Trust Fund program, the long relationship with the

7 State Bar has had with the legal service industry, if you

8 want to call it that.

9 But I simply want to confirm is that from your

10 experience malpractice insurance is available to that

11 sector and that it is common practice for entities

12 involved in legal service to be insured.

13 JULIA WILSON: Yes. I can tell you that

14 particularly for those legal aide programs as Mr. Seligman

15 said, there is insurance available through NLADA and other

16 arrangements.

17 I actually looked into this because when Frye

18 started coming up into the appellate level cases, this is

19 before my time at Los Angeles, so I don't have firsthand

20 knowledge of this, but we did do at that time a survey of

21 member programs about malpractice insurance, and

22 secondarily about the levels that were currently required

23 for profit law firms through the State Bar rules.

24 We had a much smaller membership then so we had

25 about 26 member program respond, which then we had about

1 40 member programs total, so more than half all of them
2 carried malpractice insurance. Not all of them would have
3 been able to meet the requirements that were currently in
4 place for profit corporation without it being a
5 significant financial burden.
6 There are absolutely anecdotal reports that I
7 hear from Los Angeles board members. There are very small
8 programs that you don't carry malpractice insurance. So
9 my understanding is there is some variety of opinion among
10 other member programs.
11 But the insurance is available and it is
12 something that at least most of the folks are, all of the
13 folks that have appeared in this process, they do carry
14 this.
15 Certainly legal aide where I worked carried
16 malpractice. I think most of the large programs are doing
17 that as a prudent financial practice.
18 MR. HAWLEY: Okay. Of course it's a good
19 business decision.
20 I have nothing further. I do thank you very much
21 for your assistance with this, with facilitating this
22 process well among members and in assisting us in getting
23 the word, getting what I think is a very positive response
24 just in terms of getting a lot of the data.
25 JULIA WILSON: We are happy to continue in that

1 role. If there is any follow-up questions the State Bar
2 has that would like to go out to the Los Angeles program,
3 we would be happy to facilitate that.
4 Thank you very much.
5 MR. HAWLEY: Our next speaker is Dara Schur from
6 the Protection and Advocacy, Incorporated.
7 MS. SCHUR: Good afternoon. Dara Schur. I am
8 the director of the litigation at Protection and Advocacy,
9 Inc., which we refer to usually as PAI. Protection
10 Advocacy is a statewide nonprofit providing service to
11 people with disabilities, and we have been around for
12 about 30 years and we were formed initially as part of a
13 federal movement.
14 The Federal Government in response to abuses of
15 people with disability in institutions formed the
16 Protection Advocacy agencies in every state and territory
17 in the country. And over the years they greatly expanded
18 from representing a small portion of the disability
19 community to representing people with every type of
20 disability in a range of settings.
21 We operate out of four main offices in
22 California, Sacramento, Oakland, Los Angeles and San
23 Diego, as well as a number of remote sites. We currently
24 operate with state trust fund monies, equal access monies,
25 foundation monies, seven different federal grants and two

1 separate state contracts to provide advocacy services. So
2 there is no shortage of regulation in our practice, I can
3 assure you.
4 I wanted to address four of the issues that have
5 come before you and support all of the previous speakers
6 in saying there is no demonstrated harm from or need to
7 further regulate nonprofit practice.
8 As many of the other organizations who have
9 spoken, PAI has a Board of Directors that has many
10 nonlawyers on it. And, in fact, our federal grants
11 require representation on our board from people with
12 various kinds of disabilities and representing various
13 stake holder interest in the disability community.
14 So we have about 20 percent lawyers on the board
15 with a number of board positions that are mandated to be
16 nonlawyers, or at least people who represent various
17 constituencies.
18 Our board, as many of the others, is involved in
19 setting priorities and ensuring that our case acceptance
20 criteria comply with our various funding sources and
21 further our mission of advancing the rights of people with
22 disabilities.
23 And even though we provided service last year on
24 more than 24,000 matters, there is no way that we can meet
25 the need of the disability population in California. So

1 that prior city setting process is critical to us and it
2 allows us to provide reasonable service to people.
3 In terms of the federal regulatory oversight, I
4 can tell you that our seven different Federal grants are
5 administered by three different Federal agencies and very
6 similar as the legal service corporation.
7 There is significant oversight, number reporting,
8 periodic on-site week long visits that look not just at
9 our finances, but the quality of our practice and level of
10 service that we provide to clients, and our compliance
11 with the mission of the agency as well as the Federal
12 grants.
13 As part of that Federal oversight, our auditors
14 are required annually, not just to look at our finances
15 but to do an audit to ensure that our funds are being used
16 for the purposes that they were given to us by the Federal
17 Government. So they actually look at our cases, say are
18 you serving the people that the Federal Government gave
19 you the money to serve?
20 We -- some of those on-site visits that are
21 conducted are quite extensive. They visit all of our
22 offices, do quite an extensive level. Specifically one
23 piece of that regulation you have asked a couple of times
24 about attorney fees.
25 And there is actually an office of management and

1 budgets, an OPB curricular that of course they prohibit
2 any income that we get from attorney fees from benefiting
3 any individual attorney. It's required.
4 It's OPB circular A-1 10 dot 24. And that
5 circular specifically provides that the fees have to go
6 back through the agency as program income to further the
7 purposes for which we got our original grant. So if we
8 litigate with federal dollars, we get statutory attorney
9 fees, which we often do. They go back to the program to
10 further that mission.
11 People talked about the fear of inconsistent
12 regulation. I can tell you we struggle with that already
13 with all of our different funding sources and transfers.
14 People want data in different ways. They want different
15 data. They have inconsistent and varying time tables for
16 reporting.
17 We spend an enormous amount of staff time already
18 ensuring that we are complying with various regulatory
19 overlays. We hate to burden our staff with another layer
20 of that.
21 Our attorney fees are -- we have very clear
22 guidelines. Any attorney fees that come to the program,
23 benefits the program. We have a lot of internal
24 procedures to ensure that those go back to the program,
25 that nobody can benefit individually from that some those

1 mandated by our auditor. It's very specific. We use a
2 lot of nonlawyer staff and in some ways protection
3 advocacy agencies are very unique among the nonprofit
4 world.
5 I think this goes back the one size doesn't fit
6 all framework. We have a mandate from the Federal
7 Government to investigate abuse, any neglect of people
8 with disabilities and institution. We actually have the
9 authority to go into institutions, get records, documents
10 interview witnesses.
11 It's just another example of the way that if you
12 try to put a one sizes fits all, you are going to run into
13 some situations that are really unique to various,
14 different missions.
15 We also use nonlawyers to provide pure advice and
16 counseling services to people with specific kinds of
17 disabilities, including psychiatric disabilities.
18 Certainly any legal work operates under the close scrutiny
19 supervision that is done by lawyers. We do have arms in
20 our agency that provide other kind of advocacy and service
21 to people with disabilities.
22 I wanted to just add I think a little bit more to
23 what folks have said about the IRS and Attorney General
24 regulation, the transparency of that.
25 One of the annual reports that we are required to

1 file is the IRS form 990. That is the form the previous
2 speaker indicated was available on the website and
3 available to everybody. I just thought it might be
4 helpful if I gave you an idea of some of the kinds of
5 information that are required annually for us to, not just
6 make available to the IRS and Attorney General, but to
7 make available to the public. And that form requires us
8 to identify all of our income and the sources that it came
9 from.
10 It requires us to identify all of our expenses
11 and how those expenses breakdown between program
12 management and fundraising. It requires us to talk about
13 our net assets, it asks us what kind of programs we want.
14 We have to describe those programs and say exactly how
15 much money we spend on them.
16 It asks us to identify each of our board members
17 and their names and each of our top officers or employees,
18 the ones who are in the most authority, make the most
19 money. It actually tells you exactly how much money each
20 of them get paid, each of the board members are attaining
21 any money.
22 It requires us to disclose if we are taking on
23 any new activities, something we have not done before. If
24 we changed our bylaws, if we changed our articles of
25 incorporation, any changes are posted along with this.

1 It requires us to disclose any self-dealing
2 transactions which are prohibited, anything along those
3 lines. And it also requires us to identify the lobbying
4 that we do.
5 I would say in addition in California there's a
6 new law, unfortunately I don't have the citation for it,
7 called the California Accountability to Nonprofit Act. If
8 you have a certain amount of money you have to put in
9 place a completely different separate auditing process.
10 So I think the thrust of this is that in addition
11 to our position with all of our federal overlay any
12 California nonprofit has already a very significant level
13 of accountability reporting the transparency. I think
14 that, among other things, means there is no need for any
15 further regulation.
16 The one other question I want to answer is yes,
17 we carry malpractice, we always have. I wouldn't imagine
18 practicing without it. I have 25 years of practice. I
19 have worked in a number of legal services and public
20 interest firms. Every single one of them carried
21 malpractice insurance.
22 My -- when I hear, and I can't document this, is
23 that malpractice actually, although far from cheap, is
24 often less expensive for nonprofits than private sector
25 because there's a much lower claim rate. I think that is

1 corporate, et cetera. We feel this incredible need, our
2 clients are very grateful for any kind of legal assistance
3 that we can give them, so thank you. I'm happy to answer
4 questions.
5 MR. HAWLEY: Thank you.
6 I think you have answered the questions that we
7 had. Thank you very much. In terms of our schedule our
8 next scheduled speakers are here. What I'm going to do,
9 take a five minute break. I was advised that the folks
10 from Brightline Defense Project, Mr. Joshua Arce, when we
11 return we'll take you as the next speaker. We'll break
12 now for five minutes and begin at 1:35.
13 (Whereupon, a recess was taken.)
14 MR. HAWLEY: We have another speaker. We will
15 take the Brightline Defense Project speaker, Joshua Arce.
16 MR. ARCE: Good afternoon. My name is Joshua
17 Arce. I'm executive director one of two staff attorneys
18 with Brightline Defense Project. We are based here in San
19 Francisco and we are a civil rights legal aide
20 organization concerned with the San Francisco Bay Area,
21 and our organization is one year old. We started in
22 November 2005.
23 And we thought that it would be informative for
24 the Bar to share our experience in starting our
25 organization in the climate of the Frye case.

1 Let's see, I think when we started we became
2 aware through legal publications of the Frye case, the
3 fact that the opinion was to come out. So we had to craft
4 our organization with an eye towards predicting from what
5 the Supreme Court might say in the Frye case.
6 It's true that there are many rules and
7 regulations to contrast a new organization around a
8 nonprofit legal aide organization. That is you're
9 contrasting your organization around the rules of the IRS,
10 the Secretary of State, the Attorney General, the ethics
11 rules of the State Bar.
12 And I can just weigh in on that, that adding
13 anything more than kind of letting the State Bar know what
14 you are doing, of contact information, basic information
15 to get your organization on the radar of the State Bar
16 would be an added difficulty. Not unnecessarily so, but
17 it also creates a possibility of conflict with the rules
18 that you are contrasting your organization around.
19 Those rules in particular, IRS rules to
20 recording requirements that are involved is part of the
21 reason that we are not here to address some kind of wide
22 spread problem is with laws practiced by nonprofit
23 organizations because there are some very good checks on
24 organizations like our own organization.
25 In particular the IRS rules. We just one week

1 ago finished navigating through -- we received 5013 C
2 status a week ago and we had to demonstrate to the IRS
3 that our organization is not just a law firm nonprofit
4 organization practicing law. We have to demonstrate, as
5 it was said earlier, so we had to show a few things.
6 One, we had to show how within five years we
7 were going to be an organization in which our revenue was
8 no more than 50 percent comprised of legal fees. And in
9 our first year as we -- as we just now received 5013 C
10 status, our revenue has been almost solely legal fees.
11 So that really let's us know where we need to go
12 in the next four years to get to the point where looking
13 back five years it will be nonlegal practice advocacy
14 activity, fund raising, receiving donations from a wide
15 section of the community, balanced by practicing law. So
16 that is a very important role.
17 I think that is part of the reason why I think
18 there is not a lot of problems because it keeps you
19 focused on a nonprofit organization practicing law. Then,
20 in looking at number three and number five on your list of
21 topics to address, those are specifically the profit
22 motive and fee structure.
23 We had to very earlier on decide how we were
24 going to structure fees or cases that we did take on. A
25 lot of times we take complaints. We just give someone

1 advice or referral or hear them out and give them a
2 reality check.
3 But in cases where we can take someone on as a
4 client, which we did for the first time this April. We
5 had to decide how to structure a fee agreement and a fee
6 arrangement. For myself coming from the private sector
7 and having done law in civil rights arena contingency fee
8 agreements are very common place.
9 And Frye came out, and I remember actually right
10 when it came out, maybe a week after we were trying to
11 understand. I called Mr. Collier and said quite frankly
12 what does it mean? He said let's wait and see.
13 So our staff -- we have three interns from
14 Hastings College of Law there to work through the existing
15 rules and the language in Frye to decide how we were going
16 to structure our fee arrangements with clients. And there
17 is one intern, her name was Lynn Stetler.
18 I meant to mention, Mr. Aaronson, she's in his
19 Civil Justice Clinic. She kept pointing out no
20 contingency, we are no contingency fees from the -- from
21 the, from the statute. And so we looked at some of the
22 language in Frye, also the language in other cases.
23 I think specifically I want to say in the United
24 Transportation Union case that talks about contingency
25 fees and the potential of creating a windfall, that might

1 be part of the reason that there is a prohibition on
2 contingency fees. From my point of view, I wanted our
3 organization to adopt contingency fee arrangements
4 probably because it was familiar.
5 But in thinking about this idea of contingency
6 fee and leading to a possibility of windfall, I think that
7 is where any analysis that the bar does about contingency
8 fee would want to look to. That is a possibility of
9 windfall.
10 The idea that a windfall goes along with the
11 profit margin which is something that you want to keep out
12 of law as practice by nonprofit organization. It's very
13 true that contingency fee arrangements are good to protect
14 against the kind of conflict of interest that comes up in
15 re: Jeff D. Case. I think that is one big point in favor
16 of contingency fees.
17 But I can also be honest, before I got involved
18 in the nonprofit sector, when I was in private practice, I
19 had a couple of cases where someone would come in with a
20 kind of issue that you make a couple two or three
21 20-minute phone calls and you settle the case for a few
22 thousand dollars, and that is a windfall. That is
23 something you would want to keep out of nonprofit sector.
24 You don't want to take on cases where you could
25 potentially have that kind of situation.

1 So in addressing point five to the extent that we
2 are aware of how legal fees are set, I can tell you
3 firsthand experience how we construct our agreements is
4 that we don't have a contingency arrangement. What we do
5 have to try to plan around the possibility of a conflict
6 of interest like the in re: Jeff D. situation.
7 We have what is called a total recovery which
8 includes attorney fees, costs and damages, if any. And we
9 ask for our fees from the total recovery and to prevent
10 any kind of windfall we -- in windfall types where the
11 fees exceed the total recovery, we have an agreement with
12 our client where we say if the total fees -- let me step
13 back, any amount of fees exceeding one-third of the total
14 recovery are waived.
15 So, in other words, it would be impossible for
16 attorney fees to be, to exceed one-third of the total
17 recovery. But it brings up the situation where I think
18 Mr. Seligman was talking about -- no, it was Mr. Collier,
19 was talking about if in a fee waiver that your client
20 signs up with the defendants that could bring up the same
21 defendants, but I guess we'll see.
22 I do think that would be the specific point to
23 look at in terms of contingency fees as possibility of
24 windfall, something that goes against the spirit of
25 nonprofit practice of law.

1 Also by having the situation with the different
2 factors that are in place in terms of the IRS rules
3 keeping you focused on bigger issues, the results of that
4 you are going to be collected for by the Attorney General
5 in making sure you have not lost sight of the big picture
6 it helps to keep organizations like ours out of frivolous
7 litigation.
8 A big part of what we do like I mentioned earlier
9 is we find ourselves giving folks reality checks, and this
10 kind of situation is probably better suited for a whole
11 other discussion on another day.
12 We'll find people coming in with a very, very,
13 weak case and because we are not out for profit but out
14 for the big picture, we can say you do not have a good
15 case. You need to move on. You need to talk with
16 someone, talk with a counselor, a therapist, but you need
17 to move on.
18 It's very alarming in our career that we have
19 been in the business in doing this kind of work that folks
20 have come in and said uhm, well, so and so says I have a
21 strong case. If I pay "X" amount of money they will take
22 my case. They have brought in referrals from other firms
23 that have said -- this one woman came in and she had a
24 very weak case, just a layer above no case. We told her
25 that. She became very upset.

1 She told us they left a law firm down the street
2 that was going to take her case for 50,000 bucks. She had
3 her grandmother in there ready to write a check for this.
4 We told her keep her money, move out. So that is what
5 I -- part of that gets transferred out there.
6 You help the community know that, especially the
7 area of civil rights. You can feel very strongly about
8 something, but you have to know the courts aren't the best
9 place to always try to seek redress because there's a
10 profit motive in private law firms.
11 Nonprofit legal aide organizations can help
12 counter that say, hey, hey, you got to just get this out
13 of your life, move on. So that is something that we try
14 to do in terms of with the IRS asked of us is which focus
15 on nonlaw practice advocacy activities.
16 The last thing that I wanted to say was as to
17 point is two and six, which are the role of nonlawyers.
18 It's very important for us because like I say, our
19 organization is the law aspect. Is kind of like a
20 business I guess where you're taking in clients, you are
21 keeping track of fees. That can't be all that you are
22 doing because the IRS has said so, the state has said so.
23 So you also have to keep your eye on the advocacy part of
24 your mission that's something that nonlawyers can really
25 help out with. You have heard it a lot today. I won't

1 reiterate that point too much.

2 But on page 41 of the opinion in Frye, the court

3 talks about that, having an all attorney board focusing on

4 only the poor can take you off track from the bigger

5 mission.

6 And that is something that we find here that that

7 the nonattorney that we have on our board helps focus in

8 on some certain issues. One for example, in the East Bay

9 you have got problems with law enforcement in small

10 cities. Some issues that we are looking at.

11 And I don't think that we are running aground of

12 the rules of professional responsibility when we talk with

13 a nonattorney, say we found someone who's got a complaint

14 in this city.

15 We are going to look at it, have a discussion

16 with board member saying well, have you heard other things

17 going on in the city. We say we have heard some things.

18 We got to look for it. That you are not getting into

19 violating attorney/client confidentiality when you share

20 information about the bigger picture.

21 I'm sure we'll find out otherwise because we have

22 had to call the ethics hotline as a new organization just

23 to make sure that we are doing right. A lot of times the

24 ethics hotline will say wait and see, wait and see what

25 you are -- what happens after you are done with your

1 investigation. Sooner rather than later, facts will
2 become public in terms of a situation.
3 Let's keep on this example of a small city in the
4 East Bay where there's a few incidents of reports coming
5 in about police overstepping their boundaries that are not
6 being checked by the department.
7 If we take them on a chance a complaint is filed
8 then we can talk freely about what's filed because it's
9 public record. Now, that kind of frees up some of the
10 stress on the free flow of information from staff
11 attorneys to the boards.
12 And the last thing -- I said that was the last
13 thing, but the really, the really final thing that I would
14 want to say is that page 47 of the opinion in Frye
15 highlights the fact that the Tenderloin Housing Clinic was
16 engaged in a bigger mission. They talk about the charter
17 and the bylaws, the relationship of their litigation to
18 the broader goal of maintaining the residential nature of
19 the Tenderloin District.
20 And I think that the State Bar doesn't need to
21 add further pressure to make sure these organizations have
22 that bigger mission. I think it's already there.
23 Because if you don't contrast a bigger mission
24 for your organization, you are not going to be able to
25 engage in your activities because of rules that are

1 already in place.

2 MR. HAWLEY: I thank you very much. I think you

3 bring a very special perspective to this being kind of at

4 the beginning of your business venture, and I think it's

5 very informative to us. But I think it warrants special

6 attention in terms of what you are undertaking in the

7 community. That the effort that you have gone to kind of

8 do it right. So in that respect, you should be commended.

9 Let's just go off the --

10 (A discussion was had off the record.)

11 MR. HAWLEY: For the folks that just joined us, I

12 was just going to layout, repeat my opening remarks.

13 We are undertaking -- the State Bar is

14 undertaking these process upon the direction of the

15 Supreme Court. We consider this a fact-gathering mission.

16 We are here to give those an opportunity to be heard.

17 But our narrow focus, the assignment of the

18 Supreme Court is to gather facts to find out whether there

19 is -- whether there are examples of client harm or to

20 risky activities by the nonprofit legal practice world,

21 such that some form of registration or certification of

22 that world is warranted in light fashion was we currently

23 do with the for profit world. For profit legal

24 corporation and limited liability partnership world.

25 I have made available a list of questions just to

1 sort of give some guidance as to the kind of facts that we
2 are interested hearing. This is the opportunity to be
3 heard. You are assisting us in this process. So with
4 that, we welcome you to be heard.
5 We have Mr. Utrecht and Mr. Zachs who have had
6 prearranged to be heard in this respect when you come
7 forward, please identify yourself for the record. We have
8 a court reporter, and make your points that you wish us to
9 consider. I may have some questions.
10 But as I said earlier, you are under oath, you
11 are not being cross-examined, you can decline to answer
12 the questions or answer them in I general way. But I'm
13 asking the questions simply because I'm curious. I have
14 got my marching orders to gather information. That is how
15 you do it, by asking questions.
16 With that, Mr. Utrecht, come forward and identify
17 yourself and present us with your information.
18 MR. UTRECHT: My name is Paul Utrecht, I'm with
19 the firm of Zachs, Utrecht, and Leadbetter. I was one of
20 the attorneys who represented the plaintiffs in the Frye
21 case, so I have some familiarity to issues of that case
22 which obviously spawned this proceeding.
23 My apologies for being late. I misunderstood the
24 time that we were supposed to be here. I think there is
25 two specific examples that I want to offer to you for your

1 consideration in terms of considering whether or not there
2 are either actual risk to clients and/or potential risk to
3 client from this kind of nonprofit legal practice.
4 One of them involved the Housing Clinic, the
5 other which involves it practice that I understand the
6 Pacific Legal Foundation engages in. And I assume other
7 organizations do as well. The first is with respect to
8 the Frye case.
9 The Frye case began originally not as a
10 litigation , but as a dispute by Mr. Frye and two other
11 clients that attend Tenderloin Housing Clinic dispute
12 between them regarding average fees that are being charged
13 on contingency basis from the settlement that -- or the
14 Judgement that was obtained in litigation.
15 And the results of that fee dispute didn't result
16 as it would in a normal case of the disputed fees being
17 put in a client trust account because the client's trust
18 account on the Tenderloin Housing Clinic is operated not
19 by an attorney, it was not subject to State Bar
20 regulation.
21 So the normal rule that would have required the
22 attorney to put that into the client's trust account did
23 apply because the individual attorneys who had represented
24 Mr. Frye in his cohortness litigation were not in charge
25 of the trust account. Therefore, not responsible to the

1 State Bar for putting fees into the trust account. And
2 since the fees did not belong to those lawyers, they had
3 no obligation to put the fees in one account rather than
4 another.
5 I offered that as an example of a real world
6 harm. I will also point out that the money that was
7 ultimately determined by the -- ultimately determined on
8 summary judgement that part of the fees that had been
9 charged there was at least triable issue of fact as to
10 whether or not the fees should be returned to the client.
11 There was before trial a settlement regarding the
12 return of that part of disputed fees because we had found
13 case law saying the Tenderloin Housing Clinic was not
14 entitled to that money.
15 As it happens, the clinic was able to return
16 those fees so there was not an end of the road harm to the
17 client. But prophylactic rules applying to lawyers are
18 not in fact followed and could have in the contention of a
19 different nonprofit resulted in harm to the client. So I
20 propose that as one real world example of the harm that
21 the client could have suffered, that could not have been
22 subject to the State Bar remedy to regulate nonprofit
23 entities to.
24 Pacific Legal Foundation is another example that
25 I want to talk about. My understanding from them is that

1 when you are retained to talk on a case, that they work on
2 it for free. They will occasionally ask clients to give
3 up claims other than the claim they want to litigate that
4 the Pacific Legal Foundation is to litigate.
5 So if they have a constitutional claim, the
6 client has a factual scenario that supports the claim, but
7 also supports state law claims. Pacific Legal says we'll
8 give a free legal service, you have to give up those
9 claims because we are not prepared to provided free legal
10 service to litigate those kind of claims.
11 I assume it's common for a nonprofit entities to
12 look for the case, not want the case to be distracted by
13 issues other than the issue that they're trying to
14 litigate and so clients are being asked to give up real
15 world rights.
16 And may in a given case make sense for the client
17 to give up those rights and pursue just the constructional
18 claim because of chance questions of success. But those
19 agreements should be subject to State Bar regulation
20 because clients should be given proper advice about the
21 reality of the claim that they are being asked to give up.
22 I think that those kind, those two real world
23 examples not being a practitioner in a nonprofit legal
24 world, show the kinds of problems that the State Bar
25 regulations are designed to solve and the kinds of things

1 that could in fact be used by nonprofits because there is
2 no reason that a nonprofit could have a nonlawyer go to a
3 client and say here, sign on, we'll give you free legal
4 service. You sign this piece of paper giving up these
5 claims. You would hope that a nonprofit had a lawyer do
6 that, then the lawyer would be subject to discipline.
7 But there is nothing under the current state of
8 the world that would require the nonprofit to assign a
9 lawyer to that task as opposed to some nonlawyer who isn't
10 familiar with the rules of professional conduct and is not
11 subject to discipline or abide by those.
12 The other way in which we have seen litigation
13 that we have Tenderloin Housing in litigation. Albeit
14 without actual knowledge of this, we believe the
15 Tenderloin Housing Clinic will often place its ideologic
16 interest in litigation ahead of interest of their clients.
17 Now, we don't know what they tell their clients.
18 We don't know whether clients agree to it. We just look
19 at the litigation position that they take and say it's the
20 lawyer putting the client in the position, would not take
21 the position because it would not be in the best interest
22 of the client. Obviously, the client may have approved
23 it.
24 The attorneys who are taking these positions are
25 obligated under the State Bar to advise clients about

1 those. But it occurs with some frequency with that
2 organization, which I know about because I have
3 familiarity with it.
4 I don't know how much it happens with other
5 organizations, but I think that is the kind of thing where
6 the entities ideologic interest, the entities desire for
7 either fund raising or for advancement of their political
8 interest totally apart from the client case has a impact
9 on how they litigate.
10 It seems to me the State Bar should have regular,
11 not just legal lawyers, but also the entities. Because in
12 most of those cases the entities ideological interests are
13 stronger than the lawyers desire. The entity may well be
14 directing these lawyers on how to perform.
15 The other states have dealt with this by
16 providing regulatory schemes. Where the State Bar has
17 overseen organizations engaged in litigation and made sure
18 that both of the individual lawyers who were taking
19 action, as well as those people who supervise them inside
20 the organization, were all members of the State Bar.
21 So they all understood the rules, knew what the
22 consequences were of failing to follow them in that kind
23 of structure. It seems to me is relatively easy to
24 impose, is consistent with the State Bar ordinary
25 regulation of entities and doesn't impose any significant

1 risk. First Amendment purposes would in fact be impinged
2 upon by the regulation.
3 The other thing that I think is important is have
4 to be considered is the Tenderloin Housing Clinic is one
5 of very few nonprofit organizations that engages in
6 litigation which generates fees other than court ordered
7 fees.
8 There were about 73 organizations that filed
9 amicus briefs in the Supreme Court. I believe there are
10 only two other organizations that charged fees to clients
11 other than court ordered fees to litigation.
12 So I think another danger that comes in the
13 current context of the world under the Frye decision,
14 Nonprofits are allowed to practice law, they're allowed to
15 charge contingency fees, they are allowed to charge hourly
16 fees.
17 All of those are not subject to State Bar
18 regulation because all of these fee arrangements are
19 monies paid to the nonprofit in exchange for the legal
20 services, but not to the individual lawyers.
21 So if those fees are unconscionable or improper
22 or some other way wrong, the individual lawyers may not be
23 subject to discipline. The only entity that received
24 money was the Tenderloin Housing Clinic, which State Bar
25 would not have discipline power over.

1 So I think in context, while that is apparently
2 not a wide range phenomena among nonprofit legal
3 organizations, there are at least two or three other ones
4 that engage in that behavior. That is something that is
5 important for the State Bar to consider whether -- to
6 decide whether to regulate what kind of legislation needs
7 to be imposed.
8 I think in this context any matter in which there
9 is potential where in a reasonable potential for
10 contingency fees or reasonable potential for them to pay
11 hourly fees there is no reason to have a nonprofit legal
12 organization to provide those services. It makes those
13 service not provided by the private bar rather than
14 nonprofit legal organization.
15 Other than that, I'm happy to answer questions
16 that you Have.
17 MR. HAWLEY: I had one clarifying question. You
18 mentioned some experience or knowledge in other states
19 where there was some different kind of oversight with
20 respect to the supervising of lawyer work.
21 Do you have any greater specificity as to what
22 that circumstance is as compared to California situation?
23 MR. UTRECHT: Well, a couple of different things.
24 I think there's a case from New Hampshire who was written
25 by Justice Sewer, New Jersey case. Essentially those

1 regulations provide for things like no contingency fees.
2 I think one of them allowed for hourly fees because the
3 lawyer in that organization did disability rights.
4 There were -- sounded like there weren't many
5 lawyers that handle disability litigation. There was a
6 determination that was the appropriate thing to have a fee
7 generating with some kind of sliding scale.
8 I believe that they required a board solely of
9 lawyers or a subboard or committee of board creating the
10 supervising to lawyers that were all lawyers.
11 They also imposed restrictions on the kinds of
12 cases people could take and what sort of action they could
13 take in terms of their mission. All of which were then
14 subject to State Bar enforcement if they very were
15 violated.
16 One of the problems that we face right now under
17 the current regime is even if the courts were to say
18 nonprofit entities may not do X,Y, or Z, the only remedy
19 for a client of nonprofit is to go sue the entity in
20 court.
21 Whereas regular clients of lawyers have the
22 ability to go to the State Bar, say I can't afford to
23 chase after my lawyer for taking a thousand dollars of
24 fees that he wasn't entitled to.
25 And the State Bar, in fact, might be willing to

1 do that. In fact, I have had lawyer clients where the
2 Start Bar essentially was prosecuting some kind of a claim
3 of malfeasance by the lawyers which revolved around client
4 fees in which the State Bar required a refund of those
5 that was free to the client because the State Bar incurred
6 the attorney fees in that connection.
7 Whereas right now, someone like Mr. Frye had no
8 place to go except us and have us litigate the case
9 because there was no regulatory entity to take care of
10 that problem.
11 MR. HAWLEY: Do you know, was there a discussion
12 or was there any thought given or what happened with
13 respect to the normal attorney/client fees despite -- you
14 have Business Profession Code 6200 and mandatory fees
15 arbitration process.
16 MR. UTRECHT: There was NOT any exploration of
17 that term of being a possibility here. The fact of the
18 way that you are describing fee agreements between clients
19 and a nonprofit entity, that is not a law firm that that
20 was not available.
21 I would -- it would -- well, let me step the
22 back. There was one point in a case some dispute between
23 whether or not the contract was between Mr. Frye and one
24 of the attorneys or -- the court ultimately determined
25 that the contract was between the clinic and Mr. Frye not

1 with the individual lawyers.

2 Had that been determined differently, then

3 obviously it would have been sent to the State Bar

4 regulation and State Bar arbitration. I think that

5 Mr. Frye's position, and I think ultimately validated by

6 the judicial process, that was in fact he could not have

7 gone to State Bar arbitration.

8 Now, would the State Bar have arbitrated it? I

9 don't know. I assume that the State Bar might have been

10 willing to since a submission as a courtesy suit parties

11 or as a nonlegally required thing they might do. But it

12 wasn't something that the State Bar probably could have

13 forced that man to have participated in.

14 MR. HAWLEY: That raises an interesting issue.

15 Thank you for raising it. What is the responsibility or

16 obligation you know in a fee arrangement between a client

17 and entity that is not a law firm so to speak. I was just

18 curious about the background. That's very helpful thank

19 you.

20 MR. UTRECHT: Any other questions?

21 MR. HAWLEY: Actually, no. You raised some

22 interesting points that I think are worthy of further

23 exploration.

24 MR. ZACKS: My name is Andrew Zachs. I'm an

25 attorney in San Francisco. I'm also a frequent adversary

1 of Tenderloin Housing. My clients are primarily housing
2 owners.
3 As I understand the position of the nonprofit
4 legal community, Frye case also perhaps before the State
5 Bar. I'm sorry we missed the other earlier part of the
6 hearing. I don't know what the testimony was. I'm
7 willing to look at the transcript.
8 It's basically trust us. We are doing good. We
9 are advocating for people who don't have representation.
10 We should be trusted. We don't need to be regulated.
11 That was a -- I saw in the amicus brief the Supreme Courts
12 position of that advocated the problem is that whether a
13 nonprofit cannot be trusted. And I think the Tenderloin
14 Housing Clinic itself poses that very problem.
15 In the early '80s the Tenderloin Housing Clinic
16 was formed with a mission to advocate a behalf of the low
17 income tenant in the Tenderloin. Since that time the
18 Tenderloin Housing Conflict has evolved into a much
19 different organization.
20 The Tenderloin Housing District today has budgets
21 in excess of ten million. I believe most of its money is
22 in the form -- is spent in the form of operating hotels
23 and low income housing arrangements in which it is a
24 landlord. Its role as a landlord, the Tenderloin Housing
25 District is one of the biggest evictors in San Francisco.

1 I have printed out for the State Bar a list that
2 is available online. I'll offer it if you are interested
3 in it.
4 MR. HAWLEY: Sure.
5 MR. ZACKS: Unlawful detainer cases that have
6 been filed in San Francisco in '04 and '05. Some think
7 they are not unlawful, but most of them are. There are
8 tens if not hundreds of them. Many of them don't show on
9 the website because there's a hold on revealing the names
10 of unlawful detainer cases for the first 60 days of the
11 case. So we believe there are many more than what I show
12 on the website.
13 So the Tenderloin Housing Conflict its mission
14 for advocating protecting low income persons that is
15 stated to the IRS in the early '80s when it was formed as
16 nonprofit.
17 Perhaps is different today in that it's actually
18 still adverse to the low income person. It's actually
19 responsible for creating homelessness in situations where
20 a tenant can't pay their rent or causing a nuisance.
21 I believe that that problem, the problem of the
22 low income housing, strike that. The nonprofit law clinic
23 asking the State Bar to trust us. We don't need
24 regulation, we don't need any oversight.
25 In fact there perhaps are nonprofits out there

1 that are not doing what they told the IRS when they were
2 formed, and that whose mission has changed in some way, or
3 in fact operating inconsistently with their mission vote
4 strongly in the form of oversight of attorney and entities
5 of attorneys that are engaging in the practice of law with
6 other things happening.
7 I don't know if you have questions about how the
8 Tenderloin Housing Clinic operates. I think I have some
9 understanding of it. As I understand it, the law
10 operation is actually a very small part of its operation.
11 It has these hotels. It runs a modified payment
12 program, a program to which monies come from -- in from
13 general assistance programs. Rents are paid to --
14 directly to landlords, including Tenderloin Housing
15 Clinic.
16 It has various entities. Job training, have
17 available resources that are things that the city relies
18 upon, but this little law clinic continues to operate a
19 fee-generating operation. And because of the fact that I
20 think there are risks that, that desire to generate fees,
21 and for the clinic I think because of that risk that those
22 fees, the desire for those fees, may sometimes outweigh
23 the interest of the client.
24 I think that regulation is necessary. We
25 advocate it for that court. I think the Supreme Court

1 recognized the potential for a problem, that is why we are
2 here. Obviously, we lost the case, they rejected our
3 legal argument with respect to the Frye case, but I would
4 hope the State Bar would take a careful look for a need
5 for regulation in this context. I'll answer any
6 questions.
7 MR. HAWLEY: Following up on the sort of premise
8 that you had attributed to nonprofit world in terms of
9 regulation or not, you're right, their earlier testimony
10 was that we don't need further regulation, but there was
11 testimony about the fact that there is already sufficient
12 regulation.
13 There was some testimony about qualifying under
14 the IRS regulation for your charitable or foundational or
15 whatever status, and there was also testimony about the
16 regulation to the Secretary of State, the Charitable Trust
17 Division of Attorney General's Office.
18 Some talk about what is required to be a
19 nonprofit, what you have to do to continue with the status
20 and the reports and such and that the transparency, the
21 requirements that there exist would really not be enhanced
22 at all about a State Bar's addiction to this process.
23 That is kind of what you missed earlier today in terms of
24 the folks that addressed the issue.
25 And I don't know if you -- how much experience

1 you have. I mean, I don't. This is an area that we are
2 going to explore in terms of what the IRS, the Secretary
3 of State actually do. But I just wondered if you had any
4 thoughts with respect to what they do and how effective
5 the State Bar could be in adding to that mix of oversight?
6 MR. ZACKS: Well, the State Bar regulates the
7 practice of law. That is the IRS does not regulate the
8 practice of law in california.
9 I don't believe the folks that setup and regulate
10 nonprofit entities do that either. They have no expertise
11 in that area. They have no particular understanding,
12 ethical obligation of professional responsibilities of
13 lawyers.
14 To the extent a nonprofit entity wants to engage
15 in the practice of law, it ought to be subject to the same
16 ethics as any other person or entity that is engaging in
17 the practice of law. With respect to the IRS
18 determination, the Tenderloin Housing Conflict case was
19 made in 1981. I don't believe it's ever been revisited or
20 looked at again since then.
21 Once the determination is made, it's rarely
22 revisited absent some compelling reason for the IRS to do
23 some audit process. I'm sure that the IRS has other
24 things to do other than look at specific nonprofit.
25 I don't have a lot of personal knowledge about

1 what happens at state level, the Secretary of State, the
2 nonprofit world, but I am fairly certain they didn't look
3 at the particular requirements that apply to lawyers.
4 I have confidence in the State Bar's ability to
5 do that. If the State Bar can come up with reasonable
6 regulation that will not impose hardship on these
7 entities, that will protect the consumer of these
8 services.
9 We have seen consumers harmed by this conduct.
10 That is why we spent the many years litigating that case.
11 We did -- we did it frankly without compensation. We
12 believed in what we did.
13 We'd like to see the State Bar move forward to
14 adopt some reasonable regulation that will protect the
15 consumer of nonprofit.
16 MR. HAWLEY: The term of client harm, Mr. Frye
17 would probably be a qualified candidate to be an example
18 of potential harm in that area. We and the speakers have
19 come through here. We have asked about what client
20 agreement procedures they have. Do they have malpractice?
21 How are client matters handled and that world comparable
22 to the way that private firms, practitioners deal with
23 that.
24 You have well documented in the Frye case what
25 this -- the issues and circumstance were there. And you

1 have given sort of categorical examples of trust fund
2 fees, arbitration and such.
3 But in terms of client abandonment or gross
4 misconduct in representation or claims, actually we have
5 asked whether people have experienced claims against
6 insurance policies or, you know, lawsuits.
7 There is a lot of reported cases against public
8 interest or nonprofits out there for us to access, so this
9 part of that process is asking that we -- is there some
10 place there is information that you have that you can
11 share with us, or places we can go to look to see.
12 Because reaching constituency was badly served on
13 clients of the legal services and public interest practice
14 world is hard.
15 MR. ZACKS: Sure.
16 MR. HAWLEY: It's really hard to find that. Do
17 you have any idea or examples?
18 MR. ZACKS: There are some cases where that we
19 have observed really as opponents more than anything, you
20 know. So you have sort of a skewed view of what is
21 happening. But we watch, we watch certain types of
22 decisions get made and certain types of communications
23 occur we hope with the clients.
24 We are not certain, but we assume from settlement
25 discussions and various things we watch, decisions get

1 made. We kind of wonder was that the decision made based
2 on advice to the benefit of the client or based upon
3 ideological interest of Tenderloin Housing.
4 And perhaps most relevant are a series of cases
5 that we have been involved in eviction under the Ellis
6 Act. It's a state law. What we see is Tenderloin Housing
7 Clinic is pretty much the only entity in San Francisco
8 that represents tenants in San Francisco.
9 But then when we get to litigation of cases we
10 see decisions get made and certain litigation choices that
11 get made that kind of think why would they be doing that,
12 that doesn't appear to be client interest.
13 One example would be a wrongful eviction law
14 enforcement that was brought after an Ellis Act case in
15 which the tenant suffered a rather large attorney fees
16 award against them. We wondered where were the decision
17 that were made? What was the advice that was given?
18 Advice that was pursuing the conflicts agenda about the
19 Ellis Act or the client's interest in the particular case.
20 You know of terms we are we get information
21 again, it's very difficult because we don't know really
22 know what types of advice letters are being written to the
23 clients, what kind of information is being transmitted
24 about what their risk. Perhaps they are making their
25 decision with their eyes wide open.

1 MR. HAWLEY: That is the challenge as we gather
2 facts.
3 MR. ZACKS: But I suggest the possibility that
4 ideological interest of nonprofit might be in conflict
5 with the interests of the clients themselves both in favor
6 of regulation.
7 MR. HAWLEY: That has been one of our themes
8 throughout this whole process, is that the possibility and
9 the question was posed by the Supreme Court that the
10 ideological drive may actually equal the same drive as the
11 profit sector.
12 The ideological drive has potentiality for abuse
13 as well. That is definitely a focus of our concern so
14 we'll continue to explore what facts exist out there that
15 would give us real concerns in that area.
16 MR. ZACKS: Thank you very much for your effort.
17 MR. HAWLEY: Thank you for your contribution.
18 Mr. Arce, did you want to supplement your earlier
19 comments?
20 MR. ARCE: Yes, Mr. Hawley. I spoke earlier
21 about our organization, Brightline Defense Project. I am
22 scrutinizing the ruling regarding contingency fees which
23 are currently prohibited.
24 It might be viewed in the context of when a
25 windfall opportunity is created. And I mentioned that our

1 organization looked at cases that suggested that the
2 opportunity for a windfall seemed against the spirit of a
3 nonprofit organization.
4 Our organization decided against applying
5 contingency suites. But for me I don't feel strongly for
6 or against contingency fees arrangements. I didn't
7 realize that I was the last member of nonprofit legal
8 community to speak. So I just want to come up, make that
9 general argument for contingency fees agreements because
10 there is not a proponent here to do that.
11 MR. HAWLEY: Thank you for that clarification.
12 Any further testimony or comments?
13 I wanted to take this opportunity to thank you,
14 all the folks that left before you for participating in
15 this process. We did a similar hearing in Los Angeles and
16 had a number of very interesting, fascinating
17 presentations made to assist us in this. In terms of our
18 time frame we have a questionnaire out. We are in the
19 fact-gathering mode. We have a January 31st deadline on
20 the questionnaire issues, but we will continue to go
21 through this process.
22 We have identified a number of further resources
23 including the Internal Revenue Service and in such that we
24 will be following up with. I am realistically hoping that
25 this will be a 2007 project and that we will complete our

1 gathering of data, the analysis somehow, before the end of
2 2007, have a report filed back to the Supreme Court with
3 the conclusion.
4 We thank you very much for your time and your
5 energy in assisting us with this project. So thank you.
6 With that, we'll close the record.
7 (Conclusion of proceedings at 2:45 p.m.)
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Certificate of Deposition Officer

I, the undersigned, duly authorized to administer oaths pursuant to Section 2093 (b) of the California Code of Civil Procedure, hereby certify that the witness in the foregoing deposition was by me duly sworn to testify the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and place therein stated; that the testimony of the said witness was reported by me and thereafter transcribed by me or under my direction into typewriting; that the foregoing is a full, complete and true record of said testimony; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

I further certify that I am not of counsel or attorney for any of the parties in the foregoing deposition and caption named, or in any way interested in the outcome of the cause named in said caption.

Lisa Vallesen

DEPOSITION OFFICER, CSR 9527, RPR

I hereby certify this copy is a true and exact copy of the original.

DEPOSITION OFFICER, CSR 9527, RPR

Date: JAN 19 2007

APPENDIX 2 – 7

PUBLIC COMMENT ON REPORT

PUBLIC COMMENT - STATE BAR PROPOSED REPORT

PUBLIC COMMENT RECEIVED ON THE PROPOSED REPORT OF THE STATE BAR OF CALIFORNIA TO THE SUPREME COURT OF CALIFORNIA REGARDING NONPROFIT ENTITY LEGAL PRACTICE IN RESPONSE TO THE SUPREME COURT'S REFERRAL TO THE STATE BAR IN *FRYE v. TENDERLOIN HOUSING CLINIC, INC.* (2006) 38 Cal.4th 23

The 45-day public comment period on the State Bar's proposed report regarding nonprofit entity legal practice began on August 27, 2007 and ended on October 15, 2007. Fifteen comments have been received and are briefly summarized below. The comments themselves are also attached.

Date Rcvd.	No.	ORGANIZATION	AUTHOR	POSITION	SYNOPSIS OF COMMENTS
10/18/07 *Rcvd. post comment deadline*	1	The State Bar of California Committee on Professional Responsibility and Conduct (COPRAC)	Dennis Peter Maio, Chair, COPRAC on behalf of COPRAC	Generally supports report and recommendations for revisions applicable to the Rules of Professional Conduct. Makes suggestions.	Supports excepting nonprofits from fee-sharing prohibitions but no consensus on the scope of that exception. COPRAC is concerned that Recommendation 5(D) 4 requiring nonprofits maintain the same security for errors and omissions claims as for-profits might cause some nonprofits to cease to operate. Believes it would be helpful to set out specific goals, including preventing non-attorneys from interfering with attorney's duty of loyalty to clients and protecting attorneys from ideological and funding pressures. COPRAC recommends a fuller statement of reasons for removing the statutory requirement that 70% of a nonprofit's clientele be of low income or otherwise with out access to legal services.
09/04/07	2	Member -State Bar Commission for the Revision of the Rules of Professional Conduct; Former State Bar Board of Governor	Kurt Melchior	Excellent report. Has been involved with FRYE at several levels and thinks it is a great report.	Recommendation 5, the Safe Harbor provisions requirement that entities "dedicate legal fees obtained to the entity to legal practice. Recommends a narrow "escape hatch" for nonprofits that in the rare event receive an award of attorneys fees in the tens of millions of dollars resulting in a huge litigation reserve that it couldn't use up in many years while it's other programs go under funded
10/01/07	3	Attorney	Lee A. Garry	Registration of nonprofit legal entities is absolutely necessary.	Based on personal experience cites abuses and matters involving clients receiving assistance from nonprofit legal services organizations.

PUBLIC COMMENT - STATE BAR PROPOSED REPORT

Date Rcvd.	No.	ORGANIZATION	AUTHOR	POSITION	SYNOPSIS OF COMMENTS
10/14/07	4	Tenant of a Tenderloin Housing Clinic Hotel	Robert Gimelli	Urges the Court to set in motion an overhaul of the way nonprofit entities are currently regulated.	Gimelli has been a tenant of THC for the past 7 years. He has "seen some strange things going on" and has attempted to use the legal office of THC. Has worked for nonprofits in the past and believes there is a lack of regulation of nonprofits in general and that nonprofits should adhere to and be governed by the same rules as a for-profit legal firm regardless of their tax exempt status.
09/11/07	5	Tenant, Seneca Hotel (run by the Tenderloin Housing Clinic)	Jeff Webb	Identifies concerns about the Tenderloin Housing Clinic.	Submitted a link via e-mail to his blog http://www.bluoz.com/blog which chronicles his experience as a tenant in Tenderloin Housing Clinic's hotel and examples of THC's former hotel managers extorting money from THC tenants. Webb's issues are with THCs management, their policies for tenants, and their response to his complaints about other tenants.
10/10/07	6	SF Weekly	Link to article submitted by Jeff Webb. Article written by Matt Smith	Identifies issues with THC.	Front-page article "The Vice Hotel" (published 10/10/2007 http://bestof.sfweekly.com/2007-10-10/news/the-vice-hotel/) investigates THC. It focuses on THC's Mission Hotel that was allegedly a hotel for extortion, drug dealing and other vices. The article cites criminal activity of a former THC employee and hotel manager and interviews tenants and THC employees about their dealings with the former manager and the activities at the hotel. Regarding tenant complaints, "the widespread view is among THC tenants is that this system of in-house advocacy means that complaints can be pushed under the rug."
10/22/07 *Rcvd. post comment deadline*	7	Office of the Chief Trial Counsel, The State Bar of California	Fiona Smith, Daily Journal article.	Reports there are active investigations on fake legal aid organizations and attorneys.	Daily Journal article "MoFo, Nonprofit Team to Shut Down Clinic" published October 22, 2007. Fake attorneys and fake legal aid centers are a problem. There are over 200 active investigations. More scams and complaints are reported to the State Bar every week.
09/20/07	8	Landlord Attorney	James McBride	Asserts nonprofit legal services entity abuses right to jury trial.	Specific complaint about a nonprofit legal services entity that abuses the right to jury trial that results in "millions of dollars of unpaid occupancy" unfairly extracted from landlords as well as results in added burden on trial courts. Offers to assist in developing this aspect of regulation in the nonprofit law practice world. Provided statistical information.

PUBLIC COMMENT - STATE BAR PROPOSED REPORT

Date Rcvd.	No.	ORGANIZATION	AUTHOR	POSITION	SYNOPSIS OF COMMENTS
10/12/07	9	The Impact Fund, ACLU of No. CA, So. CA, and San Diego/Imperial Counties; Pacific Legal Foundation; AARP Foundation; Tenderloin Housing Clinic; Disability Rights Advocates; Electronic Frontier Foundation; Housing Rights Center; Equal Rights Advocates; TURN; Natural Resources Defense Council, Center of Race, Poverty and the Environment	Brad Seligman, Executive Director of the Impact Fund on behalf of the non-profit organizations listed.	Reject the proposed report. The State Bar should instead report back to the California Supreme Court that it did not document actual abuse sufficient enough to justify further regulation.	The report does not document any a demonstrated danger of injury. The proposed recommendations are unwieldy, potentially expensive, may have unforeseen consequences, and interfere with the associational and expressive rights of nonprofit entities. The existing regulatory framework is sufficient and fully protects the public. There is no lack of clarity in the standards applicable to nonprofit law practice with the exception of the court of appeal's FRYE decision and the Supreme Courts reversal of that decision. Oppose Recommendation 5 to create a new "head of legal practice" registration process because it is untested and a one-size fits all concept that could interfere with the management structure of some nonprofits. Interfering with the role and status could undermine associational and expressive choices of the entity. Oppose Recommendation 5(D) 3 in that fees may only be dedicated to the reasonable operating expenses of legal practice or programmatic public service activities of the legal practice because it is a content-based restriction that threatens First Amendment rights. No objection to incorporating provisions into the Rules of Professional Responsibility that confirm non-profit firms may seek and obtain fees.
10/15/07	10	The Legal Aid Association of California, (LAAC) (74 IOLTA-funded legal services programs & 90 individual legal services staff and supporters)	Mitchell Kamin, President, LAAC Julia Wilson, Director, LAAC	Reject the proposed report. The State Bar should instead report back to the California Supreme Court that the investigation did not reveal any demonstrated harm to clients so no further	IOLTA funded organizations already operate within the judicially-created "safe harbor" for legal aid nonprofits and are governed by IOLTA-specific statutory and regulatory requirements that address concerns raised in report. They should be fully exempt from the proposed requirements. Investigation does not reveal actual harm.

PUBLIC COMMENT - STATE BAR PROPOSED REPORT

Date Rcvd.	No.	ORGANIZATION	AUTHOR	POSITION	SYNOPSIS OF COMMENTS
				regulation is warranted.	The existing regulatory oversight of nonprofits is sufficient to address concerns articulated in report. IOLTA-funded organizations are additionally regulated specifically on issues raised in report by compliance with Rules of Professional Responsibility and Business and Professions Code and extensive grant reporting requirements to the State Bar. Existing regulations of individual attorneys at nonprofit organizations are sufficient. Requirements will pose unintended but significant burdens on individual nonprofits and the statewide legal services delivery system. The judicially created exemption for legal aid and advocacy groups renders an additional “safe harbor” unnecessary and will cause confusion about state of law for legal services and advocacy entities. Oppose Recommendations 1, 2, 3, and 4 that propose amendments to a number of statues. Introducing legislation carries untenable risks that the State Bar cannot guarantee – including potential of placing additional requirements or restrictions on legal services providers. Oppose Recommendation 3 that proposes amendments to Corporations code § 13406(b) that may risk legislative uncertainty and are duplicative of requirements existing for IOLTA-funded entities. Oppose Recommendations 5 and 6 requiring a “head of legal practice” of nonprofits register because it is duplicative of exiting regulatory oversight of attorney employees. “Head of legal practice” certification could impose significant burdens and is untested. Oppose Recommendation 5(D) 3 to require nonprofits spend attorney fees on limited activities. Vague language in requirement and does not take into account requirements of other sources of funding.

PUBLIC COMMENT - STATE BAR PROPOSED REPORT

Date Rcvd.	No.	ORGANIZATION	AUTHOR	POSITION	SYNOPSIS OF COMMENTS
					Oppose Recommendation 5(D) 4 requiring nonprofits carry malpractice insurance similar to for-profit firms. Prohibitive for small and large nonprofits.
10/15/07	11	LAMBDA Legal Defense & Education Fund, the HIV and AIDS Legal Services Alliance, Inc. (HALSA), and the Transgender Law Center	Jennifer Pizer, Senior Counsel, LAMBDA Legal on behalf of the entities listed.	Reject the proposed report. The State Bar should instead report back to the California Supreme Court that there is no documented need to further regulate nonprofit entities engaged in the practice of law.	Recommendations would likely have new and disproportionate impact upon smaller and newer nonprofit legal organizations. Compliance with an additional duplicative set of regulations would redirect resources away from clients. Regulations could prevent the creation of new nonprofit legal entities.
10/15/07	12	13 clinical faculty law professors at various California law schools	Mark Aaronson, Director of Hastings College of the Law Civil Justice Clinic	The State Bar should not adopt the Report's recommendation to establish new regulations for the not-for profit practice of law.	Recommendations overstep the Court's mandate and risk inviting consequences especially for clinical legal education programs. Data in report indicates no problems in quality of representation provided to clients by law school in-house clinics. Responsibility ultimately lies with clinic's participating faculty members, who are licensed to practice law. Independence of judgment required of lawyers is bolstered by principles of academic freedom that protect faculty members from inappropriate interference in teaching. Application of report recommendations assumes the non-profit is a 501(c)(3) receiving federal tax – exemption. Law school clinics are not. In order to reduce demands of compliance or risk non-compliance law schools may question the existence of or feel compelled to restructure or scale back their clinical programs. Implementing Recommendation 5 (C) to designate a single "head of practice" in law schools settings with multiple and varied clinics could incur collateral consequences financially, programmatically and in terms of faculty and staff moral.
10/15/07	13	Center of Clinical Education, School of Law Boalt Hall, University of	Deirdre K. Mulligan, Clinical Professor of Law Director	Rejects the report's recommendations.	Recommendations exceed the Court's mandate and risk negative unforeseen consequences.

PUBLIC COMMENT - STATE BAR PROPOSED REPORT

Date Rcvd.	No.	ORGANIZATION	AUTHOR	POSITION	SYNOPSIS OF COMMENTS
		California Berkeley			The State Bar has done a commendable job in conducting a study and has found "there is not a compelling need to enhance existing regulation" but recommends new regulations anyway despite this finding. The report does not cite a particular basis for regulating law school clinics. Recommendations would burden law school clinics without demonstrable results. Recommendations would be subject to a notoriously unpredictable legislative process potentially resulting in unforeseen consequences.
09/12/07	14	Human Services Agency, Belmont, CA	Bobbi MacLean	No change to current regulation system necessary.	No change to current regulation of nonprofits is necessary. Further regulation would be an additional burden. Nonprofits are already satisfactorily regulated.
10/12/07	15	In-house Attorney, Kings/Tulare Agency on Aging	Sarah Shena	No specific recommendations regarding report recommendations.	Area Agency on Aging that has a joint powers agreement with the County of Tulare. As a county employee and attorney funded by the Older American's Act she believes her office is exempt from the proposed recommendations.

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

October 18, 2007

Kate O'Connor
Office of Legal Services, Access & Fairness Programs
The State Bar of California
180 Howard Street, 10th Floor
San Francisco, CA 94105

Dear Ms. O'Connor:

The Committee on Professional Responsibility and Conduct ("COPRAC") submits the following comments on the draft report to the Supreme Court in response to *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23, regarding nonprofit public benefit corporations providing legal services to the public ("nonprofits").

Although not unanimous, it was COPRAC's consensus that some further regulation of nonprofits is appropriate. The consensus supports the following recommendations for revisions to applicable provisions of the Rules of Professional Conduct ("Rules") and the Corporations Code, in large part because they do not appear to be particularly onerous, so as to reflect the reality of providing legal services by nonprofits and reconfirm the applicability of professional standards to attorneys practicing in nonprofits:

- To allow nonprofits to engage in the practice of law where non-attorney management or governance may exist
- To allow legal services to be mixed with other services
- To allow legal fees to be charged and contingency fee agreements to be used
- To require a "head of legal practice" in a nonprofit to register with the State Bar of California and to certify that the legal practice in California is overseen by a qualified member of the Bar, that attorneys within the nonprofit are subject to professional standards, and that policies and procedures are in place to assure compliance with such standards

With respect to requiring policies and procedures, COPRAC believes it would be helpful to set out specific goals, including preventing non-attorneys from interfering with an attorney's duty of loyalty to his or her client and protecting attorneys from ideological and funding pressures in their representation of their clients.

COPRAC also supports amendment of the Rules to except nonprofit legal practices from fee-sharing prohibitions. There is, however, no consensus among members on the scope of that exception. Some support the proposed limitation on the use of attorney fees to the reasonable operating expenses of the legal practice and to "programmatic public service activities of the legal practice"—provided the latter phrase is given some proper determinacy. But others question whether the use of attorney fees should be limited to legal services activities. They would instead endorse the approach of the American Bar Association, which imposes no such limitation, and suggest that a limitation of this sort might be unnecessary in light of the regulations applicable to nonprofits that have been promulgated by agencies including the Internal Revenue Service.

COPRAC questions the report's recommendation that nonprofits be required to maintain security for error and omission claims in the same amount as is required for for-profit law corporations. COPRAC is concerned that, as the report acknowledges, this requirement might cause some nonprofits to cease to operate and thereby reduce the supply of legal services. COPRAC recommends further study regarding whether such consequences would in fact result. Such further study could take the form of requiring nonprofits to provide information, as part of the registration process, during the first year any new requirement is in effect regarding any claim made. As an alternative to maintaining security for error and omission claims in the same amount as is required for for-profit law corporations, nonprofits could be required to disclose to their clients any absence of malpractice insurance and the potential consequences of the absence of such insurance.

Finally, COPRAC recommends a fuller statement of reasons for removing the statutory requirement that 70% of a nonprofit's clientele be of low income or otherwise without access to legal services. COPRAC assumes that the purpose may be to ensure that the statutory requirements do not violate the First Amendment, but has not found an explanation in the report.

COPRAC thanks you for the opportunity to comment and stands ready to comment further should you so desire.

Very Truly Yours,

Dennis Peter Maio

Chair

O'Connor, Kate

From: Hawley, Robert
Sent: Tuesday, September 04, 2007 5:26 PM
To: O'Connor, Kate
Subject: FW: Rules Revision Commission - State Bar's Frye v. THC Public Comment Report

-----Original Message-----
From: Melchior, Kurt W. [mailto:KMelchior@Nossaman.com]
Sent: Monday, September 03, 2007 5:23 PM
To: Difuntorum, Randall; Anthonie Voogd (E-mail); Dominique Snyder (Home) (E-mail); Ellen Peck (E-mail); Harry Sondheim (E-mail); Ignazio J. Ruvolo (E-mail); Jerome Sapiro Jr. (E-mail); JoElla Julien (E-mail); Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Home#2) (E-mail) (E-mail); Kevin Mohr (Work) (E-mail); Linda Q. Foy (E-mail); Mark L. Tuft (E-mail); Paul W. Vapnek (E-mail); Raul Martinez (E-mail); Robert Kehr (E-mail); Stan Lamport (E-mail)
Cc: McCurdy, Lauren; Hollins, Audrey; Lee, Mimi; Yen, Mary
Subject: RE: Rules Revision Commission - State Bar's Frye v. THC Public Comment Report

I thought that this was an excellent report. I have only one comment or objection: The Safe Harbor provisions require, among other things, that the entity involved "dedicates legal fees obtained by the entity to the legal practice." While I understand and concur in the thought behind this requirement, I can conceive of situations where this would be unnecessarily restrictive.

For example, it is well established in California that class action proceeds -- the substantive recovery, not the legal fees -- may be devoted to public interest purposes OTHER THAN LEGAL FEES OR THE COSTS OF FUTURE LEGAL PROCEEDINGS, OR RELATED TO THE SPECIFIC HARM CAUSED BY THE DEFENDANT. See Cal. v. Levi Strauss & Co. (1986) 41 Cal. 3d 460.

I can see (rare) situations where nonprofits could engage in really long lasting contingent fee litigation which ultimately resulted in a recovery, and an award of attorneys fees in the tens of millions of dollars. Such awards are now known in the commercial practice; and I know of some non profits which support and participate in such litigation.

This is obviously not an everyday occurrence. But were it to happen, then a nonprofit which has other social action items on its agenda besides litigation might suddenly have an eight figure litigation reserve which it could not use up in many years, while its other meritorious programs were underfunded.

I appreciate that this would be a quite rare situation; but I suggest to Bob Hawley that there should be an escape hatch -- a narrow one, to be sure -- for such occasions. Beyond that, as one who was involved with Frye at several levels I think it is a great report.

-----Original Message-----
From: Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]
Sent: Tuesday, August 28, 2007 9:26 AM
To: Anthonie Voogd (E-mail); Dominique Snyder (Home) (E-mail); Ellen Peck (E-mail); Harry Sondheim (E-mail); Ignazio J. Ruvolo (E-mail); Jerome Sapiro Jr. (E-mail); JoElla Julien (E-mail); Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Home#2) (E-mail) (E-mail); Kevin Mohr (Work) (E-mail); Melchior, Kurt W.; Linda Q. Foy (E-mail); Mark L. Tuft (E-mail); Paul W. Vapnek (E-mail); Raul Martinez (E-mail); Robert Kehr (E-mail); Stan Lamport (E-mail)

Cc: McCurdy, Lauren; Hollins, Audrey; Lee, Mimi; Yen, Mary
Subject: Rules Revision Commission - State Bar's Frye v. THC Public Comment Report

Members of the Commission:

Yesterday, RAD acted unanimously to issue the State Bar's Frye v. THC proposed report for public comment. A link to the public comment proposal is pasted below.

Given your experience and expertise, Deputy Executive Director Bob Hawley welcomes your individual informal feedback. Send your comments and reactions to me and I will pass them on.

In terms of formal Commission action, as discussed at the meeting this topic will be on the September agenda for purposes of deciding whether the approved version of the Commission's proposed Rule 5.4 [1-310X] is ready to be included in Batch 3 or needs to be further revised in light of the report. The approved version of the Commission's proposed Rule 5.4 [1-310X] is attached. -Randy D.

http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=87724

****

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Telephone (818) 986-6575
Facsimile (818) 907-5064

October 1, 2007

Ms. Kate O'Connor
180 Howard Street
San Francisco, CA 94105

Re: Nonprofit Legal Practice
Request for Comment

Dear Ms. O'Connor:

In regard to your request for comment regarding regulation of nonprofit legal practices I can only say the failure to regulate would lead to significant abuses and, to the extent such services are rendered by non-licensed "legal aid/assistance" organizations, substantial practice of law without a license.

I find it hard to believe that very many attorneys would engage in the practice of law on a meaningful basis without seeking compensation. The fact that a salary might be paid to attorneys by the nonprofit organization instead of fees paid by the client directly to the attorney does not change the dynamics.

I am not sure of the extent to which non-attorney legal aid organizations are included in your request for comment. However, in the past few years I have noticed an increase, and personally become involved, in representation of clients in matters involving pro per parties who are clearly obtaining assistance from "out of the mainstream" sources. In each of these cases the pro per party has pursued matters that were bogus or substantially without merit, based on extraordinarily incompetent advice that generated costs to my clients far in excess of what would have been incurred if attorneys had been representing the party in a proper manner. In some instances they have engaged in numerous abusive tactics that would never be permitted if done by an attorney.

While it should remain the right of individuals to appear in pro per there clearly needs to be some regulation of "do it yourself" legal assistance facilities. Likewise, there may be certain instances in which Constitutional rights might apply, as noted in the *Frye v. Tenderloin Housing Clinic, Inc.* case. However, the bottom line is that if anyone is practicing law (other than a pro per party) he/she should be regulated and governed by the same standards as "for profit" attorneys. There are various legal support organizations that are preparing pleadings, serving process and documents, appearing in court as "translators", etc., and engaging in negotiations and activities far in excess of simple assistance and guidance. Regulation of such organizations is absolutely necessary.

I hasten to add that I am pretty much a mainstream attorney and find many regulations now in place to be wasteful or unnecessary. However, my experience with matters involving legal support providers leads me to the conclusion that they create a great deal of expense and offer little in the way of real help to the public at large. If they want to simply give out information I have no objection. If they can actually help people "do it themselves" I have no objection. My objection is that they are far more involved, are engaging in the practice of law in a sub-standard manner and should either be prohibited from doing so or regulated.

In recognize that my comments may cross into some areas not encompassed within your request for comment. However, they all seem to be of the same genre and I am taking the opportunity to comment on the scope of abuses arising out of the practice of law outside the ordinary scheme.

If you are interested in details I can furnish them. Please feel free to contact me.

Thank you for consideration of my remarks.

Very truly yours,

LEE A. GARRY

LAG:aw

O'Connor, Kate

From: robert gimelli [gimellirobert@hotmail.com]
Sent: Sunday, October 14, 2007 2:35 PM
To: O'Connor, Kate
Cc: jbrayer@ocdb.com
Subject: TENDERLOIN HOUCING CLINIC vs FRYE

Having been a tenant of Tenderloin Housing Clinic and attempted to utilize the legal office over these last 7 years I have seen some strange goings on.
I am somewhat informed about this particular case and the lack of regulation of non-profits in general having worked for several in the past.
It is my opinion that many miss the point when discussing non-profits because they over look the key word in the title business or corporation. Tenderloin Housing Clinic and other similar organizations are Nonprofit BUSINESS or Nonprofit CORPORATIONS. This was meant to give some tax relief to such businesses not provide shelter from regulations that are set up for all doing business in the state. Therefore nonprofits must adhere to and be governed by the same sort of rules as any other for profit legal firm regardless of their tax exempt status. Without such regulation these entices and ripe for the type of abuses that Tenderloin Housing Clinic has been charged with. I believe that the court needs to strongly regulate such groups the same as any other business engaged in the practice of law. I urge the court to set in motion a overhaul of the way that nonprofit entities are treated under the current regulatory environment. Thank you for this opportunity to express my views on this matter.

Robert M. Gimelli
785 Brannan St. #403 San Francisco Ca. 94103
Email - gimellirobert@hotmail.com
Home Phone - 415-503-1997

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O'Connor, Kate

From: Jeff Webb [auweia1@gmail.com]
Sent: Monday, September 10, 2007 7:35 PM
To: O'Connor, Kate
Subject: regarding Frye vs Tenderloin Housing Clinic

Hello, I'm basically a tenant in one of Tenderloin Housing Clinic buildings, and I have your proposed report along with an entire section on THC on my blog

http://www.bluoz.com/blog/index.php?/categories/6-Tenderloin-Housing-Clinic

http://www.bluoz.com/blog/

I'm not sure if this will affect the report, but it is public comment.
very recenty THC itself filed a restraining order against one of it's own managers, alleging that he was 'extorting money from the clients and tenants'

http://www.bluoz.com/blog/index.php?/archives/218-THC-management-gone-bad.html

the court documents are on my blog, and this is all brand new. There might be other issues that could relate to the report, but I understand that if this is true, it could affect all of the tenants under THC care during a 3 year time span. I also think reporters are working on trying to find out how bad it was there during that 3 year period, so there might be more info on this in the future.

i guess for now, all I can do is give a link to the blog. I live in another building and have had unrelated issues with THC, which might also have something to do with ethical practices.

I think you would know if anything on my blog would have relevance

Thanks,

Jeff Webb

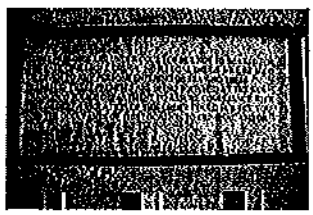
SF WEEKLY SFWEEKLY.COM/JUKEBOX
HEAR TOMORROW'S BANDS...TODAY!
BE.HEAR.NOW
"LEVEL"
THE RACONTEURS
BROKEN BOY SOLDIER

The Vice Hotel

One of the largest city-funded Care Not Cash hotels was allegedly run as a home for extortion, drug dealing, and other vices

By Matt Smith

Published: October 10, 2007



Jake Poehls

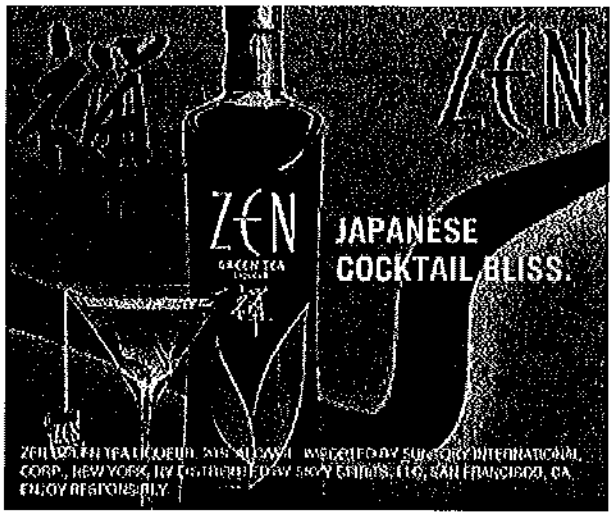
A sign in the hallway of the hotel, which residents say is the site of violence, prostitution, and yes, drug dealing.

Jake Poehls

The Mission Hotel at 520 South Van Ness Ave., leased and managed by the Tenderloin Housing Clinic (THC).

Jake Poehls

Like the rooms of most residents of the city's so-called single-room-occupancy hotels, space is at a premium.



The biceps of 53-year-old ex-boxing coach Emmett Marcel Oliver bulge to the size of cantaloupes as he demonstrates his punching technique against a locked fire escape door he says should be open. Bam!

Oliver says he's a former drug dealer, that he counts among his friends dangerous gang members, and that he's lost people close to him to violence. He frets out loud about how he doesn't want to be in that world. Oliver tells me he's a veteran prison inmate, and his day-to-day life is often interrupted by incidents that cause him to fear that he may go back in.

Oliver, usually a warm, charismatic man, is angry. And he's raging at the building. "Look at this," he says, holding up a garbage can lid to reveal black scum underneath. "It hasn't been cleaned up in years."

He then points out a window to show me how the foundation of the building next door is crumbling: "That gives the mice a place to go," he says.

Oliver speaks for many people who are disturbed by this building. Some of the complaints are more serious than garbage pail scum.

The place where these people live and struggle to stay clean is the drugs-and-violence-infested 248-room Mission Hotel at 520 South Van Ness. It is the largest of 15 city-taxpayer-subsidized "single-room-occupancy" hotels leased and managed by the Tenderloin Housing Clinic (THC), a nonprofit organization dedicated to providing services to the indigent.

Jake Poehls

Ex-boxing coach Emmett Marcel Oliver says taxpayers and residents deserve better return on their money than they received during Mendoza's stint managing the Mission Hotel.

Jake Poehls

One of 248 rooms at the largest hotel of 15 that THC leases with taxpayer subsidies.

Jake Poehls

A typical Mission Hotel residence.

It's also one of the largest of the city-funded hotels that became the vehicles for Care Not Cash, the signature antihomelessness program that helped propel Mayor Gavin Newsom to office in 2003.

Until recently, the hotel was run by a clinic employee as a haven for criminal activities, according to tenants, THC workers, and city employees familiar with the situation.

During the three years the hotel was operated by THC employee Carlos Enrique Mendoza Hernandez, it was allegedly home base for systematic, management-run rackets that may as well have been specifically designed to suck people like Oliver back into a life of drugs, violence, menace, and despair.

According to allegations from Tenderloin Housing Clinic employees, city employees and leaders of charities that aid San Francisco's poor, the neatly coiffed, 6-foot-tall, 330-pound Mendoza turned the building into an enterprise for his own profit.

During an hour-long conversation in a bar, Mendoza strenuously denied these allegations. We had agreed to meet at The Connection on Mission Street last week. There, a man met me at the door and told me the meeting place had been changed because, Mendoza said, police had been spotted in the area and he didn't want any "drama." During our eventual conversation at The Annex on Mission, Mendoza said he was an exemplary employee during his five years working first as a desk clerk and later as a manager of the Mission Hotel. He said he was one of THC director Randy Shaw's favored employees, and that Shaw had directly intervened to have Mendoza promoted.

THC attorneys, however, alleged in August court filings that Mendoza is a gang member — which he denies — and that he conducted an ongoing campaign of criminal activity at the hotel. In these filings, THC attorney Raquel Fox requested restraining orders to protect 17 employees against alleged threats of violence from Mendoza.

Yet Mendoza says the agency did not serve him with court papers or otherwise contact him about these allegations. His sister, Gloria Hernandez, claims to still work for THC. She says she learned of the requests for restraining orders on a San Francisco blog that reported on the filings. "My brother didn't do what they said he did," she said. "It bothers me that they can insinuate stuff about him when they didn't have true facts."

However, THC officials aren't the only ones describing criminal activity at the Mission Hotel. Nor are they alone in alleging that Mendoza may have been involved in it.

In addition to THC's own court filings, current and former Mission Hotel tenants and THC

Jake Poehls
Mission Hotel hallway

Jake Poehls
Concertina wire, installed to prevent dealers and other intruders, was cut long ago and left that way.

Details:
E-mail the author to discuss the story:
Matt.Smith@SFWeekly.com

employees who worked alongside Mendoza indicate the hotel may have been a base for extortion. People familiar with the situation say activities in the building also included loan sharking, extracting payments from drug dealers in exchange for protection from police, and skimming city-subsidized rent money.

Mendoza denies all the allegations, and says the sort of skimming he's accused of — which involves reporting rooms as vacant, then renting them out off the books — would not have been possible without his superiors' consent. "There's no way I could have done that. Whenever a tenant moves out, they have to let the housing department know," Mendoza says, referring to the THC division that oversees the management of city-subsidized hotels for the poor.

As of last week, Mendoza's name did not appear on San Francisco Police Department arrest logs at the Hall of Justice. A police spokesperson did not respond to requests for an update as to whether an incident report exists about Mendoza's alleged activities at the Mission Hotel. I have not received a response to requests for an interview with THC's Randy Shaw.

When I attempted to ask questions of the city department that should oversee where the money is going, I was simply told to speak to Shaw.

Taken together, the accusations point to the possibility that San Francisco taxpayers have been subsidizing the management of what amounted to a vice hotel.

Mendoza "is dangerous and a reputed gang member of the Norteños," and "employees and tenants at Mission Hotel are fearful of violence," according to Aug. 23 court filings in which a THC attorney requested restraining orders against Mendoza to protect 17 housing clinic employees. "THC discovered defendant had been involved in criminal activity, including extortion, assaults, and threats of violence toward THC's employees and Mission Hotel tenants. The conduct is ongoing," staff attorney Fox wrote in the filings.

I was told during interviews with former THC employees, hotel residents, and social service providers who placed tenants in the hotel that Mendoza might have personally rented rooms off the books. When THC workers took over the hotel from Mendoza this summer, these sources say, they discovered tenants living in rooms that had been listed as vacant.

Such allegations point toward a possible theft of city taxpayer subsidies, which should trigger an investigation by City Attorney Dennis Herrera. When I asked Herrera's office whether THC had requested such an investigation, a spokeswoman explained the department's policy of neither confirming nor denying the existence of ongoing investigations.

Again, Mendoza himself denies the allegations. He and Gloria Hernandez say that after

Mendoza left, Shaw authorized a housing division "shake-up" that involved firing Mendoza's superiors as well as employees who worked alongside him. Others resigned in connection with an internal inquiry into Mendoza's management of the Mission Hotel. People with direct knowledge of this situation, as well as city and nonprofit employees who worked with people who were fired in the shakeup, also said in interviews that allegations about Mendoza's supposed mismanagement led to at least six people recently leaving the organization through firings and resignations. Because these were confidential internal personnel matters at a private nonprofit, I was unable to ascertain precisely how many employees were compelled to leave THC in connection with the Mission Hotel shakeup.

Sources say Mendoza was also involved in loan sharking, in which tenants borrowed money at 1,200 percent interest and lived under the threat of violence in the event of late payments. "If a tenant borrowed $100, on payday he would pay back $100 more," said a source who worked alongside Mendoza, one of three people contacted independently of each other who claimed knowledge of this activity.

Mendoza insists this accusation is outrageous. He said that rather than victimize hotel residents, he went to great lengths to help them, sometimes buying them meals at a nearby restaurant. Again, he says, he has not been contacted directly by THC officials about allegations of criminal activity at the hotel.

Drug dealing is a potential problem in any facility housing people who were previously living on the street. Mendoza says that he did not tolerate it at the hotel, and that he was one of few building managers to have evicted tenants for drug dealing — an assertion confirmed by court records.

Sources with knowledge of the situation at the hotel, however, said drug dealers there were divided among those Mendoza protected, and those he did not.

"Basically we [had] an early warning system," said one source, who claims to have dealt drugs and lent money in the hotel. "The police have to call management before they enter the building. They call Carlos first, and before they come, he contacts me. I know I have to flush it down the toilet."

Sources said the hotel was also used for prostitution. "They were having open acts of prostitution in the hallways in exchange for drugs," said one of several residents who described this problem. "I felt uncomfortable and unsafe."

Mendoza denies all of this.

At the very least, a City Attorney investigation is necessary to determine whether rent-money skimming actually went on at the Mission Hotel, and, if so, whether THC promptly and fully reported this alleged theft of taxpayer subsidies.

What is more, descriptions of violence, drug dealing, prostitution, and a general atmosphere of menace at the Mission Hotel suggests San Francisco has reneged on the Care Not Cash promise of giving homeless people safe housing as an alternative to the violent, drug-ridden streets.

The aforementioned allegations emerged over three weeks as I interviewed San Francisco

social service providers who helped place people in THC-run hotels. I interviewed people who worked alongside Mendoza for THC. I spoke several times over the course of two weeks with a man who claims to have been a former loan shark and dealer who worked with Mendoza. I interviewed a crack cocaine user who says he bought rocks from a dealer Mendoza protected. And I interviewed several hotel residents who claim they knew of drug dealing, loan sharking, rent skimming, and extortion involving Mendoza. And I spoke with Mendoza.

All of the hotel residents and THC workers I interviewed, except Oliver — who claims to have seen a crack cocaine transaction in which Mendoza passed rocks to a reputed dealer within the hotel — requested that their names not be used in this article.

That's because they report an atmosphere of fear surrounding the hotel, and around THC. If their names were to appear in print, these Mission Hotel residents, dealers, users, and former THC employees said they feared possible violence from Mendoza or his associates.

Mendoza, for his part, said that they have nothing to fear and denies that he's been involved in threats of violence.

Meanwhile, social service workers and employees of nonprofit agencies are afraid that if they were to speak on the record, they could suffer repercussions from Shaw, who they believe wields considerable power in city political circles. They also believe that Shaw receives favorable treatment from the city agencies that oversee the $15 million in government grants and contract payments that fund THC's management of subsidized hotels.

This view seems to be supported by the fact that, despite several requests, I was unable to obtain interviews with Department of Human Services employees who supervise contracts with THC. Instead, an assistant to department director Trent Rhorer's assistant told me Rhorer said I should "talk to Randy" about the situation at the Mission Hotel.

Former employees were asked to sign confidentiality agreements with the implied promise that they would not speak out about the situation at the Mission Hotel, people with direct knowledge of the situation say.

In this spirit of secrecy, Shaw did not respond directly to e-mail and voicemail requests to be interviewed for this story. He did respond indirectly. Last week, he wrote a column titled "*SF Weekly* Preparing New Attack on Housing Clinic" for *Beyond Chron,* a Web site run by his nonprofit.

Defending his organization, Shaw wrote that Mendoza was a competent employee who merely left due to personal problems. "We are extremely proud of our management of the Mission over the years. Rather than wait for Smith to misinform the public, we're setting the record straight," Shaw wrote, in anticipation of this column. "After we hired Carlos Mendoza as general manager in February 2004, the Mission became a much calmer environment."

These smooth waters became choppy last fall, when "Carlos reported to us that he was going through some personal problems," Shaw continued. "Carlos' personal issues soon triggered concerns about his relationship with a couple of the hotel's tenants. An investigation was conducted, and for some time there was not sufficient evidence to conclude that Carlos should be terminated. When that evidence emerged in July 2007, Carlos was removed from his post

and his employment ended."

Mendoza says the "personal problem" allegations, in which he was said to have had an affair with a tenant, are false, and that he resigned because he thought he was being unfairly accused.

Shaw's public spin on the Mission Hotel situation contrasts sharply with THC's own court filings requesting restraining orders against Mendoza.

Mendoza "continues to stalk and threaten employees. He continues to threaten and extort tenants," according to requests for restraining orders filed by a THC attorney. According to the filing, Mendoza was furious that some employees had ratted him out.

Fox, THC's lawyer, was scheduled to appear Sept. 5 in court to explain Mendoza's alleged criminal activities. I had hoped to see an illuminating description of life inside one of the city's largest poorhouses.

Not long before this hearing date, a copy of the filing appeared on a blog run by Jeff Webb, a resident of the THC-run Seneca Hotel. Webb's blog item was then picked up by two other San Francisco–based blogs. Fox subsequently asked the court to postpone the THC–Carlos Mendoza hearing until Sept. 21. Neither she nor Mendoza showed up for the second date. Mendoza says he was not served with notices to appear.

Whatever the truth of the allegations in the restraining order requests, sources allege that THC's reputed "Vice Hotel" was a well-oiled machine. Drug dealing was the most visible illicit activity, according to residents, former residents, and employees.

"I got myself into the money-loaning business," said a source who recently moved out of the Mission Hotel. "[Users would] buy drugs from [a dealer] and when they ran out, they'd borrow money from me. It got to the point where [the dealer] had something resembling a Glide Memorial Church bread line every third of the month. This ran all night. I asked, 'How in the hell are you getting away with this shit, and nobody's going to jail?' He tells me, 'You can conduct any business you like in here, as long as you pay rent.' I said, 'But I'm on General Assistance; they pay my rent.' He said, 'No, as long as you pay *rent*.'"

"Rent," this source said, meant payments to the hotel manager.

Another tenant I spoke to also said Mendoza would warn the aforementioned dealer of the police's presence. "Carlos would go to his door, give him a soda, and say, 'You've got to slow down the traffic tonight,'" said the tenant, who claims to buy drugs from this dealer.

Since Mendoza left, however, the dealer "has not slowed down his dealing. He's still selling crack. I bought some last week, and it made my chest hurt," said the tenant, adding that at least six other occupants currently deal crack from their rooms. "There's no secret. It's done on the stairway. You can see people coming in and out."

Not everyone in the hotel welcomes the drug trade. Combined with the prostitution that several residents said went on in bathrooms and elsewhere in the hotel, the trafficking created a menacing atmosphere.

Mendoza "put me right in the middle of what they call the drug corridor, and I don't do drugs, and I was afraid," one woman said. "I was coerced, intimidated; they called me a narc. It was a horrible situation."

Mendoza said he actually reduced drug dealing in the hotel, and that he did not receive kickbacks or any other sort of benefit from dealing.

It's not a shocking idea that someone in a position of authority over vulnerable people might be accused of abusing power. But it is peculiar that a city-funded charity with an $18 million annual budget might allow such a situation to persist.

In his "setting the record straight" column last week, Shaw noted that his agency runs criminal background checks on employees. He also suggested that anything I might write should be considered unfair because I've criticized him in the past, citing a 2005 column in which I referred to him as a "skid row kingpin."

In spending three weeks talking with former THC employees and with social service providers who work with the homeless, I'll grant Shaw this: I've come to doubt that he's a cynical person. He's widely admired for having organized San Francisco's downtown poor during the 1970s. And nobody I spoke to believes that Shaw approved of what was going at his hotel.

But Shaw's organization seems to be set up in such a way that these supposed problems are widely believed to have been allowed to fester for too long. Some of his former allies believe he may not be effectively managing what has grown into a large and complex organization.

The Care Not Cash program has helped grow THC from a 20-employee charity to a multipronged organization employing some 200 people. Meanwhile, a THC structure has evolved that may keep managers such as Mendoza from being held accountable.

THC runs in-house tenant "advocacy" organizations that tenants and workers with other nonprofits believe may actually prevent problems from coming to light. Of THC's total $18 million 2005 budget spent on the housing program, the agency spent $500,000 per year running city-funded tenant-advocacy groups such as the Central City SRO Collaborative, the Mission SRO Collaborative, and its Code Enforcement Program, in which SRO employees help tenants complain about building defects. As stand-alone advocates, these groups provide a valuable counterbalance to downtown slumlords with a reputation for cheating and even abusing tenants.

However, as a branch of THC, which is the city's largest private low-income hotel landlord, such programs create a troubling situation where the organization is able to handle complaints in-house. Tenants groused to me about speaking with SRO Collaborative lawyers, only to find that they'd been identified to a building manager as a complainer. The widespread view among THC tenants is that this system of in-house advocacy means that complaints against THC can be swept under the rug.

Critics say Shaw has positioned himself as a left-wing "progressive" leader, allying himself with leading politicians such as Supervisor Chris Daly. At the same time, Shaw's organization provides a valuable political service to Gavin Newsom by carrying out the lion's share of the mayor's Care Not Cash program. News about possible problems in THC hotels can reflect badly

on these politicians.

Bolstering the perception that Shaw wields political influence is his charity's unusually large lobbying budget. According to the Housing Clinic's most recent available IRS filings, during 2005 THC spent $1 million of its $18 million budget — the vast majority of which comes from government grants and contract payments directed toward serving the poor — on lobbying expenses. During the previous three years, the nonprofit spent a total of $3.23 million on lobbying, increasing its spending by an average of $131,000 per year. Information is not yet available on how much it spent on lobbying in 2006 and 2007. Paul Hogarth, an attorney who works for THC, states on his MySpace page that his job consists mostly of running *Beyond Chron*, an online newspaper that offers Shaw's views on city politics, and where Shaw spun the Mission Hotel fiasco. It's unclear whether *Beyond Chron* is included in THC's $1 million in lobbying expenses.

The tragedy of the Mission Hotel is that well-meaning San Franciscans pay a fortune so that this type of "supportive housing" might provide a refuge from the violence, drug dealing, and despair of the streets. Indeed, Shaw himself characterizes the hotel this way in his recent *Beyond Chron* item:

"Smith views the housing of over 2,000 formerly homeless single adults in decent, safe, and affordable housing as a failure. Smith seems completely unrestricted by facts and objective reality, and like our President, feels more comfortable inventing his own world."

Residents, however, say the Mission Hotel is one of the more dangerous places they've been.

Emmett Oliver, for instance, keeps his eye on the straight and narrow while attempting to suppress his anger about what he sees as a treacherous environment at the Mission Hotel.

"I'm not dealing, and I'm going to make damned sure you're not dealing, too," Oliver said during our first meeting, by way of explaining his theory of nuisance abatement. "It's the city that pays for this place. So we shouldn't have to live this way."

SF WEEKLY PUBLISHED LETTERS TO THE EDITOR AND ON-LINE COMMENTS IN RESPONSE TO THE TENDERLOIN HOUSING CLINIC ARTICLE

Vice Hotel Letters Say City Corruption Boooooooring

Published: October 17, 2007, SF Weekly
http://www.sfweekly.com/2007-10-17/news/vice-hotel-letters-say-city-corruption-boooooooring/print

Oh No SRO

Cash not care: There were many things left out of your article ["The Vice Hotel," Oct. 10] regarding the conditions at the Mission Hotel located at 520 South Van Ness. One issue is the actual cost of the rooms that are no bigger than a jail cell, at a ridiculous price; also, the problem that some of the residents cannot get phone lines hooked up again once they have been disconnected by either the maintenance crew or AT&T mistakenly cutting the lines of tenants who reside there, then not bothering to come back and see what the problem is. The fact that this hotel has drug-dealing activities is no shock at all to any person who has lived here in San Francisco most of their lives. This is a daily occurrence in all the SROs in this city. To try to write a story to say that there is corruption is like saying Muni is not on time. Big deal. Like the taxpayers don't know this? Please. I am so tired of so-called investigative reporting lame stories. Do you really think the money that is given to the Tenderloin Housing Clinic or all the other nonprofit "homeless projects" is going to alleviate the homeless problem in San Francisco? Think again. There is too much money to be made for all these organizations. Homelessness is about profit for this city.
Laurie Estrada San Francisco

Perspicacious! Dejecta! Shenanigans!: Matt Smith doesn't know me from the Man in the Moon but I just read his boffo article and wanted to congratulate him on his wordsmithing and bravery.
My family has lived in S.F. since 1920. Alas, we've seen this gorgeous city slip into an ever-increasing death spiral, especially over the past 20 years, to the point where we've had enough and are making plans to move out. S.F.'s City Hall shenanigans put Tammany Hall to shame, and our board of supes is benighted to the extreme. My first journalism prof exposed us me to Civil War–era newspaper editor Wilbur F. Storey of *The Chicago Times*, who stated that a newspaper's job was to "print the news and raise hell." You and your paper embrace Storey's perspicacious dictum, and I encourage you to sustain your efforts to uncover the dejecta suffusing S.F. politics. I hope that the grand jury investigates what you've uncovered. District Attorney Kamala Harris, City Attorney Dennis Herrera, Mayor Gavin Newsom, and their overpaid acolytes won't touch what you've unearthed. Their complicity through silence and inaction is utterly despicable.
Bill Becker San Francisco

THC deserves TLC: Mr. Smith's article makes for juicy reading, but it's too slender a rope to hang THC, which is the city's largest private low-income hotel landlord. Using the example of one manager at one hotel to taint the service of hundreds of dedicated employees seeking to better life for this city's poor and powerless? In the more than three years that I've been with the Tenderloin Housing Clinic as a desk clerk, a day has not passed without a tenant telling me how glad they are, or how great it is, to have a place to get off the streets. I'm proud of my job! And as chief shop steward I know my co-workers feel the same. Mr. Smith may have an ax to grind with one person, but it reads like a hatchet job on the entire THC organization.
Tony Medina Chief Shop Steward, SEIU #102 San Francisco

Worth a thousand words: I just wanted to say that I loved the cover art from your "Vice Hotel" cover story. I definitely would not have picked up the issue if not for this artwork. Not to say that the story wasn't important, but the real draw was the art, at least for me. People like to claim they don't judge the book by the cover, but I personally believe that they are lying ... and even if they aren't, having a kickass cover doesn't hurt. It was a great choice on the art director's part.

Jesse Young San Francisco

Correction

We neglected to credit artist Jason Levesque for last week's "Vice Hotel" cover illustration. *SF Weekly* regrets the error.

ON-LINE COMMENTS SUBMITTED TO SF WEEKLY
IN RESPONSE TO THE ARTICLE ON THE TENDERLOIN HOUSING CLINIC

OCTOBER 2007

1. The tenderloin housing clinic has gotten to big they are creating a monopoly of the master leasing housing . (like 66%) I have documentation and audio about Central City SRO Collaborative allowing their staff rob a elderly cripple fixed income woman. when i gave this documentation to Chris Daily , Chris told me he would give Sam Dodge (a employee of cc sro c) a heads up , nothing about holding anyone accountable what makes it worse is that randy shaw is buying the voice of the smaller media .The department of human services give me the impression they will hire/contract out to ex-felons and "ex-drug" users with little oversight accountability or training

   Comment by charles — October 10, 2007 @ 10:27AM

2. Welcome to reality, Polyanna. My first reaction to reading the eviction papers on Jeff's blog was "Eviction? For cause? They don't do that here!". Anybody who lives near an SFHA housing project knows what I mean. HUD's "one-strike" policy: meaningless. Safe housing: meaningless. Property management: meaningless.

   Here's a story: talk to the cops and find out how many high-profile criminals live in public housing. Then go through the SFHA's eviction filings to see how many of them have been evicted for illegal activity. I'll give you a hint: it's a round number, with a hole in the middle.

   Comment by Kendall Willets — October 11, 2007 @ 10:36PM

3. Yeah, kendall, I see you point. Really the evictions are only the tip of the iceberg.. There's plenty going on where people didn't get evicted, and that was part of my point. But it's hard to prove a negative unless there's some other means, like video or people willing to speak up.

   Comparing only the evictions, even the SFHA evicts for drugs more than THC does does, but that barely reflects reality, especially when the suspicion is 'very selective evictions'

   there is a couple of big difference between SFHA and THC, being that SFHA is city/HUD run and is exempt from filing fees, where THC has to pay the 200 bucks for filing, because that's a private non profit. And also SFHA is mostly HUD funded, so there's a bunch of federal influence there

   I noticed that the SFHA housing is even cheaper than THC, averaging around 200 a month and people still get evicted for non payment of rent. There's still some real shocker in those documents tho, and would be worth scanning them sometime.

   the big problem with both of these is all the problems despite the evictions. Part of this may be that 'if it doesn't happen in front of, or to, an employee or manager, it doesn't exist'

   Comment by jeff — October 12, 2007 @ 09:04AM

4. At least part of the problem can be traced to the fact that this is more or less permanent housing. It shouldn't be. I'm all for giving people down on their luck a hand up, but we shouldn't be supporting their lifestyles on a permanent basis. There needs to be some intent, some future plan, when the city gives someone free housing. You can stay for a month, two, or even 90 days, but there has to be some plan about what you're going to do with your life. If you simply have no skills and are not employable in this city, then you need to leave. Perhaps you can go to the valley and work picking fruit. In any case, giving them free housing on an open-ended basis allows them to become ensconced and to build their little criminal networks. How is it that we're paying to house money lenders? That's absurd!

   Comment by Robert — October 13, 2007 @ 02:42PM

5. what alot of people don't know. The tenderloin Housing Clinic building I live in used to be nothing BUT working people. The original owners wouldn't let anybody else in.

   But since THC took over it's now nothing BUT non-working people. All the working people left since THC took over, but they didn't want to or need to before.

   So, THC, Randy Shaw, The Board of Supervisors, the Mayor, and you, the voter, have helped to displace over 100 working people in order to get homeless people off the streets at all costs.

   Only now are we getting some hint as to how big that cost is

   Comment by Jeff — October 16, 2007 @ 11:25AM

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MoFo, Nonprofit Team Up to Shut Down Clinic

Bay Area Residents Claim They Were Fleeced by 'Legal Center for Legal Aid'

By Fiona Smith
Daily Journal Staff Writer

S. TODD ROGERS / Daily Journal

"We feel it's time to take a stand against this fraud and theft — preying on the most vulnerable of society, the elderly, disabled, the less well-educated, that are the most easily duped by this legal practice," said Angela Padilla, lead attorney on the case and a partner at Morrison & Foerster.

SAN FRANCISCO — Morrison & Foerster has sued to shut down an allegedly fake legal aid center it says fleeced poor and disabled Bay Area residents out of their meager savings by promising to save them from eviction and other legal ills.

"We feel it's time to take a stand against this fraud and theft — preying on the most vulnerable of society, the elderly, disabled, the less well-educated, that are the most easily duped by this legal practice," said Angela Padilla, lead attorney on the case and a partner at Morrison & Foerster.

Plaintiff Stuart Blankinship, a double amputee living in Corning, withheld his rent after his landlord would not remodel his apartment to accommodate his disability. After being served with an eviction notice, he contacted the Legal Center for Legal Aid last year, which he found in a telephone book. Blankinship says he paid them $300 and when he couldn't pay an additional $100, the center stopped returning his calls.

A similar fate befell Albert Leonard, a 72-year-old Contra Costa County resident who is completely blind. He said he got the center's number from directory assistance and sent them $425 to help fight the eviction notice. All he got in return were some incomplete forms that were unusable in court, according to the complaint.

After Leonard realized he'd been cheated, he managed to contact a bona fide legal aid center — Bay Area Legal Aid. Others also called Bay Area Legal Aid to complain about being hoaxed, according to David Levin, a staff attorney at the Oakland-based nonprofit.

"It was a problem from the outset of the case to re-establish a good attorney-client relationship ... the first people they went to betrayed that trust," Levin said, adding that legitimate organizations can be tainted by the bad apples. "We're on very limited resources to begin with and then you have an organization out there masquerading and hurting our clients."

The non-profit sought out a law firm to help it shut down the Legal Center for Legal Aid. Morrison & Foerster agreed to take the case pro bono. Along with four individuals, Bay Area Legal Aid and Sacramento-based nonprofit Legal Services of Northern California are plaintiffs in the suit.

The case, filed Thursday in Superior Court in Contra Costa County, names as the defendants "Legal Center for Legal Aid" and Richard Gugg. Gugg could not be reached for comment, but the center's toll-free telephone number where callers can leave a message is still operating.

Fake attorneys and legal aid centers are a big problem up and down the state, according to Alan Gordon, supervising trial counsel with the State Bar. There are 200 active investigations into similar scams, and new complaints come in every week, Gordon said. He would not confirm if the State Bar is investigating Gugg or the Legal Center for Legal Aid.

Legitimate organizations are struggling to distinguish themselves from the phony set-ups, according to Toby Rothschild, general counsel for the Legal Aid Foundation of Los Angeles. In 2005, the foundation won a settlement against the fake California Law Center, which had 26 separate listings under various names in the phone book. The Legal Aid Foundation is looking into filing another suit in the near future and is concerned with the increase in con artists creating Web sites, Rothschild said.

It's a continuing problem with people coming into the office and mixing the foundation up with a fake center, Rothschild said. "We're constantly getting clients coming in and saying 'Where are my papers?'"

A big part of the problem is that these kinds of hoaxes are highly profitable and easy to set-up, said Padilla. "There are four plaintiffs on this lawsuit, but we think it's the tip of the iceberg."

James P. McBride
Attorney at Law
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510-537-4560

September 20, 2007

Kate O'Connor
The State Bar of California
Office of Legal Services, Access & Fairness Programs
180 Howard Street, 10th Floor
San Francisco, CA 94105

Re: Frye v. Tenderloin Report

Dear Ms. O'Connor:

Non profit Eviction Defense Center of Oakland requests a jury trial in every case, over 1,000 cases annually. It is leverage to negotiate rent waiver, irrespective of the merits of the case.

In my view, shared by other landlord attorneys, it is a pattern of abuse of the right to jury trial that results in millions of dollars worth of unpaid occupancy unfairly extracted from landlords. It is an added burden on the trial court.

Statistics indicate that only 3 or 4 cases go to jury trial annually in Alameda country. Those are cases with an attorney fee clause in the rental agreement.

If you or your colleagues wish to develop this aspect of the nonprofit law practice world, please call. Thank you for your consideration.

Yours very truly,

James P. McBride

Superior Court of California, County of Alameda
René C. Davidson Alameda County Courthouse
Planning, Research, Public Information, and Court Services Bureau
1225 Fallon Street, Room 104-M
Oakland, California 94612

27 December 2005

James P. McBride
Attorney at Law
1065 A Street, Suite 224
Hayward, CA 94541

Dear Mr. McBride,

I am writing in response to your letter dated December 15 in which you request information about unlawful detainer cases in the Alameda County court system. I regret that the court is not required to maintain or report all of the information that you have requested; however, we are able to provide what we have at hand. Please note that some of the information covers only a half-year.

Case Type	Filings (July 04 – June 05)	Sworn Juries (Jan. – June 05)	Verdicts (Jan. – June 05)	Cases Assigned to Jury Trial (Jan. – June 05)
Unlawful Detainer	6,211	3	2	43

Case Type	Filings (July 04 – June 05)	Sworn Juries (July 04 – June 05)	Verdicts	Cases Assigned to Jury Trial
Civil (limited and unlimited)	24,901	138	Unknown	Unknown

You have also asked for assistance locating similar statewide statistics. The Administrative Office of the Courts, staff agency to the Judicial Council of California, would be the best source of statewide trial court statistical information. Their web site address is: www.courtinfo.ca.gov. In terms of contacting someone within the AOC who might be of help, I would suggest Dag MacLeod, Manager of the Office of Court Research. He can be reached by telephone at: 415.865.7660.

Should you have further questions, do not hesitate to call me at 510.272.5093.

Sincerely,

JR Brighton

James R. Brighton
Bureau Chief for Planning, Research, Public Information and Court Services

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October 12, 2007

Board of Governors
State Bar of California
Att: Kate O'Connor
Office of Legal Services, Access & Fairness Programs
180 Howard Street, 10th Flr.
San Francisco, CA 94105

Re: Proposed Report Regarding Non-profit Entity Legal Practice (*Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23.

Dear Ms. O'Connor and the Board Of Governors:

This letter is sent on behalf of the following non-profit organizations, all of whom would be subject to the proposed regulation and legislation in the Proposed Report: American Civil Liberties Union of Northern California, Southern California, and San Diego/Imperial Counties; Pacific Legal Foundation; AARP Foundation; Tenderloin Housing Clinic; Disability Rights Advocates; Electronic Frontier Foundation; Housing Rights Center; Equal Rights Advocates; TURN; Natural Resources Defense Council; and the Center on Race, Poverty and the Environment.

None of these organizations are participants in the California State Bar's Legal Services Trust Fund Program. The Impact Fund represented many of these organizations in briefing and oral argument before the California Supreme Court in the *Frye* case, and at the San Francisco hearing held by the State Bar following the *Frye* decision. While we join in the comments made by the Legal Aid Association of California, we write separately to emphasize the significant First Amendment interests of non-profit organizations whose primary purpose is not to provide indigent legal services.

While we commend the State Bar staff for its effort and intentions, we fundamentally disagree with the approach, assumptions, and recommendations in the Proposed Report. On the most basic level, the Proposed Report expressly fails to meet the mandate of the California Supreme Court. Moreover, it fails to document any need for additional regulation. Further, the recommendations in the Proposed Report are unwieldy, potentially expensive, may have unforeseen consequences, and interfere with the associational and expressive rights of non-profit entities. Our opposition to the Proposed Report is another illustration of "a significant and unusual instance of unanimity across the political spectrum, THC, joined by organizations as diverse as the Pacific Legal Foundation and the American

Civil Liberties Union." *Frye v. Tenderloin Housing Clinic*, (2006) 38 Cal. 4th 23, 28.

I. THE PROPOSED REPORT DOES NOT DOCUMENT ANY ACTUAL DANGER OF INJURY AND THUS FAILS TO MEET THE *FRYE* MANDATE

We start, as we must, with the *Frye* decision itself. In rejecting the court of appeal's broad rendering of Corporations Code § 13406(b), the California Supreme Court relied on settled First Amendment principles. Under the First Amendment, non-profit organizations are broadly protected by the First Amendment's rights of association and expression. These rights may not be curtailed unless there is a showing of a compelling interest. *NAACP v. Button*, (1963) 371 U.S. 415, 438-39. Such a showing is not made by speculative or "theoretical" possibilities. *See United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, (1967) 389 U.S. 217, 222-23.

Accordingly, the California Supreme Court gave a narrow and specific mandate to the State Bar, consistent with First Amendment imperatives: The Court would consider "the implementation of carefully drawn regulations...if such regulations meet *a demonstrated danger of injury* to clients without impairing First Amendment expressive and associational rights." *Frye*, 38 Cal. 4th at 50 (emphasis added). The Court emphasized that "[i]t is incumbent upon the State Bar to study whether groups such as THC *actually* imperil client interests despite the absence of a profit motive, and to consider how such a danger, if it exists, may be mitigated by regulations consistent with First Amendment principles." *Id.* at 51. The Court further specifically required the State Bar to consider whether existing ethical rules applicable to individual attorneys already afford adequate safeguards. *Id.*

The mandate of the Court cannot be disregarded. Because of its First Amendment underpinnings, as well as the fact that the Court must approve any rule changes by the State Bar, proposals for change can only be justified if there is a "demonstrated danger of injury" which is shown by evidence that client interests are "actually" imperiled. Even then, regulation will only be permitted if it is "consistent with First Amendment principles."

The Proposed Report, however, by its own terms, does not purport to justify its proposed sweeping set of regulatory and legislative changes under the *Frye* mandate. Rather, it suggests that a lesser standard is applicable. It concedes that "there is not a compelling need to significantly enhance the existing regulation of non-profit corporations." Proposed Report at 4. This concession, which we agree with, should have ended the matter. Instead, the Proposed Report attempts to answer a question not asked by the Supreme Court: "the issue raised is not whether substantially enhanced regulation in this area is necessary, but whether the exemption non-profits enjoy from the

public protection standards established for other practice contexts is warranted." *Id.* The Proposed Report goes on to state "[a]lthough substantially enhanced State Bar regulation is not warranted, the State Bar finds value in seeking to bring harmony to the various statutes and rules that are in conflict in this area and in developing a 'safe harbor' registration/certification program for non-profit law practices." *Id.* at 5.

The Proposed Report not only fails to document a need for regulations, but rests on erroneous assumptions concerning non-profits: that non-profits have the same motivations as private firms, that there is a lack of regulation of non-profits, and that there is a lack of harmony or clarity in the law. We rebut these assumptions below to explain why the Proposed Report's recommendations are unnecessary.

A. <u>There is No Documented Showing of Harm</u>

The Proposed Report candidly concedes that there is no compelling need for additional regulation. Indeed, a careful reading of the Proposed Report indicates there is virtually *no evidence* of a problem, and the sum total of the hearings and survey responses demonstrate no serious issues. Our reading of the hearing transcripts and the summary of survey reports provided by the Bar indicates that the only extended call for regulation came from the very interested plaintiffs in the *Frye* case. Their testimony, as well as a handful of survey responses were largely, and correctly, deemed to be based on "perceptions" that are "incorrect," Proposed Report at 18, "derive from a misunderstanding of the governing authorities," *id.* at 17, "based upon assumptions more than facts," *id.* at 21, and "suspicion," *id.* at 27. The Proposed Report noted the "majority of general commenters found existing standards for non-profits...to be adequate." *Id.* at 14.

Nor is there any empirical evidence of a problem. The State Bar's Office of Chief Trial Counsel reported that "complaints from consumers against non-profit law practices were minimal compared to the general law practice population." *Id.* at 15. The complaints that had been made related "primarily to the conduct of individual attorneys rather than of the non-profit entities." *Id.*

The Proposed Report concludes from this record that "non-profits imperil client interests to no greater extent than do for-profit practices." *Id.* at 16. This conclusion seems at odds with the record, which establishes that non-profits are *less* likely to imperil clients than for-profit firms. Nevertheless, accepting this conclusion at face value does not lead, as the Proposed Report assumes, to the conclusion that "non-profits practice law much the same way as does the general law practice population." *Id.*

Non-profit firms operate under very different realities than private firms. Private firms, of course, operate for profit. Non-profit firms do not. While private firms must register with the State Bar, non-profit firms are subject to extensive oversight. *See infra* Section I.B. While the Proposed Report assumes that non-profit firms and private firms seek the corporate form for the same reason—to limit liability, *id.* at 32, 33—it ignores the paramount reason non-profits incorporate—to obtain tax exempt status so that they may solicit contributions.

Instead of hard data, the Proposed Report engages in speculation about the possible conduct of non-profits. While it concedes that concerns about whether non-profits "push to the margins of ethical behavior" are "based upon assumptions more than facts," *id.* at 21, it accepts these assumptions without any factual basis: "The issue, then, is not whether financial and ideological pressures exist in the non-profit environment. They do exist and they push toward the margins of professional conduct." *Id.* at 23. Nowhere does the Proposed Report document this claim, or even explain what it means. This is precisely the type of speculation that the *Frye* decision rejects. It required a showing of whether non-profits "*actually* imperil client interests." *Frye*, 38 Cal. 4th at 51.

B. The Existing Regulatory Framework Is Sufficient

Although the Proposed Report assumes that non-profits operate in a similar manner as for-profit firms, and finds that there "is no compelling evidence that non-profits imperil client interests to any greater extent than encountered in the general practice of law," Proposed Report at 39, it fails to draw the proper inference from these assumptions. If, in fact, the current regulatory regime for non-profits works as well as the State Bar's regulation of for-profit firms, there is no need for further regulation. Indeed, the Proposed Report should have concluded that non-profit legal organizations are subject to a variety of regulatory limitations that private firms are not, and that the current regulatory scheme is more than sufficient to protect the public.

The California Supreme Court summarized the broad range of regulation and oversight non-profits are subject to, and admonished the State Bar to "consider whether existing ethical rules applicable to individual attorneys already afford adequate safeguards to clients." *Frye*, 38 Cal. 4th at 51. The Court also noted the extensive regulation of non-profits by the Attorney General and the Internal Revenue Service. *Id.* at 53.

While the Proposed Report acknowledges the Supreme Court's summary of existing regulation and oversight of non-profits, Proposed Report at 34-35, it fails to explain why and how the current regulatory scheme is insufficient. In fact, the current regulatory regime fully protects the public.

Lawyers working at any non-profit must adhere to the Rules of Professional Conduct as well as statutory provisions applicable to all lawyers. *See, e.g.*, BUS. & PROF. CODE § 6068(e) (client confidentiality). Of special note is Rule 1-600(A), which appears to have been drafted with non-profits in mind. It specifies that a lawyer may not participate in a program "which allows any third person or organization to interfere with the member's independence of professional judgment or with the client-lawyer relationship." This rule is consistent with that approved by the New Jersey Supreme Court. *See Frye*, 38 Cal. 4th at 51 n.11. Lawyers at non-profits are also subject to Rule 3-110, which requires lawyers to adequately supervise the work of subordinate attorneys and non-attorney employee or agents. *See also* Rules 3-100 (client confidences), 3-300, 3-310 (adverse interests). There is no evidence that there has been any substantial or widespread violation of these Rules.

The Proposed Report's undocumented assumption that "ideological pressures exist in the non-profit environment" and these pressures "push toward the margins defined by professional standards," Proposed Report at 40, bears some additional comment. It is neither a violation of ethical rules nor otherwise inappropriate for non-profit advocacy organizations and their Boards to set policies limiting the kinds of cases they will accept, or otherwise limiting the conditions of a retainer. An organization may well determine that its goal is law reform, and thus decline representation of clients who seek damages or who have ancillary claims or would be unwilling to withstand the rigors of test litigation. These decisions do not imperil client interests, and such conduct is at the core of First Amendment protections. *NAACP*, 371 U.S. at 419-21, 428-29.

In addition to these ethical rules, non-profits are subject to substantial oversight that private firms are not. The Proposed Report acknowledges this: "non-profit corporations currently receive more oversight than for-profit corporations in order to obtain and maintain their non-profit and favorable tax status." *Id.* at 34. Fundamental to this oversight is their non-profit, tax exempt status. This status, which must be approved by federal and state authorities, distinguishes non-profits from the private sector.

Unlike a private firm or lawyer, a non-profit is not a for-profit entity. It must have a recognized charitable mission. CORP. CODE § 5111. Private gain by its staff and board is prohibited. *Id.* § 5130(b). It is highly regulated to insure there is no self dealing in transfer of assets, leases, sales, and other transactions. *Id.* §§ 5227, 5233, 6010, 7913. Its non-profit charitable status must be approved by the Internal Revenue Service, which monitors adherence to the stated charitable purpose, compensation of staff, and the circumstances under which it may accept fees from clients or through judicial awards. *See* 46 U.S.C. § 501(c)(3); Rev. Proc. 92-59.

Unlike a private firm, a non-profit, in addition to filing reports with the IRS, must file annual, public reports with the Attorney General, and register with the Secretary of State. CORP. CODE § 6210; GOV'T CODE §§ 12585-12587. The annual filings with the Attorney General include detailed financial information about salaries, expenses, and sources of income. These reports are open to the public. The Legislature recently made some of these requirements substantially more rigorous for non-profits, including heightened requirements for registration, audits, compensation reviews, and fundraising. *See* 2004 Cal. Legis. Serv. Ch. 919 (S.B. 1262) (West).[1]

The Attorney General has the authority to examine the conduct of non-profits and to bring actions to challenge a non-profit's failure to comply with its charitable mission. *See generally* CORP. CODE §§ 5250, 6216, 5141, 5142; *Frye*, 38 Cal. 4th at 53. *See also* Proposed Report at 34-35.

This extensive oversight indicates that the realities of non-profit practice differ markedly from private practice. It undercuts the Proposed Report's assumption that the "everyday practice of law in the non-profit setting is substantially similar to the practice of law in general." Proposed Report at 39. Because of their charitable purpose, non-profit status, and the extensive regulation non-profits are subject to, there is simply no basis for "harmonizing" the rules applicable to non-profits with those applicable to private firms. Any attempt to "harmonize" the rules will in fact lead to greater disharmony – the non-profit regulatory burden will increase while private firms remain exempt from the many regulatory obligations that flow from non-profit status.

C. <u>There is No Lack Of Clarity in the Law</u>

The Proposed Report presumes there is a lack of clarity in the standards applicable to non-profit law practice. In fact, with the notable exception of the period between the issuance of the court of appeal's *Frye* decision and the Supreme Court's subsequent reversal of that decision, there is no evidence of confusion or lack of clarity in the law. Before the court of appeal's decision there was a well-established framework applicable to non-profit firms that had been confirmed in both case law and opinions of the California Attorney General. *See Frye*, 38 Cal. 4th at 38-44. The clarity of the pre-court of appeals decision era is confirmed by the lack of any action by the State Bar.

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[1] Moreover, non-profits, who rely on charitable contributions, must continuously make their case for public support. Thus financial reports and descriptions of activities are normally provided in annual reports and solicitations for support. Likewise, detailed financial information and descriptions of activities must be provided to governmental and foundation funders, often accompanied with a formal audit report.

But if there had been any lack of clarity, it was surely eliminated by the *Frye* decision itself, which confirmed the First Amendment rights of non-profits, and decisively rejected the court of appeals decision. It is particularly ironic that the State Bar only seeks to regulate non-profits after *Frye* eliminated any possible lack of clarity as to their status. The Proposed Report seems uncomfortable with judicial exceptions, no matter how clear. Case law, for example, has made it clear that non-profit organizations may seek and recover attorneys fees. *Frye*, 38 Cal. 4th at 49 n.10; Proposed Report at 28. While we believe it is unnecessary, we have no objection to incorporating these exceptions into the Rules of Professional Responsibility provisions to confirm that non-profit firms may seek and obtain fees. *See* Proposed Report at 30. As we note below in Section II, the Proposed Report proposes an unwarranted limitation on the use of such fees by a non-profit.

II. THE PROPOSED REPORT'S RECOMMENDATIONS WILL BURDEN NON-PROFITS AND MAY HAVE UNINTENDED CONSEQUENCES

As non-profits working in a difficult financial environment, we are very conscious of the cost—in money and staff time—of complying with government mandates. The creation of a new, and duplicative[2], certification process will impose costs and burdens on non-profits. While the Proposed Report euphemistically refers to the registration/certification process as merely the creation of a "safe harbor," Proposed Report at 41, in fact failure to fully comply with the proposed new program would have potentially disastrous consequences that no non-profit board could countenance: the loss of the corporate shield which would expose employees and board members to personal liability for the acts of the non-profit.

The Recommendations create an entirely new and untested "head of legal practice" registration process. Since existing ethical rules already apply to all lawyers at a non-profit, it is unclear what additional obligations and consequences would flow from this new designation. Moreover, the structure and job duties at non-profits vary widely. The proposed rule, by imposing a one-size-fits-all concept, could interfere with the management structure selected by many non-profits. This is not a hypothetical concern, since the Proposed Report assumes its registration program "elevates the profile of the attorney in the non-profit legal practice where non-attorneys and non-legal services may dominate." *Id.* at 36. Just as requiring non-profits boards to have all attorney membership is an unwarranted interference in non-profit corporate governance, *Frye*, 38 Cal. 4th at 42, interfering with the role and status of attorneys in a non-profit could undermine the associational and expressive choices of the entity.

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[2] The Proposed Report concedes that its registration program is "duplicative of the existing Charitable Trust Registry maintained by the Attorney General's Office." *Id.* at 36.

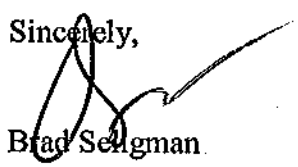
The Recommendations seek a variety of legislative changes, mostly to conform with case law, but in some instances to go further. As the State Bar knows from painful experience, there are no guarantees that the Legislature will simply do its bidding. The proposed amendments to Corporations Code § 13406(b), which after *Frye*, does not set forth mandatory requirements, could invite mischief, particularly by requesting legislation regarding contingent attorneys fees, a sometimes polarizing topic that has been the subject of earlier unsuccessful legislative and initiative efforts to limit the right to seek such fees.[3]

Finally, the Recommendations seek to impose a limitation on the use of any attorneys fees that are recovered—such fees may only be "dedicated to the reasonable operating expenses of the legal practice or to the programmatic public service activities of the legal practice." Proposed Report at 43. There is no justification for this novel limitation, which would impact many programs.[4] It would be a thoroughly unwarranted interference with non-profit governance. Legal practice at non-profits must serve the same charitable goals as the other activities of the entity. Those goals are often advanced through a variety of programs—legal, public education, grass roots organizing, lobbying, and publications. A non-profit rarely treats each activity as a separate "profit center" or dedicates any income attributable to one activity solely to that activity. The State Bar's attempt to restrict which programs within a non-profit may use fee awards gives it the "power of the purse," and essentially empowers it to decide which services a non-profit can provide. To mandate that legal fees only support the legal program is a content-based restriction that threatens First Amendment rights in much the same way a rule limiting board membership to attorneys or specifying only one type of representation would.

III. CONCLUSION

We urge the Board of Governors to reject the Proposed Report and instead report back to the California Supreme Court that it did not document actual abuse sufficient to justify further regulation of non-profits that engage in the practice of law.

Sincerely,



Brad Seligman

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[3] Other than the not mandatory language of Government Code § 13406(b), there is no statutory bar to the recovery of contingent fees applicable to non-profits.

[4] The State Bar's Data Compilation of its survey results indicates that programs that recover fees most commonly allocate the fees to their general funds. *See* Combined Appendices 2-2, 2-3, 2-4 to Proposed Report at p.12 (question 15).

"The Unified Voice of Legal Services"

October 15, 2007

The State Bar of California
Attn: Kate O'Connor
Office of Legal Services, Access & Fairness Programs
180 Howard Street, 10th Floor
San Francisco, CA 94105

Sent via mail and email to kate.oconnor@calbar.ca.gov

RE: Proposed Report of the State Bar of California to the Supreme Court of California Regarding Nonprofit Entity Legal Practice in Response to the Supreme Court's Referral to the State Bar in *Frye v. Tenderloin Housing Clinic, Inc. (2006)*

Dear Ms. O'Connor and the Board of Governors:

We are writing on behalf of the Board of Directors and organizational members of the Legal Aid Association of California (LAAC) to provide comments on the State Bar of California's study, proposed report, and recommendations regarding the practice of law in the nonprofit setting. LAAC is the statewide membership organization for nonprofit corporations that provide legal assistance to low-income, disadvantaged, and underserved Californians. LAAC's 2007 membership consists of 74 IOLTA-funded legal services programs, as well as over 90 individual legal services staff and supporters.

Our member organizations provide high-quality legal services to our state's most vulnerable populations. These services to low-income and other underrepresented individuals form an essential safety net in California and often ensure that programs' clients have access to life's basic necessities. All of LAAC's member organizations would be subject to the proposed registration and certification requirements, and while we concur with the comments made by The Impact Fund and the collection of law school clinical programs, we write separately here to raise issues that are specific to the nonprofit public benefit corporations that receive IOLTA funding.

LAAC filed an amicus brief in *Frye v. Tenderloin Housing Clinic*, Inc. (2006) 38 Cal 4th 23, and submitted comments to the State Bar during its investigation of this matter in response to Supreme Court's decision. We thank the State Bar for this opportunity to comment on whether the State Bar should implement the proposed certification requirements for nonprofit corporations offering legal assistance.

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LAAC and its member organizations appreciate the State Bar's desire to ensure that protection of clients is a strong priority. However, LAAC opposes the implementation of the recommendations of the above-referenced proposed report (hereinafter Draft Report) because the proposed certification and registration requirements are not needed to ensure public protection, for the reasons detailed below. In addition, LAAC agrees with the conclusion of the Draft Report that "there is not a compelling need to significantly enhance the existing regulation of nonprofit corporations." (Draft Report at 4.) Although it is clear that the State Bar hoped that the proposed certification and registration requirements would neither duplicate the existing oversight of nonprofits and attorney employees nor burden nonprofit organizations, for the reasons detailed below the proposed system will actually have unintended harmful consequences for the nonprofit corporations that provide vital legal assistance to our state's most vulnerable residents.

I. The State Bar's investigation reveals no harm to clients from the practice of law in the nonprofit setting.

The California Supreme Court, in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal 4th 23, referred to the State Bar, based on its expertise and role in the regulation of the legal profession, the matter of determining whether the practice of law by nonprofit corporations results in a "demonstrated danger of injury to clients" or that such nonprofits "*actually* imperil client interests." (*Frye, supra*, 38 Cal 4th 51 (emphasis in the original).) The Court stated that if the State Bar's investigation were to reveal demonstrated, actual harm to clients, then the State Bar should consider whether existing regulations and ethical rules provide sufficient client safeguards. If the State Bar were to demonstrate that existing provisions were inadequate to address documented harm to clients, then the Supreme Court would consider proposed "carefully drawn regulations" that preserve First Amendment expressive and associational rights. (*Frye, supra*, 38 Cal 4th 51.)

We thank the State Bar for its thorough investigation of this matter, consisting of at least three surveys, the collection of written public comments, two public hearings, and internal State Bar investigations, including but not limited to the complaints filed with the Office of the Chief Trial Counsel. LAAC and its member programs commend the State Bar on its diligence. Given the comprehensive existing regulatory structure governing nonprofits providing legal services and their attorney employees, which entails additional requirements for LAAC member programs based on their receipt of IOLTA and federal funds, it is not surprising that data collected by the State Bar and the Draft Report reveal no compelling evidence of actual, demonstrated harm to clients by nonprofit legal assistance corporations.

The State Bar's Office of the Chief Trial Counsel reports that complaints from clients of nonprofit law practices were "minimal" compared to the rest of the law practice population and such complaints involved the conduct of the individual attorneys as opposed to the nonprofit entity. The majority of respondents in the surveys of legal

services providers and the general public reported no client complaints against nonprofits and of those that did report complaints, the majority related to a nonprofit organization's inability to accept a case, as opposed to complaints about interference by the nonprofit entity with the attorney-client relationship (the issue involved in *Frye*), or alleged ethical violations by the attorneys. Indeed, the only public testimony suggesting the existence of even theoretical harm to clients was presented by Mr. Utrecht, who represented Mr. Frye before the Supreme Court in the underlying matter.

II. Nonprofit organizations do not require additional regulation because they are inherently dissimilar from for-profit corporations and are already sufficiently regulated, as are their attorney employees, as to ensure public protection.

Despite the Draft Report's findings regarding the lack of demonstrated harm to clients, the Report nonetheless recommends a certification and registration system affecting the nonprofit entities.[1] It appears that this recommendation stems from the assumption that nonprofit organizations providing legal services are inherently similar to for-profit corporations that do the same; thus, the proposed requirements seem to strive to ensure some similarity between the regulatory structures in place for both for-profit and nonprofit corporations.

However, this assumption and goal overlooks the fact that these two types of corporations are fundamentally *dissimilar*. Numerous decisions in California and on the federal level make clear that the core legal basis for regulating the practice of law in the *for-profit* corporate setting is to address conflicts of interest that flow directly and inevitably from the corporate entity's profit motive. The long-standing judicially-created exception allowing for the practice of law by legal services and advocacy nonprofits

[1] In so doing, the State Bar arguably goes well beyond the matter referred to it by the Supreme Court. LAAC concurs in the comments of The Impact Fund and the law school clinic programs on this point, and also notes that although the State Bar arguably could propose these regulatory changes to the Supreme Court on its own accord, any proposed requirements, regardless of whether they stem from a referral from the Supreme Court or the State Bar's own initiative, must withstand a careful First Amendment analysis, given the expressive and associational rights applicable to nonprofit law practices. The Supreme Court made clear that *any* proposed regulation of nonprofits practicing law must be "carefully drawn" and may not impair nonprofits' First Amendment expressive and associational rights. (*Frye* at 50.) This standard must be the analysis whether the State Bar issues these recommendations separate from or in response to a mandate from the Supreme Court.

stems from the understanding that the major distinction between for-profit and nonprofit organizations -- absence of the profit motive -- already obviates concerns about public protection.

In addition to this primary difference from for-profit corporations, nonprofit organizations also incorporate for different reasons, their budgeting and accounting structures are dissimilar, and they operate under regulatory oversight that far exceeds the requirements that govern for-profit corporations. Therefore, implementing additional requirements for nonprofit organizations does not achieve a similarity in regulatory structure but instead simply adds an additional -- and unnecessary -- overlay on the existing requirements for nonprofits. Furthermore, because the Draft Report's recommendations are based on the assumption that nonprofits operate similarly to for-profit corporations in many ways, the recommended system will have unintended but significantly harmful results for the delivery of legal services to low-income and other vulnerable Californians.

The Draft Report repeatedly asserts that one reason nonprofits should be regulated similarly to for-profit corporations is that both types of organizations incorporate for the same reason. However, nonprofit public benefit organizations[2] incorporate primarily to further their stated and pre-determined "public or charitable purpose," as required by Corp. Code § 5111, and to be eligible for federal tax-exempt status, which in turn leads to exemption from many state and local taxes, allows the organization to solicit charitable donations from the public, and is a requirement for most other sources of funding for such organizations, including IOLTA, the Equal Access Fund, private foundations, and other state and federal government grants.

Nonprofits also incorporate because the existence of a legal entity places the mission and structure of the nonprofit above the personal interests of individuals associated with it at any specific point in time. Programs incorporate as nonprofits to be able to enter into business dealings, form contracts, own property, ensure transferable ownership, and purchase key employee benefits such as group life insurance, health insurance, and pension plans. Finally, nonprofits incorporate to access a range of benefits, including lower postal rates on certain types of mailings, discounts on advertising rates in some markets, and the ability to air free radio and television public service announcements (PSAs).

A. <u>The existing regulatory oversight of nonprofits is sufficient to address the concerns articulated in the report.</u>

Although the Draft Report states the nonprofit practice of law is largely similar to practice in the for-profit setting, nonprofit legal services organizations actually operate within a complex system of regulatory oversight that far exceeds the regulations applicable to for-profit corporations. This regulatory overlay is sufficient to address the

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[2] The terms "nonprofits," "nonprofit organizations," and "nonprofit corporations" will hereinafter refer to nonprofit public benefit corporations.

concerns raised in the Draft Report. Nonprofit corporations are required to register with the Secretary of State and to register annually with the California Attorney General's Registry of Charitable Trust. (Bus. & Prof. Code § 6210; Gov. Code § 12585-12587.) Registration must include a copy of the nonprofit's federal tax form (IRS form 990), which is then publicly available through a searchable database on the Attorney General's website. The Attorney General may investigate a nonprofit corporation at any time to determine whether it has departed from the purposes for which it is formed and may institute proceedings to correct noncompliance or departure from the charitable purpose. (Corp. Code § 5250.)

Federal and California tax regulations impose significant restrictions on nonprofit corporations' purposes, compensation of key individuals, and use of funds.[3] Specifically, Internal Revenue Code (IRC) Section 501(c)(3) requires that nonprofit corporations approved for tax-exempt status must be organized and operated exclusively for charitable purposes, may not provide a substantial benefit to any private person or interest, and their assets must be irrevocably dedicated to charitable purposes, and their net earnings may not inure to any private shareholder or individual. (46 U.S.C. § 501(c)(3), California Revenue & Taxation Code § 23701d.) To maintain its IRC Section 501(c)(3) tax-exempt status, a legal services organization must be operated primarily for charitable or educational purposes, which may include relief of the poor and distressed through the provision of free legal services. (Treas. Reg. §§ 1.501(c)(3)-1(d)(3), Rev. Rule 69-161, 1969-1 Cum. Bull. 149.) Tax-exempt legal services nonprofits must also file Forms 990 or 990-EZ with the IRS on an annual basis, with information about compensation of officers, directors, key employees, the basis for the organizations' public charity classification, lobbying expenditures, and other certain activities.

Moreover, testimony at the public hearings on these issues established that in addition to oversight by the IRS and the California Attorney General, legal services nonprofits work within additional regulatory structures linked to the receipt of federal or other funds. Programs must sign grant assurances with sources of federal funding such as the Legal Services Corporation and Department of Justice Violence Against Women Act grants. These grant assurances also place significant requirements on the nonprofits' structure, procedures, case management practices, and handling of fees and other funds.

B. **IOLTA-funded organizations are additionally regulated specifically on the issues raised in the report.**

Legal services organizations receiving IOLTA funding must ensure the "preservation of the attorney-client privilege in any case," and that "no one shall interfere with any attorney funded in whole or in part by this article in carrying out his or her professional responsibility to his or her client" as established by the Rules of Professional Responsibility or the Business and Professions Code. (Bus. & Prof. Code § 6217.) IOLTA-funded legal services programs operate under significant oversight by the State

[3] The requirements of federal tax law are imposed on nonprofits by California tax law, including the annual tax filing of Franchise Tax Board Form 199. (Revenue and Taxation Code § 23701d).

Bar, including the annual submission of a budget which includes an allocation of funds used for qualifying legal services, quality control procedures and standards, and, for legal services projects, a financial statement which includes an allocation of total project expenditures. (*Eligibility Guidelines: Legal Services Projects* and *Eligibility Guidelines: Support Centers*, LEGAL SERVICES TRUST FUND PROGRAM (State Bar of Cal., S.F. Cal.), Dec. 2005.) This additional regulatory overlay ensures that for IOLTA-funded nonprofits, the concerns raised by the State Bar are already appropriately addressed; therefore IOLTA-funded programs should have been completely exempted from the proposed new requirements.

Furthermore, LAAC member organizations report to LAAC staff that the IOLTA application, reporting, and compliance requirements cost their organizations substantial amounts of staff time and resources, in some cases totaling thousands of dollars per funding cycle. LAAC recognizes that such existing reporting-related expenditures are an appropriate part of effective service delivery, as they promote responsible and thoughtful program administration. However, any additional regulation would divert further resources into reporting without enhancing quality control, thus detracting from the ability to provide essential service to needy Californians without any corresponding benefit. Thus, given that IOLTA-funded programs already operate within additional regulatory oversight that is both more than sufficient to ensure public protection and in excess of the regulatory structure in place for for-profit corporations or even other nonprofit organizations, the cost to IOLTA-funded programs of complying with the Draft Report's superfluous requirements cannot be justified.

C. **Existing regulations of attorneys at nonprofit organizations are sufficient to address public protection concerns.**

The Draft Report agrees that imposing additional requirements on nonprofit entities would be duplicative of the regulatory oversight described above. (Draft Report at 36.) While the Report states that it seeks to avoid creating a duplicative system by directing the proposed certification and registration requirements at the attorneys practicing within the entity, those attorneys are also already sufficiently regulated by the State Bar as detailed below.

The State Bar possesses disciplinary authority over attorneys employed by nonprofit legal services organizations. Each attorney employee provides legal assistance under the standard ethical and professional duties to maintain client confidences (Bus. & Prof. Code, § 6068(e); Rules of Prof. Conduct, rule 3-100), avoid adverse interests to those of their clients (Rules of Prof. Conduct, rules 3-300, 3-310), and maintain any client funds in a separate Trust Account (Rules of Prof. Conduct, rule 4-100), among others. Clients of attorneys at legal services organizations have the ability to file complaints for alleged failure to comply with these duties with the State Bar of California, and to pursue fee disputes by requesting mandatory fee arbitration through the State Bar or local bar association's programs. (Bus. & Prof. Code, § 6200 *et. seq.*).

Attorneys at legal services organizations must also comply with Rule 1-600(A) of the Rules of Professional Conduct, which provides that attorneys shall not participate in an organization providing legal services "which allows any third person or organization to interfere with the member's independency of professional judgment, or with the client-lawyer relationship" or allows other violations of the Rules of Professional Conduct. The Draft Report states that this approach, of requiring the individual attorney to ensure compliance with professional standards, was reported as successful by survey respondents.

Even despite the lack documented, actual harm to clients, the Draft Report states that the proposed certification system is needed to respond to incorrect public presumptions about potential harm to clients. Although LAAC shares the State Bar's concerns on public protection, a regulatory system cannot be implemented to respond to a series of incorrect "perceptions," expressed by only one participant in the investigation, particularly when the Draft Report correctly concludes that each of these concerns is based on a misunderstanding of the law.[4] Instead, such misperceptions would be more effectively and efficiently addressed through education of the public and State Bar members about the actual status of the legal requirements, rather than imposing the new, superfluous proposed certification and registration requirements.

The Draft Report also states that the proposed requirements are needed to protect clients by safeguarding attorney independence from non-attorney board interference, issues relating to attorneys fees, and ideological and financial pressure. However, the State Bar's comprehensive investigation provided no evidence of actual harm to clients related to lack of attorney independence in the nonprofit setting, or that there is in fact interference from non-attorney board members. Despite this lack of evidence, the Draft Report finds that existing regulation of attorneys cannot be projected to withstand pressures nonprofit organizations will face in some future time frame. However, this conclusion is based on the incorrect assumption that lawyers at nonprofits, like their colleagues at for-profit law firms, decide to work in nonprofit corporate settings to limit liability (see discussion above) and the incorrect perception that attorneys can use the nonprofit structure to avoid their professional liability.[5] (Draft Report at 33.)

In summary, the proposed certification and registration requirements are not necessary to safeguard clients against potential harms caused by theoretical pressures on the attorney-client relationship because the report contains no evidence of harm to clients

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[4] The Draft Report disproves this series of misunderstandings and concludes that, in complete contrast to the concerns expressed by the one commenter, clients with complaints have meaningful recourse for noncompliance with professional standards by an attorney practicing in the nonprofit setting, nonprofits providing legal services are required to maintain attorney trust accounts, and fee arbitration procedures do apply to nonprofit entities. Significantly, each of these "perceptions" cited by the report was raised only by Mr. Utrecht during his public testimony. As stated above, Mr. Utrecht represented Mr. Frye before the Supreme Court and therefore cannot be relied upon as an unbiased commenter in this matter.

[5] Again, the only participant in the State Bar's investigation to raise this erroneous perception that attorneys could use the nonprofit structure to avoid their professional responsibilities was Mr. Utrecht (*see* footnote 4 above).

caused by any interference in attorney independence, any public misconceptions are better addressed through an education campaign, and the existing regulation of nonprofit attorney employees is sufficient to ensure public protection of clients.

III. The proposed requirements will impose unintended but significant burdens on individual nonprofits and the statewide legal services delivery system.

In addition to being unnecessary to ensure public protection, the proposed certification and registration requirements will impose significant risks and burdens on an already under-resourced sector of the legal community. These negative consequences stem largely from the State Bar's attempt to treat the nonprofit legal providers as similar to for-profit corporations. This mismatch results in requirements with which some nonprofits simply cannot comply, that raise First Amendment concerns, and that simply do not comport with how nonprofits raise financial support, budget monies, and fund the activities that implement their required charitable purpose.

A. The recommendations requiring statutory amendments entail risks inherent to the legislative process (Recommendations 1, 2, 3 and 4).

Implementing the Bar's recommendations will require amendments to a number of statutes, including Corporations Code § 13406(b). These changes are fundamentally unnecessary to allow the practice of law by legal services and advocacy nonprofits, as the existing judicially-created exemption for such groups was confirmed by the Supreme Court's *Frye* decision. In the face of this certainty in the law, introducing legislation carries untenable risks, as the State Bar could not guarantee what would happen during the legislative process. There is an unknown level of risk that such legislation could be amended significantly, placing additional and unnecessary requirements or additional restrictions on the work of legal services nonprofits.

As *Frye* itself demonstrates, unintended consequences are likely, if not inevitable, in this area. One of the legislative amendments at issue in the case was intended, by all accounts, to assist a single small nonprofit entity to charge its clients fees so that it could continue providing services to low income people. (38 Cal.4th at 44.) Yet, the Court of Appeal in *Frye* used the language of that same amendment to conclude that almost all legal services programs in the State were violating the law and would have to change their practices. (*Id.* at 36.) Only the intercession of the Supreme Court prevented that from happening. The State Bar cannot guarantee that any future legislative changes sought would be so clear that they would not be misinterpreted. Given the uncertainties inherent in the legislative process, compounded by the fact that such amendments are unnecessary given the Supreme Court decision in *Frye*, seeking legislative changes poses an unacceptable risk for legal services programs.

B. **Recommendation 3:** Amendments to Corporations code § 13406(b) to require that nonprofit corporations operate under the statutes, rules and regulations that apply to members of the State Bar.

This proposed statutory change, in additional to posing the risks in the legislative system noted above, would be duplicative for IOLTA-funded legal services programs. Nonprofits receiving IOLTA grants already operate under the requirements of Business and Professions Code § 6217, the counterpart to Business and Professions Code § 6167 for-profit corporations, which requires IOLTA-funded programs to ensure "preservation of the attorney-client privilege in any case," and that "no one shall interfere with any attorney funded in whole or in part by this article in carrying out his or her professional responsibility to his or her client" as established by the Rules of Professional Responsibility or the Business and Professions Code. Given the potential risk of seeking legislation changes and the fact that such a requirement is duplicative of existing requirements for IOLTA-funded organizations, LAAC opposes this recommendation.

C. **Recommendations 5 and 6:** Adopting Rules of Court or amending existing Rules of Professional Conduct to require that nonprofits "head of legal practice" register with the State Bar and certify that the nonprofit complies with a series of requirements.

The Draft Report states that the proposed system of requiring a "head of legal practice" to register with the State Bar and certify the items in Recommendation 5(D) is directed at the attorneys practicing within the nonprofit rather than the entity itself. As articulated previously, the State Bar's current regulation of attorneys is sufficient to address the theoretical public protection issues raised in the report. Thus, this recommendation is both duplicative of existing regulatory oversight of attorney employees and unnecessary to ensure public protection.

Furthermore, the report concedes that requiring the nonprofit entity to register would be duplicative of existing requirements, including the Charitable Trust Registry, and could provide intrusive and burdensome to the nonprofit entity. (Draft Report at 34, 35, 36, and 41). However, all of the certification requirements in Recommendation 5(D) would apply directly to the actions and decisions of nonprofit organization as an entity, rather than to the attorney employees. Thus, although the certification system on its face applies to an attorney employee designated as "head of legal practice," in reality it is the nonprofit organization that must structure its malpractice coverage, budget practices, and other policies and procedures in order to comply with the requirements of Recommendation 5(D), as well as allocating staff time and resources to ensuring compliance. Accordingly, the registration and certification process is actually directed at the nonprofit entity itself and therefore duplicates existing regulatory and registration requirements.

In addition, the proposed "head of legal practice" certification system could pose significant burdens for nonprofit organizations. This newly created concept lacks clarity around potential personal liability and other complications, has no precedential history to

aid in interpretation, and may cause organizational confusion and ambiguity. Attorney staff, who may indeed function as the lead attorney in the nonprofit's practice, may not be in the position to also certify how attorney fee revenue is allocated and what malpractice coverage levels are purchased by the nonprofit. Such decisions regarding the purchase of malpractice coverage and how to budget, account for, and allocate funds are often within the purview of the organization's Executive Director and the Board of Directors, not the senior attorneys responsible for supervising the legal practice. Therefore, nonprofits may not have an attorney employee who can be registered as the "head of legal practice" and also certify to the requirements in Recommendation 5(D). Given the substantial penalty for noncompliance, there are likely to be serious unintended adverse consequences for nonprofits attempting to comply with this untested concept.

D. **Recommendation 5(D)(3):** Requiring that nonprofits spend attorney fees only on certain program activities.

This recommendation appears to be based on the concerns raised in Section IV(B)(2)(d)(iii) of the Draft Report regarding fee generation and fee splitting in the nonprofit context. However, this recommendation purports a "fix" to a problem that does not actually exist, would require an attorney employee designated as "head of legal practice" to certify a practice that is not required by the law governing nonprofits generating of fees, and raises the First Amendment problems articulated in the comments submitted by The Impact Fund, in which LAAC concurs.

The Draft Report appears to base the need for this recommendation on one individual's public testimony that the *Frye* matter created confusion for nonprofits in terms of the collection of attorneys fees. However, while this individual commenter may be confused, after the Supreme Court's *Frye* decision, there is no confusion in the law. The Court of Appeals' decision in *Frye* may have created some confusion regarding the collection of contingency fees by nonprofits, based solely on the decision's holding that Corporations Code § 13406(b), including its restriction on contingency fees, applied to all nonprofits providing legal assistance. The Supreme Court's decision in *Frye* ended any such confusion by holding that nonprofits are not required to comply with § 13406(b) to provide legal assistance; therefore, the Court's decision ended all confusion and made clear that the language regarding contingency fees in § 13406(b) is *not* mandatory.

Therefore, the law regarding the generation of attorneys fees in the nonprofit setting is clear. There is no statutory prohibition on the collection of contingency fees by nonprofit corporations. The Supreme Court's decision in *Frye* and long-established case law documents the strong public policy grounds for encouraging the practice of law by, and the granting of statutory attorneys fees directly to, nonprofit legal services organizations. (*See., e.g., Cetenko v. United California Bank* (1982) 30 Cal.3d 528, 535-36; *Serrano v. Priest* (1977) 20 Cal3d. 25, 48.) In addition, the fee splitting concerns raised in the Draft Report are based on a mischaracterization of the handling of fees within the nonprofit practice setting and already adequately addressed by the multitude of requirements that regulate the fee-generating activities of nonprofits providing legal assistance.

This oversight includes, but it not limited to: requirements of several federal sources of funding, including the Legal Services Corporation (45 C.F.R. § 1607.3(c) & (d)); the State Bar's Legal Services Trust Fund statutory and regulatory requirements (Bus. & Prof. Code §§ 6210 *et seq*, Rules Regulating Interest-bearing Trust Fund Accounts for the Provision of Legal Services to Indigent Persons, Rule 3.2); nonprofit corporations' reporting requirements (Corp. Code §§ 5130, 5120, 6210); and finally, the Internal Revenue Code § 501(c)(3) requirements that nonprofits must be operated exclusively for charitable purposes, may not provide a substantial benefit to any private person or interest, all assets must be irrevocably dedicated to charitable purposes, and net earnings may not inure to any private individual.

Thus, any alleged confusion on the issue of fees is based on a misunderstanding of the law. Such confusion would be more efficiently addressed through education, rather than implementing the requirement in Recommendation 5(D)(3). Moreover, the requirement to allocate fees only to cover certain types of work or services fails to comport with how legal services nonprofits actually organize their accounting and budgeting processes. Nonprofits usually account for funds by project or program area, not by individual staff person. This requirement would force programs to significantly modify their accounting and financial procedures, at unknown cost. In addition, the requirement is vague; the terms "reasonable operating expenses" and "programmatic public service activities" are not in use in nonprofit accounting systems for other purposes. In addition, the requirement fails to articulate what time frames would be required in the expenditure of such funds and fails to take into account how this requirement may intersect with the requirements of other sources of funding, including private foundation grants.

Furthermore, as a matter of public policy, LAAC opposes a structure where fees generated by non-legal work can be used to support all types of projects serving an articulated client population, but funds generated by legal work cannot. Our society benefits greatly from the fact that many nonprofits provide a set of services, including legal assistance, to people in need. Therefore, nonprofits should be able to structure their finances as needed to fund the entire set of needed services, and not single out legal assistance for different treatment.

E. **Recommendation 5(D)(4):** Requiring that nonprofits carry malpractice insurance at the same levels required of for-profit law firms.

As discussed above, the Draft Report incorrectly assumes that the primary goal of incorporation for nonprofits is to protect those operating through the corporation from corporate liabilities. This misunderstanding forms, to a large degree, the basis for the report's requirements regarding malpractice insurance coverage.

The malpractice requirements in the proposed certification system will be prohibitive for both small and large nonprofits. Larger legal services nonprofits with many attorney employees may not be able to locate or afford malpractice coverage at this

level. LAAC member programs with higher numbers of attorney staff have reported to LAAC that the National Legal Aid and Defender Association (NLADA), a common insurance provider for legal services nonprofits, does not currently offer professional liability coverage that will provide them with the level of coverage required by the recommendations (which is based on the number of attorneys employed). Even if such coverage could be purchased, the cost would be prohibitive and would consume in the aggregate tens of thousands of dollars otherwise used to provide service to clients.

Similarly, small or emerging nonprofits may not be able to afford coverage at the required level. Such nonprofits often provide specialized services, meeting a particular legal need or serving a particular client population. The report notes but disregards the fact that requiring malpractice insurance at this level may well force some smaller nonprofits to close and cease providing services. (Draft Report at 20.) The report mischaracterizes the nature of nonprofit funding, by stating that in such instances it is likely that such nonprofits were "undercapitalized" to begin with; however, nonprofits do not obtain capital in the same way that for-profit corporations do. In a nonprofit law practice setting, it is not possible for "partners" to simply provide additional capital through investing their own funds or for the entity to increase its rates for services in order to build additional capital. Instead, nonprofits must seek, and can only increase funding through, private donations and foundation grants. As a result, smaller nonprofit budgets do not necessarily imply a lack of financial stability. In this way, nonprofits are fundamentally different from for-profit entities.

The significant lack of funding for the delivery of legal services to low-income and other disadvantaged Californians means that the statewide system fails to meet the existing client need. In this context, all legal services nonprofits – both large and small – play an essential role in the delivery of legal services. The elimination of one nonprofit disrupts the interwoven nature of the statewide legal services delivery system, taxes the limited resources of other nonprofits, and results in fewer legal services available for the most vulnerable residents of our state.

F. **Recommendation 7:** The loss of corporate protection from liability is a significant penalty for non-compliance.

Although Draft Report proffers the certification and registration requirements as a means to create a "safe harbor" for the nonprofit practice of law, the effective result is to create a mandatory program that imposes a substantial penalty for non-compliance. The Supreme Court *Frye* decision eliminated confusion about the practice of law by legal services nonprofits by affirming the existence of an existing judicially-created exemption for legal aid and advocacy groups, such as those represented in LAAC's organizational membership. This judicially-created exemption renders any additional "safe harbor" unnecessary. In addition, the existence of a certification system that is purports to provide an additional "safe harbor" will cause confusion about the state of the law for legal services and advocacy organizations, just as the existence of Corporations Code section 13406(b) did in *Frye* until the issue was resolved by the Supreme Court.

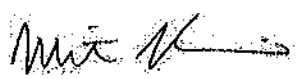
IV. Conclusion

Again, we thank the State Bar for its diligent investigation of the questions referred to it by the Supreme Court and the opportunity to make these comments. While LAAC shares the State Bar's prioritization of public protection, without documented evidence of harm to clients' interests, regulations cannot be sufficiently tailored to take into account both the variety of nonprofit organizations programs to be regulated and the accompanying constitutional concerns.

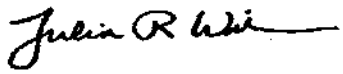
All IOLTA-funded organizations already operate within the judicially-created "safe harbor" for legal aid nonprofits and are governed by IOLTA-specific statutory and regulatory requirements that address the concerns raised in the Draft Report. Thus, IOLTA-funded organizations should have been fully exempted from the proposed new requirements. The likely costs to legal services organizations and low-income and other underserved Californians in need of legal services argue squarely against the proposed requirements.

In conclusion, we urge the Board of Governors to reject the Draft Report and to instead report to the California Supreme Court that the State Bar's investigation did not reveal any demonstrated harm to clients and so no further regulation of nonprofits that provide legal services is warranted.

Sincerely,



Mitchell Kamin
President



Julia R. Wilson
Director

2007 LAAC Organizational Members

Affordable Housing Advocates
AIDS Legal Referral Panel
Alameda County Bar Association Volunteer Legal Services Corporation
Alliance for Children's Rights
Asian Pacific American Legal Center
Bay Area Legal Aid
Bet Tzedek Legal Services
California Advocates for Nursing Home Reform
California Center for Law and the Deaf
California Indian Legal Services
California Rural Legal Assistance
California Rural Legal Assistance Foundation
California Women's Law Center
Center for Health Care Rights

Center for Human Rights and Constitutional Law
Central California Legal Services
Centro Legal De La Raza
Child Care Law Center
Coalition of California Welfare Rights Org., Inc.
Contra Costa Senior Legal Services
Disability Rights Education and Defense Fund, Inc.
Disability Rights Legal Center
East Bay Community Law Center
Elder Law & Advocacy
Greater Bakersfield Legal Assistance
Harriett Buhai Center for Family Law
Homeless Action Center - Alameda County
Immigrant Legal Resource Center
Impact Fund
Inland Counties Legal Services
Inner City Law Center
Katharine & George Alexander Community Law Center
Law Center for Families
Law Foundation of Silicon Valley
Lawyers' Committee for Civil Rights
Legal Aid Foundation of Los Angeles
Legal Aid Foundation of Santa Barbara
Legal Aid of Marin
Legal Aid of Sonoma County
Legal Aid Society of Orange County
Legal Aid Society of San Diego
Legal Aid Society of San Francisco - Employment Law Center
Legal Aid Society of San Mateo County
Legal Assistance for Seniors
Legal Assistance to the Elderly
Legal Services for Children
Legal Services for Prisoners with Children
Legal Services of Northern California
Los Angeles Center for Law and Justice
National Center for Youth Law
National Economic Development and Law Center
National Health Law Program
National Immigration Law Center
National Senior Citizens Law Center
Neighborhood Legal Services of Los Angeles County
Pro Bono Project Silicon Valley
Protection and Advocacy, Inc.
Public Advocates, Inc.
Public Counsel
Public Interest Clearinghouse
Public Interest Law Project
Public Law Center
San Diego Volunteer Lawyer Program
San Pedro Community Legal Services

Senior Law Project, Inc.
Stanford Community Law Clinic
University of San Diego School of Law Legal Clinics
Voluntary Legal Services Program of Northern California
Volunteer Legal Services Program of SF Bar Association
Western Center on Law & Poverty
WorkSafe Law Center
UC Davis School of Law Legal Clinics
Youth Law Center
Yuba Sutter Legal Center for Seniors

Lambda Legal
making the case for equality

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October 15, 2007

VIA EMAIL
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State Bar of California
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180 Howard Street, 10th Flr.
San Francisco, CA 94105
Attn: Kate O'Connor

Re: Proposed Report Regarding Nonprofit Entity Legal Practice (*Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23.

Dear Members of the Board Of Governors:

This letter is sent on behalf of Lambda Legal, the HIV and AIDS Legal Services Alliance, Inc. and the Transgender Law Center. Founded in New York in 1973, Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those living with HIV through impact litigation, community education and public policy work. With expertise in all areas of sexual orientation and HIV law and policy, Lambda Legal has served the residents of California since 1990 through its Western Regional Office in Los Angeles, which currently has four full-time attorneys and two legal support professionals.

Founded in 1997, the HIV and AIDS Legal Services Alliance, Inc. (HALSA) is the only organization in Los Angeles County dedicated specifically to serving the HIV/AIDS-related legal needs of low-income persons living with HIV or AIDS. HALSA helps individuals to improve their conditions of poverty, to address economic barriers to accessing medical treatment and support services, and to facilitate re-entry into the workplace. HALSA is a legal services provider of last resort. Individuals who have no other legal services option, or who are unable to access appropriate legal assistance elsewhere, receive help from HALSA if they meet eligibility requirements and their legal issue falls within the scope of services offered.

Despite the tens of thousands of low-income and impoverished people in the greater Los Angeles area living with HIV or AIDS who desperately need legal assistance, there is no other agency providing comparable legal services to Los Angeles County residents. Yet, due to the recent loss of grant funding, HALSA had to eliminate two staff attorney positions and one paralegal position – leaving a legal staff of only four attorneys and one paralegal to meet the growing community needs.

The Transgender Law Center (TLC) is a nonprofit civil rights organization advocating for transgender individuals. Every day TLC connects transgender people and their families to technically sound and culturally competent legal services. TLC also works to increase acceptance and enforcement of laws and policies that support California's transgender communities, and works to change laws and systems that fail to incorporate the needs and experiences of transgender people. TLC was founded in 2002, and now has five full-time employees, one part-time employee and a number of consultants.

HALSA participates in the California State Bar's Legal Services Trust Fund Program. Lambda Legal and TLC do not. None of the organizations participated in the *Frye* litigation in any capacity.

Lambda Legal, HALSA and TLC agree with and incorporate by reference the analysis presented to the State Bar by The Impact Fund, et al., in their letter dated October 12, 2007. Although we likewise support the goal of assuring quality representation for clients who seek assistance from nonprofit organizations offering *pro bono* legal representation, we similarly have concluded that the proposed regulations being considered by the Board Committee on Regulation, Admissions or Discipline are very unlikely to further that goal. In fact, we agree with the Impact Fund, et al., that the proposed regulations may well have the opposite effect.

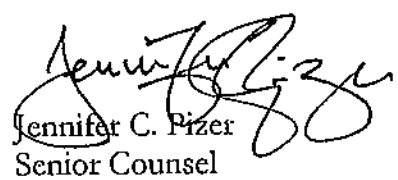
In addition to the analysis presented by the Impact Fund, Lambda Legal, HALSA and TLC also wish to underscore that the admittedly duplicative, proposed new regulations are likely to have disproportionate impact upon smaller and newer nonprofit legal organizations. At least one study has estimated that the current cost per organization of full compliance with existing federal regulations of nonprofit corporations to be as much as $25,000 annually for small organizations, and more than $150,000 for large groups. (Geoffrey W. Peters, *The Costs of Charitable Regulation: What Do Donors Pay?*, 1988, available at http://www.paperglyphs.com/nporegulation/documents/regulation_costs.html). Absent a demonstrated need for further regulation, the state should not add to the already significant (and fully effective) requirements.

Smaller and newer organizations frequently provide services to historically underserved communities, while operating on shoestring budgets with small staffs and little financial cushion. For example, prior to the birth of TLC, there was no organization in California singularly devoted to reaching and serving the legal needs of transgender people, who are some of the most vulnerable residents of this state. Similarly, HALSA was formed to enhance the consistency, cultural competence, and effectiveness of the legal services available to people with HIV in Los Angeles, out of recognition of the multiple, difficult barriers that often confront this population. Receiving roughly a thousand calls annually to its Help Desk in Los Angeles, Lambda Legal likewise offers no-cost help to a great many California residents who have legal problems concerning employment, housing, family law matters, access to education, health insurance coverage, and many other areas of law.

From their own experiences of tight budgets and annual fundraising burdens, these organizations know that compliance with an additional, duplicative set of regulatory requirements would consume scarce resources that otherwise would be used to provide legal services to individuals who are in urgent need of help. We also believe that the creation of a new layer of unwarranted regulation could very likely prevent the future establishment of innovative nonprofit legal organizations when the would-be founders have limited resources, resulting in communities with specialized legal needs remaining unserved.

Accordingly, Lambda Legal, HALSA and TLC urge the Board of Governors to reject the Proposed Report Regarding Nonprofit Entity Legal Practice and instead to report to the California Supreme Court that there is no documented need to further regulate nonprofit entities that engage in the practice of law.

Very truly yours,



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October 15, 2007

Kate O'Connor
The State Bar of California
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180 Howard Street, 10th Floor
San Francisco, CA 94105

Re: Comments on Draft Report Regarding Nonprofit Entity Legal Practice in Response to *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23

Dear Ms. O'Connor and the Board of Governors:

These comments are submitted on behalf of clinical faculty members at various California law schools. The following individuals join in the views expressed here: Professor Mark N. Aaronson (Director, Civil Justice Clinic, UC Hastings College of the Law); Professor Angelo Ancheta (Director, Katharine & George Alexander Community Law Center, Santa Clara University School of Law); Professor Cecilia Arnold (Supervising Attorney, Community Legal Services, UOP/McGeorge School of Law); Professor Steven Berenson (Thomas Jefferson School of Law); Professor Gary Blasi (UCLA School of Law); Professor Connie de la Vega (Academic Director of International Programs, University of San Francisco School of Law); Professor Bill Ong Hing (Director of Clinical Programs, UC Davis School of Law); Professor Helen H. Kang (Acting Director, Environmental Law & Justice Clinic, Golden Gate University Law School); Professor Lawrence Marshall (Associate Dean of Public Interest and Clinical Education, Stanford Law School); Professor Sharon A. Meadows (Director, Criminal and Juvenile Justice Law Clinic, University of San Francisco School of Law); Professor William W. Patton (Associate Dean of Clinical Programs, Whittier Law School); Professor Robert Seibel (California Western School of Law); and Professor Marci Seville (Director, Women's Employment Rights Clinic, Golden Gate University School of Law).

We write to highlight our concerns about the proposed adoption of new regulations contained in the above-referenced Draft Report (hereinafter "Report"). The recommendations in the Report (1) overstep the California Supreme Court's express mandate in *Frye* by fixing a problem that does not exist, and (2) risk inviting unintended consequences generally and, in particular, for clinical legal education programs that provide students with well-supervised and high quality real client experiences as part of the academic curriculum.

In *Frye*, the Court balanced the First Amendment expressive and associational rights applicable to nonprofit law practices and indicated that it would consider enhanced regulation of such practices only if the proposed regulations addressed *a demonstrated danger of injury to clients. Frye*, 38 Cal.4th at 50. In contrast, the Report reframes the Court's referral as asking *whether additional regulations of nonprofit entities are warranted.* Report at 4. This reframing leads to an ill-advised set of recommendations.

The Report offers no findings in support of a compelling need to add a new layer of State Bar regulatory provisions for not-for-profit legal practices. It reiterates what the Court noted in *Frye*, namely that nonprofit corporations are currently subjected to more oversight than for-profit corporations as a condition of securing and maintaining their nonprofit status. The Report also recognizes and reaffirms that lawyers are bound by rules of professional conduct and ethical obligations regardless of where and how they practice law. Furthermore, a fair reading of the actual data and information set forth in the Report indicates that the level of client complaints in the everyday practice of law in the nonprofit setting is less than, not similar to, what one finds in the for-profit setting. Despite acknowledging relatively extensive existing regulatory oversight of nonprofit legal providers and an absence of compelling need to craft additional regulations, the Report recommends the establishment of a new regulatory system. Were such regulations to be adopted, there almost certainly will be unanticipated and non-salutary consequences.

Our specific concern is that with respect to law school clinics, the imposition of new regulatory requirements will have problematic effects not only for the practice of law but also for how law schools develop and integrate clinical programs as part of the educational curriculum. The repercussions will fall most heavily on in-house clinics and the support afforded them.

Most accredited California law schools have in-house clinics where full-time clinical faculty members supervise law students in providing free legal services to low-income individuals and community groups and on public interest matters. None of the information gathered by the State Bar indicates any problem in the quality of representation and loyalty provided to clients by law school in-house clinics. Responsibility for legal practice decisions ultimately rests with a clinic's participating faculty members, who are licensed to practice law and almost always have substantial legal experience. In the law school setting, the independence of judgment required of lawyers is further bolstered by principles of academic freedom that protect all faculty members from inappropriate interference in their teaching. Yet the Report requires law school clinics, like any other not-for-profit legal services provider, to register and comply with new bureaucratic requirements.

One potentially troubling area pertains to the impact of how standardized compliance requirements are formulated and applied in the law school setting. A common assumption is that the legal structure for the not-for-profit practice of law is a public benefit corporation which has received federal 501(c)(3) tax-exempt status as a legal services provider. To our knowledge, none of the in-house clinics at an accredited California law school is separately organized as a nonprofit legal services corporation. In-house clinics are, however, part of parent educational institutions, which need to meet comparable organizational and operational requirements. For private law schools, there are the same kinds of checks on charitable educational institutions as there are on charitable legal services providers. There also are public law schools, which though not organized as private nonprofit corporations, function under similar constraints. In addition, most law schools in California are subject to ongoing scrutiny as educational institutions by the American Bar Association (ABA) as a national accrediting body or by the State Bar as a state accrediting agency.

Rather than accounting for these differences in formulating policies or developing "safe harbors" for compliance, the applicable bureaucratic rules may well rely on a formalistic and overbroad shorthand which presumes that the operative structure for a not-for-profit legal services provider is a separate 501(c)(3) public benefit corporation. In order to reduce the demands of compliance, or the risks of non-compliance, law schools may feel compelled to scale back or otherwise reorganize their clinical structure and offerings. This might include spinning-off and incorporating as independent entities their in-house clinics. Such a development would represent a step backward in the effort to integrate hands-on practical training into the mainstream of legal education at great cost to students and clients alike.

New requirements also may pose new opportunities for some law schools to question their commitment to supporting in-house clinics for their students. Because of the low student-faculty ratios necessary, in-house clinics are more expensive to support than standard classroom courses or externship programs in outside legal services offices. A common student-faculty ratio in an in-house clinic is six or eight to one. A chief pedagogical advantage of in-house clinics is that the same person serves as a student's case supervisor and course instructor, which facilitates greatly multi-dimensional law student learning from practical experience. The opportunities to seize teaching moments from real practice situations as they occur are especially important in identifying and discussing professional role responsibility and ethical issues.

While considerable progress has been made in the last two decades to provide increased in-house clinic opportunities for students, there has been a history of serious faculty and administrative opposition. Some law schools still have a significant number of faculty members who view teaching skills such as client interviewing and counseling, mediating and negotiating, real transactional planning, and trial and appellate advocacy as something to be learned outside of the law school curriculum and after graduation. Administrators are, of course, always sensitive to programmatic costs. Notwithstanding strong commitments to in-house clinics, today, there remains at some law schools an underlying fragility of support, on both pedagogical and financial grounds, that is not to be underestimated.

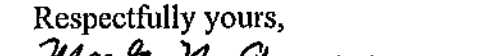
Another set of issues concerns the impact of new regulatory requirements on how law schools organize their clinical programs, which vary considerably. For example, the Report envisions a single designated "head of legal practice." Within a single law school, there may be a multiplicity of different in-house clinics. To designate a single person as "head of legal practice" or to have multiple "heads of legal practice" will have educational and organizational consequences. While such an externally imposed change well may be accommodated, there are also likely to be collateral consequences financially, programmatically, and in terms of faculty and staff morale.

The Carnegie Foundation for the Advancement of Teaching has recently published a study that calls for a much greater integration of real client clinical experiences into the mainstream legal curriculum than is presently true at most law schools. William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007). Although not be design, the Report's recommendation to enact a new regulatory system sets in motion a rule-making process which is apt to have an opposite effect. Any call for regulatory change has a life of its own. It would be unfortunate if the actual regulations implemented were to wind-up at odds with longstanding positions of the organized bar and the judiciary, both of which have been staunch supporters of increased opportunities for students to get real client clinical experiences within the law school curriculum. The progress made to date regarding the development of clinical legal education would not have occurred but for the adoption of ABA accreditation standards, which mandate and promote live-client and other real-life practice experiences (e.g., 2006-07 ABA Standards for Approval of Law Schools, Standard 302(b)(1)), and the enactment of judicially promulgated rules of court which authorize students to practice law under attorney supervision (e.g., California Rules of Court, Rule 9.42 (2007)). The State Bar should be looking at new ways to encourage, not impinge on, the development of strong clinics at California law schools.

Finally, we concur in the comments and conclusions presented in separate letters by the Impact Fund and the Legal Aid Association of California on behalf of California nonprofit legal services organizations. The factual investigation undertaken after the California Supreme Court's decision in *Frye* does not support the case for additional State Bar regulation. Further, the probability of unintentional adverse consequences is high, especially for the continuing effort to strengthen and expand supervised practice experiences for law students. Not only do the Report's proposals venture beyond the Court's referral, the likely costs of compliance, financially and otherwise, for nonprofit legal practices and the public, far outweigh any conceivable benefit.

We urge the State Bar not to adopt the Report's recommendation to establish new regulations for the not-for-profit practice of law.

Respectfully yours,



Mark N. Aaronson

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SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720-7200
TELEPHONE (510) 643-4800 • FAX (510) 643-4625

October 15, 2007

Kate O'Connor
The State Bar of California
Office of Legal Services, Access & Fairness Programs
180 Howard Street, 10th Floor
San Francisco, CA 94105

Re: Draft Report Regarding Nonprofit Entity Legal Practice

Dear Ms. O'Connor:

I write to offer comments about the above-reference Draft Report ("Report"). In my view, the Report's recommendations: 1) exceed the California Supreme Court's ("Court") mandate in *Frye v. Tenderloin Housing Clinic, Inc.*; and 2) risk negative unforeseen consequences during and after the rule-making process.

1. The Report's Recommendations Exceed the Court's Mandate

In *Frye*, the Court made clear that it would consider "carefully drawn regulations" of nonprofits only "*if such regulations meet a demonstrated danger of injury to clients* without impairing First Amendment expressive and associational rights." *Frye*, 38 Cal. 4th at 50. The Court stated further that "[i]t is incumbent upon the State Bar to study whether groups such as THC *actually* imperil client interests despite the absence of a profit motive, and to consider how such a danger, if it exists, may be mitigated by regulations consistent with First Amendment principles." *Id.* at 51 (emphasis original).

The State Bar has done a commendable job in conducting a study to ascertain the extent of such danger, and the Report finds that "there is not a compelling need to significantly enhance the existing regulation of nonprofit corporations." Report at 4. Unfortunately, the Report then reframes the Court's standard, stating that "the issue here is not whether substantially enhanced regulation in this area is necessary, but *whether the exemption nonprofits enjoy from public protection standards established for other practice contexts is warranted.*" Id. at 4 (emphasis added). At the same time, the Report reiterates what the Court noted in *Frye*, namely that nonprofit corporations are currently subjected to more oversight than for-profit corporations as a condition of securing and maintaining their nonprofit status. Finally, the Report recognizes that lawyers are bound by rules of professional conduct and ethical obligations regardless of where and how they practice law.

Despite finding existing regulatory oversight of nonprofit legal providers – and the lack of compelling need to enhance their regulation – the Report nevertheless recommends new regulations. By overstepping the Court's mandate to regulate *only where justified by actual*

danger to the public, and positing in its place that regulation is appropriate *unless an exception is warranted*, the Report has crafted its own rational for intervention.

In addition to exceeding the Court's mandate regarding nonprofit law practice, the Report fails to cite a particular basis for regulating law school clinics. At Berkeley – like sister law schools throughout the state – clinics are directed by faculty members who are licensed attorneys with substantial experience. Within parent educational institutions, clinics already meet requirements comparable to nonprofits, including internal and external scrutiny by state and national accrediting bodies. Law school clinics also help to meet the state's significant justice gap by providing high-quality legal services to under-represented clients and causes. In the absence of *any* evidence of danger – or even concern about the quality of representation – to clients, the Report recommends that law school clinics be required to comply with new bureaucratic requirements.

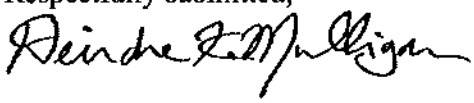
2. The Report's Recommendations Risk Negative Unforeseen Consequences

As described in letters submitted on behalf of the Legal Aid Association of California, The Impact Fund, and in-house law school clinics, the recommended changes would unnecessarily burden nonprofit legal services providers and law school clinics without demonstrable benefits. In addition, if such legislative and regulatory changes were to be introduced – much less adopted – there almost certainly will be unanticipated and non-salutary consequences. The legislative process is notoriously unpredictable. The implementation and enforcement mechanisms are unknowable at this point. In a climate of great need and limited resources, this would be an especially inopportune time to inject more uncertainty into the nonprofit legal services sector.

Given the distinct institutional structures and the teaching mission of law school clinics, the implementation and enforcement mechanisms could unintentionally create specific problems for the practice of law in the clinical setting as well as the integration of clinical programs into the legal academy. In light of the overwhelming support of the bar for increased opportunities for experiential learning, and in particular the experience afforded students in clinics, the possibility of opening the door to legislative mischief that would undermine ongoing positive developments in clinical education further cautions against the adoption of the Report's recommendations.

The findings of the State Bar do not support the *Frye*-mandated standard for additional regulation of nonprofit law practice *or* law school clinics. The costs of compliance are likely to outweigh conceivable benefits, and the risk of unintended consequences is high. For these reasons, I urge the Board of Governors to reject the Report's recommendations.

Respectfully submitted,



Deirdre K. Mulligan
Clinical Professor of Law
Director, Center for Clinical Education

O'Connor, Kate

From: Bobbi MacLean [BMacLean@co.sanmateo.ca.us]
Sent: Wednesday, September 12, 2007 1:42 PM
To: O'Connor, Kate
Subject: Re: Public Comment: Proposed Report Regarding Nonprofit Entity Legal Practice (Frye v. Tenderloin Ho

Comments to Frye v Tenderloin Housing Clinic.

After reading through the public hearing in San Francisco and reading through the report, my opinion is that practices for the non profits need not be changed. Non profit organizations are currently regulated and from my experience, very mindful of good representation for their clients. Non profit boards traditionally have included interested parties and possibly the clientele they serve. One drawback in corporate registration/certification is the elimination of all non attorneys from boards. This removes the very participants who can guide the organizations to better serve the population.

Non profits serve poverty populations. The need for legal assistance is always greater than the resources. To additionally burden organizations with regulation would use resources which are needed to help the community. Organizations have provided quality service without additional watchdogs. The fact that an occasional law suit is filed against an organization should not require all organizations to undergo further review.

Bobbi MacLean
Administrative Service Coordinator
Human Services Agency
262 Harbor Blvd, Bldg A
Belmont, CA 94002

650 802 5192
FAX 650 596 3478

O'Connor, Kate

From: Sarah Shena [SShena@tularehhsa.org]
Sent: Friday, October 12, 2007 11:34 AM
To: O'Connor, Kate
Cc: John Davis
Subject: Proposed Report Regarding Nonprofit Entity Legal Practice

Dear Ms. O'Connor:

I am an attorney for the Kings/Tulare Area Agency on Aging (K/T AAA). Through that agency I provide free legal services (under the federal Older Americans Act) to those age 60 and over in Kings and Tulare Counties.

My office is unusual, in that am in-house; I work for the Area Agency on Aging (AAA), which has a joint powers agreement with the County of Tulare. (In California most lawyers who provide services under the Older Americans Act are contract attorneys or work for corporations, who/which have a contract with the local AAA.)

It is my opinion after reviewing the State Bar's proposal that my office and K/T AAA do not qualify as a "Not for Profit Corporation" governed or targeted by the proposed changes. As a County employee and attorney funded by the Older Americans Act I believe my office is exempt from the concerns voiced in the proposal.

If someone on the Board Committee on Regulation, Admissions & Discipline disagrees with me about this, please let me know.

Sincerely,

Sarah Shena, Esq.
Kings/Tulare Area Agency on Aging
3500 W. Mineral King, Ste. C
Visalia, CA 93291

sshena@tularehhsa.org
(559) 730-2553
FAX: (559) 737-4220

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APPENDIX 3 – 1

SURVEY ANNOUNCEMENTS

Printed from The State Bar of California website (www.calbar.ca.gov) on Thursday, November 2, 2006
Location:

Public Comment

SUBJECT: Study, Report & Recommendations Regarding Practice of Law in Nonprofit Corporations [On Referral from the Supreme Court, (see *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal 4th 23.)]

BACKGROUND/PROPOSAL: On March 9, 2006, the California Supreme Court issued its decision in *Frye v. Tenderloin Housing Clinic, Inc.*, (2006) 38 Cal.4th 23, 40 Cal.Rptr.3d 221, holding that nonprofit public benefit corporations (including legal aid societies, public interest advocacy organizations and mutual benefit entities) providing legal services to the public are not subject to statutory regulations governing the practice of law by professional law corporations.

In doing so, the Supreme Court directed the State Bar, as its administrative arm in the regulation of the profession, to conduct a study and report back to the Court as to whether regulation of nonprofit legal service providers is warranted. The Supreme Court's directive to the State Bar was as follows:

> *"In view of the State Bar's experience in regulating the practice of law, its knowledge of the practical problems presented by various forms of law practice, and its ability to seek information and recommendations from the legal community and other interested persons, we believe the matter should be referred to the State Bar for further study, followed by a report and specific recommendations to this court. After appropriate study and specific recommendations from the State Bar, we shall consider the implementation of carefully drawn regulations directed at the practice of law by nonprofit corporations, if such regulations meet a demonstrated danger of injury to clients without impairing First Amendment expressive and associational rights."* (*Frye v. Tenderloin Housing Clinic, Inc.*, (2006) 38 Cal 4th 23, 241.)

Specially, the Court directed the Bar to determine whether there is evidence of actual client endangerment resulting from law practice in a nonprofit setting and whether any discovered harm to clients warrants regulation of the nonprofit entity itself, as opposed to the regulation of the individual attorneys, who remain always subject to State Bar and Supreme Court oversight. To this end, the Court instructed the Bar to:

1. Determine whether nonprofits actually imperil client interests and to consider how such a danger, if it exists, may be mitigated by regulations consistent with First Amendment principles.
2. Determine whether, absent the usual profit motive, a nonprofit organization's ideological motivation may, nevertheless, pose a risk to client interests, and if so, whether it is appropriate to impose reasonable regulation directed at the nonprofit and the employed lawyers governing the day-to-day practice of law within the nonprofit. If appropriate, such regulations must be carefully drawn to accommodate the expressive and associational interests of the nonprofit.
3. Determine if existing Rules of Professional Conduct applicable to individual attorneys already afford adequate safeguards to clients in the nonprofit setting.
4. Evaluate the benefits and detriments of a regulatory structure for nonprofit entities, balanced against their First Amendment expressive and associational protections.

The State Bar developed an action plan to respond to the directive of the Supreme Court that includes surveying the consuming public and providers of legal services of the nature at issue, conducting public hearings, and gathering relevant data from State Bar records and other enforcement agencies.

This process is being overseen by the Board Committee on Regulation, Admissions & Discipline (RAD). The action plan was approved by the RAD Committee at the Board's August meeting. More background information is contained in Board Agenda Item AUGUST 127, attached below.

The State Bar is now in the process of soliciting comments from the public and the legal communities on the issues identified

by the Supreme Court. Comments may be provided by:

- Sending an email or letter to the address below.
- Participating in an online survey or mail-in survey (see links and attachments below.)
- Attending one of two public hearings on this subject:
  - **Los Angeles**
    Wednesday, December 6, 2006
    Board Lounge, 7th Floor
    11:30 a.m.
    The State Bar of California
    1149 South Hill Street
    Los Angeles, CA 90015
  - **San Francisco**
    Friday, December 8, 2006
    Board Lounge, 4th Floor
    11:30 a.m.
    The State Bar of California
    180 Howard Street
    San Francisco, CA 94105

(Contact Sharon Ngim, 415-538-2267 for information about the hearings.)

Once the process is completed, RAD will submit to the Board its recommended response to the Supreme Court.

ATTACHMENTS:

- Agenda Item AUGUST 127: Status Report Re: *Frye v. THC*
- General Survey *(online version)*
- General Survey *(pdf version)*
- Survey for Consumers of Legal Services *(online version)*
- Survey for Consumers of Legal Services *(pdf version)*
- Survey for Non Profit Providers of Legal Services *(online version)*
- Survey for Non Profit Providers of Legal Services *(pdf version)*

SOURCE: Board Committee on Regulation, Admissions & Discipline

COMMENT DEADLINE: January 31, 2007

DIRECT COMMENTS TO:

Robert A. Hawley
Deputy Executive Director
The State Bar of California
180 Howard Street, 10th Floor

San Francisco, CA 94105
415-538-2277
415-538-2305 Fax

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California Bar Journal
November 2006 p.12

Two fee arb trainings set

A refresher course for volunteer attorneys who serve local and State Bar mandatory fee arbitration programs as well as instruction for new volunteers will be offered at two training sessions in Palm Desert and Woodland Hills. Both sessions are free and offer 2.75 hours of MCLE credit, including one hour of ethics and 1.75 hours of general credit.

The Palm Desert training will be held Nov. 14, from 5:30 – 8:30 p.m., at the University of California at Riverside's Palm Desert campus, 75-080 Frank Sinatra Dr., Room A114. To reserve a space, contact Kathleen Romero at 760/360-1734 or Lkathleenromero@aol.com.

The San Fernando Valley Bar Association is recruiting fee arbitrators to join its revived program and will offer training Jan. 17, from 5:30 – 8:30 p.m., Pierce College, Performing Arts Building Auditorium, 6201 Winnetka Ave., Woodland Hills. To reserve a space, contact Liz Post at 818/227-0490 or epost@sfvba.org.

For additional information (not RSVP), contact Jill Sperber at 415/538-2023.

Tell the bar if you move

Lawyers who change their address are required by the Business & Professions Code to notify the bar within 30 days. Because the deadline for payment of the annual membership fee will be strictly enforced this year *(see page 1)*, it is important that members keep their address up-to-date in order to receive both the fee statement and mailings about the upcoming changes.

Complete information about changing an address can be found on the bar's Web site, calbar.ca.gov. Click on Member Services in the left-hand menu and log on to My State Bar Profile. If you are a first-time

Public comment sought on *Frye* ruling

The State Bar launched a study last month of nonprofit legal practice in California, responding to the Supreme Court's directive in *Frye v. Tenderloin Housing Clinic Inc.* Following the study, the bar is to report back as to whether regulation is warranted for nonprofit legal service providers such as legal aid societies, public interest organizations and membership organizations like unions. Survey questionnaires are posted on the Public Comment page of the State Bar's Web site, calbar.ca.gov. The surveys also will be distributed to interested parties and must be returned by Jan. 31. Public hearings on the issue are to be scheduled next month.

In California, law corporations must register with the State Bar if they represent clients. In *Frye*, the Tenderloin Housing Clinic (THC), a nonprofit pubic interest organization representing San Francisco tenants, was found by the lower court to be representing clients without registering as a nonprofit law corporation. The Supreme Court reversed and found that there was constitutional protection for nonprofit entities like THC to do what it was doing. The Supreme Court asked the State Bar, however, to study nonprofit legal practice in California and determine if greater regulation in this area was necessary to protect California legal consumers.

Any interested party is invited to comment. Comments may also be provided to Robert A. Hawley, Deputy Executive Director, State Bar of California, 180 Howard St., San Francisco, CA 94105; robert.hawley@calbar.ca.gov; 415/538-2277; 415/538-2305 (fax).

Free self-study MCLE

The Lawyer Assistance Program (LAP) is offering a free self-study package approved for one hour of MCLE credit in the prevention of substance abuse. Send an e-mail to LAP@calbar.ca.gov.

Apply for a bar committee

The application for a 2007-08 appointment to a State Bar committee is available at the bar's Web site, calbar.ca.gov. Select the left-menu links to Attorney Resources and to Committees and Commissions.

For these appointments, the bar is

tees, boards and commissions.

Attorneys interested in volunteering to serve on a State Bar committee can also request an application from the Appointments Office, State Bar of California, 180 Howard St., San Francisco, CA 94105-1639; 415/538-2318; 415/538-2255 (fax).

Opt out of list sales

Attorneys who wish to remove their names from lists the State Bar provides to qualified outside entities may do so by logging on to Member Login at calbar.ca.gov. After registering with My State Bar Profile, follow the instructions.

Sign up for e-briefs

The State Bar offers "e-briefs," a short summary of recent news developments or announcements of interest to lawyers. The electronic mailings are provided on a timely basis, usually twice a month. To subscribe, go to "e-briefs" listed under "News" on the home page of the State Bar's Web site, calbar.ca.gov.

Public Comment

Board election rules

Two proposed revisions to the State Bar's Rules and Regulations regarding the nomination and election of governors would revise the timing and procedures by which nominating petitions may be submitted electronically and authorize limited public inspection of nominating petitions.

SOURCE: Board Committee on Operations

DEADLINE: Nov.16

CONTACT: Pat Bermudez, Office of General Counsel, 180 Howard St., San Francisco, CA 94105; pat.bermudez@calbar.ca.gov; 415/538-2270; 415/538-2321 (fax)

Client credit card payments

Proposed Formal Interim Opinion No. 05-0009 considers the ethical propriety of an attorney accepting credit card payments from a client for the payment of: 1) earned fees; 2) fees not yet earned; or 3) advances for costs and expenses.

SOURCE: Standing Committee on Professional Responsibility and Conduct

DEADLINE: Jan. 2

CONTACT: Audrey Hollins, Office of Professional Competence, Planning

Survey Announcement via E-Briefs (linked to public comment details)

From: The State Bar of California
Sent: Thursday, November 09, 2006 4:48 PM
To: ALLUSERS
Subject: The State Bar of California e-briefs

The State Bar of California
e-briefs
November 9, 2006

HEARINGS --- The bar's annual hearings on attorney discipline, admissions and competence will take place next month in San Francisco and Los Angeles.

2007 DUES --- Annual fee statements will be mailed Nov. 15. Bar dues not postmarked or paid online by Feb. 1 will be considered late and a penalty will attach on Feb. 2.

FREE FEE ARB TRAINING --- Recent developments in fee arbitration will be discussed at a free training program on Nov. 14 in Palm Desert.

FRYE RULING --- The State Bar launched a study last month of nonprofit legal practice in California, responding to the Supreme Court's directive in *Frye v. Tenderloin Housing Clinic Inc.* Comments are sought.

APPLY --- The application for a 2007-08 appointment to a State Bar committee is now available at the bar's Web site.

CALIFORNIA BAR JOURNAL

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OFFICIAL PUBLICATION OF THE STATE BAR OF CALIFORNIA

November 2006

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Public Comment - *Frye v. Tenderloin Housing Clinic Inc.*

Two fee arb trainings set

A refresher course for volunteer attorneys who serve local and State Bar mandatory fee arbitration programs as well as instruction for new volunteers will be offered at two training sessions in Palm Desert and Woodland Hills. Both sessions are free and offer 2.75 hours of MCLE credit, including one hour of ethics and 1.75 hours of general credit.

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APPENDIX 3 – 2

PUBLIC HEARING ANNOUNCEMENTS

THE STATE BAR OF CALIFORNIA
ANNOUNCES
TWO PUBLIC HEARINGS

ANNUAL PUBLIC HEARING ON DISCIPLINE, ADMISSIONS & COMPETENCE
(Business and Professions Code Section 6095)

and

PUBLIC HEARING REGARDING PRACTICE OF LAW BY NONPROFIT CORPORATIONS

The State Bar of California will hold its annual hearing to hear to proposals on attorney disciplinary procedures, attorney competency and admissions procedures. The hearings will be held in San Francisco and Los Angeles. The purpose of the hearing is to provide an opportunity for members of the public and the legal profession to make proposals or offer comments regarding the attorney discipline process, the admissions process or the maintenance or improvement of attorney competence.

Two hearings will be conducted. The dates and times of these public hearings are as follows:

LOS ANGELES

Date: Wednesday, December 6, 2006
Time: 10:00 a.m.
Location: The State Bar of California
Board Lounge
1149 South Hill Street, 7th Floor
Los Angeles, CA 90015

SAN FRANCISCO

Date: Friday, December 8, 2006
Time: 10:00 a.m.
Location: The State Bar of California
Board Room
180 Howard Street, 4th Floor
San Francisco, CA 94105

The hearings will conclude when all speakers present have made their presentations. Individuals who wish to speak at the hearing and/or present written materials should contact Doug Hull at (415) 538-2015 or at doug.hull@calbar.ca.gov by Tuesday, December 5, 2006

Pursuant to the Supreme Court's directive in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 40 Cal.Rptr.3d 221, the State Bar of California will conduct hearings to gather public comment on the following issues regarding the practice of law by nonprofit corporations in California. The purpose of these hearings is to gather information on the following topics and report back to the Supreme Court:

- Determine whether nonprofits actually imperil client interests and if so, how regulation could mitigate this.
- Determine whether a nonprofit organization's ideological motivation may pose a risk to client interests and if so, how regulation could mitigate this.
- Determine if existing ethical rules applicable to individual attorneys already afford adequate safeguards to clients.
- Evaluate the benefits and detriments of a regulatory structure for nonprofit entities, balanced against their First Amendment expressive and associational protections.

Two hearings will be conducted. The dates and times of these public hearings are as follows:

LOS ANGELES

Date: Wednesday December 6, 2006
Time: 11:30 a.m.
Location: The State Bar of California
Board Lounge
1149 South Hill Street, 7th Floor
Los Angeles, CA 90015

SAN FRANCISCO

Date: Friday, December 8, 2006
Time: 11:30 a.m.
Location: The State Bar of California
Board Room
180 Howard Street, 4th Floor
San Francisco, CA 94105

The hearings will conclude when all speakers present have made their presentations. Individuals who wish to speak at the hearing and/or present written materials should contact Sharon Ngim at (415) 538-2267 or at sharon.ngim@calbar.ca.gov by Tuesday, December 5, 2006

Founded in 1927 by the legislature, the State Bar of California is an administrative arm of the California Supreme Court. All lawyers practicing in California must be members of the State Bar. The mission of the State Bar: "Preserve and improve our justice system in order to ensure a free and just society under the law."

State Bar of California Public Hearings Regarding the Practice of Law By Non-Profit Corporations

Los Angeles Wednesday, December 6, 2006 11:30 AM State Bar of California 1149 South Hill Street, 7th Floor Los Angeles, CA 90015	San Francisco Friday, December 8, 2006 11:30 AM State Bar of California 180 Howard Street, 4th Floor San Francisco, CA 94105

Pursuant to the California Supreme Court's directive in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23, 40, the State Bar of California is conducting hearings to gather public comment on issues regarding the practice of law by non-profit corporations in California. The goal of these hearings is to gather information and report back to the Supreme Court on whether non-profit legal practices potentially cause public harm to any extent that would warrant regulation; whether a non-profit organization's ideological perspective may pose risks to client interests and if so, how regulation might mitigate this; whether existing rules of professional conduct that apply to individual attorneys afford adequate safe guards to clients in non-profit law practices; and if regulation is warranted, how First Amendment freedoms regarding expression and association may be balanced with regulation.

Individuals who appear and testify at the hearings on December 6 and 8 are requested to consider the following questions of interest to the State Bar and incorporate into your testimony responses and/or information regarding these issues:

1. Are you aware of members of the public who have received legal representation through a non-profit entity, whether it be a legal aid society, public interest organization or otherwise, who have expressed legitimate and extreme dissatisfactions, complaints, or other issues with the representation they received from the non-profit entity? Please elaborate.

2. What protections exist in non-profit law practices to assure that the ideological commitment of the non-profit entity and its board of directors does not influence the independent legal judgment of lawyers working for the legal unit of the same entity?

3. One of the reasons that for-profit corporations practicing law are required to register as law corporations with the State Bar of California is the concern that the profit motive inevitably pushes toward the margins of ethical and responsible behavior.

   In the non-profit entity that has high revenue, what concrete precautions exist to assure that the same economic motives that are assumed to push for-profit entities toward the margins of ethical behavior are neutralized in the non-profit setting?

4. If the State Bar were to formulate and recommend a registration/certification system for Non-profit Public Benefit Corporations practicing law, are you aware of any specific changes to the existing statutes governing corporations, law corporations and Public Benefit Corporations that would need to be addressed?

5. To the extent that you are aware, please discuss your knowledge of how legal fees and attorney fee revenues are set, collected, processed and distributed within the public interest non-profit legal practice environment.

6. To the extend that you are aware, please discuss the involvement, if any, that the board of directors of and contributors to a non-profit entity have direct involvement in the legal work of the entity by either selecting clients, determining strategy, or otherwise directing legal work.

7. If you have an opinion, please state it as to whether the existing responsibilities every attorney has under the Rules of Professional Conduct and other governing authorities are sufficient to assure that the public's interest is protected in connection with the practice of law in a non-profit setting.

   How is the non-profit setting distinguished in this regard from the for-profit corporate setting where registration/certification of the corporate entity is required to assure entity compliance with public protection standards?

8. In addition to added costs and use of resources, what do you see as potential detriments or barriers to some kind of registration/certification system for non-profit providers of civil legal services?

   What type of registration/certification system could mitigate the potential detriments or barriers that you identified?

9. In *Frye v. Tenderloin Housing Clinic, Inc.*, the California Supreme Court recognized three common law "safe harbors" allowing certain non-profit organizations to practice law in corporate form without strict adherence to California's statutory provisions governing Non-profit Public Interest Corporations. It is not always clear whether a particular entity fits within one of these three "safe harbors," i.e., a public interest entity, legal aid society, or membership association.

   What would be the potential benefits of a registration/certification system for Non-profit Public Benefit Corporations that practice law that would supplement, rather than intrude upon the "safe harbors" identified in *Frye v. Tenderloin Housing Clinic, Inc.* ?

FOR PLACEMENT OF YOUR PUBLIC NOTICES CALL 415.749.5555 OR E-MAIL publicnotice@therecorder.com

Public Notices

Public Hearing

TO: Interested Parties

SUBJECT: Study, Report & Recommendations Regarding Practice of Law by Non-profit Corporations [On Referral from the Supreme Court, (see Frye v. Tenderloin Housing Clinic, Inc. (2006) 38 Cal 4th 23.)]

Per the California Supreme Court's March 2006 decision in Frye v. Tenderloin Housing Clinic, Inc., (2006) 38 Cal.4th 23, 40 Cal.Rptr.3d 221, The State Bar of California is soliciting comments in its effort to gather information relating to the practice of law in California by non-profit entities. Comments may be provided by:

- Completing one of three short on-line surveys found on the State Bar's Web site under the Public Comment section: www.calbar.ca.gov
- Sending an e-mail or letter to:
  Robert.Hawley@calbar.ca.gov
  Robert A. Hawley
  Deputy Executive Director
  The State Bar of California
  180 Howard Street, 10th Floor
  San Francisco, CA 94105
- Attending one of two public hearings:

Los Angeles	San Francisco
Wednesday, December 6, 2006	Friday, December 8, 2006
Board Lounge, 7th Floor	Board Lounge, 4th Floor
11:30 a.m.	11:30 a.m.
The State Bar of California	The State Bar of California
1149 South Hill Street	180 Howard Street
Los Angeles, CA 90015	San Francisco, CA 94105

(Contact Sharon Ngim, Sharon.Ngim@calbar.ca.gov for information about the hearings and see www.calbar.ca.gov for additional information.)

No. 755515

TRUSTEE SALES

NOTICE OF TRUSTEE'S SALE T.S. No. 3848 On Thursday, December 21, 2006, at 2:00 p.m. of said day at the Van Ness Avenue Entrance to the City Hall, located at 400 Van Ness Avenue, in the City of San Francisco, in the County of San Francisco, State of California, Trust Deed Investments, Inc., as duly appointed trustee, will sell at public auction to the highest bidder, in lawful money of the United States, all payable at the time of sale, the following described real property situated in the City of San Francisco, County of San Francisco, State of California and described as follows: The land referred to herein below is situated in the City of San Francisco, County of San Francisco, State of California and is described as follows: Beginning at a point on the Easterly line of Hyde Street, distant thereon 87 feet, 6 inches Northerly from the Northerly line of Turk Street; running thence Northerly, along said line of Hyde Street, 25 feet; thence at a right angle Easterly 87 feet, 6 inches; thence at a right angle Southerly 25 feet; thence at a right angle Westerly 87 feet, 6 inches to the point of beginning. Being a portion of 50 Vara Block No. 285. Common Address: 222-226 Hyde Street, San Francisco, CA (A.P.N.: Lot 12; Block 337) (This Deed of Trust is cross-collateralized with that certain Deed of Trust (together with any modifications thereto) dated April 3, 2006, executed by Michael Younessian, as trustor, and recorded on April 14, 2006, as Instrument No. 2006-055536, of Official Records in the Office of the county Recorder of San Mateo County, California). Said sale will be made without covenant or warranty, express or implied, regarding title, possession or encumbrances, to satisfy the obligations secured by and pursuant to the Power of Sale conferred in a certain Deed of Trust executed by Michael Younessian, a married man as his sole and separate property, as Trustors, dated April 3, 2006, and recorded April 12, 2006 as Document No. 2006-1156533-00, as filed 3117, in Image 0364, in the office of the San Francisco County Recorder. The amount owing on subject obligation is: Principal $ 754,000.00 Interest $ 42,036.08, Late Charges $ 3,769.98, Advances $ 0.00 Legal Fees $ 5,400.00, Foreclosure Costs $ 11,901.48 You are in default under a Deed of Trust dated April 3, 2006, unless you take action to protect your property, it may be sold at a public sale. If you need an explanation of the nature of the proceeding against you, you should contact a lawyer. Dated: November 27, 2006 Trust Deed Investments, Inc., 1255 Post Street, #496, San Francisco, CA 94109 (415) 923-9061 Philip Goldstein, President This is one of two notices of sale being recorded concurrently in San Mateo County, California" ASAP# 806018
No. 757014 Nov 30, Dec 7,14-R

TS No.: 20069019203651 FHAVA/PMI No.: Notice Of Trustee's Sale YOU ARE IN DEFAULT UNDER A DEED OF TRUST, DATED 4/29/2005. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER. On 12/6/2006 at 02:00PM, First American Loanstar Trustee Services, as duly appointed Trustee under and pursuant to Deed of Trust recorded 05/05/2005, as Instrument No. 2005-H947669-00, in Book 1883, Page 0097, of Official Records in the Office of the County Recorder of San Francisco County, State of California. Executed by: Rowena Peruchio, a married woman as her sole and separate property and Filipina Peruchio, a single woman as joint tenants WILL SELL AT PUBLIC AUCTION TO THE HIGHEST BIDDER FOR CASH, CASHIER'S CHECK/CASH EQUIVALENT or other form of payment authorized by 2924h(b) (payable at time of sale in lawful money of the United States) At the Van Ness Street entrance to the City Hall, 400 Van Ness Ave, San Francisco, CA All right, title and interest conveyed to and now held by it under said Deed of Trust in the property situated in said County and State described as: As more fully described in said Deed of Trust APN #Lot: 001D BLK The street address and other common designation, if any, of the real property described above is purported to be: 727 Grafton Avenue San Francisco CA 94112 The undersigned Trustee disclaims any liability for any incorrectness of the street address and other common designation, if any, shown herein. Said sale will be made, but without covenant or warranty, expressed or implied, regarding title, possession, or encumbrances, to pay the remaining principal sum of the note(s) secured by said Deed of Trust, with interest thereon, as provided in said note(s), advances, under the terms of said Deed of Trust, fees, charges and expenses of the Trustee and of the trusts created by said Deed of Trust. The total amount of the unpaid balance of the obligation secured by the property to be sold and reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of Sale is $505,307.41 The beneficiary under said Deed of Trust heretofore executed and delivered to the undersigned a written Declaration of Default and Demand for Sale, and a written Notice of Default and Election to Sell. The undersigned caused said Notice of Default and Election to Sell to be recorded in the county where the real property is located. Date: 11/20/2006 First American Title Insurance Company Loanstar Mortgage Services, L.L.C. 3 First American Way Santa Ana, CA 92707 Loanster Mortgage Services, L.L.C. may be acting as a debt collector attempting to collect a debt. Any information obtained will be used for that purpose. For Trustee's Sale Information Please Call (714) 573-1965 P263125
No. 751279 Nov 16,22,30-R

NOTICE OF TRUSTEE'S SALE T.S. No. FD-92339-C Loan No. 0323844745 YOU ARE IN DEFAULT UNDER A DEED OF TRUST DATED 4/7/2005. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER A public auction sale to the highest bidder for cash, cashier's check drawn on a state or national bank, check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, or savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state, will be held by the duly appointed trustee. The sale will be made, but without covenant or warranty, expressed or implied, regarding title, possession, or encumbrances, to satisfy the obligation secured by said Deed of Trust. The undersigned Trustee disclaims any liability for any incorrectness of the property address or other common designation, if any, shown herein. TRUSTOR: MARLON POSADAS, an unmarried man as his sole and separate property. Recorded 4/13/2005 as Instrument No. 2005-059710 in Book, page of Official Records in the office of the Recorder of San Mateo County, California. Date of Sale: 12/20/2006 at 1:00 PM Place of Sale: AT THE MARSHALL STREET ENTRANCE TO THE HALL OF JUSTICE AND RECORDS, 400 COUNTY CENTER, REDWOOD CITY, CALIFORNIA Property Address is purported to be: 752 MADDUX DRDALY CITY, CA 94015 APN #: 006-112-200 The total amount secured by said instrument as of the time of initial publication of this notice is $697,169.44, which includes the total amount of the unpaid balance (including accrued and unpaid interest) and reasonable estimated costs, expenses and advances at the time of initial publication of this notice. Date: November 29, 2006 EXECUTIVE TRUSTEE SERVICES, LLC FKA EXECUTIVE TRUSTEE SERVICES, INC. 15151 SAN FERNANDO MISSION BLVD SUITE #208 MISSION HILLS, CA 91345 818-361-6998 Rosina Osorio TRUSTEE SALE OFFICER ASAP# 805477
No 756397 Nov 30, Dec 7,14-R

NOTICE OF TRUSTEE'S SALE TS No. 06-15956 Doc ID 00061769478520005N Title Order No. 06-8-173851 Investor/Insurer No. 221400 APN No. 024-177-130-2 YOU ARE IN DEFAULT UNDER A DEED OF TRUST, DATED 01/30/2004. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER." Notice is hereby given that ReconTrust Company, N.A., as duly appointed trustee pursuant to the Deed of Trust executed by JOSE RENATO C. SUAL, A MARRIED MAN AS HIS SOLE AND SEPARATE PROPERTY AND MARIA LOURDES SUAL, AN UNMARRIED WOMAN, EACH AS TO AN UNDIVIDED 1/2 INTEREST AS TENANTS IN COMMON, dated 01/30/2004 and recorded 02/11/04, as Instrument No. 2004-024410, in Book , Page), of Official Records in the office of the County Recorder of San Mateo County, State of California, will sell on 12/07/2006 at 1:00PM, AT THE MARSHALL STREET ENTRANCE TO THE HALL OF JUSTICE AND RECORDS, 400 COUNTY CENTER, REDWOOD CITY, CA at public auction, to the highest bidder for cash or check as described below, payable in full at time of sale, all right, title, and interest conveyed to and now held by it under said Deed of Trust, in the property situated in said County and State and as more fully described in the above referenced Deed of Trust. The street address and other common designation, if any, of the real property described above is purported to be: 202 BEVERLY AVENUE, MILLBRAE, CA, 94030. The undersigned Trustee disclaims any liability for any incorrectness of the street address and other common designation, if any, shown herein. The total amount of the unpaid balance with interest thereon of the obligation secured by the property to be sold plus reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of Sale is $391,483.25. It is possible that at the time of sale the opening bid may be less than the total indebtedness due. In addition to cash, the Trustee will accept cashier's checks drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state. Said sale will be made, in an "AS IS" condition, but without covenant or warranty, express or implied, regarding title, possession or encumbrances, to satisfy the indebtedness secured by said Deed of Trust, advances thereunder, with interest as provided, and the unpaid principal of the Note secured by said Deed of Trust with interest thereon as provided in said Note, plus fees, charges and expenses of the Trustee and of the trusts created by said Deed of Trust. DATED: 11/15/2006 ReconTrust Company, N.A. 1757 TAPO CANYON ROAD, SVW-88 SIMI VALLEY, CA 93063 Phone: (800) 281 8219, Sale Information (800) 578-6018 By: Trustee's Sale Officer ReconTrust Company, N.A. is a debt collector attempting to collect a debt. Any information obtained will be used for that purpose. ASAP# 800600
No. 751576 Nov 16,22,30-R

NOTICE OF TRUSTEE'S SALE T.S. No. T06-22438-CA Loan No. 0093865558 You are in default under a Deed of Trust dated 02-01-2006. Unless you take action to protect your property, it may be sold at public sale. If you need an explanation of the nature of the proceeding against you, you should contact a lawyer. A public auction sale to the highest bidder for cash, cashier's check drawn on a state or national bank, check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, or savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state will be held by the duly appointed trustee as shown below, of all right, title, and interest conveyed to and now held by the trustee in the hereinafter described property under and pursuant to a Deed of Trust described below. The sale will be made, but without covenant or warranty, expressed or implied, regarding title, possession, or encumbrances, to pay the remaining principal sum of the note(s) secured by the Deed of Trust, with interest and late charges thereon, as provided in the note(s), advances, under the terms of the Deed of Trust, interest thereon, fees, charges and expenses of the Trustee for the total amount (at the time of the initial publication of the Notice of Sale) reasonably estimated to be set forth below. The amount may be greater on the day of sale. Trustor: Jai Kadson O Enriquez, a single man Duly Appointed Trustee: Town & Country Title Services, Inc. Recorded 02-15-2006 as Instrument No. 2006-022623 in book --, page --, of Official Records in the office of the Recorder of San Mateo County, California, Date of Sale: 12-07-2006 at 1:00 PM Place of Sale: At the Marshall Street Entrance to the Hall of Justice and records, 400 County Center, Redwood City, California, Amount of unpaid balance and other charges: $351,816.05 Street Address or other common designation of real property: 391 Mandarin Drive # 101 Daly City, CA 94015 ; A.P.N.: 101-020-050 The undersigned Trustee disclaims any liability for any incorrectness of the street address or other common designation, if any, shown above. If no street address or other common designation is shown, directions to the location of the property may be obtained by sending a written request to the beneficiary within 10 days of the date of first publication of this Notice of Sale. The Trustee shall incur no liability for any good faith error in stating the proper amount of unpaid balances and charges. For Sale Information please contact: Agency Sales and Posting at www.tntsap.com or 714-2597850 Reinstatement line: 800-430-5262 Date: 11-16-2006 Town & Country Title Services, Inc. 505 City Parkway West, Suite 200 Orange, CA 92868 888-485-9191 Maggie Castillo, Trustee Technician ASAP# 800399
No. 751624 Nov 16,22,30-R

PROBATE

NOTICE OF PETITION TO ADMINISTER ESTATE OF WILLIAM DUANE TALCOTT

Case No. PES-06-288820

To all heirs, beneficiaries, creditors, contingent creditors, and persons who may otherwise be interested in the will or estate, or both, of WILLIAM DUANE TALCOTT

A Petition for Probate has been filed by DEBRA J. DOLCH in the Superior Court of California, County of San Francisco.

The Petition for Probate requests that DEBRA J. DOLCH be appointed as personal representative to administer the estate of the decedent.

The petition requests authority to administer the estate under the Independent Administration of Estates Act. (This authority will allow the personal representative to take many actions without obtaining court approval. Before taking certain very important actions, however, the personal representative will be required to give notice to interested persons unless they have waived notice or consented to the proposed action.) The independent administration authority will be granted unless an interested person files an objection to the petition and shows good cause why the court should not grant the authority.

A hearing on the petition will be held in this court as follows: December 18, 2006 at 9:00 a.m., Dept.: Probate, Room: 204, Superior Court of California, County of San Francisco, 400 McAllister Street, San Francisco, CA 94102.

If you object to the granting of the petition, you should appear at the hearing and state your objections or file written objections with the court before the hearing. Your appearance may be in person or by your attorney.

If you are a creditor or a contingent creditor of the decedent, you must file your claim with the court and mail a copy to the personal representative appointed by the court within four months from the date of first issuance of letters as provided in Probate Code section 9100. The time for filing claims will not expire before four months from the hearing date noticed above.

You may examine the file kept by the court. If you are a person interested in the estate, you may file with the court a Request for Special Notice (form DE-154) of the filing of an inventory and appraisal of estate assets or of any petition or account as provided in Probate Code section 1250. A Request for Special Notice form is available from the court clerk.

Nancy D. Rasch (SBN 95861)
Attorney for Petitioner
LAW OFFICE OF
NANCY D. RASCH
825 Van Ness Avenue
Suite 604
San Francisco, CA 94102
No. 757627 Nov 30, Dec 6,7-R

NOTICE OF PETITION TO ADMINISTER ESTATE OF GEORGE EDWARD RENALE

Case No. PES-06-288884

To all heirs, beneficiaries, creditors, contingent creditors, and persons who may otherwise be interested in the will or estate, or both, of GEORGE EDWARD RENALE, aka GEORGE RENALE, aka GEORGE E. RENALE

A Petition for Probate has been filed by SAN FRANCISCO PUBLIC ADMINISTRATOR in the Superior Court of California, County of San Francisco.

The Petition for Probate requests that SAN FRANCISCO PUBLIC ADMINISTRATOR be appointed as personal representative to administer the estate of the decedent.

The petition requests the decedent's LOST will and codicils, if any, be admitted to probate. The LOST will and any codicils are available for examination in the file kept by the court.

The petition requests authority to administer the estate under the Independent Administration of Estates Act. (This authority will allow the personal representative to take many actions without obtaining court approval. Before taking certain very important actions, however, the personal representative will be required to give notice to interested persons unless they have waived notice or consented to the proposed action.) The independent administration authority will be granted unless an interested person files an objection to the petition and shows good cause why the court should not grant the authority.

A hearing on the petition will be held in this court as follows: December 18, 2006 at 9:00 a.m., Dept.: Probate, Room: 204, Superior Court of California, County of San Francisco, 400 McAllister Street, San Francisco, CA 94102.

If you object to the granting of the petition, you should appear at the hearing and state your objections or

Public Hearing Notice
Los Angeles Metro
Rundates 11/27/06 – 12/08/06

TO: Interested Parties

SUBJECT: Study, Report & Recommendations Regarding Practice of Law by Non-profit Corporations [On Referral from the Supreme Court, *(see Frye v. Tenderloin Housing Clinic, Inc. (2006) 38 Cal 4th 23.)*]

Per the California Supreme Court's March 2006 decision in Frye v. Tenderloin Housing Clinic, Inc., (2006) 38 Cal.4th 23, 40 Cal.Rptr.3d 221, **The State Bar of California** is soliciting comments in its effort to gather information relating to the practice of law in California by non-profit entities. Comments may be provided by:

COMPLETING ONE OF THREE SHORT ON-LINE SURVEYS FOUND ON THE STATE BAR'S WEB SITE UNDER THE PUBLIC COMMENT SECTION:

www.calbar.ca.gov

SENDING AN E-MAIL OR LETTER TO:

Robert.Hawley@calbar.ca.gov
Robert A. Hawley
Deputy Executive Director
The State Bar of California
180 Howard Street, 10th Floor
San Francisco, CA 94105

ATTENDING ONE OF TWO PUBLIC HEARINGS:

LOS ANGELES	SAN FRANCISCO
Wednesday, December 6, 2006	Friday, December 8, 2006
Board Lounge, 7th Floor	Board Lounge, 4th Floor
11:30 a.m.	11:30 a.m.
The State Bar of California	The State Bar of California
1149 South Hill Street	180 Howard Street
Los Angeles, CA 90015	San Francisco, CA 94105

*(Contact Sharon Ngim, **Sharon.Ngim@calbar.ca.gov** for information about the hearings and see www.calbar.ca.gov for additional information.)*

Public Hearing Notice
San Francisco Daily Journal
Rundates 11/27/06 – 12/04/06

TO: Interested Parties

SUBJECT: Study, Report & Recommendations Regarding Practice of Law by Non-profit Corporations [On Referral from the Supreme Court, *(see Frye v. Tenderloin Housing Clinic, Inc. (2006) 38 Cal 4th 23.)*]

Per the California Supreme Court's March 2006 decision in Frye v. Tenderloin Housing Clinic, Inc., (2006) 38 Cal.4th 23, 40 Cal.Rptr.3d 221, **The State Bar of California** is soliciting comments in its effort to gather information relating to the practice of law in California by non-profit entities. Comments may be provided by:

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Robert.Hawley@calbar.ca.gov
Robert A. Hawley
Deputy Executive Director
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*(Contact Sharon Ngim, **Sharon.Ngim@calbar.ca.gov** for information about the hearings and see www.calbar.ca.gov for additional information.)*

Daily Journal Article published 12/12/2006, vol. 112 No. 238
(Post public hearings)

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December 12, 2006

STATE BAR MULLS REGULATING LEGAL SERVICE NONPROFITS
By Amy Yarbrough
Daily Journal Staff Writer

SAN FRANCISCO - Should nonprofit corporations that provide legal services be regulated like their for-profit counterparts?

That's a question the State Bar is weighing and one, agency officials say, without an easy answer. The bar held two public hearings on the issue recently, the latest in San Francisco on Friday.

Though the process has just begun, the bar has been looking at whether to regulate nonprofit legal service providers since earlier this year. The state Supreme Court asked the bar to study the issue following its March 9, 2006, ruling in *Frye v. Tenderloin Housing Clinic.*

The case began as a landlord-tenant dispute in which the Tenderloin Housing Clinic represented Frye and several other tenants of a residential hotel. Frye claimed THC, a San Francisco-based nonprofit that provides legal services to low-income residents, was not entitled to attorney fees because it had not complied with government code and registered with the bar to practice as a nonprofit law corporation.

The trial court found that THC was not required to register with the bar, a decision that was reversed by the Court of Appeal. The Supreme Court sided with the nonprofit, interpreting government code to mean that registration with the bar was not mandatory.

Despite its ruling, the Supreme Court asked the bar to see whether there were any instances where nonprofit legal corporations had harmed their clients and whether those problems warranted regulation of the groups themselves.

Any regulations, the Supreme Court said, would have to balance the organizations' rights of expression and association guaranteed under the First Amendment.

Brad Seligman, executive director of Impact Fund, a Berkeley-based nonprofit that does public-interest impact litigation, said regulating organizations like his would be addressing a problem that doesn't exist.

"The only people who have suggested there's any problem at all are the Frye plaintiffs," Seligman said.

Seligman points out such firms are subject to regulation by four agencies; the state attorney general, the secretary of state, the Internal Revenue Service and the bar, which has a rule that applies to legal service programs.

Bar rules that govern for-profit legal corporations would be a bad fit for the nonprofit sector, Seligman said.

The bar prohibits for-profit corporations from having anyone but attorneys on their boards of directors. Nonprofits, however, must include nonattorneys on their boards in order to qualify for certain federal funding. They also do so because a mix of expertise can be beneficial, Seligman said.

"God knows lawyers don't have all the answers to all the problems in our society," he said.

Robert Hawley, deputy executive director of the bar, said the agency's Regulation, Admissions and Discipline Committee is carefully considering such issues as well as the fact that the nonprofits differ greatly, many providing services other than legal aid.

"Unlike the for-profit world, you have a very wide spectrum of activities that the nonprofits engage in," Hawley said. "It's a challenge to figure out what type of regulation would cover them all."

The committee will submit a report to the bar's Board of Governors on its recommended response to the Supreme Court. If all goes as scheduled, it should be completed by the end of next year, Hawley said.

Paul Utrecht, who represented the plaintiffs in the Frye case, said he could cite several examples of why more regulation of nonprofits is needed.

Among them is the fact that groups may provide legal services for free but, wanting to use their client's situation for a test case, may not advise them of other legal remedies, Utrecht said. While individual lawyers are bound by the bar's ethics rules, the nonprofit corporation itself is not.

"There's a dichotomy between the lawyers and the political people who work for the nonprofit," Utrecht said.

He added that may groups may be inclined to do what's best for all their clients, rather than what's good for the individual they are working with.

"The political people don't care about the client. They care about the cause," he said.