

# Memo

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

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

**Date:** April 11, 2011

**Re:** Input re Governance of the State Bar of California

The Santa Clara County Bar Association Board of Trustees (SCCBA) submits this memo to supplement its memo dated January 13, 2011, as well as the testimony given on January 27, 2011, to the Task Force by SCCBA President Shannon Stein and SCCBA Executive Director & General Counsel Christine Burdick. We understand that the Task Force is primarily focussing its consideration on two proposals addressing the composition of the State Bar Board of Governors (BOG). Given that our earlier memo and testimony did not focus on changes to the composition of the BOG, we now want to provide input regarding the proposals currently being considered by the Task Force.

First, we want to emphasize and reiterate our earlier position that whatever recommendations are made by this Task Force, the recommendations should be based upon, reflect and respect the constitutional requirement of separation of powers between the judicial, executive and legislative branches and the necessity for independence of these three branches of government. Counted among the judiciary and subject to its control and regulation are lawyers. We understand from reading news reports that some members of the Task Force and BOG are not persuaded by the long standing principle that lawyers should be self-governing; that they do not believe that lawyers are any more unique in their societal role than doctors or accountants. While we cannot in this memo provide a lengthy discourse about the role of an independent judiciary and within that the necessity for independence of attorneys in a constitutional democracy, we want to add a few more words about this very important principle to underscore our original position.

An independent judiciary and independent lawyers are the cornerstone to a constitutional democracy, where individual freedoms, liberties and rights must be vigilantly protected. It is the duty and role of an independent

judiciary and independent lawyers to ensure that protection. We easily recognize the failure or undermining of this key principle in other countries where judges and lawyers are persecuted by the State, or manipulated by the State, even jailed. However, much more subtle ways of undermining and eroding the independence of the judiciary and lawyers exist. Any kind of erosion of the independence of lawyers threatens, however slowly, the rule of law and the foundation of a constitutional democracy. Thus, the reason that lawyers have been self-governing over the centuries where there are successful constitutional democracies.

To have a truly independent judiciary, and within that independent lawyers, requires that the Executive and Legislative branches respect that independence by not using their power and authority to overreach with respect to the judiciary and lawyers. For example, if the State took the responsibility of issuing licenses to lawyers and then require that they practice law as members of a State-run organization or agency, one can more clearly see how their independence could be threatened. The State could create regulations for lawyers to carry out their professional duties that might easily conflict with lawyers' duties to individual clients and to the constitution. Where there might be a disagreement, it is not the State's will that should prevail; if it does, that is the very essence of undermining the independence of lawyers.

In California, it appears that the some public members of BOG and some legislators keep pushing the State Bar to become something of a State regulated hybrid. While they have not yet suggested that the Supreme Court turn over the licensing of lawyers to the Legislature or to the oversight of the Legislature, the push has been and is currently to move the regulation of lawyers much more to State oversight, more similar to doctors and accountants.

This could, in fact, be part of an effort to erode the independence of the judiciary and lawyers in the State of California, whether the Task Force, the Legislature, the Governor or the Supreme Court understands or wants to acknowledge this fact. The more oversight the Executive and Legislative branches have over the State Bar and lawyers, the less likely it becomes that lawyers can carry out their professional duties independently. There are no more clearer examples of this than the when a governor vetoes the dues bill or the legislature holds the dues bill hostage because either the governor or the legislature does not like something the State Bar Board has done or not done. That is an encroachment on the independence of lawyers. And, when the lawyers on BOG acquiesce to the Legislature in making a change in the State Bar rules, or change a position taken by the State Bar or change how lawyers are regulated or disciplined because they want to avoid the

legislature or governor refusing to pass the dues bill, that also undermines the independence of lawyers.

Even though to date the issues may not seem as if they threaten our constitutional democracy, any weakening of the independence of the judiciary and lawyers contributes to the slow erosion of the rule of law. The entire structure of a free and democratic constitutional order is upheld by an impartial and independent judiciary and within that the independence of lawyers. That is why, when other countries are trying to establish a democracy, one of the key components is to establish an independent judiciary and ensure the independence of lawyers. If you look at the International Bar Association Standards for the Independence of Lawyers, you will find the standard that lawyers should be self-regulating. (Attached is the IBA Standards, which we encourage you to read, especially those who do not fully understand or believe in the unique role of lawyers in a democratic society.) The referenced standard is found in Section 18 (b) as follows:

“The functions of the appropriate lawyers’ association in ensuring the independence of the legal profession shall be inter alia:

...

b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession; and to protect the intellectual and economic independence of the lawyer from his or her client;

... .” (emphasis added)

There is an important reason this standard is promoted for countries establishing democracies: they need independent judiciaries and lawyers. Self-regulation ensures independence from the Executive and Legislative branches. It is why in every state in this country, the judiciary oversees the licensing, conduct, regulation and disciplining of attorneys and attorneys are self-regulating. With all due respect to other professionals, such as doctors and accountants, they do not have the same role in our constitutional democracy as does the judiciary and lawyers.

If the Supreme Court and the State Bar Board continue down this path of allowing the Governor and/or Legislature to dictate and mandate how the State Bar should be governed and managed, California may become the first and only state in the country where the Executive and Legislature have more oversight authority over lawyers than does the judiciary and lawyers. But it should not fall just to the Supreme Court and/or lawyers to ensure there is not a violation of the principle of separation of powers. The Executive and Legislative branches should also respect this principle. Unless the Executive

and the Legislature are likewise prepared to ensure this independence, the rule of law will slowly but steadily be eroded, and with it effective protection of the rights of the individual.

Therefore, based on these principles as our foundation, the SCCBA opposes any proposal that serves to undermine the self-regulation of lawyers and that would move the State Bar governance to any greater influence by non-lawyers than is now the case. An overwhelming majority of BOG should be lawyers and the majority of those lawyers should be elected with no more than up to three appointed by the Supreme Court. The SCCBA is not opposed to six public members remaining on the BOG. Consequently, we are more inclined to support the Streeter/Davis proposal than the Herbert/Mangers proposal.