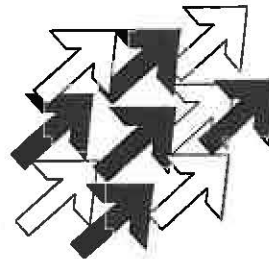


ATTACHMENT 1



BACKGROUND OF THE FUTURES COMMISSION

"It doesn't take much strength to do things, but it requires great strength to decide on what to do."

— Elbert Hubbard

2. COMMISSION MEMBERSHIP

Patricia Phillips, Chair
Los Angeles

Lee K. Alpert
Encino

P. Terry Anderlini
San Mateo

Hon. Lourdes Baird
Los Angeles

Marsha S. Berzon
San Francisco

Wendy H. Borchardt
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Michael J. Brady
Redwood City

Steven A. Brick
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Kevin R. Culhane
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Dean Herma Hill Kay
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A. Peter Kezirian, Jr.
Los Angeles

Hon. Harry Low (Ret.)
San Francisco

Hon. Campbell Lucas (Ret.)
Long Beach

Hon. Elwood Lui (Ret.)
Los Angeles

William R. Nevitt, Jr.
San Diego

Manning J. Post
Beverly Hills

Jesus E. Quinonez
Burbank

Hon. Cruz Reynoso (Ret.)
Los Angeles

Peter J. Tennyson
Irvine

Jayne E. Williams
Oakland

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Los Angeles

H. L. (Mike) McCormick - Orange County Bar Association
Costa Mesa

Patrick C. Shea - San Diego County Bar Association
San Diego

Dan McIntosh - Beverly Hills Bar Association
Los Angeles

Don Mike Anthony - Los Angeles County Bar Association
Pasadena

Leon Goldin - Executive Committee, Conference of Delegates
Los Angeles

John B. Power - Council of Section Chairs
Los Angeles

Fern Topas Salka - Section on Family Law
Beverly Hills

COMMISSION DIRECTOR

Diane C. Yu
San Francisco

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 Jayne Williams, vice chair
 Art Bernstein, staff

Discipline, Admissions
and Competence: Kevin Culhane, chair
 Andrew Guilford, vice chair
 Mable Wilkinson, staff

Services to the Public
and Professionalism: Hon. Susan Illston, chair
 William Nevitt, Jr., vice chair
 David Bell, staff

Administration of Justice
Resources: Hon. Elwood Lui, chair
 Steven Brick, vice chair
 Mary Viviano, staff

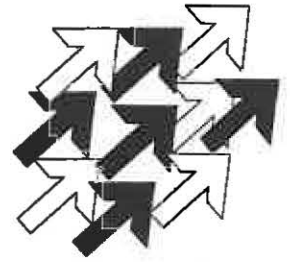
Services to and for
Lawyers:

Hon. Campbell Lucas, chair
Marsha Berzon, vice chair
Felicia A. Bailey, staff

Bar Structure and
Organization:

Hon. Candace Cooper, chair
Christine Burdick, vice chair
David Long, staff

ATTACHMENT 2



FINAL RECOMMENDATIONS

"Don't find fault. Find a remedy."

— Henry Ford

E. FINAL RECOMMENDATIONS

Below is a listing of the Commission's final proposals, grouped according to subject matter. Due to the broad scope of the Commission's task, there was inevitable overlap on some topics with some of the Subcommittees. For ease of reference, therefore, all the recommendations with common themes have been clustered together, regardless of the Subcommittee which originally formulated it.

All recommendations were the product of consensus, unless the Commission's vote is recorded in brackets at the end of the description. For purposes of this report, "consensus" means that no Commission member "called up" the item from the agenda for discussion and vote by the full Commission, with the implication being that there was no objection to including that recommendation in the final report.

DISCIPLINE, ADMISSIONS AND COMPETENCE

1. California should not require specified law school curricula. The role of the State Bar (through the Committee of Bar Examiners) should continue to be limited to choosing the subjects to be tested on the bar examination.
2. The legal profession should encourage the goal of increased practical skills and competency training for those entering the legal profession. Clinical programs in law schools should not be required, but ways should be explored for creating models to enable all students to gain more practical experience and offering those programs in partnership with law schools, the judiciary, and the profession.
3. Only graduates of American Bar Association or California approved law schools should be allowed to take the California bar examination. [Vote 11 yes - 8 no]
4. Pro bono requirements for law students should be encouraged but not be required.
5. In judging good moral character for admission or for reinstatement, positive factors to be considered should include: (a) respect for the law and the judicial process; (b) willingness to adhere to the Rules of Professional Conduct and the State Bar Act; (c) honesty, fairness, and reliability; (d) integrity, candor, trustworthiness, and discretion; (e) respect for the rights of others; (f) fiscal responsibility; and (g) mental and emotional stability.

6. An applicant should be permanently disqualified from admission to practice law if convicted of a violent felony or crime involving moral turpitude (unless pardoned). [Vote 11 yes-10 no]
7. Law schools should make possible disclosure to the admissions agency regarding moral character, including substance abuse, cheating, and acts involving moral turpitude. [vote 12 yes-11 no]
8. Admissions to the bar should be handled by the mandatory bar. [Vote 17 yes-2 no]
9. The bar examination in its present format (with written essay and Multistate Bar Examination components) should be continued, but the Bar should keep abreast of new testing methods and be open to experimentation.
10. Conditional admission to the bar (limited in scope, manner, or duration) should continue to be denied.
11. Reciprocity in admissions should be available to active members in other jurisdictions in good standing, subject to prerequisites, including: (a) membership in other jurisdiction for at least three years; (b) satisfaction of California's moral character and ethical standards; and (c) other jurisdiction affords reciprocity to California attorneys.
12. California should support a national licensure program, e.g., for attorneys who litigate cases exclusively in federal courts.
13. Discipline should continue to be a function of the judicial branch of government, and that fact should be emphasized to the public.
14. The discipline system -- other than adjudication -- should be handled by the mandatory bar. [Vote 17 yes-2 no]
15. Lawyers should continue to fund the discipline system.
16. Adjudication of discipline cases (currently in the State Bar Court) should be under the aegis of the California Supreme Court. [Vote 14 yes-6 no-1 abstention]
17. The budget for the attorney discipline function should be approved by the Supreme Court rather than the Legislature.
18. The Chief Trial Counsel should be appointed by the Supreme Court without confirmation by the Senate.

19. Complaints against attorneys should be made public when the investigation is completed and action other than dismissal is taken by the Bar (e.g., situations where the Bar issues a warning letter, admonishment, directional letter, or agreement in lieu of discipline).
20. All State Bar Court hearings, other than moral character hearings, should be open to the public.
21. A "whistleblower rule" for reporting discipline matters should not be adopted; existing statutory reporting mechanisms (notifications of criminal convictions, and reports from insurers, judges, and banks) are sufficient.
22. Conclaves of bench, bar, and academic representatives as recommended by the American Bar Association's MacCrate Report, Legal Education and Professional Development -- An Educational Continuum, should be convened to develop a plan for post-graduate skills training for new lawyers.
23. Professional liability insurance should be mandatory for all active members of the State Bar. If minimum levels of insurance are not maintained, members should be suspended from practice.
24. Mandatory continuing legal education should continue as a requirement for California attorneys, if appropriate steps are taken to ensure the quality of programs is meaningful to attorneys.
25. Mandatory periodic examination of lawyers should not be required to ensure competence.
26. Random examination of lawyers should not be required to ensure competence.
27. Random audits of lawyers should not be conducted to ensure competence.

SERVICES TO THE PUBLIC AND PROFESSIONALISM

28. The legal profession should attempt to find ways to match the large, and in some opinions, excess, supply of lawyers to the unmet need for legal services. Lowering attorneys' financial expectations would help greatly in this endeavor.
29. The legal profession should reinvent its value system so that all attorneys, no matter whom they represent or how much money they make, are truly recognized and honored as valuable contributors to the profession and society. The legal profession should consider inculcating such values in its

members through law school education and post-admission continuing legal education.

30. The legal profession should publicize the importance of service to the public at every opportunity, through articles in the legal press, speeches by influential members of the legal profession, and service awards to attorneys.
31. The focus on alternative dispute resolution (ADR) should not only be about increasing access to the legal system, which is an important objective, but also about ensuring that ADR processes produce fair, just results for all participants.
32. The legal profession should ensure that lawyers assisting clients in ADR or acting as ADR mediators or arbitrators are knowledgeable regarding the law, and are competent and ethical.
33. The legal profession should ensure that parties to ADR proceedings are informed of the law applying to their matter and of any legal rights that they are or may be waiving in resolving their dispute.
34. ADR mediators and arbitrators need not necessarily be licensed attorneys, but only attorneys shall give legal advice to clients. [Vote 15 yes-3 no]
35. The legal profession should work with ADR groups to develop ethical and professional standards for ADR providers.
36. The legal profession should work to find adequate funding for delivering legal services for the poor.
37. The legal profession should work to lower economic and cultural barriers limiting access to justice.
38. The legal profession should support efforts to expand legal aid to include the "near poor" who are not now eligible.
39. The legal profession should assist legal aid programs in maximizing investment strategies and collection of public and private grant moneys.
40. The legal profession should consider working to establish funding or civil counsel or establish a right to counsel in certain civil cases where basic human needs are involved. [Vote 16 yes-7 no]
41. The legal profession should support client outreach by legal aid programs and incentives for lawyers to enter legal aid practice.

42. The legal profession should encourage the goal of increased practical skills/competence training for those entering the legal profession, including the concept of internships.
43. The legal profession should support the expansion of prepaid legal plans, particularly to help the moderate income and small businesses.
44. The legal profession must ensure that the form and administration of legal service plans allow plan attorneys to practice in an independent and ethical manner.
45. The legal profession should support prepaid legal service plans so long as safeguards are first put into place to ensure independent, ethical practice by plan attorneys on behalf of clients.
46. The legal profession must ensure that any person providing legal services in California does so in a knowledgeable, competent, and ethical manner and under judicial agency oversight.
47. With proper public protection safeguards first put in place, the legal profession should support a broader range of legal technician services to the public, which will help achieve greater, more meaningful access to the legal system for more Californians. [Vote 15 yes-7 no]
48. Pro bono should be encouraged but not required for attorneys.
49. The legal profession should seek contributions from members and law firms to sponsor increased pro bono activities, and to represent clients at rates commensurate with clients' ability to pay. Representing such clients promotes a committed attorney-client relationship, and responds to the needs of the poor and those with modest means.
50. The legal profession should encourage approaches to emphasize the importance of pro bono service to its membership, including possible adoption of a Rule of Professional Conduct.
51. The legal profession should encourage pro bono activities by its members by supporting pro bono efforts conducted by state and local, specialty, minority, and women's bar associations.
52. The legal profession should support pro per assistance and "unbundling" (i.e., breaking out the component services usually performed by the attorney and having the client assume responsibility for certain of those services instead) as possible methods of increasing access to the legal system, but concerns regarding competent representation and legal malpractice exposure should first be examined and addressed

fully.

53. The legal profession should increase the use of public service announcements to disseminate information regarding existing educational public outreach activities.
54. The legal profession should assist local and specialty bar associations in conducting local education public outreach activities, such as workshops, seminars, or clinics.
55. The legal profession should work closely with the Legislature to ensure that rules and statutes regulating attorney practice are well-written, understandable, efficacious, and not in conflict.
56. Given the unique role of attorneys in society, the paradigm of professionalism in the legal profession is and should include: (a) ensuring attorney competence; (b) maintaining high standards of integrity, civility, and ethics; (c) encouraging access to legal services and the legal system; (d) providing service to the public; (e) regulation within the judicial branch of government; and (f) providing leadership on significant issues which impact the general welfare of society and which relate to improving the administration of justice and defending and ensuring constitutional rights and obligations. [Vote 15 yes-7 no]
57. The legal profession needs to infuse the understanding of, and the commitment to, professionalism in its members.
58. The legal profession should consider adoption of a statewide code of professionalism which contains a broad list of aspirational goals and precatory duties.
59. The legal profession should encourage and assist, but not require, all California law schools to provide professionalism education to law students that goes beyond the instruction presently required by the American Bar Association and the California Committee of Bar Examiners.
60. The legal profession should seek to publicize the importance of professionalism at every opportunity in order to send a clear signal to its members that professionalism is neither an outdated concept nor passe, but instead is a living set of principles and practices that have meaning and application today.

ADMINISTRATION OF JUSTICE RESOURCES

61. When considering reforms of the justice system, the legal profession must assure that such proposals are first analyzed

to ensure that implementation will not have an unduly negative impact on access to the courts by the poor and "near poor."

62. The legal profession must exercise care to assure that innovative technology to improve the efficiency of the courts does not unduly limit access to the courts by those without adequate access to those new technologies.
63. Lawyers as a profession have an obligation to work to assure adequate resources are devoted to the administration of the judicial system.
64. The legal profession should educate the public and the media on the role of lawyers and on how the justice system works. Lawyers should be actively involved in public discussions about how to resolve societal problems.
65. The legal profession should support development and establishment of models for user-friendly, cost-efficient, and effective forums for resolving legal disputes, to be implemented throughout the state, as appropriate. Such forums may include the multi-door courthouse concept and community dispute resolution centers.
66. The legal profession should consider whether or not to support efforts to consolidate the state's trial courts.
67. The legal profession should support efforts to establish uniform court rules.
68. The legal profession should support efforts to require bias and fairness training for judges, lawyers, and law students.
69. The legal profession should work toward increasing diversity on the bench.
70. The legal profession should be actively involved in analyzing proposals to revise the judicial selection process to make merit the principal factor, to ensure the best possible system to attract the highest quality judges. [Vote 14 yes-8 no]
71. The legal profession should be involved in evaluating and developing the most appropriate methods for judicial evaluation.
72. The legal profession should play an integral role in developing appropriate systems to address complaints about the justice system, including judges, lawyers, and court personnel, balancing the information needs of the public and the privacy needs of the parties involved.

73. Lawyers and nonlawyers should be on the Commission on Judicial Performance.
74. The legal profession should consider supporting the establishment of alternatives to the existing system of contested elections, such as retention elections for sitting trial judges.
75. The legal profession should support efforts to maintain confidentiality in juvenile delinquency cases and the use of mediation as a diversion method.
76. The legal profession should be actively involved in analyzing the effects of proposals to lower the age at which juveniles can be tried as adults to ensure that the proper balance is struck between public protection and the desire to rehabilitate the juvenile involved.
77. In juvenile dependency cases, the legal profession should support efforts to maintain confidentiality and early family mediation in order to increase the likelihood of reunification.
78. The role of attorneys should be expanded and lawyers should develop additional skills to address juvenile problems at earlier stages in order to prevent escalation of criminal behavior.
79. The legal profession should work to ensure adequate attention to needs of children in dissolution and other family matters.
80. The legal profession should work to ensure that adequate resources are devoted to the civil justice system. The legal profession should play an important role in public education about the civil justice system.
81. The legal profession should work toward ensuring that efforts to streamline the civil justice system do not diminish its fairness.
82. The legal profession should be involved in analyzing proposals to establish specialized courts to ensure that any such courts would provide the highest quality service and maintain fairness while achieving diversity.
83. The legal profession should work toward ensuring that more resources will be provided to the criminal justice system because of the continuing and increasing demands on that system.
84. Attorneys should play a role in ensuring fairness under ongoing pressure to streamline the criminal justice process.

85. The legal profession should play a central role in analyzing the impact of proposals to change how capital cases are handled; at a minimum, the profession should work to increase the staffing available to the Supreme Court.
86. The legal profession should support efforts aimed at streamlining the presentation of arguments to appellate courts by using electronic filings and use of telecommunications and video conferencing for oral arguments, provided that such changes do not have a negative impact on access to the courts by the poor and those without access to the new technologies.
87. To assure the proper resolution of appellate cases, the following possible reforms should be investigated: (a) summary adjudication for routine criminal issues; (b) discretion to use expedited review process; (c) single issue opinions; (d) dispensing with requirement of full opinions in some cases.
88. When proposals are made to shift the costs of appeals to the losing party, the legal profession should be actively involved in analyzing the impact of such proposals, particularly on the question of access to justice for the poor and moderate income.
89. The legal profession should be involved with considering innovative settlement and mediation processes, including: (a) three-member appellate settlement panels; (b) use of appellate specialists as alternatives to judges.

SERVICES TO AND FOR LAWYERS

90. The following are services and benefits that are vitally necessary for the State Bar (or a subsequent organization) to provide to its members:
 - a. Ethics Committee
 - b. Attorney advertising guidelines
 - c. Ethics Hotline
 - d. Client relations education
 - e. Competence education [Vote 17 yes-2 no]
 - f. Unauthorized practice of law division
 - g. Section membership
 - h. New admittees' orientation program
 - i. Representation of the profession in Sacramento
 - j. Clarification of and technical corrections to statutes [Vote 15 yes-4 no]
 - k. Legislative reform [Vote 13 yes-7 no]
 - l. Minimum continuing legal education (MCLE) regulation, standards, enforcement

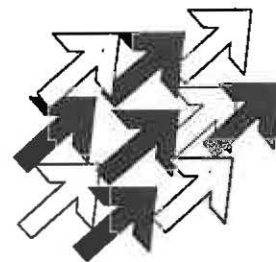
- m. Section education - continuing legal education programs
[Vote 15 yes-4 no]
 - n. Alternative dispute resolution standards
 - o. Fee arbitration panels
 - p. Publicity regarding pro bono work done for the poor
 - q. Emeritus attorney pro bono participation program
 - r. Promotion of legal services delivery systems for the poor
and middle income, pro per, ADR, pro bono, Legal Services
Trust Fund, etc. [Vote 15 yes-6 no]
 - s. Education of the public about lawyers and the justice
system [Vote 13 yes-8 no]
 - t. Malpractice insurance
 - u. Court improvement
 - v. Judicial candidate evaluation
 - w. Diversity programs/Access to the profession
91. The following are services and benefits that are necessary and
desirable for the State Bar (or a subsequent organization) to
provide to all bar members, but to a lesser extent than those
described above:
- a. Compendium on professional responsibility
 - b. Legal specialization program
 - c. Assistance for law practice management administration
 - d. Solo and small firm practitioners' practice manuals for
local practice
 - e. Speakers bureau
 - f. Local bar directories and lists
 - g. Membership directories
 - h. Monthly newsletters and magazines
 - i. Legislative digest/tracking program
 - j. Bar leaders conference
 - k. Video/Audio tapes lending library
 - l. Annual meeting
 - m. Enforcement of ADR standards
 - n. Certification of and publicity concerning lawyer referral
services
 - o. Law Day programs
 - p. Utilization of mass media to publicize positive messages
and educate
 - q. Billing alternatives for bar dues payments (e.g., credit
card)
 - r. Plastic bar membership card
 - s. Computerized legal research
 - t. Discount office services and supplies
 - u. Law library
 - v. Meeting space rental
 - w. Model legal forms (fee agreements, etc.)
 - x. Personal assistance programs (alcohol, substance abuse,
counseling services, stress management)
 - y. Quality of life committee or programs (e.g., child care
leave, sabbaticals, family leave)

- z. Awards programs/Social events
- aa. Research surveys
- bb. Special masters program
- cc. Judicial polls
- dd. Research projects on administration of justice and other law-related topics
- ee. Information packages for bar associations
- ff. Mailing lists
- gg. Networking publications
- hh. Master calendar of bar events statewide
- ii. Model CLE programs

BAR STRUCTURE AND ORGANIZATION

- 92. To assure Judicial Branch oversight of the legal profession, the total fees attorneys pay to practice law should be determined by the California Supreme Court.
- 93. The unified (mandatory) bar should be retained in California for all current functions (other than the adjudication of attorney discipline cases in the State Bar Court). [vote 13 yes-8 no]
- 94. The unified bar in California should adopt internal reforms to ensure that the organization is more effective and responsive in its communications with and representation of its membership.

ATTACHMENT 3



BAR STRUCTURE AND ORGANIZATION

"The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record."

— California Constitution, Article VI, Sec. 9

"The plan established by California for the regulation of the profession is for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar. It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort."

Keller, et al., v. State Bar of California et al., 110 S.Ct. 2228, 2235

"The Executive Committee strongly supports the continuation of the mandatory integrated State Bar as the only proven vehicle for furthering the administration of justice while representing the broad interests of both the legal profession and the public it serves."

— Judith A. Gilbert, Executive Committee, Conference of Delegates

K. BAR STRUCTURE AND ORGANIZATION

1. INTRODUCTION

Earlier sections of this report considered the trends affecting the legal profession; the regulation of the legal profession, with particular emphasis on discipline, admissions and competence; and the elements of attorney professionalism including public service and improvement of the administration of justice. The primary focus of the Commission is on the obligations of the profession as a whole. These are professional obligations which will not or cannot be met through the random acts of individual lawyers. The culmination of this analysis is the question, "What is the preferred structure for the legal profession?" In addressing this question, the Commission has sought to apply the principle that "form follows function." Earlier sections identify the functions of the profession as a whole. This section considers the structure and organization of the Bar that can best carry out these functions.

The issues addressed below are as follows:

- ♦ What branch of government should have ultimate authority over the legal profession?
- ♦ Should California continue to have a unified bar to which all lawyers must belong or would a voluntary state bar be likely to meet the challenges of the future?
- ♦ If the unified bar is to continue, what structural and organizational changes are needed to meet the challenges of the future?

The last time these issues were seriously addressed was by a committee, known as the Monterey Committee, of the State Bar Conference of Delegates, which in a July 1980 final report recommended that the unified bar continue in California.

2. JUDICIAL BRANCH REGULATION OF THE LEGAL PROFESSION

Recommendation 92: To assure Judicial Branch oversight of the legal profession, the total fees attorneys pay to practice law should be determined by the California Supreme Court.

The independence of the Judicial Branch is a cornerstone of a

free society. The Judicial Branch is a check on the exercise of arbitrary or unconstitutional power by the other branches. The legal profession is an important component of the Judicial Branch. Because lawyers frequently represent unpopular clients and make legal arguments that run counter to prevailing views, the independence of the legal profession is an important aspect of Judicial Branch independence. Without the freedom to challenge legislation or executive action considered unlawful, important rights would be in serious jeopardy. The profession's ability to represent the popular and unpopular client alike, without fear of political reprisal, is akin to the judiciary's authority to decide cases impartially without fear of the political consequences. The Commission was unanimous that the preeminence of Judicial Branch regulation of the legal profession is essential to the independence of the legal profession (reaffirming recommendation 13, above, plus non-discipline functions as well).

The Commission's concern that Judicial Branch regulation of the legal profession be fully assured is based upon past dangers to the profession's independence. In times of great social and political stress, the independence of the legal profession has been subject to attack. Regulation of the legal profession by the Legislative and Executive Branches would provide an opportunity over the long term for restricting this independence to the detriment of the rule of law.

In California, as in other states, regulation of the practice of law has been considered a judicial function over which state supreme courts have inherent and ultimate authority (See, e.g., Hustedt v. Workers Compensation Appeals Board (1981) 30 Cal.3d. 329, 336). The Commission strongly believes that the California legal profession should continue to be regulated by the Judicial Branch and Judicial Branch authority over the legal profession should be strengthened (recommendation 13). Today, lawyers pay virtually the full cost of attorney regulation, including discipline, attorney registration, and other regulatory and professionalism functions. The fees that lawyers pay for attorney regulation are set not by the Judicial Branch, however, but by the Legislature. As referenced in recommendation 17, the Commission believes that these fees should be established by the Judicial Branch, and specifically the Supreme Court.

The most common pattern in other states is for the state Supreme Court to approve the amount of attorney licensing fees, including fees for the unified bar. In about two-thirds of all states, the state Supreme Court approves attorney licensing fees. In 12 unified bar states, the state bar governing board or the members approve fees. In only seven states, including California, does the legislature have final approval for these fees. However, California is the only state in which legislative approval for fees is required every year or two; in the other six states legislative approval is required only when a change in the fee is sought.

A frequently expressed concern about the current unified bar in California is that the State Bar is inhibited in its advocacy on behalf of the Judicial Branch on issues such as court funding because it must seek legislative approval for its fees every year or other year. Some have suggested that the State Bar is less venturesome in its advocacy in years in which a fee bill is needed because of concern about antagonizing powerful Legislative or Executive Branch interests needed for passage.

This concern is not completely unfounded. In 1985, the Legislature adjourned without enacting the fee bill. As a result, the Bar asked attorneys to pay fees voluntarily and petitioned the California Supreme Court to exercise its inherent authority over the practice of law to authorize the Bar to collect licensing fees. The Court deferred action on this petition to give the Legislature an opportunity to adopt a fee bill, which it did early in 1986 after authority for the collection of licensing fees had expired. To assure Judicial Branch regulation of the legal profession, and prevent a recurrence of the 1985 situation, the Commission believes that attorney licensing fees should be determined by the California Supreme Court.

However, if attorney licensing fees continue to be set by the Legislature, at a minimum, the Commission believes that legislative action should only be required when a fee increase is sought. This approach is consistent with procedures applicable to other professional licensing agencies in California that are operated by the Executive Branch in the Department of Consumer Affairs (DCA). For DCA professional licensing agencies the Legislature sets a fee cap which continues until a fee increase above the cap is proposed. The fee is then set by agency regulation subject to review within the Executive Branch. The need to obtain legislative approval every year or two for attorney licensing fees absorbs needless time and energy. Although the Commission recognizes that the Legislature has an interest in the legal profession in much the same way that it has an interest in the courts, the means by which attorney licensing fees are set should be streamlined.

In summary, the Commission believes that the Supreme Court of California itself should establish the fees that attorneys must pay to practice law. This is an important aspect of Judicial Branch regulation. If the Legislature continues to play a role in setting attorney licensing fees, approval should only be required when a fee increase is sought.

3. A UNIFIED BAR IS THE STRUCTURE OF THE LEGAL PROFESSION BEST SUITED TO RESPOND TO THE CHALLENGES OF THE FUTURE

Recommendation 93: The unified (mandatory) State Bar should be maintained with its current functions (other than the State Bar Court) and limitations.

Recommendation 94: The unified bar in California should adopt internal reforms to ensure that the organization is more effective and responsive in its communications with and representation of its membership.

a. Overview

Earlier in this report, a variety of future trends that are likely to challenge the legal profession were identified. Major tasks for the future include:

- ♦ Maintaining high quality systems of admissions and discipline and enhancing the competence of attorneys;
- ♦ Maintaining professionalism and providing public service in the face of increasing pressures to view the practice of law as simply a business, and of declining collegiality among lawyers and increasing fragmentation of the profession;
- ♦ Improving the administration of justice in the face of increasing demands on the courts and declining court resources;
- ♦ Assuring access to the justice system and to legal services for the many citizens who cannot afford counsel or are intimidated by or alienated from legal processes; and
- ♦ Responding to the needs of lawyers in a rapidly changing environment for important assistance and services.

In considering a preferred structure for the legal profession, the Commission's guiding principle was professionalism. The Commission is convinced that professionalism is not simply avoiding disciplinary infractions; nor is it pious platitudes to be defined or ignored according to the individual conscience or whim of California's more than 144,000 attorneys. Rather, as discussed earlier, the legal profession as a whole has obligations which cannot or will not be performed by the random acts of individual attorneys.

This section of the report applies the Commission's understandings of the trends facing the legal profession and the obligations of professionalism to the issue of a preferred structure for the profession. The Commission is convinced that a unified State Bar, to which all lawyers belong, is the structure which is most likely to meet the needs of the profession and the public in the coming decades.

b. The Unified Bar in the United States

(1) History of the Unified Bar in the United States

The State Bar of California is an unified (integrated, or mandatory) state bar. The unified state bar structure can be identified by two distinct features: (a) the State Bar is a public body created by governmental action (Constitution, court rule or legislation); and (b) as a condition of practicing law in the state, all attorneys are required to be members of and pay dues to the State Bar.

The unified bar structure in the United States was modeled after the unified bar system in Canada.¹¹² In 1912, Herbert Harley, the co-founder and first executive director of the American Judicature Society, visited Toronto and learned of the unified structure of the Law Society of Upper Canada.¹¹³ Mr. Harley brought this idea home with him and began a national bar unification movement in the United States by suggesting the creation of unified state bars in a speech in 1914.¹¹⁴ In 1918, the American Judicature Society published a suggested unified bar act.¹¹⁵ In 1920, a committee of the American Bar Association appointed to study state bar organization recommended the creation of unified bars.¹¹⁶ And in 1921, the first unified state bar was formed in North Dakota.¹¹⁷

The unified bar structure was seen as a way to help the legal profession better meet its responsibilities to society. These responsibilities include protecting the public from unethical or incompetent lawyers by improving attorney admissions and discipline.¹¹⁸ However, it was also recognized that the legal profession is unique and has responsibilities to the state and the public that extend beyond simple self-policing. These additional professional responsibilities include supporting the provision of legal services and accessibility of justice for those who have limited financial resources¹¹⁹ and improving the administration of justice.¹²⁰ Consequently, one of the principal goals of bar unification was the creation of a structure that would assist the legal profession in meeting its responsibility to improve the administration of justice.

California established its unified bar in 1927 by legislative act.¹²¹ This act created a public corporation known as the State Bar of California which was to be organized by the Chief Justice of the California Supreme Court and others appointed by him.¹²² It authorized the State Bar, with the approval of the Supreme Court, to fix the qualifications for the admission to practice, adopt Rules of Professional Conduct, and conduct disciplinary proceedings.¹²³ The act also gave the State Bar the authority to aid in the advancement of the science of jurisprudence and in the improvement of the administration of justice.¹²⁴ Reflecting the goals of the bar unification movement in general, the first

President of the State Bar of California, Joseph Webb, summarized the purposes of the State Bar Act to be:

- a. To secure a better administration of justice.
- b. To place full responsibility upon the bar, both as to qualifications for admission to practice and conduct after admission.
- c. To see that every lawyer recognizes that one who practices law holds a position of public trust and that his primary duty is to be faithful to that trust.
- d. To organize the bar upon an efficient and businesslike basis.¹²⁵

There are now unified state bars in thirty-two of the 50 states and in the District of Columbia.¹²⁶ The most recently formed unified bar is the Hawaii State Bar, formed in 1989.

(2) Functions of the Unified Bar in the United States

Unified state bars in different states perform a wide range of different functions. In some states, including California, Florida and Texas, the state bar performs a wide variety of both regulatory and non-regulatory activities, including administering attorney discipline, a client security fund, and MCLE. This is the pattern for most unified bars on the West Coast. The unified bars in California, Oregon and Washington all conduct attorney discipline functions as do those in Nevada and Utah.

In other states, such as Michigan and Wisconsin, the unified bar is responsible for very few regulatory activities; admissions, discipline or other regulatory functions are performed by a Supreme Court agency. Some unified bars that do not operate the licensing system collect fees for the Supreme Court licensing agency. In states with a supreme court licensing agency, the Supreme Court typically appoints a disciplinary board that operates the agency. Unified bars that perform few regulatory functions primarily focus on professionalism concerns, e.g., proposing rules of professional conduct, providing ethics advice and improving the administration of justice, including their legislative program. No unified bars perform only regulatory functions. In a few states, there is both a unified and voluntary state bar; however, even in these states the unified bar conducts professionalism and administration of justice activities.

The unified bar is not unique to the United States. In most other common law jurisdictions, the bar is also unified. As noted earlier, the law societies of the Canadian provinces to which all lawyers belong were the early model for the unified bar of the

United States; and the Canadian law societies are based on those in the United Kingdom.

c. The Unified Bar: An Old Idea with Fresh Underpinnings

A criticism of unified bars is that they are neither "fish nor fowl." Sometimes referred to as "sui generis," they are neither simply government agencies nor professional associations. They perform regulatory functions as well as serving the professional interests of attorneys. This difficulty in characterizing unified bars has been a source of criticism and concern. There are those who want bright lines between government and the private sector. In a unified bar, the duality of roles creates a tension. For some this is a problem; for others this is seen as a source of vitality, a recipe for avoiding stagnation and for continually challenging the profession with the ideals of professionalism and public service.

Today the dichotomy between the public and private sectors is increasingly viewed as obsolete. This is a key concept in the movement to "reinvent government."¹²⁷ As the authors of Reinventing Government state:

"Most people have been taught that the public and private sectors occupy distinct worlds; that government should not interfere with business, and that business should have no truck with government. This was a central tenet of the bureaucratic model." (Osborne and Gaebler, Reinventing Government (Plume Books, 1992) at 43)

They note that there are still critics "who believe that government and business should be separate," which they refer to as an "outdated mind set" (Ibid.). They point out that most people consider only two sectors - public and private - and ignore the vast "third sector" which includes organizations run by volunteers and nonprofit organizations.¹²⁸

A premise of this new model is that the public sector will often define its role as a catalyst and facilitator. This means that it will define problems and then assemble resources for others to use in addressing those problems. One function of joint public-private ventures is to strengthen government's capacity to deliver services by providing donations of personnel. (Marc Holzer and Kathe Callahan, "Fiscal Pressures and Productive Solutions," Public Productivity and Management Review (Summer 1993) pp. 331, 340)¹²⁹

Those proposing to reinvent government were not focused on the unified bar in their discussion of this new model of catalytic government. However, the unified bar structure is an organization

which, as they propose, blurs the lines between the public and private sectors and is able to bridge the gap between government and the legal profession to facilitate public-private cooperation and accomplish important public and professional objectives. No state agency could harness the tens of thousands of hours of volunteer attorney time that is devoted to the efforts of the unified bar. No state agency could serve as a catalyst for the efforts of local bars in a way that the unified bar does.

Some of the results of this creative tension between public and professional concerns and the dynamism produced by joining government and the volunteer efforts of the legal profession are evident in the past work of the State Bar. This is most particularly seen in the State Bar's reforms of the attorney discipline system from a nightmare of the mid-1980's to the model for the country, a change that occurred in a remarkably short time. No state agency of which the Commission is aware has a similar record.

Nor does the Commission majority concur that the presence of inefficiencies within the Bar structure constitutes a rationale for eliminating the unified bar. As directly reported in the DEC report, Judge Alarcon's committee heralded the Bar's work in eradicating the investigations backlog as a "success story." In this respect, spurred by public demand for reform, the Bar aggressively undertook to identify its own shortcomings and revamp its entire system -- an accomplishment of which all California attorneys can be proud.

It should come as no surprise that with the completion of this gargantuan task, greater efficiencies and staff reductions can now be achieved. The fact that the Bar reformed its discipline structure, and five years later commissioned DEC to evaluate the new system and identify potential cost savings is a credit to, rather than an indictment of, the current Bar structure. Even as this report is being written, the Bar Board of Governors is actively pursuing and implementing plans to streamline every discipline office and reduce the number of permanent staff.¹³⁰

4. INTERRELATIONSHIP BETWEEN CORE COMMISSION THEMES AND THE STRUCTURES QUESTION

a. Discipline, Admissions and Competence

Recommendations in the Public Protection Area with Structural Implications Discussed Elsewhere in This Report

- ♦ **Discipline should continue to be a function of the Judicial Branch of government and that fact should be emphasized to the public.**

- ♦ The State Bar should continue to administer the attorney discipline and admissions systems, except that the State Bar Court should be transferred to the Supreme Court.
- ♦ The budget of the discipline function of the State Bar should be approved solely by the Supreme Court.
- ♦ The Chief Trial Counsel should be appointed by the Supreme Court without confirmation by the Senate.
- ♦ The profession as a whole has an obligation to maintain and improve the competence of the profession; and programs to maintain and enhance attorney competence should be a function of the State Bar.
- ♦ Admissions and discipline are core Judicial Branch functions relating to the regulation of the legal profession. These functions should be unambiguously within the Judicial Branch.

The Commission believes that the integrity of the discipline system as an arm of the Supreme Court should be made more complete. Today, the Supreme Court appoints the State Bar Court judges and disciplinary investigations, prosecutions and decisions are insulated from control of the State Bar, which is as it should be. However, the Chief Trial Counsel is now confirmed by the Senate, and the Legislature approves the fees to support the disciplinary system and its budget.

As discussed earlier, the Commission recommends that the budget and fees for the discipline function of the State Bar should be approved solely by the Supreme Court. In addition, the Chief Trial Counsel should be appointed by the Supreme Court without confirmation by the Senate (see recommendation 18, above). The top prosecutor of the discipline system should be insulated from political pressure from the public, members of the bar, and elected officials, in order to provide effective and fair enforcement of the rules and provisions governing the conduct of attorneys.

Presently the State Bar Court is part of the State Bar of California, even though the Supreme Court appoints the judges of the State Bar Court and reviews all of its decisions in admission, suspension, disbarment, and reinstatement cases. The Commission majority sees benefit, particularly in public perception, in institutionally separating the prosecutorial and adjudicatory functions of the discipline system. Consequently, the Commission recommends that the State Bar Court be directly administered by the Supreme Court or the Administrative Office of the Courts

(recommendation 16). This may assist in strengthening the judicial role in attorney regulation and thereby increase public confidence in the system.

The Commission believes that the investigation and prosecutorial functions of the attorney discipline system should remain with the State Bar of California (recommendation 14). The State Bar currently is responsible for this function as an administrative arm of the California Supreme Court. The system is considered a model for the country. The State Bar has addressed effectively legitimate criticism of the discipline system and has responded quickly with reforms. In general, the Commission endorses the wisdom of the saying, "If it ain't broke, don't fix it."

The Commission sees substantial advantages in admissions, discipline, competence and professionalism functions being lodged within a single agency, the unified bar. These functions are interrelated and overlap, and are best addressed together.

For instance, admissions and discipline both relate to who will practice law. Discipline often is followed by application for readmission after a suspension or disbarment. Conditions may be attached to readmission, and the overall inquiry is similar to the moral character inquiry of the admissions process. The admissions process is designed to assure a certain level of professionalism and competence. Rules of professional conduct are subject to testing on the bar examination. Admissions moral character inquiries also relate to professional standards.

Similarly, discipline and professionalism are closely related. Professional standards, both rules of professional conduct and those set out in statute, establish disciplinary standards. Every new or amended professional standard raises issues of practical enforceability as a disciplinary violation. In addition, most inquiries and complaints to the discipline agency pertain to competence and professionalism concerns that fall short of disciplinable misconduct, e.g., failure to return phone calls. Although these typically are not grounds for discipline absent aggravating circumstances, it is difficult if not impossible for the discipline system and the bar to turn a blind eye to problems which clients consider serious.

As a result, the discipline system has developed programs jointly with the professionalism and client relations offices of the State Bar to address minor disciplinary issues that clients find troubling. These include Ethics School and lawyer-client mediation for minor disciplinary infractions. In the future there are likely to be even greater demands than at present for disciplinary agencies to better address competence and professionalism problems that fall short of serious discipline. A professional licensing agency that can address the continuum of admissions, discipline and competence issues, including

preventative measures, will be in a better position to respond appropriately to these public concerns.

Performance of the discipline function also makes more effective the non-disciplinary functions of the unified bar; for example, the types of problems identified by the discipline system can help to focus the bar's competence, professionalism, and member communications activities.

A multitude of regulatory functions are now performed by the unified State Bar. These could pose a burden for the Supreme Court, were it to undertake them. These functions include maintaining membership lists; administering and monitoring the IOLTA program; administering the MCLE program; certifying law corporations, legal specialists and lawyer referral services; administering the fee arbitration program; administering the program on practical training of law students; and billing and collecting licensing fees.

In 1988 the Select Committee on Supreme Court Procedures (the Richardson Committee) appointed by the Chief Justice found that the Supreme Court was devoting too much time to State Bar matters. At that time the Supreme Court was reviewing individually each disciplinary case. Subsequent creation of the State Bar Court relieved the Supreme Court of this burdensome task, so that now the Supreme Court only reviews discipline cases based on a petition for review of a recommendation of the Review Department of the State Bar Court. Were the Supreme Court to take on the administration of the multitude of attorney regulatory tasks, it could be back in the same or worse position criticized by the Select Committee. The Commission saw no basis for suggesting that the Supreme Court itself take on these functions. Performance of these functions by the profession is a service to the Judicial Branch and the Supreme Court.

The Commission's proposal for mandatory professional liability insurance also illustrates the advantages of a unified bar for responding to the evolving needs of the profession and the public (recommendation 23). Successful implementation of this proposal would require assurance of a reliable source of insurance for the profession. Oregon is currently the only state in which lawyers are required to maintain professional liability insurance. In Oregon, the mandatory insurance program is operated through an insurance fund administered by the unified State Bar of Oregon. This fund assures a reliable source of insurance through "hard" and "soft" insurance markets. Regardless of whether the unified bar operates an insurance fund for a mandatory insurance program, constant oversight by an agency of the legal profession will be needed to assure a reliable source of insurance.

Other considerations also figured into the Commission's recommendation to maintain the attorney discipline and admission

systems in the unified bar. Regardless of who administers the attorney discipline system, the attorneys of California will fund it. In California, all professions pay for their professional discipline systems. This is the predominate pattern of attorney discipline systems in other states as well. There does not appear to be any evidence that moving the discipline function to another agency would be any more cost-effective.

Although the Commission has not closely examined the costs of the attorney discipline system, a committee appointed by the President of the State Bar recently did and made recommendations to reduce certain costs (see Report of the Discipline Evaluation Committee to the Board of Governors, supra). There may be some ability to reduce the costs of discipline, but the Commission doubts that a high quality professionalized discipline system such as is now operated by the State Bar could be run by any other agency for substantially less. That agency, like the State Bar, would have to compete in the ¹³¹same labor market for attorneys, investigators and other staff.

Some other states operate less expensive attorney discipline systems. However, these use an outmoded structure that relies heavily on attorney volunteers for screening, investigation, prosecution and/or hearing discipline cases. In light of the size of the California bar and past failure to keep pace with the volume of work under the volunteer-driven system, this structure is not a viable option. Moreover, these system have been criticized by the ABA's recent disciplinary evaluation, the McKay Commission, which recommended that these functions be performed by professional staff rather than volunteers (see Report of the Commission on Evaluation of Disciplinary Enforcement, supra).

The Commission is convinced that the future of attorney discipline looks more like the California system rather than like the volunteer-directed systems in other states. The future will bring reforms in the attorney discipline systems in other states which will increase the costs of those systems. For example, a recent external review of the New Jersey attorney discipline system concluded that volunteer functions should be performed by professional staff and that the cost of a professionally staffed system would be about the ¹³²same per lawyer as the California attorney discipline system.

b. Services to the Public and Professionalism

The Commission believes that a unified bar is the preferred structure for addressing the issues of professionalism that are likely to arise in future decades and for carrying out the public service obligations of the legal profession as a whole.

As discussed in Part H on Services to the Public and

Professionalism, the legal profession faces grave challenges, including whether it will continue as a distinct profession with the professional responsibilities that this traditionally has entailed. As detailed above, there is a growing tendency to see law as a business, focused on making money to the exclusion of public services. Lawyers are questioning their own ability to perform as professionals and decry the lack of professionalism, collegiality, and civility evidenced by other members of the bar. Concern for holding onto the traditional core of professional values and obligations into the future is heightened by the large numbers of lawyers in California and the growing diversity of attorneys and their practices.

The Commission believes that, as in the past, the major counter-force in the future to these forces of fragmentation is the common core of values, aspirations and obligations that identify the legal profession as a distinctive profession. This core goes beyond the lowest common denominator of simply avoiding discipline or funding a discipline system to root out the worst offenders. The Commission believes that this core of professionalism includes: (1) ensuring attorney competence; (2) maintaining high standards of integrity, civility and ethics; (3) encouraging access to legal services and the legal system; (4) providing services to the public; (5) regulation within the Judicial Branch of government; and (6) providing leadership on significant issues which impact the general welfare of society and which relate to improving the administration of justice and defending and ensuring constitutional rights and obligations (recommendation 56, above).

These elements of professionalism focus not simply on the lawyer's obligation to clients, but also as an officer of the court and as a professional with a unique obligation to maintain the rule of law. These are, of course, the individual obligations of every member, but they are also the obligations of the profession as a whole, since they will often have little meaning without an organized effort to implement them. Consequently, the Commission believes that the core elements of professionalism have implications both for the conduct of individual lawyers and for the structure and organization of the legal profession in California.

One of the functions of a statewide organization for the legal profession should be to maintain the community of legal professionals. This community must be an inclusive one. Both the society and the profession will be even more diverse in the future than now. This organization must knit together the diverse elements of the Bar to affirm the common core of professional responsibility and to interpret and to apply those values and obligations to the issues facing the profession and the society. The unified bar is in the best position to accomplish this since it includes every segment of the bar. Commission research indicated that voluntary state bars tend to be underrepresentative of women, minority and government attorneys.¹³³ In a fast changing

profession, it is important that all segments of the bar are "in the boat"; the unified bar keeps all lawyers in the professional communication network.

Some argue that attorneys unhappy with a unified bar should have the option of leaving and belonging to no professional organization and contributing to none of the common obligations of the profession except the bare minimum of disciplinary enforcement. However, there is another course more consistent with the obligations of the profession: to remain within the organized bar and make one's voice heard and participate in the ongoing dialogue within the bar about the role of the profession, of individual attorneys, and of the organization.

The State Bar may not have always done the best job of maintaining a communication forum for debate within the profession. However, as a structure, the unified bar appears superior for maintaining the core values of the profession for a time of increasing fragmentation and diversity than alternatives that would encourage the profession to break apart into contending camps which have little incentive to communicate or to resolve the evolving issues of the profession in a changing society.

One of the professionalism functions the unified bar should continue to perform is to recommend rules of professional conduct to the Supreme Court. The unified bar provides an effective mechanism to aggregate and reconcile the views of the diverse segments of the bar and to refine rule proposals for submission to the Supreme Court for approval. Reconciling the duties of loyalty owed both to the client, the court and the public is a constant and difficult task. The mandatory bar is in the best position to do this since it reflects the whole profession and is less subject to control by local and special interests. Both the Supreme Court and the profession need the unified bar to perform this function.

In addition, incentives for adherence to professional standards are needed. The professionalism functions of a unified bar should include not only "sticks," such a disciplinary enforcement of professional rules, but also "carrots" that provide inducements for high standards of professional conduct. These should focus on the personal and professional rewards to be gained by modifying less than satisfactory practices. Examples of functions that may provide inducements for high standards of professional conduct include: high quality continuing legal education; mechanisms to facilitate communication among attorneys to share information and solve problems; live and electronic forums and bulletin boards for discussion of professional practice and ethical issues, e.g., promoting Inns of Court programs; member newsletters; section activities; and mentoring programs.

An important professionalism function of a unified bar is to provide incentives and models for public service, including

encouraging and rewarding pro bono service. As a profession whose reason for existence is public service and not simply individual economic gain, the measure of usefulness of a unified bar cannot be simply the perceived or actual benefit to individual members; rather, the rationale must relate to the need to carry out obligations of the profession as a whole which individual attorneys either cannot or will not carry out on their own. A unified bar provides an organizational structure for performing this public service obligation. The unified bar ensures that the financial burden of performing professional obligations of the legal profession are equitably shared. It is unfair to expect that a small group of volunteers should carry all the burdens of the profession.

This is not to say that all functions designed to maintain and enhance the "professional community" should be funded from licensing fees. For some, such as section activities which focus on particular practice specialties, user fees are appropriate. However, functions which are important to maintain and develop the professional community as a whole, including raising standards of professional conduct, should be supported generally by the profession.

It is important to note that the Commission does not view these professionalism functions of the unified bar to be simply "tacked on" to discipline and admissions. The importance of maintaining professionalism places it at the core of the functions of a unified bar. Consequently, the performance of discipline and admissions functions is not the sole or the major justification for a unified bar. Indeed, a number of unified state bars in other states perform virtually no discipline or admissions functions. Rather, their primary role is to fulfill professionalism obligations, including public service and improvement of the administration of justice¹³⁴.

c. Services to and for Lawyers

Recommendations

- ♦ **Services for lawyers that are related to the regulation of the profession, the enhancement of competence, and the protection of the public are part of the mission of the unified bar and where appropriate should be funded from licensing fees**
- ♦ **Services for lawyers that primarily benefit lawyers alone may be provided by the unified bar only if the revenues from providing the service cover the cost of providing it.**

The Commission recognized that there are at least two broad categories of services for lawyers: (1) those related to the regulation of the profession, the enhancement of competence and/or the protection of the public, and (2) those which primarily benefit attorneys alone.

An example of a service that is closely related to the regulation of the profession and public protection is attorney assistance programs for substance abuse and stress. Substance abuse and stress are major contributors to attorney discipline problems. An example of a service that benefits attorneys but also protects the public is professional liability insurance; if mandated as proposed by the Commission, this would also relate to the regulation of the profession (recommendation 24).

By the same token, continuing legal education is a service that enhances competence, and MCLE requirements pertain to attorney regulation. Improvements in the administration of justice can serve lawyers by making the practice of law easier and more efficient; these can also be of substantial benefit to the public by increasing access to justice and reducing the cost of legal services. The Commission viewed these services as squarely within the mission of a unified bar.

An advantage of a unified bar is that it can offer services to all lawyers. This means that important services are made available to all attorneys in the state. Without a unified bar these may only be available to lawyers who belong to a voluntary state bar or a large local bar association. Universal availability of a service is particularly important if it is related to the regulation of the profession, the enhancement of competence, or the protection of the public. The availability of an ethics hotline, affordable malpractice insurance, or a substance abuse program, for example, should not depend on whether an attorney in need of the program belongs to a particular bar association.

The Commission, however, had a different view of services that for the most part benefit lawyers alone. Examples of such services would be credit cards, credit unions, and retirement plans. The Commission saw no problem with a unified bar offering such services, but believed that these should be self-supporting with no licensing fees used to provide them.

Commission research concerning the services offered by unified and voluntary state bars found few differences between them in the types of services offered members. The major difference appeared to be in the role that services played in the organization. Voluntary bars typically seek to recruit and hold members based upon the services offered. Because voluntary bars either do not provide services to non-members, or do not provide them at the same cost, services act as an incentive to join. Unified bars, by way of contrast, provide services to all lawyers, since all belong;

consequently, their services may be less appreciated because the element of exclusivity is absent. Nevertheless, there appear to be few differences in the types of services that unified and voluntary bars provide and there do not appear to be conceptual or other reasons for a unified bar to provide different services than a voluntary bar, so long as the services unrelated to professional obligations are not funded from licensing fees.

A major complaint about the State Bar is its perceived unresponsiveness to the practical needs of attorneys. There does not appear to be any reason why a unified bar cannot be more responsive. Commission analysis indicated that some unified bars such as Wisconsin appear to do a better job of identifying and providing services desired by their members. The Wisconsin State Bar regularly conducts surveys and focus groups of members to determine which benefits and services to offer, and it has a member relations committee which has direct responsibility for member benefits and services.

From member participation in Commission focus groups, we know that members are interested in providing input to the State Bar and would like to have the State Bar reach out to them on a regular basis for their opinions. A program that seeks to identify on a regular basis the needs of California attorneys and to respond effectively to those is likely to create better relations with the members and better services that will benefit both lawyers and the public.

d. Administration of Justice Resources

An important aspect of professionalism is the obligation of the legal profession to improve the administration of justice. This includes a variety of functions including:

- ♦ Assuring the fairness of the judicial system;
- ♦ Assuring the quality of the judicial system;
- ♦ Increasing the efficiency of the judicial system;
- ♦ Assuring adequate funding and resources for the judicial system;
- ♦ Increasing access to the judicial system and other dispute resolution processes;
- ♦ Increasing access to legal services.

The Commission believes that a unified bar is the most appropriate structure for carrying out the obligation of the profession as a whole to improve the administration of justice;

only a unified bar harnesses the resources and energy of the whole profession in this objective.

The Commission identified potentially serious problems in the justice system of the future that will need to be addressed. These include greater demands by the public on the legal system to solve disputes without a proportionate increase in court resources; the use of more court resources by the criminal system to the detriment of civil matters; a large and growing unmet need for legal services, particularly by low and moderate income individuals; and, potentially, growing public disillusionment with the ability of the justice system and the legal profession to resolve disputes effectively and expeditiously.

As noted in the above section on Administration of Justice Resources, these are not preferred scenarios. A premise of the Commission's work is that appropriate policy responses to these scenarios may avoid some of the feared undesirable consequences. The possibility of dire consequences is a warning to the profession that a fair, accessible, and effective justice system requires action by the whole profession, in addition to the actions of individual lawyers.

Moreover, not all scenarios are grim. Advances in technology promise more efficient legal practices, and the leveling of the playing field between large and small firms and sole practitioners, as well as less expensive dispute resolution processes; a scarcity of judicial resources may result in more appropriate and less complex dispute resolution processes, and may change the role that many lawyers play from advocate in an adversary system to facilitator of the parties' own resolution of disputes; new structures for legal practice and the resolution of disputes may provide greater access to legal services and to dispute resolution processes to those previously unable to afford them.

However, negative scenarios will not necessarily be transmuted to good ones by chance. The Commission believes that a unified bar to mobilize the resources and talents of the legal profession will be needed even more in the future than at present. A unified state bar is needed as a catalyst for improving the administration of justice. This includes identifying trends and issues in the justice system and in the practice of law and formulating appropriate responses. These include (1) crises affecting the courts and profession; (2) problems in the practice of law that result from problems in the justice system; and (3) the inability of the public to obtain needed legal services. This catalyst role includes making the legal profession aware of problems in the justice system and mobilizing the profession to address them. It also includes bringing together governmental and nongovernmental players to forge coalitions to consider and address administration of justice issues.

As noted earlier, organizations that can serve as change agents to bring together the public sector, the private sector, volunteers, and non-profits to address problems will likely be more effective in the future than those which try to go it alone in either the private or public sector - particularly in addressing broad, cross-cutting issues such as those affecting the justice system. (See Osborne and Gaebler, Reinventing Government, supra, at p. 43).

A unified bar is well suited to perform this catalytic role of bringing together government and non-government sectors to address problems in the justice system. Its official status as a part of the judicial branch of government allows it to function more effectively as a participant with other governmental agencies and officials, especially those in the judicial branch such as courts, judges and the Judicial Council. Although unheralded, this is an area in which the State Bar has played a major and successful role. Most of the major court improvement initiatives in recent years in California have originated in the State Bar, often as a result of joint efforts with other participants in the justice system. These include:

- ♦ Trial court delay reduction where the State Bar worked with the Attorney General, the California Judges Association, and the Judicial Council;
- ♦ Trial court reorganization and coordination, which was spearheaded by a State Bar president and a joint taskforce that included judge members;
- ♦ Court-related alternative dispute resolution for which the State Bar developed a legislative proposal with the assistance of judges and worked to develop a successful compromise proposal with the Judicial Council, California Judges Association, California Trial Lawyers Association, local bars, ADR providers and others;
- ♦ An ADR pledge campaign for lawyers and businesses: the attorney pledge program is run through local bars with State Bar support; the business pledge program is co-sponsored with the California Chamber of Commerce, the California Manufacturers Association, the American Corporate Counsel Association and the California Dispute Resolution Council;
- ♦ The Civil Discovery Act of 1986, which was a product of a State Bar/Judicial Council Joint Commission on Civil Discovery;
- ♦ A series of colloquia convened by the State Bar to

bring together a broad cross section of the participants in the justice system - judges, prosecutors, police officials, defense lawyers, civil practitioners and court administrators - to identify the problems in the justice system and propose solutions to address them; some of the initiatives described above resulted from these colloquia;

- ♦ A statewide bench/bar coalition, in which the State Bar is one of the conveners, to coordinate the court improvement activities of the legal profession and the courts.

These are important initiatives. There will be even greater need for the integrated bar to play this catalytic role in the future.

A unified State Bar also gives the legal profession official stature in the governance of the Judicial Branch which would be unavailable under any other structure. Under the California Constitution (Art.VI, §6), the State Bar designates four of the 21 members of the Judicial Council. This affords the legal profession a direct voice in the governance of the Judicial Branch of which it is a part and the rules of court and standards of judicial administration promulgated by the Council.

The unified bar also gives the legal profession an official role in the judicial selection process. By statute, the State Bar appoints members to the Judicial Nominees Evaluation Commission (JNE Commission) which reviews the qualifications of judicial candidates proposed by the Governor (Govt. Code sec. 12011.5). As noted earlier, the Commission majority favors selection of judges on merit alone (recommendation 70). The closest approximation to merit selection in the California judicial selection system is the role which the State Bar Judicial Nominees Evaluation Commission now plays in reviewing judicial candidates. This review by the State Bar JNE Commission provides a deterrent to a Governor proposing substantially unqualified judicial candidates, and constitutes an important role for the profession to preserve.

Another critical aspect of the profession's role to improve the administration of justice is to bring the expertise of the profession to bear on legal policy issues raised by legislation and court rules. The unified State Bar is directed by statute to work with the California Law Revision Commission on law reform (Govt. Code §8287). Based on this authorization, the State Bar has worked closely with the Commission to improve California statutes; for example, the State Bar was instrumental in the Law Revision Commission's recent revision of the Probate Code.

Each year, thousands of hours of volunteer attorney time are

devoted to review of legislation by State Bar entities, especially the Sections. Most relate to the practice of law, court procedures, or issues in which a segment of the Bar has particular substantive expertise, e.g., family law, probate, corporations. In addition, a high proportion of the legislative proposals made by State Bar entities, most notably the Conference of Delegates and to a lesser extent the Sections, are adopted. The State Bar's active role has aided the Legislature and its greatly reduced staff by providing advice on drafting and technical corrections. This also affords the practicing bar input into improving the functioning of the legal system through legislative enactments that their own practice experience generated. The leadership of the Sections, the Conference of Delegates and many of the local bars in the state have asserted their support for the maintenance of the unified bar in order to best carry out these activities.

The serious and growing problems of access to justice, particularly for the poor and near poor, have been described in the earlier section on Administration of Justice Resources. Only a unified bar ensures that the whole profession is enlisted to address problems of lack of access to legal services and the justice system.

A concrete contribution to the provision of legal services which the unified Bar now makes and should continue to make is administering the Interest on Lawyers' Trust Accounts (IOLTA) Program through the Legal Services Trust Fund. The Trust Fund has forged a direct link between the State Bar and legal services providers, giving the profession a more direct stake in adequate legal services programs. For example, when lower interest rates shrunk the IOLTA fund, the State Bar sought to develop additional sources of income for legal services. IOLTA, of course, does not exhaust the obligation of the legal profession to make counsel available to those who cannot afford it. Stimulation of pro bono services is one important option that should be pursued, as well as other vehicles to regularize funding for legal services programs. Programmatic and staff support are essential components of the Bar's legal services effort, e.g., promoting and developing models of pro bono service.

Only a unified bar ensures that all lawyers at a minimum contribute to funding and implementing solutions to lack of access. Commission analysis of other unified and voluntary state bars indicated that the provision of legal services is an obligation that unified bars generally take more seriously than do voluntary state bars. As a general rule, the larger unified bars, including California, have a long history of involvement in and support for legal services programs for the poor and attorney pro bono work. Their work in these areas tends to be well developed and funded, often with offices or departments devoted to the promotion and support of legal services and pro bono efforts. In contrast, larger voluntary state bars, with a few exceptions, tend to do

relatively little and devote few staff and little ongoing programmatic support for legal services. Their roles have tended to be more as followers than leaders, often being prodded by local bars or legal services programs to be more active in this area.

The unified bar is also better able to play a public protection role in the provision of legal services. For example, the State Bar today, pursuant to statute, regulates and certifies lawyer referral services. This activity reduces the likelihood that legal consumers will be misled or defrauded, while at the same time, helps clients locate lawyers for their legal problems.

The profession also has an obligation to educate the public about the justice system. This is required by Business and Profession Code section 6031(a). Only the unified bar structure can assure that all lawyers contribute to fulfilling this fundamental duty.

The Commission considered whether the public service, professionalism, and administration of justice obligations of the profession as a whole could be met were the only statewide organization of the profession a voluntary state bar association. The Commission majority concluded that they could not.

First, a substantial percentage of the California legal profession would never join a voluntary state bar. Commission analysis estimated that at best 50% of the active attorneys in California would join a voluntary state bar and the percentage could be substantially lower. The Commission analyzed the membership rates of voluntary state bars in several large urban states. Illinois and New York, for example, have long-established voluntary state bars to which half or less than half of the active lawyers in the state belong. Those states have large metropolitan bar associations to which many lawyers give first allegiance, although some, of course, are not members of any bar association. Furthermore, a number of California law firms and agencies that used to pay the bar fees and dues for their attorneys no longer do this. In addition, California attorneys have nearly the lowest percentage of membership in the American Bar Association of any state in the Union (32%) and this has dropped from 34% in 1993. These factors left the Commission pessimistic that a voluntary State Bar in California would be joined by even half of the attorneys in the State.

Second, a voluntary state bar is not likely to be broadly representative of the profession for additional reasons as well. Based on an analysis of voluntary state bars, it is likely that a voluntary state bar would be underrepresentative of women, minorities, and government lawyers.¹³⁵ Voluntary state bars tend to require a greater financial commitment for participation, e.g., not reimbursing volunteers for travel expenses to attend meetings, which can make it difficult for attorneys without large incomes to

participate. There was also substantial concern that a voluntary state bar would be dominated by powerful attorneys, big firms, and large local bar associations and would neglect the interests of attorneys outside of major metropolitan areas.

A majority of Commissioners also believes that a voluntary state bar would be limited in its ability to successfully play a statewide leadership and coordination role for the profession in administration of justice and professionalism issues. There are presently 240 voluntary and specialty bar associations in the state. Voluntary state bars are inherently in competition with local bars for members and dues. As a consequence, cooperation and collaboration between and among organized bars become difficult. This factor limits a statewide bar association's ability to lead or coordinate on important issues statewide. They tend to be but one voice among a number of contending voices within the profession in the state. In the Commission's comparative analysis, more legislative conflict between the state bar and local bars was reported in states with voluntary state bars.

An argument made in favor of a voluntary state bar is its freedom from the constraints of the Keller case. However, Keller appears to impose few restraints on unified bar activities to improve professionalism, competence, the courts, and the justice system. It is primarily when a unified bar seeks to go beyond this core mission into controversial social or political issues not directly related to attorney regulation or the administration of justice that Keller is legitimately invoked.

In addition, the Commission found that a voluntary state bar does not promise substantial advantages to those who would like the State Bar to take positions on controversial social and political issues. Commission analysis of other states indicates that voluntary bars are no more venturesome into these controversies than integrated bars, even though they are not subject to Keller constraints. They tend to avoid taking positions on social issues that are highly divisive within the profession, as they are within the society at large (e.g., gun control, abortion and the death penalty; the ABA suffered a drop in membership when it supported abortion in 1992). Even on issues germane to the administration of justice, voluntary organizations often must field competing positions within their ranks and are unable to take a strong position, pro or con (e.g., the experience of the California Judges Association, a voluntary organization, and a recent court unification measure).

Voluntary state bar restraint on these issues is based on a concern that a position on a controversial social issue would divide the profession and threaten its membership base. Indeed, the Commission heard from local bars in California that even though they have no Keller constraints, similar concerns for membership retention limit their ability to wade into controversial waters.

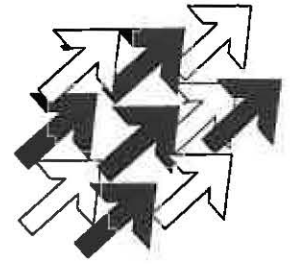
Like unified bars, voluntary state bars tend to stick to legislative proposals and policy positions on which lawyers have particular expertise, particularly those relating to the profession and the administration of justice.

There may also be an additional reason, effectiveness, which restrains the legislative activities of all state bars, whether they are unified or voluntary. The State Bar of California has a good track record of legislative accomplishments in matters relating to the legal profession and the administration of justice. Other state bars, both unified and voluntary, examined by the Commission also reported substantial success in these areas. However, even in matters affecting the courts and the administration of justice, it is our impression that state bars in large complex urban states have not been particularly effective when confronted with state fiscal constraints or highly partisan issues. For example, several state bars the Commission examined have supported merit selection against entrenched political interests, without success.

Moreover, any state bar, whether it is unified or voluntary, must take into account that on many partisan issues, lawyers will often disagree. A state bar is fundamentally unlike a narrowly focused specialty bar such as those representing trial lawyers or defense lawyers which can act single-mindedly on highly partisan issues. It is probably too much to expect of any state bar that it can unilaterally determine the outcome of highly partisan issues. Rather, it is in the areas in which lawyers have the greatest expertise - in the administration of justice and in the intricacies of specific practice areas - in which a state bar has the most to contribute and the greatest possibility of success.

A leadership role in maintaining and improving the justice system, including access to legal services, will probably be even more important in the future than in the past. Regardless of whether one believes that the justice system is deteriorating or is about to enter a renaissance, it is clear that the justice system is under great pressure to make major changes. All Commission scenarios, as well as the scenarios of the Commission on the Future of the California Courts, anticipate major changes in the coming decades. At best, change provides an opportunity for improvement. At worst, it promises gradual deterioration or cataclysmic demise. These are not issues which the profession can take lightly. The future of the legal profession and the rule of law are at stake. The Commission believes that enlisting every attorney in California to improve the justice system and access to justice is more than "nice but not necessary" - it is a basic obligation of the profession as a whole by virtue of the profession's exclusive license to practice law.

ATTACHMENT 4



MINORITY REPORT

"It were not best that we should all think alike; it is difference of opinion that makes horseraces."

— Mark Twain

Whenever one says anything, one wants to explain that one sees the other side.

— Oliver Wendell Holmes, Jr.

L. MINORITY REPORT RE BAR STRUCTURE

No lawyer, and no client, can be indifferent to the disciplinary enforcement system. If the process is performed sensibly and quickly it will provide for lawyers and clients alike a needed service to assure honorable and effective delivery of legal services. If the disciplinary process does not meet that standard, a disaffected public is likely to impose limits upon the process..... Continuity of judicial regulation of the legal profession depends on action taken by the profession itself.

Robert B. McKay, 1990
(Chair, ABA's Commission
on Evaluation of Disciplinary
Enforcement)

At the heart of the debate about the future structure of the legal profession in California are the questions: (1) What structure best serves the public interest, and (2) What structure best serves the legal profession?

The power to admit and discipline lawyers is, at present, constitutionally vested in the California Supreme Court. The Supreme Court, while retaining ultimate authority, has delegated much of its authority in this area to a public corporation, the State Bar. Simultaneously, the State Bar has attempted to serve the professional needs of over 115,000 active Bar members. The State Bar in its current structure has served neither well. The result has been damaging to the public interest and to both the reputation and the interests of California lawyers. For this reason, the mandatory State Bar in its present form should be abolished and a new structure, which could include a voluntary State Bar, emplaced.

The public would benefit under the proposed new structure because the public would have more confidence in the disciplinary system that would be administered directly under the auspices of the Supreme Court; and the public would no longer be required to submit complaints about attorneys to an attorney-run State Bar. Also, the public would have the benefit of a Bar that would be able to express its views regarding the justice system candidly and openly without fear of direct repercussion from the Legislature.

The attorneys of California would benefit under the proposed new structure by having their image enhanced, their dues decreased, and a voluntary bar that would be efficient, responsive, vocal and truly representative of the interests and concerns of its members.

Moreover, as explained below, a serious threat to judicial regulation of the profession would be removed.

The Problems With The Present State Bar

Public dissatisfaction

Public dissatisfaction with the legal profession is exemplified by the front cover of a recent edition of a popular news magazine that depicts attorneys as suited, rapacious rats gnawing successfully at the partially devoured and fractured base of "Justice" (the statue of a blindfolded female figure who, with her sword and balance scale, is often used as a symbol of our legal system).

The public's dissatisfaction extends to the present State Bar. That dissatisfaction includes the following areas of complaint:

- ♦ To register a complaint against an attorney in California; a client must do so through the Bar -- an organization perceived by the public to be run by and for attorneys, and therefore biased.
- ♦ The Bar, as perceived by the public, does not vigorously and timely investigate and prosecute clients' complaints against attorneys, and does not appropriately discipline attorneys in cases in which discipline is warranted.

In short, the public distrusts the present disciplinary system administered by the State Bar. That distrust, if not eliminated, will continue to erode public confidence in our legal system.

As noted in a 1992 report issued by the American Bar Association's Commission on Evaluation of Disciplinary Enforcement,³ neither the legal profession nor the judiciary can afford a weak legal disciplinary system.⁴ When the public perceives such weakness, not only is the public's confidence in our legal system undermined, but also the traditional power of the

¹ Judicial regulation of the legal profession is to be distinguished from self-regulation (e.g., by the Bar).

² See U.S. News & World Report, January 30, 1995 edition.

³ This ABA Commission is commonly known as the "McKay Commission" (after its original Chair, Robert B. McKay); and its 1992 report, entitled Lawyer Regulation For A New Century, is referred to as the "McKay Report."

⁴ See McKay Report, page xvi.

judiciary to regulate the legal profession is placed in jeopardy.⁵ In other words, if the judiciary cannot or will not properly and adequately discipline attorneys (and thereby protect the public), the electorate will empower another branch of government to do so.

Attorney dissatisfaction

Among California attorneys, there is widespread dissatisfaction with, and opposition to, the mandatory State Bar in its present form. The dissatisfaction among attorneys includes the following areas of complaint -- some of which are, ironically, the inverse of points of public dissatisfaction:

- ♦ Bar dues are too high because (a) the Bar has become a bloated, inefficient bureaucracy, and (b) the Bar spends money on activities most members do not either need or support; and if given a choice, most members would not fund these activities with their dues.
- ♦ The Bar is unresponsive to its members' concerns and often treats its members in a high-handed manner.
- ♦ The Bar unfairly and disproportionately prosecutes attorneys practicing law alone or in small firms.
- ♦ The Bar does not provide satisfactory value to its members.
- ♦ The Bar is politically shackled and cannot speak out forcefully on some issues important to its members; and when it does speak out, the Bar often takes a position contrary to the beliefs of some of its members.
- ♦ The Bar's professional staff, not the Bar's members or even the Bar's Board of Governors, directly or indirectly sets the priorities for the Bar and determines what is accomplished.

One does not have to accept all of the above complaints as valid to recognize that serious problems exist regarding the Bar, and they need to be rectified. The solution is to abolish the mandatory Bar as presently structured and preserve its desirable functions in other organizations.

The Solution

Most of the members of the Commission's minority believe the admissions and discipline functions of the present Bar should be moved "lock, stock and barrel" to the Supreme Court -- to become

⁵ See McKay Report, page xvi.

administrative units of the Court. Such a move would make it clear that those functions fall under the Court's auspices; and the Court will, as it should, become clearly responsible for the proper implementation of those functions. As the McKay Commission stated:

The state high court should control the disciplinary process exclusively. It should appoint disciplinary officials who are independent of the organized bar. The Court should oversee the disciplinary system with as much care and attention as it devotes to deciding cases.

The transfer of the admissions and discipline functions to the Supreme Court, as recommended by the minority, may or may not save money. The admissions system funds itself entirely through the fees charged applicants. The discipline system would continue to be funded by an assessment on California attorneys. As noted by the August, 1994 "Alarcón Report" on the discipline system, greater efficiencies can be had.⁷ However, it is the attainment of public trust and confidence, not saving money, that underlies the minority's position. As noted above, the consequences of failing to attain the public's trust and confidence are potentially dire.

A possible alternative: a voluntary bar.

The minority position articulated herein is not contingent upon the advent or promise of a voluntary state-wide bar. However, to the extent the attorneys of California want non-mandatory services to be provided by a bar, such services could be provided by a voluntary state-wide bar. The present State Bar's freedom of expression and ability to maneuver are restricted by the Scylla of the Legislature (that controls Bar dues) and the Charybdis of Keller v. State Bar of California (that restricts the Bar's political and ideological activities). A voluntary bar could advocate what it liked, without fear of running afoul of either a government body that controlled its dues or a constitutional prohibition on its activities.

⁶ McKay Report, page xvi.

⁷ The formal name of the "Alarcon Report" is *Report Of The Discipline Evaluation Committee To The Board of Governors*. It is dated August 27, 1994. The Committee was chaired by Hon. Arthur L. Alarcón, Senior Judge for the United States Court of Appeals for the Ninth Circuit -- hence the Report's informal name.

⁸ Two members of the Commission's minority believe that while the discipline function must be directly administered by the Supreme Court, there may be a very limited role for a mandatory organization to administer various mandated programs (e.g., MCLE).

⁹ 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990).

The pressure and influence of the Legislature on the State Bar, and particularly on the Board of Governors, is legend. For example, in a pointed display of power, in September, 1985, the California Assembly adjourned without passing a Bar dues bill. The president of the Bar had to ask the members of the Bar to voluntarily pay their dues in order to keep the Bar solvent until the Legislature reconvened the next year. The Legislature has affected positions taken by the Board of Governors at least as recently as January 21, 1995, when the Board, reversing an earlier vote after admonition from the State Bar's chief lobbyist in Sacramento, voted to send a proposed Rule of Professional Conduct to the California Supreme Court that would restrict public statements by counsel regarding pending cases.¹⁰

Similarly, the present State Bar continues to be lashed and financially bled by critics who sue the Bar while invoking Keller.

A voluntary bar would not suffer from the aforementioned restrictions imposed by the Legislature and Keller and the concomitant drain on the bar's energy and resources.

A voluntary bar would have to be responsive to its members and give the members true value for their dues and their support. An example of such a large, voluntary bar association is the American Bar Association. That which is virtuous and worthy of preservation in the present mandatory State Bar will presumably be found to be virtuous and preserved in a voluntary bar.¹²

There is evidence that a voluntary state-wide bar, that would

¹⁰ See "Bar Sends Lawyer-Gag Rule to High Court, With Reservations," *Los Angeles Daily Journal*, January 24, 1995, page 3.

¹¹ See, e.g., Brosterhous v. State Bar of California, 29 Cal.App.4th 963 (1994), review granted by Cal. Supreme Crt. on February 23, 1995.

¹² As James R. Edwards, Esq., President of the San Diego Chapter of the American Corporate Counsel Association, put it as he expressed support for a bifurcated bar:

Rather than forcing attorneys to support the current Bar structure, allow them to support those parts of it they each deem worthwhile on a voluntary basis. The good programs will survive and flourish; the bad ones will mercifully terminate.

Letter from James R. Edwards
to John H. McGuckin, Jr., dated
February 24, 1995, page 3.

provide value to its members, would be viable. The Rand Survey done for this Commission in 1994 shows that 73% of respondents were members of a (voluntary) local bar association.¹³ In addition, The Council of Section Chairs believes that the seventeen Sections of the State Bar, which have grown rapidly and in which approximately 50,000 California lawyers voluntarily participate, would probably survive without a unified bar.¹⁴ (Albeit, that Council also believes the sections would probably not "continue to thrive," would be put "at a great disadvantage," and would be diminished in membership and abilities if deprived of their "symbiotic" relationship with a mandatory bar.)¹⁵

The Council of Section Chairs, although in favor of "an integrated Bar structure,"¹⁶ has indicated that were the Sections part of a voluntary bar, it is foreseeable that steps would be taken to maintain the cohesion of the current Sections in a separate voluntary organization that would continue to provide educational services and legislative analysis similar to what is provided today, at least initially.¹⁷ The Council recognizes that models, such as the American Bar Association and the American Medical Association, exist.¹⁸ The Council also recognizes that although the continued viability of the Sections would depend on several factors (such as adequate financial support through dues and program attendance), there could be significant advantages to such a voluntary organization (such as "freedom from Keller restrictions and sometimes competing interests of the Board [of Governors] ").¹⁹

Also, despite the Sections' large voluntary membership, "the Sections have no direct voice in the management and policy-making functions of the State Bar," and the Sections would like to gain

¹³ See Rand's *California Lawyers View the Future*, Question 11 and summary of responses thereto on page 44.

¹⁴ See "Statement of Support for a Unified State Bar in California" from the Council of Section Chairs to the Commission, dated February 6, 1995, pages 1, 3 and 4.

¹⁵ Id., pages 3-6.

¹⁶ See letter from 1993 Chair, Council of Section Chairs, to Ms. Patricia Phillips, dated March 14, 1994, pages 3-4.

¹⁷ Id., page 8.

¹⁸ Id.

¹⁹ Id., pages 8-9.

such a voice.²⁰ In a voluntary bar, the Sections would have such a voice.

Conclusion

All members of the Commission's substantial minority believe fundamental change is necessary to best serve the public interest and to best serve the legal profession.

The Commission's minority has reached its conclusions reluctantly, but the minority believes that because of the present State Bar's size and vested interests in the status quo, the present State Bar is incapable of substantively reforming itself. Minor changes and tinkering with the present structure of the State Bar will not suffice.

This Commission's opportunity to be a catalyst for the effective restructuring of the regulation of the legal profession is historic. The minority fears the opportunity is being missed; and the credibility of the majority report has been called into question.²¹ The consequences of the legal profession not acting more boldly than the majority suggests may imperil judicial regulation of the profession.

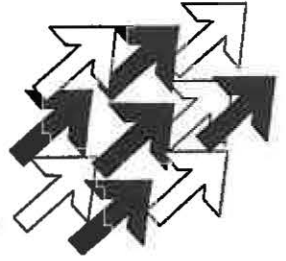
Lee K. Alpert, Esq.
Ms. Wendy H. Borchardt
Michael J. Brady, Esq.
The Honorable Lois Haight
James M. Hall, Esq.

Peter G. Keane, Esq.
A. Peter Kezirian, Jr., Esq.
William R. Nevitt, Jr., Esq.
Peter J. Tennyson, Esq.

²⁰ See Letter from Chair, Council of Section Chairs, to Hon. Candace Decarol Cooper, dated January 24, 1995, page 2; and "Statement of Support for a Unified State Bar in California" from Council of Section Chairs to the Commission, dated February 6, 1995, page 5, fn. 3.

²¹ See minority report regarding Process Utilized By The Futures Commission.

ATTACHMENT 5



BACKGROUND OF THE FUTURES COMMISSION

"It doesn't take much strength to do things, but it requires great strength to decide on what to do."

— Elbert Hubbard

B. BACKGROUND

In 1992, the California Legislature passed a bill (A.B. 687), which would have established a 21-member task force to study alternatives to the current structure of the State Bar of California.* The Governor ultimately vetoed this bill, expressing concern that the contemplated task force did not include representation from the Executive Branch and that "a study broader in scope and representation than that contemplated by this bill is warranted."

However, in recognition of both the Legislative and Executive Branch interest in such a study, the Board of Governors of the State Bar created the Commission on the Future of the Legal Profession and the State Bar ("Commission"). Thirty members were designated to serve, including eighteen members appointed by the President of the State Bar, six members appointed by the Governor, three members appointed by the Speaker of the Assembly and three appointed by the President Pro Tem of the Senate. In addition, a number of organizations appointed official liaisons to the Commission, who regularly attended meetings and participated as non-voting members.

1. MISSION STATEMENT

- ♦ To identify and examine factors which will significantly influence the delivery of legal services and the administration of justice over the next quarter-century; and
- ♦ Develop a vision of the California legal profession of the future which anticipates and effectively meets societal challenges over the next quarter-century; and
- ♦ Recommend to the State Bar of California's Board of Governors strategies and structures for:
 - ♦♦ meeting the future needs of the public and the profession; and
 - ♦♦ in light of those future needs, proposals regarding the best frameworks for the governance of the lawyers of California.

* The original version of this bill as introduced by the Speaker of the Assembly would have abolished the State Bar of California.