

April 18, 2016

Assemblymember Mark Stone
Chair, Judiciary Committee
Members, Judiciary Committee
California State Assembly
1020 N Street, Room 104
Sacramento, CA 95814-5624

Re: A.B. 2878 (State Bar Fee Bill): Support if Amended

Honorable Chair and Committee Members:

INTRODUCTION. As past and present leaders of the California State Bar, and as others with an interest in the Bar's success, we write to express support for the annual fee bill, but to suggest substantial amendments to address systemic weaknesses in Bar governance.

THE NEED FOR REFORM. Reform of the State Bar is urgently needed for many reasons. Most fundamentally, the Bar has a long history of cyclical crisis, reform, neglect, and renewed crisis. The Legislature's many efforts to address Bar governance are evidenced in detailed oversight provisions in the State Bar Act and in the substantial energy this Committee and its Senate peer commit to the effort.

You know of the current controversies concerning the 2014 termination of the Bar's Executive Director, the termination of many of his associates and the welter of lawsuits that followed. Headlines disclose his allegations against the Bar, the leak and then release of the Munger, Tolles & Olson investigation of whistleblower allegations. These controversies have leveled criticism at the Bar, its management, its Trustees and its past two Presidents. Pending controversies include a vote of no confidence in the current Chief Trial Counsel, critical audits by the State Auditor, and serial revelations about neglected complaints of unauthorized practice of law (UPL). Crises at the Bar are revealed nearly daily in the press.

These latest controversies are part of a larger pattern. Nearly every Executive Director of the State Bar over the past few decades has ended his or her service in controversy. Each is replaced by a new leader, charged to be "a new sheriff in town." A show of effort at change is made; the attention of the press, bar and public turn elsewhere; and the Bar slides back into mismanagement, failure to protect Californians, and general dysfunction until a new controversy soon restarts the cycle. This systemic dysfunction derives from the dual mission of the Bar and its short-term, diffuse, volunteer leadership. With respect, we conclude the time has come for a systemic solution to a systemic problem.

THE FAILED CASE FOR A UNIFIED STATE BAR. Unlike every other profession in our State and unlike an apparent trend in sister states of comparable size and diversity toward decoupling legal regulatory and professional organizations, California attorneys have been granted the privilege of self-regulation. Two justifications are offered for this. First, that protection of lawyers from legislative over-reaching is necessary to ensure an independent judiciary, which can only resolve disputes that lawyers bring to it. We, of course, share our national commitment to a strong and

independent judiciary. However, we fail to see how the changes we propose affect this principle. Eliminating lawyers elected by lawyers from a multi-member board, in the Judicial Branch, with a greater percentage of judicial appointees than is now the case, enhances the judicial branch's partnership with the Legislature in overseeing the Bar. That shared oversight, of course, dates from the adoption the State Bar Act in 1927 and court cases upholding the statute. Moreover, our proposal makes other enhancements to Supreme Court oversight of the Bar.

The second justification for lawyer self-regulation has been that lawyers will be more demanding of lawyers and therefore more effective regulators than non-lawyers. Facts defeat the claim. The Bar has never managed its discipline backlog well over sustained periods. Every victory over the backlog is followed by backsliding and new controversy. When its past Executive Director and present Chief Trial Counsel did manage to greatly reduce the backlog for a time, they abandoned reviews to ensure complaining witnesses that cases had been handled properly. That predictably led to a rise in *Walker* petitions to the Supreme Court and an unprecedented grant of dozens of those petitions. The Bar's current failures to credibly pursue UPL are painfully clear. Allegations the Bar more vigorously prosecutes attorneys with less money and influence than others have never been seriously addressed. These tend to be solo practitioners, small-town lawyers, and lawyers of color. The Bar can and should assure Californians that the justice it dispenses is even-handed as well as efficient.

A DISTRACTED REGULATOR. More fundamentally, our years of service to the Bar show us a very different reality. The Board of Trustees is a distracted regulator. It spends much of its energy on professional association matters such as appointments of attorneys to positions of prestige, providing continuing legal education in competition with voluntary bars and for-profit providers while also regulating those providers, conducting an annual conference that draws fewer attendees and requires greater subsidy each year, publishing legal content, selling insurance, etc. For example, the most recent Board of Trustees meeting allowed its Regulation and Discipline Committee (RAD) just one and a half hours at the end of a very long day, while association business dominated much of the remaining time. RAD is just one committee of seven. Many other committees of late have had essentially no agenda items generated by Trustees — only routine items generated by staff. The Bar's most recent annual planning meeting, in the midst of the crises noted above, was rescheduled to allow social interactions with the Chief Justices of California and New York, and allowed for little meaningful planning to effectively regulate legal services. Last year's ambitious strategic planning effort was largely abandoned this year. This institution simply cannot sustain a focus on regulation from year to year. Over the past two years, the Board has spent far more time in closed session addressing personnel, litigation and real estate issues than it has devoted in open session to regulation.

Bar Trustees serve three-year terms and just three lawyer members have sought re-election or reappointment since 2012's SB 163 allowed them to do so. Thus, nearly a third of the Board turns over each year, always including the President and typically including all committee chairs. When two effective committee chairs tried to address this turn-over by detailing provisional work inventories for their successors this year, their inventories were quickly dismissed — one without public discussion. Rather, the Board turned its focus to this year's President's signature project — an annual habit modelled on the work on voluntary Bars

— an effort to persuade the Legislature to invest \$50 million annually to fund legal services to poor Californians. A laudable goal, no doubt, but one that need not preclude attention to the Bar’s regulatory mission.

Moreover, the aspirations of attorney Trustees to attain the coveted title of President of the California State Bar have very destructive consequences. Would-be Presidents often identify themselves from the moment they are seated and begin to compete for an election to be held three years later. The election season is perpetual, with a kick-off resolution in March, nominations in May, elections in July, and transition from one President to the next in the fall.

Then Presidents commonly try to influence the selection of the next and, for decades, the seat has typically been traded off between former presidents of the San Francisco and Los Angeles County Bar Associations. The last President from elsewhere left office a decade ago. Indeed, the Los Angeles County Bar Association regularly trumpets its association with the Bar’s elected leaders to market itself. Bar Presidents appoint all committee chairs, make committee assignments, approve committee agendas, and establish Board agendas. These decisions are often influenced by desire to advance the prospects of would-be Presidents. Time devoted to a committee’s work reflects how much “air time” a President wishes to grant a would-be President as much as needs of the Committee’s work. Thus, the RAD chair becomes a platform from which to run for President rather than an opportunity to lead governance of the Bar’s regulatory function. The annual planning session, conducted by the Vice President, is a de facto campaign event and topic selections and moderator assignments are used to build and maintain a faction and to groom candidates. The fate of an idea is as often determined by its proponent as by its merit — which may explain current leaders’ abandonment of the 2015 strategic plan and committee work plans. Presidential politics produce divisiveness and factionalism that distract from the Bar’s regulatory mission. While voluntary Bar associations sometimes exhibit these behaviors, we do not think they are typical of other regulatory boards, which operate by consensus and seek to develop leaders and to ensure continuity of leadership. Factionalism reached a particularly high point last July when an outgoing President led a faction to win all three offices of the Board and his successor broke with precedent to exclude from committee leadership (and hence the Executive Committee) every trustee who had voted for his competitor. This winner-takes-all ethos that can only intensify factionalism on the Board.

AN END TO LAWYER SELF-REGULATION IS INEVITABLE. Moreover, the national trend away from lawyer self-regulation, distracted by trade association functions, is clear, with several of the largest states having preceded California on this path, including New York (166,000 attorneys in 2013, larger than California’s 163,000), Illinois (62,000), Pennsylvania (50,000), New Jersey (41,000), and Ohio (34,000). Twenty-three states separate judicial branch regulation of attorneys from thriving voluntary State Bar Associations.

Even in States which couple regulation and professional association activities, lawyer self-regulation is under attack. The Arizona Bar has faced legislation to end lawyer self-regulation in each of the last two years. The Nebraska Supreme Court recently separated regulation from professional association activities. Reasons for this trend include not only issues like those noted above, but also antitrust concerns that arise from allowing active market

participants to police admission to the marketplace. The recent U.S. Supreme Court ruling against the North Carolina Board of Dental Examiners' effort to preserve the teeth-whitening market for licensed dentists sparked voices in California who assert an end to lawyer self-regulation is required by antitrust laws. Whether or not they are right, litigation can be expected if California does not voluntarily end lawyer self-regulation. We see no reason to fight the trend and many reasons to join it.

A BETTER PROFESSIONAL ASSOCIATION. Nor is the Bar effective as a professional association, despite the attention its Board pays to those subjects. Its voluntary Sections — which produce valuable intellectual content to educate the profession and the public, to assist this Legislature, and to ennoble the profession — are in crisis. They can no longer afford the Bar's very high overhead and find the demands of the Bagley-Keene Open Meeting Act an obstacle to volunteerism. We cannot support allowing a government agency to operate outside public view, but also see no need for a voluntary professional association to bear such burdens. Legal restrictions on the Bar rooted in the First Amendment and expressed in the *Keller* and *Brosterhous* cases have emasculated the Bar as an advocate for the profession. To cite but one recent example, when the Legislature debated extending sales taxes to services last year, CPAs and other professionals came out in force to express their views, defend their professions and advocate for their clients. Lawyers were silent. The existence of the Bar as a mandatory state-wide professional association silences other voices and the First Amendment silences it.

The lack of an effective state-wide professional association has consequences for California. It means less effective advocacy for a well-funded judiciary and legal services. It serves to undermine — not protect — judicial independence. A private professional association would be a better champion of these values than a state agency hemmed in by the most conservative perspective on what and how it can advocate. For example, workers compensation judges and lawyers associated with the Workers Compensation Section of the Bar do excellent work in identifying appellate decisions which should be published to guide future cases. They cannot file requests for publication in the name of the Bar because the time required for Board review (to ensure the decisions neither are, nor appear to be, pro-labor or pro-management) means they cannot meet short court deadlines for such requests. Thus, they must forego their official connection with the Bar to do their work.

Similarly, Prop. 209's prohibition on state-funded affirmative action has hampered the Bar's ability to advocate for diversity in the profession and for full and fair access to justice for communities of color. Indeed, the Bar recently ended its legal relationship with the California State Bar Foundation under a threat of suit for precisely this reason.

Still further, the Political Reform Act of 1974, Government Code section 1090 and other conflict of interest laws silence important voices a professional association should empower. For example, leaders of legal aid organizations like Public Counsel and Bet Tzedek who serve on the Bar Board are obliged to leave the room when issues affecting such organizations are discussed. A private association can give a seat at the table to such vital contributors to the legal profession.

PROPOSAL FOR REFORM. So, what specifically do we propose to address these problems? First, we do not recommend haste or a failure to solicit input from the Legislature's partners in

regulating the State Bar — the Chief Justice and Supreme Court, and the Governor. We recommend a three-year process, led by the Bar itself, with input from five Trustees appointed by the Supreme Court and as many as four appointed by the Governor, to design and achieve separation. We also recommend that the Bar's Governance in the Public Interest Task Force, which the Legislature first required in 2011, be continued through 2018 to allow input from the Court, the Governor, the Legislature, the profession and the public. Which functions belong in government and which can more effectively performed by a private entity are questions worthy of thorough discussion. Let the Bar study this in 2017 and makes recommendations for legislation in 2018. Moreover, these ideas have been debated since before the 1927 adoption of the State Bar Act and legislation has been proposed repeatedly over the years, including a 1996 proposal of then-Senator (and subsequently Judge) Quentin Kopp from which our proposal draws.

The Legislature should mandate some points. First, no job losses should result from separation of the Bar's two missions. While we expect this to achieve efficiencies and to lower the cost of professional association activities, the Bar's regulatory functions are understaffed. Second, there should be an explicit commitment to a larger role for the Supreme Court in Bar oversight. This means a larger share of seats (4 of 13 as compared to the present 5 of 20), a separation plan prepared with involvement of the Court's five appointees, and more express obligations that the Bar report to the Supreme Court.

Our proposal invites input from the Governor, too. There is a role for his current appointees to the Board and for those he might appoint to two vacant seats.

We recommend changes to achieve a more stable board with less turnover and more ability to sustain focus on regulation. We call for longer terms, opportunity for multiple terms, a smaller, more collegial board and an end to signature projects of each new President. We seek a more potent professional association on the model of the California Medical Association, which has thrived since the Legislature de-coupled regulation from advocacy for that profession. Our proposal requires the Bar to collect the private association's dues via its annual invoices from those who do not opt out; forbids the Bar to compete with the education functions of the Sections; transfers intellectual property, reserve funds, and other assets; and empowers the association to enhance the image of the profession. Our proposal also requires the Bar to establish a voluntarily funded loan forgiveness program to encourage new lawyers to practice in underserved communities.

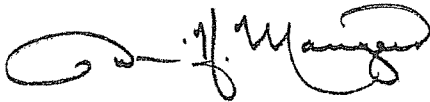
CONCLUSION. We respect the voices for the status quo. Change is always difficult and demands justification. However, failure to change will not help a Bar mired in crisis, the legal profession or California. Some for-profit entities may prefer the status quo to a more effective regulator and a more potent professional association. Neither bodes well for those who seek profit in the legal services sector at the expense of attorneys and without watchful regulatory oversight. Suffice it to say, we find those voices less persuasive than others.

We are not content with the status quo. We foresee a more effective regulator of legal services to Californians and a more potent and less costly professional association for lawyers.

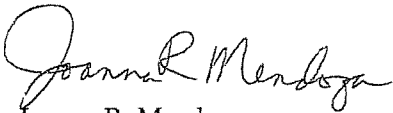
We look forward to working with you and other leaders of good faith and common will to achieve those ends.

Thank you for your consideration.

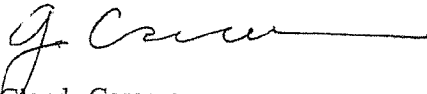
Very truly yours,



Dennis Mangers
Trustee
Senate Appointed, Public Non-Attorney Member
State Bar of California



Joanna R. Mendoza
Trustee
Elected Member, 3rd District
State Bar of California



Glenda Corcoran
Trustee
State Appointed Member
State Bar of California



Heather Linn Rosing
Former Vice-President, Trustee
State Bar of California

- c: Senator Hannah Beth Jackson, Chair, Senate Judiciary Committee
Governor Jerry Brown
Chief Justice Tani Cantil-Sakauye and Members of the Supreme Court
President Pasternak and Trustees of the California State Bar
Elizabeth Parker, Executive Director, California State Bar