



**CENTER FOR PUBLIC INTEREST LAW  
CHILDREN'S ADVOCACY INSTITUTE**

University of San Diego School of Law  
5998 Alcalá Park  
San Diego, CA 92110-2492  
P: (619) 260-4806 / F: (619) 260-4753  
1107 Ninth Street, Suite 880  
Sacramento, CA 95814 / P: (916) 844-5646  
1023 15<sup>th</sup> Street NW, Suite 401  
Washington DC, 20005 / P: (917) 371-5191  
[www.cpil.org](http://www.cpil.org) / [www.cachildlaw.org](http://www.cachildlaw.org)

April 25, 2016

David Pasternak, Chair, and Members  
Governance in the Public Interest Task Force  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

re: Testimony of the Center for Public Interest Law

Dear Mr. Pasternak and Task Force Members:

The Center for Public Interest Law (CPIL) is pleased to submit the following testimony to the Governance in the Public Interest Task Force. As you know, this Task Force is statutorily charged with making “recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys....” Business and Professions Code section 6001.2(b). Central to this discussion is the very definition of “public protection,” which “shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions.” Bus. & Prof. Code § 6001.1. “Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” *Id.* Today we respectfully examine this obligation, and how its fulfillment might guide your decisions.

We are grateful for the opportunity to participate in this hearing today, and especially for the efforts of Ms. Parker and Ms. Wilson to properly frame the issues and convene the Task Force in such a way that a variety of viewpoints and voices may be heard. What has become clear over the past few months is that the Bar is at a defining moment in its history — never before has the Bar so thoughtfully considered redefining itself and with the public’s best interest in mind.

In light of our experience studying the State Bar, as well as 25 other occupational licensing agencies in California for the past 35 years, CPIL urges this Task Force to recommend reforms in four key areas in its report to the legislature that we believe will greatly enhance the Bar’s public protection efforts, and make the Bar much more transparent and accountable to the people of California: (1) deunification; (2) compliance with the U.S. Supreme Court’s February 2015 decision in *North Carolina State Board of Dental Examiners v. FTC*; (3) Board of Trustees restructuring; and (4) independent discipline system reform.

## **CPIL Expertise in State Bar Matters**

CPIL is a nonprofit, nonpartisan academic and advocacy center based at the University of San Diego School of Law. Since 1980, CPIL has examined and critiqued California's regulatory agencies, including the State Bar of California. We have attended the Bar's meetings and followed its activities for 35 years. From 1987 to 1992, I served as the State Bar Discipline Monitor (under now-repealed Business and Professions Code section 6086.9), under appointment by then-Attorney General John Van de Kamp, with CPIL serving as the Monitor's staff. The State Bar Discipline Monitor position was created by the Legislature and — over the course of almost five years — we wrote eleven reports on the operation of the State Bar's discipline system, reporting to the Judiciary Committees and to the Chief Justice of the California Supreme Court. We worked with Senator Robert Presley and a succession of State Bar Presidents to fashion some 40 reforms of the system, including the passage of Senate Bill 1498 (Presley), 1988 legislation creating the current independent State Bar Court. We participated actively in the proceedings and deliberations of the 2010 Governance in the Public Interest Task Force, whose work culminated in the Legislature's passage of SB 163 (Evans) (Chapter 417, Statutes of 2011). Our work and research prompted further reforms contained in SB 387 (Jackson) (Chapter 537, Statutes of 2015). We are well aware that the Bar is part of the judicial branch under the aegis of the California Supreme Court. And we are similarly familiar with all of the executive branch agencies that license and regulate other professions and trades in California.

### **I. The “Unified Bar” Must “Deunify” into a Regulatory Agency With Public Protection As Its Highest Priority.**

The State Bar must — once and for all — sever off its trade association functions and engage only in regulatory agency activities which may be funded with compulsory Bar dues (which should be called “licensing fees”) under *Keller v. State Bar of California*, 496 U.S. 1 (1990).

Imagine if the California Medical Association — a trade organization representing and promoting the interests of the medical profession — also were designated as the agency with the public protection task of the Medical Board of California. The resulting conflict of interest would be obvious and unacceptable. However, that is the very conflict of interest that has existed with the California Bar's regulation of attorneys for over 80 years. The Bar has the California Supreme Court as its potential overseer. The Medical Board has the Department of Consumer Affairs. Indeed, all state agencies have potential legislative oversight. But the existence of occupational or other conflicts of interest now requires, as discussed below, much more than the historical systemic deference which these entities have heretofore enjoyed.

#### **A. The integrated Bar creates an inherent conflict of interest.**

A significant amount of testimony during the past two Task Force meetings has rightfully been dedicated to the question of whether the Bar should continue as an “integrated” bar — “an association of attorneys in which membership and dues are required as a condition of practicing law in a State.” *Keller*, 496 U.S. at 5. At its essence, this model creates an inherent conflict of

interest between acting in the best interests of the profession and the best interests of the public. As you know, the Bar is currently functioning as a hybrid organization; it is part regulatory agency and part trade association. Based on the discussions we have heard over the past two months, however, there appears to be a great deal of confusion about the difference between the two. Likewise, there is confusion as to which of these functions are truly aimed at fulfilling the Bar's "public protection" mandate.

In *Keller*, the U.S. Supreme Court held that the Bar must provide dissenting attorneys with an opportunity to opt out of paying for trade-association-type political and ideological activities unrelated to the regulation of the legal profession and improving the quality of legal services when they pay their mandatory Bar dues. *Id.* at 13. The Court's guidance as to "*Keller*-good" expenses as opposed to "*Keller*-bad" expenses, as well as the California Supreme Court's follow-up decision in *Brosterhous v. State Bar*, 12 Cal. 4th 315 (1995), provide a useful framework for determining which of the Bar's programs are regulatory vs. trade association functions. Using this framework, we have divided some of the Bar's current programs into two categories.

CPIL believes that the following regulatory agency functions may properly stay with the State Bar (which can continue to be housed in the judicial branch of state government) and may be lawfully funded with compulsory licensing fees: (1) licensing of attorneys; (2) its legal specialization program; (3) adoption of ethical standards for the legal profession; (4) attorney discipline; (5) administration of the Client Security Fund; and (6) access to justice activities, including IOLTA funding of legal services for the poor through the Legal Services Trust Fund, the Center on Access to Justice, and the Commission on Access to Justice. The following "trade association" activities should be severed off: (1) the sections; (2) lobbying and legislative activity on issues unrelated to the regulation of the legal profession and/or improving access to the justice system; (3) the annual meeting; (4) insurance programs and services; (5) the regulation of legal referral services; and (6) continuing legal education.<sup>1</sup>

The "integrated" structure that combines a private trade association entity with the exercise of police power that properly emanates from the People raises profound ethical issues. The most fundamental check in our system is not legislative/executive/judicial; rather, it is the overriding separation between public and private. The Bar's current "integrated" structure violates that check.

**B. Its "trade association" functions distract the Bar from its core mission of public protection.**

As we have heard over the past few months, beyond the conflict of interest issue, this structure alone demands an inordinate amount of staff time and resources — time that is diverted away from achieving the Bar's public protection mandate.

To comply with *Keller* and *Brosterhous*, the Bar established a "*Hudson* deduction" method by which dissenting members could avoid funding (with compulsory Bar dues) the Bar's unrelated political/ideological activities. The Bar is also entitled to be fully reimbursed for any

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<sup>1</sup> To the extent continuing legal education enhances or assures competence in areas of actual practice, particularly if subject to testing, it may also serve a regulatory function.

administrative or support services provided to the sections. Bus. & Prof. Code § 6031.5. This creates not only a great deal of administrative work to identify and bill the cost allocations, but has resulted in a significant amount of strife with the sections challenging the amount charged — as we have heard many times over the past months from section advocates. In fact, the Board of Trustees has spent more time in the past six months attempting to deal with the sections’ issues than it has on discipline or access to justice issues.

Likewise, the Bar sponsors thirty different “revenue generating programs,” offering a panoply of insurance, financial services, consumer products, and professional software to members of the State Bar. [See February 23, 2016 memo from Elizabeth Parker to the Task Force, at page 4.] As Ms. Wilson reported at the February 25, 2016 Task Force meeting, these services are run by two separate committees, both of which are supported by staff and take up significant time and resources. No other occupational licensing agency offers any of these goods and services to its licensees.

In stark contrast to the Bar’s hybrid structure and the limitations on its use of compelled licensee dues imposed by the U.S. Supreme Court, the California Supreme Court, and the California Legislature, other California occupational licensing agencies are limited to the traditional police power functions of licensing, standardsetting, and discipline. They are not distracted by the trade association functions that are so intertwined with the Bar’s current daily functions. No other agency has a “*Hudson* deduction.” Unlike the State Bar, they need not engage in detailed documentation of each and every expenditure so as to determine whether each comports with their core regulatory functions; they are simply not permitted to spend public money on issues outside their core regulatory functions. As you heard from Yvonne Choong of the California Medical Association, if licensees of those agencies want to engage — as members of a profession — in advocacy on issues related to their profession but unrelated to licensing, standardsetting, and/or discipline, they voluntarily join an external, independent trade association (and pay it membership dues, which are pooled and used to pay lobbyists, lawyers, and others needed to influence government on such issues). The agencies that license them have no authority to engage in lobbying on those issues and, as a result, the agencies play no role in such political lobbying.

According to Linda Katz’s presentation to the Task Force, eighteen states, including Illinois, New York, Pennsylvania, and Massachusetts, have non-unified bars where attorneys must only join the regulatory arm and not the trade association. Those states average 50% membership in their voluntary bar associations. There is no reason why the Bar cannot spin off its sections and other trade association functions into a private entity like the California Medical Association.

**C. The “disintegration” of the California Bar has been the subject of studies, legislation, and reports for decades.**

No one disagrees with the Chief Justice’s recent admonition that deunification proceed thoughtfully. However, this matter has been repeatedly studied and has been the subject of discussion, legislation, and thought for decades. It is time to act.

In our 35 years of monitoring the Bar, we have observed lawmakers — and members of the Bar itself — grapple with the deunification issue on multiple occasions. For example, in July 1992, then-Assembly Speaker Willie Brown amended his bill, AB 687 (Brown), to include provisions abolishing the State Bar of California as the state’s attorney regulatory agency and creating a new “Attorneys’ Board of California” within the Department of Consumer Affairs. In the past 35 years, we have seen at least 10 legislative proposals for significant Bar reform, a 1997 veto of the Bar’s dues bill by Governor Pete Wilson specifically criticizing the Bar’s integrated structure; a Bar-created “Futures Commission” which barely voted 13-8 to retain the Bar’s unified structure; another Bar dues bill veto in 2009 by Governor Schwarzenegger; the first “Governance in the Public Interest Task Force” in 2010; and several critical audits by the Bureau of State Audits — all of which yielded significant questions as to the Bar’s ability to protect the public in light of its dueling function as trade association and regulatory agency. Governor Pete Wilson’s 1997 veto message rings eerily true today. He noted that the Bar was created in 1927 to assist the Supreme Court “with responsibility for regulating the legal profession and promoting fair and efficient administration of justice. The Bar has drifted, however, and become lost, its ultimate mission obscured. It is now part magazine publisher, part real estate investor, part travel agent, and part social critic, **commingling its responsibilities and revenues in a manner which creates an almost constant appearance of impropriety.**”

We provide a more detailed description of these many studies in Appendix A. We have looked at 25 California regulatory agencies for 35 years, and we can say with confidence that no other agency rivals the Bar in terms of constant chaos, disruption, and distraction. The Bar must be disintegrated so that it can focus on its regulatory activities that protect the public, not “service programs” that protect and promote the legal profession. Deunification is not a new concept; it has been thoughtfully and carefully analyzed for at least 25 years. It is time to take action and actually implement this significant and necessary reform.

#### **D. Access to Justice will be improved with a deunified Bar.**

Out of all the comments this Task Force has heard to date, the most common admonition from those opposing deunification is that the Bar’s access to justice efforts will suffer. This is simply not true. Indeed, in *Keller*, the Supreme Court specifically held that expenditures on “improving the quality of the legal service available to the people of the State” is a permissible use of compulsory Bar dues. 496 U.S. at 14. Thus maintaining access to justice would be rightly maintained as a necessary function of the regulatory arm of a deunified Bar.

Other state regulatory agencies have maintained a mission to provide services to the underserved communities in California with great success. In fact, the mission statement of the Medical Board of California reads as follows: “The mission of the Medical Board of California is to protect health care consumers through the proper licensing and regulation of physicians and surgeons and certain allied health professions and through the vigorous, objective enforcement of the Medical Practice Act, and **to promote access to quality medical care through the Board’s licensing and regulatory functions**” (emphasis added).

The Medical Board has acted to promote access to medical care in underserved communities. For example, the Board created the Steven M. Thompson Physician Corps Loan Repayment Program, which since 2005 has been funded by a mandatory contribution of \$25.00 assessed to each newly licensed physician's license fee or upon biennial renewal of a physician's license (Business and Professions Code section 2436.5). These funds assessed against licensed physicians, plus foundation grants and other revenue, provide funding that enables the Medical Board, through the Health Professions Education Fund in the Office of Statewide Health Planning and Development, to offer grants to physicians who agree to practice medicine in an underserved community for a minimum of three years. These grants often total \$105,000. And a survey of physicians assisted by this program within the past few years revealed that a substantial percentage of these physicians have remained living and working in the underserved area.

By contrast, although then-Assemblymember Bob Hertzberg authored AB 935 in 2001, creating a Public Interest Attorney Loan Repayment Program for licensed attorneys who practice public interest law, no funding has ever been allocated to this program. Although now-Senator Hertzberg authored SB 134 last year in an attempt to guide some funding to the Public Interest Attorney Loan Repayment Account, that bill was amended in the Assembly to change the source of funding for the Program from voluntary fees collected by the State Bar to a portion of escheated IOLTA funds. These efforts, while laudable, are meager and don't go very far to satisfy the need for legal services by low- and even middle-income Californians.

And the Bar has yet to meaningfully tackle the recommendations contained in the final report of its own Civil Justice Strategies Task Force (CJSTF) issued in February 2015. As the CJSTF report bleakly observed, "... there has never been adequate funding to provide legal assistance for the millions of Californians who need help. Even before the economic downturn, legal services organizations only had sufficient resources to meet about 20-30 percent of the legal needs of low-income Californians. In recent years, the funding has reached critically low levels. One of the largest sources of state funding, interest on lawyers' trust accounts ("IOLTA"), has dropped from over \$22 million in 2007-2008 to under \$5 million in 2013-2014. Not only did IOLTA revenue drop over 80% between 2008 and 2014, but other sources of funding including government grants and contracts, foundation funding and private giving, have all been negatively affected by the economic downturn." CJSTF report at 8.

To ensure that access to justice maintains its rightful place as a key mission of the Bar, we believe this Task Force should recommend to the Legislature that it amend Business and Professions Code section 6001.1 to expressly include "access to justice" as a priority for the State Bar and the Board of Trustees.

A Bar less distracted by trade association functions and more dedicated to pursuing public protection can certainly, like its counterpart in the medical community, maintain a robust mission of pursuing access to justice for all Californians.

## **II. The Board of Trustees Must Be Restructured to Comply with *North Carolina***

### **A. The *North Carolina* Decision Applies to the State Bar of California**

In its landmark decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1101 (2015) (“*North Carolina*”), the U.S. Supreme Court recognized the inherent conflict of interest that exists when a state licensing board is largely comprised of members of the trade regulated by that board. For the first time, the Supreme Court explicitly held that boards are not immune from federal antitrust scrutiny unless (a) they are controlled by public members — not licensees; or (b) the state has created a mechanism in place to actively supervise the acts and decisions of these boards to ensure they are acting for the benefit of the public, and not for the benefit of the professions themselves. By repeatedly citing a case specifically involving the legal profession, the Court went out of its way to include the regulation of attorneys expressly within its holding. “State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members”).” *North Carolina*, 135 S. Ct. at 1111.

### **B. Especially after *North Carolina*, lawyers can no longer self-regulate.**

Even though they may have the best of intentions, lawyers are no different than any other profession when it comes to self-regulation — as the *North Carolina* Court thoughtfully stated:

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*’s supervision requirement was created to address. See *Areeda & Hovencamp* ¶ 227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals. The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had “joined in what is essentially a private anticompetitive activity” for “the benefit of its members.” This emphasis on the Bar’s private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U.S., at 791; see also *Hoover*, 466 U.S., at 569, 104 S.Ct. 1989 (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361–362, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (granting the Arizona Bar state-action immunity partly because its “rules are subject to pointed re-examination by the policymaker”).

135 S. Ct. at 1114 (internal citations omitted).

In its current form, the State Bar of California is at risk of significant antitrust liability because it is unquestionably controlled by lawyers — the Board of Trustees consists of a supermajority of lawyers, six of whom are elected to the Board by their peers. The following recommendations will bring the Bar into compliance with this decision:

**(1) The Board of Trustees Must Be Restructured:** The simplest way to avoid antitrust liability (and ensure the interest of the public is properly considered and protected) in light of *North Carolina* is recommend that the Legislature convert the Board composition to a supermajority of public members, with the added provision that no vote may be taken where those voting are not public members in the majority. At minimum, the Legislature must eliminate the remaining six elected attorney positions on the Board of Trustees (see below).

**(2) The Legislature must establish an “active state supervision” mechanism which reviews the Bar’s rulemaking and other actions for anticompetitive activity:** Unless the Bar recommends that the legislature restructure the Board of Trustees into a public member supermajority, it needs to establish some kind of “active supervision” mechanism to review its decisions for anticompetitive activity. Currently, the State Bar — which often initiates the rulemaking process to adopt changes to its many sets of rules and regulations — is not subject to the Administrative Procedure Act (APA), so its changes to its many compilations of rules and regulations are not reviewed by the Office of Administrative Law (OAL). Although changes to the Bar’s Rules of Professional Conduct are reviewed and must be approved by the California Supreme Court, the Court is not required to review them for anticompetitive effect or “modify” them as active state supervision requires.

One option would be for the Bar to become subject to the rulemaking provisions of the Administrative Procedure Act, Government Code section 11340 *et seq.*, including Office of Administrative Law review, for all rule changes other than the Rules of Professional Conduct.

Alternatively, a “competition review body” could be established within the California Supreme Court to oversee supply, group boycott, and other restraints that naturally occur within regulatory agencies. That entity must not be under the control of actively practicing attorneys, and it must not perform in a *pro forma* fashion; instead, it must “actively” review any decision with an eye towards the anticompetitive impact of these decisions. Per *North Carolina*, this entity must also have the clear power to “modify or veto particular decisions to ensure they accord with state policy.” 135 S. Ct. at 1116.

The term “active” is critical. It cannot be simply the presence of a supervening entity. The fact there is a state Supreme Court at the zenith of the organizational chart does not provide compliance. Indeed, the other leading case cited (*Midcal*) involved a state agency in alcohol beverage control supervising price setting, but it did not meaningfully examine the restraint of trade effects.

At present, neither the California Supreme Court, nor any other entity, provides the requisite independent and “active” supervision for anticompetitive effect as required by *North Carolina*. This Task Force should recommend that the Legislature require the California Supreme



Court to engage in “active state supervision” of the Bar, and any part of it controlled by “active market participants” in the profession, as commanded by the U.S. Supreme Court. That mandate should include the power and resources to fashion, in its own manner, a system for filtering decisions to focus on those with anticompetitive effect; and, for those, to examine their substantive anticompetitive effect and alternatives, using relevant economic, antitrust, and other expertise separate from practicing attorneys.

This is the course already under consideration by the Legislature for the Department of Consumer Affairs boards facing the same dilemma, and takes a similar, prudent course (SB 1195 (Hill)). Indeed, failure to do so would be irresponsible because many acts of the Bar are what are called *per se* antitrust offenses that violate the Sherman Act as a matter of law. We cannot responsibly continue to subject California and her officials to the serious criminal and treble damage liability that here confronts us. We make this observation aware that there is a need for restraints of trade to protect the public from incompetent practitioners. But this is properly done by balancing the competing interests, and in a way that complies with federal law.

Unlike the “active supervision” mechanism being considered for DCA agencies, we would prefer that the state Supreme Court appoint, direct, and manage this filtering mechanism for the Bar, and that the commission or committee or other entity that it fashions is not delegated final decisionmaking power — whether qualified as a state entity not controlled by “active participants” or not. We would prefer that this creation make recommendations to the Court for final decision by the Court.

It is unrealistic to assume that current Court staff — lacking extensive experience and background in the questions here presented, and under substantial work burden — can accomplish this task. But not only must it happen, it is prudent that it occur in a visible examination. Ideally, it would include a filtering system that allows the Court, and its appointed body, to bypass detailed examination of any decision that does not rise to a threshold of potential serious anticompetitive effect. But where that system confronts obvious restraints, particularly where they are *per se* offenses, examination must then occur. Ideally, it would include (a) review for anticompetitive effect, which commends economists and other experts, and (b) with the assistance of studies as needed, the measurement of costs and consequences of restraints. A prime example is the overriding *per se* supply control decision concerning Bar Examination passage rates.

The Court will on occasion reject Rules of Professional Conduct. But in order to pass federal muster under *North Carolina* and other state action immunity decisions, “active supervision” of restraints necessarily involves more than currently happens. And ideally it is accomplished visibly to preclude legal antitrust challenges in federal court which can be expensive, exhausting, and dangerous to many, including sitting Board members.

I have litigated antitrust cases in federal and state courts, both on behalf of the Center for Public Interest Law and for nine years as a public prosecutor — enforcing both state and federal antitrust law. If the current “state supervision” of anticompetitive decisions were subject to extensive discovery as to what questions were asked, what facts were adduced, and what expertise drawn upon, the evidentiary outcome might not be favorable. Discovery in a challenge to “active

state supervision” would explore the level of inquiry into the relationship of the restraints at issue *vis-a-vis* empirical effects, and to their connection to restraint justifications, or with alternatives and their concomitant effects. The odds that the minimum criteria of *Midcal* and *North Carolina* would be met is problematical. And you should all be aware that these “state action” refusal cases are not marginal decisions; *North Carolina* was joined by six of the current eight sitting justices, and the *Midcal* and *Goldfarb* cases were unanimous judgments (both with one recusal). A prudent attorney advises preventive law: Engage in procedures that establish clear compliance and preclude or deter legal challenges. That admonition is of special gravity when the cause of action involved can be felony charges; although we believe that is an unlikely scenario, the treble damage private action is a very real prospect.

**(3) The Office of the Chief Trial Counsel should be moved to the Attorney General’s Office:** In order to assure that attorney discipline does not become a group boycott offense, it is best not controlled in any way by the Board of Trustees — particularly if that Board continues to be under the control of practicing attorneys. The decisions about who to prosecute are within the province of the Office of the Chief Trial Counsel (OCTC) – in turn controlled in theory by competitors of those accused. Hence, the OCTC and the Bar’s Office of Investigations should be removed from the Bar. They are best housed in the Office of the Attorney General. That is the office that prosecutes disciplinary matters for every other occupational licensing board in the state. That is what they do. And for a reason. Moving the OCTC and its investigators over to the Office of the Attorney General is a necessary step to achieve compliance with the *North Carolina* decision in our opinion. It is also sound policy.

### **III. Elections Must Be Eliminated: The Board of Trustees Should Be Selected by Public Officials, Not By Professional Colleagues.**

Six of the Board of Trustees’ attorney members are elected by those they supposedly regulate — practicing attorneys. Imagine if physicians could vote for and select Medical Board members; or insurance companies could select the Insurance Commissioner; or utilities could choose the members of the California Public Utilities Commission. A bill that sought to enact such regimes would likely fail to earn a single vote. This indefensible policy must end. For these six elected Trustees, their allegiance is understandably but inappropriately with the colleagues who selected them — not the public whom the Board is supposed to protect as its paramount priority.

These six attorney positions should be converted to public members, with three appointed by the California Supreme Court, and one each by the Governor, Senate, and Assembly. Even if the attorney-controlled format is continued, these positions should be appointed by public officials and not elected by persons the Bar is supposed to regulate in the public interest.

### **IV. The Bar Should Request an Independent Discipline Monitor.**

The Bar’s failures in its disciplinary system and other internal struggles have been widely covered by the press in the past year. It is in the best interest of the Bar — and the public — to hire an independent expert (outside of the politics, lawsuits, union votes, and finger-pointing) who

can study the discipline system as it exists today, and make recommendations to strengthen it, make it more efficient, ensure public protection, and ensure accurate reporting to the Legislature.

This concept is not new to the Bar or the Legislature. In 1986, the legislature created a State Bar Discipline Monitor position in SB 1543 (Presley) (Chapter 1114, Statutes of 1986), and — as stated above — the undersigned and CPIL staff served in this role for five years. The Legislature has created independent “enforcement monitors” for several Department of Consumer Affairs agencies, including the Dental Board of California, the Contractors’ State License Board, the Medical Board of California, and the Bureau for Private Postsecondary Education. This mechanism has proven valuable to the Legislature, the affected agencies, and the public — because an independent expert can evaluate the system as a whole and make recommendations for reform.

We appreciate the attention this Task Force is devoting to these critically important issues.

Sincerely,

A handwritten signature in blue ink that reads "Robert C. Fellmeth". The signature is fluid and cursive, with the first name "Robert" and last name "Fellmeth" clearly legible.

Robert C. Fellmeth, Executive Director  
Center for Public Interest Law  
Price Professor in Public Interest Law  
University of San Diego School of Law

Former State Bar Discipline Monitor  
1987-1992

cc: Honorable Mark Stone, Chair, Assembly Judiciary Committee  
Honorable Hannah-Beth Jackson, Chair, Senate Judiciary Committee

## APPENDIX A

CPIL has monitored the State Bar since 1980 — for 35 years. During that time period, we recall at least the following:

- During July of 1992, Assembly Speaker Willie Brown amended his bill, AB 687 (Brown), to include provisions abolishing the State Bar of California as the state’s attorney regulatory agency and creating a new “Attorneys’ Board of California” within the Department of Consumer Affairs, which houses most of the state’s other occupational licensing agencies. That bill, carried by one of the legislature’s most powerful lawmakers, shocked the Bar into action. The Bar persuaded Speaker Brown to remove the abolition provisions from his bill and to amend it to instead require the Bar to appoint a 21-member task force to study whether the integrated Bar should be abolished. Under the amended version, the Bar would have been permitted to appoint 15 of the 21 members (including all 11 lawyer members) of the task force. Governor Pete Wilson vetoed AB 687 (Brown), citing the fact that he was given no role in appointing the task force members. “A task force of this composition would be lacking in objectivity and would not lend credibility to a truly independent study of alternatives to the structure of the State Bar ... A study broader in scope and in representation than that contemplated by this bill is warranted,” wrote Governor Wilson, in what would be the first of his many comments on the structure of the State Bar.<sup>2</sup>
- Despite the veto, the Board of Governors — at its January 1993 meeting — voted to establish a commission to study the future of the legal profession and the role of the State Bar in regulating it. On March 30, 1993, Bar President Harvey Saferstein appointed Los Angeles attorney and former Board of Governors member Patricia Phillips to chair the commission. The “Commission on the Future of the Legal Profession and the State Bar” (eventually called the “Futures Commission”) grew to include 21 members appointed by the Governor, Legislature, and the Bar. It held a series of public hearings throughout 1993 and 1994 and released a series of recommendations on a wide-ranging set of issues in April 1995. On the issue of deunification, the Commission said only: “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]” At its August 1995

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<sup>2</sup> AB 687 was preceded by at least four other efforts to dismantle the Bar: (1) AB 4120 (Felando) (1986) would have repealed the statutory provisions establishing the State Bar and established an Attorney’s Regulatory Board within the Department of Consumer Affairs; (2) ACA 46 (Felando) (1986) would have deleted the constitutional authority for the State Bar; (3) AB 4120 (McClintock) (1986) would have repealed the statutory provisions establishing the State Bar and established an Attorney Regulatory Board within the Department of Consumer Affairs; and (4) in 1992, Yorba Linda political consultant Robert Kiley circulated a petition to qualify an initiative for the November 1992 ballot; the initiative would have abolished the Board of Governors and replaced it with an elected commissioner who is an inactive member of the Bar. The initiative, which also would have required attorneys to be retested every four years, failed to qualify for the ballot.

meeting, the Board of Governors adopted this recommendation of the Futures Commission.<sup>3</sup>

- At the same time the Board of Governors adopted the Futures Commission's recommendation to retain the unified bar, Governor Wilson signed SB 60 (Kopp) (Chapter 782, Statutes of 1995), which required the Bar to conduct a plebiscite of its active members to determine whether they favor abolishing the State Bar as the agency regulating lawyers. The bill tasked the Bar with asking California lawyers the following question: "Shall the State Bar be abolished as the agency regulating lawyers in this state on behalf of the Legislature and Supreme Court, with its regulatory functions turned over to another body or bodies and some or all of its other activities handled by a voluntary bar association or associations?" Conducted in June 1996, only 60,885 active members of the Bar (out of 119,327 active members) cast a valid vote. Of those, 21,589 lawyers answered "yes" to the plebiscite, while 39,296 lawyers voted "no."<sup>4</sup>
- During 1997, SB 1145 (Burton) — the Bar's "dues bill" for 1998 — was passed after a rocky trip through the legislature; three public members of the Board of Governors even testified against it in the Assembly. Legislative analyses of the bill cited high Bar dues (despite a 1995 Bureau of State Audits finding that the Bar had not taken advantage of opportunities to reduce its fees, did not adequately control travel and contracting costs, and did not recover costs related to its discipline and Client Security Fund programs); ongoing litigation by lawyers unhappy over the Bar's ongoing legislative lobbying on issues unrelated to regulation of the legal profession or improvement of access to the justice system); excessive salaries for senior managers; and a dubious lobbying contract. Specifically, the Bar's lobbyist resigned his \$125,000 per year position, and was then awarded a two-year \$900,000 contract which included an illegal \$75,000 bonus if the lobbyist negotiated a two-year dues bill.

On October 11, 1997, Governor Wilson vetoed the dues bill and issued a stinging veto message. He noted that the Bar was created in 1927 to assist the Supreme Court "with responsibility for regulating the legal profession and promoting fair and efficient

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<sup>3</sup> Interestingly, the Futures Commission made several other recommendations that the Bar has never pursued. Among others, the Futures Commission recommended that (1) only graduates of ABA- or California-approved law schools should be allowed to sit for the California Bar Examination, (2) the Bar should grant reciprocal admission to a person licensed for three years in another jurisdiction if that jurisdiction reciprocates with California licensees; (3) California attorneys should be required to carry malpractice insurance; (4) the State Bar Court should be transferred to the California Supreme Court; and (5) the Chief Trial Counsel should be appointed by the California Supreme Court instead of the Board of Governors.

<sup>4</sup> Undeterred, Senator Kopp amended his SB 1413 (Kopp) in 1996 to create a new "Administrative Office of the California Supreme Court" which would perform the regulatory functions of the State Bar, while a new "California State Lawyers' Association" would perform all nonregulatory functions, such as the promotion of lawyers' interests. That bill died in committee without a hearing.

administration of justice. The Bar has drifted, however, and become lost, its ultimate mission obscured. It is now part magazine publisher, part real estate investor, part travel agent, and part social critic, **commingling its responsibilities and revenues in a manner which creates an almost constant appearance of impropriety.** The Governor pointed directly to the Bar's structure as a "unified" bar. A lawyer himself who is not known for left-leaning views, the Governor stated: "Last year, a significant minority of bar members voted to abolish the mandatory bar in favor of a voluntary model embraced in ten other states. **This difference of opinion as to the mandatory nature of the Bar is at the heart of what might be charitably characterized as an almost chronic disharmony. Simply stated, some members believe that the Bar cannot function effectively as both a regulatory and disciplinary agency as well as a trade organization designed to promote the legal profession and collegial discourse among its members.**" The Governor concluded: "It is time for the Bar to get back to basics: admissions, discipline, and educational standards. I would look with favor upon a bill that required Bar members to pay only for functions which were, in fact, a mandatory part of a responsible, cost efficient regulatory process...." The consequences of the veto were staggering to the Bar and its ability to protect the public from unscrupulous lawyers; within eight months, it was forced to lay off 470 of its 700 employees (including most of its discipline system employees); it retained only about 200 persons to handle the most essential functions and those programs (such as admissions) that were funded by sources independent of the dues bill.

- On May 29, 1998, Governor Wilson issued a press release entitled "Reforming the State Bar," in which he announced the contents of a "dues bill" that he would consider signing. He demanded a new mandate of "protection of the public" for the Bar, "with its top priority the maintenance of discipline among members, not promotion of the legal profession." The Governor also sought to lower licensing fees and ensure financial accountability of the Bar to the Legislature. As for oversight, he sought to replace the 23-member Board of Governors "with an appointed Board similar to that employed by the Medical Board of California," with gubernatorial appointees subject to Senate confirmation; he also believed the new Board should be subject to the Bagley-Keene Open Meeting Act. Finally, he sought to shift the duties of the State Bar Court to the California Supreme Court.
- In 1998, three bills were introduced to deal with the Bar. The Bar sponsored AB 1669 (Hertzberg), which would have preserved its existing governance structure and its authority to regulate admissions, discipline, and development of professional standards; and prohibited the Bar from using compulsory Bar dues on its Conference of Delegates or its Sections. AB 1669 would also have restricted Bar legislative lobbying to its discipline, admissions, professional competence, and legal services functions. AB 1798 (Morrow) would have stripped the Bar of all but its most essential services: admissions, discipline, and regulation of the legal profession; it would have eliminated the Client Security Fund, the Bar's oversight of attorney referral services, the Legal Services Trust Fund, and the Judicial Nominees Evaluation Commission. As introduced, SB 1371 (Kopp) would have abolished the Bar entirely and turned most of its functions over to the Administrative Office of the Courts under the California Supreme Court. SB 1371 would have allowed for the

creation of a voluntary California State Lawyers' Association to lobby on behalf of lawyers. Senator Kopp later amended his bill to preserve the Bar but limit its functions (and its expenditure of compulsory Bar dues) to those functions authorized by the Legislature; the amended bill would also have converted the 23-member Board of Governors to a 19-member board with 17 members appointed by the Governor and two members appointed by the Legislature, and would have subjected the Bar and all of its committees to the Bagley-Keene Open Meeting Act. Although two of these bills (AB 1669 and SB 1371) were the subject of extensive hearings by the Legislature, none of them emerged from the Legislature. Governor Wilson left office in 1999 without ever signing another Bar dues bill.

- In 1999, Governor Gray Davis signed SB 144 (Schiff and Hertzberg), which once again authorized the Bar to charge its members licensing fees; however, it restricted the fee to \$395 annually (as compared to \$478 in 1996 and \$458 in 1997), and it required the Bar to further discount its fees for lawyers earning less than \$40,000 per year. The bill prohibited the Bar from using mandatory licensing fees on the Conference of Delegates or the Sections; set a minimum "*Hudson* deduction" of \$5; required the Bar to engage in competitive bidding before entering into any contract for goods, services, or both in an amount greater than \$50,000; and required the Bar to undergo external and independent financial and performance audits on an ongoing basis. Pursuant to SB 1897 (Kuehl) (Chapter 415, Statutes of 2002), the Conference of Delegates formally left the State Bar in 2002 and spun off into a California nonprofit mutual benefit organization.
- On October 12, 2009, Governor Arnold Schwarzenegger vetoed SB 641 (Corbett), the Bar's dues bill. He noted that Governor Wilson had vetoed the dues bill in 1997, and stated: "Unfortunately, twelve years later, inefficiencies remain unaddressed and questions about the State Bar's role in the evaluation of judicial nominees suggest that the State Bar's political agenda continues." The Governor cited to a July 2009 Bureau of State Audits report on the Bar that cited excessive salaries for staff; the high cost of the discipline system "while the number of disciplinary inquiries has declined; and a lack of internal controls [that] allowed the embezzlement of nearly \$676,00 by a former employee." He also noted that the Bar's Judicial Nominees Evaluation (JNE) Commission breached the confidentiality that is supposed to shroud its proceedings by leaking a qualification rating of one of the Governor's nominees. The Governor concluded: "The State Bar cannot continue with business as usual. It must take the time to reexamine the problems noted by the State Auditor and continue its investigation into the JNE Commission."
- During the summer of 2010, legislative dissatisfaction with the Bar again prompted significant amendments to the Bar's dues bill, AB 2764 (Committee on Judiciary). Legislative analyses of the bill cited Bar reserves exceeding \$12 million despite rapidly declining revenues for California's legal services organizations; an exceedingly long and bitter rulemaking process that finally resulted in a Bar rule requiring attorneys to simply disclose to clients that they do not carry legal malpractice insurance; and the Bar's creation of a 2009 "Find A Lawyer" program that was scaled back by the Bar in deference to complaints by local county bar associations that the program would interfere and compete

with their lawyer referral services. This Bar track record led legislative analysts to conclude that “recent actions by the State Bar Board of Governors have not sufficiently taken into account the protection of the public.”

As signed by the Governor in September 2010, AB 2764 permitted the Bar to charge the same level of licensing fees during 2011 as it was permitted to charge in 2010; however, it gave lawyers the voluntary option of diverting \$10 of their license fee to a temporary fund (to sunset three years hence) to augment legal services funding.

Importantly, the bill required by the Board President to convene a “Governance in the Public Interest Task Force” by February 1, 2011. AB 2764 charged the Task Force with conducting public hearings and submitting a report to the Legislature by May 15, 2011 “that includes its recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys.” Anticipating conflict, the bill stated that “if the task force does not reach a consensus on all of the recommendations in its report, the dissenting members of the task force may prepare and submit a dissenting report.”

- After holding about a dozen meetings and public hearings at which it heard public comment from a wide variety of sources, the Task Force did in fact issue a “majority report” and a “minority report” on May 11, 2011. The “majority report” (supported by seven members of the Task Force, including most of the attorney members) proposed some cosmetic changes but — perhaps unsurprisingly — did not alter the basic current system in which the 23-member Board of Governors (renamed as “Board of Trustees”) would be retained and most of the attorney members of the Board would continue to be elected by other lawyers, the system that produced their own selection to the Board. The “minority report” (supported by two attorney members and two public members of the task force) called for a smaller, 15-member “Board of Trustees” consisting of nine attorneys and six public members, all of whom would be appointed by public officials (including the California Supreme Court). The minority report also called for a revision to the State Bar Act to make public protection the “paramount” priority of the Bar and the Board of Trustees, and to require all trustees to take an oath making public protection their highest priority. Finally, the minority report called on the Legislature to subject the Bar to the Bagley-Keene Open Meeting Act. The two Judiciary Committees took both reports and merged several of their recommendations into SB 163 (Evans) on May 27, 2011.
- As signed by Governor Brown on October 2, 2011, SB 163 (Evans) represents a compromise product resulting from the work of the Governance Task Force. The bill renamed the Board of Governors as the “Board of Trustees” (to more accurately reflect the Board’s fiduciary duty to the public), downsized it to 19 members, and changed the method of selection of the attorney members. Six attorney members may be elected by attorneys in recast districts based on the six appellate court districts; seven attorney members will be appointed by public officials (the California Supreme Court and the Legislature); and six non-lawyer public members will continue to be appointed by the Governor and the Legislature. Consistent with the statutes creating other occupational licensing boards, SB 163 specified that protection of the public is the highest priority for the State Bar and its



Board of Trustees in exercising their licensing, regulatory, and disciplinary functions. It required the Board to conform its open meeting rules to the Bagley-Keene Open Meeting Act, and subjected its public members to the conflict of interest laws in the Business and Professions Code to which public members of all other occupational licensing boards are subject. It added new section 6140.12 to the Business and Professions Code, which requires the Board to complete and implement a five-year strategic plan (which must be updated every two years), and requires the Board's President to update the Supreme Court, Governor, and Judiciary Committees of the measures the Board has taken to implement the strategic plan on an annual basis. Importantly, SB 163 added new section 6001.2 to the State Bar Act, which charged the Bar with recreating the Governance Task Force on February 1, 2013, required the Task Force to submit a new report to the Legislature on further governance recommendations by May 1, 2014, and directed the Task Force to assist the Board with updating its strategic plan now required by section 6140.12.

- The Bar chose to flout several provisions of SB 163. It conducted two rulemaking proceedings to conform its open meeting rules to Bagley-Keene, but they fell far short. In the second proceeding conducted in 2013, the Bar sought to make four changes. CPIL informed the Bar that three of the four changes were completely inconsistent with Bagley-Keene. CPIL's comments were ignored and the Bar adopted the rules anyway.

Similarly, the Bar ignored section 6001.2 of the Code. It failed to reconvene the Governance Task Force by February 1, 2013, and failed to apprise the Chief Justice and the Legislature of that fact. Because there was no Task Force, no report with additional governance recommendations was filed with the Legislature by May 1, 2014, as required by section 6001.2(b). And the Task Force did not assist the Board of Trustees with strategic planning at its January 2015 or 2016 strategic planning sessions, as required by section 6001.2(c). Rather than complying with the law as written, the leaders of California legal profession chose to ignore the law. The Bar belatedly reconvened the Governance Task Force in 2015. However, and as the legislative findings in AB 2878 (Committee on Judiciary) reflect, "that first report is now two years overdue and, although the Governance in the Public Interest Task Force finally began holding meetings this year, it appears that this already long overdue report will not be completed during this legislative session."

- In the meantime, the Bureau of State Audits released its biennial audit of the performance of the State Bar in June 2015. The report entitled *State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability* made a number of disturbing findings — many of which it repeated from its 2009 audit of the Bar's discipline system, suggesting that the Bar had ignored them for six years.

Among other things, the Auditor found that the Bar's annual discipline report (ADR) has not consistently calculated and reported (as required by law) the "backlog" of complaints pending at the Bar, nor has it apprised its stakeholders of the various ways in which it changes its calculation of the "backlog" in its annual discipline report (Report at 26); and (b) the Bar does not consistently calculate and report its discipline case processing times,

nor does it apprise its stakeholders of the various ways in which it changes its calculation of case processing times (Report at 30–31).

Disturbingly, the audit also found that the Bar — in its 2011 attempt to eliminate the “backlog” — settled dozens of cases by imposing an insufficient level of discipline: “In 2010 and 2011, during the years the State Bar focused its efforts on decreasing the backlog, the State Bar settled more cases than in any of the other four years in our audit period and it appears that some settlements should have resulted in more severe forms of discipline....by prioritizing reduction of the backlog, the State Bar may have put the public at risk because it settled more cases for less severe levels of discipline than it otherwise might have” (Report at 23). BSA noted that, in 2011, the California Supreme Court returned 27 cases that the Bar settled in 2011 “due to the appearance of insufficient discipline. Upon further consideration by the State Bar, 21 of the 27 cases resulted in greater discipline, including five disbarments.” In this regard, the Auditor found that the Bar has not performed adequate workforce planning to ensure that the staffing level of its attorney discipline system is appropriate.

The audit also found that the Bar — rather than spending its resources to improve its discipline system — spent a substantial portion of its resources to purchase a building in Los Angeles and then misled the Legislature about the actual cost of the building and the fact that it had made a final decision to purchase the building, “even though state law required it to do so.” (Report at 43). The Auditor also found that the Bar financed the Los Angeles building through a series of “troubling” fund transfers, and that many of the Bar’s various funds have excessive balances. **These findings reflect the fact that no one above the Bar reviews the State Bar’s spending.** Although the Legislature reviews the Bar’s proposed annual budget each year pursuant to Business and Professions Code section 6140.1, no one reviews the Bar’s actual spending to ensure that it is consistent with the Legislature’s authorization; nor does anyone review “interfund transfers” which were used to fund the Los Angeles building or the Bar’s “reserve fund” policy.

- SB 387 (Jackson), the Bar’s 2016 dues bill, addressed a number of the Auditor’s findings. First, it made significant changes in Business and Professions Code section 6086.15, the law defining the contents of the ADR. SB 387 added new section 6140.16 to the Code, which requires the Bar to develop and implement a workforce plan for its discipline system and to conduct a public sector compensation and benefits study. The Bar has undertaken these tasks, and its report to the legislature is due on May 15, 2016. The bill also amended section 6145 to require the Bar to contract with the State Auditor to conduct an in-depth financial audit of the State Bar, including an audit of its financial statement, internal controls, and relevant management practices. This audit is underway, and the State Auditor’s report is due to the Legislature on May 15, 2016.

SB 387 also imposed some long-overdue transparency requirements on the Bar. In response to the Bar’s refusal to properly implement Business and Professions Code section 6026.7 (which required the Board to ensure that its open meeting rules “conform to, and are consistent with” the Bagley-Keene Open Meeting Act), the Legislature directly

subjected the Bar, effective April 1, 2016, to Bagley-Keene (with exceptions for the Committee of Bar Examiners and the JNE Commission). In response to the Bar's failure to produce records which are unquestionably public records, the Legislature directly subjected the Bar (again, with some exceptions) to the California Public Records Act.