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Mark Broughton and Richard Ramirez, “Topic B” Co-chairs, 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 regarding
Organizational Structure of the Bar to Enhance Protection of the People of California

Dear Mr. Broughton, Mr. Ramirez, and Task Force Members:

On behalf of the Center for Public Interest Law (CPIL), I write to address our specific recommendations for the optimal organizational structure of the State Bar of California in order to best achieve the Bar’s public protection mandate. CPIL has been studying the State Bar, as well as numerous other occupational licensing agencies in California, for the past 37 years. I have personally been involved with monitoring the Bar since 2014, and have attended and participated in each meeting of the 2016 Governance Task Force last year.

First, I would like to commend all of you, and especially Ms. Parker, Ms. Wilson, and Ms. Cohen, for the extraordinary amount of thought and careful consideration you have dedicated over the past year to address and define the Bar’s public protection mandate, and enhance the Bar’s transparency and accountability to the people of California. It is very encouraging to see the progress you have made towards bringing this organization more in line with its regulatory mission – specifically, your webcasting efforts and pending website redesign, improved financial policies, workforce planning implementation, increased dedication of funds to improve the discipline system, and most recently the separation of your trade association functions from the Bar’s organizational structure.

Today, I will focus my remarks on two topics. First, I urge this Task Force to carefully consider a critical aspect of public protection that you simply cannot afford to ignore: reforming the Board of Trustees’ organizational structure to comply with the U.S. Supreme Court’s February 2015 decision in *North Carolina State Board of Dental Examiners v. FTC*. I spent a great deal of time with the 2016 Task Force addressing this very topic, and the Supreme Court specifically directed the Bar to propose a policy on this very issue in September of last year. Second, I provide specific recommendations for improving the Bar’s transparency and public participation efforts going forward.

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, CPIL's Executive Director, Professor Robert C. Fellmeth, 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 — CPIL 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. CPIL 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 Board of Trustees Should 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 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.

Professor Fellmeth and I provided extensive written and oral testimony to the 2016 Task Force, explaining that the *North Carolina* holding places the State Bar of California at significant

risk of antitrust liability. First, the Bar is unquestionably controlled by lawyers – indeed the Board of Trustees consists of a supermajority of lawyers, six of whom are elected to the Board by their peers. Second, the Bar routinely makes decisions that have anticompetitive impact. For example, Bar exam passage criteria and admission details are in fact supply control decisions – keeping people out of the market for legal services and artificially increasing prices. This type of restraint of trade is unlawful as a matter of law.

In response to our testimony, the Bar’s Office of General Counsel (OGC) researched the applicability of the *North Carolina* case, and opined that the Court’s holding does not raise serious concerns for the State Bar of California. We respectfully disagree.

OGC’s main argument is that “the State Bar’s core regulatory functions (admissions, attorney discipline, and rules of professional conduct) fall under the ‘sovereign immunity’ exception to antitrust liability because the California Supreme Court is the ‘ultimate decision maker’ over these functions.” See 2016 Governance in the Public Interest Task Force Majority Report at 22. In our view, however, OGC’s heavy reliance on *Hoover v. Ronwin*, 466 U.S. 558 (1984), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), ignores critical factual distinctions between the structure of the Arizona Supreme Court and the California Supreme Court *vis a vis* the level of supervision and delegation of these critical regulatory functions.

In *Hoover*, for example, the plaintiff was an unsuccessful applicant for admission to practice law in Arizona and sued the Arizona Supreme Court’s Committee on Examinations and Admissions, alleging that the Committee had conspired to restrain trade in violation of the Sherman Act by reducing the number of competing attorneys in the state. The Supreme Court held that because the defendants “were each members of an **official body selected and appointed by the Arizona Supreme Court**,” and because the Supreme Court found that the Arizona court “retained **strict supervisory powers and ultimate full authority** over the [committee’s] actions,” the Court itself (and not the committee) was the actor and state action immunity therefore applied. *Hoover*, 466 U.S. at 572 (emphasis added).

Critical to the Court’s holding was “the court’s **direct participation in every stage of the admissions process**, including retention of the sole authority to admit or deny.” *Id.* at 579, n.30. Specifically, the Arizona Supreme Court itself promulgated its own rules that specified the subjects to be tested and the general qualifications required of applicants for the Bar, including explicit Supreme Court Rules authorizing the Committee to determine an appropriate grading or scoring system. *Id.* at 572. The Arizona Supreme Court’s rules also limited the Committee’s authority to making recommendations to the Supreme Court; the court itself made the final decision to grant or deny admission to practice law. *Id.* Ultimately, the U.S. Supreme Court did not analyze the active state supervision element of *Parker v. Brown* because the Court held that the Arizona Supreme Court itself was the actor—it had not delegated any power to the committee, but the committee was merely advisory. *Id.* at 579.

The structure in California, however, is much different. Unlike in Arizona, the California Committee of Bar Examiners is a standing committee of the State Bar (not the Court), and its members are appointed by the Board of Trustees, the Governor, and the Legislature. **None of the**

members of the Committee of Bar Examiners are appointed by the California Supreme Court. Indeed, this Task Force spent quite a bit of time at its January meeting discussing the dismal bar passage rates in California and the fact that the Committee of Bar Examiners is barely supervised by the Board of Trustees – let alone the Supreme Court.

Moreover, while the Supreme Court maintains its own rules pertaining to several committees and programs (*see e.g.*, California Rule of Court Rule 9.80 (establishing Committee of Judicial Ethics Opinions)), it does not have its own rules pertaining to the Committee of Bar Examiners or the administration of the Bar Exam. Instead, the rules pertaining to the Bar exam are contained within the Rules of the State Bar of California – promulgated by the Board of Trustees.

Accordingly, this Task Force would be wise to take a more careful look at the *North Carolina* case, its holding, and its implications for fulfilling the Bar’s statutory mandate to first and foremost protect the people of California. While we prefer to work with the Bar, and specifically this Task Force, to implement the *North Carolina* decision and prevent future antitrust violations from occurring, CPIL is prepared to resort to litigation and let a court decide this matter if the Bar does not reform itself to comply with this decision. CPIL’s specific recommendations for doing so are provided below.

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

Even though they may have the best of intentions, lawyers are no different from 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. [citation] **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.** [citation]

135 S. Ct. at 1114 (emphasis added, internal citations omitted).

I have heard members of this Board, including members of this Task Force, discuss the concept of self-regulation at length, and Justice Kennedy’s point bears repeating: This is not about the specific individuals serving on the Board today. I am sure all of you are acting with the utmost care, and with every intention to protect the people of California. This is about the structure of the Board itself. You must be attuned to your own hidden biases. Justice Kennedy went to great lengths to reiterate this very point. “[E]stablished ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. **Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.**” 135 S. Ct. at 1111 (emphasis added). This is not mere “rhetoric” designed to personally attack the members of this Board – this is the opinion of the U.S. Supreme Court—the law of the land.

C. CPIL's Specific Recommendations

(1) Restructure the Board of Trustees: 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 to 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) Request that the Supreme Court establish an independent, “active state supervision” mechanism to review 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 form of “active supervision” mechanism to review its decisions for anticompetitive activity. Indeed, the Chief Justice recognized this when she specifically requested that the Bar formulate a policy that it must follow in identifying, analyzing, and bringing to the court any proposed board action that implicates antitrust concerns. *See* September 8, 2016 Letter from the Chief Justice to the Bar at p. 2. Thus far, the Board of Trustees has not addressed this issue.

For example, 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.

CPIL stands ready to assist this Task Force, and Bar staff, with the formulation of such a policy. We have been working with the Legislature on similar mechanisms with respect to Department of Consumer Affairs regulatory boards, and have drafted proposals which we would be happy to share.

(3) Eliminate Elections: The Board of Trustees Should Be Appointed by Public Officials, Not By Professional Colleagues.

Six of the Board of Trustees’ attorney members are elected by those they are charged with regulating – 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.

II. CPIL's Recommendations for Enhancing Transparency and Accountability

As I mentioned above, we are very appreciative of the Bar's recent efforts to increase transparency. The webcasting of Board meetings was an important step in this direction, and we are happy to hear that the website will be upgraded soon. To maximize meaningful public participation in Bar meetings – including all committee meetings—I urge you to implement the following additional measures:¹

- 1) Permit public comment on each agenda item at the time the item is heard:** Public comment that is targeted to the matters at hand is much more meaningful, and permits the Board to consider public comments prior to making important decisions. Time limits can be imposed, and strictly enforced, to ensure the efficient management of the agenda.
- 2) Allow public comment from the phone:** Many members of the public are unable to travel to San Francisco or Los Angeles to participate in your meetings. Now that you have webcasting, however, the opportunity exists for members of the public who are watching at home to provide their comment on important matters as they are occurring via telephone. This is routine at other professional licensing boards.
- 3) Post meeting materials a week in advance:** I was happy to hear that this issue was addressed during the recent Board retreat in San Diego. Providing Board materials in advance is not only important to ensure that Trustees have time to review them, but also to ensure more meaningful public comment.
- 4) Provide more detailed meeting minutes:** The Bar's current policy for meeting minutes is to provide a bare-bones accounting of final resolutions without much context or detail. I encourage you to consider a policy to provide more detailed minutes, and to post them, along with the agenda and meeting materials, in an easy-to-find location on your website.

¹ I urge you to observe the next meeting of the Medical Board of California to see how these policies may be efficiently implemented.

In conclusion, I am very grateful for the opportunity to provide my comments to this Task Force here today, and am happy to answer any questions or give further guidance as you work through these critically important issues.

Sincerely,

A handwritten signature in black ink, reading "Bridget Fogarty Gramme". The signature is written in a cursive, flowing style.

Bridget Fogarty Gramme, Esq.
Assistant Administrative Director
Center for Public Interest Law

cc: Elizabeth Parker, Executive Director
Sarah Cohen, Office of General Counsel
Hon. Hannah-Beth Jackson, Chair, Senate Judiciary Committee
Hon. Mark Stone, Chair, Assembly Judiciary Committee