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Assuring Compensation for Consumers Damaged by Legal Malpractice: Why, What, and How

Summary: The State Bar Act states: “Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”¹

Nevertheless, the Bar bases licensure on a general examination that flunks most takers and does not measure actual competence in any of the 24 areas of actual practice relied on by consumers. It does not require continuing legal education courses to pertain to actual practice, nor does it ever test competence in the subject area relied upon by consumers—never over the 40- or 50-year career of an attorney—in a profession where ignorance of a single recent holding may be determinative. Exacerbating this failure to fulfill the core function of a regulator, it then does not discipline attorneys for negligence.

¹ Business and Professions Code section 6001.1.

To put the pathetic cherry on the top, the Bar does not require attorneys to carry malpractice insurance, nor does it include malpractice judgment collection as part of its Client Security Fund. The Bar knows that about 20% of practitioners work naked of insurance and are effectively immune from civil suit and restitution to any victim of their malpractice. The only measure, a disclosure on a legal form that may state there is no coverage, is hardly effective protection from the consequences of the Bar's nonfeasance in failing to seriously address actual competence, or to provide so many consumers with even civil recovery for these failures.

To fulfill its primary mandate under the law, which should matter to those regulating lawyers, the Bar needs to (a) work to prevent incompetence in good faith, and (b) allow consumers to recover at least some reasonable sum for damages or restitution where negligence has occurred. There are a variety of ways to do this without seriously impeding the representation of poor consumers by attorneys who lack high remuneration. We discuss these options below, including a low-level malpractice ceiling for low-revenue attorneys, the possible option of posting a bond, and the use of a slightly enhanced Client Security Fund as a risk pool to facilitate coverage at very low cost for such practitioners. That CSF option would provide a small cross-subsidy from the profession as a whole—a profession-wide contribution that would be individually very small and is well warranted given the profession's control of its own governance.

Personal and CPIL Background re Experience on the Subject

My general background includes teaching and scholarship in related subject areas.² Also relevant is regulatory and related work which includes service for the past 38 years as the executive director of the Center for Public Interest Law (CPIL) based at the University of San Diego School of Law. CPIL has long had an office in Sacramento and seeks to represent consumers and the public interest, focusing on state regulatory agencies, including the State Bar, with student and staff attendance at major meetings, wherever they occur.³ And the Bar is included in our *California Regulatory Law Reporter* covering the major agencies regulating trades and professions.

Our past work with the Bar includes my service for five years as the State Bar Discipline Monitor. This was a onetime position created by the Legislature in 1986.⁴ I was appointed to the position by then-Attorney General John Van de Kamp, reporting to the Legislature and the Chief Justice. The position allowed access to all files, from incoming telephone complaint calls to investigative actions taken, and we

² Stanford University (AB, 1967); Harvard University (JD, 1970), former white collar crime state and federal prosecutor (1972-81); co-author of CALIFORNIA WHITE COLLAR CRIME AND BUSINESS LITIGATION (w/Thomas A. Papageorge, Tower, 5th Edition 2015); former faculty of the National College of District Attorneys, faculty of the National Judicial College (established in Nevada by the U.S. Supreme Court); faculty member at the USD School of Law since 1978; holder of the Price Chair in Public Interest Law since 1990; founder of the Center for Public Interest Law in 1980; co-editor of the *California Regulatory Law Reporter* since 1980; appointed State Bar Discipline Monitor from 1987 to 1992.

³ See <http://www.cpil.org>.

⁴ SB 1543 (Presley) (Chapter 1114, Statutes of 1986).

wrote 11 reports over five years.⁵ We drafted legislation including many reforms related to that work; perhaps the most important was the creation of the nation's first independent and professional State Bar Court.⁶ Prior to its creation, discipline was initially pursued by private attorneys serving as "hearing examiners," who could be colleagues or competitors of the accused, with a final decision by a "Review Department," a panel of 18 attorneys meeting monthly. The California Supreme Court was not confident in the process and reviewed every attorney discipline case. They were not happy. Following the passage of SB 1498 in 1988, the new State Bar Court worked well and our Supreme Court not only approved it, but stopped reviewing all cases, then and now taking cases only by discretionary petition. We also proposed about 30 other reforms, about half of which were enacted. The one relevant to your work was not. It should have been. Now is the chance to make that correction.

Since the Bar Discipline Monitor work, we have continued to monitor other Bar issues.⁷ Those of us working on Bar issues, whatever our recommendations, are

⁵ See the detailed initial report and the final report at: <https://www.sandiego.edu/cpil/publications/#accordion2>.

⁶ SB 1498 (Presley) (Chapter 1159, Statutes of 1988).

⁷ Since the 1990s, we have continued to be very much involved in Bar reform issues, including recent legislation subjecting the Bar to the Bagley-Keene Open Meeting Act and the Public Records Act, and divesting the Bar of its non-regulatory trade association functions. We also were involved in the bill that changed the name of the governing board from the Board of Governors to the Board of Trustees. And we are currently supporting provisions in the pending fee bill to designate our license fees as "fees" and not "dues" as if we were a country club.

not getting rich working on them. We do it on our own time without serious compensation. We do it because we want things to be done right. But—as was recognized by Justice Kennedy in the U.S. Supreme Court’s decision in *North Carolina State Board of Dental Examiners v. FTC*, ___U.S.___, 135 S. Ct. 1101 (2015)—we do have a certain affinity for our own grouping, one that we may not fully appreciate.⁸

I think most of us work for justice, for due process, to get people to follow the law. And hopefully we try to prevent disputes to lessen the need for our services. If we were anthropologists observing ourselves, say, as might Mr. Spock circling the earth in the Starship Enterprise, what might be the observations made?

BACKGROUND: ISSUES OF NONFEASANCE

Are there signs of unconscious group affinity among us? These questions occurred to me, imagining a regulatory body controlled by well-informed non-lawyer members of the public:

⁸ In this 6-3 decision holding that a state regulatory board controlled by “active market participant” licensees of that board is not entitled to state action immunity from federal antitrust scrutiny, Justice Kennedy noted: “Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established 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.” *North Carolina State Board of Dental Examiners*, 135 S. Ct. at 1111.

1. What do we discipline our colleagues for?⁹ How often do we call them on billing excessive hours? Would that be more of an issue if we were governed by the public as opposed to by ourselves? How often has an attorney ever been sanctioned for submitting to a court an argument that is dishonest, deliberately distorting, or excluding relevant holdings or facts?¹⁰

2. We require passage of an exam for entrance. To what extent is that examination a good faith attempt to protect consumers from incompetent practice versus the dynamic of those in the castle raising the drawbridge?

3. Meanwhile, we are so concerned about assuring competent attorneys that we:

a. use an examination that has not been validated for its relevance to applicable competence (unlike every other California occupational licensing agency) in more than 30 years;

b. do not necessarily measure competence in or knowledge of actual areas of legal practice relied upon by consumers;

c. do not include negligence as a basis for attorney discipline except in extreme cases involving addiction or inability to function;

⁹ See the annual discipline report of the [State Bar for 2017](http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-of-california-releases-draft-of-2017-annual-discipline-report) at: <http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-of-california-releases-draft-of-2017-annual-discipline-report>

¹⁰ In theory, our adversary system assumes that the other side will point out any such errors or lack of good faith. But is this process helped when both have little intellectual honesty? Nor does it help when third parties not before the court may be affected by an outcome.

d. do not acknowledge that an attorney's practice—post Abraham Lincoln—is now in a specific area of law, ranging from admiralty to bankruptcy to criminal defense to immigration law, to juvenile law, to probate, *et al.* We have counted 24 of them, and rarely does an attorney practice in more than one and even more rarely in more than two.¹¹ Each of the areas requires significant expertise and competence. The need for competence assurance does vary by area of law and circumstance.¹² But the Bar assures competence, at any level, in none of these actual areas of practice—regardless of consequences. Even required continuing legal education courses need not be in the area of actual practice, and there is never any testing of aptitude where actually relied upon, including areas of practice where negligence can yield irreparable harm. And this concerns a profession where a single

¹¹ For example, 1) immigration law; 2) criminal law; 3) property law; 4) probate law, (5) corporate, securities and commercial law; 6) family law; 7) environmental law; 8) civil rights law; 9) administrative and regulatory law; 10) antitrust and economic crime law; 11) personal injury and consumer law (including product liability, property damage and class action law); 12) labor/employment law and worker compensation; 13) real estate and construction law, 14) insurance law; 15) admiralty law; 16) bankruptcy law; 17) elder law; 18) education law; 19) health care law; 20) medical malpractice; 21) legal malpractice; 22) military law; 23) patent and trademark law (IP); and 24) taxation.

¹² The variables here may include (1) client ability to gauge competence (b) whether a single act or case can portend serious results, as opposed to an attorney engaged in many small acts over a long period, and (c) the degree of harm that attends attorney negligence. We may not be quite as concerned with assuring competence and recompensing victims of negligence in the practice of transactional admiralty law as in the area of immigration law where the price of an error can indeed be irreparable. For a discussion of the factors that might influence the degree of concern that properly attends particular areas of legal practice, see Robert C. Fellmeth, *A Theory of Regulation: A Platform for State Regulatory Reform*, 5 Cal. Reg. L. Rep. 2 (1985) at http://www.cpil.org/download/A_Theory_of_Regulation.pdf

appellate court decision, if not tracked when it is published, can mean a 180-degree error in legal practice.

e. exacerbate our nonfeasance in failing to realistically assure competence by excluding negligence not only from most discipline, but also from eligibility for relief from the Client Security Fund—which only covers attorney dishonesty, not damages from negligence, even if extreme. (And, by the way, we then underfund that.)

f. And then we top all of this off by allowing our colleagues to operate without malpractice insurance. And we well know that few plaintiff malpractice attorneys are going to make the significant financial commitment to sue any attorney lacking insurance.¹³

So what has the Bar done, given (a)–(f) above, to either assure competence that prevents or limits harm from negligence, or to at least allow some recovery of the damages accruing from it? I am well aware that many of us have worked hard to enhance skills of practice in many areas. The sections do indeed strive to advance knowledge, and update members, and inform CLE programs. I have long been a part of two of them. And there are certification efforts and other means used to add

¹³ Plaintiff attorneys understandably will reject any case where financial recovery is in doubt. I have friends who specialize in this area of law, have participated as an expert witness in malpractice cases, and I trust most of you are also aware of this fact of life. So what we have are a substantial number of licensed attorneys running naked and effectively immunized from financial accountability. Their clients are left hanging with likely no monetary relief, not even restitution.

expertise and consumer confidence.¹⁴ But these efforts do not provide a reliable base of assured competence *vis-à-vis* consumers that is the basic charge of a state regulatory agency.

WHY

Beyond the equitable responsibility we bear given our control of entry and the terms of practice, what else properly guides us as we consider this issue? In 2011, we supported a legislative change that adds to the State Bar Act the following: “Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” Business and Professions Code section 6001.1.¹⁵ “Shall be,” not “may be” or even “should be.” *Shall* be. Now, look on your Bar Card and see what is on it. What is repeated there for each of us?

WHAT

What does this lodestar mean for us who participate as the regulators of our profession? We have a dual obligation to take reasonable steps to (1) prevent consumer harm and (2) assure at least some substantial compensation for consumer

¹⁴ I have been involved in one of these, the Child Welfare Law Specialist (CWLS) certification, grading the examinations offered and working to expand it into over 30 states beyond California.

¹⁵ Added by Stats. 2011, Ch. 417, Sec. 1. (SB 163) Effective January 1, 2012.

victims where we have failed. Indeed, from the consumer viewpoint, the power of licensed attorneys to determine qualifications for and terms of practice makes that assurance of damages most appropriate. Accountability properly accompanies power.

HOW

a) Reduce the Need for Consumer Recovery

Obviously, on one level, we fulfill our obligation by engaging in more responsible prevention. Virtually every other nation of the world licenses its attorneys after five years of higher education. We require seven. And the cost of that travail has increased more than ten times since my law school attendance, more than five times any CPI measure that compensates for inflation. It can now cost, including the \$40,000-\$60,000 per year in tuition plus living costs, close to \$500,000 to be eligible to take the Bar exam. And then more is required for Bar review courses which one would think a law school taking a fortune from its students would be able to make unnecessary. And then at the conclusion of the primrose path, we flunk most takers and claim it is because we must have competence, while we do nothing about actual competence relied upon by consumers. We need to hold both law schools and the Bar accountable for a system that prepares applicants to create a system where 90%-95% pass a general bar exam.

We need to explore the idea of licensing attorneys in their areas of practice. For some areas of law, where clients are able to judge competence, or there are systems of supervision in place (such as a governmental position), perhaps we do not

impose strict qualification. But in areas ranging from family law to immigration to juvenile law and others, where one error can mean irreparable harm or overwhelming damages that cannot be easily covered by a client, we require on-point competence. We should require CLE courses to be in the area of practice. We need to explore the idea of periodic re-examination—maybe every five years.

I am aware that this prevention recommendation is not within your purview here. Your assignment here largely is what to do about damages from attorney negligence. But one aspect of that should be to eliminate its need by improving on-point competence.

b) Assure at Least Some Compensation for Victims of Attorney Negligence

The devil is in the details, and how do you do it? I suggest that there are three mechanisms to consider, either individually or in combination:

i. All Non-indemnified Attorneys Must Carry Minimal Malpractice Insurance

One option is a simple requirement that attorneys carry malpractice insurance. However, there are some who may properly be excluded, *e.g.*, those who are effectively indemnified by a large entity employing them, such as a governmental body, or where that entity carries equivalent insurance that provides such coverage. Further, the requirement need not impose required high coverage. Certainly a \$1 million coverage limit would be preferable, but given the large number with *no* coverage, it would

hardly be unreasonable to at least require \$100k in coverage for individual claims with a \$300k aggregate coverage ceiling.

California does have higher malpractice premiums than do most other states, but coverage to \$100,000 per claim and \$300,000 in aggregate appears to cost in the \$500-\$1,500 annual premium range.¹⁶ Some policies cost as little as \$600 a year, depending upon various factors. But the objection based on cost, as a general matter, has some problems. The average salary for full-time counsel is not trivial. The California average is \$157,152, and the average for new attorneys out of law school is \$67,000,¹⁷ both well above national averages. As a general proposition, persons with this level of income can afford to pay 1-3% of their income to ensure recovery of clients from their errors. At the statistical average of hourly compensation for salaried attorneys (\$75 per hour), that is roughly 12-30 hours of paid services per year.

ii. Two Options to Facilitate Coverage for Low Remuneration Legal Practice

A common objection to required malpractice coverage is the burden it would portend for those performing public interest or poverty law work with particularly low annual salaries. There are two possible solutions to this understandable and often *bona fide* objection, plus a third option of Client Security Fund use.

¹⁶ The University of San Diego provides coverage for CPIL but, out of curiosity, I applied for insurance from Mainstreet Insurance at a \$100k per claim and \$300k aggregate limit. I identified child law, public interest law and antitrust law as my three areas of practice. My annual premium offer was \$973.

¹⁷ See <https://www.sokanu.com/careers/lawyer/salary/california/>.

(a) Those practicing in such areas (*e.g.*, immigration, criminal defense, family law, consumer law, poverty law, *et al.*) warrant coverage more than perhaps any other practitioner. The damage they can do to persons with likely limited client experience in shopping for counsel, or perhaps lacking effective choice at all, is profound. Indeed, the areas of law where such insurance is most appropriately required will roughly correlate to these practitioners.¹⁸ Those who practice in such low-remunerative geographic or subject areas could perhaps be allowed some alternatives to lower this burden. It might be appropriate to require a somewhat lower coverage amount, perhaps just \$100,000 per claim plus reasonable attorneys' fees, and a \$300,000 aggregate ceiling.

(b) Another option would be to allow a bond to be posted at perhaps somewhat lower cost to cover malpractice judgments for attorneys in such a position. Note that even contractors have to post a bond in our state's regulatory system. If that swimming pool is only half done or was put right over a leech field or the contractor runs out of money and cannot finish, the consumer is covered.¹⁹

¹⁸ Such sentiments are often advanced in good faith. However, from the perspective of the Bar as a whole, it would help if there were the same kind of relief from student loans and other assistance that the Medical Board supplies to young physicians who practice unremunerative medicine in underserved areas. Business and Professions Code section 2436.5 requires \$25 of each physician's biennial renewal fee to be transferred to a loan repayment assistance program which awards up to \$105,000 to physicians who agree to serve in an underserved area. The State Bar does nothing close to this measure.

¹⁹ Business and Professions Code section 7071.6 requires most contractors to post a \$15,000 bond to recompense consumers who are damaged as a result of defective construction or employees who have not been paid wages owed to them. Attorneys, in general, are rather better able to pay for a bond or insurance than are dry wall contractors. It is hardly a source

iii. Use of the Existing Client Security Fund

Another option would be to arrange for the Client Security Fund to cover malpractice judgments as a limited risk pool for such qualifying attorneys in need (at least up to a reasonably low ceiling, such as \$100,000 plus reasonable attorney's fees per claim and a \$300,000 overall liability ceiling). Currently, the CSF covers intentional theft and dishonesty but not damages from negligence or malpractice. The Bar could alter the system so that those who are engaged in public interest practice for low-income clients can qualify for that malpractice coverage, assuming other payors are unavailable.

That extension might then be applied to the 10-15% of practitioners likely to qualify in terms of remuneration and stated "inability to afford." Hypothetically, a \$200–\$400 yearly contribution from those to be so covered would augment this Fund—which requires additional funding in any event! Additionally, this solution would also involve a supplemental contribution to the CSF from the entire profession above current levels. We believe that going from \$40 to \$70 for CSF contribution might provide the additional sum needed with a relatively minor cross-subsidy from the rest of the profession.²⁰ The advantage to this additional cross-subsidy above the

of pride that the Contractors' State License Board appears to be more protective of consumers on the issue we are now deciding than is our State Bar.

²⁰ Note that if one-eighth of licensed attorneys are covered by the Fund, the \$30 in extra contribution from all attorneys to the Fund could provide \$240 per attorney covered. Combined with the \$200–\$400 required from them, the total would likely approach predicted payouts. While insurance premiums may be somewhat higher, the Fund does not have the

reduced premium for coverage does two things: (1) it reduces the burden on attorneys who find insurance financially difficult,²¹ and (2) at the same time, it provides at least some cross-subsidy from the rest of us. That cross-subsidy makes sense in terms of basic ethical obligation.²² Bar licensees could be given a choice: (1) meet the minimum required malpractice coverage, or (2) post a bond, or (3) (if you so qualify) contribute an extra sum to the CSF as a risk pool for eligible attorneys to cover malpractice judgments.

CPIL thanks you for considering these thoughts and suggestions, and for your public service.

profit and other price-enhancing features of private insurance. Hence, that \$440 to \$640 annual amount may well suffice.

²¹ It appears that about one-half of attorneys lacking insurance and making over \$50,000 a year could “afford to pay” \$1,000 in annual insurance premiums, according to a recent Bar survey. Only 35% could afford to pay \$1,000 where earning under \$50,000. But the amounts suggested above (\$200-\$400) would appear to be within the reasonable reach of even these lowest income attorneys. *See* Linda Katz, *Survey of Attorneys Re Legal Malpractice Insurance*, State Bar of California, 2018 at 13. And note that one’s opinion of “what you can afford to pay” may not be entirely objective. It is unlikely that any of them would starve or be rendered homeless.

²² We have some role in deciding our rules of practice and our professional discipline and, more importantly, we largely control the system that is supposed to assure competence. Is it not appropriate for those who control assured quality to have some accountability where that purpose is not entirely actualized? One suspects that this accountability might make the State Bar at least theoretically more accountable where the profession then pays at least a part of the costs of any shortfall in that “competent practice” standard.