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June 10, 2019

The Honorable Rudy Salas, Chair, Joint Legislative Audit Committee
The Honorable Hannah-Beth Jackson, Chair, Senate Judiciary Committee
The Honorable Mark Stone, Chair, Assembly Judiciary Committee
1020 N Street, Room 107
Sacramento, CA 95814

Re: California State Auditor Report 2016-137 – Commission on Judicial Performance

Dear Chairs Salas, Jackson and Stone:

On behalf of the Center for Public Interest Law (CPIL), I write in strong support of California State Auditor Elaine Howle's recommendations for greater transparency and strengthened public protection measures at the Commission on Judicial Performance (CJP). We applaud the Legislature for undertaking this critical oversight of our judicial system, and I look forward to speaking to your respective committees at the joint hearing on June 12, 2019. Given the fact that three-quarters of litigants in California state courts are self-represented, public trust in the judiciary, and judges' ability to conduct themselves in a fair and equitable manner, are of the utmost importance in our state. CJP's role in regulating these judges and preserving that public trust is a pillar of our democracy, and the Auditor's recommendations must be taken seriously, and acted upon as swiftly as possible. The following provides a summary of the remarks I will make at the hearing.

The Center for Public Interest Law

CPIL is a nonprofit, nonpartisan, academic center of research, teaching, learning, and advocacy in regulatory and public interest law based at the University of San Diego School of Law. We have taught the administrative enforcement process—which concerns performance standards for public officials and their enforcement—of relevance to CJP functions. For almost 40 years, CPIL has worked to protect and advance a reality where the public is protected by a government that is transparent, ethical, and accountable. Since 1980, we have studied the state's regulation of business, professions, and trades, monitoring the activities of major state occupational licensing agencies. CPIL's expertise has long been relied upon by the Legislature, the executive branch, and the courts where the regulation of licensed professionals is concerned.

CPIL has been particularly active in monitoring and strengthening enforcement programs at California occupational licensing agencies — programs that are intended to receive complaints and reports about licensees, investigate them, and take appropriate disciplinary action. CPIL faculty and staff have served as “enforcement monitors” at three different California agencies — conducting research, writing detailed reports, and drafting legislation to implement our recommendations. From 1987 to 1992, CPIL’s Executive Director, Professor Robert C. Fellmeth, served as the State Bar Discipline Monitor, 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 have also participated actively in the proceedings and deliberations of the 2010, 2016, and 2017 iterations of the Governance in the Public Interest Task Force at the State Bar. This work culminated in significant reform to enhance transparency and accountability at the State Bar, and with which the Judiciary Committee members are surely familiar.

Professor Robert Fellmeth has in the past served as the Chair of the California Athletic Commission, exercising disciplinary authority. He has also served as an expert witness in CJP disciplinary hearings. Finally, he is the co-author of the California White Collar Crime treatise (with Thomas A. Papageorge, Tower Publishing, Fifth Edition 2016).

Additionally, former CPIL Administrative Director Julie D’Angelo Fellmeth served as Medical Board Enforcement Monitor from 2003-2005, drafting two detailed reports and implementing legislation that was successful in 2005. From 2001-2003, D’Angelo Fellmeth served as principal consultant to the Contractors’ State License Board Enforcement Monitor, which produced four reports and several bills implementing their recommendations. As such, CPIL is well familiar with the enforcement process discussed in this Audit.

The Quality of Investigations and Staff/Commission Decisionmaking Must Be Improved

Although the Audit finds (at pages 17, 24, and 28) that investigations were inadequate in fully one-third of the cases examined, it does not describe the investigative training provided to either the intake attorneys or the investigating attorneys. Although these individuals are attorneys, completing law school and perhaps practicing law does not ensure guaranteed investigative training and/or experience. Inasmuch as CJP is required to prove misconduct by clear and convincing evidence, the quality of the investigation and the lawful procurement of admissible evidence is of utmost importance. CPIL agrees with the Auditor’s recommendation that a new investigations manager position be created at CJP; that person

should be responsible for setting investigative timeframes which are currently nonexistent at CJP (see Audit at page 30), establishing clear and mandatory investigative techniques and procedures, and substantively reviewing the investigative reports prepared by intake attorneys and investigating attorneys.

Additionally, although the Commission makes decisions at various points in the process, it is unclear what information the Commission has been given at each point. If, as the Audit implies, the Commission is asked to decide whether to close or investigate a given case based on nothing but a memo from an intake attorney (and – as noted above – one-third of those investigations were inadequate), then those attorneys are acting unilaterally. There is no assured substantive review of those memos or the evidence underlying them – and the Commission is deprived of information that would enable it to make decisions to properly protect the public. Indeed, the Audit (at page 23) states that the Commission almost never disagrees with an intake attorney’s recommendation to close a complaint without investigation. And with no apparent recourse for the complainant.

The Audit’s critique of CJP’s case tracking system is familiar to us, having studied the Department of Consumer Affairs’ unfortunate “BreEZe” database for the last six years. Neither CJP’s tracking system nor its procedures enable or require CJP to detect trends or track patterns of misconduct by particular judges (at pages 25 and especially 54). CPIL supports the Auditor’s recommendation that the Legislature appropriate sufficient funds to enable CJP to update its electronic case management system. Without such an appropriation, CJP will be unable to implement one of the Auditor’s most common sense recommendations (at page 51) — that it accept online complaints, like most other regulatory agencies, instead of requiring complainants to submit paper complaints through the U.S. mail.

Using Special Masters to Judge their Peers May Implicate a Conflict of Interest

CPIL shares the Auditor’s concerns that CJP’s reliance on a panel of Special Masters — who are themselves judges — to consider evidence and establish findings of fact and conclusions of law about their peers’ misconduct. Such reliance may involve a conflict of interest and deprives the public of the role in ensuring the accountability of the judiciary that recent initiatives have sought to assure. This is especially concerning given the great deference the Commission appears to give to the panels’ findings and conclusions, and the Auditor’s finding that in instances where the Commission disagreed with the Special Masters’ conclusions, the Commission (which includes a majority of public members) always chose to elevate the level of sanction from that recommended by the three-judge panel of Special Masters. Whether or not the panel believes they were justified, the public perception that judges are more lenient when disciplining their peers undermines the public trust in the judiciary.

Again, we believe other regulatory agencies may provide useful models for CJP and the Legislature to consider as alternative structures. Most other California professional licensing

boards are governed by the Administrative Procedure Act (APA), Government Code section 11370 *et seq.*, which separates investigation/prosecution functions from the final disciplinary decision and thus establishes the bicameral structure recommended by the Auditor. CPIL supports that approach, for reasons discussed below. At other agencies governed by the APA, intake and investigative staff are employed by the agency (or are centralized in the Department of Consumer Affairs), and prosecutions are handled by the Attorney General's Office. Public evidentiary hearings are conducted by an administrative law judge (ALJ) from the Office of Administrative Hearings, some of whom specialize in a specific complex type of matter. The ALJ writes a proposed decision including findings of fact and conclusions of law, and then recommends disciplinary action based on a set of "disciplinary guidelines" which the agency adopts and periodically updates (no "disciplinary guidelines" setting forth a recommended range of penalties for each type of judicial misconduct appear to exist at CJP – we strongly urge the Commission to examine other boards' disciplinary guidelines and adopt some of its own). The final disciplinary decision is usually made by the board on the record admitted by the ALJ, and that decision is appealable to the judicial branch.

Of critical importance, board members at other occupational licensing agencies are walled off from complaints, pending investigations, and the filing of accusations (the formal written charges against the licensee). Board members are supposed to know nothing about a pending complaint or disciplinary matter unless and until they receive a stipulated settlement (agreed to by the licensee and the Attorney General's Office) or a proposed ALJ decision which recounts findings of fact and conclusions of law. Board members at APA agencies do not participate in the interim decisions the Commission makes under its existing structure. For example, they do not decide whether to open an investigation (Figure 2 at page 8) or determine whether clear and convincing evidence of misconduct exists before initiating a formal proceeding (Figure 3 at page 9). As such, they are not privy to inappropriate information or unproven allegations which may influence their ultimate disciplinary decisionmaking.

The actual enforcement process at other California agencies (some subject to the APA, some not) varies by agency. For example, members of the State Bar's Board of Trustees play no role whatsoever in investigative, prosecutorial, or disciplinary decisionmaking; those functions are performed by the Chief Trial Counsel's Office (which includes the Office of Investigations) and – if approved for filing – the independent State Bar Court. Members of the Contractors' State License Board similarly play no role in final disciplinary decisionmaking; that function is performed by CSLB's executive director (called the "registrar" at that agency). Members of the California Athletic Commission (which regulates professional boxing) themselves sit at evidentiary hearings, assisted by an ALJ from the Office of Administrative Hearings who controls the proceeding and makes evidentiary rulings. Some agencies use the Attorney General's Office to prosecute disciplinary matters; others (like the State Bar) do not. CPIL has looked at these variations for 40 years. We can say with confidence that we are not aware of any other state agency in California that maintains CJP's "unitary" structure, and we

support the recommendation that these functions be separated to preserve independent decisionmaking.¹

CJP's responses to the Audit indicating that there is "no problem" with the existing structure is troublesome. And the fact that no other state judicial discipline agency is structured as the Audit proposes is simply irrelevant. The legislative branch properly sets the standard federally and in all fifty states for government transparency and accountability. There are some distinguishing features to judicial branch discipline and there is a judicial aspect to executive branch discipline. But the legislature has a role in enacting the structure and in setting minimum standards.

Increased Transparency and Accountability at the Commission on Judicial Performance are Critical to Preserve the Public's Trust in the Judiciary

As an organization dedicated to government accountability, we fully support the Audit's recommendations that CJP implement a series of reforms to improve its communication with and transparency to the public. Indeed, the very fact that the Commission waged a court challenge to this audit in the first place demonstrates a culture that deeply values its ability to conduct its proceedings outside of the public eye. It is beyond time for CJP to align its practices with other regulatory agencies in California that properly apply. We are encouraged that CJP's written response to the Audit agrees that they should implement the Auditor's recommended transparency measures.

Specifically, we agree that the Commission should make every effort to advise the public about the purpose of CJP, and clearly advertise—in plain and accessible language—the procedures for filing a complaint with the Commission, and the evidence that must be submitted in conjunction with that claim. We also agree that the Legislature should require signage to be posted at state courthouses providing information about CJP and directing the public to its website for further information about filing a complaint.

A myriad of regulatory agencies in California — from the Medical Board to the State Bar — provide various models of effective transparency measures that CJP may utilize to better inform the public, and enhance their ability to alert the Commission to wrongful conduct of the judiciary. In addition to the Auditor's important recommended transparency measures,

¹ CPIL does not concur with the Auditor's recommendation that the Commission could be divided into "subsets" of members which would preside over evidentiary hearings. Although this recommendation is superior to the status quo, it will lead to inconsistent decisionmaking by the "subsets," especially in the absence of disciplinary guidelines discussed above. For purposes of disciplinary decisionmaking, the Medical Board is divided into two "panels" which make final decisions in matters based on the first initial of the subject physician's last name. CPIL has not supported that division, but the Medical Board handles hundreds more disciplinary matters than most other regulatory boards, so it may be unavoidable. At least the Medical Board has disciplinary guidelines; CJP does not.

based on our observations of best practices at other California agencies, we recommend the following specific transparency recommendations:

- Implement an ***email subscription function*** on CJP's website so that members of the public may easily sign up and receive notifications of important information about the Commission including upcoming public hearings, public meetings, opportunities for public comment on proposed rules, and disciplinary action taken against members of the judiciary.
- ***Notify the public at least 10 days in advance of Commission meetings***, post the agenda on CJP's website, and expressly provide opportunity for public comment as to each action item on the agenda that takes place in open session (all of which are required by the Bagley-Keene Open Meeting Act which is applicable to the State Bar and most other occupational licensing boards).
- ***Webcast public meetings***, and provide opportunity for members of the public to provide public comment from remote locations (*i.e.*, telephonically).
- ***Clearly post proposed rules online***, notify the public in advance, provide ample opportunity for public comment via online submission as well as U.S. Mail, and hold public hearings upon request with respect to the proposed rules (as is required by the APA's rulemaking provisions, Government Code section 11340 *et seq.*).

Adequate Resources are Necessary

The Audit demonstrates that CJP does not expend much of its budget on its core functions (only 61%), and improperly spends part of its budget on rent and other avoidable expenses. CPIL concurs with the Auditor's recommendations concerning elimination of avoidable expenses and the need for a one-time appropriation for an investigations manager and a new case management system.

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Thank you for the opportunity to present these recommendations to the committees. We are happy to provide additional information if you have further questions.

Sincerely,

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

Bridget Fogarty Gramme
Administrative Director
Center for Public Interest Law
University of San Diego School of Law

Cc: Honorable Members, Joint Legislative Audit Committee
Honorable Members, Senate Judiciary Committee
Honorable Members, Assembly Judiciary Committee