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Committee on Judiciary

Assembly Committee on Business & Professions

Re: AB 3279, State Bar of California – SUPPORT WITH AMENDMENTS

Dear Committee on Judiciary:

The Consumer Protection Policy Center (CPPC) 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. CPPC's executive director, Professor Robert Fellmeth, served as State Bar Discipline Monitor from 1987–1992. He was appointed by the Attorney General to this statutorily created position and reported to the California Chief Justice and Legislature. Professor Fellmeth helped achieve the following major reforms: [1] increased receipt of information from relevant sources, e.g., court sanctions, malpractice judgments; [2] creation of an independent, professional, and full time State Bar Court, including independent hearing judges and a three-judge appellate panel, instead of Supreme Court review of every discipline case (the system was upheld by the California Supreme Court in the 1990s and resolves the vast majority of cases without further review), and [3] sponsorship over the past twenty years of numerous amendments to the State Bar Act (e.g., subjecting the State Bar to the Bagley Keene Open Meetings Act and the Public Records Act). CPPC supports AB 3279, which will increase fees for attorney licensees that are necessary for licensing and adjudication proceedings, as well as additional recommendations for this Legislature to consider.

Increase in Licensing Fees

The Legislature has correctly identified faults within the State Bar's recent shortfalls when it comes to disciplinary and cost matters. However, unless the Legislature provides adequate resources, the State Bar cannot improve upon the identified shortfalls. When Professor Fellmeth served as discipline monitor the annual fee for attorneys was approximately $410. Over 30 years later, the licensing fees are essentially the same. Considering the rise of inflation would bring it to around $900 in today's standards.

Current caseloads for Office of Chief Trial Counsel (OCTC) investigators and attorneys are unacceptable. Each OCTC attorney has 40 to 60 disciplinary cases. Caseloads must be half of the current caseload to allow expeditious and thorough investigation and resolution. There is no question that investigators must be increased by at least 45 percent in number and attorneys by 30 percent. Caseloads will remain high and difficult, but that burden is manageable with such an increase. Without increased funding via licensing fees, there will be no improvement. Requiring the State Bar to operate at the current budget structure will certainly continue the cycle of State Bar shortfalls the Legislature continues to identify.

Update Case Resolution Benchmarks and Use Interim Remedies to Better Protect the Public

The legislatively stated primary purpose of the State Bar is to protect the public through the discipline of attorneys. CPPC recommends shortening benchmarks to 30 or 90 days, depending upon a case's complexity, while leaving a 12-month maximum for extraordinary cases. For cases likely to take more than 90 days to complete, the Bar must consider interim remedies.

The interim remedies must not be confined to immediate suspension from practice. While such suspension or disbarment carries with it a difficult "clear and convincing" evidentiary burden, other interim remedies simply alter the "how" of continued practice and are properly established by a preponderance of the evidence. The Legislature properly makes that distinction clear by statute. Note that most states allow disbarment by preponderance of the evidence and California is one of a minority of states that require the "clear and convincing" burden. That enhanced standard may be justified where the proceeding involves the taking of a "vested" right. But preliminary injunctions and temporary restraining orders in civil proceedings generally involve the two-part test: (1) is there a preponderance of evidence supporting the interim remedy sought, and (2) balance the irreparable harm between the parties.

Such interim remedies should include requiring an independent accountant to handle all monetary funds connected to questionable spending or concealment of funds from client payments or from settlement or other sources not exclusively received for legitimate attorney compensation. Such an interim remedy in the infamous Girardi case would have meant many hundreds of thousands of dollars going to intended beneficiaries rather than to counsel. Such an attorney, where the preponderance test is met, may continue to practice, but all financial transactions will go through the offices of that State Bar assigned independent professional, with some or all costs potentially borne by that attorney.

Other interim remedies may include the assignment of independent counsel, particularly if the subject matter is complex and competence is at issue. Assigning an attorney with expertise in the subject area of a suspect counsel can provide an ongoing check on possible irreparable harm to clients. A myriad of other possible interim remedies may assuage continued or increased harm from corrupt or negligent practice. This option is of particular merit where proceedings consume six months or more, or the practice involved imposes continuing harm or danger to clients.

Create a Prioritization Process to Focus on High-Risk Respondents

We recommend building upon the established OCTC system that uses case prioritization categories and Major Case Designations (MCD) to identify high-risk attorneys who warrant a heightened level of monitoring. Such designations should consider (a) irreparable harm, (b) unethical misconduct, (c) number/frequency of complaints, (d) diversity of complaints, and (e) lack of available alternatives for victims. One crucial aspect of appropriate prioritization is to identify all counsel with multiple serious complaints (e.g., more than three within a short time). Some of these attorneys are properly assigned an investigation that is not merely focused on addressing the complaint of a single client. Rather, attorneys with repeated complaints are properly subject to a wholesale inquiry into their legal practice. For example, Girardi had over one hundred complaints that generated investigations over more than twenty years. Few of them considered, or were apparently aware, of the many other investigations into his practice. He is an obvious example of an attorney whose complaints should trigger not seriatim, disassociated inquiries from different investigators, but rather the assignment of one investigator and one OCTC attorney to comprehensively monitor all activities and problems in a timely manner.

Increase in Public Member Representation

CPPC recommends the Bar have a public member majority for the Board of Trustees. Such a composition will provide a much-needed shift in perspective as to how to best achieve the Bar's statutory paramount priority of protecting the public. It will also send an important message to the public about the Bar's commitment in this regard.

Additionally, this is a recommendation for which we at CPPC have been advocating for decades—particularly following the U. S. Supreme Court's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S.494 (2015). This holding included the bold general rule that where a regulatory board is controlled by active market participants in the occupation the board regulates, it lacks state sovereignty and thus is subject to federal antitrust liability unless the state can show that it is actively supervising these boards. While a public member majority would not shield the Board of Trustees from antitrust lawsuits, changing the Bar's composition to a public member majority will decrease the Bar's risk of exposure to lawsuits, and is the right thing to do for public protection.

Provide Necessary Areas of OCTC Expertise

We recommend the Bar hire expert counsel in at least the following areas: Family Law, Immigration Law, Probate Law, and Bankruptcy Law. Some expertise on immigration exists, but all four of these subject areas, and possibly several more, warrant subject matter expertise among State Bar discipline counsel. Two factors commend such subject matter expertise. First, these experts will be better able to ascertain negligent practice more quickly. The practice of law is now divided into 24 very different subject areas, with often different types of courts, procedural rules, malpractice harm, etc. The Bar properly maintains in-house expertise about certain areas of practice portending irreparable harm from negligent practice.

Second, the Bar should include in its regulatory ambit strategies to *prevent* consumer harm, not just *post hoc* investigation and remedies. These expert discipline attorneys would have a crucial task to propose rules to mitigate attorney negligence. For example, perhaps attorneys practicing in Family Law should be required to focus their required Continuing Education on their area of actual practice. And they should be required to be tested after each such program to ensure competent knowledge about their actual field of practice. And there may be many other measures to ensure competent practice. Interestingly, this is a purported *raison d'etre* of the very existence of the Bar. But to its discredit, the Bar does not require any updated education or demonstration of competence in actual areas of practice-not for the entire fifty or more years of practice relied upon by consumers. Nor does its Client Security Fund provide payment for attorney negligence damages, nor does it require attorneys to carry malpractice insurance.

For these reasons, CPPC supports AB 3279 to increase attorney license fees, and recommends necessary amendments to this bill.

Sincerely,

Marcus Friedman

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