Responsive Law
The Consumer's Voice in the Legal System

Comments on: Consumer Protection in the Wake of the *Dental Examiners* Decision

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Comments to the

State Bar of California Governance in the Public Interest Task Force

April 22, 2016

Responsive Law would like to thank the Governance in the Public Interest Task Force for the opportunity to present these comments. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people.

As a consumer advocacy organization, our primary concern in matters of bar organization and governance is that governance structures are structured to create checks on lawyer self-interest and allow the public interest to be served. The State Bar of California is better than the bars of many states in this regard. The State Bar Board of Trustees is required to have six non-lawyer members among its 19 members.[1] In addition, California law makes protection of the public the highest priority of the State Bar.[2]

Despite these measures, though, the State Bar's system of governance and oversight is insufficient to guarantee that the public's interest takes precedence over the business interests of lawyers. Most lawyers are good and ethical and want to do the right thing both for their clients and for the greater public good. However, unchecked self-governance is an invitation to erring on the side of perceived professional interest when making decisions that affect the public.

The *Dental Examiners* Decision Subjects the State Bar to Antitrust Law When It Engages In Anticompetitive Activity

The U.S. Supreme Court's recent decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* makes clear that when

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[1] Bus. & Prof. Code § 6013.5.
[2] Bus. & Prof. Code § 6001.1.

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a controlling number of the decision makers on a state licensing board are active participants in the occupation the board regulates, the board can invoke state-action immunity only if it is subject to active supervision by the state.[3] The current governance structure of the State Bar leaves it and its Board of Trustees open to antitrust action, for which *Dental Examiners* makes it clear they would not receive state action immunity.

The State Bar engages in a number of anticompetitive regulatory activities. Subject to the approval of the California Supreme Court, it can formulate and enforce rules of professional conduct for members of the State Bar.[4] Such rules include a prohibition on aiding unauthorized practice of law[5] and a prohibition on sharing fees with a non-lawyer[6], both of which can be used to stifle innovative competition in the provision of legal services.

Members of the State Bar will undoubtedly argue that these rules are intended to protect the public. However, bar members have made it clear that they expect their elected and appointed brethren on the State Bar Board of Trustees to place protection of lawyers' financial interests ahead of the public interest in access to justice. For example, in response to a call for public comment regarding the possibility of licensing non-lawyers to provide limited legal services, multiple lawyers (including a former president of the State Bar) responded that such a proposal should be anathema to the bar due to the adverse financial impact they perceived a new legal profession would have on lawyers.[7]

Oversight by the California Supreme Court Does Not Meet the "Active Supervision" Requirement for State Action Immunity

The *Dental Examiners* decision allows active market participants to receive state action immunity if the state is actively supervising their

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[3] *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).
[4] Bus. & Prof. Code § 6076.
[5] Cal. R. Prof. Conduct 1-300.
[6] Cal. R. Prof. Conduct 1-320.
[7] See Attachment A, Selected Comments from Lawyers in Response to State Bar Consideration of LLLT Licensure.

anticompetitive decisions. One of the requirements for active supervision is that "the state supervisor may not itself be an active market participant."[8] Because of this requirement, the oversight of the State Bar Board of Trustees by the California Supreme Court is not sufficient to establish state action immunity.

California Supreme Court Justices are active market participants under the definition established in *Dental Examiners*. The California Constitution requires that they have been members of the State Bar for at least ten years.[9] Additionally, FTC guidance on active supervision states, "A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant."[10] At least eleven of the past twenty California Supreme Court Justices to leave office returned to private practice in some capacity.[11] These justices are ratifying regulations created by the State Bar that, for the majority of them, will impact their financial interests after they leave the bench.

To Avoid Antitrust Liability and to Better Serve the Public Interest, Some State Bar Actions Should Be Subject to Review Outside the Judiciary

Oversight by the California Supreme Court is insufficient for the State Bar to avoid antitrust scrutiny. Therefore, it is imperative that State Bar actions that raise anticompetitive concerns be reviewed by some other agency.

Review by a non-judicial agency need not impact all decisions made by the State Bar. As the California Attorney General has noted, "licensing boards perform a variety of distinct functions,

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[8] *Dental Examiners*, 135 S. Ct., at 1116–17.
[9] Cal. Const, Art. VI, section 15
[10] FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p 7 (October 2015).
[11] See Attachment B, Activity of Recent California Supreme Court Justices After Leaving the Court.

and…different supervisory structures may be appropriate for different functions."[12]

It may be appropriate, therefore, to separate regulation of the *practice* of law, which does not have anticompetitive ramifications, from the *business* of law, which often does. Drawing a bright line distinction between the two areas may be challenging, but as a starting point, regulations governing either who may participate in legal practice or the financial relationships between lawyers and others should be considered the business of law, even if they impact its practice as well.

As an example, rules regarding lawyer conduct in trials are concerned only with the practice of law, as are rules regarding attorney-client privilege. On the other hand, rules regarding lawyer advertising, unauthorized practice of law, and alternative business structures, although they may impact the practice of law, are primarily concerned with the business of law. These latter categories of rules need to be reviewed by non-lawyers to ensure that the public protection rationales asserted by the State Bar for their implementation are not merely pretexts for limiting competition.

The Supremacy Clause Trumps Any Inherent Power of the California Supreme Court to Exclusively Govern the Business of Law

Courts have long asserted that "admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers," goes this argument, "the court has inherent and primary regulatory power [over the legal profession]."[13] [14]

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[12] Cal. Att'y Gen. Op. No. 15-402, at 11-12 (September 10, 2015).
[13] 1 Witkin, Cal. Proc. 5th (2008) Attys, § 340, p. 441.
[14] Although not necessary to this analysis, we take issue with the extent to which the inherent power of the court to regulate its officers has been extended to include regulations governing conduct involving neither lawyers nor courts, such as document preparation, legal information, and advice provided by non-lawyers in contexts other than litigation.

State courts and bars have generally been successful in using a separation of powers argument to defend their regulation of the legal profession against attempts by state legislatures to intervene.[15] However, the Supremacy Clause of the United States clearly prioritizes federal statutes over any state law, even state constitutional provisions.[16] Thus, the argument that separation of powers compels judicial supervision of the bar fails against federal antitrust statutes where it succeeds against state laws.

This does not mean that the legal profession will be subject to interference with its core professional values. As mentioned above, regulations that have no anticompetitive implications need not be subject to external review. And when regulations regarding the business of law face external review, the State Bar will receive appropriate deference to its expertise on what regulations will best serve its clients. However, that expertise will be considered in conjunction with a perspective on consumer protection that has not been influenced by the indoctrination about the horrors of UPL and fee splitting that begins in law school and continues throughout a lawyer's career.

Conclusion

Responsive Law is agnostic, at this time, about what body should be tasked with review of State Bar regulatory action governing the business of law. Further discussion can illuminate whether an existing state agency is suited for this task or whether a new agency is required, either within the executive branch or independent of it. However, to ensure that consumers have a say in how they receive and pay for legal services, lawyers can no longer be allowed to create anticompetitive regulations without review by a body that doesn't face a conflict of interest between its duty to protect access to justice and its own financial interests.

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[15] Laurel A. Rigertas, "Lobbying and Litigating Against "Legal Bootleggers"--The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century", 46 Cal. Western L. Rev. 65, 118-123 (2009).

[16] U.S. Const. Art VI, Cl. 2.

Attachment A

Selected Comments from Lawyers in Response to State Bar Consideration of LLLT Licensure

Thursday, April 18, 2013
Why should lawyers pay for nonlawyers?
LETTERS TO THE EDITOR COLUMN
It boggles my mind to consider the ramifications of licensing nonlawyers. ["State Bar begins on path to nonlawyer licensing," April 11]. The vast majority of our dues go toward disciplining lawyers who step out of line. After years of delayed discipline, there is finally a reasonable time for imposition of penalties.
Now, in an era of limited economic resources, it is proposed to increase the load on our discipline system and, for a penalty, we will "disbar" nonlawyers? Oh well, they can go do something else if they are "disbarred," right? Perhaps practice medicine or accounting?

If our state has a problem with nonlawyers, let them regulate and discipline them and pay the costs; why must our profession do it (and pay for it)?

We have thousands of lawyers looking for jobs; we don't need any more practitioners. Really, the State Bar Trustees must have better things to do than consider this folly.

JUDGE SHELDON SLOAN (RET.)
PAST PRESIDENT, STATE BAR OF CALIFORNIA
LEWIS, BRISBOIS, BISGAARD & SMITH LLP

Tuesday, April 16, 2013
Licensing nonlawyers equals nonsense
LETTERS TO THE EDITOR COLUMN
I do not see the ethical issue of access to justice addressed by the lowering of fees attorneys charge, reducing what law professors are paid, reducing law school tuition, and reminding us of our pro bono opportunities. These topics put the issue squarely on how we feel about our right to money.
What I took from the April 11 article, "State Bar begins on path to nonlawyer licensing," was my State Bar trying to save our standards of living rather providing access to justice. Licensing nonlawyers is intellectually dishonest. A nonlawyer by definition cannot practice law. What a person puts on a form always has legal consequences. The way to help the person who cannot afford $150 per hour is to charge less. This does affect an attorney's standard of living.
Money is not number one.

KENNETH BROOKS
SAN DIEGO

Tuesday, April 16, 2013
Nonlawyer licensing an ill-conceived idea
LETTERS TO THE EDITOR COLUMN
Just when I thought that I had heard everything imaginable in my 28 years of

Greenman, Teri

Subject: RE: Limited license program

-----Original Message-----
From: Janet [mailto:janetgutierrezesq@gmail.com]
Sent: Tuesday, April 02, 2013 7:22 PM
To: Greenman, Teri
Subject: Limited license program

My name is Janet Gutierrez. I am an attorney in Chula Vista California. I was admitted to the Bar in December of 2009. Although I was fortunate enough to have a partial tuition scholarship and I worked all through law school, I owe about $150,000.00 in student loans. I have a very small practice in Chula Vista, and it is a struggle every month to make ends meet. I make about $4,000.00 gross per month. I keep having to lower my fees to deal with so much competition, especially from paralegals, legal document preparers, bankruptcy petition preparers, and unlawful detainer assistants. I am currently charging $700.00 for chapter 7 cases because bankruptcy petition preparers charge $300.00 and some attorneys are advertising for $700.00 for no asset cases, and clients don't understand that doesn't include fees and costs, etc. Bankruptcy petition preparers don't have to go to court, so they dont spend money on gas getting to court, or pay parking at the courthouse. Essentially I am working more every year just to make about the same amount I made when I first started. I am good at what I do. I was recently named one of San Diego's Top Young Attorneys, but I can barely afford rent.

Adding a limited license program will only make things worse for attorneys by forcing us to compete with these professionals. It will also be bad for consumers. I get cases all the time from people that paid "professionals" to help them, and I have to fix what they did wrong, and explain why what they were told is incorrect. It is already a misdemeanor to engage in the unauthorized practice of law, but unless you've been through law school, losing a limited license is not the same stakes as losing your bar license. There are already legal document preparers, bankruptcy petition preparers, unlawful detainer assistants, etc. Why create another category?

I read that hundreds of law school teachers were going to be laid off because the number of student applicants for law school decreased so much. The reason why is because lawyers are not making a lot of money, recent grads are having a difficult time finding a job, or keeping a job, and we can't afford to even pay our student loans. How is this going to help? Is it fair that I had to pay $150,000.00 for my education and someone who didn't invest the time and money can counsel a client about bankruptcy? I don't think so.

The program is a terrible idea. The state bar is supposed look after us. It would be better to force us to take on more pro bono cases than to create a limited license program. I believe the only reason why this hasn't resulted in an outcry from attorneys is that a lot of attorneys don't know about it. I can't even afford to make it to San Francisco to attend the meeting or I would. I truly hope you'll consider and read our emails in lieu of us not being able to attend.

If you would like, I can provide testimony from clients that were defrauded by legal document preparers or assistants. The clients reported them to the DA, and they just filed for bankruptcy or moved offices and nothing could be done because they weren't attorneys.

Respectfully,

Janet Gutierrez, Esq.
Gutierrez & Associates
303 H St., Suite 457
Chula Vista, CA 91910

Sent from my NOOK

Greenman, Teri

Subject: RE: Non-lawyers practicing law - Comments for your public hearing

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From: Joan Medeiros [mailto:joan.medeiros@yahoo.com]
Sent: Monday, April 08, 2013 10:08 AM
To: Greenman, Teri
Subject: Non-lawyers practicing law - Comments for your public hearing

I do not believe that it is beneficial to the general public to consult with non-attorneys for legal advice. I have had to undone so many messes caused by notaries, "document preparers," financial advisers, etc., who did not have to go to law school, do not have to be a member of the State Bar, do not have to purchase malpractice insurance, and are not subject to any disciplinary actions by the State for misconduct.

As an association that represents the attorneys in California, I am astonished that you would consider actions that would be detrimental to the honest attorneys who are trying to make a living in California. In the past, when I have reported non-attorneys practicing law to the State Bar, I was told that "you did not have jurisdiction," and that I should call the local police. Really? Is that consumer protection?

I am very much opposed to this proposal.

Joan M. Medeiros
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Greenman, Teri

Subject: RE: Limited Practice Licensing

From: Brian Kretsch [mailto:brikretsch@sbcglobal.net]
Sent: Wednesday, April 10, 2013 10:48 AM
To: Greenman, Teri
Subject: Limited Practice Licensing

California State Bar:

Why are you are working to hurt, rather than help your members? I am a bankruptcy attorney and I represent debtors and bankruptcy trustees. Bankruptcy is not the simple area of law you apparently believe that it is. Once a case is filed, it brings in all the legal issues the debtor may be involved in. You are supposed to help prevent the unauthorized paractice of law not license it. I have been faithfully paying my membership dues for 21 years now for this in return?

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Attachment B

Activity of Recent California Supreme Court Justices After Leaving the Court

Activity of Recent California Supreme Court Justices After Leaving the Court

JUSTICE	LEFT OFFICE	ACTIVITY AFTER LEAVING COURT
Marvin Baxter	January 5, 2015	No information available
Joyce Kennard	April 5, 2014	No information available
Carlos Moreno	February 28, 2011	- U.S. Ambassador to Belize [1]
Ronald George	January 3, 2011	No information available
Janice Rogers Brown	June 30, 2005	- Judge on the U.S. Court of Appeals for the D.C. Circuit
Stanley Mosk	June 19, 2001	Died while active
Malcolm Lucas	May 1, 1996	- Private practice [2]
Armand Arabian	March 1, 1996	- Professor [3] - Private Practice [3]
Edward Panelli	May 3, 1994	- Private Practice [4]
Allen Broussard	August 31, 1991	- Private Practice [5]
David Eagleson	January 6, 1991	- Private Practice [6]
Marcus Kaufman	January 31, 1990	- Private practice [7]
John Arguelles	March 1, 1989	- Private practice [8]

Rose Elizabeth Bird	January 5, 1987	Did not return to work [9]
Cruz Reynoso	January 5, 1987	- CA Postsecondary Education Commission [10] - Private Practice [10] - Professor [11] - Vice-Chairman of the U.S. Commission on Civil Rights [12]
Joseph Grodin	January 5, 1987	- Professor [13]
Otto Kaus	October 16, 1985	- Private practice [14]
Frank Richardson	December 2, 1983	- Professor [15] - Solicitor to the U.S. Department of the Interior [15] - Private Judge [16]
Frank Newman	December 13, 1982	- Professor [17]
William Clark, Jr.	March 24, 1981	- Deputy Secretary of State - U.S. National Security Advisor - Secretary of the Interior - Private Practice [18]

Key

Shading indicates return to private practice.

Citations

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