

Testimony on: **Assembly Bill 2878—Reform of State Bar Act**

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**California Senate
Judiciary Committee**
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Responsive Law would like to thank the Committee for the opportunity to present this testimony. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people. We have testified to dozens of state bar associations and legislatures as well as to the American Bar Association on regulatory issues affecting users of the legal system.

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. **We support Assembly Bill 2878, which creates legitimate public oversight of the business of law.**

The Current Governance Structure of the State Bar Creates A Conflict Between the Interests of Lawyers and the Public

Under California law, the primary mission of the State Bar of California is protection of the public.¹ The current structure of the SBC is inadequate for this mission. Under the current State Bar Act, the State Bar Board of Governors consists of 13 attorney members and only six public members. Furthermore, six of the attorney members are elected directly by other members of the bar.

Having the body that regulates the legal industry composed predominantly of members of that industry creates an inherent conflict of interest. The financial interests of lawyers are often in conflict with the interests of the public. For example, California lawyers have a financial interest in excluding competition from both

¹ Bus. & Prof. Code § 6001.1.

non-lawyers and out-of-state lawyers. They also may have an interest (or at least perceive an interest) in restricting new ways to structure law firms or new forms of advertising, so as to maintain the status quo and minimize the need to adapt their business model to a changing marketplace.

To be sure, there is nothing inherently unethical about lawyers. (The author of this testimony is a lawyer, as are nearly all the members of the board of directors and advisory board of Responsive Law.) However, lawyers are not immune from the financial pressures that affect any other group of professionals. If another profession had a system of self-governance similar to that of the State Bar and sought counsel from a lawyer, that lawyer would certainly advise her client to correct the conflicts of interest inherent in such a structure.

The Conflict of Interest Inherent in the Current Governance Structure Has a Severe Impact on Access to Justice

The conflicts of interest in the current system of lawyer self-governance are not merely theoretical; they have a very real impact on consumers. At hourly rates that do not dip much below \$200 and which routinely exceed \$300, few average Americans can afford to pay lawyers for assistance with everyday legal needs: simple estate planning; providing for elder care; arranging child custody and obtaining child support; addressing consumer debt problems and foreclosure; managing disputes over employment conditions or pay; obtaining access to legal entitlements to health care, education and public services.² Surveys of legal needs of low- and moderate-income Americans find that roughly 50%-60% of American households faced an average of two significant legal problems in the previous year. Lack of access to legal representation leads Americans to take no action to address their legal problems at rates much higher than in countries, such as England and the Netherlands, with fewer

² Deborah L. Rhode, *Access to Justice* (2005); Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law," 38 *Int'l Rev. L. & Econ.* 43 (2014); Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 *Daedalus* 83 (2014).

restrictions on who may provide legal advice and assistance: roughly 25%-30% compared with 5%-10%.³

The current model of providing legal services is insufficient to meet the needs of the public. If Californians are ever to be able to afford legal help, the bar will have to consider innovating the way in which that help is provided. 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.⁴

The Supreme Court's Decision in the *Dental Examiners Case* Heightens the Need for Reforming Bar Governance

The need for public oversight of the regulation of legal services has been made clear by the recent United States Supreme Court decision in *North Carolina Board of Dental Examiners v. FTC*.⁵ In this case, the Court held that an industry governing board controlled by market participants in the governed industry is not exempt from federal antitrust law unless it is actively supervised by the state.

AB 2878 addresses the issue of antitrust liability by reforming the State Bar Board of Trustees so that a majority of its members are not lawyers.⁶ Furthermore, it provides that no motion can pass without a

³ "Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans." (with Jamie Heine). Forthcoming in S. Estreicher and J Radice (eds.) *Beyond Elite Law: Access to Civil Justice in America*.

⁴ See attached Comments of Responsive Law to State Bar of California Governance in the Public Interest Task Force, pp. 6-11.

⁵ 135 S. Ct. 1101 (2015).

⁶ Because the new governing structure would not be controlled by active market participants, it is unnecessary that it be actively supervised by another portion of the government. In our attached testimony to the State Bar of California Governance in the Public Interest Task Force, we

majority of the non-lawyer members voting in favor. This is consistent with FTC guidelines issued in the wake of *Dental Examiners* that make clear that control of a board can occur without a majority, and that governing board structure should ensure that a minority of market participants do not control the board.⁷

We are mindful of the concerns expressed by the bar about the harms to lawyer professionalism and public protection that would arise if the bar were stripped of its self-governing status. We are skeptical that the alleged harms would come to pass, let alone that they would be as severe as alleged. However, the governance structure of AB 2878 does not leave these concerns unaddressed. Lawyers will still have significant representation on the State Bar Board of Trustees. They will have ample opportunity to make the case against any proposed regulatory changes. The fundamental difference in the new governing structure is that the ultimate decision on whether a particular regulation is in the public interest will belong to representatives of the public, not to members of an affected industry. **For this reason, above all, we urge the Committee to recommend passage of AB 2878.**

demonstrate why vesting such oversight in the California Supreme Court, rather than in a legislative or executive body, is problematic under *Dental Examiners*, and as matter of public policy.

⁷ FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, pp. 8-9 (October 2015).