

Testimony on: Concerns Regarding Committee Analysis of Assembly Bill 2878

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Testimony to the

**California Senate
Judiciary Committee**

August 11, 2016

Responsive Law would like to thank the Committee for the opportunity to once again present testimony on this bill. 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. While we supported this bill in a June 22 letter to the Committee, **we are troubled by the Committee's June 27 analysis of the bill, particularly amendments that would (1) remove the bill's requirement that anticompetitive regulations be passed by a majority of non-lawyers on a reconstituted Board of Trustees and (2) appoint a special master to further study bar governance. If those amendments were to be included in the bill, we would have to withdraw our support of the bill.**

We Concur in the Antitrust Analysis Undertaken by the Center for Public Interest Law

The Center for Public Interest Law (CPIL), in a July 27 letter to the Committee, outlined its concerns about the Committee's interpretation of the *Dental Examiners* decision as it pertains to the potential antitrust liability of the State Bar of California. It would be impossible to improve upon this analysis, especially given Robert Fellmeth's expertise in this set of issues. Rather than attempt to do so, we simply note our agreement with CPIL's thorough analysis.

The Access to Justice Crisis Has Been Exacerbated By the Current Bar Governance Model

As we outlined in our previous testimony, California, like the rest of the country, faces an access to justice crisis, with most poor and middle-income people unable to afford the \$200-\$300 per hour they would need to pay for legal help. There are many potential solutions to this problem. Allowing easier multijurisdictional practice by lawyers, and loosening restrictions on the unauthorized practice of law would give consumers a wider—and more affordable—selection of competent lawyer and non-lawyer help. Ending the prohibition on lawyers providing legal services through a non-lawyer corporation could lead to the creation of mass consumer law firms providing lawyer services for a fraction of current prices by utilizing economies of scale that are now uniquely unavailable to law firms.

The obstacle to these access-to-justice solutions is not a lack of ideas or a lack of willing service providers. Rather, it is the refusal of a hidebound legal profession to even consider—let alone adopt—the regulatory changes that are needed for the profession to become a 21st century service provider. The only way that consumers will ever be able to get affordable access to legal services is to remove the stranglehold that lawyers have over regulation of their own business interests.

Even Oversight by the State Supreme Court May Not Be Sufficient for State Action Immunity Under *Dental Examiners*

Review of anticompetitive policies by a state actor is necessary for state action immunity under the *Dental Examiners* decision. However, the California Supreme Court may not meet the standard required for active supervision under the state action doctrine. The Federal Trade Commission's guidance on this issue specified that active state supervision is inadequate when the supervisors are themselves active market participants, and that active market participants include those who have temporarily removed themselves from the market.¹

¹ FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p. 7 (October 2015).

This is clearly the case for the California Supreme Court. All of its members are lawyers. Furthermore, as we've noted in our testimony to the Governance in the Public Interest Task Force, most of these judges have returned to practice after serving on the bench, and all are eligible to do so. Thus, a body with a controlling interest of non-lawyers may be required to review potentially anticompetitive policies proposed by the bar.

Appointing a Special Master to Study These Issues Would Unnecessarily Delay Needed Reforms

Appointing a special master to study governance issues would create additional delay in restructuring lawyer governance, which has already been studied extensively by the Governance in the Public Interest Task Force, the State Bar, and numerous outside parties. The Governance in the Public Interest Task Force was formed in 2011; the Supreme Court would present its report based on the recommendations of the special master by March 1, 2018. By the time the legislature evaluates the Court's recommendations and acts upon them, the state would have spent nearly a decade studying the bar governance issue. In the meantime, millions of Californians—the people this process is ostensibly trying to help—will go without legal help in navigating evictions, divorces, child custody, employment disputes, consumer disputes, and small business matters.

Conclusion

For decades, the status quo of bar self-governance has ill-served Californians who need legal help. Requiring public oversight of anticompetitive regulations, as the current version of the bill requires, is the minimum that the state owes to its citizens. Leaving the regulatory process completely in the hands of lawyers, as proposed in the suggested amendments, will consign California's poor and middle-class to continued exclusion from the civil justice system. **For these reasons, we strongly urge the Committee to recommend passage of the bill without amendment from its June 2 version.**