

State Bar's 'Find a Lawyer' doesn't protect the public

Richard Zitrin

On Sept. 29, Gov. Arnold Schwarzenegger signed AB 2764, the annual State Bar dues bill, into law. Unlike other dues bills, however, this one contained a pointed message from the Legislature to the Bar: [R]ecent actions by the State Bar Board of Governors have not sufficiently taken into account the protection of the public. The first item cited by the Legislature as an example of the Bar's public-protection failures was a "scaled-back online 'Find a Lawyer' program."

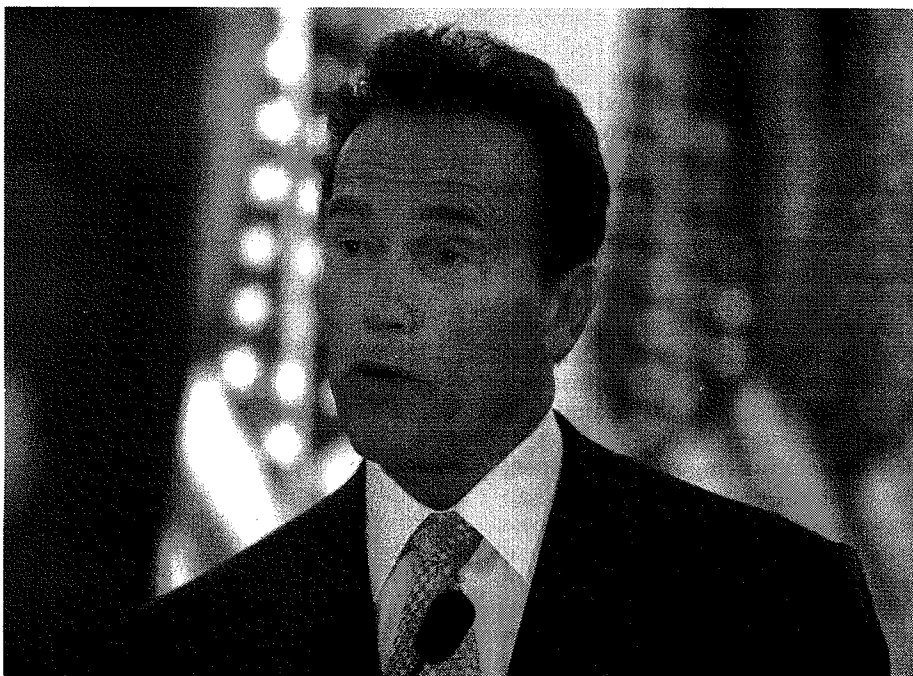
Two years ago this month, the Board of Governors rejected "Find a Lawyer," a proposal that would have allowed lawyers to list themselves on the State Bar's website by self-selected practice areas. Members of the public would have been able to sort Bar members by subject-matter category. For example, someone looking for a personal injury lawyer in San Francisco could plug in the county and practice area and find a list of every San Francisco lawyer who practiced personal injury law. Or at least *claimed* to practice personal injury. And that was the public-protection problem. Because the Bar proposal would not have required either that the State Bar vet the lawyers' designations or even insist that listing lawyers prove some — *any* — level of knowledge in the practice area, Bar members would have been free to self-designate themselves as experienced in lucrative areas of law in which they had *absolutely no experience* and get the extra bonus of apparent State Bar imprimatur.

This proposal, originally approved by the Bar's Member Benefits Committee with the support of Executive Director Judy Johnson, was rejected because the board recognized that it would do nothing to help consumers, and in fact, would likely have *harmed* the public by implying that "Find a Lawyer" was somehow better than throwing darts at a dart board. In contrast, 60-some State Bar certified lawyer referral services — both profit-making and nonprofit — have for years abided by state statute and the Bar's own stringent certification requirements, including subject-matter experience and mandatory malpractice insurance, before being allowed to do business in California.

That should have been the end of that. But it wasn't because the Legislature's dues-bill message cited "Find a Lawyer" as an example of the State Bar's failure to protect the public. Apparently, the Bar saw this as an opportunity, but *not* to recast "Find a Lawyer," enlarge the Bar's role, vet lawyer participants or require malpractice insurance. Instead, the Bar reintroduced the same program that was rejected two years earlier and placed it on November's agenda before the same committee, now called Member Oversight. Meanwhile, no one at the Bar has made any effort to explain to the Legislature why this discredited program was not consumer-friendly as proposed, but merely pro-lawyer.

Interestingly, this time around, no one seems eager to take credit for putting "Find a Lawyer" back on the agenda. Committee Chair Michael Tenenbaum told me that the Bar's staff had recommended approving "Find a Lawyer" and that he altered the item to ask only for its

Richard Zitrin practices law in San Francisco, where he also teaches legal ethics as a member of the Hastings College of the Law faculty.



SAFETY ISSUE: When Gov. Arnold Schwarzenegger signed the State Bar dues bill, he made it clear that the Bar's "Find a Lawyer" program didn't do enough to protect the public.

"consideration." Johnson, however, pointed out, accurately, that it was Tenenbaum, not staff, who had requested the agenda item in the first place. At the committee hearing, with most of the public audience there for this one item, it was continued to the next meeting without a vote, though Tenenbaum refused to say afterward whether it would come back for "consideration" or "approval."

But it was State Bar staff, not Tenenbaum or the board, who — entirely without Board approval — added a new online member benefit this summer: "Sept. 1 marks the start of a new 'Find Legal Help' feature on the State Bar website that allows the public to get more information about California attorneys that may aid in their decision to hire a particular lawyer. Attorneys are invited to add a photo and information to their public record such as *area(s) of practice*, additional language(s) spoken and law firm website address." (Emphasis added.) Just go to Member Services and click on "Beef up your profile," then self-select any area of law you want.

What's going on here? On one hand, the State Bar has long been afraid of the Legislature, because that body controls the dues bill that must be approved for the Bar to operate. Bar staffers and board members alike remember when the dues bill was killed and the Bar had to "go on the ark" (think Noah) in 1998, closing down its disciplinary function and laying off most of its staff for more than a year until it could get a dues bill approved.

On the other hand, the State Bar has unfortunately long been more interested in how things look rather than how they really are — here, the appearance of public protection rather than its reality. While board members, both good and bad, come and go, this remains an abiding perspective for many senior staffers. And of course, board members and staff alike recognize that the State Bar's constituents are not the public, but the more than 200,000 California lawyers who elect all but the public members — a point not lost on the Legislature.

Contrast "Find a Lawyer" with an issue of even greater importance to the public — a wide-ranging revision of the proposed California Rules of Professional Conduct. The Legislature has not focused on this issue, perhaps because final approval of these rules rests with the state

Supreme Court, not Sacramento. Besides, these proposals, with literally thousands of pages of text flowing from the commission that developed them, are neither sexy nor easy to digest. But more than any other subject, these rules are vital to the public interest, because they mandate how lawyers must behave towards both their clients and the public at large.

The rules commission was created after the California Supreme Court charged the State Bar to harmonize the California rules with the American Bar Association's in a manner that ensured public protection. But after almost 10 years of work, the Commission for the Revision of the Rules came up with proposals that are patently anti-consumer in many respects, in stark contrast to the ABA Model Rules that form the basis of every state's rules, except California.

How could this happen? The first, and biggest, problem was that instead of appointing a new commission to take a fresh look at the rules, in 2001, then-President Palmer Madden, on the advice of staff, brought back the decommissioned, but apparently cryogenically-frozen 1985-vintage commission that had rejected the ABA approach and much of its public protection back in the late 1980s. This group was already wedded to its 1989 work product, which had bluntly refused to acknowledge the ABA or focus sufficiently on client and public protection.

The commission's refusal to reform continued for several years until the Supreme Court sent a clear message virtually ordering the group to get with the court's program. Reluctantly, the commission finally adopted the ABA's numbering system, but its final work product still fell substantially short in the public-protection department. Still, the volume of its work product was so huge that even those public-spirited members of the State Bar Board felt they had little choice but to rubber-stamp almost all of the commission's proposals.

The end result is a disaster for ordinary members of the public who use legal services. The current proposal, among many other things:

- Allows lawyers one "free" act of incompetence before a lawyer may be disciplined, even if the mistake is egregious.
- Doesn't prohibit "unreasonable" fees,

but only fees that are "unconscionable," a much narrower standard, unlike the ABA and our own legislative State Bar Act.

- Limits the definition of incompetence by focusing on a lawyer's skill and knowledge, while ignoring lawyers' duties to diligently pay attention to their cases.

- Allows lawyers to modify fee agreements with their clients, even at the last second, removing protections that are part of the current California rules.

- Refuses to adopt several ABA rules that say lawyers may not: purposely delay litigation or embarrass others (Rules 3.2 and 4.4(a)); keep it secret from the other side if they receive documents that they know were not intended for them (Rule 4.4(b)); and — believe it or not — lie and misrepresent to others (Rule 4.1).

The rules commission's reasoning for refusing to adopt the simple language of Rule 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person") is both illustrative and instructive: "The Commission considered such issues as what knowledge is required to establish a lawyer's 'knowledge' of a statement of untruth ... and concluded that the subtleties of language in the Model Rule do not lend themselves to a disciplinary rule." Sounds like "what is 'is'?"

The State Bar has unfortunately long been more interested in how things look rather than how they really are — here, the appearance of public protection rather than its reality.

With help from esteemed ethics professors Deborah Rhode of Stanford Law School and Geoffrey Hazard of Hastings College of the Law, last June I drafted a letter to the State Bar board addressing these and other public interest issues that was co-signed by 30 California ethics professors from 14 different law schools. Noted consumer advocate John Sims, a professor at University of the Pacific's McGeorge School of Law, presented our concerns to the State Bar board. With one exception, every single one of the recommendations was ignored. Fortunately, at least on this subject, the California Supreme Court is the final arbiter.

It is long past time for the State Bar to step up and do things right. If it doesn't, the Legislature may well step in and force change. Bar staff is deeply entrenched, so voluntary change will not be easy. But there is hope so long as the board is led by people like new State Bar President William Hebert, who has solid public-protection credentials, and new Chief Trial Counsel James Towery, whose goal is to prosecute lawyer offenders who do the most harm to the public. But form can no longer prevail over substance. If the Bar wants to control its own destiny, it will have to prove itself both to the Legislature and the public, and do so quickly and emphatically.

The Recorder welcomes submissions to Viewpoint. Contact Sheela Kamath at skamath@alm.com.