THE RECORDER

Viewpoint: Bar Flunks History Test

MORAL COMPASS

Richard Zitrin, The Recorder

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Richard Zitrin, Jason Doiy /The Recorder

On April 9, the State Bar Ethics Committee (generally known by its acronym, COPRAC) held its 20th annual symposium in downtown San Francisco. The first program of the day was entitled "Who's Running the Profession? The Future of Rules-Making and the Disciplinary Process." In a neat bit of déjà vu, the symposium planners used the same title as one of the sessions at the very first COPRAC ethics conference in 1995, at a time when I was COPRAC chair.

The four panelists came to a clear though depressing consensus: that after 20 years, as moderator Larry Doyle put it, the bar has "come back full circle." Robert Hawley, a long-time bar factotum who had been a deputy trial counsel, then COPRAC's chair and special advisor while in private practice, then deputy executive director, acting executive director, and briefly, acting chief trial counsel, called the circumstances "a merry-go-round" in which "we're seeing the same scenery over and over." Somewhat more tongue-in-cheek, he opined that "everyone's running around naked, [thinking] they're in charge, while nobody is."

Tongue-in-cheek or not, Hawley—now retired from the bar and living in London—did not miss the mark by much. Indeed, the debates and arguments that roiled the state bar twenty years ago are on the principal issues being debated today. The panelists, who included David Cameron Carr, a former disciplinary counsel, and Mark Tuft, who as special advisor to COPRAC in 1995 moderated the first "Who's Running the Profession" panel, gave the audience a brief history refresher.

Unfortunately, this refresher was strong evidence that the state bar, to paraphrase Santayana, had failed to learn from history and is thus condemned to repeat it.

A few examples:

Then: In 1995, a "Futures Commission" issued a report about the status of the bar and the need for change. The main issues before that commission:

•"What branch of government should have ultimate authority over the legal profession?"

•"Should California continue to have a unified bar to which all lawyers must belong or would a voluntary state bar be [better for] the future?" and

•"If the unified bar is to continue, what structural and organizational changes are needed…?"

A "unified" or "integrated" bar means a mandatory membership public entity that combines both discipline and admission issues, on one hand, and voluntary groups such as practice-area sections on the other.

The majority of the 1995 Futures Commission concluded that while changes were necessary, a mandatory "unified" bar should be maintained. But a "substantial minority," led by Peter Keane, former San Francisco bar president and bar governor and future Golden Gate Law dean, concluded that "the mandatory state bar in its present form should be abolished and a new structure, which could include a voluntary state bar, emplaced."

Now: In 2011, the Governance in the Public Interest Task Force was reconstituted to specifically require that "enhancing [and] ensuring protection of the public is the highest priority" of the state bar. The reconstituted task force has since focused on the same issues and is to provide a report to the judiciary committees of both legislatures by May 15, 2017.

At last month's meeting of this task force, one of the seven members railed against a unified bar, while other attorneys, including former San Francisco bar president and longtime bar activist James Brosnahan, testified against it, and a leading business law section member announced he and others had founded an independent "trade" organization to provide an alternative home for current section members frustrated by the current bar.

Then: Two occurrences closely related to the unified bar debate were the 1996 bar plebiscite, created by legislation carried by bar opponent Quentin Kopp, then a state senator, and Governor Pete Wilson's veto of the bar's dues bill in October 1997.

Fifty-one percent of California admitted attorneys voted in the plebiscite, with 65 percent in favor of a unified state bar. Then-president Jim Towery claimed victory, but Kopp, Keane, and their allies noted that the low turnout was really a vote of no confidence, in that less than one-third of all admitted lawyers had voted in favor of the status quo.

Wilson's veto the next year put the bar on what was then called "the Ark." (Think Noah and the limited number of animals allowed on board, the rest being laid off.) The Ark floated for two years until a dues bill passed in late 1999.

In his 1997 veto message, Wilson wrote that "the Bar has … become lost, its ultimate mission obscured. It is now part publisher, part real estate investor, part travel agent, and part social critic, commingling its responsibilities and revenues in a manner which creates an almost constant appearance of impropriety. It is time for the Bar to get back to basics: admissions, discipline and educational standards." Clearly, Wilson was sick and tired of the unified bar.

It was after yet another dues crisis and gubernatorial veto, this one in 2009 by Arnold Schwarzenegger, that a supposedly wide-ranging "reform" bill was passed in 2011. This bill changed the structure of the bar's governing board (though the biggest change may have been from the title "governors" to the title "trustees"), and substantially revised the Governance Task Force.

Now: As the Governance Task Force takes testimony on the same issues that were raised by the Futures Commission and the Wilson veto a generation ago, the bar is again facing a potential dues crisis, this time with some legislators who are frankly (and understandably) skeptical about a unified bar in light of its woeful record over the last several years. Among other lowlights: the resignation under fire in 2011 of newly-appointed Chief Trial Counsel Jim Towery (yes, the same Towery), ousted by pressure from the even newer then-Executive Director, Joe Dunn; the Supreme Court's blanket rejection in August 2014 of the bar's Rules Revision Commission's work product, in its entirety, demarking a decade-long failed effort to revise the ethics rules; the termination of Dunn in November 2014 for cause, allegedly based on the whistleblowing of Chief Trial Counsel Jayne Kim; and the 2016 vote of no confidence on Kim from her own staff attorneys and her decision to not seek reappointment, leaving a long-troubled disciplinary system, the subject of my next column, even more in limbo than ever.

Then and Now: I share grave reservations about a unified bar. Pairing a discipline and admissions system with a voluntary association of practice-oriented sections, groups, and gatherings has never been a natural fit. More importantly, the bar has frankly bollixed up both jobs. Although former governor Wilson and I are not political brethren—his veto criticized the bar's support of same-sex marriages, non-discrimination of transgender people and lower sentences for drug offenders, all valid positions that have since come to pass—I agree that the system hasn't worked.

One example is the bar's former "Conference of Delegates." This conference used to make legislative recommendations but became increasingly weakened by fear that a mandatory bar had only a limited capacity to take positions on behalf of its members—a fear supported by the United States Supreme Court case of Keller v. State Bar of California, 496 U.S. 1, which held that the state bar's compulsory dues structure could not be used to promote ideological activities if they involved the expenditure of funds.

As a result, the bar conference has largely been supplanted by the Conference of California Bar Associations, a voluntary group of local bar association members who are free to take any

position they wish and convey it to the legislature. Which they do, through their lobbyist, Larry Doyle, who moderated the "Who's Running" panel—and who used to be the state bar's own lobbyist.

But there remains one big problem: If we do away with a unified bar, what should we replace it with? This question is not new, for it too was raised at the time of the bar plebiscite, and was one of the cornerstones of Towery's campaign in favor of a mandatory bar.

There are alternatives, such as placing discipline directly under the courts—the California Judicial Council, the various courts of appeal (similar to New York's system), and the Supreme Court have all been mentioned. I have long advocated abolition of the death penalty because (among many other reasons) it would free up the high court to review discipline matters the way it used to when I started in practice.

Should we move in that direction? Probably. Should we wait and see? Possibly. The bar once again has a new executive director, Elizabeth Parker, who despite her past employment (counsel to the CIA and the NSA) says she wants to increase transparency. I've had several conversations with her and have been pleasantly surprised with what appears to be a genuine willingness not to cover up past mistakes—the bar's usual course—but to look at them with fresh eyes. But talk is just that, very different from demonstrable action. Besides, this system has been dysfunctional for so long, and the disciplinary system long a mess.

Meanwhile? At the very least the legislators should grill the state bar representatives, demand answers, vigorously inquire into the too-frequent failures of the discipline system to get the worst "bad guys," and ask whether this historically dysfunctional system can ever work properly. And they should begin a serious investigation of alternatives.

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