21st Century Mandatory State Bars: Change Agents in the Public Interest or State Sponsored Guilds?

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Introduction

In discussing whether the legal profession has changed in any significant way in the last quarter century or so, I will evaluate the question based on the activities of mandatory state bars. While not every state has a mandatory state bar, they are prevalent enough, especially west of the Mississippi River, to be widely recognized by the general public as one of the key institutional voices of lawyers and the legal profession.

To cut to the chase, in my opinion mandatory state bars have not had a transforming effect on the practice of law or the legal system in the last twenty-five years. By and large they have performed and continue to perform important functions concerning the regulation and socialization of the legal profession, but they have not been and are not now leading edge organizations with clear missions to move the profession in any particular direction in the public interest. Mandatory state bars are conflicted institutions structurally caught between the self-interests of their members and the public interest. Self-regulation as a model of lawyer regulation has pluses and minuses. In my view, the current governance structure of mandatory state bars limits their potential to be true change agents in the public interest. With some structural changes, they could become more responsive to the needs of consumers of legal services and the general public, if not true leaders in the transformation of the practice of law in the public interest in the 21st Century.

This brief paper will first review some of the changes mandatory state bars have helped make in the regulation of the legal profession and the administration of justice in the United States over the last quarter century. Second, it will evaluate those changes to determine the overall effect they have had on the legal profession and the general public. Finally, I will make several suggestions of actions that mandatory state bars can take to transform themselves in the public interest in the next twenty-five years. Perhaps the changes that need to be made in the legal system to meet the needs of the public are not capable of being made

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through state sanctioned bar membership organizations and that the changes I am suggesting mandatory state bars make will have no transforming effect on them or the legal system. Transforming or not, I believe my suggestions will help mandatory state bars maintain their relevance to not only their members, but their broader constituencies, the clients and public lawyers serve. Mandatory state bars should at all costs avoid the siren calls of protectionism and self-interest that can so easily be disguised as requests for enhanced services to their members.

What has changed in the world of mandatory state bar organizations since 1975?

Here is a list of some of the changes that mandatory state bars have participated in or made in the last twenty-five years or so:

1. Most mandatory state bars assisted in the adoption of various versions of the ABA Model Rules of Professional Conduct in their states during the 1980s. Many are now in the process of deciding, twenty or so years later, whether to make the changes the ABA House of Delegates recently approved to those model rules.
2. All mandatory state bars had to revise their programmatic activities and adopt procedures in light of *Keller v. State Bar of California*, the 1990 U.S. Supreme Court case that set parameters on the use of mandatory membership fees under the First Amendment.
3. Some mandatory state bars added public members to their governing boards.
4. Many mandatory state bars helped create bar foundations for the purpose of increased funding for low-income legal services.
5. Many mandatory state bars created lawyer assistance programs, including diversion programs for the resolution of "minor" ethics complaints without the imposition of traditional discipline.
6. A number of mandatory state bars established trust account overdraft notification and trust account audit programs.
7. A number of mandatory state bars established Client Security/Client Protection Funds or improved the funding and administration of their existing funds.
8. Most mandatory state bars improved their disciplinary procedures so as to speed up the investigation and prosecution of complaints about the ethical conduct of their members.
9. Many mandatory state bars helped enact and administer mandatory continuing legal education requirements for lawyers in their states.

What hasn't changed in the world of mandatory state bar organizations since 1975?

1. Few, if any, mandatory state bars have changed their essential governance

structure. Many mandatory bars are still exclusively governed by lawyers who are elected by their peers. Several mandatory state bars have added public members and minority representatives to their boards, but no mandatory state bar is governed by a board that has more public members than lawyers.

2. Most mandatory state bars still fund and operate their state's lawyer discipline process.
3. Lawyers, as a group, do not have a better reputation for honesty and professionalism than they had twenty-five years ago.
4. Mandatory state bars have not done very much to make the services of their members more affordable to the public nor have they played much of a role in simplifying the law and the legal process.
5. Apart from requiring lawyers to obtain a certain number of continuing legal education credits to maintain their licenses to practice law, most mandatory state bars have not played much of a role in improving the quality of legal services lawyers deliver to clients. Quality control is left to individual lawyers and law firms. Only one state, Oregon, requires lawyers in private practice to maintain malpractice coverage for the protection of clients.

Why the changes listed above have not transformed the legal profession or the practice of law in any fundamental way from what they were twenty-five years ago.

The role and activities of mandatory state bars has evolved somewhat over the last twenty-five years, but not in any fundamental way. Improvements have certainly been made in the efficiency and effectiveness of their disciplinary procedures (California being a major exception until recently). Many mandatory state bars have expanded their programming to include, for example, enhanced lawyer referral services for the public, enhanced *pro bono* legal services for low and moderate income people, and have engaged in other access to justice initiatives. On the other hand, the core focus of mandatory state bars has always been on dealing with complaints about the conduct of their members. New and improved disciplinary procedures, fee arbitration procedures, trust account procedures, and Client Security/Client Protection Fund procedures have not fundamentally changed the public's perception of or respect for bar associations or lawyers as a group. In addition, rank and file bar members have become more vocal in recent years concerning their dissatisfaction with being required to belong to state bar organizations in order to practice law. Lawyers have asked, what's my bar organization doing for me? Every bar organization in the country, mandatory and voluntary, has responded with enhanced member services.

The conflict between public service and member service has heightened in recent years. The governance structures of most mandatory state bars being

what they are,[1] lawyer special interest groups, be they plaintiffs lawyers, defense lawyers, government lawyers, or sole and small firm practitioners, have influenced the policy and programming direction of mandatory state bars. The self-regulation model that many legislatures approved for the legal profession six or seven decades ago is in need of retooling to ensure the regulatory and institutional activities of the legal profession are better focused on what is most important to the public concerning its legal system.

What is most important to the public concerning the legal system? The Oregon State Bar co-sponsored a Citizens Justice Conference in 2000. Top priorities of conference attendees included (1) equal access to the justice system regardless of wealth or race; (2) alternatives to prison for non-violent offenses; (3) less costly alternatives to trials; and (4) information about available resources and alternatives. Additional priorities within certain groups included coordination of services under one judge, lawyers who are ethical and professional, and that the judicial branch needed to be equal to and separate from other branches of government. Recommended actions included (1) wide distribution of and any easy access to user-friendly information; (2) increased availability of legal services to meet demand; (3) alternative dispute resolution and mediation as the first course of action; (4) increased treatment programs and facilities (mental health and substance abuse) for youth and adults; and (5) improved coordina-

1. For example, the Alabama State Bar Board of Bar Commissioners consists of sixty lawyers. The Idaho State Bar Board of Bar Commissioners is made up of five lawyers. The North Dakota State Bar Association Board of Governors is made up of thirteen lawyers The Nevada State Bar Board of Governors is made up of fifteen lawyers. The Washington State Bar Association Board of Governors is made up of sixteen lawyers (fourteen with full votes; the president and president-elect are members and can vote when presiding, but only in the case of a tie vote). All twenty-eight members of the West Virginia State Bar Board of Governors are lawyers (twenty-seven are voting members; the executive director is an ex-officio member of the board).

The governing boards of several mandatory state bars do have public members, but they represent no more than twenty-five percent of their memberships. For example, the State Bar of Arizona Board of Governors is made up of a total of twenty-nine members. Nineteen are lawyers elected by the bar membership, four are public members selected by the board, three are appointed by the Arizona Supreme Court (currently one lawyer and two public members), and three are ex-officio members (past president and the deans of the two Arizona law schools). Thus, of twenty-six voting members, six are non-lawyers. The State Bar of California Board of Governors has nineteen lawyer members and four public members. The New Mexico State Bar Board of Governors is made up of twenty-one lawyers and one non-lawyer legal assistant. The Oregon State Bar Board of Governors is made up of twelve lawyers and four public members. The State Bar of Texas Board of Governors has forty-six voting members, six of whom are members of the public (the board has an executive committee that consists of fourteen lawyers and two public members). The Utah State Bar Board of Commissioners is made up of eleven lawyers and two public members.

Various law-related groups have liaisons to some mandatory state bar governing boards. Most liaisons are lawyers or judges and their participation only reinforces the dominant voice lawyers already have concerning the governance, programs and activities of their state bar associations.

tion, collaboration and follow through concerning cases and/or services between courts, social services agencies and non-profit organizations.

Are the resources of mandatory state bars aligned with these priorities? By and large, I believe the answer is no. For example, approximately 77% of the 2000 general fund expenditures of the State Bar of California were spent on the California lawyer discipline process. In Oregon, approximately 18% of the Oregon State Bar's 2002 general fund budget is allocated to the Oregon lawyer discipline process[2] and 28% is allocated to the bar's continuing legal education activities (both programs and publications). The expenditures of mandatory state bars on the legal system priorities of the public as exemplified by the priorities identified by the 2000 Oregon Citizens Justice Conference are relatively small percentages of the general fund expenditures of most, if not all, mandatory state bars.

Structural changes necessary to better align the programs and activities of mandatory state bar with the legal needs of the public.

First and foremost, the voice of the public must be enhanced in the setting of the program priorities of mandatory state bars. Several mandatory state bars have governing boards that contain a small number of non-lawyers representing the public interest. California and Oregon come to mind. Many mandatory state bars are governed solely by lawyers. The vast majority of these lawyers are working in good faith to improve the administration of justice in their states, but they are susceptible to professional myopia and peer pressure. Mandatory state bars need to, nay must, incorporate many more representatives of the public interest into their governance structures to ensure the voice of the public is heard and the interests of the public are better addressed in the administration of their programming. Mandatory state bars must not allow the voices of their members (protect us, defend us) to drown out the voices of the public (inform and educate us, help us, protect us). Whether mandatory state bars have the will and courage to change their governance structures to address this serious imbalance of power is an open question.

Second, mandatory state bars must narrow their focuses as so to concentrate their financial and human resources on the accomplishment of changes and improvements in the legal system that matter most to the broader public.

2. Comparing the State Bar of California and Oregon State Bar's discipline system expenditures as a percentage of their general fund expenditures could lead to the conclusion that the California State Bar places a much greater priority and emphasis on its regulatory responsibilities in policing the conduct of its members and also has a more effective disciplinary system than does the Oregon State Bar. Simple generalizations from such comparisons can be very misleading, however. The Oregon State Bar may well have a more cost effective and efficient disciplinary process than the State Bar of California considering all appropriate financial, human resource, structural, and procedural factors, leaving more bar resources available to address issues of higher priority to the Oregon State Bar (and the general public).

Many mandatory state bars have expansive programmatic portfolios ranging from the policing of the legal profession to the provision of administrative and staff support to groups of members who are interested in particular areas of the law (sections). Few, if any, mandatory state bars have sought to narrow their programmatic activities to include only those which address the legal system issues of most concern to the general public. Certainly, many mandatory state bars are creatures of statute and clarification of their statutory charges may be necessary to better focus their activities in the public interest. But aligning the programs and activities of mandatory state bars will the highest priorities and expectations of the public concerning their legal system would go a long way in bringing lawyers and the public back together to achieve common goals. In the end, the legal system is not for lawyers and judges. They are supposed to assist the public in obtaining justice. Currently, I'm afraid, they are perceived by many members of the public to be working more to further their own interests than the public interest.

Finally, mandatory state bars must educate and convince their members that they are not advocacy organizations whose principal missions are to advance and defend the interests of lawyers. Mandatory state bars have a governmental charge and governmental power. Lawyers have many options in voluntarily joining legal affinity groups. Those voluntary groups can advocate the interests of their members, as they deem appropriate. Lawyers in states that have mandatory state bars are not free to decline to join them. This forced membership requires mandatory state bars to focus their activities on accomplishing the purposes for which the state mandated that membership for every lawyer. As the U.S. Supreme Court stated in *Keller v. State Bar of California*, those purposes are to improve the quality of legal services available to the citizens of the state and to effectively regulate the conduct of those persons who have been granted a license to practice law.

Conclusion

The premise of this paper has been that mandatory state bars, as key representatives of lawyers and the legal profession, have not engaged in activities over the last quarter century that have transformed the legal profession or the legal system to the point they are perceived to or are actually meeting the needs of the general public. In point and fact, mandatory state bars have come to focus more and more of their attention on the wants and needs of their members instead of the public interest. Lawyers want their "guild" to advocate for their rights and defend them from "excessive" government oversight and control. Thus, while mandatory state bars were created to regulate the legal profession and improve the administration of justice, they have become conflicted organizations, swinging from self-interest to public interest depending on the changing composition of their governing boards which are made up mostly of lawyers.

The thesis of this paper is that mandatory state bars can reconnect with the

public interest if adequate representation of the public interest is reflected in the composition of their governing boards. Mandatory state bars should add significant numbers of members of the public to their governing boards in order to better understand the priorities of the public concerning their legal system and to better align their programs and activities with those priorities. They should focus their financial and human resources on addressing these priorities. And they should educate their members on the why and the wherefore of the necessity for these changes. A key test of the organized bar in the years to come will be to see if it understands that there is a significant disconnect between mandatory bars as membership organizations and mandatory bars as regulators and change agents for the improvement of the legal system to meet the needs of the general public. Let's hope that in twenty-five years we can say they saw the light and made the changes in their organizational structures, priorities and programming that were needed to truly elevate the public good over the self-interests of their members. Will the image of the legal profession be a lot better in 2027 than it is today? If we hope the answer to that question is "yes", what will mandatory state bars have done to cause the public to reach that conclusion? In my opinion, business as usual in the governance and programming of mandatory state bars will not help us reach the desired result.