COMMENTARY

TEN YEARS OF PUBLIC INTEREST LAW: A RETROSPECTIVE AND A PROMISE

AN OPEN LETTER REGARDING PHYSICIAN DISCIPLINE

TEN YEARS OF PUBLIC INTEREST LAW: A RETROSPECTIVE AND A PROMISE

The Center for Public Interest Law (CPIL) was formed in 1980. It has survived its first decade. It has grown. And due to the generosity of Sol and Helen Price, who recently endowed the Price Public Interest Law Chair, and the University of San Diego's own commitment to the Center, we are proud to announce that it will continue indefinitely. We believe the public interest law chair, financing a full-time faculty position to teach public interest law and to direct the Center for Public Interest Law, is the first of its kind in the nation. CPIL will now be a permanent institution, training law students in public interest law and directly advocating the interests of the unorganized and underrepresented in California's courts, its legislature, and especially its regulatory agencies.

The Center's purpose has been to make the regulatory agencies of state government more visible and accountable, and to train students in the skills of public interest law practice. The Center monitors the sixty California agencies regulating business, the environment, and the professions and trades. As time has passed, we have become convinced that our choice of the state regulatory forum as our focus for public interest law practice and training is correct. Why? Because it is important: look at the table of contents of this publication. It might be easier to list what is *not* regulated than what is. And because law schools do not teach much about regulatory law, or rulemaking, or agency adjudications; they mostly teach caselaw, and some statutory and constitutional law. And because the media does not cover the detailed activities of these agencies.

Ten Years of Education and Advocacy: A Retrospective

Certainly one should not be preoccupied with what one has done, whether it succeeded or failed. But at the ten-year mark, we have paused and looked back, and would list our major efforts to this point—perhaps with a smidgen of self-congratulations, but also with the knowledge that we have had our share of failures, and our list reminds us of them as well.

Part of CPIL's program has been constant: students serving in the Center attend courses in Administrative Law and Practice, Regulated Industries, Environmental Law, and Consumer Law. Each student in the program takes the course "California Administrative Law and Practice" and monitors at least two state agencies, attending meetings and learning about regulatory practice and the state legislative process. The students are assisted in their field training by CPIL professionals in San Diego and in two field offices—one in San Francisco (where the State Bar, the Department of Insurance, and the Public Utilites Commission are headquartered) and one in Sacramento.

The Center has steadily published the quarterly *California Regulatory Law Reporter*, the only publication of its kind in the nation. This publication reports to journalists, professionals, and the public the actions of California's regulatory agencies in detail, including their major projects, meeting proceedings, advocacy by public interest entities, actions by related state oversight agencies, legislation, litigation, commentaries, and feature articles by experts.

After one year in the program monitoring agencies and learning substantive and procedural law governing regulatory agencies generally, students become eligible for third-year internship advocacy projects. These projects may involve writing a publishable critique of an agency or policy, proposing rulemaking, intervention in agency rulemaking, drafting of model legislation, hearing testimony, or litigation.

CPIL professional staff training and assisting students include Julie D'Angelo, a former U.S. Department of Justice trial attorney who was also the editor-in-chief of the *San Diego Law Review* and a former CPIL intern; Carl Oshiro, a veteran litigator with the West Coast office of Consumers Union of the United States and the Public Utilities Commission; Steve Barrow, former lead lobbyist for California Common Cause; Terry Coble, former managing attorney of an office in the Department of the Public Advocate in New Jersey; and others.

In general, CPIL has increased in size and sophistication over the past ten years. The *California Regulatory Law Reporter* has increased its circulation, and increased its coverage and length by approximately 50%. CPIL's student enrollment has doubled; its staff and budget have tripled. Its advocacy work has become more extensive.

Four hundred students have now graduated from CPIL's program. An unusual number have made public or public interest law their career. CPIL graduates now include staff counsel to the Assembly Judiciary Committee, staff counsel to the Senate Judiciary Committee, a senior attorney in the Department of Insurance, former counsel in the Office of Administrative Law, the current executive director of the Utility Consumers' Action Network (UCAN), a senior attorney in the Department of Health Services, counsel in the Office of the Auditor General, four deputy district attorneys specializing in consumer fraud (in Los Angeles, San Diego, and Sacramento), a staff attorney in the Division of Consumer Affairs and another in the Antitrust Division of the U.S. Department of Justice, a senior attorney in the San Diego City Attorney's office, and numerous other positions.

CPIL's advocacy activities over its first decade fall into distinct subject areas as follows:

Government Efficiency, Deregulation, and Enhanced Competition

1. During 1980-82, eleven CPIL interns participated or intervened in agency rulemaking under the requirements of AB 1111 to review, clarify, and simplify the California Administrative Code (now called the California Code of Regulations), including the substantial drafting of new rules for seven different agencies at agency invitation.

2. In 1985, CPIL drafted and sponsored legislation to abolish the first regulatory agency terminated by legislative act in twenty years, the State Board of Fabric Care regulating dry cleaners (AB 183-Johnson). This effort was substantially aided by the publication in the *California Regulatory Law Reporter* of CPIL intern John Moot's feature article

critique entitled "The State Board of Fabric Care: It Does Not Care For You."

3. In 1986, CPIL filed an *amicus curiae* brief in support of the prevailing position in *Cardenas v. Sharp Cabrillo Hospital*, upholding the application of state antitrust law to the medical profession.

4. During 1986-88, CPIL advocated trucking deregulation in general before the Public Utilities Commission (PUC), leading to a general deregulation decision on June 6,1989 (I.88-08-046) consistent with CPIL's arguments and citing its briefs (at 35, 36, 68, 69, 80-82, 101-116).

5. In 1989, CPIL testified before the Commission on California State Government Organization and Economy ("Little Hoover Commission") on the proper criteria for proposing a new licensing agency; the Commission report issued on July 18, 1989 substantially adopted the recommendations of the CPIL and recommended implementing legislation.

6. Subsequently, CPIL assisted in the drafting of AB 2572 (Eastin), legislation to create strict "sunrise" criteria necessary to justify a new licensing agency; at this writing, the bill is pending in the legislature.

7. In 1989-90, CPIL drafted an *amicus curiae* brief for the State of California in *State of California v. American Stores Co.*,__U.S.__, 90 D.A.R. 4678 (April 30, 1990), before the United States Supreme Court, sustaining California's position that private plaintiffs (including the Attorney General when bringing a *parens patriae* action for state citizens in federal court) have available a divestiture remedy to unwind unlawful mergers or monopolies.

8. In 1989, CPIL helped to draft and sponsored AB 671 (Connelly) with the Los Angeles Office of the District Attorney, in order to add to California's antitrust statutes the monopolization and attempt to monopolize prohibitions of the federal Sherman Act's section 2. At this writing, AB 671 is pending in the legislature.

Open Government and Public Visibility for Regulatory Agencies

9. In 1985-86, CPIL drafted and sponsored successful amendments to California's "sunshine" open meeting law covering state agencies to give it a then-absent civil remedy (AB 214-Connelly); and subsequent matching amendments to the Brown Act (AB 2674-Connelly) covering open meetings by local governmental entities.

10. CPIL has served as the state's most active enforcer of open meetings and public records act provisions, including:

(a) In 1985-86, the Center served as counsel for the plaintiff in *Yoffie v. Marin District Hospital*, unsuccessfully arguing to prevent the exclusion of a hospital district from the Brown Open Meetings Act through the device of selling the district's hospital to a private nonprofit corporation with the admitted intent of avoiding open meetings requirements;

(b) At the same time, CPIL served as counsel for plaintiff in *Citizens for Public Accountability v. Desert Health Systems, Inc.*, successfully arguing the same issue rejected in *Yoffie, supra*;

(c) In 1986, CPIL filed and litigated *Ramirez-Cardenas v. Bunner* to compel the Insurance Commissioner to open to the public the meetings of the Department's Consumer Advisory Panel; and

(d) In 1989-90, CPIL filed and successfully litigated *Center for Public Interest Law v. California Lottery Commission*, to compel the defendant to allow inspection of numerous public documents improperly refused to CPIL.

11. CPIL has worked to expand the application of open meetings law by:

(a) Successfully petitioning the State Bar in 1985 to adopt rules to apply the basic provisions of the Bagley-Keene Open Meetings Act to State Bar proceedings (and introducing legislation to accomplish coverage should the Bar decline [AB 1917-Harris]);

(b) Unsuccessfully petitioning the Superintendent of Banking to appoint an advisory board which, as a multi-member body, would be subject to the Open Meetings Act, and compel public discussion of banking policies otherwise decided by a single administrator without open meetings or public input;

(c) Successfully petitioning the Insurance Commissioner to create an advisory board for reasons as stated in (b) above equally applicable to insurance regulation (and introducing AB 1355 (Waters) to compel such a board should it not be created by rule); CPIL intern Julie Ramirez-Cardenas was appointed and eventually chosen as chair of the consumer advisory board; and

(d) Proposing an as-yet-unrealized "Sunshine Institute" to monitor open government, provide information to journalists and others, hold conferences, monitor legislation, and litigate test cases.

12. The Center has opened California regulatory agencies to greater visibility and public scrutiny, with CPIL commentaries or activities on regulatory issues appearing from two to three times per week in major news publications and media, including appearances on "Sixty Minutes," "Inside Edition," People Magazine News Show," and "Newsmakers," and numerous special newspaper and television in-depth series on regulatory issues. Over five hundred articles involving CPIL advocacy during 1980-90 are catalogued.

Professional Discipline Reform: The State Bar and the Medical Board

13. In January 1987, CPIL Director Robert C. Fellmeth was appointed State Bar Discipline Monitor by Attorney General John Van de Kamp; CPIL serves as the Monitor's staff. In June 1987, the Monitor published the *Initial Report of the State Bar Discipline Monitor*; since then, six subsequent progress reports have been published at six-month intervals.

14. CPIL advocated and helped win adoption of 85 policy and rule changes by the Bar; and in 1988, drafted and advocated enactment of SB 1498 (Presley), a 35-section bill reforming the procedures for the discipline of attorneys and creating a State Bar Court operating directly under the California Supreme Court. The new procedures of the Bar have tripled the discipline output of the Bar, ended multi-year backlogs, and provided for interim remedy protection for clients.

15. In 1989, CPIL published a critique of the physician discipline system of the Board of Medical Quality Assurance (now called the Medical Board of California) entitled *Physician Discipline in California: A Code Blue Emergency*, and engaged in extensive public education on the deficiencies of the current physician discipline system.

16. In 1989-90, CPIL drafted, sponsored, and advocated SB 1434 (Presley) and its successor, SB 2375 (Presley), which includes creation of a Medical Quality Panel of administrative law judges within the Office of Administrative Hearings to handle discipline adjudications with greater expertise and consistency; creation of a chief medical prosecutor to coordinate complaint intake and investigations; establishment of procedures encouraging the enhanced flow of information to the Medical Board regarding physician incompetence or impairment; and interim authority to suspend or restrict a physician's license where patient health is in jeopardy. At this writing, SB 2375 is pending in the legislature.

17. In 1989, CPIL successfully advocated before the Medical Board creation of a centralized complaint intake system with a statewide publicized toll-free hotline number, professional complaint handlers, and comprehensive computerized recordkeeping for pattern detection.

Representation of Ratepayers Before the Public Utilities Commission

18. In 1982, CPIL initiated adjudicative proceedings before the PUC to authorize creation of a consumer ratepayer entity with democratic structure to receive partial access to the billing envelopes of SDG&E in order to recruit members. After prevailing, CPIL organized and created the Utility Consumers' Action Network (UCAN), now the nation's third-largest power utility ratepayer organization with 60,000 members. This effort was spearheaded by former CPIL intern Michael Shames, now executive director of UCAN.

19. In 1983-84, CPIL presented *amicus* arguments in *Pacific Gas & Electric v. Public Utilities Commission* in the U.S. Supreme Court, unsuccessfully arguing that the first amendment does not preclude the PUC from allowing a consumer group certified by the PUC to obtain access to the ratepayer-financed mailings of a utility.

20. CPIL intervened in the PUC's 1988 SDG&E General Rate Case to argue successfully that the utility should not impose a "reconnect fee" on ratepayers who have disconnected during the prior year, while invoking no such charge for those requesting new connections, thus gratuitously penalizing the poor, military personnel, and students. The PUC awarded CPIL intervenor compensation for its advocacy.

21. From 1985 to 1989, CPIL represented the state's ratepayers continuously in Proceedings 85-01-034 and 87-11-033, the major post-deregulation telecommunications rate hearings before the state PUC; the advocacy obtained $8 million in expense disallowances and writedowns attributable to CPIL advocacy by the Commission, the possibility of $280 million per year in future cost disallowances given CPIL's alternative "sizing drivers", and an award of intervenor compensation to CPIL by the Commission.

22. In 1985-86, CPIL represented household mover consumers opposing rate bureau price fixing before the PUC.

23. In 1989, CPIL received a grant award from the PUC's Telecommunications Education Trust in the amount of $176,300 to conduct public education of inside wiring changes attending telecommunications deregulation.

Representation of Insurance Consumers

24. In 1988-89, CPIL served as co-counsel for real parties in interest Voter Revolt and Ralph Nader before the California Supreme Court in *CalFarm v. Deukmejian*, defending an insurance industry challenge to the facial constitutionality of Proposition 103. On May 4, 1989, the court unanimously upheld the validity of the proposition.

25. Also in 1988-89, CPIL proposed comprehensive procedural rules for the implementation of Proposition 103, including methods for establishing fair rate of return, using competition as a rate regulator, and summary proceedings where companies require interim authority to raise rates. While the rules were rejected as a package, many of the suggested provisions were later adopted as a part of the Commissioner's implementation of Proposition 103.

26. During 1989-90, CPIL has represented insurance consumers in subsequent administrative proceedings of the Insurance Commissioner; provided expert testimony and advocacy; and received an intervenor compensation award from the Commissioner for contributions to the administrative proceedings.

27. Also during 1989-90, CPIL has represented insurance consumers in subsequent litigation, intervening in suits brought by insurance companies challenging the implementation of the initiative.

Representation of the Environment

28. In 1985-86, CPIL assisted in *Audubon Society v. Department of Fish and Game*, with an intern arranging for expert testimony relevant to saving the near-extinct California Condor.

29. In 1986, CPIL filed a petition for rulemaking with the Coastal Commission to ensure that waste-to-energy plants sited in the coastal zone do not present public health hazards from emissions of certain contaminants for which standards have not yet been considered or applied.

30. In 1990, CPIL served as counsel for *amici curiae* Natural Resources Defense Council, CalPIRG, Environmental Health Coalition and the San Diego Audubon Society in *City of El Cajon v. State of California* (still pending), challenging the California Department of Food and Agriculture's aerial malathion spraying over the San Diego suburb of El Cajon.

Equal Justice and Constitutional Rights (Civil Rights)

31. From 1986 to the present, CPIL has served as counsel to Vietnamese boat people seeking physician licensure in *Le Bup Thi Dao v. Board of Medical Quality Assurance*, alleging civil rights violations by the Board in its categorical denial of all Vietnamese physician licensing for a two-year period; this litigation is still pending.

32. In 1987, CPIL assisted in drafting and sponsored SB 1358 (Royce), requiring the Medical Board to appoint a "faculty council in exile" to assure fair and unbiased evaluation of post-1975 Vietnamese applications for physician licensure, and certification of degrees by former University of Saigon Medical School faculty members. This legislation was enacted in 1987 over Medical Board opposition, and has resulted in the licensure of all eligible post-1975 Vietnamese medical graduates.

33. In 1989-90, CPIL served as counsel for plaintiff in *Kaplan v. Los Angeles County*, representing Los Angeles Juvenile Court Judge Leon Kaplan in a regrettably unsuccessful challenge to the county's requirement that nonpartisan candidates for local office pay their pro rata cost of printing their qualification statement in the official sample ballot and voter's pamphlet sent by the county to each voter (amounting to $80,000 for Judge Kaplan's candidacy for superior court judge).

Consumer Protection and White Collar Crime

34. Over the past decade, CPIL has opposed and helped to defeat various special interest bills against the interests of consumers, including:

(a) AB 2521 (Johnston), an attempt by the banking industry to rewrite the Banking Code to remove critical consumer protections; *see* Hillebrand, "The California Bankers Association Proposes to Rewrite California Banking Law: The Ultimate Blank Check," *California Regulatory Law Reporter*, Vol. 10, No. 1 (Winter 1990);

(b) AB 4263 (Duplissea), an attempt to exempt auto dealers from California's deceptive advertising and unfair practice statutes; and

(c) AB 985 (Harvey), an attempt to allow for "crude oil cooperatives" of otherwise competing oil firms able to collude to set prices exempt from antitrust law.

35. In 1990, CPIL helped to draft, sponsored, and testified in support of SB 2500 (Hart), allowing corporations convicted of major crimes to be placed on court probation to allow prospective monitoring of compliance with the law. At this writing, this bill is pending in the legislature.

36. Also in 1990, CPIL helped to draft, sponsored and testified in support of AB 2249 (Friedman), making it a crime to knowingly allow a defect or dangerous condition to endanger the lives of consumers or workers without notifying the relevant regulatory agency of the hazard. This bill is also pending in the legislature.

Procedural Legality and Fairness

37. In 1984, CPIL filed suit on behalf of two public members duly appointed to the Board of Osteopathic Examiners and whom the Board refused to seat, on grounds that its authorization in the California Constitution precluded legislative direction to appoint non-trade members to the state agency overseeing the profession. CPIL subsequently obtained a writ from the Sacramento Superior Court in *Ervin v. Board of Osteopathic Examiners*, upheld by the Third District Court of Appeal, which also awarded CPIL attorneys' fees as a "private attorney general" conferring a general benefit on the public through its advocacy.

38. In 1985, CPIL filed an *amicus curiae* brief in support of the prevailing position in *University Chrysler Plymouth v. New Motor Vehicle Board*, challenging the fairness of an adjudicative regulatory body consisting of direct and adverse competitors to the respondent the board adjudged; CPIL intern Linda Maramba wrote the brief and assisted Professor Fellmeth in oral argument before the Fourth District Court of Appeal.

39. In 1989, CPIL intern Misty Colwell drafted an *amicus curiae* brief in *Moore v. State Board of Accountancy* before the First District Court of Appeal, supporting the challenge of unlicensed accountants to an order of the Accountancy Board that only certified public accountants may use the term "accountant" to describe their services (decision pending).

40. Throughout the past decade, CPIL has published critiques of the Office of Administrative Law (OAL), and has assisted in drafting or sponsoring five bills refining its jurisdiction, four of which were enacted: AB 2024 (Areias); AB 2025 (Areias); AB 2026 (Areias); AB 2027 (Areias); and AB 2028 (Areias). In 1987, CPIL worked successfully to block regrettable amendments to AB 2540 (Leonard) formulated by OAL, which would have conferred unprecedented discretion to that agency. [*See especially* Fellmeth, "A Theory of Regulation: A Platform for State Regulatory Reform," *California Regulatory Law Reporter*, Vol. 5, No. 2 (Spring 1985).]

41. CPIL has facilitated and supervised student testimony before legislative committees, including empirical critiques of agency performance, *e.g.*:

(a) 1987 testimony critiquing the discipline performance of the Contractors State License Board (Rob Rochelle); and

(b) 1987 testimony before the Assembly Committee on Governmental Efficiency and Consumer Protection on the entry barriers to accountancy licensure (Mary Livingston).

42. CPIL has challenged several agency attempts to adopt or enforce rules without notice and hearing, by seeking and obtaining formal determinations by OAL voiding the efforts as unlawful "underground rulemaking" [*see Rules of the Board of Chiropractic Examiners* (1986); *see also Professional and Vocational Regulations of Board of Osteopathic Examiners* (Aug. 13, 1986)].

Government Ethics and Campaign Reform

43. CPIL has drafted model legislation and sponsored bills in the area of ethics and campaign reform, including:

(a) legislation to create an Office of Special Counsel to handle investigation and prosecution of political crimes by state legislators and high executive officials [AB 410 (Killea), merged into AB 113 (Isenberg)];

(b) campaign finance reform legislation through AB 1844 (Vasconcellos) and AB 370 (Vasconcellos), to provide for matching public funds for small, local contributions;

(c) CPIL helped to formulate final passage of AB 938 (Lempert), implementing conflict of interest restrictions on the legislature contingent on the passage of Proposition 112 (which passed in June 1990). The legislation bans honoraria, limits gifts to $250, subjects legislators to conflict of interest prohibitions, precludes them from lobbying for one year after leaving office, and restricts their use of campaign funds.

44. In April 1989, CPIL testified before the Assembly Select Committee on Ethics, outlining a proposal for comprehensive conflict of interest legislation: a "wall of integrity" to distinguish state legislators.

45. CPIL has appeared periodically before the Fair Political Practices Commission to advocate strict interpretation of existing conflict standards, and to urge retention of the portions of 1988's Proposition 68 not in conflict with Proposition 73, also passed in the same year.

46. In 1988, CPIL filed *Center for Public Interest Law v. Fair Political Practices Commission*, attempting to defend the public campaign finance reform provisions of Proposition 68 against the provisions of Proposition 73, both of which passed in June 1988. Although the effort was rejected by the Fourth District Court of Appeal, 89 D.A.R. 7125 (Apr. 30, 1989), another case entitled *Taxpayers to Limit Campaign Spending v. FPPC*—now before the California Supreme Court—raises similar questions with regard to the important aggregate campaign limits in Proposition 68, upheld by the Second District Court of Appeal.

47. In 1990, CPIL drafted and sponsored SB 2163 (Hart), legislation to prohibit private (*ex parte*) contacts between financial institutions and state regulators as to matters currently being adjudicated by the agency. At this writing, this bill is pending in the legislature.

48. In 1989, along with California Common Cause and the Office of the Attorney General, CPIL helped to draft the Clean Government Initiative, which will appear on the November 1990 ballot.

49. In 1989, CPIL presented an *amicus curiae* brief in *Austin v. Michigan State Chamber of Commerce*, __U.S.__, 90 D.A.R. 3371 (Mar. 27, 1990), before the U.S. Supreme Court, upholding the right of the state to limit corporate contributions to political campaigns.

Scholarship

50. In 1982, Professor Fellmeth coauthored with colleague Ralph Folsom the published treatise *California Regulatory Law and Practice* (Butterworths, 1983), and published subsequent supplements in 1985, 1987, and 1989.

51. Over the past ten years, CPIL has published the equivalent of 50,000 double-spaced pages of information about the current actions of state agencies otherwise substantially unreported, through the *California Regulatory Law Reporter*, including 35 feature articles and 112 commentaries. The *Reporter* is subscribed to by most legislators, agency officials, journalists, libraries, and thir-

teen of the state's fifteen largest law firms. In addition to its monitoring of agencies and intern attendance at meetings, the *Reporter* includes comprehensive information about general supervisory agencies, and litigation and legislation affecting each agency substantively and procedurally. Additional commentaries and articles also appear in each issue and have been cited by courts [*see, e.g., Toyota of Visalia, Inc. v. DMV*, 155 Cal. App. 3d 315 (1984); *Maltaman v. State Bar*, 43 Cal. 3d 924 (1987)]; reprinted by legal publications [*e.g.*, Sacramento Recorder and Los Angeles Daily Journal]; and used as leads for numerous stories about regulatory action by journalists.

52. CPIL has published seventeen critiques of regulatory agencies and their policies, including comprehensive evaluations of the Department of Insurance, the Public Utilities Commission, the State Bar, the Medical Board, the Water Resources Control Board, the Department of Banking, the Department of Food and Agriculture, the Department of Fish and Game, the Coastal Commission, the Board of Funeral Directors and Embalmers, the Cemetery Board, the New Motor Vehicle Board, the Board of Fabric Care, the Board of Registration for Geologists and Geophysicists, the Board of Barber Examiners, the Board of Cosmetology, the Office of Administrative Law, the Board of Osteopathic Examiners, and others.

53. In 1989, CPIL received a grant from the Philip M. Stern Family Fund to conduct a study of the performance of citizen utility boards (CUBs) nationally (currently under way).

54. CPIL has sponsored or made presentations in over twenty conferences and academic symposia.

Creation of Children's Advocacy Institute

55. In 1988, CPIL created the Children's Advocacy Institute (CAI) with a two-year $400,000 grant to operate the project out of the Center; CAI subsequently received an award of $1.4 million in grants from the Weingart Foundation to extend CAI from 1991 to 1994.

56. CAI has attracted an active Board of Directors, including:

*Dr. Birt Harvey, President of the American Academy of Pediatrics;

*The Honorable Leon Kaplan, juvenile court judge of Los Angeles County;

*Dr. Quyhn Kieu, pediatrician and leader of the Asian community;

*Paul Peterson, respected San Diego attorney;

*Gloria Perez Samson, educator and principal of a San Diego inner city junior high school;

*Dr. Gary Richwald, public health specialist from UCLA; and

*Thomas Papageorge, Chief of Special Operations of the Los Angeles County District Attorney's Office.

57. CAI now publishes the quarterly *Child Advocate News*, the most circulated newsletter on the activities of child service organizations and advocates in the state.

58. CAI represents the Children's Lobby, the California Association for the Education of Young Children, the Child Development Administrators' Association, and the Professional Association of Childhood Educators in *CTA v. Huff*, No. 363630, now before the Third District Court of Appeal—involving the budget protection of over $200 million in child development monies for preschool services for migrant, handicapped, and other children with special needs.

59. CAI has drafted and sponsored a program of model legislation to address problems of child abuse, child care insurance provision, and government structure in the delivery of child welfare services, including in 1990:

(a) SB 2332 (Killea), which would authorize the replication of a model hotline intake system for child abuse detection;

(b) AB 3949 (Lempert), which would arrange for the replication of a model for the joint investigation of serious child abuse cases;

(c) AB 4268 (N. Waters), which would provide for multidisciplinary teams to investigate child abuse serving multiple rural counties where volume precludes service;

(d) SB 1061 (Killea), which would provide for possible insurance coverage for child victims of unlawful sexual molestation;

(e) SB 2682 (Hart), which would provide for required insurance coverage by homeowner carriers for licensed in-home child care provision;

(f) SB 1948 (Seymour), which would allow joint powers agreement pooling by larger out-of-home child care centers; and

(g) AB 3130 (M. Waters), which would create an interagency commission to assure coordination between state agencies and ensures that major policy decisions are discussed in a public forum.

A Prospective

Lest we fall into the traditional pattern of unbridled self-congratulations, let us turn to what remains to be done. That is a much longer and more significant list. We must look at trends and dangers and reorient ourselves as both evolve.

It appears that our original reasons for choosing these agencies as our primary focus—their breadth of coverage and import, lack of law school regulatory curricula, and agency invisibility—have become more compelling, except now we would add others—some very alarming. The legislature's oversight of California's agencies is minimal. Most are "special funded" by the industry or trade regulated and are viewed as "free" by the legislature, despite the obvious fact that an industry-wide fee imposed by the state to finance a regulatory entity operates as a tax on the consumers of that industry. The enabling statutes authorizing agency actions have been steadily broadened. Agency powers are often extreme: for example, the authority of the Director of the state Department of Food and Agriculture to spray any insecticide he designates for any reason in any locale, is virtually unrestrained as the relevant statutes read. There are no requirements of hearing, recitation of the basis for factual findings, or meaningful consideration of alternatives. There are no standards and no limitations. This authorizing statute is not unique in the lexicon of regulatory power sources—others also read with the ring of declarations of martial law in despotic lands.

Agencies have been given the power to fine not only licensees, but *non*licensees. Agencies are now allowed to search under much broader latitude than the police investigating a violent criminal offense. The baffling assumption here is that the state's interest in building permit compliance rightfully justifies search and seizure intrusions on a massive scale, while privacy notions become elevated only when the police are conducting an investigation of a violent criminal act which has already occurred. And the agencies which do breach the loose standards restricting their ability to search and interfere are then largely exempted from exclusionary rule sanction: *their* operations are too important to the public to warrant proscription.

The most important remaining check has always been the vaunted writ of mandate review by the judiciary: the final check on abuse. Here is where the last ten years have been the most disturbing. The trend of caselaw has been toward unabashed deference to these agencies. That deference traces its source to several dynamics: the growth

of agencies and the complexity of their separate procedures and substantive expertise; the growing caseload of the courts; a judicial empathy for agency regulators as persons with the same kinds of problems (and from the same peer group) as the judges reviewing their actions; and a sense of territorial recognition.

We have seen this deference increase in our own cases. In one, *Le Dao v. Board of Medical Quality Assurance*, we saw two courts identify with the members of the Board to overlook one of the most outrageous violations of civil rights law one will ever see, twist the law into nonexistence, and declare their own expiation in an unpublished decision to preclude, as a practical matter, Supreme Court review.

But we are not the only ox gored. In the area of antitrust law, there is a doctrine called "state action immunity." Translated, it means that if the state authorizes an anticompetitive act and independently reviews it to compensate for the absent marketplace, the nation's antitrust laws requiring a fair and open competitive system do not apply. Courts are now declaring that any state-authorized cartel practice or any local government review suffices. The existence of a purported "agency" to review an exclusive franchise—even by a local government collecting franchise fees from the monopolist it has created—supervenes our antitrust laws and any requirement to bid competitively. The result in areas such as trash collection and cable television has been widespread corruption and excessive charges. And it is getting worse, as courts simply sign off on what are transparent shams based on the catechistic incantation of "there is a city, county, state, special district, or other agency entity...the public is protected, this is their territory, this is a political matter...*carte blanche* is in order."

The major exception to the rule of judicial abdication occurs where there is a gross taking without hearing, or where an agency action interferes with a first amendment speech or religious practice right. Here, the courts understand the concepts. They do not involve expertise, will not flood the courts with the caseload of the agency, and involve an area traditionally within the "territory" of the courts. But that is about it. The process has now reached its zenith with the recent *Common Cause v. Los Angeles County*, 49 Cal. 3d 432 (1989), declaring that the agency must be free from court review as to any of its decisions involving "discretion." Since the basis of writ of mandate review turns on the concept of "abuse of discretion," we are now in quite a fix.

The problem of judicial obeisance to agencies is not just that power corrupts; absolute power corrupts absolutely and we have to have *some* check. It goes beyond that. These agencies are not neutral arbiters of the public interest. Not only do they have their own bureaucratic ambitions, but most of them are fundamentally corrupt. No, not corrupt in the Boss Tweed sense, or in the Godfather sense, or in the Idi Amin sense. This is actually worse. Most agencies consist of, or are effectively controlled by, the interests they are supposed to restrict in the public interest. Others have institutional financial interests directly in conflict with their theoretical public obligations. Most agencies focus on erecting barriers to entry, and then, post-entry, protection of those in the club. Most regulators are well-intentioned, but they are in a subculture where group pride is at work. They are easily acculturated by staffs and by each other—even where they do not already have a direct profit-stake in the industry or trade they are to regulate. Attorneys are regulated by a 23-member Board: seventeen are practicing attorneys elected directly by...attorneys. Most of the regulators of physicians and other health professionals are currently active members of the profession, legislating and adjudicating with the power of the state in *our* name and with *our* authority.

Within these agencies, private "*ex parte*" meetings and off-the-record deals are common—and are perfectly lawful within the Public Utilities Commission, the regulators of banks, savings and loans, insurance, and others.

The problem with agency bias and unfettered power is exacerbated by the overall legislative and executive stench of campaign, honoraria, and revolving-door corruption of Sacramento in general. Our incumbent legislators are defeated at less than a 2% rate; more of them die in office. But they collect hundreds of thousands of dollars each in order to have a "preemptive strike fund" to preclude challenge. That is important to them, and over 80% of these funds come from the PACs in Sacramento. Eight hundred professional lobbyists ply the halls in our Capitol—six for every legislator. They are more active and aggressive in California than in most states simply because the stakes are so high. Fifty-eight *billion* dollars in state appropriations and the control of the marketplace in the nation's richest state are at issue. And they are firmly in control.

We have been in the halls of Sacramento for ten years and we have sad news to report. Things are bad and getting worse. Money controls. Those groups representing broad interests do not get access to legislators. This is not a party phenomenon. Both parties are equally bad. Members on both sides of the aisle ignore their purported values at the drop of a contribution.

We have a lot of work to do. The generosity of Sol and Helen Price ensures that we shall have the resources to contribute to the effort needed. The question is: do we have sufficient checks in the system so that an argument on the merits or serving the public interest can prevail? Or has money corruption, inbred conflicts of interest, media preoccupation with celebrities and petty ironies, and "big lie" political (and now "big lie" proposition) campaigns, already made it too late for us? We are worried. Very worried.

AN OPEN LETTER REGARDING PHYSICIAN DISCIPLINE

[*EDITOR'S NOTE: The following letter was written by two jurors who participated in* People v. Klvana, *No. A791288 (Los Angeles County Superior Court), a ten-month criminal trial which resulted in 47 felony convictions including nine counts of second-degree murder. For more information on the* Klvana *trial and recent efforts to reform the physician discipline system of the Medical Board of California (MBC),* see infra *agency report on MBC;* see also *CRLR Vol. 10, No. 1 (Winter 1990) at 77-78.*]

AN OPEN LETTER TO Los Angeles County District Attorney Ira Reiner; Kenneth Wagstaff, Executive Director, Medical Board of California; Senator Robert Presley, Riverside; Governor George Deukmejian; Members of the California Legislature; California doctors; and fellow consumers of medical services:

We were jurors in the recently concluded *People v. Klvana*. Since our verdicts in this trial and the recent sentencing, we've been asked by reporters whether we feel justice was done. Our answer is "yes and no."

"Yes" because the courts did their job unusually well. "No" because the sham self-policing procedures that made Dr. Klvana possible are still in place and the Medical Board of California continues to fight efforts to tighten those procedures.

The seriousness of our fellow jurors and the high level of professionalism shown by Deputy District Attorney Brian Kelberg, Judge Judith C. Chirlin,

and defense attorneys Rita-Jane Baird and Richard Leonard all served to restore our faith in "the system." The behavior of the medical community's leadership conspires to shake that faith.

We—a jury of his peers—found this one doctor guilty, not of incompetence, but of persisting willfully and knowingly over a period of many years in dangerous practices that unnecessarily cost the lives of nine infants—nine that we know about. Meanwhile, at the Medical Board in Sacramento, another group of Dr. Klvana's peers investigated *themselves* and found their system for monitoring doctors "not guilty," declaring that the system is "adequate."

"Adequate" is the one thing the Board's procedures are not, based on the detailed inside look that this trial gave us. In this case, justice is not fully served by sending one doctor to prison. Until steps are taken to prevent future Klvanas, we all remain vulnerable—in fact, we find the Medical Board's continuing performance so irresponsible that we wish there were a way for them to share in the verdicts.

A system that allows a doctor like Klvana to pass himself off as a specialist despite washing out of Ob-Gyn residency, to gain privileges at several hospitals and then to continue unchallenged after each of the hospitals revoked those privileges in turn, to lie his way out of reports from fellow doctors and others of dangerously below-standard care, and to continue in practice for *five years* after clear evidence emerged of his willful endangerment of lives...such a system shares culpability for the string of dead babies and shattered families that Dr. Klvana left in his wake.

Somehow the full extent of the Board's irresponsibility gets fuzzed over. The Board didn't just get a vague whiff at some point and fail to dig out the facts. The Board has a bulging file on Dr. Klvana. His license was under some degree of suspension or investigation almost constantly after 1978. He was called in repeatedly to explain reports and allegations—beginning in *1983* with the first infant deaths considered in this trial. These murders were detailed for the Board by a doctor (a friend of Klvana's!), whose own efforts to get Klvana to stop his dangerous practices had been ignored. No action. The third murder happened about this time.

Later, one of the Board's own hearing examiners recommended further investigation for possible referral to the district attorney's office. Nothing happened. Two more infants were killed. Other investigations followed, including one in which autopsy evidence was available to the Board that contradicted Klvana's version. Klvana was sued for malpractice. Insurance companies uncovered fraud. Los Angeles county sheriffs and the Garden Grove police raided Klvana's office in 1984, with Medical Board investigators in tow. Still no action. Two more dead babies.

The malpractice trial uncovered damaging evidence. The district attorney's investigation uncovered previously hidden murders—including two in which the dead infant's body was disposed of. No action. Three more murders, with the last one in September 1986, just before Klvana was arrested. In fact, the doctor was still fully licensed after he had been in jail for a year.

Part of the tragedy is that a couple of phone calls could have alerted the Board to Klvana's pattern of lying—a call to the Downstate Medical Center in Brooklyn where he did his residency, for example. The Nevada medical board made these calls and denied him a license! When the California Medical Board did finally move, it moved vigorously—it changed its name from Board of Medical Quality Assurance (BMQA) to Medical Board of California. That ought to do it! Oh, and one incompetent evaluator got scapegoated, too, with the implications that the Klvana case is an anomaly in an otherwise healthy system.

We do not believe he is an anomaly. If the Medical Board's "adequate" system can't even handle one of the worst cases in history, what about the less melodramatic instances of everyday incompetence? What does it take to acknowledge a responsibility for protecting the public? Is nine deaths too few—still below the threshold for caring?

Medical Board and California Medical Association lobbying has attacked legislation introduced by Senator Robert Presley that attempted, at least, to put a few teeth into the monitoring of doctors. The bill [SB 1434] was withdrawn, with apologies from Senator Presley, who cited a dramatic erosion of support.

They have managed to grey the issues raised by the Klvana trial, turning it into a drab political joust over legislation—even the best of which is inadequate. Apparently our legislators have lost touch with the carnage and pain wrought by Dr. Klvana and the initial public outrage that this caused—or perhaps they are in the process of confirming, again, why they are widely regarded as the paid servants of major campaign contributors.

Maybe it would help to backtrack a little. The victims in the Klvana trial were infants. Many of the women suffered terribly while Klvana pumped Pitocin into them in situations where this was specifically contraindicated, battering the baby against the pelvic bone for hours, until it was born with a misshapen head and severe brain damage, visible in autopsy photographs.

Babies were born limp and a deep blue color—or stillborn—after being squashed in protracted contractions that cut off oxygen for long periods. Babies were born lathered in their own feces, generally a sign of distress, while snapshots record Klvana ignoring the most basic procedures and allowing them to ingest this muck. Babies wheezing and rasping in a struggle to breathe were sent home. Parents calling to report similar symptoms were advised not to go to a hospital. One mother was saved from bleeding to death by the intervention of a relative, against Klvana's advice.

Given the full dimensions of this tragedy, what can be done?

First, it cannot be overemphasized that most of the murders were preventable! It would help a little if the Medical Board could come to see its primary role *not* as self-protection, but as protecting the public. If we were doctors, we would find the performance of the Board and the California Medical Association distinctly embarrassing. How does it serve the profession to protect criminals at the expense of the public? We call on responsible doctors to act within the profession—to toss out the current "leadership" and institute more responsible attitudes.

More specifically, allowing that pulling a doctor's license is a measure not lightly taken, there has to be some system for closely and continuously monitoring a doctor's practice when serious questions have arisen. Surely it's possible to distinguish between lethal practices and legitimate uncertainty.

We are also disturbed by the apparently widespread practice of allowing doctors threatened with loss of hospital privileges to quietly resign—thereby avoiding the unfavorable report to the Medical Board required of the hospital. Klvana was a master of the timely resignation. He was in constant hot water at the numerous hospitals where he gained privileges—each of which gave only the most cursory check of his background, but the Medical Board rarely received the required "805 form." The effect of this is a hospital washing its hands of potential liability, while unleashing on an unsuspecting public a doctor who does not meet the hospital's own standards! We recommend that hospital officials be held legally culpable if it is dis-

covered later that they avoided filing an unfavorable report.

When we voiced these concerns to Deputy District Attorney Brian Kelberg, he pointed out one legal remedy that would aid in the investigation of medical cases. Past medical lobbying achieved passage of legislation putting the deliberations and records of hospital oversight committees out of the reach even of law enforcement investigators. This has the effect of protecting incompetents and law-breakers. Law enforcement agencies—representing the public's interest—can only act on those few complaints that do reach the Medical Board or after a tragedy thrusts the problem doctor out of the shadows. We urge a change in the law to require open records.

Officials and the public need to speak out:

We urge District Attorney Ira Reiner and other officials of the courts and criminal justice system to vigorously support any legal remedies aimed at better protecting the public.

We urge these same officials to support Senator Presley's efforts in the legislature to design laws that help protect the public.

We urge responsible doctors to break ranks with the complacent arrogance of the profession's current regime in Sacramento and help devise laws and procedures that protect the public—and incidentally, help preserve whatever shreds of public trust in the profession still remain.

And we urge everyone to write, speak up, now! Write or call your senator and representative, the Governor, Ira Reiner, the Medical Board of California, and Senator Presley. Demand sincere efforts to protect us.

Putting one doctor away without changing the system leaves the job half done—leaves us all still vulnerable. In that sense, "justice delayed is justice denied."

Sincerely,

Jaime Pulido
Jury Foreman

Sam Orr
Juror