Since 1980, the Center for Public Interest Law (CPIL) has functioned as an academic center studying California regulatory agencies. The Center trains law students at the University of San Diego School of Law in public interest and regulatory law, and publishes the *California Regulatory Law Reporter*. CPIL is nonpartisan and has no vested profit stake in the decisions of the regulatory agencies it studies. It has participated in statewide research and advocacy on behalf of consumer and future interests, particularly to improve the efficiency, openness, and fairness of executive branch agency performance. It has litigated appellate cases, and sponsored significant reform legislation and rulemaking, including “process improvement” advocacy similar to the focus of the Commission.

The voluminous Report of the California Performance Review is an important public service. It raises issues of clear and longstanding importance. And it creates an opportunity to ask the “forest” questions in an environment mostly preoccupied with immediate and narrow “tree” concerns. The recommendations include a number of meritorious proposals and none should be dismissed because they imply change. CPIL notes that its prior advocacy to create “sunset” criteria to limit the creation of marginal new regulatory systems,¹ improve the coverage of state “sunshine” (open meetings) laws,² and to streamline and make more independent the discipline systems of the State Bar,³ the Medical Board of California,⁴ the California Board of Accountancy,⁵ the Contractors State License Board,⁶ and other agencies were often reflexively opposed by the existing bureaucracy.

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¹ See Gov’t Code § 9148 et seq., added by AB 2572 (Eastin) (Chapter 832, Statutes of 1990).

² See AB 214 (Connelly) (Chapter 936, Statutes of 1985) (Bagley-Keene Open Meeting Act reform); see also AB 2674 (Connelly) (Chapter 641, Statutes of 1986) (Ralph M. Brown Open Meeting Act reform).

³ See SB 1498 (Presley) (Chapter 1159, Statutes of 1988).

⁴ See SB 2375 (Presley) (Chapter 1597, Statutes of 1990); see also SB 916 (Presley) (Chapter 1267, Statutes of 1993).

⁵ See AB 270 (Correa and Figueroa) (Chapter 231, Statutes of 2002).

⁶ See SB 1953 (Figueroa) (Chapter 744, Statutes of 2002).
After many of these changes became part of the new fabric of administrative law, some of those same public officials — who earlier warned ominously of the sky’s imminent collapse — have become their strongest supporters. Such is the power of inertia in any hall of government.

However, the recommendations thus far advanced have not been subject to the crucible of public debate, and CPIL finds that many of them (as well as the Report’s supporting materials) are couched in general language that inhibit useful comment. A number of the specific recommendations may have unintended consequences, or misunderstand applicable law or the practical functioning of their subject matter. But that is to be expected where hundreds of proposals are advanced without input from many of those affected by proposed changes, or by those who know of unanticipated implications. The work before the Commission now is to drop, add, and refine so the end product accomplishes what it intends.

The strongest part of the Report consists of its “findings” — the diagnosis of problems and failures. In particular, the Report recognizes the danger of a regulatory regime where regulation may be unnecessary and/or may be controlled by the very interests requiring state check in the public interest. Indeed, members of trades and professions have historically been the motivating force behind much state regulation, not consumers. Business interests may be able to use the power of the state, free from competitive forces or antitrust limitation, where they inappropriately dominate their own state regulation. On the other hand, much regulation that is warranted in the modern era requires sophisticated and detailed knowledge. A “generalist” may not be in the optimum position to determine whether a patent attorney is competent or a surgical procedure is unduly dangerous. The underlying and pervasive tension in state regulation is between “expertise” — so those making decisions know what they are doing and act competently and consistently, and “independence” — so they operate in the interests of the general body politic and not for interests with a short-term proprietary stake. Reconciling this tension in the public interest is the lodestar of any reform endeavor and is the focus of many of CPIL’s comments.

We offer below our suggestions for Report refinement and addition.

LEVELS OF EXECUTIVE BRANCH
REORGANIZATION AND REFORM

State intervention in the market may take many forms, from the “prior restraint” of licensing (state control of entry prior to practice) to certification or permitting systems. And beyond these are many other options available to the state to shape and influence the market, ranging from antitrust and fair competition enforcement to preserve market prerequisites (independent competitors, truthful advertising, etc.) to measures to address unavoidable market flaws. Such flaw amelioration may range from criminal prohibition to bond requirements to disclosure obligations to civil liability. Over twenty of these options are discussed in CPIL’s article on state regulation entitled A Theory of Regulation: A Platform for State Regulatory Reform (attached). The article explores the market flaw justification for licensing — arguably the most extreme form of state intervention short of public ownership. It also reviews the necessity of approximately 50 agencies and recommends substantial deregulation — eliminating licensure requirements for some trades and professions.

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entirely, and substituting other less intrusive remedies to address relevant market flaws with greater precision and efficacy.

In general, regulatory licensure systems are justified because of alleged market flaws. We offer two points about the role of the market and alleged flaws. First, the market is a creation of human society and the withdrawal of regulation does not relegate what remains to any sort of "natural law" utopia. The state has already intervened in many ways to create the default “market” remaining apart from any particular state regulation. Such a market is defined by a myriad of human decisions concerning the rules of the market and society (e.g., when possession passes in a bill of lading to the receiver; inheritance rules; taxation; rules of liability for pollution, injury, or privacy incursions that attend commercial functioning). State regulation and the departments, boards, and commissions that administer that regulation are simply one part of society’s management of markets. Second, the mere existence of a market flaw does not ipso facto warrant the creation of a licensing requirement or other continuing form of state regulatory intervention. The most common justification for such regulation is a cited “external cost” — usually involving some aspect of health and safety or other possible consumer disadvantage. Proponents then advance a largely unconnected system of continuing intervention without regard to nexus, cost-benefit analysis, or less intrusive alternatives. Often, such regulation is not proposed by consumers, but by the industry “suffering” the applicable regulation. The resulting system is often broad in scope and either does not address or exceeds originally outlined market flaws. Much of this regulation represents a usually heartfelt and bona fide view by industry leaders that its work is “important,” that it warrants greater recognition, and that by working together through the state will produce societal gain. Notwithstanding their sincerity, such sentiments deserve a measure of skepticism.

Many of the agencies California has created have not been the result of a considered calculation of applicable market flaw and measurement of alternatives. And the forces behind their creation are exposed with the new boards and commissions proposed repeatedly — especially those with new licensure barriers to entry. Recent efforts have included those advising on interior decor, youth coaches, and aerobics instructors. The appeal of such regulation is illustrated by the repeated efforts of former Senator Dills to create a licensing board for “astrologers,” apparently to assure consumers of competent star-based predictions. All other things being equal, CPIL supports societal adjustments that strengthen and utilize market forces where informed consumer choices dictate market outcomes from the bottom, and where state intervention focuses on the rules of the market, not on top-down agency direction.

The California Performance Review Commission is charged with reviewing existing state agencies and recommending improvement — including the abolition or alteration of the existing scheme. In considering options, regulatory reform may operate at alternative “levels” — from removing state market restraint to consolidating regulatory authority to altering the nature of the oversight agency itself. Aside from the option of adding new agencies or regulatory scope, five common types of regulatory policy change may be listed as follows:

1. **Removal of state “prior restraint” restrictions.** Perhaps the most intrusive type of state regulation is the “prior restraint” alternative of “licensure.” A business or practitioner cannot enter the market in a category of enterprise unless and until the state gives its permission. This type of intervention is most often justified where three qualifying criteria are in place:
Incompetence or dishonesty poses a risk of irreparable harm where “the remedies at law” (money damages) or other available relief is inadequate.

Licensure or other prior restraint is capable of lessening or preventing such irreparable harm. It is usually interposed to address an “external cost” (such as pollution) or to assure the public welfare by assuring competent business or trade practitioners. In the latter case, justification for state licensure declines as (a) the harm from incompetent or dishonest business is not irreparable or has other amelioration, (b) the merchant or tradesperson requires repeat business from the same customers and harm is noticeable, and (c) the particular buyers/clients protected are able to judge competence without assistance from the state.

The restraint effectively acts to assure competence, honesty, or other applicable protection.

As our attached article outlines, many licensing agencies have been created with dubious justification under these criteria. For example, is the harm from an incompetent landscape architect really irreparable? Does the repeat business need of a barber not provide an effective market check on incompetence? Who needs the protection afforded by the licensing or certification of petroleum engineers? Does our system of licensing attorneys — consisting of a single examination on subjects unrelated to actual practice at the age of 25 — really assure their competence for public protection throughout their careers?

An example of such deregulation is AB 183 (Johnson) (1986), CPIL-sponsored legislation to abolish the required licensing of dry cleaners. We argued that repeat business, lack of irreparable harm, and Cal-OSHA jurisdiction over chemicals made the licensing system unnecessary and imposed indirect consumer costs through harsh and gratuitous barriers to entry. Since that deregulation, the dry cleaning industry has not been adversely affected, nor have consumers been harmed. Similar deregulation may well be warranted for a host of licensing schemes, including shorthand reporters, landscape architects, and other agencies discussed in the attached article. Following its publication, the legislature enacted many of its criteria into a “sunrise standards” barrier for new agency proposals (see Gov’t Code § 9148). As our article almost twenty years ago discussed, many existing agencies do not meet those standards and would suffer appropriate rejection if newly proposed.

**2. Substitution of a less intrusive form of regulatory intervention.** Here, one may find a compelling need for state intervention, but conclude that a lack of irreparable harm or other justification allows some other option to suffice without the opportunity diminishment of required prior state approval. These alternative and more narrowly tailored forms of state intervention may involve required affirmative disclosure of information to consumers, the posting of a bond, the imposition of a rule of liability, or one of many other options set forth in the attached article.

Similarly, this second alternative may include enhancing competitive forces to remove the need for regulation where serving as a substitute for an absent market. Some prior deregulation has retracted agency oversight authority — only to subject the industry sector to forces lacking antitrust
enforcement and meaningful competition. The energy debacle costing California over $40 billion in excess power generator billing in 2000 and 2001 illustrates the tragic consequences of such an error.\(^8\)

3. **Consolidation of agencies into a more efficient and less fragmented structure.** As discussed below, such combinations are advisable where subject matter commonality and economy of scale efficiencies commend them.

4. **Abolition of an existing board and transference of its authority to a larger department, or (alternatively) devolution of a department’s functions into boards or commissions.** Restructuring may take the form of combining previously independent boards and commissions into departments or bureaus. Such consolidation may lower administrative cost. In the alternative, a department may be restructured to govern through a board or commission — creating government by a multimember body that must meet and make decisions in a public meeting, thus enhancing governmental transparency. Or a department may operate with an “advisory” board to provide a forum for public discussion that a department headed by a single person lacks.

5. **Alteration of procedure or agency authority to enhance efficiency.** Procedure and authority statutes, particularly the Administrative Procedure Act and the structure of the Office of Administrative Hearings or the Office of Administrative Law, may be reorganized or procedurally altered to improve the quality and efficiency of public decisions.

**STRENGTHS OF THE REPORT**

CPIL is not in a position to judge many of the specific recommendations applicable to regulatory agencies other than the ones it has monitored since 1980. However, we are aware of the problem of numerous positions on various boards enjoying pay and patronage status that are not justifiable on the merits and believe those abolition recommendations of the Commission deserve special consideration. Some of these boards may warrant continuation, but any public official receiving more than token per diem for meeting attendance should (a) work full-time on the task at issue, (b) demonstrate that the task warrants public subsidy (see discussion below), and (c) qualify for the post on a basis apart from prior political service, contributions, or friendships. We join in any recommendations made to end the various agencies, boards, and positions that have become the reward sinecure for previous supporters of each successive administration as it leaves office.

Within our area of expertise, most of the findings and many of the recommendations have substantial merit. We join in the recommendation to abolish the Athletic Commission because of its continuing failure to preserve and protect the boxers’ pension plan — among its most important functions — and for recent shenanigans in essentially co-sponsoring “reality television” bouts that will shortly become public. We also join, and would go further, in limiting the Office of Administrative Law’s review of the “necessity” of every specific new rule provision (see discussion below). We also join in many of the findings of the Report, particularly those noting the excessive

influence of “special interests” (those with a profit or commercial stake in public policy) over economic regulation.

DANGERS OF THE REPORT

The Report, despite its length, lacks sufficient specificity that is necessary to evaluate it fully. Much depends on the interpretation of vague prescriptions. Where recommendations are sufficiently clear, there is often a marked disconnect between meritorious findings (e.g., the problem of special interest influence) and its prescriptions. Consistent with that non sequitur pattern is a dearth of analysis to explain the connection between problem and solution. More specifically, the Report includes the following apparent problems warranting addition or revision.

1. Foreclosure of Cost-Generating Options. The Report studiously avoids recommending increased funding (except for rare examples such as FTB enforcement directly enhancing state revenue). This artificial self-limitation weakens the credibility of the CPR’s work. In many instances, increased expenditures will yield broad public benefit, and in some cases long-term tax reductions. One example of this resource avoidance bias is the Report’s failure to condemn categorical hiring freezes applicable to “special-fund” agencies — reflexively imposed by both Democratic and Republican administrations because of general fund shortfall. These agencies are “special-funded” from licensing and other fees, and no rational justification can be (or has been) advanced for imposing arbitrary freezes on their hiring, “sweeping” vacant positions, and cutting their budgets — notwithstanding the agency’s needs or public impact.

Many agencies suffer from a lack of enforcement resources. Where regulation is justified and relied upon, such a failure imposes momentous costs on consumers and honest businesses. Public officials commonly pay political obeisance to police “on the streets” — and eschew reductions in their pay or numbers (even where crime rates are much diminished). But the same public officials will countenance inadequate “law and order” policing in areas of white collar crime where the economic costs are far greater than any count of street crime loss. Environmental depredations, accounting fraud jeopardizing pensions and investments, and incompetent or dangerous medical practitioners all represent violations of law. Ironically, many of the same public officials who fail to support white collar enforcement also complain about the civil justice system that enables recovery of damages post-harm. A major purpose of regulation — where it is warranted — is to prevent irreparable harm. Where such regulatory systems are necessary and work, public harm — as well as expensive, time-consuming civil court proceedings — are mooted.

Our familiarity with actual cases brought by the State Bar (whose enforcement efforts were decimated by budget and staff cuts for most of the last decade), the Medical Board, and other demonstrably important regulators suggests a profound lack of “cops on the beat” where California consumers necessarily rely on state protection and where market mechanisms and private tort or other remedies are weak (or may be understandably less preferred than regulatory enforcement and prevention).

The repeated concern of the Schwarzenegger Administration for a healthy business environment should not undermine the state’s commitment to commercial honesty and statutory
compliance. Identification with business interests can be misinterpreted to imply solicitude for unfair or unlawful competition — for any and all specie of business practice. CPIL contends that where an Administration publicly identifies with the political forces supporting business, it has a special obligation to tell those interests of its expectation of support for fair competition and adherence to the law.

2. Need for Selective, Deeper Deregulation. Of the five levels of reform outlined above, the Report focuses on levels #3 and #4 (consolidating and moving commissions into a smaller number of departments), and gives less attention to actual deregulation of governmental functions (levels #1 and #2 above) where market forces suffice, or where a less intrusive form of state intervention may work as effectively to address the relevant market flaw. Very few of the numerous licensing functions recommended for termination in CPIL’s Theory of Regulation analysis are included (or considered) in the voluminous CPR Report.

Related to this Commission’s “forest” review of California’s executive branch is the state’s existing “sunset review” process. This “sunset” concept — historically applicable only to occupational licensing boards within the Department of Consumer Affairs — automatically terminates a board on a date certain unless the legislature affirmatively reviews and decides to continue the state function (perhaps in modified form). Different groups of agencies are scheduled for such termination at dates certain, and their continuation depends upon review by special joint legislative committee. This system of rolling review shifts the burden to an agency to justify its existence and its performance, with a deadline and consequences. As it originated in Colorado two decades ago, and as it operates in most states, the “sunset review” process weighs the basic merits of alternative regulatory intrusion and options. But not in California. This state simply sunsets the “board” or the “commission” — not the regulatory program or the licensing requirement. A failure to extend — that is, the “sunset” of an agency — simply devolves its governance to the Department of Consumer Affairs as a bureau or a program. To be sure, the exercise is not entirely without value because as a practical matter few boards or commissions or the upper staff they have selected want to suffer the ignominy of forced extinction. But as with the CPR’s first draft, California’s sunset process overly relies on category #4 above (abolish a board in favor of a department or bureau) and ignores the more fundamental categories #1 and #2 (end prior restraint regulation or substitute a less intrusive alternative).

CPIL contends that California government presents many opportunities for basic deregulation — not merely authority transfer in the direction of gubernatorial control. On the other hand, clear areas of market flaw require prior restraint or other forms of regulation — and here that regulation is relied upon by consumers and the market, and it is often inadequate. Such inadequacy should not be omitted from this Commission’s concern. In particular, enforcement of reasonable standards necessary for public protection has been weak or absent — as the history of savings and loan, accounting, attorney, medical, HMO, and other important regulation well represent. At the same time, other regulatory regimes — ranging from shorthand reporters to landscape architects to the New Motor Vehicle Board — are subject to regulation that is not warranted, artificially limits entry, raises consumer prices, and confers little public benefit. The Report needs to include both ends of

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9 See Bus. & Prof. Code § 473 et seq.
the spectrum not adequately covered: (a) strengthening regulation where irreparable harm and market flaw warrant public protection, and (b) ending or limiting “prior restraint” regulation where its rationale is weak.

3. Inefficient Consolidation and Less Informed Decisions. As noted, the recommendations of the CPR Report focus on measures to consolidate and/or transfer authority to departments in categories #3 and #4 above. The terms “combine” and “consolidation” are most frequently repeated in the recommendations. The seminal criterion here must be efficiencies obtained though joining two or more separate functions together. That advantage turns on (a) commonality of information and expertise, and (b) economy of scale structure. The former allows decisions with no loss of relevant expertise — and its possible enhancement as related consequences otherwise outside of an agency’s domain are now part of the calculus. The latter allows fuller use of fixed costs, and perhaps of government workers, as they are spread more efficiently across a larger base. However, the Report often lacks proper or any analysis along these lines of inquiry to support its common consolidation prescriptions.

What are the economies of scale or common subject matter between air pollution control and water quality regulation? Both involve environmental issues in the broadest sense, but involve disparate modes of regulation of different kinds of industries. What is gained in administrative efficiency from combining the regulation of automobile exhaust or utility smokestacks, and the adjudication of water rights?

In taking hundreds of agencies and devolving their functions into a relatively small number of “departments,” the Report appears to be eliminating “red tape” and “waste” by reducing the number of named agency boxes from 200 or more to 11. But those 11 departmental boxes at the top are, in general, not relieved of any relevant governmental functions (as reform types #1 and #2 above would accomplish). Rather, where the commonality required for such consolidation is lacking, apples and oranges combine before decisionmakers who know relatively less about their subject matter, and who have less contact with their impact. In such an environment, three consequences are predictable: (a) the “at the top” departments will not accomplish efficiencies because the functions they subsume do not so allow; instead, the departments will form an extra layer of red tape, (b) that extraneous layer will not be particularly informed (given the breadth of subject matter assigned to each) and that generality will increase “special interest” influence — of the very type the Report sensibly decr...
Using the above analysis calls into question the combination of disparate environmental agencies, as the CPR Report seems to recommend. What is the subject matter commonality between air pollution, water pollution, water rights, and solid waste management? They tend to regulate different sectors of the economy, with different purposes and powers. Each area of environmental regulation tends to require a substantial body of expertise, and combining them may relegate decisions to a level of generality yielding unintended consequences. Most such agencies appear to have substantial economy-of-scale size by themselves without addition. Where the concern is the regrettable multi-jurisdictional imposition of paperwork and requirements on businesses, more refined alternatives might: (a) require agency deference to another agency where functions overlap, (b) create “ombudsmen” positions to assist small business navigation between agencies, and/or (c) identify the specific areas where environmental regulators deal with the same businesses and enact (or adopt by rulemaking) a protocol for deferral or coordination.

The need for such consolidation may be most compelling in the medical services and regulation area — where six or more separate and largely uncoordinated agencies occupy more related territory. The state’s regulation of HMOs, hospitals and clinics, medical services for the poor, and prepaid medical insurance may very well benefit from enhanced coordination. Regulatory visibility and accountability is compromised by excessive fragmentation and, unlike the broad array of environmental agencies, here we have much more pertinent expertise reaching across agency lines.

Currently, the Medical Board of California (which regulates physicians) confronts a separate agency that licenses podiatrists, another that licenses respiratory care practitioners, and still others that regulate acupuncturists, hearing aid dispensers, physical therapists, occupational therapists, speech-language pathologists and audiologists, registered nurses, vocational nurses and psychiatric technicians, and psychologists (while the Medical Board regulates psychiatrists). Within the last decade all but three of these agencies were part of the Medical Board of California and have been moved out *seriatim* — responding to the dictates of territory more than public policy.

As stated above, the critical factor in deciding consolidation/specialization is the balancing of the need for “expertise” with the benefits of “independence.” Adequate expertise means an agency covering all nursing would know how to license a vocational nurse as well as a registered nurse. An agency regulating psychiatry/psychology should be able to set standards for all within the range of its ambit with full understanding of the consequences. Where such a combination preserves adequate expertise, it may enhance independence by overcoming much of the territoriality between professions and allow decisionmaking as to “scope of practice” and other sensitive subjects to be made by someone with some independence from the respective competing camps.

In general, CPIL believes that many opportunities for consolidation exist in the area of medical regulation. Combining the licensure of individual practitioners with medical coverage services or insurance regulation functions may not be practical, but it is unclear why greater coordination among practitioner licensing entities is not advisable, and certainly among the various agencies involved in public payment of health services and of the regulation of health plans and insurance. The new Department of Managed Health Care (DMHC) is a step in that direction, but many more steps may be feasible. For example, it is unclear why all regulated health insurance-
related entities and products now regulated by the Department of Insurance are not consolidated into DMHC (as suggested in Health and Safety Code section 1342.3). The Report does not appear to recommend the consolidation of individual professional licensure with medical plan regulation — and, given the disparate subject matter often at issue, that exclusion is prudent.

Perhaps the single most fruitful opportunity for consolidation reform arises because of the federal policy to provide and to finance the medical coverage of children. It is not generally well known that less than 3% of California children are both uncovered privately and are ineligible for public medical coverage. The state has created 17 separate agencies and programs to cover children. Each involves forms, qualifications, social workers, and immense cost — all directed at filtering out that tiny percentage of those who seek coverage but are ineligible. The rationale for premiums (beyond possibly justifiable co-payments) and the myriad of coverage barriers is unclear and leaves 800,000 children who fully qualify without coverage. The kicker is a standing offer from the federal government (under federal Child Health Insurance Program legislation) to pay $2 for every $1 in state money spent for the coverage of almost all of these uncovered kids. We shall be sending and have been sending unprecedented billions of dollars back to Washington, D.C. — perhaps the largest such give-back in our national history. This failure is not the denial of welfare or cash in any form, but of antibiotic treatment for kids with ear infections, broken bone casts, and other medical needs of these children. That failure should be a major focus for this Commission given its repeated emphasis on securing maximum federal benefits, including the assurance of qualification for that money. Here is the largest single source of such funding — and it is all obtainable through the kind of structural efficiency measures the Commission was created to propose. The answer lies in bringing all children into the system — universal coverage. How can a Commission studying state executive branch “efficiency” and “performance” fail to address 17 fragmented programs with social workers, forms, qualifications, enrollment, re-enrollment, and attendant transaction costs? We should shift to a system where all applicants are presumed eligible. If a given child expends more than $1,000 per year in medical expenses, the parents can be checked for qualification; if above the poverty line limit or otherwise unqualified, they would be billed on a sliding scale. The result: (a) clinics and hospitals do not charge four times the market rate in emergency rooms — deterring their parents from seeking help because all pay at the Healthy Families or Medi-Cal or private insurance negotiated rate; (b) all children are covered, allowing efficient public health administration, (c) many millions of dollars expended on pre-qualification screening in 17 separate programs are saved, and (d) billions of dollars in federal funds expended for these services are captured. This reform should be this Commission’s first and most ardent recommendation.

Note that uncovered children are primarily from working poor families — where employee dependent medical coverage is often lacking. These children are relegated to emergency room care, and the billing of parents at “market rates” of four to five times the price charged to Medi-Cal or private insurers. The medical coverage cost of children is less than one-fifth the cost of older adults. The United States covers all senior citizens although children have more than double the poverty rate of the elderly.

For a detailed discussion of the “presumptive eligibility” proposal for child health coverage and supporting documentation, see Children’s Advocacy Institute, CALIFORNIA CHILDREN’S BUDGET 2004–05 (2004) at Chapter 4 (available at www.caichildlaw.org). One explanation for failure of both Democratic and Republican administrations to propose such presumptive eligibility is an apparent obsession to avoid any new revenue requirement, regardless of long-term benefit. As discussed in the California Children’s Budget at Chapter 1, the state now provides little examination

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5. **Less Visible Government Is More Responsive to Special Interests.** CPIIL agrees that circumstances may sometimes justify converting an agency from a board form of governance to a department or bureau. As noted above, that recommendation as to the Athletic Commission may be justified due to its lack of performance and its lack of resources to afford a board or commission structure. But each such decision exacts several costs. Losing the board or commission format means that there is no multimember body holding meetings and making decisions in public, subject to public input, comment, and scrutiny.\(^\text{12}\) Rather, decisions are made by a single person behind closed doors. While hearings may occur as a result of noticed rulemaking, most other kinds of decisions would be made without notice or public comment, participation, or review.

Two other features peculiar to multimember governing boards may commend them over departmental or bureau governance. First, boards tend to overlap between gubernatorial terms. Hence, there is some institutional memory among decisionmakers that carries over to a new Governor — possibly to the benefit of new appointees. Second, bureaus and departments tend to be headed by persons who serve at the pleasure of the Governor, while board or commission membership tends to be for certain and stated terms in office. This added independence is buttressed by a common role the legislature has assumed in confirming those appointees, and in making some board or commission appointments itself.

Finally, the participation of the legislature may assist an administration in garnering important support for its regulations — which serve in large part to flesh out the legislature’s intent. Arguably, including legislative appointees in that exercise may have jurisprudential merit.

The overriding problem of devolution to large, centralized departments is the opportunity for special interest influence. It creates decisionmakers serving at the pleasure of someone who requires and solicits enormous private campaign contributions from economically interested parties. While such contributions may or may not directly influence public policy, few would deny that they facilitate access by interests giving to top policymakers in any administration. Where that access occurs via *ex parte* (private) communications without a public forum for visibility and broader input, the result is not likely to be beneficial to unorganized, impoverished, or future interests. The fact that such a large grouping may necessarily diminish the on-point expertise of the decisionmaker in the precise subject matter only adds to such private, organized sources of influence. Power tends to devolve to organized lobbies, retained counsel, and longstanding professional staff (who often come from or go to jobs with organized profit-stake interests).

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\(^12\) The Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.*, generally requires “state bodies” and subsets thereof to publish an advance agenda of all topics to be discussed at a meeting, and to meet in public in order to “take action” on any of those agenda items.

CPIL agrees that private markets, where effective competition prevails, may allocate resources according to informed consumer demand from the “bottom up” with efficiency. All other things being equal, such economic democracy serves the public more reliably than does a regime of state “top down” directives. Our agreement with that principle underlies our disappointment in the failure of the CPR Report to advocate true deregulation, or to demand regulatory accountability as a substitute, as discussed above. Instead, the Report recommends in places the delegation of some state functions to private commercial interests where no market check exists to safeguard the public. Turning over economic allocation to a market and removing or lessening state intervention is one thing; delegating police power to a functioning cartel is another.

Prudence dictates caution in the deferral of any publicly related decision to private “accrediting entities.” The body of evidence in American unfair competition and antitrust law pertaining to the market and consumer abuses flowing from cartel practice is considerable. Deferral to private coordinating bodies is not deferral to a market, but to a combination of competitors. Such delegation, where recommended by the Report, should be blue-lined out of the next serious draft of recommendations. This further refinement is best accomplished by drafters familiar with market dynamics, antitrust and white collar crime abuses, and the body of law known as “state action immunity” from federal antitrust exposure. The last element is a practical necessity given the violation of federal antitrust law implicit in the delegation of public powers to private sources — particularly to organized private bodies not subject to effective market check.  


Related to the above concern is the notion of “negotiated rulemaking” tentatively endorsed in the CPR Report and the subject of some limited federal experience. Although the details of the Commission’s recommendation are unclear, its outline raises fundamental concerns. A “rule” explicates a state statute, a basic police power function. It often sets a standard — the violation of which may be grounds to deprive someone of their occupation or their liberty. The consideration and adoption of rules are not properly delegated to any private party or limited group. Their formulation in a “mediation” setting with “parties” negotiating a “compromise” arrangement raises the spectre of anti-democratic abuse. CPIL contends that the most important check and balance of the American system is not between the executive, judicial, and legislative branches — but is the check between public and private. Where public government becomes primarily the passive reflection of private interest interplay, this most basic check in our system is breached. The results are replete — see Enron, WorldCom, Global Crossing, the savings and loan crisis, and other examples of cartel capture of government agencies.

In terms of “negotiated rulemaking,” who decides what “parties” are entitled to participate?

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13 Note that under the “state action” doctrine allowing states to carve out and authorize restraints of trade that would otherwise violate federal antitrust law (entitled to supremacy), states must both affirmatively and specifically articulate the restraint to be allowed, and must exercise “independent state supervision” to assure that there is no improper delegation of market exemption to private parties. See the leading case of Parker v. Brown, 317 U.S. 341 (1943); see detailed discussion in Papageorge and Fellmeth, California White Collar Crime (Lexis 2002) at Ch. 2.

Who is the mediator and what is his or her accountability to the public? The state properly represents more than simply the vector-like product of organized interest groups, many of whom intrinsically and understandably vie for their own relatively short-term profit. Sacramento includes over 1,200 registered lobbyists and numerous unregistered counsel, more than ten for every legislator. The state is not merely the passive crucible for private machinations. Our government is intended to represent the ethical sensibilities of the body politic — in whose name and by whose authority it acts. Those ethical priorities include, for example, the fate of children and of the future — interests that may not be paramount among recognizable parties chosen or available to negotiate a proposed state rule.

Where decisions are made at any table, those who are not sitting among the negotiators pay the price. Indeed, it is a reliable human dynamic to forge agreements among those present at the expense of those who are not. Two troubling examples of such relegation for the future are provided by the federal deficit and the state’s deferral of billions of dollars to future taxpayers. Excessive special interest dictation of state power is more likely checked where decisions are made in the public light. Delegation to a limited number of private parties of the law-making power of rule adoption raises questions about unconstitutional “delegation of power,” but more importantly, can be an affront to the underlying balance in our system — the public check on private power abuse. Perhaps most curious about this federal experiment is any cited real advantage over adoption of rules by public hearing.15 As one respected commentator has concluded: “Whatever benefits negotiated rulemaking may provide,...they undermine and subvert the principles underlying administrative law by elevating the importance of consensus among the parties above the law, the facts, or the public interest.”16 And Professor Funk adds that “courts are unlikely safeguards against this subversion, because of their focus on the formalities of the process.”17 Of all of the tasks assigned to our public officials, rulemaking should be the least eligible for “privatization” or delegation to anyone else.

8. The Report’s Focus on Enhancing Gubernatorial Authority. The work of this Commission occurs under the auspices of the new gubernatorial administration and is a part of his effort to restructure state government for greater efficiency and efficacy. To the extent the Commission’s recommendations would enhance gubernatorial authority over legislative prerogative or quasi-independent agencies, its credibility is lessened. It is understandable that a new administration tends to recommend greater authority to itself. We all trust ourselves to do the right thing. But structural changes do not necessarily unwind with administration changes, and restructuring properly assumes the need to check each branch — even the one directing or identified with reform proponents.

15 Note that negotiated rulemaking was the creation of a Clinton Administration task force headed by then-Vice President Al Gore. Its format and principles have been harshly criticized by Judge Posner, among many others. See *U.S.A. Group Loan Services v. Riley*, 82 F.3d 708, 714–15 (7th Cir. 1996). One of its driving assumptions is that interested parties may be more willing to compromise in a more intimate and less public setting.


17 *Id.*
The reforms that are included in the CPR Report identify eleven departments headed by single persons serving at the pleasure of the Governor, and devolve into that authority large numbers of previously semi-independent boards and commissions that operated more in the public eye, have continuity between administrations, and involve some power sharing with the legislature. Such a strong emphasis in recommendations — particularly one that requires legislative implementation — will have less support than recommendations that provide greater balance in their sum impact. CPIL presents four reform proposals below in broad outline that meet these criteria. While enhancing the efficiency of boards and commissions, they do not operate primarily through gubernatorial assumption of greater authority.

OMISSIONS: ISSUES NOT ADDRESSED IN THE REPORT

We noted above the omission of budgetary/resource issues beyond ways to cut costs, and the Report’s failure to consider the single most commended structural reform with positive financial and public welfare consequences — true presumptive medical coverage for California children. But beyond these issues are four other omissions within the scope of traditional Administrative Procedure Act coverage and state law relevant to unfair competition law that interact inextricably with APA agency proceedings. All four should be addressed, and added to the Report’s recommendations.

1. Rulemaking and “Red Tape” Reform. The CPR Report recommends that the Office of Administrative Law (OAL) halt its consideration of the “necessity” of each aspect of newly proposed rules, and instead simply judge the “necessity” of a rule as a whole. CPIL endorses this reform suggestion, but proposes that it be broadened to remove the “necessity” criterion of OAL review entirely.

OAL was created as an “over the top” agency to review rules across broad subject matter by legislation 25 years ago (AB 1111 in 1979). It is somewhat analogous to the role of the federal Office of Management and Budget, which reviews proposed federal agency rules. OAL necessarily is a generalist body — usually consisting of young attorneys. Its staff has designedly little expertise in the subject matter of agency rulemaking. As such, it is well-positioned to review a rule for five of the six criteria assigned to it: authority, clarity, consistency, nonduplication, and reference. Such review can be important. For example, less than 1% of rules are judicially reviewed to measure whether the agency in fact has legislative authority to so adopt — and agencies are historically amenable to expanding their scope beyond legislative intent. A generalist with legal and legislative intent research expertise is well-positioned for such a review. The same holds true for the other four criteria. And OAL may also be well qualified to review the rulemaking file to make certain that the procedures required by the Administrative Procedure Act assuring public participation and notice are followed. But the power to decide whether a rule is “necessary” has created much mischief,

18 Gov’t Code § 11349.

19 See Gov’t Code § 11340 et seq.
spawned gratuitous delay, and properly frustrates agency officials — as CPIL’s surveys over past years indicate.\(^\text{20}\)

That a rule is “necessary” turns on whether it is justified based on its empirical consequences. OAL staff know little about the subject matter of rules, most of which may be esoteric. Should clenbuterol be allowed within the last 48 hours before a horse race? Should boxers be required to avoid sparring for 24 hours or two weeks after a knockout? Should a utility smokestack be 30 feet high or 50 feet high to trap sufficient particulate matter?

In assessing whether the rulemaking agency has demonstrated “necessity,” OAL will look at the record. It will try to weigh the merits (“need”) of a rule against its costs — knowing little about either. It necessarily must rely on the agency’s required response (even if superficial and shallow) to every comment made to the agency. The end result is a review that does not really measure necessity, but merely nit-picks a rulemaking file to make sure it contains voluminous material. And the interaction between OAL and agencies then creates agency incentive to engage in voluminous paper production for OAL prophylactic purposes. This Commission recognizes this problem in its recommendation to cease and desist the “necessity” qualification of each and every sentence and provision of each rule as a separate proposition.

The agencies of California are directed primarily by gubernatorial appointees. They are assigned a defined task, usually with some relevant expertise. They hear the evidence, question the witnesses, and direct staff to gather empirical data. It is a common pattern of reform efforts to seek to reduce imperfection by creating another layer of review. Such “red tape” creation then results in an entity that thereafter advocates for its own continuation and authority enhancement. The real effort of reform is to curb such institutions where their role is not matched by their expertise. As stated above, the underlying lodestar for an executive branch structure is the combination of independence\(^\text{21}\) with such expertise. OAL lacks expertise to make a “necessity” judgment. It should focus on the five other criteria within its domain — all are important, and all rules benefit from OAL’s review for those criteria.

The CPR Report cites the somewhat cumbersome statutory APA rulemaking requirements and recommends reducing information that now must be posted in “notices of proposed rulemaking.” But the California Regulatory Notice Register announcing proposed rules is an important call to the public and properly includes detailed explication of what is intended and why. Nor is it unduly burdensome on the Register’s modest length nor on agency expense. Scanning documents otherwise required for Internet or general posting costs little.


\(^{21}\) Note that OAL may have independence from the special interests directly advocating before the agency, but may have some perceived or actual connection to the same groups functioning through the political offices of the Governor — at whose pleasure the OAL Director serves. And OAL decisions are not made via the same kind of public process guiding the underlying rule adoption by a board or commission.
What is a more propitious target for reform is the fragmented requirements of numerous disclaimers, analyses, and proofs of evaluation that must be included in the rulemaking file submitted to OAL. What started in 1980 as a modest requirement to respond to comments received has been supplemented year after year with duplicative and confusing requirements to consider, analyze, evaluate, and comment upon virtually every pet peeve and concern of legislators for 24 years. A review of Government Code section 11346.3 and adjacent sections reveals a required “small business” impact statement; the required identification of whether preferred “performance” standards or “prescriptive” standards are chosen by the rules, and — if the latter — why; a required housing impact statement and analysis; an analysis of the impact on local governments and their costs; and required analyses of any adverse impact on business, impact on new businesses moving to California, impact on the “ability of California business to compete,” impact on current California “business expansion,” and the impact on the creation or elimination of jobs.

A convincing case may exist for each one of these paper-generating, albeit largely incomprehensible and duplicative requirements. But as with a long circular trek in the desert, each reasonable step has forged a self-defeating total path. The Commission should recommend a single, simple statement that rulemaking files indicate whether the rule will disadvantage business activity in the state, and — if so — to what extent, with what justification, and with what consideration of less harmful alternatives. This alternative revises a long and convoluted list of required findings that are likely to suffer the fate of too many demands (compliance becomes pro forma). The suggested revision promises a more manageable and focused agency effort to consider business consequences.

2. **Adjudicatory Cost and Inefficiency Reform.** The Administrative Procedure Act governs not only the rulemaking process, but also the procedure that state agencies must follow in “adjudication” proceedings — most commonly, proceedings to determine whether to revoke or otherwise discipline an occupational license.22 This area — the most promising area of efficiency reform — has not been meaningfully addressed by the CPR Report.

Complaints against agency licensees are investigated by investigators — some of whom are “sworn” peace officers, and some of whom are “non-sworn” investigators. These investigators may specialize in a particular subject matter (such as the Medical Board’s sworn peace officer investigators and the Contractors State License Board’s mostly non-sworn investigative staff), or they may work as “generalist” investigators assisting a number of different agencies (such as the sworn peace officer investigators in the Department of Consumer Affairs’ Division of Investigation). The CPR Report recommends diversion of all sworn peace officer investigators into a new Department of Public Safety and Homeland Protection, thus fragmenting them away from the agencies whose licensees they investigate. Standing alone, this is not a bad idea. It is unwise to place sworn peace officers, whose paramount priority is to protect the public, under the supervision of politically appointed agency heads who may have other priorities. However, the CPR Report then fails to address whether these sworn peace officers will be able to continue to specialize in a particular subject matter area — which is indispensable to efficient functioning. And it wholly fails to discuss where existing non-sworn investigative staff will be placed — suggesting that the authors

22 Gov’t Code § 11340 et seq.
of the CPR Report do not fully understand the procedure or importance of the administrative enforcement process.

Following investigation and a determination by the agency that disciplinary action is warranted, the adjudication process begins formally with the filing of an “accusation” against the respondent licensee. This accusation is filed by the Attorney General’s Office, which is a statutorily required participant in the enforcement processes at most California agencies. The Attorney General’s Office is mentioned only once in the entire CPR Report — and that is a statement saying that the Report will not address the AG’s Office because the Governor has no control over the AG’s Office. This is not acceptable. The AG’s Office is an integral component in the success of any agency enforcement program designed to protect the public. This omission also substantiates our suspicion that the authors of the Report do not understand the enforcement process. In CPIL’s view, these agencies’ enforcement programs would benefit from the transfer of their investigative staff (whether sworn or nonsworn) into the AG’s Office to work directly, in a vertical prosecution model, with the prosecutors who will plead, file, and try these cases. Many of these cases are complex white collar crime matters that require attorney/investigator collaboration and cooperation throughout the investigation, hearing, and appeal. That does not happen under the current fragmented system, and it will not happen under the poorly-explained set-up recommended by the CPR Report.

Absent a settlement between the respondent licensee and the agency, the accusation then becomes the subject of a five-step hearing process:

1. **First, an evidentiary hearing is held by an administrative law judge (ALJ), who is usually from the centralized Office of Administrative Hearings (OAH).** In this proceeding, testimony under oath and other evidence is received. The ALJ who admits and receives the evidence and has had an opportunity to observe the witnesses, their credibility, and demeanor writes a decision containing findings of fact, conclusions of law, and proposed discipline (based on disciplinary guidelines fashioned by the agency that is prosecuting the case). However, this decision is merely a “proposed decision” that is transmitted back to the prosecuting agency for review.

2. **The board or agency director reviews the ALJ’s “proposed decision” and determines whether to “adopt” it as its own or to “nonadopt” it.** These decisionmakers may have general knowledge of the regulatory subject but often lack “on point” expertise. Hence, a neurosurgeon on the Medical Board may review an incompetence case against a pediatrician. Moreover, these supervening decisionmakers did not attend the hearing or directly consider the evidence, and usually do not have the transcript of the hearing. However, they are authorized to use or ignore the proposed decision; if they reject it, they may write their own, perhaps after additional argument by the parties. This second step in the process is not a review for error or to determine if evidentiary support exists — the considered opinion written by the person who has heard the evidence may be wholly disregarded.

3. **The agency’s final decision is then subject to judicial review, usually starting with**
a superior court. This court reviews the entire matter on an “independent judgment” basis, meaning the judge may substitute his/her opinion for that of the agency. The judge does not hold a hearing, receive evidence, and listen to witnesses; he or she simply reviews the transcript of the proceeding before the agency. The judge may hear new evidence (but usually does not), and may alter the result on an independent basis. Again, this is not merely a review for legal error or to assure substantial evidence to support findings; the judge may disregard the agency’s decision and reach a different one.

(4) The superior court’s decision is (usually) subject to appeal as of right. This involves full briefing before an appellate court, an opportunity for oral argument, and a written decision.

(5) The appellate court’s decision may be appealed to the California Supreme Court. That court’s review is discretionary. On rare occasions, a party may appeal a disciplinary decision to the U.S. Supreme Court.

This five-step hearing and review process within the state of California, where fully pursued, will take well over four years and will cost the respondent and the agency — conservatively — in the high six figures. Generally, it affords licensed professionals more due process than criminal defendants. Such a process applies to a disciplinary decision to revoke a license or simply to impose a modest condition on practice.

This process cannot be defended on its merits. It produces numerous low-quality reviews. It does not effectively combine “independence” with on-point “expertise” that is the lodestar referenced above. The generalized reform needed to resolve this problem should include the following elements:

(1) The quality of the first step — the hearing or trial where evidence is taken — should be enhanced so it need not be reviewed four successive times. This can be accomplished by enhancing the quality and independence of the state’s administrative law judges. California began that process in 1990 when it created a special panel for physician discipline cases.23 These ALJs are permitted to retain and call their own expert witnesses to assist in piercing the expert testimony financed by both sides. Such an option is needed in only a small percentage of cases, but it allows the ALJ to understand the evidence beyond the often incomprehensible or murky contentions between competing expert witnesses paid by the parties. Similar specialized panels should be created in other subject matter areas where the volume of cases and economies of scale so warrant.

(2) The second step — review of the ALJ’s decision by the board or agency head — should be eliminated. The board or department head is not a judge, did not hear the evidence, and does not usually have the transcript. If the decision misunderstands agency rules or policy, those should be clarified by the board or agency head via rulemaking.

23 Gov’t Code § 11371.
(3) The third step — independent judgment review by a superior court judge — should be eliminated. Why should a case that has been adequately tried by retried again? What is the advantage of such a repetition?

(4) Review by the court of appeal, based on legal error or absence of substantial evidence to support the findings, should be preserved. That review should be fashioned as an expedited review of the record with the possibility of review denial where the appellant fails to make a *prima facie* case for error.

The end result is the same number of steps we require in major criminal cases — sufficient due process for a lifetime of incarceration. A major high-quality evidentiary hearing and judicial review — with the possibility of Supreme Court petition — are preferable to five separate steps now commonly available. This format would improve quality and predictability, enhance independence, and yield a final decision in months rather than years. Some slight movement in the direction of this model has been implemented at the Medical Board of California, but that reform is incomplete, and other agencies throughout state government function in the five-step manner as described above.

3. **Public Information About Licensees.** This Commission properly considers market forces to augment sound regulatory policy. One increment of effective competition is informed consumer choice. Where consumers have maximum information about licensees subject to agency regulation, they are able to more easily exercise their market option as consumers to purchase or not. This Commission has proposed a consolidated state consumer complaint hotline for consumer use. However, it is unclear how such a single channel could possibly work across the breadth and variety of consumer inquiry — short of the creation of the world’s premier “voicemail hell” product. Nor are those humans who might answer such inquiries able to do so easily given the variety of inquiries likely.

CPIL recommends enhanced use of telecommunications increasingly available. Facilitating such disclosure is the increasing use of agency Web sites — a potential source of detailed and extensive information. The current problem is not the inability of a consumer to find a phone number or a Web site, but the lack of information available when inquiry is made. Many agencies fail or deliberately refuse to gather or disclose basic and otherwise public information about their licensees. CPIL contends that substantially related criminal arrests and convictions, civil judgments and settlements, disciplinary actions in other jurisdictions, business bankruptcies, pending disciplinary actions (at the point where an agency intends to file an accusation), and other information about licensees (including the details of currently applicable disciplinary conditions) should be routinely available about licensees on applicable Web sites.24

4. **Public Prosecutors and Private Enforcement of the Unfair Competition Act.** The primary purpose of state agencies interacting with business is to assure a fair and lawful system of

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24 For detailed discussion of current agency practice and proposed reforms on public disclosure, see Juliane D’Angelo Fellmeth, Administrative Director of the Center for Public Interest Law, 2001 Testimony on Proposed Standards for Consumer Complaint Disclosure (testimony to the Department of Consumer Affairs), available at www.cpil.org.
competition. Coextensive with that function, public prosecutors and private counsel are often able to supplement the power of agencies to assure legal compliance. The most important single statute allowing such a check is the Unfair Competition Act (UCA), found in Business and Professions Code section 17200 et seq. The federal counterpart to state unfair competition acts is section 5 of the Federal Trade Commission Act, but only the FTC is empowered to enforce that statute and its authority and resources are weak. The state UCA is shallow in its remedies — allowing only injunctive relief to private parties (injunction and restitution). The statute does not provide for attorneys’ fees, but such fees may be possible if a plaintiff vindicates the public interest well beyond involved clients under California’s private attorney general statute. Public prosecutors may collect civil penalties under the Act. And the Department of Consumer Affairs (as well as district attorneys) has sometimes been active in its enforcement.

The public and private enforcement of the UCA is critical to the functioning of state agencies. Time and again our agencies have failed to identify and stop major acts of unfair competition. The savings and loan debacle of the 1980s, securities fraud in the 1990s, accounting fraud cases in the past two years, the wholesale failure of the Insurance Commissioners of the 1970s and 1980s to police bad faith actions by their insurer licensees, and many other examples exist. This author brought a series of 22 Unfair Competition Act cases while a prosecutor in southern California during the 1970s and 1980s. Most of them could have been avoided had state regulators performed their duly assigned tasks competently. Indeed, a large number of UCA cases pertain to regulated industries and licensees. The existence of an alternative track to the courts through this mechanism is an important check on agency failure. Needless to say, but for court cases filed against Firestone Tires, we might still not know of its tragic tread separation incidence.

Related to this important remedy is the current practice of defendants (often licensees) settling private tort or UCA suits in secret. Such secret settlements violate public policy and legislation to prohibit them has been attempted and has regrettably failed. Current practice tragically allows, for example, physicians and other licensees relied upon by consumers — with multiple settlements and severe irreparable harm to patients — to secrete the results of what are public court proceedings from the public. And even more indefensible, the law even allows regulated defendants in civil proceedings to demand, as a condition of settlement, that their victims agree not to notify or cooperate with the Medical Board and other applicable regulators. CPIL is prepared to provide examples of these private deals and of their consequences. A modest bill to prevent this practice is represented by AB 320 (Correa), passed by the Legislature in 2004. It would codify case law prohibiting clauses in civil settlement agreements that purport to obligate a consumer to secrete from a regulatory agency the allegations and results of public litigation involving possibly incompetent, dishonest, or dangerous business practice. The concept of paying money in a settlement to buy the silence of a plaintiff who has suffered injury by a business person who is licensed and still in business warrants prohibition without extensive debate. Regrettably, the Governor vetoed AB 320 on September 22, 2004 — with the explanation that barring payoffs to plaintiffs to gag them from reporting public dangers to state regulators creates “double jeopardy.” What this explanation means is baffling. The Governor is the head of the executive branch and his agencies should not be

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deprived of information relevant to their public charge — based simply on a pay-off to an injured party. This Commission should recommend the passage of anti-secrecy legislation well beyond the modest and uncontroversial (we thought) scope of AB 320.

The Unfair Competition Act has spurred recent controversy, centering around its unusual “private attorney general” power allowing “any person” to represent the interests of the general public. Over the last three years, some attorneys have engaged in abusive civil filings. The Trevor Law Group in Beverly Hills, for example, took minor “notices of violation” posted on the Web site of the Bureau of Automotive Repair (BAR), filed actions on behalf of the “general public” against BAR licensees, and demanded $5,000 or more to “settle” each case. It sent such demands for payment to over 1,000 businesses. Other firms have engaged in similar practices. While defenders of the private attorney general power of the UCA cite the fact that involved attorneys have been disbarred (and in fact have been sued under the UCA themselves by the Attorney General), the current format of the private attorney general power has serious flaws. And they are not adequately ameliorated by State Bar discipline of selected counsel. The problem here is the other side of the coin from the benefits of multiple access points to reach the courts: Here, we may have the danger of “piling on” — of private UCA actions repeating what agencies intend to be minor and final disciplinary measures. And, of course, each of these settlement demands of the UCA private attorney general suffers another basic defect: It is not final. Indeed, another or the same attorney can make another demand a week later, based on the exact same cited wrong. This flaw exists because the private attorney general power of the UCA omits the basic notice and other requirements that allow any court judgment on behalf of others (beyond the named plaintiff) to collaterally estop future actions. Hence, there is no finality — ever.

The power to bring an action on behalf of the general public is not to be taken lightly. It gives the plaintiff strong leverage, and it also confers an important responsibility. Well prior to the problems surfaced from Trevor, CPIL warned of the lack of adequate safeguards in the invocation of the private attorney general power. The director of CPIL was selected by the California Law Revision Commission of the state legislature to study the matter. That report produced a reform measure, SB 143 (Kopp). It failed passage in 1997, opposed by both trial lawyers and business interests. Its solution to the problem is not esoteric or untested. The responsible remedy would take all of the elements of class action law required for due process compliance and impose them upon private attorney general UCA plaintiffs. Those additions include: (1) the plaintiff and his counsel must be an adequate representative of the general public, and conflicts of interest are prohibited; (2) any filing and any proposed final judgment or settlement must be fully noticed through the AG’s Web site (the cost is minimal given Internet technology; further, the AG already monitors 17200 public cases for district attorneys); (3) any person may object to a proposed judgment; and (4) all judgments and proposals for attorneys fees must be approved by a court after such hearing as fair, reasonable, and in compliance with applicable law.

The Trevor-type abuses, and many others, would not be possible in such a regime. California has numerous organizations, including CPIL, that would monitor such filings and lodge appropriate

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26 Bus. & Prof. Code § 17204.
objections. Attorneys’ fees would not be obtainable in any of the Trevor cases under applicable law and — lacking possible compensation — such cases are unlikely to be filed.

The trial lawyers have rejected this solution for reasons that elude us. Meanwhile, the courts are manifesting rising hostility to UCA actions — including legitimate and important suits. Most ominously, one court has erroneously held that the restitution that may be ordered in a private attorney general UCA case may not include the disgorgement of unjust enrichment from the unlawful acts, but only those sums where victims may be identified and individually recompensed. Hence, the violator keeps his ill-gotten gains if he has had enough foresight to deep six the names and addresses of his victims.

Assemblymember Correa introduced AB 2369 in 2004 to address these problems. CPIL has proposed some revisions to his last amended draft and we believe, along with many others, that they would resolve the problems of UCA abuse, and also reverse the Korea Supply error. Both sides in this dispute apparently reject such a sensible option. Instead, the trial lawyers wrote SB 185 (Sher) — a continuation of earlier legislation they sponsored.

Meanwhile, some business interests — although they have legitimate objections to the private attorney general format — have offered Proposition 64 to the public. This measure has been endorsed by the Governor. He should withdraw that endorsement and this Commission should so urge. This measure completely eliminates the private attorney general option, requiring all actions to comply with all class action requirements. This includes not only those needed to prevent abuse and assure due process and finality (outlined briefly above), but those that are not appropriate to the quick-acting injunction orientation of a UCA. The initiative would also require all plaintiffs to have suffered “financial harm” themselves. This eliminates whole categories of legitimate UCA cases, including those addressing public health harm, environmental depredations, privacy intrusions, and innumerable other historical and current examples where there is no financial harm or where the courts need to act before harm accrues — indeed, that is the structural purpose of the UCA.

Ideally, this Commission should take a balanced approach that preserves private UCA check on agency inaction, preserves its important role in identifying abuses that regulators should be looking at, and supports agency enforcement of standards that are in the public interest.

The balance CPIL urges would enhance the overall credibility of this Commission. The weight of your judgment to end regulation is much enhanced where you also advise its effective implementation where it is clearly needed.

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28 This measure seems to provide for court review of UCA private AG cases. But it does not include any notice provisions whatever. Courts are essentially passive and will sign the pro forma documents demanded by this measure without real review. Further, lack of notice and the other provisions listed above are absolutely necessary for minimal due process and without due process you do not have finality. To make matters worse, SB 185 then purports to exempt even from pro forma court review all actions filed by labor unions or by any 501(c)(3) nonprofit organization. There is no reason to exclude labor from due process compliance, nor anyone else. And Trevor and other abusers in fact have created 501(c)(3) entities to use as named plaintiffs.