



1-1-1999

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## Recommended Citation

Daniel F. Berberich, *Business Associations and Professions / Does the State Bar Have an Institutional Bias Against Solo Practitioners and Attorneys from Small Firms?*, 31 MCGEORGE L. REV. 191 (2000).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol31/iss2/4>

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## *Business Associations and Professions*

### **Does the State Bar Have an Institutional Bias Against Solo Practitioners and Attorneys from Small Firms?**

*Daniel F. Berberich*

#### *Code Sections Affected*

Business and Professions Code §§ 6095.1 (new), 6068, 6085 (amended), 6079.1, 6086.65 (amended, but set to be repealed and reenacted with new language effective Nov. 1, 2000).

SB 143 (Burton); 1999 STAT. Ch. 221

#### I. INTRODUCTION

Disciplinary proceedings are a necessary component of the legal profession, giving lawyers incentives—other than from their personal moralities—to uphold their duties as attorneys.<sup>1</sup> Without proceedings to suspend or disbar attorneys, no means would exist to prevent lawyers who continually or egregiously engage in malpractice, or who lie to judges, from practicing law. Many attorneys complain that, in its disciplinary process, the California Bar Association (State Bar) unfairly targets solo practitioners and attorneys in small firms.<sup>2</sup> These complaints stem from the belief that the State Bar prosecutes fewer complaints against attorneys from large firms.<sup>3</sup> Chapter 221 was enacted to investigate these concerns.<sup>4</sup> Additionally, Chapter 221 clarifies the rights of attorneys against whom disciplinary proceedings are brought.<sup>5</sup>

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1. See *Brotsky v. State Bar*, 57 Cal. 2d 287, 301, 368 P.2d 697, 704, 19 Cal. Rptr. 153, 160 (1962) (commenting that the intent of the Legislature in establishing an attorney disciplinary system was to provide the State Bar with the opportunity to police its own ranks).

2. See Maura Dolan, *California and the West: Jurists Lean Toward Levies on Lawyers to Fund State Bar Discipline*, L.A. TIMES, Nov. 10, 1998, at A3 (indicating that many lawyers share Governor Wilson's criticism that the Bar disciplines solo practitioners and leaves the big firms alone).

3. *Id.*

4. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 143, at 4 (Mar. 23, 1999) (asserting that any such bias is addressed by this legislation).

5. See CAL. BUS. & PROF. CODE § 6085 (amended by Chapter 221) (specifying six separate rights of attorneys:

- (a) To defend against the charge by the introduction of evidence.
- (b) To receive any and all exculpatory evidence from the State Bar after the initiation of a disciplinary proceeding in State Bar Court, and thereafter when this evidence is discovered and available.
- (c) To be represented by counsel.
- (d) To examine and cross-examine witnesses.

## II. EXISTING LAW

### A. Communications to the State Bar

If a person has a complaint against an attorney, he or she can file that complaint with the Intake Unit, a department of the Office of the Chief Trial Counsel within the State Bar, by calling a toll-free number.<sup>6</sup> Attorneys in the Intake Unit evaluate all communications entering the system to determine whether a violation of the attorney statutory duties<sup>7</sup> or Rules of Professional Conduct has been stated.<sup>8</sup> Some less serious communications can be handled within the Intake Unit, while others reach “inquiry” status, which means that the complaints merit an evaluation to determine if any action by the State Bar is warranted.<sup>9</sup> If the communication warrants an investigation, then it is designated as a “complaint.”<sup>10</sup> In 1997, the State Bar received 138,239 total communications, which resulted in 15,164 inquiries and 5,811 complaints.<sup>11</sup>

Upon completion of investigations, attorneys in the Office of Chief Trial Counsel analyze and evaluate the investigations, draft notices of disciplinary charges, conduct civil discovery, settle cases by stipulation, or prepare and present cases at trial<sup>12</sup> or for review<sup>13</sup> in the State Bar Court.<sup>14</sup> The State Bar Court is similar to a criminal trial court,<sup>15</sup> and a defendant attorney in a disciplinary proceeding has many of the rights a defendant has in a criminal trial.<sup>16</sup> Non-serious types of disciplinary actions, such as public or private reprovings, can be imposed by the State Bar, but to impose more severe penalties, such as suspension or disbarment, the

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(e) To exercise any right guaranteed by the State Constitution or the United States Constitution, including the right against self-incrimination. He or she shall also have the right to the issuance of subpoenas for attendance of witnesses to appear and testify or produce books and papers, as provided in this chapter).

6. See STATE BAR OF CALIFORNIA, 1998 REPORT OF THE STATE BAR DISCIPLINARY SYSTEM 3 (1998) (indicating that the State Bar maintains a toll-free number for the receipt of complaints) (copy on file with the *McGeorge Law Review*).

7. See *infra* Part II.B (detailing attorneys’ duties listed in California Business and Professions Code section 6068).

8. STATE BAR OF CALIFORNIA, *supra* note 6, at 3; see *id.* (describing the State Bar’s process of evaluating communications).

9. See *id.* at 3, 28 (summarizing how a complaint reaches “inquiry” status).

10. See *id.* at 27 (giving the State Bar’s definition of “complaint”).

11. *Id.* at 4.

12. The trial level of the State Bar Court is called the “Hearing Department.” *Id.* at 14.

13. The appellate level of the State Bar Court is known as the “Review Department.” *Id.*

14. See *id.* at 10 (describing to what end the investigation process can ultimately lead).

15. See *id.* at 14 (noting that the State Bar Court is the branch of the California court system approved to adjudicate disciplinary actions against attorneys).

16. See *supra* note 5 (describing the rights of defendant attorneys in these proceedings).

State Bar must make a recommendation to the California Supreme Court.<sup>17</sup> If the Supreme Court does not accept this recommendation, it can modify the recommendation or return it for further hearing.<sup>18</sup> In 1998, the California Supreme Court issued 679 final dispositions, including 96 disbarments, 54 resignations with charges pending, and 487 suspensions.<sup>19</sup>

### B. Attorneys' Duties

California Business and Professions Code section 6068 details the general duties of attorneys.<sup>20</sup> These include: (1) "the duty to maintain only such actions that appear to be legal or just;"<sup>21</sup> (2) the duty to respond promptly to status inquiries of clients;<sup>22</sup> and (3) the duty to provide clients with copies of certain documents in a timely manner."<sup>23</sup> The code also imposes a duty on attorneys to cooperate and participate in any disciplinary proceeding pending against them.<sup>24</sup>

An attorney must respond to the disciplinary agency within 30 days of the time that the attorney knows that he or she is involved in any one of several specified situations.<sup>25</sup> Some of these situations include having three or more malpractice suits filed against the attorney within one year,<sup>26</sup> having a judgment for fraud entered against the attorney,<sup>27</sup> or having a felony indictment or information brought against the attorney.<sup>28</sup>

Some attorneys have had difficulty interpreting what "cooperating" with the State Bar means.<sup>29</sup> For instance, in *Black v. State Bar*,<sup>30</sup> Black, the defendant attorney, did not realize that he could refuse to testify on the grounds of the privilege against self-incrimination and still be in cooperation with the State Bar.<sup>31</sup> The State Bar required Black to testify under oath as to the accusation made against

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17. See STATE BAR OF CALIFORNIA, *supra* note 6, at 14 (specifying the California Supreme Court's role in the attorney discipline system).

18. *Id.*

19. See *id.* at 16 (listing the final dispositions of the California Supreme Court).

20. CAL. BUS. & PROF. CODE § 6068 (amended by Chapter 221).

21. *Id.* § 6068(c) (amended by Chapter 221).

22. *Id.* § 6068(m) (amended by Chapter 221).

23. *Id.* § 6068(n) (amended by Chapter 221).

24. *Id.* § 6068(i) (amended by Chapter 221).

25. *Id.* § 6068(o) (amended by Chapter 221).

26. *Id.* § 6068(o)(1) (amended by Chapter 221).

27. *Id.* § 6068(o)(2) (amended by Chapter 221).

28. *Id.* § 6068(o)(4) (amended by Chapter 221).

29. See, e.g., *infra* notes 30-35 and accompanying text (giving an example of an attorney who misinterpreted the meaning of "cooperating" with the State Bar).

30. 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288 (1972).

31. *Id.* at 693, 499 P.2d at 978, 103 Cal. Rptr. at 298.

him,<sup>32</sup> but did not inform him that he had a constitutional<sup>33</sup> right to refuse to answer questions the answers to which would tend to be self-incriminating.<sup>34</sup> The California Supreme Court held that the State Bar was not required to admonish the defendant of his right to refuse to testify on the grounds of self-incrimination, and that, by testifying, Black had waived that privilege.<sup>35</sup>

### C. Rights of Attorneys in Disciplinary Proceedings

In 1990, the Legislature amended Business and Professions Code section 6068(i) to clarify the rights of attorneys during disciplinary proceedings.<sup>36</sup> As a result, section 6068(i) now contains language that describes exactly which “rights” attorneys have in such proceedings: they “shall not be deprived of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States.”<sup>37</sup> This language will serve to prevent attorneys like Black from misinterpreting the statute.

Section 6085 of the Business and Professions Code enumerates the “rights of attorneys complained against.”<sup>38</sup> Although attorneys do not enjoy all of the rights that defendants do in criminal cases,<sup>39</sup> they nevertheless have certain basic rights.<sup>40</sup> For example, existing law provides common due process protections during attorney disciplinary proceedings.<sup>41</sup> Section 6085 provides that an attorney against whom a complaint is lodged shall be given notice.<sup>42</sup> Attorneys also have the right

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32. *Id.* at 685, 499 P.2d at 972, 103 Cal. Rptr. at 292.

33. *See* U.S. CONST. amend. V (stating that “[n]o person shall be . . . compelled in any criminal case to be a witness against himself”); *see also Black*, 7 Cal. 3d at 686, 499 P.2d at 973, 103 Cal. Rptr. at 293 (holding that “[w]ith respect to our state constitutional privilege against self-incrimination, it has been held that an attorney against whom a disciplinary proceeding has been brought . . . may refuse to answer questions on the ground that his testimony would ‘tend to incriminate him.’”).

34. *See Black*, 7 Cal. 3d at 686, 499 P.2d at 973, 103 Cal. Rptr. at 293 (recounting that the State Bar called defendant as a witness without giving him the privilege to refuse to be sworn).

35. *See id.* (refusing to endorse the defendant’s argument that the State Bar had violated his privilege against self-incrimination by not giving him actual notice that he could refuse to testify on those grounds).

36. *See* 1990 Cal. Stat. ch. 1639, sec. 4, at 7845 (amending CAL. BUS. & PROF. CODE § 6068) (stating that the requirement “to cooperate with the disciplinary investigation should not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States”).

37. CAL. BUS. & PROF. CODE § 6085(i) (amended by Chapter 211).

38. *Id.*

39. *See Black*, 7 Cal. 3d at 688, 499 P.2d at 974, 103 Cal. Rptr. at 294 (noting that, with respect to our state constitutional privilege against self-incrimination, it has been held that an attorney against whom a disciplinary proceeding is brought does not have complete immunity from testifying as does a defendant in a criminal case; he may be compelled to testify[,] but may also refuse to answer questions on the ground that his testimony would tend to incriminate him).

40. For a complete list of these rights, *see* CAL. BUS. & PROF. CODE § 6085 (amended by Chapter 221).

41. Essentially, the law requires that any person against whom a complaint has been filed shall be given a fair, adequate, and reasonable opportunity to defend against the charge. *Id.*

42. *Id.* § 6085 (amended by Chapter 221). However, the State Bar’s failure to disclose to the attorney that it will request disbarment does not constitute lack of notice. *Dixon v. State Bar*, 32 Cal. 3d 728, 737, 653 P.2d 321, 326, 187 Cal. Rptr. 30, 35 (1982); *see also Bowles v. State Bar*, 48 Cal. 3d 100, 108, 768 P.2d 65, 70, 255 Cal. Rptr. 846, 851 (1989) (noting that the State Bar is not required to make reasonable efforts to locate an

to: (1) defend against the charge by introducing evidence;<sup>43</sup> (2) receive exculpatory evidence from the State Bar;<sup>44</sup> (3) be represented by counsel;<sup>45</sup> (4) cross-examine witnesses;<sup>46</sup> and (5) issue subpoenas.<sup>47</sup> These protections are important because they represent an individual's Fourteenth Amendment right to due process.<sup>48</sup>

#### D. State Bar Court Procedures

The Chief Trial Counsel prosecutes serious complaints in the State Bar Court.<sup>49</sup> The State Bar Court is composed of seven hearing judges and a presiding judge, all of whom are appointed by the California Supreme Court.<sup>50</sup> The State Bar Court's purpose is to decide regulatory matters pending before the Hearing Department of the State Bar Court. Each judge serves a six-year term and may be reappointed for additional six-year terms.<sup>51</sup> The Supreme Court makes appointments based on "nominations"<sup>52</sup> by the Board of Governors (Board), which screens and rates all applicants.<sup>53</sup> The State Bar Court also has a Review Department composed of the Presiding Judge of the State Bar Court, one Lay Judge, and one Review Department Judge.<sup>54</sup> The Board also nominates these judges.<sup>55</sup> Additionally, the Board has the authority to provide a rule regarding the review of decisions other than those issued by the Review Department.<sup>56</sup>

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attorney to inform him or her of disciplinary proceedings against him or her, but rather the Bar is only required to send a hearing notice by certified mail to the most recent address shown on the attorney's membership records).

43. CAL. BUS. & PROF. CODE § 6085(a) (amended by Chapter 221).

44. *Id.* § 6085(b) (amended by Chapter 221).

45. *Id.* § 6085(c) (amended by Chapter 221).

46. *Id.* § 6085(d) (amended by Chapter 221).

47. *Id.* § 6085(e) (amended by Chapter 221).

48. *See* U.S. CONST. amend. XIV, § 1 (guaranteeing individuals the right of "due process of law"); *see also* CAL. BUS. & PROF. CODE § 6085 (amended by Chapter 221) (promising any attorney who is facing a complaint that he or she will have a fair opportunity to present a defense).

49. STATE BAR OF CALIFORNIA, *supra* note 6, at 14.

50. CAL. BUS. & PROF. CODE § 6079.1(a) (amended by Chapter 221, but set to expire Nov. 1, 2000).

51. *Id.*; § 6070.1 (amended by Chapter 221, but set to expire on Nov. 1, 2000); *see also id.* (stating that "a judge appointed under this section shall be subject to admonition, censure, removal, or retirement by the Supreme Court").

52. *Id.* § 6079.1(c) (amended by Chapter 221, but set to expire Nov. 1, 2000); *see also id.* (specifying that the board shall submit no fewer than three nominations for each available judicial position).

53. *Id.* § 6079.1 (c) (amended by Chapter 221, but set to expire Nov. 1, 2000).

54. *Id.* § 6086.65(a) (enacted by Chapter 221).

55. *Id.*

56. *Id.* § 6086.65(d) (amended by Chapter 221, but set to expire Nov. 1, 2000).

### III. CHAPTER 221

#### A. *Seeking to Discipline All Attorneys Equally*

Chapter 221 attempts to ensure that the State Bar gives equal treatment in disciplinary actions to solo practitioners, attorneys from small firms, and attorneys from larger firms.<sup>57</sup> To this end, Chapter 221 instructs the State Bar to compile statistics on disciplinary actions<sup>58</sup> and issue a written report on or before June 30, 2001, to the California Senate Committee on Judiciary and the Assembly Committee on Judiciary.<sup>59</sup> The report should be designed to reveal whether disciplinary proceedings are brought disproportionately against attorneys from small firms as opposed to attorneys from large firms.<sup>60</sup>

If the statistics show disparate treatment, then the State Bar must include in the report a description of any efforts to correct the institutional bias and ensure that the State Bar's resources are used "fairly and equitably" in the investigation and prosecution of complaints against attorneys.<sup>61</sup> However, attorneys involved in disciplinary proceedings may not invoke the report as a defense.<sup>62</sup> If the reason that solo practitioners and small firm attorneys are prosecuted more than attorneys from larger firms is because more complaints are lodged against them, then the State Bar will not have to change its practices.<sup>63</sup>

#### B. *Adding to Attorneys' Rights in Disciplinary Proceedings*

Chapter 221 attempts to remedy the interpretation problem surrounding an attorney's duty to "cooperate" in disciplinary proceedings.<sup>64</sup> This new law provides that the duty to cooperate shall not be construed to require an attorney, even if

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57. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS of SB 143, at 4 (Mar. 23, 1999) (incorporating the statement by the author of SB 143 that the bill is needed to bring basic fairness to the State Bar's disciplinary process, and to ensure that constitutional protections and statutory rules still apply so that attorneys will receive due process in the disciplinary realm).

58. CAL. BUS. & PROF. CODE § 6095.1(a) (enacted by Chapter 221).

59. *Id.* § 6095.1(a) (enacted by Chapter 221).

60. See *id.* § 6095.1(b) (enacted by Chapter 221) (mandating that the report "focus on whether disciplinary proceedings are brought in disproportionate numbers against attorneys practicing as solo practitioners or in small law firms or partnerships, as compared with proceedings brought against attorneys practicing in large law firms").

61. *Id.* § 6095.1(c) (enacted by Chapter 221).

62. *Id.* § 6095.1(d) (enacted by Chapter 221).

63. See *id.* § 6095.1(c) (enacted by Chapter 221)

(Disciplinary proceedings shall not be brought in disproportionate numbers against attorneys practicing as solo practitioners or in small law firms or partnerships, as compared to proceedings brought against attorneys practicing in large law firms, *unless* the number of complaints against solo practitioners, or attorneys practicing in small law firms or partnerships, is commensurate with the higher number of disciplinary proceedings) (emphasis added)).

64. See *supra* notes 29-35 (discussing *Black v. State Bar*, 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288 (1972), a situation in which an attorney misconstrued the meaning of "cooperate").

requested, to waive any constitutional or statutory privileges,<sup>65</sup> such as the privilege against self incrimination. Moreover, if the attorney invokes a constitutional or statutory privilege, this invocation may not be used against the attorney in a disciplinary proceeding.<sup>66</sup> This rule changes existing law, which had allowed the judge to draw an inference of guilt from an attorney's refusal to testify regarding a certain matter.<sup>67</sup>

Finally, Chapter 221 clarifies that to "cooperate" with the State Bar in disciplinary proceedings means that attorneys have a reasonable period of time, in light of the time constraints of their practices, to comply with a request for information or other types of requests.<sup>68</sup> Chapter 221 requires that notice of disciplinary proceedings be "fair, adequate, and reasonable."<sup>69</sup> In addition, Chapter 221 makes clear that the "fair, adequate, and reasonable" standard also applies to other due process rights outlined in the statute.<sup>70</sup> Chapter 221 also specifies that attorneys have the right "to exercise any right guaranteed by the California Constitution or the United States Constitution, including the right against self-incrimination."<sup>71</sup> This addition makes section 6085 consistent with the former section 6068,<sup>72</sup> which had contained a provision mentioning constitutional rights of attorneys in disciplinary proceedings, but doing so using inconsistent language.<sup>73</sup> Chapter 221 also ensures that attorneys can exercise rights guaranteed to them by the State Constitution,<sup>74</sup> a guarantee that had not been clear under sections 6068 and

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65. CAL. BUS. & PROF. CODE § 6068(i) (amended by Chapter 221).

66. *Id.* § 6095.1(d) (enacted by Chapter 221).

67. *See In re Vaughan*, 189 Cal. 491, 496, 209 P. 353, 355 (1922) (holding that "[t]he rule in criminal cases that the failure of the accused to testify on his own behalf shall not be considered against him does not apply to proceedings for disbarment of an attorney, and such failure may be considered in weighing the evidence offered against him).

68. CAL. BUS. & PROF. CODE § 6068(i) (amended by Chapter 221).

69. *Id.* § 6085 (amended by Chapter 221).

70. *Id.*; *see supra* note 5 (explaining the details of section 6085 as amended by Chapter 221).

71. *See* CAL. BUS. & PROF. CODE § 6085(e) (amended by Chapter 221) (resolving that attorneys shall be given "a fair, adequate, and reasonable opportunity" to exercise state and federal constitutional rights, including the right against self-incrimination); *see also* U.S. CONST. amend. V (securing for the people the right not to be forced by the federal government to incriminate themselves); *id.* amend. XIV, § 1 (protecting the right against self-incrimination from breach by the states).

72. *See* 1990 Cal. Stat. ch. 1639, sec. 4, at 7845 (amending CAL. BUS. & PROF. CODE § 6068) (stating that section 6068 "shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States or any other constitutional or statutory privileges").

73. *Compare id.* (stating merely that attorneys "shall not be deprived of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States or any other constitutional or statutory privileges" (emphasis added)), with CAL. BUS. & PROF. CODE § 6085(e) (amended by Chapter 221) (containing affirmative language which states that attorneys *shall have the right* "to exercise any right guaranteed by the [California] Constitution or the United States Constitution, including the right against self-incrimination" (emphasis added)).

74. CAL. BUS. & PROF. CODE § 6085(e) (amended by Chapter 221).



6085 prior to the passage of Chapter 221.<sup>75</sup> Accordingly, these changes should clarify the rights of attorneys facing disciplinary proceedings.

*C. Making Minor Changes to the State Bar Court's Composition*

Chapter 221 also changes the composition of the State Bar Court. As of November 1, 2000, five hearing judges will be appointed to the Hearing Department, as opposed to the previous seven.<sup>76</sup> Chapter 221 changes the terminology so that instead of "nominating" these judges, the Board of Governors makes "recommendations" as to who these individuals should be.<sup>77</sup> The effect of this provision is not clear, but each appointing authority might not be required to choose a judge based solely on the list that the board provides. Moreover, the Supreme Court will no longer be the sole entity capable of appointing all of the judges; Chapter 221 provides that the Supreme Court will appoint two judges, while the Governor, the Senate Committee on Rules, and the Speaker of the Assembly will each appoint one judge.<sup>78</sup>

IV. ANALYSIS OF CHAPTER 221

Chapter 221 makes California Business and Professions Code section 6068 consistent with section 6085.<sup>79</sup> This change should alleviate any confusion surrounding the question of whether attorneys have the right to refuse to testify.<sup>80</sup> Indeed, the portion of Chapter 221 stating that an attorney's refusal to testify will not be weighed against the attorney is an improvement over existing law. In criminal trials, a defendant's silence cannot be used as evidence against him or her.<sup>81</sup> The U.S. Supreme Court has acknowledged several policy rationales for protecting this right. Silence cannot be used as incriminating evidence against an individual because the fundamental values of this nation's people reflect their unwillingness to subject those suspected of crimes to the "cruel trilemma of self-

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75. See 1990 Cal. Stat. ch. 1639, sec. 4, at 7845 (amending CAL. BUS. & PROF. CODE § 6068) (containing no provision mentioning rights under the California Constitution prior to the enactment of Chapter 221); 1939 Cal. Stat. ch. 34, sec., 1, at 355 (amending CAL. BUS. & PROF. CODE § 6068) (same).

76. CAL. BUS. & PROF. CODE § 6079.1(a) (enacted by Chapter 221) (effective Nov. 1, 2000).

77. *Id.* § 6079.1(c) (enacted by Chapter 221) (effective Nov. 1, 2000).

78. *Id.* § 6079.1(a) (enacted by Chapter 221) (outlining the procedure for appointing judges to the State Bar Court Hearing Department).

79. See *supra* notes 72-73 and accompanying text (highlighting the fact that both California Business and Professions Code sections 6085(e) and 6068(i) contain language verifying that attorneys have the privilege to refuse to testify if the testimony may be self-incriminating).

80. See *supra* notes 29-35 and accompanying text (focusing on the confusion previously existing regarding the meaning of the word "cooperate" in the context of the attorney's duty to cooperate with the State Bar in disciplinary proceedings brought against him or her).

81. *Griffin v. California*, 380 U.S. 609, 613 (1965).

accusation.”<sup>82</sup> The U.S. also has an adversarial rather than an inquisitorial system of criminal justice, due to fears that self-incriminating statements will be elicited by abuses of governmental authority.<sup>83</sup> Likewise, the nation cherishes fair play, which requires “the government to leave the individual alone until good cause is shown.”<sup>84</sup> Chapter 221 implements these policies in the attorney disciplinary proceedings context by preventing a judge from drawing inferences of guilt from an attorney’s silence.<sup>85</sup> Although an attorney in a disciplinary proceeding is not threatened with loss of liberty as is a defendant in a criminal trial, he or she may be faced with loss of livelihood,<sup>86</sup> which can be just as important to many attorneys. Chapter 221 provides the defendant attorney with a fairer trial because the right to refuse to testify is not a true right if a judge can simply infer guilt from the refusal.<sup>87</sup>

Chapter 221 also makes a needed change to the State Bar’s procedure for appointing judges.<sup>88</sup> Dispersing the appointment of judges over four branches instead of only the Supreme Court should help create a balanced panel; indeed, judges appointed from four sources should bring “a broader diversity of opinion to the State Bar Court.”<sup>89</sup> The new method mirrors the checks and balances that exist elsewhere in the structure of government in America.<sup>90</sup>

## V. CONCLUSION

Overall, Chapter 221 should bring positive changes to attorney disciplinary actions.<sup>91</sup> The statistics that the State Bar is required to compile could identify what some believe to be an institutional bias in favor of large-firm attorneys and against solo practitioners and small-firm attorneys.<sup>92</sup> If the mandated research indicates that

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82. *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 55 (1964).

83. *Id.*

84. *Id.*

85. CAL. BUS. & PROF. CODE § 6068(i) (amended by Chapter 221).

86. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS of SB 143, at 5 (Mar. 23, 1999) (“The author [of SB 143] notes that due process is a good idea in disciplinary actions in that an attorney facing disciplinary charges risks losing the ability to earn a livelihood”).

87. *See Griffin*, 380 U.S. at 612 (commenting that “a court’s acquiescence [in making an inference from the defendant’s silence is] the equivalent of an offer of evidence and its acceptance”).

88. *See* CAL. BUS. & PROF. CODE § 6079.1(a) (enacted by Chapter 221) (restructuring the appointment process for openings in the State Bar Court Hearing Department).

89. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS of SB 143, at 6 (Mar. 23, 1999) (summarizing the intent of the author of AB 143 to bring a broader range of opinion to the State Bar Court).

90. *See generally* Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1050 (1999) (discussing how the power to make laws in the government of the United States is dispersed among the legislative, executive, and judicial branches, in order that these branches may create checks and balances against each other).

91. *See supra* Part IV (analyzing the positive changes made by Chapter 221).

92. *See supra* note 2 and accompanying text (referring to Governor Wilson’s criticism, shared by many, that the State Bar disciplines solo practitioners and small-firm lawyers at a greater ratio than it disciplines large-firm lawyers).

attorneys from small firms violate their oaths in greater numbers than do attorneys from larger firms, then suspicions that the State Bar Court applies its rules more harshly in the case of solo practitioners and small-firm attorneys<sup>93</sup> will be shown to be baseless.

Chapter 221 makes a significant stride in attorneys' rights by denying judges the power to infer guilt based on the attorney's refusal to testify.<sup>94</sup> However, Chapter 221 does not extend far enough; attorneys should be afforded all of the privileges that are guaranteed to defendants in criminal cases.<sup>95</sup> Attorneys who might be suspended or disbarred face the potential loss of their livelihood, a penalty which, while it does not rise to the level of that faced by defendants in criminal cases, is still significant enough to be given the same procedural protections.<sup>96</sup> Nevertheless, Chapter 221 does make a necessary change by bringing attorneys' rights in disciplinary proceedings closer in line with the rights of defendants in criminal cases.

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93. See *supra* note 2 (acknowledging that some lawyers feel the State Bar unfairly targets such attorneys for disciplinary actions).

94. *Supra* notes 80-86 and accompanying text.

95. See *supra* note 39 and accompanying text (noting that attorneys in disciplinary proceedings are not afforded all of the same privileges as defendants in criminal cases).

96. *Supra* note 84 and accompanying text.