

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

SHARON LYNN LAPIN

Applicant for Admission

No. 91-M-07563

Filed February 11, 1993

SUMMARY

In a moral character proceeding in which the applicant waived confidentiality, the hearing judge granted the applicant's motion to compel the State Bar to answer interrogatories seeking the identities of persons who had discussed the applicant with the Committee of Bar Examiners. (Hon. Jennifer Gee, Hearing Judge.) After the case was reassigned for trial to a judge pro tempore, the applicant moved to preclude the use of testimony by two distantly located witnesses against the applicant, due to problems in obtaining their depositions. The trial judge ordered the State Bar to produce the two witnesses for deposition before putting on its case at trial as a condition of allowing the witnesses to testify. (Vivian L. Kral, Judge Pro Tempore.)

The State Bar sought discovery review of the order compelling interrogatory answers, and, when the Presiding Judge upheld the order, sought reconsideration by the review department in bank. The applicant sought discovery review of the trial judge's order, asserting that the State Bar should be precluded altogether from offering the two witnesses' testimony or any other evidence about their assertions regarding the applicant. The applicant's request for discovery review was referred to the review department in bank.

The review department overruled the State Bar's objections to the interrogatories, including those based on the statutory official information privilege and the constitutional right to privacy, except that, on privacy grounds, it modified the order compelling discovery to allow the State Bar to withhold the identities of persons whom it did not intend to call as trial witnesses under any circumstances. The review department also modified the order with regard to the two witnesses. It ordered the State Bar, as a condition of being permitted to call the witnesses at trial, to subpoena them for deposition prior to trial and either to produce them for deposition in the trial venue or to pay applicant's counsel's travel expenses to the location of the deposition.

COUNSEL FOR PARTIES

For Office of Trials: Jill Sperber

For Applicant: Richard Lubetzky

HEADNOTES

- [1] **101 Procedure—Jurisdiction**
199 General Issues—Miscellaneous
2690 Moral Character—Miscellaneous
Admission of attorneys to practice law is an exercise of one of the inherent powers of the California Supreme Court, which relies on the Committee of Bar Examiners of the State Bar to administer and carry out the bar admission process, including examining applicants for admission and investigating their fitness. An applicant who is denied certification by the Committee may seek independent adjudication by the State Bar Court. The determination of moral character made by that court is final and binding, subject to review by the Supreme Court.
- [2] **113 Procedure—Discovery**
135 Procedure—Rules of Procedure
2604 Moral Character—Discovery
Under rule 835 of the Transitional Rules of Procedure, various discovery provisions applicable in disciplinary proceedings are also applicable in moral character proceedings.
- [3 a-c] **113 Procedure—Discovery**
135 Procedure—Rules of Procedure
2604 Moral Character—Discovery
Rule XI of the Rules Regulating Admission to Practice Law in California, providing that the files of the Committee of Bar Examiners are confidential, does not have any bearing on the Committee's duty to respond to interrogatories from the applicant in a moral character proceeding, and, when read in conjunction with other applicable rules, only precludes the Office of Trials from disclosing documents voluntarily as opposed to pursuant to appropriate discovery requests or by court order.
- [4] **113 Procedure—Discovery**
143 Evidence—Privileges
148 Evidence—Witnesses
The identities of persons who have knowledge of relevant facts and who may be potential witnesses are outside the scope of both the attorney-client and work product privileges. The added fact that such a person is a member of the State Bar is a matter of public record and cannot appropriately be claimed to be privileged.
- [5] **113 Procedure—Discovery**
130 Procedure—Procedure on Review
194 Statutes Outside State Bar Act
2604 Moral Character—Discovery
Normally, discovery objections not raised in a timely fashion will not be considered, and this provision applies in discovery in moral character proceedings even though the Civil Discovery Act has not been made applicable to such proceedings in its entirety. However, where a claim of privilege from discovery had been belatedly presented to the hearing judge without objection and raised an important issue, the review department considered its applicability on review.

- [6 a-e] 113 **Procedure—Discovery**
 148 **Evidence—Witnesses**
 159 **Evidence—Miscellaneous**
 194 **Statutes Outside State Bar Act**
 2604 **Moral Character—Discovery**

The State Bar is a public entity within the scope of the statutory official information privilege (Evid. Code, § 1040). The procedure to be followed in State Bar Court proceedings where the official information privilege is asserted is the same as in civil cases. In a moral character proceeding, where the information sought was the identities of persons whom the State Bar had reserved the right to call as impeachment or rebuttal witnesses at trial, the official information privilege did not apply to such information, either because the consent exception was applicable, or because the reservation of the right to call such persons reduced the Committee of Bar Examiners' need for secrecy to the interest of a party in the outcome of the proceeding, which is not protected under section 1040 and which was outweighed by the interests of the public and the applicant in a fair trial.

- [7] 113 **Procedure—Discovery**
 119 **Procedure—Other Pretrial Matters**
 136 **Procedure—Rules of Practice**
 148 **Evidence—Witnesses**

The rule permitting a party to exclude rebuttal or impeachment witnesses from a pretrial statement (Prov. Rules of Practice, rule 1222(g)) has no bearing on the broader issue of discoverable information. Discovery of identities of individuals is not limited to persons who may be called in the opposing party's case in chief.

- [8 a, b] 113 **Procedure—Discovery**
 130 **Procedure—Procedure on Review**
 139 **Procedure—Miscellaneous**

Generally, when a lower court ruling favors disclosure of materials requested in discovery, in camera inspection cannot be requested for the first time on review. There is an exception for questions of first impression, but this exception did not apply where the authority relied on in requesting the inspection had been decided over 30 years earlier. Where the party requesting in camera inspection did so for the first time on a motion for reconsideration before the review department in bank, and gave no explanation of its failure to request such inspection earlier, the review department declined to conduct an in camera inspection.

- [9] 113 **Procedure—Discovery**
 141 **Evidence—Relevance**
 148 **Evidence—Witnesses**

In camera inspection was not appropriate before ordering a party to disclose names of potential witnesses in response to an interrogatory, because the court was ill-equipped to evaluate the potential relevance of the undisclosed names without argument from the counsel of the party requesting them, which could only be made after the names were disclosed.

- [10 a-f] 113 **Procedure—Discovery**
 139 **Procedure—Miscellaneous**
 148 **Evidence—Witnesses**
 193 **Constitutional Issues**
 2604 **Moral Character—Discovery**

Private personal information about a non-party to a proceeding may be privileged from discovery under some circumstances pursuant to the California constitutional right to privacy. The privacy

right to be protected is that of the non-party, and the custodian of the private information may not waive it. The right to privacy is not absolute, but must be balanced against the need for disclosure. In a moral character proceeding, it was unreasonable for material witnesses against the applicant to claim a right of privacy preventing the disclosure of their identities to the applicant during discovery, while consenting to testify against the applicant at trial. However, as to the identities of persons whose testimony would not be used under any circumstances, the applicant had not made a sufficient showing of need to overcome these persons' privacy rights, and their names could be withheld from disclosure.

[11] **159 Evidence—Miscellaneous**
204.90 Culpability—General Substantive Issues

A hearing judge should scrutinize with care any evidence bearing the earmarks of private spite. Nevertheless, any instigating factor or personal motive in the initiation of a State Bar proceeding is not a matter of controlling concern where the facts disclosed justify disciplinary action.

[12] **113 Procedure—Discovery**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous

Declaration regarding facts relating to discovery motion was stricken as untimely, where it related to facts which should have been presented to hearing judge, not offered for the first time on review.

[13 a-c] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
113 Procedure—Discovery
114 Procedure—Subpoenas
148 Evidence—Witnesses

Where examiner's conduct in connection with obtaining depositions of State Bar's non-party witnesses, while not in bad faith, clearly fell short of her duty under the circumstances, review department upheld hearing judge's order permitting such witnesses to testify only if first deposed, and modified such order to require examiner to subpoena the witnesses and to pay transportation costs as a condition of permitting witnesses' testimony.

[14] **113 Procedure—Discovery**
135 Procedure—Rules of Procedure
194 Statutes Outside State Bar Act

The Civil Discovery Act has not been adopted in its entirety in the conduct of State Bar proceedings. The imposition of monetary costs as discovery sanctions is precluded under rule 321, Trans. Rules Proc. of State Bar. Authorized discovery sanctions include orders precluding a party from supporting or opposing designated claims or defenses or from introducing evidence or testimony.

[15] **101 Procedure—Jurisdiction**
119 Procedure—Other Pretrial Matters
120 Procedure—Conduct of Trial
139 Procedure—Miscellaneous

Judges in State Bar proceedings have inherent authority to exercise reasonable control over the proceedings in front of them.

ADDITIONAL ANALYSIS

[None.]

OPINION AND ORDER ON REVIEW OF DISCOVERY ORDERS

PEARLMAN, P. J.:

We have before us two significant issues involving discovery in moral character proceedings. The applicant, Sharon Lynn Lapin, has waived confidentiality of these proceedings pursuant to Business and Professions Code section 6060.2.

The first issue involves the propriety of the hearing judge's order compelling the Committee of Bar Examiners (hereafter "the Committee") to answer two interrogatories propounded by the applicant's counsel seeking the identity of all persons who initiated a complaint with the State Bar against applicant or provided information to the State Bar regarding applicant. The Committee had objected on the grounds of confidentiality and sought review of the judge's order, pursuant to rule 324, Transitional Rules of Procedure of the State Bar, before the Presiding Judge who affirmed the order. The Committee then sought reconsideration of the Presiding Judge's order before the review department in bank and the Presiding Judge exercised her discretion to refer the matter to the review department.

The second issue involves both parties' challenge to the subsequent pretrial order of the judge pro tempore who was assigned to the case for trial. The order involved two previously uncooperative State Bar witnesses who had failed to honor deposition subpoenas. The judge pro tempore ordered the State Bar to produce the witnesses for deposition on the morning of the first day of the State Bar's presentation of evidence or be precluded from calling them at trial. The Presiding Judge referred the ensuing request for discovery review to the review department in bank for consideration together with the other

discovery issue already before the review department. Discovery and trial proceedings in the hearing department have been stayed pending the outcome of these discovery review proceedings.

Both issues have been extensively briefed and argued.¹ We basically agree with the analysis applied by both judges below, but have considered arguments more fully developed on review and modify the orders accordingly.

DISCUSSION

[1] Admission of attorneys to practice law is an exercise of one of the inherent powers of the California Supreme Court. (*In re Lacey* (1938) 11 Cal.2d 699, 701; see also Cal. Const., art. VI, § 1.) The California Supreme Court relies on the Committee of Bar Examiners created by the State Bar Board of Governors as its primary agent to administer and carry out the bar admission process. (*In re Admission to Practice Law* (1934) 1 Cal.2d 61, 67; *Chaney v. State Bar* (9th Cir. 1967) 386 F.2d 962, 966; Bus. & Prof. Code, § 6046.) Among the activities the Committee undertakes is the onerous duty of examining applicants for admission and investigating their fitness. (*Spears v. State Bar* (1930) 211 Cal. 183, 191.) If the Committee denies certification of an applicant, pursuant to rule X, section 2(d), Rules Regulating Admission to Practice Law in California, the applicant may initiate a proceeding in the State Bar Court for its independent adjudication. In such proceeding the Committee, represented by the Office of Trials, is the opposing party. The determination of moral character ultimately made by the State Bar Court is final and binding on the applicant and the Committee, subject to discretionary review by the Supreme Court at the applicant's request.² The instant proceeding was initiated by applicant's application for hearing filed November 5, 1991.

1. Additional briefing was requested by the court following oral argument on September 1, 1992. Thereafter, the applicant requested additional oral argument to address issues of first impression. Submission was vacated and a second oral argument was held on November 17, 1992, following which the matter was again taken under submission.

2. A rule change currently pending before the Supreme Court would, if adopted, also extend the right to petition for Supreme Court review to the Committee, parallel to the right extended in 1991 to the Office of Trials in disciplinary proceedings.

A. Review of the Order Compelling Answers to Interrogatories

[2] Rule 835 of the Transitional Rules of Procedure of the State Bar (hereafter "Rules of Procedure" or "Rules Proc. of State Bar") makes various discovery provisions applicable in disciplinary proceedings such as those concerning interrogatories, depositions and requests for admission, also applicable to moral character proceedings. Applicant's counsel propounded a set of interrogatories to the Committee on April 22, 1992, pursuant to rules 319 and 835. Interrogatory number 9 sought the identity of "all persons who initiated a complaint with the State Bar regarding the Applicant, either informal or formal, without having first been contacted the State Bar." Interrogatory number 10 sought the identity of "all members of the Bar of the State of California who have provided information to the State Bar regarding the Applicant." In its response, the Committee objected to interrogatories 9 and 10 on grounds of the confidentiality provisions of rule XI of the Rules Regulating Admission to Practice Law in California ("rule XI") and, as to interrogatory 10 only, the work product and attorney-client privileges. In opposition to the applicant's motion to compel and again in the petition for discovery review, the Committee has also relied on the California constitutional right to privacy and the official information privilege set forth in Evidence Code section 1040.

The hearing judge granted the motion to compel, reasoning as follows: "After reviewing the parties' arguments on this motion, I am not persuaded by the State Bar's argument that the interrogatories cannot be answered because of confidentiality and privacy considerations. Though moral character proceedings are confidential, Rule XI of the Rules Regulating Admission to Practice Law in California specifically provides that the applicant may request 'all records, exhibits, findings, conclusions, reports and hearing transcripts' Moreover, as to the individuals' expectations of privacy, any right of privacy was not absolute. The Committee of Bar Examiners had the authority to release confidential information under Rule XI. In any event, the Applicant has waived her right to confidentiality in this proceeding." (Order filed June 24, 1992.)

On petition for review before the Presiding Judge, the Committee for the first time presented a declaration from the Senior Executive, Admissions, who is the chief staff officer for the Committee. He attested in pertinent part as follows: "4. All inquiries are conducted in a completely confidential manner, and neither the applicant nor anyone other than the staff processing the application is permitted to review raw information received. In fact, those who provide information to the Committee as part of its moral character determination inquiry do so on the assurance of the Committee that all information provided will be held confidential and will not be used against the applicant without the provider's consent. To do otherwise would create a chilling effect on the provision of information which could and in my experience does result in the refusal of persons having relevant information about applicants to come forward with the information because of fear of retribution by the litigant, usually through litigation.

"5. However, no applicant is finally determined to not be of good moral character on the basis of information from a person who has not consented to its use. A determination that an applicant is not of good moral character is made only on the basis of documents and information which are not confidential and on the basis of testimony of a person subject to cross-examination. The Committee will not use adverse information received from a person who will not consent to its use or who will not testify against the applicant nor will it rely on anonymously received information unless that information can otherwise be attested to in open court. For that reason and to protect the confidentiality of persons who communicate with the Committee regarding applications, the Committee's raw moral character files are considered to be confidential and not available to the public, to other offices of the State Bar or to the applicant." (Declaration of Jerome Braun, exh. C to petition for review of discovery ruling filed July 6, 1992.)

The Presiding Judge ordered a temporary stay of the hearing judge's order to permit the applicant to respond to the Committee's request under rule 324 for discovery review. In her response, the applicant

did not object to reliance by the Committee on the California constitutional right to privacy and the official information privilege although these grounds had not been raised as objections in the original interrogatory responses. The applicant also did not object to the submission of the chief staff officer's declaration on behalf of the Committee for the first time on review.³

1. Rule XI

[3a] With respect to the argument that rule XI justified the Committee's objection, the author of this opinion, as Presiding Judge, upheld the hearing judge's determination that no privilege to withhold any documents was set forth in that rule. Sitting in bank on reconsideration, we find no basis for reaching a different conclusion and adopt as part of our opinion that portion of the Presiding Judge's order filed July 21, 1992, which reads as follows:

"Rule XI [9] Rule XI states that the Committee's 'files, records and writings within the meaning of Evidence Code Section 250' are confidential, but the rule also provides that at the investigation stage, the Committee's 'records, exhibits, findings, conclusions, reports and hearing transcripts' may be requested by the applicant, or by a 'Court or agency charged with exercising licensing . . . authority over attorneys,' if the request 'is to facilitate the investigation of the conduct of the applicant to determine admission . . . to the practice of law.' The third paragraph of rule XI ('rule XI, paragraph 3') provides that in the event of a request for a State Bar Court hearing, 'the files, records and writings of the Committee which have remained confidential . . . shall not be disclosed by the Office of Trial Counsel.'

[3b] "All of these provisions concern Committee *documents*, not *information* in the possession of the Committee. The discovery requests at issue on this review are interrogatories—i.e., requests for information—not requests for inspection and copy-

ing of documents. It is by no means clear that the provisions of rule XI regarding confidentiality of the Committee's records have any bearing on the Committee's duty to respond to interrogatories.

"In any event, rule XI, paragraph 3 does not appear to provide any basis for the Office of Trials to object on confidentiality grounds to discovery requests of the kind made by applicant herein. As already noted, notwithstanding the general confidentiality of Committee records vis-a-vis the world at large, rule XI provides that at the investigation stage, the applicant and the applicant's counsel may have access to the Committee's 'records, exhibits, findings, conclusions, reports, and hearing transcripts.' The court notes that the duty of the Committee and the State Bar to respond to otherwise proper discovery requests *by the applicant* is unaffected by whether or not the applicant has waived confidentiality *vis-a-vis the general public* under Business and Professions Code section 6060.2.

"The limitation of rule XI, paragraph 3 does not apply to documents previously disclosed to the applicant upon request as provided in rule XI, paragraph 2, nor does it purport to prohibit discovery otherwise allowable in the State Bar Court. To the contrary, rule XI, paragraph 1 provides that the Committee's records 'may not be released . . . except . . . as provided elsewhere in these Rules [Regulating Admission to Practice Law in California].' With respect to proceedings before the State Bar Court, section 2(d) of rule X of the Rules Regulating Admission to Practice Law in California provides that 'discovery shall be conducted pursuant to chapter 18 of the [Transitional] Rules of Procedure of the State Bar (rules 830-836).' Rule 835 of the Transitional Rules of Procedure incorporates by reference most of the discovery rules applicable in formal State Bar Court proceedings generally, including rule 319 permitting the service of interrogatories. Thus, the State Bar's rules expressly authorize the use of interrogatories in moral character proceedings.

3. The applicant thereafter did object to a second declaration offered on review attesting to the Committee's upcoming meeting schedule in connection with the Committee's request for a date after August 21, 1992, for oral argument on recon-

sideration. We overruled this objection because the declaration was limited to a scheduling issue on review which only became relevant after issuance of the Presiding Judge's July 21, 1992 order.

“These rules must be construed together to render a sensible interpretation which, if possible, makes all of them meaningful. The rules clearly provide that an applicant may obtain Committee records during the investigation stage and may promulgate interrogatories at the State Bar Court stage. Assuming that the Committee has records containing the information sought in these interrogatories, it would not make sense to construe rule XI, paragraph 3 as making unavailable in formal discovery the very same information that would have been available at the investigation stage, had the appropriate records been requested at that time. To do so would make the discovery provisions superfluous, since the applicant could obtain through discovery only those records that had already been provided at the investigation stage.

“Nor does it make sense to read into rule XI a confidentiality exception to otherwise appropriate discovery in the State Bar Court based on what records a particular applicant sought in the investigation stage or what unprivileged information the Committee had but chose not to memorialize in a record to preclude its disclosure at the investigation stage. This would render otherwise relevant and unprivileged information arbitrarily protected from discovery based on the parties’ previous conduct. This interpretation is further supported by the fourth paragraph of rule XI, which states that nothing in the rule precludes or supersedes access to or disclosure of Committee records as provided in sections 6060.2 and 6090.6 of the Business and Professions Code. Section 6060.2 provides that records of a confidential moral character investigation may be subject to a lawfully issued subpoena. It would make little sense to uphold rule XI confidentiality as an implied bar to applicants obtaining through other discovery methods the very same records that they would be able to obtain by subpoena under section 6060.2. [3c] Accordingly, in light of rule X, rule XI and Transitional Rules of Procedure 830-836 adopted by the Board of Governors, we construe rule XI, paragraph 3 only to preclude the Office of Trials from disclosing documents voluntarily, as opposed to pursuant to appropriate discovery requests or by court order. Therefore, any privilege not to answer the two challenged interrogatories must find support in authority other than rule XI.” (Order filed July 21, 1992.)

To the extent that the Committee relies on *Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548 as a basis for claiming the confidentiality of the requested information, that argument rests on the applicability of Evidence Code section 1040 discussed below and not on any exception provided in rule XI. The appropriate body to consider the Committee’s argument that policy reasons should justify State Bar rules specifically protecting certain raw materials in its files against discovery in subsequent contested moral character proceedings is the State Bar Board of Governors. Since rule XI does not currently carve out any exceptions from discovery, we turn to the other claimed bases for asserting the confidentiality of the requested information.

2. Attorney-Client Privilege and Work Product Doctrine

We also find no justification for reaching a different conclusion than set forth in the Presiding Judge’s order with respect to the attorney-client privilege and work product doctrine. Although the Committee originally raised these objections in response to interrogatory number 10, it apparently abandoned them thereafter. They were not mentioned in opposition to applicant’s motion to compel or raised in the Committee’s petition for discovery review. We therefore also adopt as part of our opinion that portion of the Presiding Judge’s July 21, 1992 order which reads as follows:

“In any event, the objections [based on the attorney/client privilege and work product doctrine] are not supported by any authority. The interrogatory in question does not seek the contents of any communications, or the results of any attorney’s mental processes or research. [4] The mere identities of persons who have knowledge of relevant facts and who may be potential witnesses are outside the scope of both the attorney-client and work product privileges. (See *Willis v. Superior Court* (1980) 112 Cal.App.3d 277, 291; *City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 73.) The added fact that such a person is a member of the State Bar is a matter of public record, and cannot appropriately be claimed to be privileged.”

3. Evidence Code Section 1040

[5] The Committee did not in its interrogatory responses assert Evidence Code section 1040 as justification for refusing to answer interrogatories 9 and 10. Normally objections not interposed in a timely fashion will not be considered. (Code Civ. Proc., § 2030, subd. (a); see generally 1 Hogan, *Modern Cal. Discovery* (4th ed. 1988) Interrogatories to a Party, § 5.16, p. 279, fn. 84, and cases cited therein.) Moral character proceedings incorporate various provisions of the Civil Discovery Act, but not the act in its entirety. Accordingly, the requirement that claims of privilege must be raised in the interrogatory responses absent good cause for relief is not expressly applicable. On the other hand, there is nothing in the rules regulating moral character proceedings to abrogate the general requirement of timely objections. (Cf. *Coy v. Superior Court* (1962) 58 Cal.2d 210, 216-217.) No good cause has been offered for the examiner's failure to raise all claims of privilege in the original discovery responses, but because this important issue was presented to the hearing judge at the next opportunity without objection, we will consider its applicability.

[6a] In deciding whether the Evidence Code section 1040 privilege applies we are guided by the test applied in civil cases. In *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, the California Supreme Court determined the procedures to be followed in civil suits where the official information privilege is asserted. First, the court must determine whether the moving party has met the statutory foundational requirements for discovery without considering the privilege issue; second, the court must ascertain whether the information was "acquired in confidence" as required by Evidence Code section 1040; and third, the court must balance the competing interests to determine whether the conditional privilege applies. (*Id.* at pp. 127-128; see Comment, *California's Evidence Code Section 1040: Discovery of Govern-*

mental Information after Shepherd v. Superior Court (1977) 10 U.C. Davis L. Rev. 367, 370-372, 375-386.)

Evidence Code section 1040, subdivision (a) defines official information to mean "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Subdivision (b) provides in pertinent part as follows: "A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: [9] . . . [9] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

[6b] We accept the Committee's assertion that the State Bar is a "public entity" within the scope of section 1040, subdivision (b), since it is both a public corporation under Business and Professions Code section 6001 and a constitutional agency in the judicial branch of government. (Cal. Const., art. VI, § 9.) We also accept the assertion that the requested information was "acquired in confidence" as established by the declaration of the Committee's chief staff officer. However, the official comment to Evidence Code section 1040 provides that "the official information privilege does not extend to the identity of an informer." The Committee contends that persons providing information to the Committee are not "informers" within the meaning of the official comment to Evidence Code section 1040.⁴ It therefore

4. Although there is no definition of informer in section 1040, it is certainly arguable that the comment only intended to exclude from the scope of section 1040 persons covered by Evidence Code section 1041. Evidence Code section 1041 pertains to informers and provides a similar balancing test to that of Evidence Code section 1040 but limits the applicability of that statute to persons who furnish confidential information to: "(1) A law enforcement officer; [9] (2) A representative of

an administrative agency charged with the administration or enforcement of the law alleged to be violated; or [9] (3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2)." The Committee has never relied on Evidence Code section 1041 which both parties argue is inapplicable to the Committee's claim of confidentiality in this proceeding.

argues that the names of such persons constitute protected "official information" as defined in section 1040, subdivision (a).

The Committee relies primarily on the holding in *Chronicle Publishing Co. v. Superior Court*, *supra*, 54 Cal.2d 548 interpreting the provisions of former Code of Civil Procedure section 1881 which was the predecessor of Evidence Code sections 1040-1042. In that case, an attorney brought a libel action against the Chronicle alleging the publication of a libelous article in its newspaper. The Chronicle, in discovery, sought unpublished information from the State Bar concerning the attorney's disciplinary history. The State Bar, which was not a party to the proceeding, obtained a court order precluding most of the requested discovery on grounds of confidentiality.

In *Chronicle Publishing* the high court issued a limited peremptory writ permitting discovery of a statement from the State Bar as to whether or not the attorney received a private reproof, and if so, the information upon which it was based. The high court explained that former rule 8 of the State Bar Rules of Procedure⁵ provided "in effect, that the *preliminary investigation shall not be made public and that all files, records and proceedings of the board are confidential and no information concerning them can be given without order of the board or unless disciplinary action is taken against the attorney accused.*" (54 Cal.2d at p. 571, emphasis supplied in the Committee's brief.)

Unlike the situation in *Chronicle Publishing*, *supra*, the information sought by the interrogatories at issue here is solely the identities of persons who initiated a complaints with the State Bar regarding applicant or provided information to the State Bar concerning applicant. Also, the discovery request is in the context of an adversary proceeding following denial by the Committee of Lapin's application for admission which appears parallel to the "disciplinary action" taken against an attorney, the basis for

which the high court found to be discoverable in *Chronicle Publishing*.⁶

The Committee's brief argues that information given in confidence *which is not subsequently used* by the State Bar to deny the applicant certification must be protected. However, in its brief the Committee also expressly reserved the "right" to call persons not disclosed in discovery as impeachment and rebuttal witnesses at the hearing on applicant's moral character in order to defeat her evidentiary showing of fitness to practice law. The Committee contends that to compel disclosure of their names would have a chilling effect due to fear of retribution by the litigant.

The reluctance of complainants and others who have communicated with the State Bar to make themselves available to testify and be cross-examined is natural, but it ill serves the public, the State Bar and the legal profession if persons who may not be fit to become attorneys are certified for lack of persons with material evidence willing to come forward to speak against them. Nor does it serve the public interest, the State Bar or the profession if a person is denied admission without being given the right to prepare adequately to defend herself against adverse witnesses. The Committee asserts that the unnamed persons may fear being sued, but that fear should be put to rest. The Committee's counsel attaches as an exhibit a successful motion by General Counsel of the State Bar to dismiss a lawsuit filed against a State Bar Court judge, witnesses, the Committee and State Bar employees who participated in another moral character proceeding. The threat of meritless lawsuits did not deter the witnesses who testified in that case or other witnesses who have come forward in other moral character proceedings, nor has it apparently dissuaded the 20 witnesses subpoenaed by the Committee in this proceeding whom the Committee has listed in its pretrial statement as persons it intends to call in its case in chief. It is difficult to credit the concerns of the remaining unnamed persons if they may eventually be called to

5. See current rules 220 et seq., Rules Proc. of State Bar.

6. The Supreme Court in *Chronicle Publishing* specifically pointed out that "If the information is relevant there is no reason that in a proper case such information should not be available by discovery." (*Id.* at p. 574.)

testify in rebuttal or impeachment of applicant's showing.

Chronicle Publishing does not support the conditional assertion of the official information privilege. In protecting from discovery any investigatory files which resulted in no discipline, the high court noted that the State Bar "is not a party to the litigation and is asserting no rights, which in the interests of fairness would require it to divulge information." (*Id.* at p. 573.)

[6c] Here, in contrast, the State Bar is the opposing party and has promulgated a rule, rule 835, which expressly provides for discovery by the applicant in a contested case such as the one before us. No privilege from disclosure is set forth in rule XI or elsewhere and neither Evidence Code section 1040 nor *Chronicle Publishing* appears to protect the identity of complainants or other informants in order to preserve the element of surprise in the rebuttal evidence of the Committee in the adversary proceeding which applicant must litigate with the State Bar to seek to obtain a license to practice law. To the contrary, in weighing whether to except from disclosure otherwise relevant official information, Evidence Code section 1040 expressly precludes consideration of the interest of the public entity as a party in the outcome of the proceeding.

In *Rider v. Superior Court* (1988) 199 Cal.App.3d 278, the court applied the balancing test of section 1040, subdivision (b)(2) to the assertion by the police in a defamation case of the privacy rights of an alleged rape victim, determining that no privilege against disclosure existed. While it recognized a valid privacy interest, it noted that "On occasion, one person's right to privacy may conflict with another's right to a fair trial. When this happens 'courts must balance the right of civil litigants to discover relevant facts against the privacy interests

of persons subject to discovery.'" (*Id.* at p. 282, quoting *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 842.) Ultimately, the court decided that Rider's interests in disclosure of the information necessary for proving his defamation case—and thereby clearing him of the rape allegations—outweighed the interests in keeping the rape victim's statement to the police confidential.⁷ (199 Cal.App.3d at pp. 285-287.) Here, applicant will likewise suffer a harsh penalty unless she can prevail in the pending proceeding—she will be unable to pursue her chosen profession due to a determination that she is morally unfit to practice.

The Committee also relies on the court's decision in *Johnson v. Winter* (1988) 127 Cal.App.3d 435 which found requested records exempt from disclosure under Government Code section 6255. The California Supreme Court has recognized that the balancing test in Evidence Code section 1040, subdivision (b)(2) is similar to that required by Government Code section 6255. (*ACLU Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 446-447, fn. 6.) It has also stated that rejection of the section 6255 exemption from disclosure on the ground that the public interest weighs in favor of disclosure requires it to reject a claim of privilege under section 1040, subdivision (b)(2). (*Ibid.*) In other words, if the court determines that certain information is not exempt under section 6255, it should also find that it is not privileged under section 1040, subdivision (b)(2).

In *Johnson v. Winters, supra*, Johnson's application for special deputy sheriff status was denied, he was not told the reasons for the denial, and he was refused access to his application file. (127 Cal.App.3d at p. 437.) After reconsideration, Johnson was granted special deputy status, but still denied access to his application file. (*Ibid.*) He then sought disclosure of his file under the Public Records Act.⁸ (*Ibid.*) The

7. In its opinion denying the section 1040 privilege and ordering disclosure, the *Rider* court stated that "It is difficult to imagine any material more relevant to a defamation case based on a false accusation of rape than the statements by the alleged victim to the police." (*Rider v. Superior Court, supra*, 199 Cal.App.3d at p. 284.) We also note that in *Rider*, the rape victim was warned by the police that her accusation would be made public if she pressed charges. Here, similarly, the

persons whose identity is sought were told that their communications would be confidential unless they consented to testify, which the Committee has reserved the right to have them do.

8. The Public Records Act (Gov. Code, §§ 6250 et seq.) gives individuals the right to request public records from public entities.

sheriff's department again refused, claiming the file was exempt from disclosure under Government Code section 6255, which provides that "The agency shall justify withholding any record by demonstrating that . . . on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." (*Id.* at pp. 437-438.)

In balancing the interests involved, the court acknowledged the public interest in monitoring the selection of deputy sheriffs, as well as Johnson's personal interest in correcting any inaccurate information contained in his files so that in the future he would not be denied advancement or favorable employment. (*Id.* at p. 438.) It also, however, recognized "that assurances of confidentiality may be a prerequisite to obtaining candid information about applicants for special deputy status, and that nondisclosure of such information given in confidence serves the public interest." (*Id.* at p. 439.) The court concluded that as to "matters obtained with the understanding implicit or explicit that such matters could be kept confidential," the balance of interests was in favor of confidentiality, thus the denial of disclosure was proper. (*Ibid.*)

One important factual distinction exists between *Johnson* and the present case bearing on the weight accorded the interests involved. Although the sheriff's department initially denied Johnson's special deputy sheriff application, it had granted him such special status by the time he applied to the court for access to his job application file. Thus, Johnson had little demonstrable interest in the information. In contrast, applicant Lapin has not yet been certified morally fit for California bar membership, nor will she be unless she prevails in this moral character proceeding. Thus, she has the interest in pursuing her chosen profession, a goal Johnson had already achieved prior to seeking disclosure. The California Supreme Court recognizes the importance of a State Bar applicant's interest. (*Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447, 452, fn. 3.)

[7] The examiner's reliance on the ability to exclude rebuttal or impeachment witnesses from a pretrial statement is misplaced. (See rule 1222(g), Provisional Rules of Practice of the State Bar Court.)

Such rule has no bearing on the broader issue of discoverable information. There is no statutory or case law limiting civil discovery of identities of individuals to persons that may be called as witnesses in the opposing party's case in chief.

[6d] Generally, the identities of persons sought to be disclosed by interrogatories need only be reasonably calculated to lead to the discovery of admissible evidence. The Committee has never argued that the names sought were not relevant or that the evidence would not be admissible. To the contrary, by seeking to reserve the right to call the persons targeted by the interrogatories as rebuttal or impeachment witnesses, the Committee underscores the materiality of their identities and potential testimony. It also affirmatively establishes that it either already has the consent of such persons to testify in rebuttal or impeachment or anticipates that such consent might readily be obtained. The declaration of its chief staff officer unequivocally states that "The Committee will not use adverse information received from a person who will not consent to its use or who will not testify against the applicant." (Declaration of Jerome Braun, *supra*, at p. 3.)

Evidence Code section 1040 specifies that "no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceedings." It appears that the Committee, by reserving the right to call the persons for impeachment or rebuttal, may well have established the applicability of this exception to the official information privilege.

[6e] We conclude that Evidence Code section 1040 does not protect the information sought in the two interrogatories at issue here. Even assuming that the persons sought to be identified are not informers within the meaning of the official comment to Evidence Code section 1040, we find that the reservation of the right to call such persons in rebuttal or impeachment either comes within the consent exception to Evidence Code section 1040 or reduces the Committee's need for secrecy to that of a party in the outcome of the proceeding. On the other hand, the public has an interest in seeing that justice is done in a particular case. (Official Comment to Evid. Code, § 1040; cf. *Board of Trustees v. Superior Court*

(1981) 119 Cal.App.3d 516, 525 [“another state interest lies in “facilitating the ascertainment of truth in connection with legal proceedings””].) The interest of the public and the applicant clearly outweighs the Committee’s need for secrecy in this situation and Evidence Code section 1040 does not protect the requested names from disclosure. Unlike the situation in *Chronicle Publishing*, the Committee is a party to the litigation and is asserting rights which in the interests of fairness require it to divulge the requested information. Unlike the situation in *Johnson*, the applicant has a strong interest at stake.

[8a] In ruling on this issue, we must reject the Committee’s request for an in camera inspection of the requested information prior to determining whether the applicant’s discovery rights in preparing for the contested hearing outweighs the Committee’s interest in secrecy. This request was made for the first time on motion for reconsideration on review. Generally, when a lower court ruling favors disclosure, in camera review cannot be requested for the first time on review. (*Williams v. Superior Court* (1974) 38 Cal.App.3d 412.) In *Williams*, the court rejected a criminal prosecutor’s belated request for an in camera hearing under Evidence Code section 1042 both out of concern for avoiding duplicative effort and because disclosure was warranted as a matter of law, rendering in camera review unnecessary. (*Id.* at p. 425.) *People v. Allen* (1980) 101 Cal.App.3d 285, cited by the Committee, is not authority to the contrary since there the trial court had declined to order disclosure, putting the case in a different posture on appeal than in *Williams* or here.

[8b] We also have been provided with no explanation for the examiner’s failure to ask either the hearing judge or the Presiding Judge for an in camera inspection prior to ruling on the requested discovery although the primary authority on which the examiner now relies for an in camera inspection is *Chronicle Publishing* which was decided over 30 years ago. The exception for a case of first impression made in *Goodlow v. Superior Court* (1980) 101 Cal.App.3d 969 therefore does not support the extremely belated request for in camera inspection.

[9] In any event, Evidence Code section 1040 does not itself grant any right to request in camera

review. Evidence Code section 915, subdivision (b) authorizes the court in its discretion to order in camera review if it cannot rule on the matter without it. We see no merit to an in camera inspection at this juncture. The court is ill-equipped to evaluate the potential relevance of the undisclosed names absent argument from applicant’s counsel which could only be made after the names were disclosed to applicant. In this respect, this matter is similar to *Saulter v. Municipal Court* (1977) 75 Cal.App.3d 231, in which the Court of Appeal reversed a trial judge’s denial of a criminal defendant’s motion for discovery of prior complaints against the victim police official, based on the judge’s in camera inspection of the requested records. In ordering the matter remanded, the Court of Appeal in *Saulter* pointed out that “The fact remains that under our constitutional system the burden for preparing a criminal defendant’s case rests with his counsel That burden cannot be properly discharged unless counsel has direct access to potential witnesses, for it is counsel who must decide if they can aid his client” (*Id.* at p. 239, quoting *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 829.)

4. Constitutional Right of Privacy

[10a] Under *Valley Bank v. Superior Court* (1975) 15 Cal.3d 652, private personal information about a non-party to a proceeding may be privileged from discovery under some circumstances pursuant to the California constitutional right to privacy. The privacy right to be protected is that of the persons sought to be identified and not that of the Committee which asserts the privilege. The custodian of the allegedly private information may not waive the privacy right. (*Board of Trustees v. Superior Ct., supra*, 119 Cal.App.3d at p. 526.)

[10b] The constitutional right to privacy is not absolute; it must be balanced against the need for disclosures. (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 20.) Privacy expectations must be reasonable as a matter of law. Case law indicates that certain personal interests and rights may deserve more weight than others in balancing tests. In *Kahn v. Superior Court* (1987) 188 Cal.App.3d 752, for example, the court granted a writ of mandate precluding Kahn from deposing a professor regarding what transpired

at a faculty meeting regarding Kahn's appointment to a tenured faculty position, despite Kahn's insistence that he needed the testimony to prove his defamation suit against the university and professors employed thereby based on his denial of tenure.

The court balanced the constitutional right to privacy against Kahn's right to and need for discovery, finding in favor of confidentiality. The court expressly noted that Kahn's interest was only in monetary damages, since he had no right to be employed by the university which denied him tenure. (*Id.* at p. 770.) This denial of discovery is in contrast with the subsequent result in *Rider v. Superior Court*, *supra*, 199 Cal.App.3d 278. Although the court in *Rider* was asked to interpret the scope of section 1040, subdivision (b)(2), it also considered the constitutional right of privacy as a countervailing interest in the defamation case before it. (*Id.* at p. 282.) One factor the *Rider* court used to distinguish *Kahn* was the nature of the interest at stake. The *Rider* court characterized the consequences of nondisclosure of testimony about Kahn's tenure review, resulting in his inability to prove his defamation case, as injury to his scholarly reputation and the loss of monetary damages. (*Id.* at p. 287.) The court contrasted this with the severe opprobrium from the public at large caused by the allegations of rape against *Rider*. (*Ibid.*)

[10c] Since applicant has a right to practice her profession important enough to deserve due process protection (*Hallinan v. Committee of Bar Examiners*, *supra*, 65 Cal.2d at p. 452, fn. 3), and since she seeks to clear her name by overturning the denial of her admission for lack of sufficient moral character, her need for seeking discovery appears to merit at least as much weight as *Rider*'s interest in clearing his name.

Porten v. University of San Francisco (1976) 64 Cal.App.3d 825, cited by the Committee, presents a different issue. There, the defendant had given the plaintiff's private personal information (college grade transcript) to a third party without the plaintiff's consent. The situation would be parallel here if the Committee furnished confidential information about applicant to third parties without applicant's consent. Here, the information sought is only the identities

of the persons who discussed applicant with the Committee, not the substance of what they told the Committee. Applicant has waived confidentiality and is formally requesting in accordance with applicable State Bar rules that the Committee, as opposing party, furnish her with information relevant to the presentation of her case. *Porten* does not stand for the proposition that the plaintiff's privacy rights would have been violated if the defendant had released plaintiff's transcript to *him* in litigation to which such information was relevant. *Craig v. Municipal Court* (1979) 100 Cal.App.3d 69 is distinguishable on similar grounds.

[10d] We conclude that it would be unreasonable for potential material witnesses to have the Committee claim a right of privacy on their behalf while at the same time consenting or indicating their amenability to come forward to testify at a later date in the very same public proceeding if it appears tactically advantageous to the interest of the Committee for them to do so. Since the Committee is at this stage merely preserving the constitutional rights of these nonparties, we cannot be sure of their intentions.

[10e] If the Committee were to indicate on remand that the undisclosed persons who are covered by the interrogatories in question would not consent to be called to testify in the moral character proceeding under any circumstance, the applicant would have to make a greater showing of need than she has to date to overcome these persons' privacy rights. Applicant's own brief indicates that her primary reason for requiring disclosure is "if the State Bar intends to use the information sought by applicant against her."

Applicant also argues that obtaining the requested names is material to her claim that this proceeding is being manipulated and that many of the State Bar's witnesses have been pressured into testifying against her. [11] The hearing judge should scrutinize with care any evidence bearing the "earmarks of private spite." (*Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431, quoting *Peck v. State Bar* (1932) 217 Cal. 47, 51.) Nevertheless, it is settled that "Whatever may have been the instigating factor, or whatever may have been the personal motive, in the

initiation of the State Bar proceeding, are not matters of controlling concern in a case where the facts disclosed independently lead to the conclusion that the attorney is subject to some disciplinary action.” (*Sodikoff v. State Bar*, *supra*, 14 Cal.3d at p. 431, quoting *Rohe v. State Bar* (1941) 17 Cal.2d 445, 450.) By the same token, the judge pro tempore will decide whether or not to find applicant to be of good moral character based on the evidence presented. [10f] In preparation for that hearing applicant has the right to compel discovery of the identities of persons whom the Committee itself indicates remain potentially willing to waive confidentiality in order to testify. However, the balance shifts when we consider the privacy rights of persons unconditionally refusing to testify. Applicant would have to make a greater showing to overcome these persons’ privacy rights than has been made on this record.

We hereby modify the hearing judge’s order to require the Committee to answer interrogatories 9 and 10 within 10 days of the date this order is served as to all persons covered by such interrogatories except those who have unconditionally refused to testify in this proceeding and will not be called by the Committee for any purpose.

B. The Conditional Order Regarding the Smiths’ Depositions and Trial Testimony

During the discovery period, the examiner noticed the depositions of two nonparty witnesses, Edwin and Sandy Smith, for April 25, 1992, in Nevada City, California where the Smiths reside. Depositions are expressly authorized to be taken in moral character proceedings under rules 318 and 835. Rule 318 specifically provides that: “Except as otherwise stipulated or as authorized by section 1987(b) of the Code of Civil Procedure, attendance of the deponent . . . shall be compelled by subpoena.” Business and Professions Code section 6050 provides that any person subpoenaed who refuses to appear or testify is in contempt and Business and Professions Code section 6051 provides the mechanism for punishment of disobedient subpoenaed witnesses.

The examiner failed to subpoena either of the Smiths for their April depositions. Mr. Smith did not

appear at the deposition. Mrs. Smith stayed for direct examination by the examiner and left the deposition shortly after applicant’s prior counsel commenced cross-examination. Both the examiner and the applicant’s counsel remonstrated with her to no avail. Thereafter, the parties disagreed about who should bear the expense of rescheduling the deposition and it was not rescheduled.

On May 21, 1992, the examiner filed a motion to extend time for discovery to complete the deposition of Mrs. Smith and to take the deposition of Mr. Smith because she expected him to be unavailable for trial. On May 27, applicant moved for an order suppressing the deposition of Sandy Smith and on June 2 moved for a protective order against the renoticing of the deposition of Edwin Smith. Applicant’s counsel stated that he was willing to hold the depositions in San Francisco but would not travel back to Nevada City unless the Office of Trials would pay for applicant’s attorneys’ expenses in doing so. On June 10, 1992, the issue was discussed at a status conference before the hearing judge which resulted in an order dated June 11, 1992, denying applicant’s motion to suppress the Sandra Smith deposition, granting the State Bar’s motion to extend the deadline for completion of formal discovery to June 26, 1992, and the following additional provisions:

“After extensive discussion, it was agreed that the Applicant’s counsel and the Examiner will agree on a site within 70 miles of Nevada City that involves less costly travel expenses to complete the deposition. They will further agree on a date and time for the continued deposition. The State Bar was ordered to insure Ms. Smith’s appearance by having her subpoenaed to appear for the deposition. The applicant’s attorney indicated that he may also separately subpoena her to appear. [¶] . . . [¶] After discussion about Mr. Smith’s deposition, it was agreed that his deposition will be handled in the same manner as Ms. Smith’s with respect to the place, time and location. The State Bar was also ordered to subpoena his appearance at the agreed upon date, time and location for the new deposition.” (Order filed June 11, 1992.)

The applicant’s counsel thereafter notified the examiner that he would like to take the depositions

on June 24, 1992, in Sacramento. There is a dispute as to whether she agreed to that date or simply "tentatively" agreed. On June 12, the applicant subpoenaed Mr. Smith for his deposition on June 24 and subpoenaed Mrs. Smith the following day. On June 12, Mrs. Smith notified the examiner that the Smiths were leaving on a prepaid vacation on June 22 and would not return until July 8, thereby precluding *any* date during the extended discovery period for their depositions to be taken. The examiner states that she was previously unaware of any such vacation plans. She conveyed them to applicant's counsel on June 15 and memorialized them in a letter to the hearing judge the same date. The examiner then unilaterally decided she would not subpoena the witnesses for deposition in light of their alleged unavailability and asked the Smiths to send a letter to applicant's counsel concerning their travel plans. She apparently made no mention to the Smiths of any need to move to quash the subpoenas which had been served by applicant's counsel. She then subpoenaed the Smiths for trial.

Applicant's counsel served a notice of deposition on June 17 and advised the Smiths that they were required to appear on June 24. They failed to do so, as did the examiner. Applicant and an investigator filed affidavits attesting to the Smiths' presence at work through June 24 and the examiner concedes that they were not on vacation as they had stated in seeking to avoid their depositions and that they could have attended the depositions. Applicant then filed a motion to preclude the State Bar from presenting any evidence on the Smith matter, including their testimony.

According to applicant, the Smiths indicated that the examiner led them to believe that if she did not subpoena them for deposition but subpoenaed

them for trial they did not need to appear to honor the applicant's deposition subpoenas. The examiner disputes this and takes no responsibility for the fact that applicant has expended over \$4,000 in connection with the Smiths' aborted depositions.

The judge pro tempore, who had been assigned the case for trial due to the originally assigned hearing judge's unavailability, denied outright issue preclusion as a sanction, but issued an order on July 27, 1992, requiring the State Bar to produce the Smiths for deposition on the first day of trial or be precluded from calling them to testify at the hearing if they failed to appear at the deposition. She also ordered that applicant would be permitted an additional opportunity for investigation or discovery if necessitated by new issues raised in the depositions. On August 10, 1992, her order was clarified to require the Smiths to be produced for deposition on the first day of the examiner's presentation of rebuttal evidence which would be the same day as the Smiths' scheduled trial testimony. The order required applicant to prepare the notices if applicant intended to take the depositions.⁹ [12 - see fn. 9] Both sides are dissatisfied with this ruling.

On review, applicant seeks to have us vacate the judge pro tempore's order and issue an order precluding the Smiths from testifying at trial, an order suppressing the deposition of Sandra Smith and an order precluding the State Bar from introducing any evidence at trial concerning the Smith matter. The examiner argues that applicant's allegation of prosecutorial misconduct is frivolous and also argues that the judge pro tempore's order should be vacated because it would be unjust to the public to preclude the Smiths' testimony or to require them to be deposed the same day as a condition thereof.¹⁰ She

9. We grant applicant's motion to augment the record to include the order of the judge pro tempore as modified on August 10, 1992. [12] On applicant's motion, we strike the supplemental declaration of the examiner as untimely offered, and we deny the examiner's counter-motion to augment the record to include such declaration. This declaration related to facts surrounding events in June of 1992 which should have been presented, if relevant, to the judge pro tempore in connection with the order we review, not offered for the first time on review.

10. Applicant's motion to strike the examiner's request to vacate the hearing judge's order is denied. Even if such request would have been untimely if embodied in a petition for discovery review of the original unmodified order, it was still proper as part of the examiner's response to applicant's timely petition and as a request for review of the order as modified on August 10.

argues that the condition of a deposition on the same day would dissuade the Smiths from participating.¹¹

[13a] While there is no evidence that the examiner acted in bad faith, the examiner's conduct clearly fell short of her duty under the circumstances. The Smiths had a legal obligation to honor applicant's subpoenas which could not be discharged by letter as suggested by the examiner. Applicant's subpoenas would have been unnecessary if the examiner had discharged her original duty under rule 318 to subpoena the Smiths for deposition in April or her duty to fulfill the ensuing order of the court to subpoena them for deposition in June.

The examiner conceded at oral argument that if Code of Civil Procedure section 2025, subdivision (j) were applicable, it would expressly make her office subject to monetary sanctions for applicant's attorney's wasted trip to Nevada City in April for the depositions of the Smiths. This is because section 2025, subdivision (j)(2) provides that "If a deponent does not appear for a deposition because the party giving notice of the deposition failed to serve a required deposition subpoena, the court shall impose a monetary sanction . . . unless the court finds that . . . circumstances make the imposition of the sanction unjust."

[14] However, the Civil Discovery Act has not been adopted in its entirety in the conduct of State Bar proceedings. Rule 321 expressly renders inapplicable provisions in the Civil Discovery Act for the imposition of monetary costs or sanctions in disciplinary or moral character proceedings. It does expressly authorize as sanctions an order "that the disobedient party shall not be allowed to support or oppose designated claims or defenses or introduce in evidence documents or items, or testimony of the physical or mental condition of the person sought to be examined"

In *Waicis v. Superior Court* (1990) 226 Cal.App.3d 283, 287, an appellate court noted that

"The sanction of preclusion of the testimony of a noncooperative deponent is authorized by the discovery statutes." The court then upheld the evidentiary sanction precluding from trial the testimony of a noncooperative expert witness. As the court noted, "Since Waicis selected Dr. Frankel as an expert witness, she must bear adverse consequences which flow from his failure to comply with the requirements of the legal process." (*Id.* at p. 288, fn. omitted.) Case law from other jurisdictions provides additional persuasive authority in support of the judge pro tempore's order. The Supreme Court of Michigan held that a trial court did not abuse its discretion in striking an expert witness from a party's witness list, in light of prior express orders of the court ordering that plaintiffs produce the witness for continued deposition. (*Korsh v. Boji* (Mich. 1984) 348 N.W.2d 4.)

This analysis is not limited to expert witnesses. In a New York case involving a situation where the court had no jurisdiction over a non-party and could not subpoena him to appear at deposition or at trial, the court was within its discretion to order that any witness's failure to appear for deposition would preclude that witness from testifying at trial. This was within the court's power to "control the proceedings in its own courtroom and insure that the trial to be conducted would be a fair one." (*Sarac v. Bertash* (N.Y. 1989) 148 A.D.2d 436, 437.) [15] Judges in State Bar proceedings have similar inherent authority to exercise reasonable control over the proceedings in front of them. (*Cf. Jones v. State Bar* (1989) 49 Cal.3d 273, 287.)

[13b] We uphold the judge pro tempore's authority to permit the testimony of the Smiths only if they first are deposed. However, we modify her order to require the examiner, as a condition of the Smiths' ability to testify at trial, to subpoena the Smiths for their deposition as the examiner was required to do under rule 318 in the first instance and was ordered to do by the hearing judge.

11. The position of the examiner is curious in light of the fact that the examiner has subpoenaed the Smiths for trial and has the power to pursue penalties for contempt if they fail to appear. If she is signaling her unwillingness to hold subpoe-

naed witnesses to their legal duty, then she is undermining the entire premise of compelled testimony. She must apprise the Smiths of the serious penalties that could follow if they fail to honor the subpoenas.

[13c] Pursuant to rule 318 of the State Bar rules, the deposition expenses shall be borne by the party taking the deposition. We read rule 318 to permit the Office of Trials to pay for the cost of transporting applicant's counsel to Nevada City for purposes of the Smiths' depositions or of transporting the Smiths to San Francisco for their depositions. We deem these expenses reasonable expenses of the renoticed depositions under the circumstances and we further modify the conditional order to require these expenses of the depositions to be paid as a condition of permitting the use of the Smiths' testimony at trial. Had the Committee's counsel elected to pay these expenses in the spring following its original failure to subpoena the witnesses, it could have avoided the far more considerable time and expense incurred in its motion to extend discovery and the ensuing paper war over this issue.

Both parties also challenge the timing of the Smiths' deposition ordered by the judge pro tempore, who was understandably trying not to delay the proceedings if it could be avoided. Applicant asserts that taking the depositions the same day as the Smiths

are to testify will not give her sufficient time to prepare following their depositions. The examiner argues the Smiths would be exhausted if twice cross-examined in one day. The hearing date has necessarily been delayed for purposes of seeking review of both discovery orders and discovery has not yet been completed pursuant to our determination of the motion to compel answers to interrogatories. In light of that delay, a new hearing date has yet to be set. To accommodate both parties' concerns, we order that the depositions be noticed by the examiner for a date at least one week in advance of the commencement of that hearing.

The stay of proceedings in the hearing department previously ordered by the Presiding Judge is hereby vacated, and the hearing department shall resume conduct of this proceeding in a manner not inconsistent with this opinion.

We concur:

NORIAN, J.
STOVITZ, J.