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GUEST COLUMN

Leaner bar is good for public

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Last spring, a State Bar trustee abruptly proposed a plan to radically restructure the bar by eliminating everything except its admissions and discipline functions. In an April 13, 2016, Daily Journal article, we challenged that idea as hasty and half-baked because a task force had not finished studying the issue. Wait for the task force report, we said. That report issued in May 2016, followed by another in May 2017. The main proposal of the 2017 report is to liberate the sections (voluntary groups focused on a particular subject matter area). But the report also emphasized that the bar's public protection mission extends beyond admissions and discipline, and includes promoting greater access to the legal system. Last week the Assembly and Senate judiciary committees approved amendments to a bill (Senate Bill 36, Jackson) that would make a number of important changes to the bar. We focus on two: changes to the board of trustees, and separating the sections.

The bill would abolish all elected members of the board of trustees and replace it with a pure appointment system divided among the branches of government. It would reduce the board's size from 19 members to 13, composed of seven attorneys and six public members. Five will be appointed by the California Supreme Court, four by the Legislature, and four by the governor. The upshot: seven attorney seats (a majority), but the Supreme Court only has five appointments (a minority).

The second major change is the separation of the bar's sections into an independent private nonprofit entity. The bar will transfer all section funds and intellectual property to this new association, which will continue the section educational programs. Affinity programs (member discounts) will continue, and the legislation contemplates that the California Bar Foundation (an independent nonprofit) will

administer the program and distribute its proceeds to foundation programs. Malpractice and group insurance programs will continue, with 50 percent of the 2018 proceeds allocated to support the sections during the transition. The balance of the 2018 proceeds (and all insurance program proceeds thereafter) will be divided equally between the bar and CBF.

Last year the bar was not in crisis, so a headlong charge was a solution in search of a problem. We had two concerns: the rush to reform without involving the California Supreme Court (the bar's constitutional parent) created a separation of powers problem, and we wondered who would benefit from that impetuous proposal. Now, after the stakeholders have spent the past year meeting, debating and studying deunification, those issues have been resolved. All involved parties have reached consensus that the bar's regulatory and associational functions should divorce, and that supporting access to justice is squarely within the bar's public protection mission. We think this is the right course.

Our separation of powers concern no longer exists. The previous proposal would have separated the sections by legislative fiat. We thought that the Legislature dictating terms on this subject created a serious core powers problem because the State Bar is a judicial branch agency over which the California Supreme Court has ultimate discretionary authority. In the ensuing year after the unilateral proposal was shelved, the court monitored the study of this issue, and more importantly it had the opportunity to deliberate and provide input. Apparently the court has independently reached the conclusion that reform is best for its agency, as — unlike last year — it has voiced no objection to the pending bill's terms. When the court decides that a legislative action does not impair a core judicial power, our separation of powers concern is moot.

We think the court's lack of a majority of appointees is not a separation of powers problem. True, it could in-

dicating a shift in power to the other two branches. But the court retains ultimate constitutional authority. No legislative bill can alter that. So the trustees are not the final word, as demonstrated by the court's recent rule change removing the bar's ability to determine a passing score on the bar examination.

After moving past what was essentially a dispute over who gets to decide what is best for the bar, we move to the question of what is best. What kind of bar will best serve its primary public protection purpose? The answer is driven by the reasons the sections should be independent.

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The sections were a major driver for the split. From the bar's perspective, having them in the tent posed serious problems. In particular: where to draw the line between regulatory and associational activity, especially given how much associational programming the bar currently offers. Separating the sections appropriately isolates the bar's primary mission (protecting the public) from the sections' primary function (associational activity). Indeed, the task force found that the bar spent more time focusing on associational activity than on public protection; the opposite should be true. And the task force found that the two halves of the operation are in conflict. For example, balancing the need to observe restrictions on public bodies with the goal of hosting associational activities — like social events involving alcohol — has been a thorny problem for the bar and driven negative external perception. These social programs raised legitimate questions about whether bar resources and staff are better directed toward the chronically underfunded discipline program.

The sections themselves, which earlier resisted being jettisoned based on funding concerns, now want to leave. They will form an independent nonprofit, to which the bar will transfer all the intellectual property and wealth of educational programming the sections have developed. The bill requires that the bar give the new nonprofit the sections' reserve funds, and outside accountants will ensure that the sections get their fee money going forward. The sections are getting exactly what they want: independence, their funds, and no trouble with the open meeting and public contracting laws that apply to the bar.

Thus, our question about who benefits now has a ready answer: The public and the bar will both benefit. One thing that should improve is quality control. The leaner bar will have more resources to devote to investigating and prosecuting discipline cases. That can only inure to the public's benefit. From the attorney's perspective, almost nothing should change. Admission, dues, discipline and general regulatory oversight will remain where they have always been: with a state government entity overseen by the Supreme Court. And the sections will still provide no-cost and low-cost MCLE and offer associational activities for those who value them. The sections potentially can be even more successful without the bar's chiding eye. True, the annual meeting may no longer happen, unless the new association hosts one. If tighter funding requires the sections to focus more on education and less on social events, so much the better.

At this point, after much study and careful deliberation, there is agreement among the sections, the State Bar, the Supreme Court, and the judiciary committees of both legislative houses that this course is best. We agree.

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