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PERSPECTIVE

Get all the facts before dismantling the bar

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Last week a trustee of the State Bar of California proposed that the state Legislature dissolve the bar. In its place, a new state agency would assume the admission and discipline functions. All other bar functions (volunteer sections, publishing, education, public benefit activity) would end, unless some non-governmental actors voluntarily assumed them. We think this is a solution in search of a problem. And we question the need for an abrupt abandonment of the bar's task force process on this issue.

The task force has been studying changes to the bar's structure. Specifically, it has been gathering evidence to inform proposals about how the bar should be governed, the best means for ensuring consumer protection, and the bar's role in society. These are important policy questions that merit serious debate, and reasonable minds can differ on the best answers. But hasty action here is unlikely to produce a good result, and there is no obvious need for speed.

The inspiration for the dissolution proposal is unclear. The rationale for immediate action is equally opaque. The trustee claimed in public comments that the bar is enduring a "seemingly endless cycle of disruption, dissension, crisis and scandal" and a "quagmire of discord, internecine politics, and suits and counter suits." Bold claims indeed. But dramatic language aside, what exactly is the problem? The bar is hardly in crisis now. True, the bar recently endured the contested departure of its former executive director, Joe Dunn, after he was terminated in

November 2014 — and Dunn fired back with a lawsuit against the bar.

That dispute was cited as evidence that the bar is somehow in crisis. How so? Instead, the contrary is true: Now that the leadership has changed, any crisis appears to be over. And just last week an arbitrator sustained the bar's demurrer to all of Dunn's claims. To the extent that those events are cited as demonstrating that the legislature needs to be more involved in supervising the bar, we note that Joe Dunn and the trustee now proposing these sweeping changes were both members of the Legislature. So was Joe Dunn part of the problem, or was his departure part of the solution?

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Leaving motivation aside for the moment, there can be no dispute that over the past 20 years the governor and the Legislature have frequently intervened in bar governance matters, and it is equally apparent that the Legislature and some governors have asserted increasing control over regulating the practice of law. In 2011, those branches compelled major structural changes to the bar by assuming partial control over appointments to its governing body. The trustee's proposal would go even further: The judiciary no longer would have a majority of appointments to the proposed new regulatory agency. That would place the Legislature and the governor firmly in control of the new agency.

Thus, the bar will no longer be a judicial branch agency. That raises a separation of powers issue, which may make the proposal unconstitutional. The bar was first created by statute in 1927, and it became a constitutional entity in 1966 when it was added to the judicial article of the state constitution. The existing bar is a judicial branch agency, which functions as an administrative arm of the California Supreme Court. And because the admission and discipline of attorneys is a core judicial branch power, the judiciary is the ultimate authority over regulating the practice of law in California. The core judicial power over officers of the court is subject to only reasonable legislative regulation. At some point "regulation" becomes "destruction" and unconstitutionally invades the judiciary's power.

Returning to the question of motivation, consider this: who benefits? It is clear who will not benefit: the public. Proponents of the proposal have justified it by comparing it favorably to regulatory schemes for other professions and the bar in other states. There are some superficial similarities between this profession and others — medicine, for example. But the law is unique, and the bar's work is crucial to our government and to society itself. Although doctors perform an important public service (saving lives), that is substantively distinct from the public role the bar plays: maintaining the integrity of the legal system and ensuring access to justice. For example, the bar has a major role in vetting judicial candidates. Will the new entity have the resources to continue operating the Judicial Nominees Evaluation Commis-

sion? And if some other states regulate their bars differently, so what? California should take pride in doing things differently — and better.

No one disputes that the profession should be regulated. And it currently is. The question is whether there is anything so fundamentally wrong with the existing regulatory scheme that requires it to be entirely dismantled. That question is still pending, and the task force is still taking evidence. Regarding the proposal, California's Chief Justice Tani Cantil-Sakauye said that it would be "extraordinary" for it to proceed without the benefit of a deliberative process and without input from the California Supreme Court: "Given the critical work the state bar does in the area of access, fairness, and diversity, it would not be fair or just to the people of the state if the state bar's governance issues were unreasonably rushed." We share the chief justice's concern about a rush to judgment being both unwarranted and likely to produce a negative outcome. Making hasty decisions on limited information, when there is no reason to do so, is rarely the best way to produce positive change. We think the task force should complete its investigation, analyze the evidence, and present its recommendations. Then we can revisit this proposal — when all the facts are in.

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