The Latest Bar Exam Fiasco Is an Opportunity to Restore Judicial Control

The California Supreme Court's limited oversight of the bar is a separation-of-powers violation, and the court should remedy that by taking direct control of the bar.

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After the California state bar's examination meltdown last week much commentary has rightly focused on the obvious: this was foreseeable, and those responsible should be held to account. Yet we see a hidden theme about the judicial branch's weakened governance over the legal profession that both explains how all this came to pass and perhaps offers a way forward. The California Supreme Court's limited oversight of the bar is a separation-of-powers violation, and the court should remedy that by taking direct control of the bar.

The court can do so because it has ultimate power over the bar as a judicial branch administrative arm. Although the bar was first created as a public corporation by the legislature in 1927, in 1960 the bar was recodified in the state constitution's judicial branch article (art. VI, § 9). Doing so expressly acknowledged the bar's special character "as an integral part of the judicial function." *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 599. But constitutionalizing the bar gave

it no independent power: it instead serves "as an administrative arm of this court for the purpose of assisting in matters of admission and discipline of attorneys." *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224.

That constitutional grant of judicial authority is in addition to the state judiciary's inherent powers over attorney admission and discipline. Since California's constitution creates courts without any special limitations on their power, they have all the inherent and implied powers necessary to function effectively. *Brydonjack v. State Bar* (1929) 208 Cal. 439, 442. In California (and every other state) the power to regulate the practice of law has long been recognized as among the inherent judicial powers; because attorneys are officers of the court, admission and discipline are judicial questions. *Hustedt v. Workers' Compensation Appeals Board* (1981) 30 Cal.3d 329, 336–37.

Thus, the California Supreme Court has sole jurisdiction and power over attorney admission and discipline, *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 305, with the bar acting as "an administrative assistant to or adjunct of" the court, *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557. Indeed, at times the court has bypassed the bar and exercised its inherent authority directly, as in *In re Attorney Discipline Cases* (1998) 19 Cal.4th 582. Yet such cases are extreme scenarios where the court was forced into action when it lacked alternatives. And except for these rare instances, the court has long lacked true control over the bar.

On that score, the modern decline in the court's power over the bar began in 1988 when Chief Justice Malcolm Lucas instituted internal reforms that included transferring attorney discipline cases to a new State Bar Court. See *In re Rose* (2000) 22 Cal.4th 430, 457. That jurisdictional shift preceded a series of battles with governors and the legislature, with the bar's fee bill often held as leverage to secure changes to further weaken the court's dominion over the bar. That struggle culminated in the 2017 deal that split off the sections (now housed in the voluntary California Lawyers Association) and reordered the bar's leadership. The key change was that the bar's leadership is now controlled by Sacramento.

Back when it was a trade association the lawyers controlled the bar: its old Board of Governors had 23 members, with a majority of 16 elected by attorneys. Starting in 1977 six members were appointed by the governor and legislative leaders; the California Supreme Court had no appointments. In 2012 the board's size and the number of elected members were both reduced, with appointed members holding a majority of the 13 seats; the court had five appointments, a minority. Finally, in 2017 the new Board of Trustees became a fully appointed body: eight members by the governor and the legislature, and five attorney appointments (a minority) by the court.

Nowhere in that history has the court ever controlled the bar's leadership. Allowing the other branches to gradually seize control of the bar has proved to be a mistake, as last week's snakebit bar exam illustrates. The court should recognize the adverse public consequences of surrendering control over its administrative arm's leadership and look to the underlying separation-of-powers problem as both the root cause and the solution. The court must have actual control over the bar because it is a judicial branch entity—absent such control the court has either delegated power

over a judicial branch agency, or that power has been arrogated by another branch. Either is a separation-of-powers violation.

In mundane procedural matters the legislature can regulate judicial branch functions, and the courts ordinarily will comply. *Brydonjack v. State Bar* (1929) 208 Cal. 439, 442–43; *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 54. That regulatory power is broad and may put "reasonable restrictions upon constitutional functions of the courts," but it cannot "substantially impair the constitutional powers of the courts, or practically defeat their exercise." *Brydonjack* at 444; *Mendocino* at 54. Because the bar oversees licensing, regulation, and discipline, directing the bar is no mere regulatory matter. Allowing the other branches to control the bar, a judicial branch agency with rule-making power (Bus. & Prof. Code § 6025), exceeds the regulatory power and defeats the core judicial power over the legal profession.

We know that because, despite its initial attempt to veto the new bar exam experiment, the court was ultimately unable to prevent it. This shows that external control over the bar has in this instance defeated or materially impaired one of the court's core functions: regulating admission to the bar. This is sufficient to declare a regulation invalid, see *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104, and the court has at times rejected such interference, as in *Briggs v. Brown* (2017) 3 Cal.5th 808. This situation arguably calls for the unusual remedy of rejecting external regulation.

The California Supreme Court's mastery over the bar mostly exists on paper. The court should make it a reality, eject the bar's leadership, and take command.

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