What if SCOCA Decided to Fund the State Bar with Judicial Branch Fees?

In this article we consider a simple separation of powers issue with serious implications: Can the California judicial branch fund the State Bar of California by imposing fees on practitioners?[1] We think this is a problem in two stages. The first question (whether the judiciary can impose such fees) raises one sort of separation of powers issue, and the second (the likely consequences) requires a different analysis.

Background

The state bar was created by statute in 1927. It received constitutional entity status in 1966, when article 6, section 9 of the California constitution was added: "The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record." Since it first created an integrated bar, the legislature has gradually inserted itself into the process of regulating the practice of law. The legislature does this sometimes through direct legislation. Most important for this analysis is the fact that the legislature uses the bar's annual fee bill to bargain for changes it wishes to make in the profession.

The executive also has been involved, as when Governors Pete Wilson and Arnold Schwarzenegger vetoed the fee bill, in 1997 and in 2009 respectively. After the 1997 veto, the bar reduced active member dues to a bare-minimum $77 fee. Nearly all bar employees were laid off, the discipline system practically suspended, and mandatory continuing legal education became voluntary. SCOCA ultimately ordered lawyers to pay a $173 assessment (in addition to the $77 fee) to revive the discipline system.

Although their acts are not always as dramatic as a fee bill veto, the bargaining power of the other branches has compelled major structural changes to the bar. Most recently, the legislature succeeded in changing the bar's governance to a

board of trustees with a membership that is partially selected by the legislature and the governor. This is significant: the executive and legislative branches have advanced from indirect involvement in the bar through the fee bill to direct supervision power through appointments to the bar's governing body.

Questions about how the bar should be governed, the best means for ensuring consumer protection, and the bar's role in society are all important policy questions that merit serious debate.[2] This piece is not concerned with those matters. Instead, our focus is on a narrow legal question: Can the California judiciary fund the state bar through fee assessments?

Analysis

It is undisputed that SCOCA is the ultimate arbiter of admission and discipline of attorneys, and that its final and plenary authority over those matters is a core judicial branch power. It is hornbook law that "the power to discipline licensed attorneys in this state is an expressly reserved, primary, and inherent power" of the judicial branch. *Obrien v. Jones* (2000) at 48. The state bar is a constitutional entity within the judicial article of the state constitution, and it acts as an administrative assistant to SCOCA. *In re Rose* (2000) at 438. Thus, notwithstanding the legislature's role in creating it, the bar is a judicial branch agency. *Obrien* at 48; *In re Attorney Discipline System* (1998) at 607. Accordingly, the judiciary has the "ultimate authority" over the practice of law in the state; as SCOCA put it, "[w]e retain our preexisting powers to regulate and control the attorney admission and disciplinary system, including the State Bar Court, at every step." *Obrien* at 48. Even the legislature recognizes this power.[3]

If the judiciary has plenary power over the bar, one might wonder how the other branches have asserted some control over attorneys. In general, that fact presents no constitutional issue, as California's material impairment principle permits some overlap in the reach of the branches.[4] But that same principle works to guard the core powers of the branches. The core judicial power over officers of the court is subject to reasonable legislative action, but the legislature cannot materially impair the judiciary's core power over admission and discipline. Because governing the practice of law is a core judicial power, the judicial branch would be well within its

rights in rejecting excessive legislative encroachment on that subject. Thus, if the judicial branch determines that ensuring funding for the admission and discipline functions of the bar through fees on practitioners is necessary to maintaining trust in the courts and protecting the public, then that is the end of the matter.[5]

These questions (whether SCOCA can do this, and how it will play out) can be viewed in terms of whether they pose a self-defense or a self-preservation issue. Obviously, if the courts did assume control over funding the bar, that likely would provoke a confrontation between the judiciary and the legislature; perhaps the executive as well. Separation of powers doctrine contemplates such interbranch conflict. Consequently, one essential element of a branch is the power of self-defense. Another is the power of self-preservation. The courts can use the first to reassert power over maintaining the bar. And the second would be outcome-determinative if the legislature threatened to retaliate by defunding the courts.

The power of self-defense in this context is the basis for the judiciary to halt the legislature's encroachment, resume control over funding the profession's governing body, and decline to participate in fee-bill bargaining. The judiciary has inherent authority over attorney admission and discipline. *Obrien* at 48. The bar itself is a judicial branch agency, and how the judicial branch distributes its budget allocation among its agencies is a matter for its own discretion. If the legislature were to decline to pass a fee bill, or failed to include funding in the judicial branch allocation for the bar, so be it. The judicial branch has already demonstrated its power to assess fees on attorneys, specifically to fund the bar, when on its own motion SCOCA imposed fees on practitioners in 1998.[6]

Indeed, funding the bar is the easier of our two separation of powers issues to resolve, as there is no need for the judiciary to engage the legislature on this issue at all. Let the legislature drop the fee bill entirely; let the governor refuse to sign it. The judiciary need not take affirmative action on a fee bill, nor need it react to anything the other branches do or fail to do on that bill. Instead, the judiciary can operate independently, entirely within its own sphere, by imposing fees on practitioners. This would not encroach on the legislature's core power of levying taxes. Fees are not taxes.[7] Thus, a judicial branch fee on attorneys to fund bar

operations presents no constitutional question.

The power of self-preservation comes into play in the endgame, and this issue is harder to resolve because it has more variables. Say the judicial branch decides to fund the bar on its own accord. That path likely could provoke legislative countermeasures; for example, the legislature could decline to include any appropriation for the judicial branch in the state budget. Just as the power to tax is the power to destroy, so is the power of the purse equally destructive when used to withhold funds. Defunding the courts doubtless would create a post-apocalyptic legal landscape. But again, core powers doctrine provides an answer. Indeed, the hypothetical of the legislative branch attempting to eliminate the judicial branch is a familiar thought exercise, with a ready answer: it would break the tripartite structure of the state government itself.[8] One branch cannot destroy another, whether directly through assuming its powers, or indirectly by making it impossible for the other branch to exercise its own core powers.

But what if the legislature attempts to defund the courts? Ordinarily, a branch has sole discretionary decision-making power in the exercise of its core powers. Thus, the general rule is that the legislature cannot be compelled to appropriate funds, because deciding general fund spending policy is a core legislative power. But the courts have the power of self-preservation, including "the power to remove all obstructions to [their] successful and convenient operation." *Millholen v. Riley* (1930) at 33–34. And SCOCA is the final arbiter of any disputes between the branches. *Nougues v. Douglass* (1857) 7 Cal. 65, 69. If faced with the existential crisis presented by complete omission of court funding from the state budget, a SCOCA decision ordering at least a minimal level of survival funding would write itself.[9]

Conclusion

The judiciary will always lose when bargaining with the legislature over the fee bill, because the fee bill is a *bill*, which lies in the legislature's unchallenged territory. The only way for the judiciary to win this game is to walk away from the table and move to more favorable ground.

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[1] On California's unique separation of powers doctrine generally, *see California Constitutional Law: Separation of Powers* (2011) 45 U.S.F.L. Rev. 655, David A. Carrillo and Danny Y. Chou.

[2] On those issues generally, *see Renovating the Bar After Keller v. State Bar of California: A Proposal For Strict Limits On Compulsory Fee Expenditure* (1991) 25 U.S.F.L. Rev. 681, David F. Addicks.

[3] *See, e.g.,* Bus. & Prof. Code §§ 6087 ("Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of Chapter 34 of the Statutes of 1927, relating to the State Bar of California.") and 6100 ("Nothing in this article limits the inherent power of the Supreme Court to discipline, including to summarily disbar, any attorney.").

[4] The separation of powers doctrine "limit[s] the authority of one of the three branches of government to arrogate to itself the core functions of another branch. Although the doctrine does not prohibit one branch from taking action that might

affect another, the doctrine is violated when the actions of one branch defeat or materially impair the inherent functions of another." *Steen v. Appellate Div., Super. Ct.* (2014) at 1053.

[5] As was the case in *In re Attorney Discipline System* (1998).

[6] *In re Attorney Discipline System* (1998) at 607 (holding SCOCA may unilaterally impose fees upon attorneys to fund the discipline system if the legislature fails to assess sufficient dues for that purpose).

[7] *See In re Attorney Discipline System* (1998) at 595 ("Bar membership fees used to fund attorney discipline are not taxes or appropriations, however"); *see also Sinclair Paint Co. v. State Bd. of Equalization* (1997) at 876 (distinguishing regulatory fees from taxes).

[8] *See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) at 223 (holding electorate's legislative power could not be used to eliminate the state judicial branch). If the electorate's legislative power cannot eliminate the state judicial branch, then it is unlikely the legislature could eliminate the judicial branch without violating California's separation of powers doctrine. If anything materially impairs the function of another branch of government, it is outright elimination.

[9] Of course, the legislature could merely adjust court funding down in response to SCOCA action on state bar fees. That presents a more difficult question. For example, assume the legislature believes that X dollars in fees is enough, but SCOCA believes that a higher value of dollars Y is the bare minimum necessary. SCOCA unilaterally imposes a fee to cover the difference, valued at Z. In response, the legislature could vote to reduce the overall state court budget by Z dollars. In this scenario it is not clear whether the legislature's actions "materially impair the inherent functions" of the judiciary. *See In re Rosenkrantz* (2002) at 662; *supra note 1*, Carrillo & Chou at 656, 669.