

Q&A re Decoupling Bar's Regulatory & Professional Association Functions and Advocacy for Access to Justice and Diversity in the Profession

Will de-coupling the Bar's regulatory and professional association functions require diversity and access to justice programs to be assigned only to the professional association?

No, the Trustees' decoupling proposal does not detail what programs go to which successor agency; it requires the Bar to study the division for a year and to make a recommendation as to what programs should go to which agency. These programs could stay with the mandatory regulatory agency or, better yet, be assigned to **both** agencies.

Does Prop. 209 prevent a mandatory regulatory agency from advocating for people of color in the profession?

Not entirely, but it does impose significant restraints with respect to taking affirmative measures with respect to diversity programs. Two years ago the California State Bar legally severed its ties with the California State Bar Foundation, its non-profit research, education and advocacy arm, under threat of suit under the Constitutional amendment created by Prop. 209 because of the Foundation's Diversity Scholars program, which affirmatively helps young people of color enter the profession.

Would a private professional association be subject to Prop. 209?

No. It could advocate for a diverse profession unhampered by the anti-affirmative-action mandate of Prop. 209 since that mandate applies only to governmental agencies.

Do First Amendment restrictions developed in the *Keller* and *Brosterhous* cases decided during the Pete Wilson administration limit the Bar's ability to advocate for diversity and access to justice?

Yes. Those cases and the First Amendment prevent the use of mandatory dues to advocate for any politically charged position on issues as to which people in our society disagree. Indeed, Pete Wilson's 1997 message accompanying his veto of the fee bill criticized the Bar for advocating for marriage equality,

discrimination protections for transgendered people, and reduction in harsh criminal penalties — the same reductions Governor Brown is now seeking at the ballot box. Wilson also criticized the State Bar for resisting application of Prop. 209 to California law schools, excoriating it as a “social critic” rather than a regulatory agency. The Bar has lived in the shadow of those events since and carefully limits its advocacy to avoid criticism.

Could a private trade association advocate for diversity in the legal profession, access to justice for all communities, and for meaningful justice in our State without restriction by the First Amendment as interpreted in *Keller* and *Brosterhous*?

Yes, just as the Conference of California Bar Associations — a private professional association which by statute collects its dues via the Bar’s fee invoices — has done since the Wilson veto. The Trustees’ proposal seeks the same form of dues collection for the voluntary state-wide bar association to result from decoupling, allowing the existing voluntary, dues-paying, self-supporting statewide Bar — the State Bar’s specialty law sections — to remain on the Bar’s annual invoice as they are today but to enjoy greater freedom of advocacy freedoms and control over their own costs and governance.

Is there benefit to allowing both successors to a decoupled Bar to pursue these issues?

Yes. The private professional association would be free to advocate unrestrained by Prop. 209 and the First Amendment. The regulatory body would have the force of government and secure funding and staff and fewer restraints on the involvement of sitting judges than a private association. Burden sharing by these two organizations with their different strengths will be the best way to advance these goals. This is far superior to the status quo in which a state-wide, unified Bar is shackled by Wilson-era conceptions of appropriate advocacy and the existence of that Bar prevents the development of a private state-wide association that could fill the gap in advocating for these policies.

Will decoupling the bar’s regulatory and professional association roles impair our democracy by stripping it of a well-placed advocate for the rule of law, an independent judiciary, and a vibrant legal culture.

No. Nearly half the states have de-coupled Bars. New York's judiciary is no less independent than California's and its legal culture not less vibrant. Both the new entities to proceed from de-coupling will contribute to our democracy.