

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

AB 2958 (Committee on Judiciary)

Version: June 15, 2022

Hearing Date: June 21, 2022

Fiscal: No

Urgency: No

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**SUBJECT**

State Bar of California

**DIGEST**

This bill authorizes the State Bar of California (State Bar) to collect annual license fees of \$390 for active licensees for 2022. The bill makes various changes to enhance the State Bar's main priority of public protection, including requiring the State Bar to comply with existing notice requirements related to a data breach of confidential information. The bill requires the State Auditor to evaluate each program or division of the State Bar receiving support from the annual State Bar licensing fees and other fees required of active and inactive licensees.

**EXECUTIVE SUMMARY**

The State Bar of California (State Bar) is a public corporation and the largest state bar in the country. Attorneys who wish to practice law in California generally must be admitted and licensed in this state and must be members of the State Bar. (Cal. Const., art. VI, § 9.) This bill is the annual State Bar licensing fee bill. The bill authorizes the State Bar to collect attorney licensing fees of \$390 for active licensees for 2022. The bill makes various changes related to the State Bar, including, among others, requiring the State Bar to comply with requirements under the Information Practices Act of 1977 related to notice of data breaches of confidential information.

This year's audit of the State Bar found that weak policies are limiting the State Bar's ability to protect the public from attorney misconduct, which is its highest priority. The State Bar generally agrees with the recommendations by the State Auditor and even began implementing some of the recommendations during the audit. In regards to other recommendations, the State Bar states it will need a significant increase in resources in order to implement them, i.e. a significant increase in attorney licensing fees; however, the State Auditor disagrees about the need for many of the requests for additional resources. Accordingly, the bill requests the California State Auditor to evaluate each

program or division of the State Bar receiving support from the annual State Bar licensing fees and other fees required of active and inactive licensees, as provided.

The bill is author sponsored. There is no known support. The bill is opposed by Responsive Law and David Freeman Engstrom, Co-Director of the Deborah L. Rhode Center on the Legal Profession at Stanford Law School and volunteer member of the Closing the Justice Gap Workgroup.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Requires all attorneys who practice law in California to be licensed by the State Bar and establishes the State Bar for the purpose of regulating the legal profession. The Legislature sets the annual fees. (Bus. & Prof. Code § 6000 et seq.) The State Bar is governed the Board of Trustees of the State Bar (Board). (Bus. & Prof. Code § 6010 et seq.; § 6016.)
- 2) Establishes that protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for Board in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Bus. & Prof. Code § 6001.1.)
- 3) Authorizes the State Bar to collect the following fees from active licensees for the year 2021:
  - a) \$395 annual license fee. (Bus. & Prof. Code § 6140.)
  - b) \$40 fee for the Client Security Fund. (Bus. & Prof. Code § 6140.55.)
  - c) \$25 fee for the costs of the disciplinary system. (Bus. & Prof. Code § 6140.6.)
  - d) \$10 fee for the attorney diversion and assistance program. (Bus. & Prof. Code § 6140.9.)
- 4) Authorizes the State Bar to collect the following fees from inactive licensees for the year 2021:
  - a) \$97.40 annual license fee. (Bus. & Prof. Code § 6141 (a).)
  - b) \$10 fee for the Client Security Fund. (Bus. & Prof. Code § 6140.55)
  - c) \$25 fee for the costs of the disciplinary system. (Bus. & Prof. Code § 6140.6.)
  - d) \$5 fee for the attorney diversion and assistance program. (Bus. & Prof. Code § 6140.9.)
  - e) An inactive licensee who is 70 years old or older is not required to pay an annual license fee. (Bus. & Prof. Code § 6141 (b).)

- 5) Requires the State Bar to charge a \$45 fee in addition to the annual license fee for active and inactive licensees for the purposes of funding legal services for persons of limited means, as provided, unless a licensee elects not to support those activities in which case the licensee can deduct the amount from the annual license fee. Requires \$5 of the \$45 fee to be allocated to qualified legal services projects or qualified support centers, as defined, to hire law school graduates with a temporary provisional license issued by the State Bar, as provided. (Bus. & Prof. Code § 6140.03.)
- 6) Requires that the mandatory State Bar outreach for its Attorney Diversion and Assistance Program include continuing legal education courses relating to the prevention, detection, and treatment of substance abuse. (Bus. & Prof. Code §6236.)
- 7) Requires the Board to establish and administer the Client Security Fund to relieve or mitigate pecuniary losses caused by dishonest conduct of active members of the State Bar, as specified. (Bus. & Prof. Code § 6140.5.)
- 8) Establishes a Public Interest Task Force within the Stat Bar that is required to prepare a report every three years that includes recommendations for enhancing the protection of the public and ensuring protection of the public is the highest priority in licensing, regulation, and discipline. (Bus. & Prof. Code § 6001.2(a).)
- 9) Requires the State Bar to contract with the California State Auditor’s Office to conduct a performance audit of the State Bar’s operations every two years.<sup>1</sup> (Bus. & Prof. Code § 6145 (b).)
- 10) Requires the Auditor to conduct an independent audit to determine whether the State Bar’s attorney complaint and discipline process adequately protects the public from misconduct by licensed attorneys or those who wrongfully hold themselves out as licensed attorneys.
  - a) Specifically provides that the audit should analyze whether the State Bar takes reasonable steps to determine the existence and extent of alleged misconduct, and if the State Bar has sufficient management controls, including conflict of interest policies, to ensure complaint investigations are not compromised by undue influence, and examine any data trends that could suggest racial or gender inequities in outcomes from the discipline process.
  - b) Provides that the audit also include consideration of possible options for the State Bar to more proactively protect the public.

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<sup>1</sup> *The State Bar of California: It Is Not Effectively Managing Its System for Investigating and Disciplining Attorneys Who Abuse the Public Trust* (Auditor of the State of California) April 2021, available at <https://www.auditor.ca.gov/pdfs/reports/2020-030.pdf> (as of May 1, 2021).

- c) Required the audit to be submitted no later than April 15, 2022 to the Board of Trustees, the Chief Justice, and the Assembly and Senate Judiciary Committees. (Bus. & Prof. Code § 6145(c).)
- 11) Provides that the chief trial counsel, with or without the filing or presentation of any complaint, may initiate and conduct investigations of all matters affecting or relating to: the discipline of the licensees of the State Bar; the acts or practices of a person whom the chief trial counsel has reason to believe has violated or is about to violate any provision of Articles 7 (commencing with Section 6125) and 9 (commencing with Section 6150) of the State Bar Act; and any other matter within the jurisdiction of the State Bar. (Bus. & Prof. Code § 6044.)
- 12) Provides that it shall be the goal and policy of the State Bar to dismiss a complaint, admonish the attorney, or forward a completed investigation to the Office of Trial Counsel within six months after receipt of a written complaint. As to complaints designated as complicated matters by the chief trial counsel, it shall be the goal and policy of the State Bar to dismiss, terminate by admonition, or forward those complaints to the Office of Trial Counsel within 12 months. (Bus. & Prof. Code § 6094.5(a).)
- 13) Provides that the State Bar shall issue an annual discipline report by October 31 of each year describing the performance and condition of the State Bar discipline system, including all matters that affect public protection. . Requires that the annual discipline report include, among other things:
- a) the existing backlog of cases in the discipline system;
  - b) the number of inquiries and complaints and their disposition;
  - c) the speed of complaint handling and disposition, by type; and
  - d) a description of the condition of the Client Security Fund. Requires that the report include statistical information presented in a consistent manner for year-to-year comparison and compare the previous five years. (Bus. & Prof. Code § 6085.15(a).)
- 14) Finds that one of the purposes of the State Bar Act is to expand the availability and improve the quality of existing free legal services in civil matters to indigent persons. (Section 6210.)
- a) Requires that the interest and dividends earned on all interest on lawyer trust accounts (IOLTA accounts) be paid to the State Bar to be used to fund civil legal services for indigent persons. (Bus. & Prof. Code §§ 6211(a), 6216(a).)
  - b) Defines which nonprofit entities are presumed to be eligible for legal services funding administered by the State Bar. (Bus. & Prof. Code §§ 6213(a), 6213(b), 6214, 6214.5, 6215.)

- 15) Prohibits the corporate practice of law, except as specifically authorized. (Corp. Code §§ 13045 & 16951.)
- 16) Requires, under the Information Practices Act of 1977, that any agency, as defined, that owns or licenses computerized data that includes personal information, as defined, to disclose, pursuant to specific notice requirements, any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California:
  - a) whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person, or
  - b) whose encrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person and the encryption key or security credential was, or is reasonably believed to have been, acquired by an unauthorized person and the agency that owns or licenses the encrypted information has a reasonable belief that the encryption key or security credential could render that personal information readable or usable. (Civ. Code § 1798.29.)

This bill:

- 1) Authorizes the State Bar to collect an annual license fee of \$390 for active licensees for 2022, and \$97.40 for inactive licensees.
  - a) Reduces the active licensee fee by \$4 if the State Bar has entered into a contract to sell its San Francisco office building by December 31, 2022.
  - b) Reduces the inactive licensee fee by \$1 if the State Bar has entered into a contract to sell its San Francisco office building by December 31, 2022.
- 2) Authorizes the Board to provide each licensee with the option of including up to \$5 to the annual fee if the licensee elects to support lobbying and related activities by the State Bar, as provided. Prohibits the State Bar from spending more for the support or defense of lobbying and related activities than the amount paid by licensees pursuant to the optional increase for lobbying.
- 3) Provides that any filing of a vacancy on the Board mid-term does not count toward the two-term limit for appointments of trustees.
- 4) Repeals the Public Interest Task Force. Also repeals obsolete provisions.
- 5) Directs, until January 1, 2025, \$45 of the annual license fees to legal services unless a member elects not to support those activities.
  - a) Requires \$5 of the \$45 fee to be allocated to qualified legal services projects or qualified support centers, as defined, to fund law student summer fellowships for the purpose of supporting law students interested in pursuing a career in legal services.

- b) After January 1, 2025, reverts to direct the \$45 to legal services purposes, without any funding specified for law student summer fellowships.
- 6) Requires that the mandatory State Bar outreach for its Attorney Diversion and Assistance Program include continuing legal education courses addressing behavioral health issues.
- 7) Requires the 2023 audit by the State Auditor to evaluate each program or division of the State Bar receiving support from the annual State Bar licensing fees and other fees required of active and inactive licensees. Requires the audit to be submitted by April 15, 2023, to the board of trustees, the Chief Justice of the Supreme Court, and to the Assembly and Senate Committees on Judiciary.
- 8) Requires the audit in 7) to include, at a minimum:
  - a) an assessment of how much fee revenue, staff, and resources are currently budgeted and subsequently expended to perform existing tasks and responsibilities;
  - b) an assessment of whether the State Bar has appropriate program performance measures in place and how these measures are used for budgeting purposes;
  - c) assessment of the usage of any real property sold by the State Bar;
  - d) a review of the State Bar's cost allocation plan used to allocate administrative costs; and
  - e) a calculation of how much fee revenue would be needed from each State Bar active and inactive licensee to fully offset State Bar costs to perform existing tasks and responsibilities and to support additional proposed expenditures determined to be necessary to meet the State Bar's public protection function.
- 9) Requires any committee or subcommittee of the State Bar exploring a regulatory sandbox or the licensing of non-attorneys as paraprofessionals to:
  - a) prioritize protecting individuals, especially those in need of legal assistance, from unscrupulous actors, including those actors seeking to do business in the legal field above all else;
  - b) prioritize increasing access to justice for indigent persons;
  - c) exclude corporate ownership of law firms and splitting legal fees with non-lawyers, which has historically been banned by common law and statute due to grave concerns that it could undermine consumer protection by creating conflicts of interests that are difficult to overcome and fundamentally infringe on the basic and paramount obligations of attorneys to their clients;
  - d) adhere to, and not propose any abrogation of, the restrictions on the unauthorized practice of law, including but not limited to, Corporations Code Section 13405 and Corporations Code Section 16951; and
  - e) not expend any funds, regardless of the source, on activities that do not meet these requirements.

- 10) Requires the State Bar to comply with the requirement, under the Information Practices Act of 1977, that any agency, as defined, that owns or licenses computerized data that includes personal information must disclose any breach of the security of the system following discovery or notification of the breach to any resident of California.

## COMMENTS

### 1. Stated need for the bill

The author writes:

This bill reauthorizes the State Bar to collect annual membership fees, but reduces fees by \$5 and instead allows licensees who so choose to pay \$5 extra for the Bar's lobbying activities. It also makes other changes to make the State Bar more accountable.

### 2. State Bar of California

As a constitutional matter, the judicial power of California is vested in the Supreme Court, Courts of Appeal, and superior courts. (Cal. Const., art. VI, Sec. 1.) (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48.) In addressing this inherent authority to regulate the practice of law, the Supreme Court has explained: "The important difference between regulation of the legal profession and regulation of other professions is this: Admission to the bar is a *judicial function*, and members of the bar are *officers of the court*, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and *primary regulatory power*." (*In re Attorney Discipline System, supra*, 19 Cal.4th at 593.) The State Bar functions as the administrative arm of the Supreme Court for the purpose of assisting in attorney admissions and discipline, with the court retaining its inherent judicial authority to disbar or suspend attorneys. (*In re Attorney Discipline System, supra*, 19 Cal.4th at 599-600; see *Keller v. State Bar of California* (1990) 496 U.S. 1, 11.)

Attorneys who wish to practice law in California generally must be admitted and licensed in this state and must be members of the State Bar. (Cal. Const., art. VI, Sec. 9.) The State Bar of California is a public corporation. Although originally a creature of statute, the State Bar is now "a constitutional entity within the judicial article of the California Constitution." (*Obrien, supra*, 23 Cal.4th at 48; see Cal. Const., art. VI, § 9; Bus. & Prof. Code, Sec. 6001.) The State Bar's regulatory assistance is an integral part of the judicial function. (*Obrien, supra*, 23 Cal.4th at 48.) Emphasizing the *sui generis* nature of the State Bar as its administrative arm, the Supreme Court has made clear that "express legislative recognition of reserved judicial power over admission and discipline is critical to the constitutionality of the State Bar Act." (*In re Attorney Discipline System, supra*, 19 Cal.4th at 600, citing Bus. & Prof. Code Sec. 6087.)

At the same time, the Legislature's exercise, under the police power, of a reasonable degree of regulation and control over the profession and practice of law in California, is well established. (*O'Brien, supra*, 23 Cal.4th at 48.) The Legislature exercises regulatory authority pursuant to the State Bar Act and has authority to set the amount of membership fees necessary to fund the disciplinary system. The Legislature has enacted statutes making protection of the public the highest priority of the State Bar (Bus. & Prof. Code § 6001.1) and subjecting the chief trial counsel of the State Bar to Senate confirmation (Bus. & Prof. Code § 6079.5).

The State Bar of California is the largest state bar in the country. As of June 15, 2022, the total State Bar membership is 285,518, which includes 195,385 active licensees, 2,156 judge members, 16,662 licensees who are "Not Eligible to Practice Law," and approximately 71,315 inactive members.<sup>2</sup> The State Bar's programs are financed mostly by annual license fees paid by attorneys as well as other fees paid by applicants seeking to practice law. The State Bar is governed by a Board of Trustees (Board). Pursuant to SB 36 (Jackson, Ch. 422, Stats. 2017), the Board was required to transition to a 13 member board comprised of Governor, Supreme Court, Assembly, and Senate appointees.

### 3. Attorney licensee fees

In 2019, based largely on recommendations from the California State Auditor and the Legislative Analyst's Office, the 2020 annual license fee was increased to \$438 for active licensees and \$108 for inactive licensees. This fee increase consisted of a \$71 increase on an ongoing basis and a onetime fee increase of \$52 for active licensees, and a \$20 increase on an ongoing basis and a onetime fee increase of \$13 for inactive licensees. The 2021 annual license fee was decreased to \$395 for active licensees and \$97.40 for inactive licensees through AB 3362 (Committee on Judiciary, Ch. 360, Stats. 2020). The decrease included the cessation of several of the onetime fee increases imposed in 2020. When all fees were added together, excluding the optional legal services fee, the total license fee for 2021 was \$470 for active licensees and \$137.40 for inactive licensees.<sup>3</sup> The 2022 annual license fee was the same as the license fee for 2021. (SB 211 (Umberg, Ch. 723, Stats. 2021.)

The State Bar is planning on putting the building it owns and operates out of in San Francisco up for sale sometime this year. Various estimates of revenue from that sale have been predicted; however, the estimates fluctuate broadly due to numerous factors, such as if the State Bar purchases or leases another building and conditions in the commercial real estate market. When the license fee was increased in 2020, it provided

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<sup>2</sup> *Attorney Status*, State Bar of Cal. (current as of April 27, 2021), available at <https://members.calbar.ca.gov/search/demographics.aspx>.

<sup>3</sup> This amount includes the fee for the Attorney Diversion and Assistance Program of \$10 for active licensees and \$5 for inactive licensees, which last year was only \$1 and \$0, respectively. (Bus. & Prof. Code § 6140.9(a).)

for a \$4 increase to be used by the State Bar for capital improvements needed at its San Francisco building. If the building is sold, obviously the State Bar will no longer need these funds for capital improvements. As such, the bill provides that the active license fee is to be reduced by \$4 and the inactive licensee fee by \$1 if the State Bar has entered into a contract to sell its San Francisco office building by December 31, 2022.

*a. State Bar requests a licensing fee increase*

The State Bar has requested an increase in the licensing fee, including an ongoing annual inflationary adjustment. Reasons for the increased fee include various legislative priority requests from the State Bar. Additionally, the State Bar requests a fee increase of \$1 to support its diversion, equity, and inclusion efforts. It also requests to maintaining the additional \$5 in legal services opt-out fees that was set to sunset this year, but directs that portion of the voluntary fee to law student summer fellowships, in order to bolster efforts to recruit legal services attorneys.

The bill includes the later request by authorizing grants to be allocated to qualified legal services projects or qualified support centers to fund law student summer fellowships for the purpose of supporting law students interested in pursuing a career in legal services from the portion of the legal services fee. As noted in the Assembly Judiciary Committee analysis, “because the Legislature reviews and approves the State Bar’s licensing fee every year, there appears to be no reason for providing an automatic inflation adjustment to the licensing fees, when the Legislature could choose to do that annually, should it deem that to be an appropriate choice.”<sup>4</sup>

*b. Audit of State Bar programs and divisions*

In 2018 the State Bar requested an almost doubling of the existing fee and the Legislature directed the Auditor and Legislative Analyst’s Office to review the State Bar’s request along with its expenses and performance. As a result of that audit, the Legislature increased the State Bar fee by nearly 40 percent (from \$315 to \$438). In response to the State Bar’s new request for a fee increase, this bill requests the Auditor to evaluate each program or division of the State Bar receiving support from the annual State Bar licensing fees and other fees required of active and inactive licensees. The bill states it is the intent of the Legislature that this audit can be reviewed in conjunction with the legislation that authorizes the State Bar’s licensing fee in 2023, and requires the audit to be submitted by April 15, 2023. The audit is required to include, at a minimum, certain information. This information includes:

- an assessment of how much fee revenue, staff, and resources are currently budgeted and subsequently expended to perform existing tasks and responsibilities;

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<sup>4</sup> Asm. Judiciary Comm. Analysis of Asm. Bill 2958 (2021-2022 Reg. Sess.) as amended May 4, 2022, at p. 6.

- an assessment of whether the State Bar has appropriate program performance measures in place and how these measures are used for budgeting purposes;
- assessment of the usage of any real property sold by the State Bar;
- a review of the State Bar’s cost allocation plan used to allocate administrative costs; and
- a calculation of how much fee revenue would be needed from each State Bar active and inactive licensee to fully offset State Bar costs to perform existing tasks and responsibilities and to support additional proposed expenditures determined to be necessary to meet the State Bar’s public protection function.

#### 4. Chief trial counsel

The State Bar Act provides that the State Bar’s chief trial counsel is subject to Senate confirmation. However, the State Bar had not followed the statute and instead had managed its discipline system without a Senate confirmed chief trial counsel for over five years. In order to ensure that the State Bar actually followed through with the Senate confirmation process as required by statute, SB 211 (Umberg, (2021), as amended May, 5, 2021), conditioned the ability of the State Bar to collect its license fee on the Senate confirming the appointment of a Chief Trial Counsel. In August of 2022, the State Bar finally appointed a chief trial counsel. In light of that development, SB 211 authorized the State Bar to collect a licensing fee for 2022 in the same amount as 2021. (Ch. 723, Stats. 2021.) The State Bar has appointed George Cardona, a former Assistant United States Attorney, as its chief trial counsel, and Mr. Cardona is currently awaiting Senate confirmation.

#### 5. State auditor finds continued issues with State Bar discipline system

##### *a. 2021 audit found State Bar was not effectively managing its system of discipline*

The State Bar’s highest priority is the protection of the public, which includes quickly finding and disciplining dishonest or incompetent attorney. In the 2021 audit, the Auditor found that changes made to improve the State Bar’s discipline system actually significantly reduced its efficiency and that the State Bar’s annual discipline report does not provide all required information and is of less value to its stakeholders, including the Legislature.<sup>5</sup> The Auditor notes that “the State Bar’s backlog grew by 87 percent from the end of December 2015, to the end of June 2020.” As pointed out by the Auditor, this “growing backlog allows attorneys who are under investigation more time to continue practicing law while their cases are pending, increasing the risk for potential harm to the public.” The Auditor’s “analysis indicates that both higher- and lower-priority cases are taking significantly longer to resolve.” Additionally, as the Auditor highlights, the “State Bar is also disciplining attorneys at a drastically lower rate for

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<sup>5</sup> Cal. State Auditor, *The State Bar of California: It Is Not Effectively Managing Its System for Investigating and Disciplining Attorneys Who Abuse the Public Trust* (April 2021).

reasons it cannot adequately explain. From 2015 through 2019, the total number of cases that resulted in discipline – including reprimands, suspensions, and disbarments – declined by 54 percent.”

*b. 2022 audit states weak policies are limiting the State Bar’s ability to protect the public*

Last year, Thomas Girardi, a famous trial attorney, was accused of stealing millions of dollars from his injured clients over many years. Serious and repeated allegations of misconduct against him were reported to the State Bar over decades, but the State Bar did not take action against him until 2021. The State Bar issued a statement acknowledging that mistakes were made over years in the handling of complaints in this situation. In light of these revelations, SB 211 required an independent audit of the attorney complaint and discipline process to determine if it adequately protects the public from attorney misconduct.

The most recent audit of the State Bar’s discipline system finds that “weak policies limits its ability to protect the public from attorney misconduct.”<sup>6</sup> The audit found that many cases (64.5 percent) are closed during the State Bar’s intake process, with another 22.2 percent closed during the investigation process, leaving only 5.3 of cases receiving formal discipline, which can include formal, private discipline.<sup>7</sup> Additionally, the audit indicated that too many cases appear to be closed with private discipline and without further investigation, which can fail to deter some attorneys from, and allow some to commit, further misconduct. The audit stated:

*The State Bar’s data indicate that the use of nonpublic measures is not providing reasonable protection against future misconduct, as its policy requires. A State Bar study from July 2021 showed that a significant number of attorneys were investigated for misconduct within two years after being disciplined. It also showed that nearly 26 percent of attorneys whose cases were closed with a warning letter in 2019 had a new complaint about their professional conduct investigated by the State Bar within two years of the original case being closed. [...]*

Notwithstanding these steps, patterns of attorney misconduct suggest that the State Bar is overusing nonpublic measures. [...] Our review of a selection of cases associated with five [...] attorneys [whose cases were closed through nonpublic measures] determined that *State Bar staff closed cases through nonpublic measures despite indications in its case files that further investigation or actual discipline may have been warranted.* Of the five attorneys, four had at least one previous complaint for

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<sup>6</sup> Cal. State Auditor, *The State Bar of California’s Attorney Discipline Process: Weak Policies Limit Its Ability to Protect the Public From Attorney Misconduct*, Report 2022-030 (April 14, 2022).

<sup>7</sup> *Id.* at 11.

similar misconduct that was closed through nonpublic measures.<sup>8</sup> (emphasis added)

The Audit provided a specific example of a case that used private discipline that highlights the issues with the current practice:

An attorney exhibited a pattern of failing to provide settlement payments or to provide files to clients until the client complained. The State Bar closed cases against this attorney 28 times over 16 years using nonpublic measures and all of the other closed cases were closed outright. However, complaints against the attorney continued to increase. *From 2014 to 2021, the attorney was the subject of 165 complaints. Despite the high number of complaints, many for similar matters, the State Bar has imposed no discipline, and the attorney still maintains an active license.* In one early case, the State Bar issued a warning letter to the attorney for failing to release a client's case file for nearly a year. However, the attorney has continued to generate complaints from other clients for this same issue. In the 11 years since the State Bar issued that warning letter, complaints have led the State Bar to issue 11 directional letters requiring the attorney to return client files.<sup>9</sup> (emphasis added)

Until the results of this audit, the State Bar closed cases when a complainant withdrew their complaint, which happened repeatedly in the instance of Mr. Girardi who tended to settle cases after a complaint against him had been filed. Though this may help the individual complainant, it does not necessarily protect the public if this is used as a tool to evade investigation and potential discipline. An example described in the audit illustrates this point:

The State Bar closed multiple complaints that were made against an attorney over the course of about 18 months, each alleging that the attorney had failed to pay clients their settlement funds. Generally, the State Bar closed each complaint after the attorney finally paid the client, noting either that the matter was resolved between the attorney and the complainant after the client withdrew their complaint or that there was insufficient evidence to support that the attorney's conduct warranted discipline. A pattern was discernible from five complaints the State Bar received within one year alleging that the attorney's clients were not receiving settlement payments. However, *the State Bar did not identify the need to examine the attorney's bank records until it had received more than 10 complaints over two years. It did not examine the records for another six months, during which time the State Bar continued to receive similar complaints.*

When the State Bar finally examined the client trust account, it found that the attorney had misappropriated nearly \$41,000 in total from several clients. The

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<sup>8</sup> *Id.* at 14.

<sup>9</sup> *Id.* at 17.

State Bar ultimately filed charges against the attorney stemming from these more recent complaints. After the State Bar questioned the attorney about discrepancies in the client trust account, the attorney admitted to using client funds for personal reasons.<sup>10</sup> (emphasis added)

The audit also found that, likely in response to prior audits, the State Bar places too great an emphasis on closing cases quickly. The audit concluded that “the State Bar’s actions have failed to prevent additional misconduct of a similar nature, leading to an increase in the volume of subsequent complaints about a specific attorney for the same misconduct. In turn, this has increased the State Bar’s workload, which makes it more difficult for it to address its backlog and fulfill its primary mission of protecting the public.”<sup>11</sup>

The audit also found that current practices and policies limit the State Bar’s ability to identify patterns of complaints, which if identified could prevent future misconduct:

The patterns of complaints against some attorneys suggest that the State Bar’s responses to those complaints did not influence the attorneys’ subsequent behavior. . . . Had the State Bar considered the pattern of past conduct, it might have conducted further investigation, which could have resulted in more severe corrective action and discouraged the attorney from continuing this conduct.<sup>12</sup>

The audit noted that a quarter of all attorney complaints involve client trust accounts, yet the State Bar closes many cases because the amounts involved are de minimis [under \$50]. Sometimes these complaints are closed without even notifying the attorneys involved, even if those closures are not in the best interest of the public:

Our review identified that the State Bar closed many client trust account complaints using nonpublic measures, sometimes without even notifying the attorney about the complaint, and that an attorney’s prior history of allegations did not appear to affect the State Bar’s decision to close certain client trust account cases. For example, for one attorney we reviewed, the State Bar closed 87 complaints spanning 20 years, some through nonpublic measures and some through a policy that allowed it to close certain cases without contacting the attorney for additional information because the monetary amounts involved were relatively low (a de minimis closing). However, the State Bar eventually sought disbarment based on this attorney’s conviction in federal court for money laundering through client trust accounts.<sup>13</sup>

The audit provided several recommendations to address the issues identified in the audit. The audit recommended that the Legislature improve the independence of the

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<sup>10</sup> *Id.* at 18.

<sup>11</sup> *Id.* at 18-19.

<sup>12</sup> *Id.* at 25.

<sup>13</sup> *Id.* at 2.

State Bar's external review of its discipline system and assess the State Bar's compliance with this audit before the end of the year. In regards to the State Bar, the audit made several recommendations:

- Revise its policies to define specific criteria that describe which cases are eligible to be closed using nonpublic measures and which are not eligible.
- Begin monitoring compliance with its new policy for identifying the circumstances in which investigators should continue to investigate even if the complainant withdraws the complaint.
- Notify the public on its website when other jurisdictions have determined that an attorney who is also licensed in California presents a substantial threat of harm to the public.
- Begin using its general complaint type categorizations when determining whether to investigate a complaint.
- Create a formal process for determining whether it is able to objectively assess whether such a complaint should be closed or whether the decision should be made by an independent administrator.
- Amend its policies to require its external reviewer to select the cases for the semiannual review and establish formal oversight to ensure that it follows up and addresses the external reviewer's findings.
- Discontinue the use of informal guidance for review of bank reportable actions and direct all staff to follow the established policies and revise its intake manual to disallow de minimis closures if the attorney has a pending or prior bank reportable action or case alleging a client trust account violation. When investigating client trust account-related cases and bank reportable actions not closed de minimis, require its staff to obtain both the bank statements and the attorney's contemporaneous reconciliations of the client trust account, and determine if the relevant transactions are appropriate.<sup>14</sup>

The State Bar generally agrees with the recommendations by the State Auditor and even began implementing some of the recommendations during the audit. In regards to other recommendations, the State Bar states it will need a significant increase in resources, i.e. a significant increase in attorney licensing fees. The State Auditor disagrees about the need for many of the requests for additional resources from that the State Bar. Specifically, the audit questions the estimates used by the State Bar, the Bar's claimed need for a new platform for the collection of bank and attorney records information, accuracy of staffing study used in light of changes since the study was conducted, and a proposal from the State Bar regarding random monitoring of trust accounts when it is

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<sup>14</sup> *Id.* at 5-7.

not yet effectively responding to the risks represented by bank reportable actions and complaints.<sup>15</sup>

The above described audit clearly illustrates significant concerns about the State Bar's discipline system. The State Bar indicates it needs significant additional resources to implement many of the audit's recommendations; however, the Auditor generally contests this.

As stated above, this bill will require an audit, due in April 2023, to assess State Bar programs and divisions to better understand how fee money is currently being allocated and how much, if any, additional fees would be needed to implement the State Bar's priority of public protection. The results of this audit will assist the Legislature in assessing the request of the State Bar for additional resources to enact the recommendations of the Auditor.

#### 6. Data breach of confidential State Bar discipline records

In February of this year, the State Bar publicly disclosed that there had been a breach of its confidential attorney discipline case data and that thousands of its records had been posted on a public website that aggregates court records nationwide.<sup>16</sup> A vulnerability in the Texas-based Tyler Technology automation system used by the State Bar (and most of California's superior courts) led to the exposure of the confidential information, which subsequently resulted in the information being published on a public third-party website. (Confidential information from California court records was also accessed and published on this same website.) As of March 14, 2022, the State Bar reported that 322,525 confidential records were made available to the public, of which 188 included personal information, and that evidence indicates 1,034 of the confidential records were viewed by the public.<sup>17</sup>

The State Bar was transparent about the data breach and responsive to legislative and press inquiries. It also agreed to notify all persons whose confidential data was compromised, even though current law does not require such notification. The Information Practices Act (Act) requires state agencies to comply with its provisions related to notice and disclosure of a breach of confidential data; however, the State Bar is located in the judicial branch and judicial branch entities are exempted from the Act. (See Civil Code Section 1798.3 (b)(2).) This bill makes the State Bar subject to the data breach reporting requirements of the Act because it is more similar to the regulatory agencies under the Department of Consumer Affairs, which are subject to the data breach requirements of the Act, than it is to the courts.

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<sup>15</sup> *Id.* at 68-69.

<sup>16</sup> Cal. State Bar, press release, *State Bar of California Addresses Breach of Confidential Data* (Feb. 26, 2022), available at <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-addresses-breach-of-confidential-data>.

<sup>17</sup> Cal. State Bar, *Data Breach Updates*, available at <https://www.calbar.ca.gov/About-Us/News/Data-Breach-Updates>.

7. Concerns regarding working groups of the State Bar

Earlier this year, the chairs of this Committee and the Assembly Judiciary Committee raised concerns in a letter to the State Bar about two working groups within the State Bar and the wisdom of using scarce resources of the State Bar, particularly given its long-standing lack of attention to the discipline system, on these working groups:

Unfortunately, it appears that the State Bar has chosen to divert its attention from its core mission of protecting the public and addressing the critical issues affecting the discipline system. Instead, the State Bar has used a substantial amount of its resources for the CTJG [Closing the Justice Gap Working Group], as well as the Paraprofessional Program Working Group, apparently utilizing hundreds of hours of staff time and an unknown amount of other State Bar resources. [ . . . ]

The CTJG has been exploring a proposed regulatory sandbox and proposals that would recommend allowing a participant in the sandbox who is not a licensed attorney to be exempt from existing statutory laws regarding the practice of law and rules of professional conduct. Our Committees have prioritized protecting consumers from unscrupulous actors, including those seeking to do business in the legal field. Corporate ownership of law firms and splitting legal fees with non-lawyers has been banned by common law and statute due to grave concerns that it could undermine consumer protection by creating conflicts of interests that are difficult to overcome and fundamentally infringe on the basic and paramount obligations of attorneys to their clients.

Corporations are driven by profits and demands for returns to shareholders, and do not have the same ethical duties and are not subject to the same regulatory oversight as attorneys. The regulatory sandbox could become an open invitation for profit-driven corporations, hedge funds, or others to offer legal services or directly practice law without appropriate legal training, regulatory oversight, protections inherent in the attorney-client relationship, or adequate discipline to the detriment of Californians in need of legal assistance. Any proposal that would materially change current consumer protections for clients receiving legal services and fundamentally alter the sacrosanct principles of the attorney-client relationship would be heavily scrutinized by our Committees.

The Closing the Justice Gap Working Group (CTJG) is tasked with “exploring the development of a regulatory sandbox to encourage the development of innovative legal service delivery models serving clients at all income levels through the collaboration of lawyers, law firms, technologists, entrepreneurs, and others.”<sup>18</sup> The other working group is the California Paraprofessional Program Working Group, which is charged

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<sup>18</sup> Cal. State Bar *Closing the Justice Gap Working Group*, available at <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Closing-the-Justice-Gap-Working-Group>.

with creating a “paraprofessional licensure/certification program to increase access to legal services in California.”<sup>19</sup> These work groups are both directed to balance the dual goals of ensuring public protection and increasing access to legal services. Since receipt of the letter, the State Bar reformed the CTJG to minimize out-of-state members and directed that recommendations be delivered to the Board of Trustees by May 2023. The recommendations of the Paraprofessional Working Group received public comment, over 70 percent of which was opposed to the proposals, and has continued working to refine its proposals.

In light of the concerns raised by these workgroups, the results of the most recent audit, and the Legislature’s clear direction to focus on discipline – the core mission of the State Bar – this bill provides that any committee or subcommittee of the State Bar exploring a regulatory sandbox or the licensing of non-attorneys as paraprofessionals is required to:

- a) prioritize protecting individuals, especially those in need of legal assistance, from unscrupulous actors, including those actors seeking to do business in the legal field above all else;
- b) prioritize increasing access to justice for indigent persons;
- c) exclude corporate ownership of law firms and splitting legal fees with non-lawyers, which has historically been banned by common law and statute due to grave concerns that it could undermine consumer protection by creating conflicts of interests that are difficult to overcome and fundamentally infringe on the basic and paramount obligations of attorneys to their clients;
- d) adhere to, and not propose any abrogation of, the restrictions on the unauthorized practice of law, including but not limited to, Corporations Code Section 13405 and Corporations Code Section 16951; and
- e) not expend any funds, regardless of the source, on activities that do not meet these requirements.

This provision is intended to ensure that State Bar’s resources are used to focus on its core priority of discipline, and is intended to apply not only to a committee or subcommittee itself, but to employees and contractors who assist and support their work.

## 8. Other changes

The bill makes various other changes to the act, including:

- specifying that any filling of a vacancy on the Board mid-term does not count toward the two-term limit for appointments of trustees;

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<sup>19</sup> Cal. State Bar, Paraprofessional Program Working Group, *available at* <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/California-Paraprofessional-Program-Working-Group>.

- requiring that the mandatory State Bar outreach for its Attorney Diversion and Assistance Program to include continuing legal education courses addressing behavioral health issues.
- repealing the Public Interest Task Force; and
- deleting obsolete provisions.

9. Statements in opposition

David Freeman Engstrom, Co-Director of the Deborah L. Rhode Center on the Legal Profession at Stanford Law School and a volunteer member of the Closing the Justice Gap Workgroup of the State Bar, writes in opposition to the provisions analyzed in 7) above. He writes that three facts should be considered by the Committee “the access to justice crisis is deep and costly,” these provisions would end the work of the sandbox, and it “dishonors the diligent and careful efforts of the members of the Working Group” to provide useful information related to potential reforms. He writes:

Throughout its public deliberations, the Working Group has sought to frame a cautious and incremental approach to a sandbox – a pilot program where entrants would be carefully screened and subject to significantly more robust oversight than lawyers are, including, for example, ongoing detailed data reporting on consumer services, audits of entities authorized in the sandbox, and robust consumer disclosures. To shut the Working Group down now via Section 3’s knee-jerk, information-stifling provisions would be a disservice to Californians throughout the state.

**SUPPORT**

None known

**OPPOSITION**

David Freeman Engstrom, Co-Director of the Deborah L. Rhode Center on the Legal Profession at Stanford Law School  
Responsive Law

**RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation:

SB 211 (Umberg, 2021, Ch. 723, Stats. 2021) authorized the State Bar to collect annual licensing fees of \$395 for active licensees and \$97.40 for inactive licensees and enacted

other reforms. The bill required the Auditor's Office to conduct an independent audit to determine if the discipline process adequately protects the public from misconduct by licensed attorneys or those who wrongfully hold themselves out as licensed attorneys.

AB 3362 (Committee on Judiciary, Ch. 360, Stats. 2020) authorized the State Bar to collect annual licensing fees of \$395 for active licensees and \$97.40 for inactive licensees and enacted other reforms.

SB 176 (Jackson, Ch. 698, Stats. 2019) authorized the State Bar to collect annual licensing fees of \$438 for 2020 and enacted other reforms, including raising the salary cap that qualify attorneys to pay reduced licensing fees.

AB 3249 (Committee on Judiciary, Ch. 659, Stats. 2018) authorized the State Bar to collect annual licensing fees of \$390 for 2019 and enacted other reforms, including a strengthening of the attorney discipline system.

SB 36 (Jackson, 2017, Ch. 422, Stats. 2017) authorized the State Bar to collect active membership dues of up to \$390 for the year 2018; reformed the State Bar Act by separating the sections from the State Bar and creating what is now the California Lawyers Association; changed the composition of the State Bar Board; and enacted various reforms to remove politics from the Board.

AB 2878 (Committee on Judiciary, 2016) would have authorized bar dues for 2017 and enacted numerous reforms. The bill died on concurrence on the Assembly Floor.

SB 387 (Jackson, Ch. 537, Stats. 2015) authorized the State to collect active licensee fees of up to \$390 for the year 2016; required the State Bar to develop and implement a specified workforce plan for its discipline system; required the State Bar to conduct a public sector compensation and benefits study, conduct a thorough analysis of its operating costs and develop a spending plan to determine a reasonable amount for the annual membership fee, as specified; required the State Bar to contract with the California State Auditor's Office to conduct an in-depth financial audit of the State Bar; and made the State Bar subject to the Bagley-Keene Open Meeting Act and the California Public Records Act, as specified.

**PRIOR VOTES:**

Assembly Floor (Ayes 65, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)

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