

**SENATE JUDICIARY COMMITTEE**  
**Senator Hannah-Beth Jackson, Chair**  
**2019-2020 Regular Session**

AB 3362 (Committee on Judiciary)

Version: August 7, 2020

Hearing Date: August 13, 2020

Fiscal: Yes

Urgency: No

AM

**SUBJECT**

State Bar: open meetings: discipline: attorneys: foreign legal consultants: annual  
license fees

**DIGEST**

This bill would authorize the State Bar of California (State Bar) to collect annual license fees of \$395 for active licensees and \$97.40 for inactive licensees for 2021, and would increase the annual legal services fee, which a licensee can opt out of paying, to \$45. The bill also includes other reforms related to recouping funds paid out of the Client Security Fund (CSF), public comment related to items to be heard in closed session, and discipline for attempting to seek agreements relating to: not reporting misconduct to the State Bar; not cooperating with the State Bar in a disciplinary investigation; withdrawing a disciplinary complaint; or sealing the record of any action or proceeding from the State Bar. The bill also provides that if any of the first three administrations of the law students' examination includes the June 2020 administration, an applicant will be permitted an additional fourth administration of the examination to pass in order to receive credit for all law studies completed to the time the examination is passed.

**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 that reauthorizes the State Bar to collect attorney licensing fees. The bill also makes other reforms to enhance protection of the public, including strengthening the ability of the State Bar to go after attorneys whose dishonest conduct has caused funds to be paid out of the Client Security Fund. The bill is supported by the Service Employees Union, Local 1000 (SEIU, Local 1000). There is no known opposition for the bill.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) 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 the State Bar and the Board of Trustees (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.)
- 2) 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.)
- 3) Authorizes the State Bar to collect the following fees from active licensees for the year 2020:
  - a) \$438 annual license fee for 2020. (Bus. & Prof. Code § 6140.)
  - b) \$40 fee for the CSF. (Bus. & Prof. Code § 6140.55.)
  - c) \$25 fee for the costs of the disciplinary system. (Bus. & Prof. Code § 6140.6.)
  - d) \$1 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 2020:
  - a) \$108 annual license fee for 2020. (Bus. & Prof. Code § 6141.)
  - b) \$10 fee for the CSF. (Bus. & Prof. Code § 6140.55)
  - c) \$25 fee for the costs of the disciplinary system. (Bus. & Prof. Code § 6140.6.)
  - d) \$0 fee for the attorney diversion and assistance program. (Bus. & Prof. Code § 6140.9.)
- 5) Requires the State Bar to charge a \$40 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.
- 6) Provides that it is cause for suspension, disbarment, or other discipline for any licensee, whether as a party or as an attorney for a party, to agree or seek agreement, that:
  - a) The professional misconduct or the terms of a settlement of a claim for professional misconduct are not to be reported to the State Bar.

- b) The plaintiff will withdraw a disciplinary complaint or will not cooperate with the investigation or prosecution conducted by the State Bar.
  - c) The record of any civil action for professional misconduct will be sealed from review by the State Bar. (Bus. & Prof. Code § 6090.5.)
- 7) Requires, with specified exceptions, applicants for licensure to have passed a law students' examination administered by the examining committee after completion of their first year of law study. Those who pass the examination within its first three administrations upon becoming eligible to take the examination receive credit for all law studies completed to the time the examination is passed. (Bus. & Prof. Code § 6060.)
- 8) Requires the Board to establish and administer the CSF to relieve or mitigate pecuniary losses caused by dishonest conduct of active members of the State Bar, as specified. (Bus. & Prof. Code § 6140.5.)
- 9) Requires an attorney whose actions have caused the payment of funds to a claimant from the CSF to reimburse the fund for all moneys paid out as a result of their conduct, with interest, in addition to payment of the assessment for the procedural costs of processing the claim, as a condition of continued practice. Provides that the reimbursed amount, plus applicable interest and costs, is to be added to and become a part of the license fee of a publicly reprovved or suspended licensee for the next calendar year, paid as a condition of applying for reinstatement of their license to practice law or return to active license status, or if the assessment is part of an order imposing a public reprovval on a licensee or is part of an order imposing discipline or accepting a resignation with a disciplinary matter pending, the assessment may also be enforced as a money judgment. (Bus. & Prof. Code § 6140.5(c) & (d).)
- 10) Provides that the State Bar is subject to the Bagley-Keene Open Meeting Act and that all meetings of the State Bar are subject to the Bagley-Keene Open Meeting Act. (Bus. & Prof. Code § 6026.7(a).)
- a) Authorizes the State Bar to conduct business in a closed session to discuss certain things, including the preparation, approval, grading, or administration of the California Bar Examination or the First-Year Law Students' Examination. (Bus. & Prof. Code § 6026.7(c).)
  - b) The Bagley-Keene Open Meeting Act requires a state body to provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item, however, this requirement is not applicable to a closed session. (Gov. Code § 11125.7.)
  - c) The Bagley-Keene Open Meeting Act provides that it does not prevent either of the following:

- i. state bodies that administer the licensing of persons engaging in businesses or professions from holding closed sessions to prepare, approve, grade, or administer examination; or
- ii. an advisory body of a state body that administers the licensing of persons engaged in businesses or professions from conducting a closed session to discuss matters that the advisory body has found would constitute an unwarranted invasion of the privacy of an individual licensee or applicant if discussed in an open meeting, provided the advisory body does not include a quorum of the members of the state body it advises. Those matters may include review of an applicant's qualifications for licensure and an inquiry specifically related to the state body's enforcement program concerning an individual licensee or applicant where the inquiry occurs prior to the filing of a civil, criminal, or administrative disciplinary action against the licensee or applicant by the state body. (Gov. Code § 11126(c).)

11) Provides that all fines, state or local penalties, bail, forfeitures, restitution fines, restitution orders, or any other amounts imposed by a juvenile or superior court of the State of California or the Supreme Court of the State of California, upon a person or any other entity that are due and payable in an amount totaling no less than one hundred dollars (\$100), in the aggregate, for criminal offenses as specified, no sooner than 90 days after payment of that amount becomes delinquent, may be referred by the juvenile or superior court, the county, the state, or the State Bar to the Franchise Tax Board for collection under guidelines prescribed by the Franchise Tax Board. (Rev. & Tax. Code § 19280(a).)

This bill:

- 1) Authorizes the State Bar to collect an annual license fee of \$395 for active licensees and \$97.40 for inactive licensees for 2021.
- 2) Requires the State Bar to charge \$45 in addition to the annual license fee 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.
  - a) 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.
  - b) Prohibits the State Bar from making any deductions from the \$5 for any reason, including, but not limited to, administrative fees, costs, or expenses.
  - c) Requires the funds to be allocated pursuant to a competitive grant process.

- d) Authorizes the Legal Services Trust Fund Commission in consultation with the board of trustees to create priorities for allocating the competitive grants.
  - e) Any funds remaining after the termination of the provisional license program are to be reallocated to support legal services for persons of limited means, as provided.
  - f) Repeals these provisions on January 1, 2023, and reenacts the \$40 fee for legal services.
- 3) Provides that the State Bar may collect costs stemming from a public reproof of a licensee using any means provided by law.
- 4) Provides that it is cause for suspension, disbarment, or other discipline for any licensee, or a person acting on a licensee's behalf, whether or not in the context of litigation, to agree or seek agreement, that:
- a) misconduct or the terms of a settlement related to misconduct are not to be reported to the State Bar;
  - b) a complainant withdraw or not cooperate with the investigation conducted by the State Bar; or
  - c) the record of any action or proceeding be sealed from the State Bar.
- 5) Requires an applicant to be permitted to pass the First-Year Law Student's Examination within the applicant's first four administrations upon becoming eligible to take the examination and receive credit for all law studies completed to the time the examination is passed if any of the first three administrations of the examination includes the June 2020 administration.
- 6) Requires a licensee whose actions have caused the payment of funds to an applicant from the CSF to owe those funds to the State Bar and reimburse the CSF for all moneys paid out as a result of the licensee's conduct, with interest.
- a) Authorizes the State Bar to collect from an attorney any funds paid to an applicant from the CSF related to conduct by that attorney through any means authorized by law and as a money judgment if the reimbursed amount is part of a final determination by the CSF.
  - b) Prohibits a licensee from raising the defense of laches regarding any attempt by the State Bar to recover funds owed to the CSF by that licensee.
  - c) Provides that these provisions are to be applied retroactively as well as prospectively.
  - d) Provides the Legislature finds and declares the following:
    - i. There is a dramatic imbalance between payouts from the CSF to clients victimized by attorneys and reimbursement to the State Bar from dishonest attorneys on whose behalf payments were made.
    - ii. There is a significant state interest in enhancing the State Bar of California's collection of overdue CSF reimbursement in order to

- enhance revenue necessary to reimburse victims of attorney misconduct.
  - iii. That amendments to Section 6140.5 of the Business and Professions Code are necessary to advance this important state interest.
  - iv. These amendments will enhance to State Bar of California's ability to effectively collect overdue CSF reimbursement that is not part of a disciplinary order.
  - v. The amendments to subdivisions (c), (f), and (h) of Section 6140.5 of the Business and Professions Code are intended to apply retroactively.
- 7) Requires that a publically reprovved or suspended attorney repay to the CSF any funds paid to an applicant related to conduct by that attorney, with interest, as a condition of continued practice, and that the funds are added to and become part of the license fee of a publicly reprovved or suspended license.
- 8) Requires the State Bar, in order to seek a monetary judgment against any attorney for repayment to the CSF, to file a certified copy of the Notice of Payment of the CSF with the clerk of the superior court and requires the clerk to immediately enter judgment in conformity with the Notice of Payment of the CSF.
- 9) Provides that any order imposing upon an attorney licensee public reprovval, discipline, or accepting a resignation with a disciplinary matter pending, in which the licensee is ordered to pay restitution is enforceable as a money judgment by the payee, and provides that the entry or enforcement of any money judgment based on such order, the payee must reduce the amount owed by the licensee to the payee by any reimbursement received by the payee from the CSF or by any amount received as criminal restitution ordered pursuant to a specified section of the Penal Code.
- a) A payee or other applicant who files an application with the CSF has an ongoing obligation to inform the CSF as to any payment recovered directly or indirectly from the attorney or any other source.
  - b) A money judgment entered pursuant to these provisions will not affect the right of a payee to file an application with the CSF to recover any portion of the restitution as provided.
  - c) To the extent that a payee or other applicant has already collected on any portion of the loss, the CSF may reduce any qualifying reimbursable amount by the amount collected.
  - d) To the extent that the CSF reimburses a payee or other applicant, the licensee or former licensee is required to reimburse the CSF for that payment.
- 10) Authorizes the State Bar to have a closed session, in addition to grounds authorized in the Bagley-Keene Open Meeting Act, for the preparation of examination materials, the approval, the grading, or security of test administration for

certification of a specialist, the California Bar Examination, or the First-Year Law Students' Examination.

- 11) Requires the state to accept public comment in open session on all matters that are on the agenda for discussion or decision by the board of trustees, whether in an open or a closed session.
- 12) Provides that, in addition to fines, state or local penalties, bail, forfeitures, restitution fines, or restitution orders, monetary sanctions and any payment from the State Bar of California's CSF that is part of a final determination by the CSF, may be referred to the Franchise Tax Board for collection under guidelines prescribed by the Franchise Tax Board.

### COMMENTS

#### 1. Stated need for the bill

The Assembly Judiciary Committee, as author of the bill, writes:

This bill constitutes the annual measure authorizing the State Bar of California to collect licensing fees from attorneys practicing law in this state. In 2019, after years of requests from the State Bar of California to increase the annual license fee, the Legislature approved a significant increase in the licensing fee paid by attorneys. The 2019 fee increase was less than half of what the State Bar originally sought and instead reflected the analysis of the State Auditor and Legislative Analyst's Office regarding the actual ongoing needs of the State Bar.

Seeking to ease some of the financial burden placed on attorneys as a result of the 2019 fee increase, and in the absence of clear justification for maintaining several one-time fees approved in the 2019 legislation, this bill permits those fees to lapse, thereby lowering the amount of 2021 annual dues by \$34 for active attorneys and \$5.60 for inactive attorneys.

#### 2. State Bar of California

The State Bar of California is a public corporation. 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 power to regulate the practice of law, including the power to admit and to discipline attorneys, is among the inherent powers of the Supreme Court. The State Bar functions as the administrative arm of the Supreme Court for the purpose of assisting in attorney admissions and discipline, with the Supreme Court retaining its inherent judicial authority to disbar or suspend attorneys.

The State Bar of California is the largest state bar in the country. In 2020, the total State Bar membership was 275,635, which included 191,360 active licensees, 2,274 judge members, 15,529 licensees who are “Not Eligible to Practice Law,” and approximately 66,000 inactive members.<sup>1</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. 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.

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.) The power to regulate the practice of law, including the power to admit and to discipline attorneys, is among the inherent powers of the Supreme Court. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592; *O'Brien v. Jones* (2000) 23 Cal.4th 40, 48.) In addressing this inherent authority, 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.)

Although originally a creature of statute, the State Bar of California is now “a constitutional entity within the judicial article of the California Constitution.” (*O'Brien, supra*, 23 Cal.4th at 48; *see* Cal. Const., art. VI, § 9; Bus. & Prof. Code, Sec. 6001.) 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.) The State Bar’s regulatory assistance is an integral part of the judicial function. (*O'Brien, 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 also 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

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<sup>1</sup> *Attorney Status*, State Bar of Cal. (current as of Aug. 4, 2020), available at <https://members.calbar.ca.gov/search/demographics.aspx> (as of Aug. 5, 2020).

(Bus. & Prof. Code § 6001.1). And, while the Board has statutory authority to formulate rule proposals, they only take effect if the State Supreme Court approves them.<sup>2</sup>

3. License fees

*a. Annual license fee decrease*

Last year, 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. This year the annual license fee was decreased to \$395 for active licensees and \$97.40 for inactive licenses. The decrease includes the cessation of several of the onetime fee increases enacted last year. When all fees are added together, excluding the optional legal services fee, the total license fee for 2021 is \$470 for active licensees and \$137.40 for inactive licensees.<sup>3</sup>

*b. Increase in optional legal services fee*

Due to the COVID-19 Pandemic the California Supreme Court was forced to delay the annual July State Bar Examination until October and has directed that the examination will be offered remotely online. The California Supreme Court wrote in a letter to the State Bar, dated July 16, 2020:

[...] Although a few less populous states have been able to accommodate a diploma privilege that grants entry for all of the graduates of their states' constituent American Bar Association (ABA)-accredited law schools, the law schools in California, unlike in other states, represent a diverse array of ABA-accredited, California-accredited, and California-registered schools. If California were to adopt diploma-privilege criteria used by other states, graduates of nearly four dozen California law schools would not meet those criteria and would be excluded.

With these considerations in mind, the court seeks a path that ensures the fair and equal treatment of all graduates, regardless of law school accreditation status, while also ensuring that protections remain in place for consumers of legal services [...]

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<sup>2</sup> The Rules of Professional Conduct are the professional standards to which California attorneys must adhere. Violation of the rules may subject an attorney to discipline.

<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)).

The court recognizes that postponement of the bar examination may impact employment prospects, delay incomes, and otherwise impair the livelihoods of persons who recently have graduated from law school. Moreover, the court recognizes 2020 graduates may not be in a position to study and prepare for a fall bar 2020 examination. Therefore, in order to mitigate these hardships faced by graduates while fulfilling the responsibility to protect the public by ensuring that persons engaged in the practice of law are minimally competent to do so, the court directs the State Bar to implement, as soon as possible, a temporary supervised provisional licensure program – a limited license to practice specified areas of law under the supervision of a licensed attorney. This program will be made available for all 2020 graduates of law schools based in California or those 2020 graduates of law schools outside California who are permitted to sit for the California Bar Examination [...] At a minimum, this provisional licensure program shall remain in effect until at least June 1, 2022 to permit 2020 graduates maximum flexibility. This timeframe will afford the 2020 graduates several opportunities to take the exam of their choosing through February 2022 and await the exam results [...]<sup>4</sup>

This bill raises the optional legal services fee to \$45 from \$40 and provides that the \$5 increase is to be used to allocate competitive grants to qualified legal services projects or qualified support centers to hire law school graduates with a provisional license issued by the State Bar. If any funds remain after the termination of the provisional license program, those funds are to be reallocated to support legal service for persons of limited means in the same manner the State Bar allocates those funds now. COVID-19 has affected so many aspects of everyday life and the 2020 law school graduates are no exception. They spent three years or more receiving rigorous academic training, with many taking on very large amounts of debt to do so, to be faced with the uncertainty of when or if they would be able to begin their legal careers. Though this proposal is not a panacea to all the issues facing recent law school graduates, it will provide some additional funds to legal services organizations to not only hire provisionally licensed graduates, but will also provide much need legal services to persons in need.

*c. Total license fee for 2021*

When all fees are added together, including the optional legal services fee, the total licenses fees for 2021 is \$515 for active licensees<sup>5</sup> and \$182.40 for inactive licensees.<sup>6</sup>

4. CSF and collecting funds owed to the State Bar

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<sup>4</sup> Clerk and Executive Officer of the Supreme Court Jorge E. Navarrete, letter to the Alan K. Stenbrecher, Chair State Bar of Cal. Board of Trustees, July 6, 2020 re: California Bar Exam, available at [https://newsroom.courts.ca.gov/gallery/get\\_file/?file\\_id=5f10f6e92cfac2089661af1f&ir=1&file\\_ext=.pdf](https://newsroom.courts.ca.gov/gallery/get_file/?file_id=5f10f6e92cfac2089661af1f&ir=1&file_ext=.pdf) (as of Aug. 4, 2020).

<sup>5</sup> Bus. & Prof. Code §§ 6140, 6140.55, 6140.6, 6140.9, and 6140.03.

<sup>6</sup> Bus. & Prof. Code §§ 6141, 6140.55, 6140.6, 6140.9, and 6140.03.

Under existing law, the CSF seeks to protect consumers of legal services by mitigating losses caused by the dishonest conduct of California attorneys. The CSF is funded through a mandatory contribution that is collected as part of the annual bar fee statement – active licensees contribute \$40, and inactive licensees contribute \$10. Under the State Bar’s rules, the following types of dishonest conduct can lead to reimbursement from the fund: (1) theft or embezzlement of money or the wrongful taking or conversion of money or property; (2) failure to refund unearned attorney fees paid to the lawyer in advance where the lawyer performed no services, or an insignificant portion of the services; (3) the borrowing of money from a client without the intention or reasonably anticipated ability to repay the money; (4) obtaining money or property from a client by representing that it would be used for investment purposes when no investment is made; and (5) an act of intentional dishonesty or deceit that directly leads to the loss of money or property that actually came into the lawyer’s possession. The State Bar’s Discipline Report of April 30, 2020, notes that there were approximately 2,370 open applications with a value of approximately \$16.8 million based on historical experience.<sup>7</sup>

The State Bar reports that unreimbursed payments to the CSF account for the overwhelming majority of the \$177 million in debts that are owed to the State Bar. This bill seeks to bolster the State Bar’s ability to recover funds paid out from the CSF due to the misconduct of attorneys by enacting several changes. The bill reforms the process by which the State Bar can obtain a court order declaring the debt to the CSF and also authorizes the State Bar to recoup debts owed to the CSF through the Interagency Intercept program administered by the Franchise Tax Board.

The bill makes it clear that a licensee owes any funds paid out from the CSF to the State Bar and is required to reimburse the CSF, regardless if the attorney continues to practice law. This change aligns with existing State Bar Rule 3.451 that requires an attorney to repay the CSF for any reimbursement with simple interest and assessment of processing costs. The bill also authorizes the State Bar to collect from an attorney any funds paid to an applicant from the CSF related to conduct by that attorney through any means authorized by law and as a money judgment if the reimbursed amount is part of a final determination by the CSF. In order to ensure that the State Bar can collect on outstanding funds under these provisions the bill prohibits an attorney whose actions caused funds to be paid out from the CSF to raise the defense of laches, and specifies that all of the provisions described in this paragraph apply retroactively.

There are four general categories of retroactive laws the raise potential constitutional issues: (1) ex post facto laws, (2) laws that overturn final court judgments, (3) laws that impair vested rights without due process of law, and (4) laws that impair the obligation

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<sup>7</sup> 2019 Annual Discipline Report, State Bar of Cal. (April 30, 2020) at 33, available at <http://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf> (as of August 2, 2020).

of contracts. The only category this bill's provisions could potentially fall within are laws that impair vested rights without due process of law. When a court analyzes if a retroactive statute impairs a vested right without due process it applies a two-step analysis: (1) is a vested right at issue, and (2) if so, is the impairment reasonably necessary to protect important state interests. (*Plotkin v. Sajahtera, Inc.* (2003) 106 Cal. App. 4<sup>th</sup> 953, at 962-96.) Whether or not a vested right is impaired is a decision for the courts and a very fact specific analysis. This analysis will not focus on that issue because the courts have found that even if a vested right is impaired by a retroactive statute it may be permissible if "reasonably necessary to protect the health, safety, morals and general welfare of the people." (*Id.* at 964.) The court will weigh several factors when making this determination, including "the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." (*Ibid.*)

Recognizing that there is a dramatic imbalance between payouts from the CSF to clients victimized by attorneys and reimbursement to the State Bar from dishonest attorneys on whose behalf payments were made, having these provisions apply retroactively will strengthen the State Bar's ability to recoup money owed to the CSF by attorneys whose dishonest conduct was the cause of payouts from the fund. This will enhance the State Bar's mission of public protection and also provide enhanced protections to the public by bolstering the reserves in the CSF to ensure that there are funds available for any future payouts that may be needed. Allowing dishonest attorneys to skirt their obligations to repay the CSF for funds paid out on their behalf actively harms the public and places the burden of their dishonest actions on attorneys that are not acting dishonestly and their victims if the CSF does not have enough funds to pay out valid claims. It is likely that if the court were to find the retroactive provisions affect a vested right, the court would still find the provisions constitutional because they are reasonably necessary to protect the health, safety, morals, and general welfare of the people.

The bill also provides that a payee or other applicant who files an application with the CSF has an ongoing obligation to inform the CSF as to any payment recovered directly or indirectly from the attorney or any other source, and that a money judgment entered against a licensee will not affect the right of a payee to file an application with the CSF to recover any portion of the subject restitution. However, to the extent that a payee or other applicant has already collected on any portion of the loss, the CSF may reduce any qualifying reimbursable amount by the amount collected. The bill further provides that, to the extent that the CSF reimburses a payee or other applicant, the licensee or former licensee is required to reimburse the CSF for that payment. These provisions will ensure that persons harmed by the dishonest conduct of attorneys can recoup costs owed to them through all available channels while ensuring that they do not receive more from the CSF than is owed to them.

## 5. Changes to open meetings provisions

The Bagley-Keene Open Meetings Act, which existing state law applies to the State Bar, allows closed sessions for the discussion of topics related to professional licensing examinations on the grounds that certain aspects of licensing exams cannot be discussed publically to maintain the integrity of the exams. In addition, the State Bar is authorized in statute to hold meetings in closed session to discuss preparation, approval, grading, or administration of the California Bar Examination, examinations for certification of a specialist, and the First-Year Law Students Examination. The intent of these provisions is to generally provide for the integrity of examinations and to prevent the release of exam questions or security measures to examinees.

Due to the COVID-19 Pandemic, the Board of Trustees held a meeting in April of this year to discuss whether or not it would be possible to hold a July bar exam. The Board held this discussion in closed session citing the Bagley-Keene Open Meetings Act and State Bar specific statutes that allow for closed session on topics related to administration of licensing examinations. Many members of the public, including potential examinees and law school professors and administrators, asked to provide public comment to the Board on this topic and the topic of alternatives to the exam such as provisional licensing and diploma privilege. Initially the Board refused to accept public comment even though hundreds, if not thousands, of law school graduates sent in comments to the State Bar asking to be able to speak to the Board about their deliberations. Eventually, the Board allowed 30 minutes of public comments to be given before it moved into closed session to discuss what recommendations it would make to the Supreme Court regarding the fate of the bar exam. This was little comfort to the numerous students who wished to speak on this critical topic that deeply impacts their future and livelihoods. In light of these events, this bill seeks to provide more transparency to the deliberations of the State Bar by allowing the State Bar to use closed sessions for the preparation of examination materials, the approval of the exam, grading the exam, and the security of exam administration, instead of a discussion that merely involves the administration of an exam. The bill also requires the State Bar to accept public comment on all topics that are on the agenda for discussion or decision at Board meetings, regardless if in open session or closed session. This will ensure that the Board considers all viewpoints of the public on important topics up for discussion while still allowing the Board to have closed session discussions.

## 6. Other reforms

Under existing law, attorneys can be subject to discipline for seeking to dissuade their clients from filing complaints about them with the State Bar. The existing provisions refer to plaintiff and records in any civil action, which could be narrowly construed to mean that if a civil action had not been filed, it is ok for an attorney to attempt to dissuade their clients from filing complaints with the State Bar. In order to strengthen the existing law and to provide the State Bar with additional authority to prosecute

attorneys who attempt to avoid having complaints filed against them, this bill provides that no attorney, or person acting on the attorney's behalf, can solicit or seek an agreement where a client agrees not to file, or subsequently agrees to withdraw, a disciplinary complaint against the attorney. By removing the references in the existing law to civil actions and plaintiff, the bill expands the situations in which an attorney can be punished for seeking to avoid a complaint being filed against them or hindering a State Bar investigation by agreement with a client, thereby increasing protection to the public.

Due to the COVID-19 Pandemic, the State Bar was forced to delay the First-Year Law Student's Examination until June and to administer the exam online remotely. Because of this, the bill allows an applicant to be permitted to pass the First-Year Law Student's Examination within the applicant's first four administrations, instead of three, upon becoming eligible to take the examination, if any of the first three administrations of the examination includes the June 2020 administration.

Existing law provides that any order imposing a public reproof on a licensee of the State Bar is to include a direction that the licensee pay costs and requires the California Supreme Court to include a direction that the licensee will pay costs in any order imposing discipline, or accepting a resignation with a disciplinary matter pending. This bill provides that an order imposing such costs may be collected through any means provided by law.

## 7. Statements in Support

The SEIU, Local 1000 writes in support:

The Service Employees International Union, Local 1000 (Local 1000), representing 96,000 members, including attorney and non-attorney bargaining unit employees of the State Bar of California (State Bar), supports AB 3362, which would ensure that the State Bar continues its mission of managing the admission of lawyers to the practice of law, investigating complaints of professional misconduct and prescribing appropriate discipline.[...]

AB 3362 would reduce attorney fees by eliminating the one-time forty-dollar fee to the Client Security Fund and the three-dollar reserve fund fee. While we understand that the Client Security Fund was a one-time fee, we do believe the State Bar should have a reserve fund to ensure funding stability and avoid drastic fee increases, like we saw last year. Therefore, we are respectfully requesting that the bill be amended to reinstate the three-dollar reserve fund fee.

### SUPPORT

SEIU, Local 1000

### OPPOSITION

None known

### RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

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 (Assembly 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 76, Noes 0)

Assembly Appropriations Committee (Ayes 18, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 0)

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