

Date of Hearing: July 13, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 211 (Umberg) – As Amended May 5, 2021

As Proposed to be Amended

SENATE VOTE: 37-0

SUBJECT: STATE BAR: ATTORNEYS' ANNUAL LICENSE FEES, DISCIPLINE SYSTEM REVIEW, AND GENERAL OVERSIGHT

KEY ISSUES:

- 1) SHOULD THE LEGISLATURE ONLY ALLOW THE STATE BAR TO ASSESS LICENSEE FEES FOR 2022 AND BEYOND AFTER THE SENATE HAS CONFIRMED A CHIEF TRIAL COUNSEL TO OVERSEE THE DISCIPLINE SYSTEM?
- 2) GIVEN THE STATE BAR'S ACKNOWLEDGMENT OF DECADES OF MISTAKES IN ITS HANDLING OF COMPLAINTS AGAINST ATTORNEY THOMAS GIRARDI, SHOULD THE STATE AUDITOR REVIEW THE BAR'S DISCIPLINE SYSTEM TO HELP ENSURE THAT IT IS NOT COMPROMISED BY MISCONDUCT OR UNDUE INFLUENCE?
- 3) IN ORDER TO BETTER SUPPORT THE LEGAL SERVICES COMMUNITY, SHOULD THE LEGAL SERVICES TRUST FUND COMMISSION BE CODIFIED IN STATUTE AND PROVIDED WITH MORE AUTONOMY?

SYNOPSIS

This is the annual State Bar licensee fees reauthorization and legislative oversight bill. The annual bill allows the Legislature to review the performance and operation of the State Bar in the past year and determine if any statutory changes need to be made to improve its functioning, as well as approve annual licensing fees for attorneys in the state. As is often the case, this bill arrives during another year of controversy for the State Bar. First, the State Auditor discovered that the State Bar's backlog of discipline cases increased by 87 percent between 2015 and 2020, despite (at least near the end of the time period) new case prioritization standards and new discipline staff. Second, the public learned that famed trial attorney Thomas Girardi is accused of stealing millions of dollars from his injured clients over many years; and it now appears that serious and repeated allegations of misconduct against him were reported to the State Bar over decades, but the Bar had, until just the last few months, never taken action against him. The State Bar issued a statement acknowledging that mistakes were made over years in the handling of complaints in this case. It seems likely that if the State Bar had instituted disciplinary proceedings years earlier when allegations of misconduct first surfaced, many clients might have avoided theft of their damage awards. Finally, the State Bar has also been operating without its required, Senate-confirmed chief trial counsel – the head of the State Bar's discipline program – for over five years.

As a result of these events, this legislation conditions the State Bar's ability to charge licensing fees to California attorneys on Senate confirmation of the State Bar's chief trial counsel position. This bill also, as proposed to be amended, seeks an outside, independent audit of the State Bar's discipline system to understand both what went wrong and how to ensure that this does not happen again. Specifically, the amendments direct the State Auditor, by April 15, 2022 – in time for next year's attorney fee bill – 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. Additionally, in order to better support the state's legal services organizations that provide civil legal assistance to low-income Californians across the state, the bill, as proposed to be amended, seeks to codify the Legal Services Trust Fund Commission and give it greater autonomy in operations. The amendments are incorporated into the summary of the bill and explained in the analysis. Finally, the bill deletes unnecessary governance restrictions on the California Lawyers Association, the attorney trade association which separated from the State Bar as the result of SB 36 (Jackson), Chap. 422, Stats. 2017.

The bill is supported by the Civil Justice Association of California and has no opposition on file. The State Bar previously supported the bill, but withdrew its support when the dollar amount of the licensing fees were removed from the bill and the fees were made contingent upon Senate confirmation of the chief trial counsel.

SUMMARY: Prevents the State Bar from charging attorneys their annual licensing fees until the Senate confirms a chief trial counsel, requires the State Auditor to audit the State Bar's discipline system, and codifies the Legal Services Trust Fund Commission. Specifically, **this bill:**

- 1) Authorizes the Board of Trustees (Board) of the State Bar to collect an annual license fee of no more than \$_____ for active licensees for 2022, but prevents the Board from charging the annual licensing fee for 2022 unless and until the Senate confirms the appointment of the State Bar's chief trial counsel. Provides that the annual fee is payable before February 1st or 30 days after the date the Senate confirms the appointment of the chief trial counsel, whichever occurs later.
- 2) Prohibits the Board of the State Bar from charging an annual license fee for inactive licensees unless and until the Senate confirms the appointment of the chief trial counsel, at which time the fee may not exceed \$_____. Provides that the annual fee is payable before February 1st or 30 days after the date the Senate confirms the appointment of the chief trial counsel, whichever occurs later.
- 3) Removes governance restrictions imposed on the California Lawyers Association (CLA) that required that the bylaws ensure that (a) the governing board include one representative of each of the 16 Sections and one from the California Young Lawyers Association; (b) each governing board member have equal voting power on the governing board; and (c) the governing board may only terminate an individual Section or add new Sections by a two-thirds vote.
- 4) Directs the State 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; and specifically provides that the audit analyze whether the State Bar takes

reasonable steps to determine the existence and extent of alleged misconduct, 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. Also provides that the audit include consideration of possible options for the State Bar to more proactively protect the public, including, to the extent possible, the appropriateness of an independent discipline monitor to more closely review the State Bar's discipline process, an independent ombudsperson to assist the public, and other options to protect the public. Requires that the audit be submitted no later than April 15, 2022 to the Board, the Chief Justice, and the Assembly and Senate Judiciary Committees.

- 5) Provides that notwithstanding the confidentiality of disciplinary investigations provisions, case related findings may be included in the State Auditor's report under 4), provided that the names of attorneys investigated, any complaining witnesses, and the names of other members of the public associated with complaints are not included in the State Auditor's report.
- 6) Codifies the Legal Services Trust Fund Commission (LSTFC) within the State Bar to administer the distribution of funds to qualified legal services projects and support centers. Specifies that the LSTFC is comprised of 24 members, clarifies the length of terms, and who makes the appointments -- ten appointments by the Chair of the Judicial Council, six by the Board, two by the Speaker of the Assembly, two by the Senate Committee on Rules, and four by the LSTFC itself. Sets forth the duties of the LSTFC, including establishing rules, consistent with existing law, to determine an applicant's eligibility and grant making decisions, and monitor and evaluate a recipient's compliance with requirements and grant terms based on criteria established by the LSTFC. Subjects the LSTFC to the California Public Records Act and the Bagley-Keene Open Meeting Act. Requires the LSTFC annually to report on its receipts, expenditures, and disbursements, as provided.
- 7) Removes obsolete provisions of the State Bar Act.

EXISTING LAW:

- 1) Requires all attorneys who practice law in California to be licensees of the State Bar and establishes the State Bar for the purpose of regulating the legal profession. Pursuant to the State Bar Act, requires the annual mandatory membership fee set by the Board to pay for discipline and other functions to be ratified by the Legislature. (Business and Professions Code Section 6000 *et seq.* Unless stated otherwise, all further statutory references refer to that code.)
- 2) Provides that protection of the public, which includes support for greater access to, and inclusion in, the legal system, is the highest priority of the State Bar and its Board in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, provides that the protection of the public shall be paramount. (Section 6001.1.)
- 3) Authorizes the State Bar to collect up to \$395 in annual licensing fees from active members for a total annual fees bill of up to \$470 for the year 2021. Provides that the other \$75 is pursuant to statutory authorization to assess annually the following fees: \$40 for the Client Security Fund; \$25 for the disciplinary system; and \$10 for the Lawyer Assistance Program. (Sections 6140, 6140.55, 6140.6, 6140.9.)

- 4) Authorizes the State Bar to collect up to \$97.40 in annual membership fees from inactive members for a total annual dues bill of up to \$137.40. Provides that the other \$40 is pursuant to statutory authorization to assess annually the following fees: \$10 for the Client Security Fund; \$25 for the disciplinary system; and \$5 for the Lawyer Assistance Program. (Sections 6141, 6140.55, 6140.6, 6140.9.)
- 5) Directs, until January 1, 2023, that \$45 of the annual license fees to legal services purposes unless a member elects not to support those activities. 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. After January 1, 2023, reverts to a direction of \$40 of the annual license fees to legal services purposes unless a member elects not to support those activities, without the additional \$5 to hire law school graduates. (Section 6140.03.)
- 6) Requires the Board to establish and administer the Client Security Fund to relieve or mitigate pecuniary losses caused by dishonest conduct of active licensees of the State Bar, as specified. (Section 6140.5.)
- 7) Provides for the establishment of the California Lawyers Association as a private, nonprofit corporation composed of what were formerly the Sections of the State Bar. Required the State Bar to assist the Sections to incorporate as a private, nonprofit corporation and transfer the functions and activities of the 16 State Bar Sections and the California Young Lawyers Association to the new private, nonprofit corporation. Specifies the governance structure of the California Lawyers Association and requires that the bylaws ensure that the governing board include one representative of each of the 16 Sections and one from the California Young Lawyers Association and that each governing board member have equal voting power on the governing board. Requires that the bylaws also ensure that the governing board may only terminate an individual Section or add new Sections by a two-thirds vote. (Section 6056.)
- 8) 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. (Section 6145 (b).)
- 9) Holds, except as otherwise provided and as stated below, that hearings and records of original disciplinary proceedings in the State Bar Court are public, following a notice to show cause, as provided. Provides, however, that all disciplinary investigations are confidential until the time that formal charges are filed and all investigations of specified matters are confidential until the formal proceeding is instituted. These investigations may not be disclosed pursuant to any state law, including, but not limited to, the California Public Records Act. Allows this confidentiality requirement to be waived under specified exceptions. (Section 6086.1.)
- 10) Requires the Board to appoint a chief trial counsel and to notify the Senate Committee on Rules and the Assembly and Senate Judiciary Committees within seven days of the dismissal or hiring of a chief trial counsel. Requires that the appointment of the chief trial counsel is subject to confirmation by the Senate, as provided. (Section 6079.5.)
- 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: (a) the discipline of State Bar licensees; (b) 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 regarding the unlawful practice of law or unlawful solicitations; (c) and any other matter within the jurisdiction of the State Bar. (Section 6044.)

- 12) States that it is 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, states 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. (Section 6094.5.)
- 13) Requires the State Bar to issue an annual discipline report by April 30 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, the existing backlog of cases in the discipline system; the number of inquiries and complaints and their disposition; the speed of complaint handling and disposition, by type; and 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 three years. (Section 6085.15.)
- 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.)
- 15) 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. (Sections 6211 (a), 6216 (a).)
- 16) Defines which nonprofit entities are presumed to be eligible for legal services funding administered by the State Bar. (Sections 6213 (a), 6213 (b), 6214, 6214.5, 6215.)
- 17) Establishes a statutory formula for the State Bar to use in distributing legal services funds. Key aspects of this formula are as follows:
 - a) Eighty-five percent of funds (after payment of administrative costs) are distributed via a pro rata county-by-county formula, based upon the number of persons in the county whose income is at 125 percent or less of the current poverty threshold.
 - b) In counties served by more than one qualified legal services project, as defined, that is applying for funding, funding is based on the ratio of the amount of each project's total budget expended in the prior year for legal services in that county compared to the total expended by all qualified legal services projects in the prior year in that county.
 - c) Fifteen percent of the remaining funds after payment of administrative costs are distributed equally to qualified support centers. (Section 6216.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: This is the annual State Bar fees reauthorization and legislative oversight bill. The annual bill allows the Legislature to review the performance and operation of the State Bar in the past year and determine if any statutory changes need to be made to improve its functioning, as well as approve annual licensing fees for attorneys in the state. As is often the

case, this bill arrives during another year of controversy for the State Bar. First, the State Auditor discovered that the State Bar's backlog of discipline cases increased by 87 percent between 2015 and 2020, despite (at least near the end of the time period) the Bar's new case prioritization standards and new discipline staff. Second, the public learned that famed trial attorney Thomas Girardi is accused of stealing millions of dollars from his injured clients over many years; and it now appears that serious and repeated allegations of misconduct against him were reported to the State Bar over decades, but the Bar had, until just the last few months, never taken action against Girardi. The State Bar issued a statement acknowledging that mistakes were made over years in the handling of complaints in this case. It seems likely that if the State Bar had instituted disciplinary proceedings years earlier when allegations of misconduct first surfaced, many clients might have avoided theft of their damage awards. Finally, the State Bar has also been operating without its required, Senate-confirmed chief trial counsel – the head of the State Bar's discipline program – for more than five years.

As a result of these events, this legislation conditions the State Bar's ability to charge licensing fees to California attorneys upon Senate confirmation of the State Bar's chief trial counsel position. The bill also, at this point, leaves the maximum fees that may be charged blank. This bill also, as proposed to be amended, seeks an outside, independent audit of the State Bar's discipline system to understand both what went wrong and how to ensure that those missteps do not happen again. Specifically, the amendments direct the State Auditor, by April 15, 2022 – in time for next year's attorney fee bill – 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. Additionally, in order to better support the state's legal services organizations that provide civil legal assistance to low-income Californians across the state, the bill, as proposed to be amended, seeks to codify the Legal Services Trust Fund Commission and give it greater autonomy in operations. Finally, the bill deletes unnecessary governance restrictions on the California Lawyers Association, the attorney trade association which separated from the State Bar as the result of SB 36 (Jackson), Chap. 422, Stats. 2017.

In support of the bill, the author states:

In 2019, after years of requests from the State Bar to increase the annual license fee, the Legislature approved a significant increase in the licensing fee paid by attorneys for 2020. The 2020 fee increase was less than half of what the State Bar originally sought and instead reflected an amount justified by the analysis of the State Auditor and Legislative Analyst's Office. The fee approved for 2021 was \$34 less for active attorneys than it was in 2020.

It is clear from the State Auditor's April 29, 2021 audit report that there are serious issues with how the State Bar has managed its system for investigating and disciplining attorneys. The State Bar has been managing its discipline system without a Senate confirmed chief trial counsel for over five years. In order to ensure that the State Bar actually follows through with the Senate confirmation process as required by statute, SB 211 prohibits the State Bar from charging active and inactive attorneys a licensing fee for 2022 unless and until the Senate confirms the appointment of the chief trial counsel. I also amended out the \$395 active attorney licensing fee for 2022 and \$97.40 inactive attorney licensing fee so the Legislature can reassess what an appropriate licensing fee should be.

Background on the Bar. Attorneys who wish to practice law in California generally must be admitted and licensed in this state by the State Bar. (Cal. Const., Art. VI, Sec. 9.) The State Bar of California is the largest bar in the country, with approximately 193,000 active licensees and 69,000 inactive licensees. The total number of State Bar licensees is above 280,000, which includes 2,310 judge-licensees and 16,135 licensees who are “not eligible to practice law.” (<http://members.calbar.ca.gov/search/demographics.aspx>.)

The mission of the State Bar is “to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and support of efforts for greater access to, and inclusion in, the legal system.” (<http://www.calbar.ca.gov/About-Us/Our-Mission>.) Pursuant to statute, “[p]rotection 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 of California and the board of trustees 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.” (Section 6001.1.)

Return of the former Executive Director. The Bar Board of Trustees recently rehired its former Executive Director Leah Wilson, who had left in January 2020 to pursue other interests. Since that time, the Bar has relied on an interim executive director – Donna Hershkowitz – while Leah Wilson continued to work for the State Bar on a contractual basis. The State Bar has now entered a four-year contract with Ms. Wilson, with an annual salary of \$298,280 and a guarantee that her salary will remain at least five percent above the highest subordinate staff and will receive all cost-of-living adjustments afforded to other executive staff. Additionally, she is eligible for an annual merit salary increase at the discretion of the Board. By comparison, the Chief Justice of the California Supreme Court earns \$288,266 annually (data reported is from 2019), the Governor currently earns \$209,747, and the Attorney General earns \$182,189, though the latter two will receive a 4.2 percent increase in December (still well below the salary of the Bar’s executive director). (California Citizen’s Compensation Commission, *available at* <http://www.calhr.ca.gov/cccc/pages/cccc-salaries.aspx>; California State Controller, Government Compensation in California, *available at* <http://publicpay.ca.gov/Reports/State/StateEntity.aspx?entityid=3852>.) The Chief Justice, the Governor, and the Attorney General all supervise *significantly* more employees than the Bar’s executive director. The contract provides that the executive director is an at-will employee “who serves solely at the pleasure and discretion of the Board” and that either the State Bar or the executive director may terminate the contract with or without cause with 30 days’ notice.

No Senate-confirmed Chief Trial Counsel for the last five years and the bill makes licensing fees contingent on confirmation. The chief trial counsel position at the State Bar, which requires Senate confirmation, has been open for over five years, with an acting person currently in the position. The chief trial counsel is the top prosecutor in the State Bar’s discipline system, which reviews complaints of attorney misconduct and the unauthorized practice of law, conducts investigations, files discipline charges, and prosecutes cases in the State Bar Court. In frustration at the length of the vacancy and the failure of the State Bar to obtain Senate confirmation of the critical position – and significant concerns about the State Bar’s discipline program, discussed below – the current version of the bill, which passed the Senate on a 37-0 vote, prohibits the State Bar from charging an annual license fee for active and inactive licensees for 2022 and beyond, unless and until the Senate confirms the appointment of a chief trial counsel. As of the

date of the writing of this analysis, that position remains open and the Board continues to search for an appropriate candidate with the help of a search firm.

The State Bar has withdrawn its support of the bill due to the removal of the fee amount from the bill and the fees being conditioned on Senate confirmation of the chief trial counsel. The State Bar writes that those provisions “undermine the reforms that the Board of Trustees has been directing, make it impossible to plan, and create tremendous uncertainty for State Bar employees.” The State Bar adds:

To be sure, the State Bar has challenges that the Board needs to and is addressing. But we cannot pursue change and improvement when basic funding for the organization is at risk. We reach out to the Legislature with a request to partner with us to provide the State Bar with the funding it needs not only to continue regular operations but continue the reforms and changes the Board has pursued since I joined the Board in 2016.

In recent years the State Bar has made considerable progress on a number of key priorities. In 2018, the State Bar implemented a case prioritization system to ensure that disciplinary resources are focused on those cases that pose the greatest harm to the public, including the most vulnerable. The State Bar also established an enforcement unit dedicated to addressing the unauthorized practice of law, a problem which is especially severe in immigrant communities. In 2020, the State Bar published its first report card on diversity in the legal profession and released a study on the justice gap in California. The Board of Trustees has already acted on both of these reports to enhance diversity in the profession and provide greater access to justice.

Although we cannot support SB 211 in its current form, we look forward to continued partnership with the Legislature as we continue to work toward our shared goals of protecting the public, enhancing access to justice, and diversifying the legal profession.

While the current version of the bill leaves blank the maximum amount of fees that the Board may charge active and inactive attorneys, it is anticipated that, as this bill moves forward, those blanks will be filled in. Given the information on the State Bar’s finances available to this Committee, it is likely that if and when the maximum fees are added back to the bill, they will be the same as last year’s – \$395 for active attorneys and \$97.40 for inactive attorneys for a total maximum fees of \$470 and \$137.40, respectively.

State Auditor’s biennial report on the State Bar’s performance reveals significant concerns with its discipline program, including an 87 percent increase in the backlog of discipline cases. As stated above, the State Bar’s highest priority is the protection of the public. To the extent that protection of the public means quickly rooting out dishonest or incompetent attorneys, the State Bar is falling behind at its key mission, according to the State Auditor. The Auditor is required by law to conduct a performance audit every two years of the State Bar’s operations. (Section 6145 (b).) In its latest biannual audit of the State Bar, the State Auditor found that changes made to improve the State Bar’s discipline system actually significantly reduced its efficiency and that its annual discipline report does not provide all required information and is of less value to its stakeholders, including the Legislature. (California 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).) The State Auditor found:

- Beginning in 2016, the State Bar reorganized the staffing for its discipline system, in part by converting its discipline staff from specialists to generalists and promoting some of its most senior attorneys to full-time supervisors. However, these actions did not fully address the audit recommendations and statutory requirements that originally prompted the State Bar to review its discipline system.
- Following the reorganization, the State Bar has experienced longer case processing times and an increasing backlog of discipline cases [generally cases that remain pending six months from receipt]. In fact, the State Bar's backlog grew by fully 87 percent from the end of December 2015 to the end of June 2020. 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 State Bar has not effectively monitored the impact of its reorganization because it does not adequately track performance benchmarks for its discipline system. (*Id.* at 11.)

Additionally, the average duration for conducting discipline investigations increased by 56 percent from 2015 to 2020. The State Bar asserted that the 87 percent increase in the backlog and the 56 percent in case processing times may be due to their new prioritization of higher priority cases – those that present a high potential for serious harm to the public. However, the State Auditor found that the average time to process cases raised for both high and low priority cases – 14 percent for high priority cases and 21 percent for low-priority cases. (*Id.* at 16.) And while discipline cases may be increasing, cases where attorneys are disciplined are “dramatically lower,” with cases that resulted in discipline against an attorney dropping from five percent in 2015 to just three percent in 2019. (*Ibid.*) The State Auditor sums up its concerns with the discipline data and the State Bar's explanations as follows:

Because the State Bar cannot definitively explain why discipline has decreased, we are concerned that the decline has continued even as the State Bar began prioritizing the processing of more serious cases in 2018. . . .

The increase in the backlog and the time to complete investigations, despite the decline in discipline, indicate that the State Bar's reorganization has not improved its efficiency or effectiveness. Nonetheless, in 2019 the State Bar abandoned a plan to evaluate the results of its reorganization. However, the factors we describe throughout this section—an increase in the average number of cases in the investigation phase, an increase in case processing times, and an increase in the backlog of discipline cases—suggest that unless the State Bar takes steps to address its current process, its backlog will continue to increase. (*Id.* at 17.)

The State Bar disagreed with some of the State Auditor's findings, writing:

The State Bar generally agrees with many of the California State Auditor's recommendations for improvement and has already begun implementing some of them. However, we also strongly disagree with several statements made in the report. Perhaps the most important point of disagreement is the audit's assertion that changes to the structure of the discipline system have reduced its efficiency. We believe that the State Bar has made substantial progress in recent years to improve both the efficiency and the effectiveness of the discipline system. (State Bar of California, *Statement in Response to the California State Auditor's April 2021 Report.*)

Two years ago, the Legislature approved the State bar's request to raise fees substantially on attorneys, increasing the total fee for active attorneys from \$430 to \$544, in part to fund additional discipline staff – \$13 of every active attorney's licensing fees goes to fund additional discipline staff. It may well be that the new staff were not hired in time to have their results show up in this audit, but the State Auditor found that while the Bar hired 19 new discipline staff in 2019 and 2020 and formed a new discipline team in September 2020, it had not yet studied the impact of the team on the caseload or the backlog, so at this point it is premature to know whether the fee increase will actually result in a more effective attorney discipline system.

The Senate Judiciary Committee noted that the "State Auditor's findings are not surprising in light of the fact that the State Bar does not have a chief trial counsel that has been confirmed by the Senate. In fact, it has been over five years since the State Bar has had a Senate confirmed chief trial counsel working at the State Bar."

The State Auditor also found that:

- The State Bar does not fully and consistently present required information in its discipline report, limiting the ability of stakeholders to evaluate its administration of its discipline system.
- The deadline established in state law for submitting the annual discipline report limits the amount of time the Legislature has to assess the State Bar's performance before deliberating on the annual fee bill. (*Id.* at 21.)

As the result of its audit, the State Auditor made recommendations for the State Bar and also made a few recommendations for the Legislature, including:

- Clarify state law on the discipline backlog, including adding the number of complicated matters that were pending after 12 months; and
- Require the discipline report to cover the state fiscal year (July 1 to June 30) and be submitted by October 31st annual, with a report on both period for the year the Bar changes reporting periods. (*Id.* at 18-19, 25-26.)

Finally, the Auditor also reviewed issues that this Committee has been concerned about in prior years. It found that the State Bar had an adequate amount of reserves in its general fund, so that no additional fees are necessary from licensees to maintain an adequate reserve, which the Bar had requested last year. Additionally, while the Bar has reduced its annual debt service by \$1.2 million annually by refinancing the loan on its Los Angeles building, it was not maximizing the use of its San Francisco office space, citing a Bar-commissioned space usage study that "identified a 20 percent vacancy rate for its staff's workspace and a low usage rate for many of its conference rooms." (*Id.* at 31.) However, given the COVID-19 pandemic causing many S.F. workers – both those who work for the State Bar and others – to now work remotely, the Bar notes that is unclear how successful it will be at leasing office space in San Francisco.

Numerous questions have been raised about the management of the State Bar's discipline process, in particular about its handling of decades of complaints against attorney Thomas Girardi. Questions and concerns about the State Bar's discipline process do not stop with the State Auditor's latest report. Near the end of 2020, the legal career of prominent trial attorney Thomas Girardi imploded after a federal judge accused him of stealing at least \$2 million from

his clients – widows and orphans whose family members died in the Boeing 737-MAX plane crash in Indonesia. The judge referred the case to federal prosecutors for criminal investigation, froze Girardi's assets, and ordered a trustee be appointed to oversee whatever assets Girardi's law firm had in order to repay the victims' families the money that was wrongfully taken from them. (Matt Hamilton and Harriet Ryan, *Judge freezes assets of famed L.A. Lawyer Tom Girardi, citing million unpaid to clients*, Los Angeles Times (Dec. 14, 2020).)

It now appears that serious and repeated allegations of misconduct against Thomas Girardi were reported to the State Bar over a 40 year period, but the Bar had, until just the last few months, never taken action against him. According to the Los Angeles Times:

The warning signs about Tom Girardi flashed year after year, allegations that he skimmed settlement money, inflated costs, abandoned clients and cheated colleagues.

The vaunted Los Angeles trial lawyer, a regular on "Real Housewives of Beverly Hills," and his firm were sued more than a hundred times between the 1980s and last year, with at least half of those cases asserting misconduct in his law practice.

Yet through it all, Girardi's record with the State Bar of California, the government agency that regulates attorneys, remained pristine. The bar took no action to warn the public despite receiving what The Times has learned were multiple complaints. That spotless license allowed him to continue marketing himself as one of the nation's most renowned civil lawyers, and to sign up thousands of new clients, some of whom would later say he absconded with millions of dollars of their settlement money.

In the wake of the stunning collapse this winter of Girardi's law firm and reputation, The Times investigated how he was able to stay in the bar's good graces for decades while attorneys accused of similar wrongdoing were reprimanded, suspended or disbarred. (Harriet Ryan and Matt Hamilton, *Real Housewives' Tom Girardi seduced California State Bar*, Los Angeles Times (March 6, 2021).)

The Los Angeles Times' investigation revealed that Mr. Girardi and his firm had been sued at least 45 times for malpractice or misappropriation of client funds, but the State Bar did nothing. The Times article speculated that this may have been because Mr. Girardi maintained very close relationships with State Bar employees, particularly investigator Tom Layton, as well as former executive director Joe Dunn and several former presidents of the Bar. A confidential (but later made public) investigation of the Bar performed by the law firm Munger, Tolles & Olsen in response to a complaint by the Bar's then Chief Trial Council Jayne Kim of improper activities involving Joe Dunn and Tom Layton, among others, found that "[a]lthough we have not uncovered instances of any sort of misconduct involving or untoward influence exerted by Tom Girardi or his firm, the closeness of the relationship between some senior managers and that firm does raise potentially troubling perceptions that the Board should take action to rectify going forward." (Mark Helm and Bart Williams, *Independent Investigation for the State Bar of California: Summary of Findings and Recommendations* (undated, but completed in 2014), p. 20.) The report's recommendations included:

The Board should instruct senior management how important it is to cultivate and maintain a public perception that the Bar represents all attorneys, and that no one law firm or segment of the bar has a special position. It should further instruct management that its conduct to date

may have created an unhealthy perception that Girardi and his firm have special influence or receive special treatment – and that management should take steps to dispel and avoid contributing further to this perception in the future. (*Id.* at 32.)

Tom Girardi was placed in a conservatorship in March, due apparently to Alzheimer’s disease; and, as a result, the State Bar placed him on inactive status. After the L.A. Times article about Mr. Girardi came out, the State Bar filed discipline charges against him in late March, “formally accusing him of misappropriating millions in client funds, dishonesty and other acts of moral turpitude in his law practice,” although the State Bar had likely been working on the case against Mr. Girardi for a while. (Harriet Ryan and Matt Hamilton, *State bar charges famed attorney Tom Girardi with misappropriating millions from clients*, Los Angeles Times (March 30, 2021).) According to the L.A. Times, he owes \$56 million to creditors, lenders, and to clients. The Bar’s charges involved multiple times where Mr. Girardi failed to pay his clients their financial settlements he recovered in litigation.

While the State Bar’s current discipline charges against Mr. Girardi could well be too little, too late, since he no longer appears to be capable of practicing law or have insufficient recoverable funds to repay the clients whose funds he allegedly stole. The State Bar commissioned an internal audit to review its handling of the past complaints against him. Following a closed session, the Board released a statement, which acknowledged that the State Bar had made mistakes in the handling of complaints against Mr. Girardi over many decades:

Following review of an audit of past complaints filed against Attorney Thomas V. Girardi, the State Bar Board of Trustees is announcing measures responsive to the confidential audit’s findings. Mr. Girardi is the subject of pending disciplinary charges resulting from complaints filed in late 2020 regarding misappropriation of client funds.

In light of public interest in this matter, the Board and State Bar leadership concluded that it is important to provide some information to the public regarding the outcome of the audit and reforms that have been or will be undertaken as a result.

The audit, commissioned by Interim Chief Trial Counsel Melanie Lawrence, *revealed mistakes made in some investigations over the many decades of Mr. Girardi’s career going back some 40 years and spanning the tenure of many Chief Trial Counsels*. In particular, the audit identified significant issues regarding the Office of Chief Trial Counsel’s investigation and evaluation of high-dollar, high-volume trust accounts. Among immediate actions the Office of Chief Trial Counsel (OCTC) is considering in response to the audit, with input from the Board, is retention of accounting experts to examine high-volume, high-dollar client trust accounts to detect improprieties. The audit also signaled the need for automated tools to assist OCTC in identifying patterns of behavior that could signal possible misconduct.

In addition, Board leadership has asked staff to investigate new and innovative means of regulating and monitoring attorney-client trust accounts to prevent misappropriations from occurring in the first place. These enhanced measures could include requiring regular independent audits of attorney-client trust accounts and/or required use of monitored escrow accounts. The results of this study will be presented to the Board for consideration. (State Bar, *Board of Trustees Announces Actions Following Special Disciplinary Audit* (June 10, 2021) (emphasis added).)

Given the Bar’s acknowledged long-standing “mistakes” with respect to complaints against Thomas Girardi, and perhaps unknown others, this bill seeks an outside, independent audit of

the Bar's discipline system to prevent future "mistakes," and acts of corruption and undue influence, and to ensure that the Bar's discipline system treats all attorneys equally. The Bar has acknowledged 40 years of mistakes in its handling of complaints against Mr. Girardi, which only came to public light because of the actions of a federal court judge. It is unclear if this was just a mistake involving one bad actor or a more systemic problem of the Bar's discipline system. Certainly Committee staff has heard allegations over the years that the Bar targets solo practitioners, disproportionally attorneys of color, and ignores inappropriate activity by well-connected attorneys. The Legislature today does not have enough information to know what went wrong in the case of Mr. Girardi, whether more attorneys were able to escape accountability for their dishonest or incompetent behavior, and whether other, less well-connected attorneys were inappropriately targeted for discipline.

Therefore, this bill, as proposed to be amended, seeks an outside, independent audit of the Bar's discipline system to get answer to those questions. Specifically, the amendments direct the State Auditor, by April 15, 2022 – in time for next year's attorney fee legislation, 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. Specifically, this audit will analyze whether 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. Additionally, the bill asks the State Auditor to consider possible options for the State Bar to more proactively protect the public, including, to the extent possible, the appropriateness of an independent discipline monitor to more closely review the State Bar's discipline process, an independent ombudsperson to assist the public, and other options to better protect the public. It is hoped that, with the results of the audit next year, the Legislature can take necessary steps to ensure that the State Bar's discipline system protects the public and not well-connected attorneys.

Discriminatory impact of the State Bar's discipline system. One of the issues of concern, raised by the Bar itself in 2019, is the discriminatory impact that the Bar's disciplinary process has. A study commissioned by the Bar analyzed data for 116,363 attorneys admitted between 1990 and 2009 and found that, between 1990 and 2018:

The probation rate for Black male attorneys over this time period was 3.2%, compared to 0.9% for White male attorneys. The disbarment/resignation rate for Black male attorneys was 3.9% compared to 1.0% for White males. Race differences were smaller for Hispanic males and for Black and Hispanic females compared to White females. There were no meaningful differences for Asians compared to Whites. (George Frakas, *Discrepancies by Race and Gender in Attorney Discipline by the State Bar of California: An Empirical Analysis* (Oct. 31, 2019), p. 2.)

The study found that the racial and gender difference could be explained, for attorneys with at least one investigation, stating that "the number of investigations opened, the % of investigations without counsel, and the number of prior disciplines might fully explain [] racial and gender differences in these outcomes." (*Ibid.*) However, all of those characteristics could potentially be impacted by racial and gender differences.

These findings are also consistent with results from a Bar review of its moral character determination, a key part of admission to the Bar. In the Background Paper to this Committee's

2019 “How Can California Increase the Diversity of the Legal Profession and the Judiciary?” hearing, Committee staff wrote:

An analysis of a random sampling of 100 applicants denied admission to the Bar based on moral character in the past ten years revealed that people of color with no criminal history are significantly more likely to be denied admission based on moral character than white applicants. Fully 42 percent of people of color in the sample of applicants denied admission due to moral character did not have a history of criminal offense, compared with only 30 percent of white applicants. These results suggest that the subjective assessment of moral character beyond evidence of criminal behavior may present an additional obstacle to applicants of color, but a larger sample of applicants unsuccessful due to moral character is necessary to confirm these findings. The State Bar’s 2019-2020 Diversity & Inclusion Plan highlights intended expansion of ongoing efforts to provide staff involved in the moral character determination with training on mitigating implicit bias. Whether such training is effective in eliminating bias in the moral character determination process remains to be seen. (Assembly Judiciary Committee, *How Can California Increase the Diversity of the Legal Profession and the Judiciary?*, Background Paper (May 14, 2019) p. 17.)

As a result of concerns about systemic racism and discriminatory impacts of the State Bar’s admissions process and its discipline system, this bill, as proposed to be amended, directs the State Auditor, as part of its audit of the discipline system discussed above, to also examine any data trends that could suggest racial or gender inequities in outcomes from the discipline process.

This bill eliminates the California Lawyers Association’s statutory governance provisions that limit its ability to self-govern. Until 2018, the State Bar had worn two hats – regulatory agency and professional trade association. California had a unified bar, which meant that the State Bar was both the regulatory arm of the state, as well as a mandatory attorney trade association. Attorneys who wished to practice law in the state had to join the State Bar and their fees covered both the regulatory arm and the trade association (although the trade association “Sections” charged additional fees). This arrangement was unique among professions licensed by the State of California. The State Bar was “deunified” in 2018 and the 16 Sections and the California Young Lawyers Association were spun off into their own private, nonprofit organization called the California Lawyers Association (CLA). (SB 36 (Jackson), Chap. 422, Stats. 2017.)

SB 36 included several governance provisions that the Sections themselves insisted upon during the deunification. This Committee had, at the time, strongly suggested that the restrictive governance provisions in SB 36 be removed, and in fact worked at that time to reduce their prescriptiveness, but the Sections prevailed. In particular, Section 6056 (b) now requires that the CLA bylaws ensure that (1) the governing board include one representative of each of the 16 Sections and one from the California Young Lawyers Association; (2) each governing board member have equal voting power on the governing board; (3) the governing board may only terminate individual Sections or add new Sections by a two-thirds vote. CLA now asks that these governance provisions be eliminated from statute so that CLA can have “more flexibility to self-govern, thereby bringing the association more in line with other independent professional associations.” This bill does just that by eliminating the above provisions.

This bill, as proposed to be amended, codifies the Legal Services Trust Fund Commission to better support legal services organizations across the state and improve access to justice. The State Bar has, for many years, administered grants to over 100 nonprofit organizations in California that provide free civil legal assistance to low-income individuals. (Section 6210 *et seq.*) The legal aid that is delivered, and the means of delivery, vary in nature, and can include direct services to clients, impact litigation on behalf of client populations, and the provision of legal expertise in a particular area of law to other legal services organizations. Most legal services nonprofits also partner with, and rely heavily on, pro bono legal assistance from the private bar. Funds for these grants come from three main sources: financial support provided by the state through the Equal Access Fund, which was significantly increased in this year's budget (the Equal Access Fund received \$70 million in this year's budget and \$40 million ongoing) and is by far the largest component of funding; interest on lawyers' trust accounts (IOLTA); and voluntary contributions by California attorneys.

While the State Bar ratifies the decisions, nearly all of the work of administering the program and determining which legal services organizations get funded and what they receive is performed by the Legal Services Trust Fund Commission (LSTFC), an uncodified commission of the State Bar. The LSTFC has 21 voting members (15 lawyers and six non-attorney members) and three nonvoting judges. At least two of the non-attorney members must be eligible to receive legal services from qualified programs. The Board appoints 14 voting members, and the Chair of the Judicial Council (the Chief Justice) appoints the other seven voting members and the three non-voting judges. The LSTFC is staffed by State Bar employees.

In 2018, the State Bar established the Legal Services Trust Fund Commission Stakeholder Process Working Group to review the functioning of the LSTFC, with a possible eye toward reducing its membership and its role in administering grants to legal services organizations, expanding the role of the State Bar, and changing the grant structure to provide more discretionary grants determined by the State Bar and less basic funding to the legal service organizations that provide the backbone of support to low-income Californians in need of civil legal assistance in matters such as housing, family law and domestic violence, guardianships and conservatorships, and public benefits. The legal services community raised significant concerns about the possible restructuring and, as a result, few changes were made by the working group.

However, concerns have remained in the legal services community that the State Bar could in the future alter the basic framework that provides support to legal services programs in every county in the state. Given the significant contribution that the state makes to funding legal services programs through the state budget, and the need to properly oversee the expenditure of those funds and ensure support for legal services programs across the state, this bill, as proposed to be amended, codifies the LSTFC within the State Bar. It clarifies the LSTFC's members and length of terms, and who makes the appointments (ten for the Chair of the Judicial Council, six for the Board, two for the Assembly, two for the Senate, and four for the LSTFC itself). The proposed amendments also set forth the duties of the LSTFC, including establishing rules, consistent with existing law, to determine organization eligibility and grant making decisions, and monitor and evaluate a recipient's compliance with requirements and grant terms based on criteria established by the LSTFC.

It should be noted that this Committee recently passed the author's SB 498, which increases the income limit for free legal services from the current 125 percent of the federal poverty line to 200 percent of the federal poverty line and exempts compensation to veterans for service-related

disabilities from this income calculation. As of the date of the writing of this analysis, that bill is on the consent calendar on the Assembly Floor.

ARGUMENTS IN SUPPORT: The Civil Justice Association of California supports the bill, writing:

SB 211 would impose a fee-collection ban until the state Senate confirms the State Bar's choice for chief trial counsel. This ban provides needed oversight for a governing body that has been negligent in their management of disciplinary actions. The Bar's failure to exercise this important role has allowed attorneys operating outside the scope of professional standards to continue in their practice of law to the detriment of their clients. A prime example of this is former attorney Thomas Girardi who misused client funds, leaving his victims out \$23 million dollars, because of delayed action on the part of the State Bar.

It is in the best interest of the public and the legal profession that the regulating body responsible for overseeing disciplinary action of attorneys be held accountable for properly managing their investigative system and removing unethical actors in a timely manner.

REGISTERED SUPPORT / OPPOSITION:

Support

Civil Justice Association of California

Opposition

None on file

Analysis Prepared by: Leora Gershenzon / JUD. / (916) 319-2334