

Public comment letter received from Vicken O. Berjikian, Esq.

June 12, 2013

Attention: Ms. Dina DiLoreto
State Bar of California
180 Howard Street
San Francisco, CA 94105

To: Regulation, Admissions and Discipline Oversight Committee

From: Vicken O. Berjikian, Attorney at Law

Public Comment

Subject: Proposal re: Refusal-of-Admission and Suspension for Tax Delinquency (AB 1424, Stats. 2011, And Ch. 455). Request for Release for Public Comment

Dear Ms. DiLoreto, Ladies and Gentlemen of the Committee,

The State Bar of California is proposing to suspend from practice members whose names appear on the Franchise Tax Board's "500 delinquent Taxpayers" list.

I respectfully object to the implementation of this proposal on the ground that Government Code 494.5 is unconstitutional as it is written and unconstitutional as it applies.

Following are my analyses of my contention.

SECTION 494.5 OF THE GOVERNMENT CODE MAKES IT DISCRETIONARY FOR THE STATE BAR WHETHER OR NOT TO SUSPEND A LICENSEE

In your Proposal ("Background", page 1-2) you say the following: "Business and Professions Code section 494.5... to provide for [...] suspending the license of, a named tax delinquent.'

This statement is not correct.

Section 494.5, in paragraph 1 mandates that all professional licenses be suspended. It says, in relevant part, that a State Government licensing entity: "shall suspend a license if a licensee's name is included on a certified list".

In paragraph 3, the statute provides an exception to the State Bar. The language of paragraph 3 changes the "shall" to "may": "The State Bar of California may recommend to refuse to issue, reactive, reinstate, or renew a license and may recommend to suspend a license if a licensee's name is included on a certified list."

The Random House English Dictionary, 2nd ed. Defines the word “shall” as: must; is or are obligated to.

The definition of the word “may” is: used to express possibility, opportunity, permission, ability or power.

Family Code section 17520 does not contain this exception provided to the State Bar as it is in Code 494.5.

When a new statute does not obligate the State Bar to take adverse action against its members, then any action should be justified using conventional State Bar disciplinary guidelines.

When the legislature chose to provide the State Bar this discretion, it did not do so without reason. Section 3 is not a typographical error. The legislature had a purpose in including Section 3. The State Bar cannot arbitrarily choose and follow the mandates of Section 1 of Code 494.5 and ignore the specifics of section 3. Doing so, the State Bar is acting contrary to the apparent intent of the legislature.

In as much as members of the State Bar attempt to religiously follow the dictates of rules of professional conduct imposed by the State Bar, and in interpreting disciplinary rules give utmost deference to the difference between the meaning of “shall” and “may”, the same members expect that the State Bar return the courtesy to them when their licenses and livelihoods are at stake.

SECTION 494.5 IS NOT PATTERNED AFTER FAMILY CODE SECTION 17520 AS ASSERTED IN THE PROPOSAL, PARAGRAPH 1

Government Code 494.5 lacks all the Due Process protections that are embedded in Family Code 17520.

Section 17250 of the Family Code mandates the suspension of licenses of parents who are delinquent in child support payment.

Primarily, the obligation to pay child support derives from court orders.

Section (b) of that act provides for the suspension of licenses of individuals “against whom a support order or judgment has been rendered by, or registered in, a court of this state, and who are not in compliance with that order or judgment” (emphasis added).

Further, the same code allows for a judicial review of alleged delinquency. Section (h) provides “the local child support agency shall immediately send a release to the appropriate board” when “the applicant has filed and served a request for judicial review” (subsection 3).

The amounts involved in the child support matters are mostly in the several thousand dollars range, which, in a worst case scenario a person may beg or borrow and pay off the delinquency and be in compliance.

Further, not paying court-ordered child support when the person actually can, involves moral turpitude, and subsequently harsh consequences in retribution may be justified.

Government Code 494.5 has totally contrary attributes and lacks all the Due Process protections embedded in family Code 17520.

The amount of tax considered delinquent is not rendered by a court order. It is solely decided by the Franchise Tax Board (hereinafter FTB). Unlike Family Code 17520 which reflects the true and exact amount of a delinquency, the FTB amounts include substantial percentages of penalties and interest which at times far exceed the actual and original tax liability.

Further, 494.5 does not provide an opportunity for a court review with an automatic removal from the list upon initiation of such review. The only remedies provided in this Code are either that the amount asked for is paid in full, or a payment arrangement is made, or a declaration of hardship is established.

The FTB acts as a prosecutor and a judge and executioner. It decides how much the amount asked for is, and it reviews the applications for payment arrangements or for hardship status, and it decides whether to accept the requested relief or not (which are routinely denied) and then renders judgment that destroys the careers of hard-working professionals. This violates the separation of powers doctrine.

In *Laisne v. California Board of Optometry*, 19 Cal.2d 831, 1942 The California Supreme Court found this behavior unconstitutional:

“That there can be no rigid line over which one department cannot traverse has been recognized since the first set of the doctrine of separation of powers. There still remains, however, this unalterable fact: when one department or an agency thereof exercises the complete power that has been by the Constitution expressly limited to another, then such action violates the implied mandate of the Constitution.”

THE RESEARCH AND FACT FINDING PROCESS BY THE STATE BAR THAT LED TO THE DRAFTING OF THE PROPOSAL IS LACKING

The State Bar Proposal provides on page 2 paragraph 3, the following remark; “In light of this data, there is a need for a new rule of court and new State Bar rule governing suspension of attorneys who are tax delinquents under section 494.5.”

It is not clear what is meant by the phrase “in light of this”. Does it mean that 11 attorneys who owe \$3 million to the FTB are somehow of depraved character? Does the Bar Committee really know the circumstances of, and reasons for, these obligations? Imputing moral judgment by just looking at random figures is equivalent to forming an opinion and deciding somebody’s destiny by reading tea leaves.

If the 11 or 15 attorneys who allegedly owe \$3 million to the FTB deserve to be suspended, will any action also be taken by the State Bar against California State Bar member attorneys who advised Microsoft, Chevron, Bank of America and numerous other multinational corporations to pay practically no taxes to the United States and help them keep billions in profit? Refer to: Mark Gongloff “*Apple, Google, Microsoft Avoid Taxes by Keeping Billions In Profits Offshore: Senate Report*” The Huffington post, Posted: 09/20/2012, at: http://www.huffingtonpost.com/2012/09/20/microsoft-taxes-profits-offshore_n_1901398.html

Further, Federal law makes it a misdemeanor not to file a Federal income tax return (26 USC § 7203). Why is the State Bar not planning to inquire as to how many lawyers have not filed annual tax returns? Why not require that members sign a “declaration of tax return filing” at time of annual membership renewals?

Is the State Bar attempting to “save face” with the public by sacrificing the careers of a dozen or so middle-class attorneys and keep a clear conscience by considering them “collateral damage”?

A CIVIL STATUTE MAY NOT APPLY RETROACTIVELY UNLESS SPECIFICALLY MENTIONED SO IN THE STATUTE ITSELF

Section 494.5 took effect July 2012. By its language taxpayers who owed more than \$100,000 to the FTB would be included on the list and their driver’s licenses and professional licenses would be suspended.

At the time this statute was enacted, thousands of people already owed over \$100,000. Those individuals did not have knowledge or suspicion of the coming of this statute. Had they known of the coming of this statute years ago when their obligations were close to or less than a hundred thousand dollars, they might have been able to resolve their tax problems. Once the amounts had reached the several hundred thousand mark, the legislature enacted 494.5 and surprised hundreds of individuals by exposing them to extremely harsh punishment.

Now the FTB is punishing taxpayers who owed much over \$100,000 from years ago. The FTB thus is punishing a past behavior that was not punishable by the laws of the past.

The statute as it is written can only be effective to punish delinquent taxpayers who pass the \$100,000 mark after the date of its enactment, and cannot apply to those who had already passed that mark before its enactment.

The California Supreme court in *Fox v. Alexis*, 38 Cal.3d 621 (1985) provided:

“To apply these new statutes to conduct which occurred prior to their effective enactment is “to apply the new law of today to the conduct of yesterday,” a basic form of retroactive application of the statute. (See *Pitts v. Perluss* (1962) 58 Cal.2d 824, 836, 27 Cal. Rptr. 19, 377 P.2d 83.)”

The California Supreme Court in *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, (1988) provided:

“Both this court and the Courts of Appeal have generally commenced analysis of the question whether a statute applies retroactively with a restatement of the fundamental principle that “legislative enactments are generally presumed to operate prospectively and not retroactively unless Legislature expresses a different intention.” (at 1208)

And also,

“these numerous precedents demonstrate that California continues to adhere to the time-honored principle, codified by Legislature in Civil Code section 3 and similar provisions, that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application. As we explain below, we conclude that the Legislature did not intend to depart from the established rule that new statutes are to be applied prospectively only; the laws in effect at the time of the offense control revocation of petitioner’s license. The Department therefore erred in revoking petitioner’s license.” (at 1209-1209).

THE STATE BAR MAY NOT TAKE PROPERTY WITHOUT DUE PROCESS OF LAW

The 14th amendment to the United States Constitution provides: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

According to the Proposal, the State Bar is attempting to suspend licenses merely by administrative fiat, which constitutes an abrogation of due process of law.

The State Bar may not take property without due process of law. The license to practice law is a “vested property right”.

The California Supreme Court in *Laisne v. California State Board of Optometry*, 19 Cal. 2d 831 (1942) provided:

“The right of a licensed optometrist to practice optometry was a ‘vested property right’ in the constitutional sense” 148 Cal. 590

The California Supreme Court, in *Hewitt v. Board of Medical Examiners*, S. F. 4, 414 (1906) provided:

“The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured.”

The U.S. Supreme Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) said:

“Article I, §10, cl. 1 prohibits States from passing another type of retroactive legislation, laws “impairing the Obligation of Contracts.” The Fifth Amendment’s Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a “public use” and upon payment of “just compensation.” The prohibitions on “Bills of Attainder” in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. *See, e.g. United States v. Brown*, 381 U.S. 437, 456-462 (1965). The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute’s prospective application under the Clause “may not suffice” to warrant its retroactive application. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, (1976).”

The Supreme Court of California provided in *Hallinin v. State Bar of California*, 65 Cal. 2d 447, footnote 3, (1966):

“Stricter substantive and procedural requirements necessary to sustain an adverse decision in a disciplinary proceeding are frequently rationalized on the theory that an attorney has a vested property right in maintaining a practice already established [...]. Thus, for example, the highest court in Connecticut stated in 1906 that, “to disbar an attorney is to deprive him of what, within the meaning of our constitutions of government, may fairly be regarded as property.”

The Supreme Court of the United States in *Schwartz v. Board of Bar Examiners of the State of New Mexico*, 77 S. Ct. 752, (1957), provided:

“A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.”

OWING MONEY TO THE FRANCHISE TAX BOARD DOES NOT IMPLY MORAL DEPRAVITY

Allow me to explain the normal and customary method that a person would owe taxes to the FTB.

The FTB normally does not audit taxpayers. The IRS does. When an audit results in a deficiency assessment, the tax payer ends up owing the IRS further taxes.

The IRS code is currently three million words long, added to that are the Treasury Regulations in the thousands attempting to interpret the IRS code, and added to those the almost infinite number of Tax Court, District Court, Court of Appeal and Supreme Court decisions interpreting the IRS code and Regulations.

Small businesses at times would fall prey to this complexity of the tax system. Even tax professionals do not have all the answers. When a small business is audited it is not unusual that a deficiency assessment could be made. Most lawyers are small businesses.

When the IRS makes its deficiency assessment, the information is transmitted to the FTB, and the FTB automatically produces its own assessment.

If the individual being assessed does not have the funds to pay the amount immediately, that amount will increase astronomically over a short period of time because of a combination of penalties and interests.

As seen from the above, owing funds to the FTB does not necessarily imply greed or an attempt not to pay the government.

One can safely assume that those who are on the delinquency list are there because they cannot pay the amounts asked, and not because they do not want to pay.

If an appreciable number who are on the list could pay and avoid harsh consequences, then how is it that out of the combined (individual and corporate) amount of \$169,601,455.50 only \$368,880.59 is paid after six months? The amount paid is 0.02 cents on each dollar asked.

Those whose names were removed from the list appears to be a result of filing for bankruptcy (Revenue and Taxation Code 19195 (e) (3)).

IT IS NOT CORRECT THAT THE PASSAGE OF THE PROPOSAL WILL HAVE NO FISCAL OR PERSONNEL IMPACT

The legal system of our country is based on the Common law principles. Statues are not the final law. Statutes are constantly interpreted, reinterpreted, modified, changed, found unconstitutional, or left as they are by the courts.

The application of this statute is still in its infancy. We cannot easily determine how many legal challenges have been filed against its operation yet, nor how many are about to be filed. It is clear that no reasonable person would let go of a professional license without litigation. This is even truer when attorneys' licenses are being threatened.

What reason allows us to believe that in case this proposal passes and attorneys start losing their rights to practice, they would just go home, have fun with their kids, and say "well, that's how the cookie crumbles" and sit in front of the TV and watch HBO?

Potential litigation in Superior Courts and appeals do not come without a manifest fiscal impact.

CONCLUSION

In light of the above, it is respectfully requested that the State Bar heed to the legislature's manifest intent at not making section 494.5 mandatory to the State Bar, and not pass the proposed Refusal-of-Admission and Suspension for Tax Delinquency (AB 1424, States. 2011, Ch. 455).

The legislature gave the State Bar the golden opportunity to opt out of this oppressive and experimental statute which is inefficient in raising revenues and intertwined with potentially very costly litigation prospects.

Respectfully submitted,

/s/

Vicken Berjikian
Attorney at Law