



The State Bar of *California*

Report of the 2020 Task Force on Governance in the Public Interest

**Recommendations for Applying Principles of Risk-Based Regulation to
the Legal Profession in California**

May 15, 2020

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Introduction

Business & Professions Code section 6001.2 requires that every three years the State Bar convene a Task Force on Governance in the Public Interest (Governance Task Force or GTF) to “prepare and submit a report to the Supreme Court, the Governor, and the Assembly and Senate Committees on Judiciary.” The report is required to include “recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys,” and to “make suggestions to the Board of Trustees regarding possible additions to, or revisions of, the strategic plan.”¹

Previous reports of the GTF were issued in 2011, 2016, and 2017. Consistent with the needs of the State Bar at the time, those reports had a predominantly *inward* focus. The reports looked closely at the organizational structure of the State Bar and addressed issues such as the size of the Board of Trustees (Board); the selection process and terms of Trustees; the role of elected Trustees on the Board; the operational purpose and scope of authority of committees, commissions, and councils (subentities) supporting the work of the Bar; and the allocation of functions between the Board, State Bar staff, and subentities.

Recommendations contained in previous reports were brought to the Board of Trustees and discussed in open sessions of Board meetings. Where recommendations could be carried out by the State Bar, the Board directed State Bar staff to develop implementation plans and monitored progress through regular reports delivered at Board meetings on the status of the implementation plans.²

Due to the organizational complexity of recommendations from the 2017 GTF report, implementation continued well into 2018. A detailed, follow-up report on the scope of work of

¹ The complete text of Business and Professions Code section 6001.2 is provided as Attachment A. While Business and Professions Code section 6001.2(c) also requires the GTF to include “suggestions to the Board of Trustees regarding other issues requested from time to time by the Legislature,” for the 2020 report, no such request has been made by the Legislature.

² See Board of Trustees meeting, September 13, 2018, “705 - Appendix I Subentity Review: Report and Recommendation;” Program Committee meeting, August 17, 2018, “III.A – Appendix I Review: Opportunities for Improving Governance and Service Delivery”; Board of Trustees meeting, July 19 & 20, 2018, “701 – Appendix I Review: Framework for Board Committee Discussions”;

State Bar subentities was presented to the Board in September 2018, generating recommendations for additional consultation with stakeholders in certain areas. Committees were formed to further evaluate the implementation of recommendations from the 2017 GTF report in those areas. As of this writing, a small number of the recommendations from 2017 regarding subentities remains the subject of on-going implementation and reporting to the Board.³

Recognizing the myriad organizational and structural changes undertaken by the State Bar in the last three years, many in direct response to recommendations of previous GTF reports, the 2020 report of the GTF shifts its attention from internal governance of the State Bar to regulation of the legal profession, a primary function of the State Bar. In addition to adopting an outward focus for the 2020 report of the GTF, this report also looks forward rather than backward to explore opportunities for governance of the discipline system through *risk-based regulation*.

After discussing the sources and methods of the GTF, this report begins by defining terms and briefly reviewing the literature on risk-based regulation. The report then looks at research on risk-based regulation in the medical profession and in the legal profession in Australia. The comparative perspectives on risk-based regulation are examined to identify lessons that may be applied to the regulation of the legal profession in California. The report concludes with a set of recommendations on concrete steps the State Bar can take to identify opportunities for supplementing its current regulatory work with tools that seek to prevent harm before it occurs.

Sources and Methods of the Task Force

The 2020 GTF held four publicly-noticed meetings beginning in 2019. In September and November 2019, the Task Force met to establish the direction for the 2020 GTF at meetings that coincided with meetings of the Board. In 2020 the GTF held two additional meetings, one in San Francisco on February 9, and the other in Los Angeles on March 5. During the meetings in

³ See Board of Trustees meeting, May 14, 2020, “704 – Approval of Moral Character Decision Making Tools and Related Documents,” and “705 – Report on and Approval of Recommendations Regarding the California Bar Examination Studies.”

2020, members of the Task Force received presentations from two scholars who have conducted research relevant to the topic of risk-based regulation.

At its February 9 meeting, the Task Force received a presentation from David Studdert, Professor of Medicine and Law at Stanford University. A leading expert in the fields of health law and empirical legal research, Professor Studdert oriented the Task Force to the topic of risk-based regulation and explained how risk-based regulation is being evaluated for application to the field of medicine.

At its March 5 meeting, the Task Force received a presentation from Tara Sklar, Professor of Health Law and Director of the Health Law and Policy Program at the University of Arizona, James E. Rogers College of Law. Formerly a professor and Director of Aging Programs at the University of Melbourne, Professor Sklar has extended the research on risk-based regulation in medicine into the field of law. Working with a team of researchers and the Victorian Legal Services Board in Australia, Professor Sklar led an innovative study to determine the characteristics of attorneys who were disciplined in the Australian state of Victoria.

In coordination with the public meetings of the Governance Task Force, State Bar staff identified scholarly research relevant to the topic of risk-based regulation and made the literature available to Task Force members. Following the presentation by Professor Sklar, State Bar staff began synthesizing the presentations and research to identify opportunities for the application of risk-based regulation to the legal profession in California. At that time the Task Force also identified a third, potentially useful point of comparison from which to draw lessons: risk mitigation as practiced by third-party legal malpractice insurers and as applied directly by law firms in evaluating and mitigating their own risk.

With the intervention of the novel coronavirus and the imposition of stay at home orders almost immediately following the March Task Force meeting, resources were diverted from further research on this line of inquiry. As a result, this report is limited to only the first two points of comparison: risk-based regulation in medicine, and in the legal profession in Australia. One of the recommendations of this report, however, is to finalize the data collection necessary

to determine what the State Bar can learn from legal malpractice insurers and private law firms to improve risk mitigation across the profession as a whole.

A Brief Overview of Risk-Based Regulation

Many of the ideas behind risk-based regulation appear to have emerged from efforts in the 1990s to “reinvent government” in the United States and the United Kingdom. Even where the particulars of the initiatives in the two countries diverged, they shared the broad goals of making government more efficient, transparent, and accountable.⁴

David Osborne and Ted Gaebler’s 1992 book, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, became a touch-stone for the Clinton administration’s National Performance Review (NPR) led by then Vice President Gore. This federal initiative, and many state and local initiatives that followed, focused on:

- Clarifying the goals of regulation and establishing targets based on these outcomes;
- Using performance metrics to gauge the effectiveness of regulation;
- Encouraging government agencies to operate more entrepreneurially;
- Reducing the regulatory burden on business; and
- Treating citizens as customers.

At roughly the same time that ideas related to reinventing government were being implemented in the United States, “risk-based” approaches to regulation were being touted in the United Kingdom with similar goals. Governmental reforms in the UK grouped under the heading of the New Public Management (NPM) involved:

- Establishing explicit standards and measures of performance;
- Emphasizing private-sector styles of management practice;
- Promoting hands-on professional management; and

⁴ See “The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation,” Bridget M. Hunter, March, 2005, Discussion Paper No. 33, Center for Analysis of Risk and Regulation, London School of Economics and Political Science, p. 2.

- Emphasizing greater discipline and parsimony in resource use.⁵

Building on the work of the National Performance Review and the New Public Management, risk-based regulation is generally understood to encompass the following broad principles:

- Avoid the blanket application of rules, regulations, and standards;
- Identify those issues in the regulatory field that present the greatest risk;
- Deploy resources accordingly;
- Apply cost-benefit analysis to establish priorities.

For the State Bar of California, a risk-based regulatory approach may be usefully contrasted with the most common source of work for the attorney discipline system: the client-based complaint. The vast majority of the work of California's attorney discipline system is driven by responding to complaints of attorney misconduct filed by clients. As a result, by definition, the discipline system is typically reactive, seeking to address misconduct – whether through discipline or, in the work of the Client Security Fund, through compensation of clients – only after harm has been done.⁶ A risk-based approach, however, focuses on the prevention and mitigation of harm.

More specifically, and for purposes of this report, risk-based regulation may be distinguished by following features:

- Using *data* to inform regulatory decision making;
- Focusing on *caseloads* in addition to cases;
- *Prioritizing* regulation and enforcement based on risk.⁷

⁵ See “The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation,” Bridget M. Hunter, March, 2005, Discussion Paper No. 33, Center for Analysis of Risk and Regulation, London School of Economics and Political Science.

⁶ One obvious exception to the tendency of the discipline system to be reactive is the Lawyer Assistance Program (LAP). Additionally the work of the State Bar in providing guidance to attorneys on ethics questions, and the requirements to satisfy minimum continuing legal education requirements and new attorney training requirements serve as prophylactic measures to prevent misconduct.

⁷ The section draws on the presentation given by Professor David Studdert to the Governance in the Public Interest Task Force on February 7, 2020, in San Francisco, California.

In the context of the State Bar’s regulatory mission, the risk that is being regulated is relatively straightforward: risk of harm to the public from attorney malfeasance or nonfeasance. A number of additional points, however, should be made to clarify the elements of risk-based regulation as used in this report.

Using data to inform regulatory decision making does not imply the elimination of individual judgment and its replacement with algorithms or blind adherence to decision matrices. Rather, as Professor Studderdt emphasized in his presentation to the GTF, the emphasis in this statement needs to be placed on both data and informed. Risk-based regulation involves the use of data to understand the population better and to intervene where appropriate.

Determinations about exactly where to intervene and how must always be informed judgments, evaluated in light of regulatory policy, priorities, and resource constraints.

Focusing on caseloads in addition to cases also merits some additional clarification, especially in the regulatory context of the State Bar of California. The focus on individual cases is deeply embedded in the US justice system.⁸ Individual circumstances and the evidence related to individual cases are all critical factors that weigh in the balance of criminal cases and disciplinary decisions. Unlike individual cases, however, *caseloads* provide valuable information by highlighting tendencies, common features among cases, and correlations between risks and individual characteristics of the regulated population.

It may be that the key distinction between a focus on caseloads and a focus on individual cases relates to the specific function being performed by the regulator. For those who prosecute and adjudicate cases against individuals, broad relationships, tendencies, and correlations may not be of much value. For administrators and policy makers, in contrast, looking at the bigger picture to understand the caseload may be exceptionally valuable for deploying resources and setting policy.

⁸ One of the four key principles of court administration articulated by the National Center for State Courts is that “every case receives individual attention [and] individual attention is proportional to need,” see *Achieving High Performance: A Framework for Courts*, 2010 p. 2. Brian Ostrom and Roger Hanson, National Center for State Courts Research Division.

The *prioritization* of enforcement based on risk has actually advanced significantly in recent years at the State Bar. The introduction in 2017 of a prioritization framework in the Office of Chief Trial Counsel and its further refinement and operationalization throughout 2018 and 2019 have produced measurable changes in the processing of cases that pose the greatest threat to the public.⁹ These measures, however, remain reactive, essential to the management of the caseload, but still focused on attorney misconduct *post hoc*. How the State Bar can prioritize regulation to *prevent* harm will require additional evaluation of factors that *predict* the risk of attorney misconduct.

This report now turns to two comparative cases that may provide guidance for exploring the application of risk-based regulation to the regulation of the legal profession in California. The next section looks at research conducted to predict the filing of complaints and medical malpractice claims against physicians. The section following that looks at research conducted on the attorney discipline system in the state of Victoria, Australia. Lessons from both of these comparative cases are then explored and synthesized to develop recommendations for the California State Bar.

Applying Risk Based Regulation in Other Contexts

Professors David Studdert and Tara Sklar presented the findings of their research to the Governance Task Force and engaged in a dialogue with Task Force members. The summary that follows synthesizes these two presentations and additional scholarly research on the topic of risk-based regulation, including papers written by Professors Studdert and Sklar.¹⁰ A list of references is provided as Attachment A.

Risk-Based Regulation in Medicine

For a number of reasons the medical profession provides an especially useful point of comparison to the regulation of the legal profession. In both medicine and the law, there is a

⁹ See the 2019 Annual Discipline Report.

¹⁰ Additional information that informs this discussion is drawn from “Prevalence and Characteristics of Physicians Prone to Malpractice Claims,” Studdert et. al., *New England Journal of Medicine*, January 28, 2016, and; “Characteristics of Lawyers Who Are Subject to Complaints and Misconduct Findings,” Sklar, et. al., *Journal of Empirical Legal Studies*, April 17, 2019.

power imbalance in the relationship between client and professional. This power imbalance is compounded by the fact that clients often seek out both attorneys and medical professionals during times of crisis, when they are in a particularly vulnerable position.

In addition to these similarities, there are also similarities in the manner in which the two professions are regulated. Both are commonly regulated through the licensing and registration of professionals, and oversight of both professions is driven largely by complaints of consumers to the regulatory agency.

Although considerably more research has been conducted on the topic of risk-based regulation in the field of medicine than in the legal profession, risk-based regulation in medicine appears to be still in its infancy. Scholarly writing on the topic focuses on data collection and the development of models for predicting which physicians will receive complaints or be sued for malpractice. The literature does not show how these models have been incorporated into regulatory practice, leaving something of a gap between the theory and practice of applying risk-based regulation to the medical profession.

Statistical models looking at risks in medicine tend to focus on two types of risk: the risk of the regulatory body receiving a complaint against a physician, and the risk of a physician receiving a claim for malpractice. Using various statistical techniques, the studies generally quantify the likelihood of physicians receiving complaints or being the subject of malpractice claims based on the measured characteristics of the physicians.

Certain demographic and professional characteristics appear repeatedly in the research exploring the traits associated with an increased risk of complaints and malpractice claims, including:

- Gender: male physicians have a greater risk than female physicians;
- Age: older physicians have a greater risk than younger physicians;
- Specialty: depending on the study, certain specialties such as internal medicine, and obstetrics and gynecology place a physician at greater risk;

- Profession: within the medical field, in one study doctors appeared to be at greater risk than nurses and midwives;¹¹
- Prior complaints and prior malpractice claims: medical practitioners with previous claims and prior malpractice complaints are at greater risk of receiving additional complaints and claims.

Prior complaints and malpractice claims appear to be among the strongest predictors of additional complaints and claims. Doctors who had two claims for malpractice were twice as likely to receive a subsequent claim for malpractice; and doctors with three malpractice claims were more than three times as likely to receive a subsequent claim. By the time a doctor had been the subject of six or more malpractice claims, the likelihood of receiving a subsequent claim had grown to *twelve times* the likelihood of receiving a subsequent claim, compared to a physician who had received only one malpractice claim.¹²

Moving from the individual characteristics that predict complaints and claims in the medical field to the *caseload* perspective on the data, an important finding in the research is that complaints and claims are almost always concentrated. That is, a relatively small proportion of physicians and other medical professionals are responsible for a disproportionately large number of the total complaints and claims.

According to one study in Australia of formal patient complaints against doctors, only three percent of the physician population was responsible for over half of all complaints lodged in a 10-year period.¹³ Another study of malpractice claims found that one percent of physicians accounted for almost one third of all malpractice claims that resulted in a payment over a 10-

¹¹ "Outcomes of Notifications to Health Practitioner Boards: A Retrospective Cohort Study," Matthew J. Spittal, et al., *BMC Medicine*, 2016, 14:198.

¹² " See "Identification of Practitioners at High Risk of Complaints to Health Profession Regulators," Matthew J. Spittal, et al., *BMC Health Service Research*, 2019, 19:380, p. 4.

¹³ See "Identification of doctors at risk of recurrent complaints: a national study of healthcare complaints in Australia," Bismark MM, Spittal MJ, Gurrin LC, et al., *BMJ Quality and Safety*, 2013;22:532–40.

year period.¹⁴ In theory, this clustering of complaints, sometimes referred to as a “hot-spot,” could help the regulator to prioritize resources.

The fact of clustering, however, does not provide guidance about what the regulator should do. Instead, further analysis is needed to understand qualitatively the issues that led to the complaints, the specifics of the medical practice, and the individual practitioner’s complaint history before a response can be developed.¹⁵

Two additional findings in the medical literature merit consideration in evaluating the potential for applying the principles of risk-based regulation to the legal profession. First, one study found that physicians who had been the subject of malpractice claims were more likely to leave the profession. However, the remaining physicians who did not leave the profession were more likely to move into solo practice than doctors who had no malpractice claims against them. Research on attorneys has found that solo practice is, itself, a risk factor for discipline. If attorneys prove to be more likely to move into solo practice following discipline, that would appear to place the attorneys at even greater risk of misconduct and discipline.

The second finding of interest to the regulation of the legal profession relates to the collection of data on complaint type. The type of work performed by different medical professionals was associated with different types of misconduct. For example, complaints against pharmacists were clustered around issues related to the dispensing and use of drugs. Complaints against psychologists, in contrast, involved issues of communication, confidentiality, and sexual misconduct. Although research conducted on attorney complaints and misconduct has already pointed to the potential value of collecting information on the type of law that an attorney practices – the equivalent of a physician’s specialty – this finding in medicine points to the value of collecting additional data beyond simply the specialty. The development of an intervention would, likely, rely on knowing more about the specifics of the complaints and misconduct.

¹⁴ See “Prevalence and characteristics of physicians prone to malpractice claims,” Studdert DM, Bismark MM, Mello MM, Singh H, Spittal MJ, *New England Journal of Medicine*, 2016; 374: 354-62.

¹⁵ In much of the research there is also acknowledgement that the statistical models lack an important piece of information: the volume of cases or patients underlying the complaints or malpractice claims. Generally, however, the statistical findings are robust enough that it seems unlikely that the sheer volume of caseload is the unexplained variable driving the differences in complaints and malpractice claims.

Risk-Based Regulation in the Australian Legal System

A recent study on the characteristics of attorneys who were disciplined in the state of Victoria, Australia, reflects a substantial amount of cross pollination from the medical literature on risk-based regulation. Many of the same researchers who have collected and evaluated data on physicians subject to complaints and malpractice claims collaborated on the study of the legal profession in Australia, and the research published on the topic evaluates attorney misconduct through a similar analytic lens.¹⁶

Professor Tara Sklar presented to the GTF on March 5, 2020. Professor Sklar's presentation called out a number of similarities with research on risk-based regulation in the medical profession. Professor Sklar also sought to draw explicit lessons for the State Bar in evaluating the potential application of risk-based regulation in California.

Among the similarities between patterns of complaints and discipline in the legal profession and those in medicine are:

- Gender: male attorneys were at a greater risk than female attorneys;
- Age: older attorneys were at a greater risk than younger attorneys;
- Firm size: attorneys working in smaller firms were at greater risk than those working in larger firms;
- Prior complaints and prior discipline: attorneys who had already been the subject of complaints or already been disciplined were at much greater risk than attorneys with no such prior record.

A number of additional factors that increased the risk of attorneys receiving complaints or being disciplined that were unique to the legal profession, included:

¹⁶ See "Characteristics of Lawyers Who Are Subject to Complaints and Misconduct Findings," Sklar, et al., *Journal of Empirical Legal Studies* as Volume 16, Issue 2, 2019. The discussion that follows draws on the presentation by Professor Sklar to the Governance Task Force and on the published research paper.

- Trust-account authority: attorneys with trust-account authority were at greater risk than their counterparts who lacked that authority;
- Practice location: attorneys working in non-urban locations were at greater risk for complaints, but not greater risk for discipline;
- Practice type: attorneys who practiced in an “incorporated legal practice” were at greater risk for complaints than attorneys who worked in a “traditional legal practice,” and even greater risk than attorneys working as in-house counsel, or at a “community legal center.” This effect, however, is less clear for the risk of attorneys being disciplined.

The research on the legal profession in Australia provided additional insight into the factors driving complaints and discipline against attorneys by adding a qualitative component to the quantitative analysis. The research team in Australia conducted a detailed case file review of 32 “complaint-prone” lawyers: practitioners who were each the subject of 20 or more complaints and of at least one ruling from the Victorian Civil and Administrative Tribunal (VCAT, the equivalent of being subject to discipline in the California context).

These 32 complaint-prone lawyers were the subject of 91 orders by the VCAT, providing the research team with a rich dataset of official determinations relating to the misconduct. Using tribunal and court decisions, the research team looked more closely at, and coded, the personal and situational variables related to the cases. Using the official record, the research team was also able to track information on aggravating and mitigating factors in the cases.

The qualitative findings related to complaint-prone lawyers reinforced the findings of the quantitative analysis in a number of areas, and supplemented the findings in others. The same characteristics that were found in the quantitative analysis were seen in the complaint-prone lawyers who were disproportionately male, older, more likely to be working as solo and small practitioners, and more likely to be working in a non-urban location.¹⁷

¹⁷ These findings were not reported in Sklar, et al., 2019. They were presented at the meeting of the Governance in the Public Interest Task Force on March 5, 2020, and reviewed for fidelity of presentation here by Professor Sklar.

Table 1: The Same Characteristics Identified as Risks in the General Population Were Shared by the Most Complaint-Prone Lawyers

	% General Population	% Complaint-Prone
Male	50	90
Older (56-years and older)	7	20
Solo practitioner	50	70
Non-Urban Location	6	16

The qualitative research also revealed patterns that had not been uncovered in the quantitative analysis. The complaint-prone lawyers appeared to be “ill-equipped generalists” whose efforts to be a “Jack or Jill of all trades” led to difficulties for one quarter of this group. The complaint-prone lawyers also appeared frequently to have both personal and professional relationships with clients resulting in “blurred professional boundaries.” Finally, they were professionally isolated. Although they insisted on the quality of their work and their character in their defense, they were unable to provide references to support those assertions.

What emerges from the qualitative portion of the research is a profile of attorneys who work on the edge. Personal and professional problems contribute to one another and multiply. Over half of the sample of 32 complaint-prone attorneys had some form of health impairment (mostly depression).¹⁸ Half of the lawyers in the sample were in financial distress, and one third had recently experienced either a death or serious illness in the family.

When a complaint is lodged against a lawyer, it appears to compound the stress already weighing on the subject attorney. Citing a discipline case from 2013, one Legal Services Commissioner noted:

¹⁸ Surprisingly, substance abuse was rare, with only one of the 32 attorneys exhibiting it.

It is all too common for misconduct to arise from a failure to deal effectively with the disciplinary complaint and the investigation process, rather than the subject matter of the complaint itself.¹⁹

Opportunities and Challenges of Applying Risk-Based Regulation to the Legal Profession in California

Risk-based regulation, as conceived in medicine and in the legal profession in Australia generally views support of professionals as compatible with protection of the public. Reduction of harm and the prevention of harm before it occur generally involve supporting the professionals, helping them refocus careers that may have taken a wrong turn, all of which should improve protection vulnerable clients. If, in the process, these measures allowed for better allocation of scarce regulatory resources, reduced overall complaints, and improved the satisfaction of clients, then implementing a program of risk-based regulation would seem imperative.

The challenge lies in translating the principles into specific policies and programs. However attractive the principles of risk-based regulation may be, the exact mechanisms for achieving its benefits are less certain. At present, the application of risk-based regulation to both the medical and the legal professions is largely in the phase of research and development.

Nonetheless, as this report has shown, there appears to be unrealized potential for developing risk-based solutions to apply to the oversight of the legal profession. Moving to recommendations for how to proceed, a recent paper by Professor Sklar and others provides some guidance ranging from legal education and well-being programs for at-risk attorneys to enhanced services and oversight for vulnerable clients. Any such programs developed by the State Bar of California would need to be tailored to fit the profile of the particular “problem lawyer” which would require additional data collection and analysis.²⁰ Follow-up work would

¹⁹ Legal Services Commissioner v MacGregor, 2013.

²⁰ Tara Sklar et al, . *Vulnerability to legal misconduct: a profile of problem lawyers in Victoria, Australia*. (2020) See Figure 3, page 14. Recommendations are listed on pages 16-17.

then be needed to evaluate the efficacy of programs and modify them as needed to ensure that they achieve their intended purpose.

To assist in charting the course for future work in this area, it will be useful to review four “pre-requisites for useful risk-based regulation” identified by Professor David Studdert in his presentation to the Governance Task Force. According to Professor Studdert, the following conditions are prerequisites for a regulatory body to utilize risk-based regulation:

- The events of interest (e.g. complaints, malpractice claims) in the regulated population must have a distribution that is amenable to prediction;
- There must be variables available in routinely-collected data that are strongly associated with the events of interest;
- Those associations must support reliable prediction;
- There must be a feasible and effective intervention to follow.

Distribution of “Events of Interest”

Risk-based regulation depends on the clustering of misconduct in specific populations. Preliminary evaluation of misconduct data among attorneys in California does reveal a clustering of these events of interest. Barely 28 percent of all attorneys are responsible for all complaints lodged with the State Bar of California. Similar to the data on physicians and attorneys in Australia, male attorneys are more likely than female attorneys to receive complaints or be disbarred; attorneys in solo and small practices are more likely to be disciplined than attorneys who work in larger firms or work in the public sector, and; prior complaints and prior discipline is associated with a greater likelihood of future discipline.

Research conducted to date on the factors that contribute to attorney discipline in California, however, has focused on two ends of the spectrum: complaints, which in most cases do not support further action by the State Bar, and the most severe types of sanctions for misconduct: probation and disbarment. A range of intermediate sanctions – resource letters, warnings, and reprimands – can and should be evaluated along with the most severe sanctions.

Another limitation of the State Bar's data on the distribution of events relates to the characteristics of attorneys' practice, the nature of the complaint, and possibly even information related to complaining witnesses. Data from Australia indicate that specific types of practice are more prone to complaints and also include information on the issue contained within the complaint.

All of this information would be useful to better understand the distribution of complaints and discipline against attorneys. However, while the Board recently approved the collection of additional data on attorneys' practice areas, these data are not yet available and will not be reported until 2021 at the earliest.

Routinely Collected Data

Risk-based regulation cannot be implemented successfully if it depends on extraordinary data collection efforts. Instead, the data used for identifying at-risk populations must be routinely collected information that is already in the possession of the regulator.

Recent decisions by the Board to require that licensed attorneys report additional information to the State Bar will be exceptionally useful for identifying the factors that contribute to an attorney's risk of receiving a complaint or being disciplined. In particular, new data reporting requirements related to practice area and practice type – the former relating to the legal subject matter practiced by the licensee, the latter relating to the characteristics of the licensee's legal practice, whether public or private, and type of firm.

In addition to using data on practice area and practice type directly, collecting this data may also provide information on career transitions from one practice area to another. If discipline in the legal profession leads attorneys to move into solo practice as malpractice claims appear to in the field of medicine, transitions to solo practice may be especially risky periods in an attorney's career, such as moving out of a large law firm with institutional support for important responsibilities performed by an attorney to a solo practice, or moving from the public sector to the private sector where new responsibilities may present themselves to an attorney.

Finally, one of the strongest predictors of future misconduct in almost any setting, whether the criminal justice system, the medical profession, or the legal profession, is previous misconduct. When attorneys are disciplined, the State Bar captures additional information that may be useful for developing prediction models and programs to support risk-based regulation.

Although the additional information gleaned through an investigation and prosecution of an attorney is not part of the larger universe of data “routinely collected” on all attorneys, it does constitute an important subset of data that is routinely collected. The State Bar should examine the validity and reliability of this information as well as the mechanisms used for capturing the data – whether in narrative form, or contained within a database of some kind – and consider systematizing this data collection to support risk-based regulation.

Stressful life events – financial distress, bereavement, relationship breakdown – were identified by both Professors Studdert and Sklar as risk factors for professional misconduct or harm to the client. The data showing the relationship between personal stress and misconduct in the study of the Australian legal system, however, was collected retrospectively, through a labor-intensive process of case file review. It’s unlikely that the State Bar could capture this type of data in real time for use in a prediction model.

Data on Associations and Predictive Models

Moving from observations of correlation among variables to predictive modeling involves conducting specific types of statistical analyses on the data. Once the data are available, the State Bar has staff with the expertise necessary to run these types of analyses and, at relatively little cost, could draw on additional external support to validate a predictive algorithm.

Following Professor Studdert’s overview of developing a predictive model, the key components of that process would be to:

- Run a multiple regression model that allows the State Bar to identify the variables with the most robust and the strongest predictive value;
- Use the variables identified to re-evaluate the data with a random sample of half of the original data set;

- Use the estimates derived from the evaluation of the random sample to develop weights that distinguish the predictive value of different variables;
- Conduct additional evaluation of the data set to determine sensitivity of the model and conduct ongoing refinement of the model.

Feasible and Effective Interventions

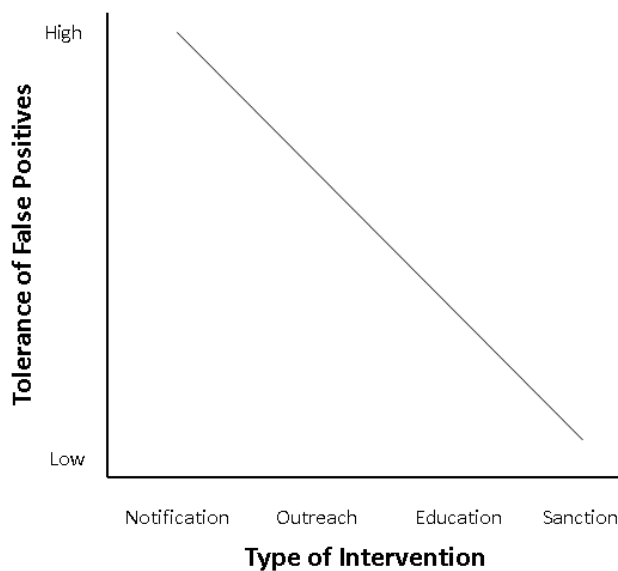
Evaluating interventions based on predictive models raises a number of important policy questions. To begin, because predictive models are necessarily probabilistic, there will always be a margin of error. A useful framework for assessing error in prediction is that of hypothesis testing, in which a distinction is made between false positives and false negatives.

In the regulation of the legal profession, a false positive would refer to those cases where a model *incorrectly* predicted misconduct. Because no model predicts with 100 percent accuracy, some unknown percentage of the population for which misconduct was predicted would not, actually, have engaged in misconduct. A false negative, on the other hand, would refer to those cases for which the model *failed to predict* misconduct and yet, misconduct occurred.

Figure 1, adapted from Studdert, shows how the distinction between false positives and false negatives comes into play when evaluating possible responses to predicted misconduct. Where there is any risk at all of a model falsely predicting misconduct – which is to say, in every known predictive model – the intervention cannot be punitive. Imposing sanctions based entirely on a predictive model needs to remain in the realm of dystopian science fiction.²¹ However, such a predictive model could be the basis of supportive interventions such as providing information, conducting outreach, and educating the regulated population about the risks, and providing resources to mitigate them.

²¹ Philip K. Dick's 1956 short story, "The Minority Report," involved a special "Pre Crime" police force that apprehended criminals based on foreknowledge of their crimes, and was popularized in a 2002 movie of the same name, directed by Steven Spielberg and starring Tom Cruise.

Figure 1: The more intrusive the sanction, the less tolerance there is for false positives



Recommendations

Based on the preceding, the State Bar appears to have a number of potentially viable options for further evaluating the potential benefits of risk-based regulation. The list below provides a menu of options to organize the different types of work that the State Bar might engage in to improve its regulation of the legal profession in California.

These recommendations will contribute to the development of prediction models similar to those found in the medical literature and in Australia. The models, in turn, would be used to identify programs and policies that can be tested to evaluate the efficacy of targeted, predictive regulation. State Bar staff should bring a proposal for incorporating risk-based regulation into the Strategic Plan at the next strategic planning session of the Board of Trustees in January, 2021.

Data Collection and Analysis

Potentially useful data for the development of risk-based regulation fall into a number of different categories.

Data on attorneys

The State Bar should continue evaluating existing data already contained in its administrative records to determine if it can be used for identifying attorneys who are at risk of misconduct.

Among the records that might prove useful are the data on addresses of attorneys. Even without the new requirements on data reporting, address change data may allow the State Bar to flag attorneys who have left a firm and moved into solo practice, or left the government sector. Using these data, the State could begin to evaluate the impact of these career moves on attorney risk.

The State Bar should clarify how it intends to capture data on an attorney's practice type. The findings on clustering of complaints and malpractice claims on particular specialties within the medical profession is suggestive of patterns that we would expect to see in the legal profession. Criminal law, family law, and high-volume tort practices have all been cited anecdotally as legal practices that may be especially susceptible to high-levels of client dissatisfaction that is not, necessarily, related to attorney misconduct. To utilize these data for risk-based regulation, however, it may be necessary to capture data on the subspecialties within these areas. For example, it's not clear if district attorneys are more at risk of complaints than public defenders within criminal law. Similarly, a family-law attorney specializing in adoption is probably not at the same risk as one specializing in divorce.

The State Bar should evaluate existing data that is collected on attorneys who are the subject of complaints. Although this type of data is not collected for all attorneys, a subset of data on attorneys who have received complaints may help to identify:

- How the data should be structured and captured in the future to create a model of those attorneys that may be most at risk of further complaints and misconduct;
- What the specific issues are that gave rise to the complaint and whether there is a relationship between the issue raised in the complaint and the type of law the attorney practices.

Data on clients

The State Bar should seek to build on its current measures of complaining witness satisfaction and begin looking qualitatively at complaints. More than two-thirds of all complaints from complaining witnesses result in the closing of the complaint without action being taken against the attorney suggesting that there is a large range of misunderstanding between a client's expectations and an attorney's obligations.

The State Bar should conduct a qualitative assessment of complaints including those that do *not* result in discipline and structure the data to better understand:

- The specific issues raised by complaining witnesses;
- The categories of complaints;

- The relationship between issues and attorney characteristics including practice type and legal specialty.

Using the data from this assessment, the State Bar should determine if educational material of some kind could be provided to clients or attorneys to encourage a clearer understanding of the possibilities and limits of an attorney's work and clarify the difference between attorney misconduct and an adverse outcome in a case or other causes of client dissatisfaction.

Pilot Programs

Using the data identified above, the State Bar should begin developing pilot interventions taking advantage of current vehicles of communication with attorneys and complaining witnesses:

- For attorneys, the State Bar should evaluate warning letters to determine the most effective way to nudge attorneys toward improvements in their practice including encouraging them to recognize and address the relationship between personal problems and professional misconduct;
- For complaining witnesses, the State Bar should evaluate the entire pathway from client dissatisfaction to the filing of a complaint and determine if alternative pathways might yield improvements in satisfaction with the discipline process.

Attachment A: Business and Professions Code 6001.2

DRAFT

State of California

BUSINESS AND PROFESSIONS CODE

Section 6001.2

6001.2. (a) On or before February 1, 2013, there shall be created within the State Bar a Governance in the Public Interest Task Force comprised of 7 members, including 6 members appointed as provided herein and the Chair of the State Bar. Two members shall be elected attorney members of the board of trustees who are selected by the elected attorney members, two members shall be attorney members of the board of trustees appointed by the Supreme Court who are selected by the Supreme Court appointees, and two members shall be public members of the board of trustees selected by the public members. The chair shall preside over its meetings, all of which shall be held consistent with Section 6026.5.

(b) On or before May 15, 2014, and every three years thereafter, the task force shall prepare and submit a report to the Supreme Court, the Governor, and the Assembly and Senate Committees on Judiciary that includes its recommendations for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys, to be reviewed by the Assembly and Senate Committees on Judiciary in their regular consideration of the annual State Bar fees measure. If the task force does not reach a consensus on all of the recommendations in its report, the dissenting members of the task force may prepare and submit a dissenting report to the same entities described in this subdivision, to be reviewed by the committees in the same manner.

(c) The task force shall make suggestions to the board of trustees regarding possible additions to, or revisions of, the strategic plan required by Section 6140.12. In addition, the task force shall also make suggestions to the board of trustees regarding other issues requested from time to time by the Legislature.

(d) This section shall become operative on January 1, 2013.

(Amended by Stats. 2018, Ch. 659, Sec. 4. (AB 3249) Effective January 1, 2019.)

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