



The State Bar of California

OPEN SESSION

AGENDA ITEM

704 SEPTEMBER 2020

DATE: September 24, 2020

TO: Members, Board of Trustees

FROM: Lisa Chavez, Director, Office of Research & Institutional Accountability

SUBJECT: State Bar Discipline System: Implementation of Changes to Address Disparity; Past and Planned Changes to Improve Efficiency, Process, and Experience; and Recommendation for Ad Hoc Commission on the Discipline System

EXECUTIVE SUMMARY

This agenda item follows up on the July 2020 Board of Trustees meeting at which the Board directed State Bar staff to evaluate and implement five changes to address the disparate discipline imposed on Black attorneys as recommended by Professor Christopher Robertson. This agenda item also describes the breadth and depth of organizational and operational changes that the Office of Chief Trial Counsel (OCTC) has undergone over the last decade. Finally, this agenda item describes the State Bar's current research agenda on the discipline system. It concludes with a recommendation for the formation for an ad hoc committee to take a comprehensive look at the discipline system to explore further changes that would address disparity and simultaneously enhance the effectiveness and efficiency of the system for protecting the public.

BACKGROUND

Public Protection and Disparate Discipline

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." In 2018, the State Legislature adopted language from the State Bar's mission statement and added it to the Business & Professions Code, thereby directly linking access and inclusion to the State Bar's public protection mission. Effective January 1, 2019, Business and

Professions Code section 6001.1 stated that “protection of the public, *which includes support for greater access to, and inclusion in, the legal system*, shall be the highest priority for the State Bar of California.”¹

At the same time that the Legislature codified the connection between public protection and issues of access and inclusion, the State Bar had begun scrutinizing the discipline system to evaluate whether there were disparate impacts of the discipline system on attorneys of color. Conducted by Professor George Farkas of the University of California, Irvine, a study presented to the Board of Trustees in November 2019 found that while Black, male attorneys are disbarred or placed on probation at rates above those of their white, male counterparts, the relationship between these outcomes and race appeared to be related to a number of factors. Specifically, Black, male attorneys were subject to more complaints, were less likely to be represented by counsel when under investigation, and had more prior discipline than white, male attorneys.²

Following receipt of the report on disparities in the discipline system, the Board directed staff to develop an action plan to address the factors that appear to result in disproportionate discipline of Black, male attorneys. The State Bar contracted with Professor Christopher Robertson to evaluate the findings of Professor Farkas’ report, study the discipline system more closely, and make recommendations.

Professor Robertson, N. Neal Pike Scholar in Health & Disability Law at Boston University and a specialist in issues of diversity and inclusion and organizational design, presented preliminary observations about a possible course of action at the January 2020 Board planning session. The Board then directed staff to continue working with Professor Robertson to evaluate the preliminary observations more closely, conduct more detailed investigation, and return to the Board with fully developed recommendations. Professor Robertson presented those recommendations at the July 2020 Board meeting. The Board then directed staff to implement a number of the recommendations and return with a status report at its next meeting.

Before updating the Board on the status of these recommendations, it will be useful to provide an overview of the major organizational changes that have occurred in OCTC over the last decade. This overview is intended to contextualize the current work on disparities in the discipline system and clarify the extensive, ongoing changes that have taken place in OCTC.

Organizational Change in OCTC

OCTC is the single largest division in the State Bar with about half of all State Bar employees working in it. OCTC is also the lynchpin of the discipline system. OCTC staff processes approximately 16,000 complaints of misconduct each year and another roughly 4,000 notifications of potential ethical violations related to criminal cases, client trust accounting, and

¹ See 2017–2022 Strategic Plan <https://www.calbar.ca.gov/Portals/0/documents/bog/Updated-2017-2022-Strategic-Plan.pdf> and Assembly Bill 3249, Chaptered September 21, 2018, emphasis added.

² See Open Session Agenda Item 705, “Report on Disparities in the Discipline System,” Board of Trustees Meeting, November 14, 2019, <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000025090.pdf>

the unauthorized practice of law. Because of its centrality to the State Bar's mission of public protection, OCTC is also possibly the most closely scrutinized of the State Bar's divisions.

Partially as a result of this scrutiny, in recent years, OCTC has undergone numerous, major organizational changes. Approximately half of the recommendations contained in the Bureau of State Audits' 2015 report focused directly on OCTC; and 17 recommendations contained in the legislatively mandated workforce planning report of 2016 were also directed toward OCTC.³ Finally, it should be noted that some of the most significant changes in OCTC in recent years were initiated by OCTC leadership in their ongoing effort to streamline operations and ensure that the State Bar fulfilled its public protection mandate. Case prioritization, one of the most important changes introduced in OCTC in recent years was developed entirely by OCTC leadership.

DISCUSSION

The following narrative describes the changes the State Bar has made or is in the process of making in response to the directive of the Board of Trustees on recommendations made by Professor Robertson discussed above. It also discusses the dozens of OCTC initiatives, policies, and procedures the State Bar has implemented over the last several years.

IMPLEMENTATION OF CHANGES TO ADDRESS DISPARITIES

At the July 2020 Board meeting, staff presented the Board with 12 potential reforms developed by Professor Robertson that address disparate discipline imposed on Black attorneys. The Board directed staff to engage in five projects that address these reforms. Below is a summary of work completed to date.

Archive Five Years of Closed Complaints

One of the variables Professor Farkas found to be most strongly associated with attorney disbarment is the number of prior investigations opened against an attorney. Investigations are opened by OCTC attorneys when a complaint alleges misconduct that would be grounds for discipline if proven to be true. Given the disproportionate number of complaints filed against Black, male attorneys, this raised the question of whether prior complaints factor into the decision-making process in a manner that influences the determination to move a case forward for investigation.

Professor Robertson recommended that OCTC archive complaints closed without discipline, such that they would be accessed only rarely and only upon written application to a supervising attorney. The Board directed staff as follows:

³ See California State Auditor Report, 2015-030, "State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability," <https://www.bsa.ca.gov/pdfs/reports/2015-030.pdf>; also see "State Bar of California Workforce Planning: Report to the Office of the Executive Director," May 10, 2016, http://www.calbar.ca.gov/Portals/0/documents/reports/2016_Workforce_Planning_Report_May_15.pdf

OCTC should implement an interim reform that prior, closed complaints more than five years-old should not ordinarily be considered in evaluating and investigating a new complaint, with exceptions permitted based on a written showing to an attorney at the level of Assistant Chief Trial Counsel or higher within OCTC. Prior closed complaints for purposes of this resolution do not include those resolved with a warning letter, directional letter, resource letter or agreement in lieu of discipline.

OCTC has worked with the Office of Research and Institutional Accountability and the Office of Information Technology to develop a system for “archiving” complaints within Odyssey, the State Bar’s case management system. The following project milestones have been met:

- Notification of all OCTC staff of the Board’s resolution. Interim Chief Trial Counsel Melanie Lawrence notified all OCTC staff of the Board directive on July 17, 2020. She directed staff not to consider 5+ year-old closed complaints, with the exceptions noted in the resolution, for the purpose of evaluating or investigating a new complaint and informed them that this directive was effective immediately.
- Identification of over 513,000 complaints more than five years-old that closed without discipline. The Office of Research and Institutional Accountability identified this list of cases and identified, with OCTC, several categories of cases that need further consideration as to whether they should be archived. Examples of these cases include cases where the Respondent has another open, active case in the investigation, pre-filing, or post-filing stage; or cases of deceased, disbarred or resigned respondents. Other issues to resolve include determining how to calculate the case age for archiving cases that were previously reopened (i.e., should it be based on the original open date or the subsequent reopen date?) and how to handle additional mail from complainants when their original complaint was filed more than five years ago. OCTC is currently reviewing these issues with the chair and vice-chair of the Regulation and Discipline Committee and expects to resolve them shortly.
- Initiation of discussions with Odyssey’s vendor, Tyler Technologies, to create a programming routine that will automatically archive complaints while retaining access for certain staff.

Staff continues to work on this project and will keep the Board of Trustees apprised of its status.

Research on Complaints Not Leading to Discipline

Professor Farkas found that while approximately 32 percent of white, male attorneys had at least one complaint filed against them, almost half (46 percent) of Black, male attorneys had at least one complaint filed against them. We have no way of knowing the extent to which racism or bias of complaining witnesses may have contributed to the disparate percentage of complaints filed against Black, male attorneys. Nonetheless, the disproportionate filing of complaints against Black attorneys, by itself, increases the odds of discipline.

Professor Robertson proposed exploring a proactive nondisciplinary system to support attorneys at higher risk of future complaints. Such a system would include “upstream” prevention strategies and interventions that range from outreach efforts to formal programs. Outreach efforts could include providing information, educating the regulated population about legal misconduct and the State Bar’s role to regulate it, and offering resources to mitigate it.

This potential reform dovetails with the work of the 2020 Governance in the Public Interest Task Force whose final report recommended analyzing closed complaints to identify attorneys at risk of future complaints. Professor Robertson recommended exploring closed complaints to inform the development of such a system as a first step. The Board directed staff as follows:

Evaluate complaints closed without discipline to determine whether specific issues can be identified that allow for proactive regulation.

To work on this project, the Office of Research and Institutional Accountability has retained the consulting services of University of Arizona Professor Tara Sklar, an expert in risk-based regulation who also led an innovative study to determine the characteristics of attorneys who were disciplined in the Australian state of Victoria. The research team has developed a project plan and is conducting initial data exploration and knowledge gathering in partnership with OCTC. An interim report on findings and recommendations for proactive nondisciplinary interventions to explore will be shared with the Board of Trustees in January 2021.

Reportable Action Bank Matters

Professor Farkas’ report also found that among attorneys with large numbers of complaints against them, Black male attorneys were more likely to have a large number of Reportable Action Bank (RA-Bank) cases. Professor Robertson recommended a number of potential reforms including revising the policy for handling *de minimus* bank overdrafts, currently set at \$50, and exploring options to prevent overdrafts in the first place including allowing attorneys to create a “cushion” with their own funds in a client trust account (similar to the way in which attorneys may deposit a reasonable amount of their own funds to cover bank fees). The Board directed staff as follows:

Evaluate RA-Bank matters to understand the impact on public protection of modifying the de minimus threshold for closing RA-Bank matters. Specifically, staff should evaluate:

- 1. The volume of RA-Bank matters organized by the amount of the overdraft;*
- 2. Whether low-level RA-Bank matters are useful as predictors of subsequent malfeasance related to client trust accounts or other misconduct;*
- 3. Whether modifications of State Bar rules to allow for attorneys to place a specified amount of money in a trust account would have any impact on the incidence of overdrafts from client trust accounts.*

OCTC should evaluate the results found in Item 1 as soon as possible, adopt an interim reform as the results might support and bring the results of the investigation and interim reform to the Board for further consideration at its next meeting.

The Office of Research & Institutional Accountability (ORIA) conducted an analysis of more than 100,000 RA-Bank cases from 1991 to 2018 ranging from more than 5,000 cases per year in earlier periods to more than 2,000 cases in recent years. The complete results of the analysis and all of the tables referenced below are contained in Attachment A.

Cases analyzed represent more than 22,000 attorneys. On an annual basis, in recent years, they represent less than one percent of all active attorneys. More than 40 percent of these respondents had only one RA-Bank case, 43 percent had between one and five cases, and seven percent had more than 10.

What is the volume of RA-Bank matters by nonsufficient funds (NSF) overdraft amount?⁴ Information on NSF overdraft amount was available for 70,431 cases. Of these, 22 percent actually had a positive balance. These positive balance cases are caused by deposits on which the banks had put a hold when the check was presented. Table 1 in Attachment A shows the distribution of cases that had a negative balance. Nearly one-in-five was under \$50, and more than half had a negative balance under \$500. The median NSF balance was \$440.

Are low-level RA-Bank matters useful predictors of subsequent malfeasance related to client trust accounts or other misconduct? Table 1 below shows three types of dispositions for cases and respondents organized by the number of prior RA-Bank matters. Dispositions are grouped into three categories for purposes of understanding the outcomes: the most serious outcome involves some level of discipline, ranging from a reproof to disbarment; an intermediate category of outcome is the issuance of a warning or resource letter; the final category of disposition is a dismissal of the case.

The results show that the likelihood of an RA-Bank matter case resulting in discipline depends heavily on whether the attorney had previous RA-Bank matter cases. For attorneys with no prior RA-Bank matter cases on their record, only one-tenth of one percent were ultimately disciplined. In contrast, over 50 percent of attorneys with more than 21 cases in their prior history ultimately received some form of discipline.

Table 1. Relationship between RA-Bank Matter Cases and Subsequent Discipline

*Respondents (N = 22,568)**

Prior RA-Bank Cases	Disciplined	Warning/ Resource Letter	Dismissed	Total
None	0.1	5.6	94.4	100.0
1-5	2.9	15.9	81.2	100.0
6-10	11.7	36.1	52.2	100.0
11-20	27.8	37.7	34.5	100.0
>=21	55.2	22.4	22.4	100.0
Total	4.7	13.7	81.6	100.0

* For respondents with multiple cases, the most serious of the three disposition outcomes was presented in this table.

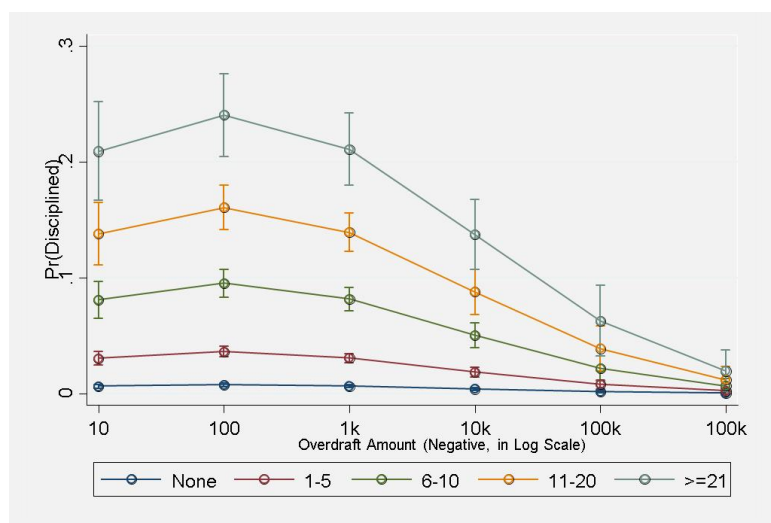
⁴ Overdraft here is defined as the difference between the available balance in a client trust account and the amount of the check presented against that account.

It is important to note here that the subsequent discipline associated with a prior history of RA-Bank matters is *not* discipline that results directly from the RA-Bank matter at hand. The structure of the data in Odyssey makes it very difficult to track a one-to-one relationship between a precipitating event and subsequent discipline. Instead, what Table 1 above shows is that an RA-Bank matter, especially when it is part of a pattern of RA-Bank matters, is a red flag that indicates an increased likelihood of future discipline.

While it is clear that the number of prior RA-Bank matters is related to future misconduct, the question remains about the relationship between subsequent discipline and the *amount* of the RA-Bank matter. For this analysis, a multiple regression model was used to evaluate and control for the impact of related variables such as prior history of RA-Bank cases, and whether other more serious allegations, such as commingling, misappropriation, and moral turpitude, were charged in the case. The results are as follows:

- The chance of a respondent getting disciplined is actually greater when the amount of the NSF overdraft is smaller. Up to a negative balance of approximately \$100, the discipline risk *increases* as the amount of the overdraft increases. However, with NSF overdraft amounts greater than \$100, a larger negative balance is associated with *lower* discipline risks. An OCTC Staff attorney who specializes in RA-Bank cases observed that larger NSF overdrafts tended to result from occasional mistakes in account maintenance while smaller overdraft amounts, especially involving multiple incidents, tended to be a reflection of more serious misconduct (See Figure 1).

Figure 1. Relationship between Amount of NSF Overdraft and Likelihood of Subsequent Discipline



While the results of this analysis do not support adopting an interim reform that raises the *de minimis* threshold for closing RA-Bank matters, they do suggest other possible reforms to prevent attorney misconduct in the first place. OCTC currently responds to RA-Bank matters not forwarded to investigation in a variety of ways, including sending resource and warning letters. OCTC can explore options for a more robust proactive preventative approach for attorneys who

experience low-level RA-Bank matters that also ensure public protection is not compromised. This approach will take into account the number of prior RA-Bank matters and their clustering for the purpose of preventing future misconduct related to client trust accounts.

Finally, given the distribution of overdraft amounts found in the analysis and shown in Attachment A, a modification of the rules to allow attorneys to place a specified amount of money in a client trust account would have an impact on the incidence of overdrafts. Because approximately half of all RA-Bank matters were associated with amounts below \$500, a cushion of that amount would presumably result in fewer RA-Bank matters being submitted to OCTC. In light of staff's recommendation not to adopt an interim reform at this time tied to the amount of an overdraft, this alternative was not explored.

Respondent Representation by Counsel

Professor Farkas' study also found that whether respondents were represented by counsel was a statistically significant predictor of attorney discipline and that Black respondents were about twice as likely not to be represented by counsel compared with white respondents when facing a disciplinary investigation by the State Bar. Professor Robertson recommended a set of potential reforms including informing respondents facing discipline about the increased statistical likelihood of probation or disbarment if they fail to secure counsel, evaluating different modes of communication with respondent attorneys to determine which message are more likely to increase respondent representation, and tracking and reporting on the proportion of discipline cases lacking representation as a key performance indicator. The Board directed staff as follows:

Develop a metric and begin regular reporting of data on representation by respondent attorneys;

Pilot test different messages to respondent attorneys regarding the value of representation by counsel in attorney disciplinary proceedings and evaluate the most effective method of encouraging representation; and

Begin discussions with Association of Discipline Defense Counsel representatives to develop and distribute a roster of attorneys who could provide low-cost and pro bono case evaluations to respondent attorneys.

The Office of Research and Institutional Accountability (ORIA) is leading this work in collaboration with OCTC. Working with Professor Robertson, a plan to pilot test different messages based on behavioral science principles is being implemented. Specifically:

- The State Bar has initiated the development of a letter to distribute immediately. This letter will, in very straightforward language, inform respondents of the importance of retaining counsel and will describe the State Bar's research findings on this topic. It will be posted to respondents' My State Bar Profile page at the same time OCTC posts a letter to respondents that describes allegations and requests a response. For the purpose of testing whether receiving a letter has an impact on respondents securing counsel, respondents will be randomly assigned to a two different groups and only one group will receive the letter.

- The State Bar has established a timeline to engage in lab or focus group testing to identify the most effective method of encouraging representation. This work will be completed by December 2020 with plans to roll out an updated version of the letter in early 2021.
- ORIA has initiated conversations with OCTC about how to operationalize a metric that measures respondent representation in a meaningful way. Issues being explored include measuring respondent representation at various stages of the discipline process and determining whether Odyssey captures the information needed to measure representation at various points in time. Preliminary findings and alternatives for consideration will be ready to review by November 2020.

Staff will initiate a meeting with the Association of Discipline Defense Counsel and the Court expeditiously to continue these discussions.

CHANGES IN OCTC THAT IMPROVE EFFICIENCY, PROCESS, AND EXPERIENCE

The work outlined above will build on the dozens of initiatives, policies, and procedures the State Bar has implemented over the last several years that improve access for, and protection of, the public served by the State Bar. As described in the Background section, OCTC has also undergone numerous, major organizational changes.

A detailed and comprehensive description of these changes is provided in Attachment B. The summary is not exhaustive. Instead, the focus is on those changes that involved organizational restructuring to process cases more efficiently and effectively and changes focused on protecting the most vulnerable victims of attorney misconduct and the misconduct of those who hold themselves out to be attorneys, defrauding the public in the process. These include changes that:

- Improve access to the complaint process;
- Improve the treatment of complaining witnesses;
- Enhance operational efficiency;
- Improve the use of technology;
- Identify and prioritize cases posing the most significant public protection risk;
- Improve efficiency at specific stages of the discipline process.

ONGOING AND PLANNED RESEARCH ON EFFICIENCY, PROCESS, AND EXPERIENCE

The State Bar has also developed a research agenda that addresses topics such as risk-based regulation, efficiency, access and fairness, and disparities in the discipline system that it will carry out over the next 12 months. This research agenda will rely largely on electronic data available in administrative databases but will be supplemented with data gleaned from in-depth reviews of narratives available in case files where applicable.

Implemented a New Performance Metrics System for All of Its Operational Areas, including the Office of Chief Trial Counsel

OCTC metrics measure both cycle time (for example, caseload clearance rates) and quality (for example, number of internal appeals granted by the Complaint Review Unit and number of *Walker* petitions granted by the California Supreme Court). Metric results are reported to the Board of Trustees at their bimonthly meetings. Staff also prepares a Discipline System Statistical Report to supplement the metrics. This report contains data elements that measure the system's impact, including recidivism rates and procedural fairness ratings generated by complaining witnesses.

Reporting of Racial/Ethnic Differences in Outcomes at All Stages of the Discipline System

In August 2020, the Interim Chief Trial Counsel gave an overview of the discipline system to the Committee on Access and Fairness (COAF). The committee chair requested that staff prepare a set of statistical reports that summarize outcomes at various points in the complaint process by race/ethnicity. ORIA is currently planning this project and will give COAF an update at their winter 2020 meeting.

Pilot Testing of Alternatives to Warning and Resource Letters

The State Bar issues over 800 resource and warning letters annually when complaints allege low level or aberrational violations unlikely to result in discipline. The Governance in the Public Interest Task Force report of 2020 recommended evaluating 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. This project will involve a comprehensive empirical assessment of these letters including evaluating which letter is more effective at reducing the number of future complaints and/or the severity of complaints resulting in discipline and how this relates to respondent demographic background and practice characteristics.

Exploration of OCTC Charging practices with a Focus on Understanding Moral Turpitude

The goal of this project is to understand the allegation “moral turpitude” and the role it plays in discipline outcomes. The project will evaluate changes in allegations over the life of cases to determine how often moral turpitude allegations that are charged result in discipline with a finding of moral turpitude. This project will also evaluate the impact of introducing moral turpitude allegations on a case to determine if the presence of moral turpitude allegations is associated with longer times to case resolution (as would be the case, for instance, if a moral turpitude charge reduces the likelihood of settlement). Finally, the research will explore the use of moral turpitude allegations by the race/ethnicity of respondents to determine if these allegations are used disproportionately.

Research on the Predictors of Complaint Risk

The purpose of this project is to understand the factors that make attorneys at risk for a complaint. The project will be guided by the following questions: What are the characteristics of attorneys, their complaining witnesses, and complaints who are subject to (1) frequent complaints, (2) discipline, and (3) repeat discipline? How do these characteristics compare with the general attorney population?

2020 Workload Study

ORIA conducted a workload study in 2017–18 involving all staff from OCTC, Probation, and the State Bar Court. Using an experiential sampling method to collect data over a period of two to

three weeks, the study estimated the amount of staff resources needed to process cases through different stages of the attorney discipline process. The resulting workload measure provided support for the State Bar's proposed fee increase in 2019 to fund, in part, additional staff level for OCTC. The purpose of the current study is to replicate the 2017 workload study to generate up-to-date estimates, with the following modifications and expansions:

- Refine the workload model to differentiate case weights for different complaint types as recommended by the Legislative Analyst Office;
- Assess the impact of Odyssey, which was fully implemented in February of 2019 to replace the AS 400, on case processing with respect to efficiency and staff caseload; and
- Re-evaluate and update the current discipline costs assessed for discipline matters, which were previously updated in 2011.

AD HOC COMMITTEE

This report documents the considerable commitment of the State Bar to engage in ongoing evaluation and improvement of the attorney discipline system. However, it is time to undertake a comprehensive look at the State Bar's attorney discipline system. A project such as this will involve continued efforts to reduce disparity in the system, improve effectiveness and efficiency in case processing, while providing OCTC with appropriate discretion not to pursue cases where doing so would not serve our public protection mission.

A commission would build upon work that has already been done (as well as work currently in progress), build upon initiatives that have been implemented but still require evaluation, and utilize additional insight on how to improve the discipline system. This body would review the entire discipline system, from initial complaint to discipline imposed, with appropriate respect for the independence of the decision making of the State Bar Court. In particular, this body would:

- Review implemented reforms that address disparities and evaluate if the reforms had their intended effect and recommend additional or revised reforms;
- Review all other OCTC reforms implemented and evaluate if the reforms have had their intended effect and recommend additional or revised reforms;
- Review research studies that have been completed and determine whether additional research or change is needed;
- Review research studies in progress and generate policy recommendations as results become available; and
- Identify processes, policies, procedures and areas of the discipline system that need examination.

FISCAL/PERSONNEL IMPACT

In addition to personnel costs for staffing this committee and expenses for meetings, it is anticipated that expenses will be incurred to hire a consultant to conduct research as needed.

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: b. Develop and implement transparent and accurate reporting and tracking of the health and efficacy of the discipline system, and measures to improve the fairness and efficacy of the discipline system to include: (a) an updated workload study for OCTC; (b) identification of staffing and resource needs based on the results of that study; (c) evaluating the different points of contact between the State Bar and Complaining Witnesses/Respondents to identify areas where modifications to the form or content of communication could improve the sense of procedural fairness; and (d) pilot changes in the form or content of communication w/ Complaining Witnesses and Respondents to identify measures that will improve the sense of procedural fairness by complaining witnesses or Respondent Attorneys.

RECOMMENDATIONS

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that staff will continue its work on projects that address disparities in the discipline system and provide an update to the State Bar of Trustees at its next meeting; and it is

FURTHER RESOLVED, that the Office of Chief Trial Counsel will explore options for a more robust proactive preventative approach for attorneys who experience low-level RA-Bank matters that also ensures public protection is not compromised. This approach will take into account the number of prior RA-Bank matters and their clustering for the purpose of preventing future misconduct related to client trust accounts;

and it is

FURTHER RESOLVED, that the Board of Trustees directs State Bar staff to:

Develop plans to establish an ad hoc committee on the State Bar discipline system in consultation with leadership of the Regulation and Discipline Committee. In so doing staff will explore size, structure, and composition of the committee and share their recommendation with the State Bar Board of Trustees at its November 2020 meeting. The recommended charge for this committee would be to review the entire discipline system, from initial complaint to discipline imposed, with appropriate respect for the independence of the decision making of the State Bar Court. In particular, this body would:

- Review reforms implemented that address disparities and evaluate if the reforms had their intended effect and recommend additional or revised reforms;
- Review all other OCTC reforms implemented and evaluate if the reforms have had their intended effect and recommend additional or revised reforms;
- Review research studies that have been completed and determine whether additional research or change is needed;
- Review research studies in progress and generate policy recommendations as results become available; and
- Identify processes, policies, procedures and areas of the discipline system that need examination;

and it is

FURTHER RESOLVED, that the ad hoc committee will begin its work in early 2021 and present a final report on its findings and recommendations no later than June 30, 2022, with periodic status updates to be provided to the State Bar Board of Trustees.

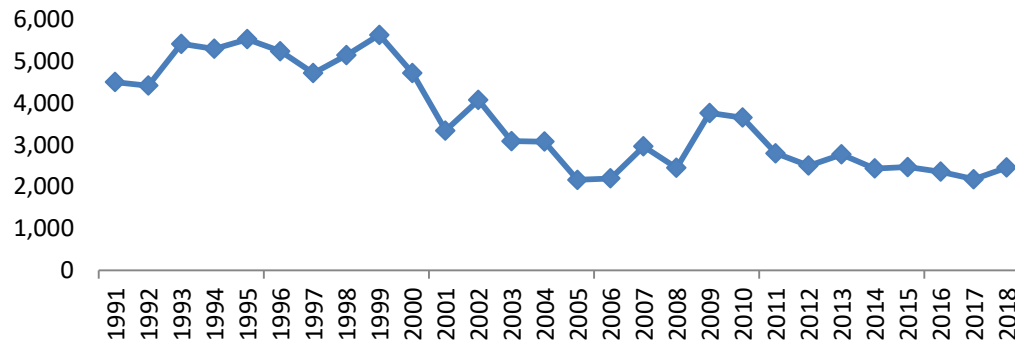
ATTACHMENT(S) LIST

- A.** Analysis of Reportable Action Bank Matters
- B.** Changes to Improve Efficiency, Process, and Experience with the State Bar Discipline System

Analysis of Reportable Action Bank Matters

The Office of Research & Institutional Accountability (ORIA) conducted an analysis of more than 100,000 RA-Bank cases from 1991 to 2018 ranging from more than 5,000 cases per year in earlier periods to more than 2,000 cases in recent years. Cases analyzed represent more than 22,000 attorneys. Figure 1 shows the trend of these cases.

Figure 1. Annual RA-Bank Cases, 1991–2018



Case Characteristics in Check Amount and Account Balance

A large portion of the cases involve small amounts on the check presented for clearance, with nearly one-half under \$500. The trend of the check amounts over the past 30 years, especially at the lower range of the distribution, has remained largely unchanged. Table 1 shows the distribution of the client trust account balance amount, including nearly 20 percent with a positive balance. These positive balance cases are caused by deposits on which the banks had put a hold when the check was presented. For the remaining cases with a negative balance, 20 percent were under \$50, with more than 50 percent under \$500. The median no sufficient fund (NSF) balance is \$440.

Table 1. Client Trust Account Balance Amount in RA-Bank Notices

Balance (Negative)	Freq.	Percent
\$0-50	10,586	19.2
\$51-250	12,081	21.9
\$251-500	6,628	12.0
\$501-15k	9,931	18.0
>\$15k	16,027	29.0
Total*	55,253	100.0

*Include cases in which the balance information is readily available and for which there was a negative balance.

Cases, Respondents, and Disposition Outcomes

Looking at the respondents involved in these RA-Bank cases, Table 2 shows more than 22,000 respondents over the 30 year period. On an annual basis in recent years, they represent less than one percent of the total population of active attorneys. The table further reveals the skewed distribution in terms of their prior history related to RA-Bank matters: more than 40 percent of the respondents had only one case and another comparable proportion had 1 to 5 cases.

Table 2. Prior History in RA-Bank Cases

Prior RA Bank Cases	Freq.	Percent
None	9,883	43.8
1-5	9,718	43.1
6-10	1,467	6.5
11-20	799	3.5
>=21	701	3.1
Total	22,568	100.0

A unique feature of RA-Bank matters has to do with instances in which multiple NSF notices related to a respondent's account were sent to the State Bar within a short period of time, which would be processed as a group of related cases, and at the end all of them receiving the same disposition outcome. To account for this nested nature of cases in relation to respondents—multiple NSF incidents in a single episode, and multiple episodes over time, all affecting the discipline outcome of a respondent—disposition outcomes in Table 3 are presented at both the level of individual cases and respondents.

Disposition outcomes are grouped into three categories: from the most serious outcome involving some level of discipline from reproof to disbarment, followed by warning or resource letters, and the rest in the dismissal category for various reasons.¹ For respondents with multiple cases during the period examined, the most serious of the three outcomes at the case level is used to represent the respondents' disposition outcome.

¹ Dismissals due to the respondent being involved in another matter pending disbarment are treated as "disciplined" for purpose of this analysis.

Table 3. Disposition Outcomes, by Case and Respondent, with Breakdown of Prior History (Row Percentages)

<i>Cases (N = 101,248)</i>					<i>Respondents (N = 22,568)*</i>				
Prior RA-Bank	Warning/ Resource				Prior RA-Bank	Warning/ Resource			
Cases	Disciplined	Letter	Dismissed	Total	Cases	Disciplined	Letter	Dismissed	Total
None	1.0	6.5	92.6	100.0	None	0.1	5.6	94.4	100.0
1-5	3.7	10.5	85.8	100.0	1-5	2.9	15.9	81.2	100.0
6-10	9.7	12.5	77.8	100.0	6-10	11.7	36.1	52.2	100.0
11-20	16.0	9.7	74.4	100.0	11-20	27.8	37.7	34.5	100.0
>=21	21.4	4.7	73.9	100.0	>=21	55.2	22.4	22.4	100.0
Total	8.9	8.5	82.6	100.0	Total	4.7	13.7	81.6	100.0

* For respondents with multiple cases, the most serious of the three disposition outcomes categorized in this table.

Broken out by prior history of RA-Bank matters, Table 3 shows that, at the case level, the chance of a case receiving discipline ranges from 1 percent for first-time incidents to 21 percent for cases with more than 21 priors. Overall, nearly 9 percent of the cases received some level of discipline.

At the respondent level, the discipline rate ranges from one-tenth of one percent for those with only one complaint to more than 50 percent for those with more than 21 cases in their prior history. Overall discipline rate for respondents during the period is 4.7 percent.

Balance Amount and Other Factors on Disposition Outcome

To evaluate the connection between balance amount and discipline outcome, multivariate models were used to control for various facets of the cases and respondents, including:

- Balance amount;
- Prior history of RA-Bank matters;
- Other allegations, such as commingling, misappropriation, and moral turpitude, associated with the cases;
- Years of practice; and
- Length of time between incidents of RA-Bank notices.

The multivariate analyses looked at two aspects of the case disposition outcomes: whether a case was forwarded from Intake to Investigation; and whether a case resulted in discipline (ranging from reproof to disbarment). In both aspects, balance amount shows a strong correlation with disposition outcomes, with the impact displaying a nonlinear relationship. In both situations, the initial probability of a case in either going forward to investigation or resulting in discipline increases with the balance amount; as the balance amount reaches certain point, the probability in both decision outcomes declines. The particular impact of

balance amount on case outcomes in following certain nonlinear pattern also depends on the prior history of RA-Bank matters.

Figure 2. Predicted Probability of Discipline by NSF Overdraft and Prior History

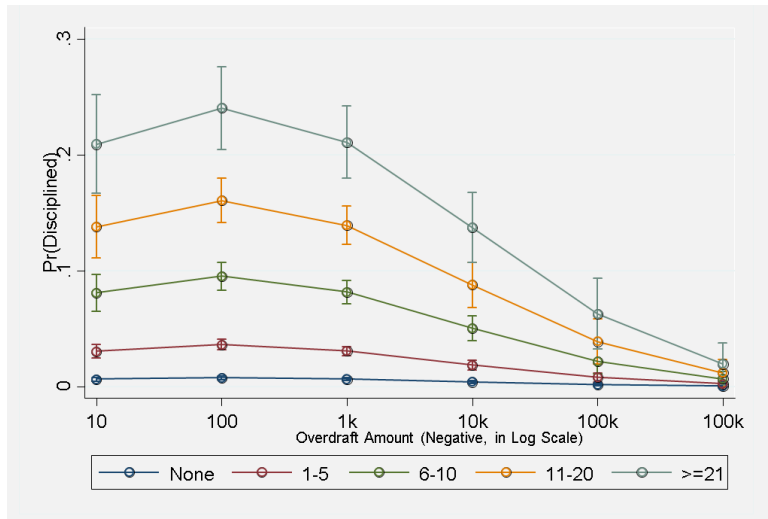


Figure 2 summarizes the relationship among three variables estimated from the multivariate models: probability of a case being disciplined (on vertical axis); NSF overdraft amount (in log scale, on horizontal axis); and prior RA-Bank history, grouped into five categories and each displayed in its curvilinear line to show the change in discipline risk as balance amount changes. Consistent with the results shown in Table 3 on discipline outcomes and priors, Figure 2 shows that the risk for discipline is almost none for first-time incidents, regardless of the balance amount. The probability of discipline increases noticeably with higher number of RA-Bank priors. Within each category for prior history, the risk of discipline increases initially with higher balance amounts; it then begins to decrease after reaching approximately \$100. The same pattern is observed in the analysis of Intake decision, where the inflection point for balance amount reaches at a much higher level at approximately \$1,000.

Changes to Improve Efficiency, Process, and Experience with the State Bar Discipline System

Online Complaint Portal

- In 2018 OCTC launched an online complaint portal, allowing complaining witnesses to file complaints electronically, rather than on paper via mail in both English and Spanish. For approximately 10 months afterwards, OCTC saw a significant increase in the number of complaints received overall. Four additional languages (Vietnamese, Korean, Russian, and Chinese) were added to the system in 2019 to further expand access to complaining witnesses in their preferred language.

Targeted Services and Outreach to Vulnerable Populations

- In 2016 OCTC formed a specialized team dedicated to the investigation of complaints related to the unauthorized practice of law by nonattorneys (NA/UPL), a problem that often impacts vulnerable communities such as immigrants. OCTC did so in response to concerns from stakeholders, that the office was not adequately addressing the issue. Since then, the team has streamlined its work and processes, including referring matters to law enforcement for criminal action early and prioritizing cases that pose the most significant public protection concerns. While the formulation of the team doesn't directly impact backlog in that, the NA/UPL cases do not count in statutory backlog, the Bar did not receive any additional resources to support this effort. Thus, staff resources that would have otherwise been dedicated to the processing of attorney discipline cases, were diverted to form the team.
- In 2018 OCTC engaged with a third-party communications company to facilitate collect calls from complaining witnesses who are in custody. Doing so eliminates the need to interview complaining witnesses via written format, a process that caused delay because of the need to mail questions and responses. Interviews are completed in a more expeditious manner.
- To increase access to the attorney discipline system and to avoid undue delay of cases involving people who would prefer to communicate in a language other than English, OCTC had the Complaint Acknowledgement Letter translated into the most 10 most common languages spoken in California (English, Arabic, Chinese, Farsi, Hindi, Korean, Russian, Spanish, Tagalog, and Vietnamese) in late 2019. OCTC also developed new procedures to ensure that we communicate with complaining witnesses in their preferred language. This change has also eliminated a 10-day delay in each case requiring translation. In 2020 OCTC translated several informational letters sent at the initial stage of the investigation and whenever a case is reassigned. These letters are also now available in the 10 most common languages spoken in California.
- To speed the process of obtaining the privacy waivers required to receive immigration records, in 2020 OCTC created an immigration-specific assignment letter, in the same most

common languages, which requests that complainants provide the waiver as soon as their case is assigned. The letter also includes the waiver translated into those same languages. Getting the privacy waivers and the file request letters out at the earliest opportunity reduces the time spent waiting for other agency files in immigration matters, which can sometimes be as long as six months or more.

- In 2020 OCTC launched a pilot team to primarily handle cases implicating the practice of Immigration Law. Because Immigration Law is particularly complicated OCTC hopes that dedicating staff with expertise in the area will improve efficiency in handling those cases. The pilot-team is in Los Angeles and consists of two attorneys whose caseloads will be made up of cases wherein the alleged misconduct was in the context of an Immigration case or where the misconduct implicates the immigration status of a client. Those attorneys will oversee the investigations of those complaints, prepare cases for filing and present cases at trial.

Additional Policies and Procedures that Improve Complaining Witnesses' Experience with the Complaint Process

- In 2016, Rule 2603 of the Rules of Procedure of the State Bar of California was amended to delegate to Office of General Counsel the “second look” function that had previously been completed by OCTC staff. This amendment was sought upon the recommendation of the state auditor in 2015. Complainants are entitled to request that the State Bar Office of General Counsel’s Complaint Review Unit (CRU) review OCTC’s decisions to close a case. If CRU finds that the case was not closed properly, or if it the complaining witness presents new evidence it will refer the complaint back to OCTC with a recommendation that it be reopened for investigation. While the recommendation was made in order to make the review process more independent, it also had the practical effect of freeing up OCTC resources to dedicate to case processing.

Changes in OCTC Supervisors, Teams, and Administrative Functions

- In 2011 OCTC moved from a model of horizontal prosecution to a model of vertical prosecution. For example, one attorney would see a case through the investigation process, a new attorney would charge a case, and then yet another attorney would prosecute the case after filing. That kind of model significantly slowed the process. It required each new attorney to come up to speed on the case before moving it forward. Inevitably, each new attorney had a different perspective, leading to additional work at each stage, and further delay. In a vertical model, the same attorney handles the case from investigation through prosecution. In this model, time is not lost on learning the case and the plan for each case is determined and carried out, by the same attorney. The downside to this model, in particular without sufficient resources, is that one attorney is responsible for managing a large volume of cases all at different stages. That challenge can slow down the movement of some cases.
- In 2016 OCTC moved the “worker-team” from Intake to Enforcement. That team, which had been assigned to Intake for years, was comprised of attorneys and complaint analysts (a classification no longer used), who would “work” lower-level complaints with the goal of resolving them before having to send them to Enforcement. While a number of those

complaints were able to be resolved without moving them to Enforcement, in some instances, the cases were not resolved and were then forwarded to Enforcement. However, by the time the cases were moved to Enforcement, they were already aged—some so much so they were already nearing backlog. The change meant that cases were not held and “worked” in Intake but rather, assigned like all other cases, to the team in Enforcement. In implementing Workforce Planning recommendations, OCTC dissolved the specialized “worker-team” entirely and deployed the staff among the Enforcement teams. Doing so did slow the movement of lower-level cases because they became subject to many of the same processes as other cases that moved to investigations. The adoption of the case prioritization system in 2018, eliminated many of those processes in lower-level cases and has brought greater efficiency to handling those cases.

- In 2017 OCTC implemented other Workforce Planning recommendations that were made to improve efficiencies. In so doing, a number of significant structural changes were made. Included in those were the addition of a number of supervisor positions, the structuring of a number of Intake and Enforcement teams headed by those supervisors, empowerment of supervisors to approve charging and resolution decisions, and the decentralization of many administrative functions. While making this change improved efficiencies in some respects, the change necessarily required OCTC to move senior staff into supervisor positions and away from carrying full-caseloads thereby reducing resources for case processing.
- In 2017 OCTC fully staffed a training and calibration team in order to formalize and improve training for all levels of staff. By doing so, OCTC was able to streamline the onboarding of new staff and improve the quality and consistency of the work of existing staff. The downside to this change was the need to divert staff that otherwise would be processing cases to this important function.
- In 2018 OCTC sought amendments to Rule 5.21 of the Rules of Procedure of the State Bar of California to toll the rule of limitations when an attorney is on inactive status pursuant to Business and Professions Code section 6007(a) or (b). Many of these attorneys are unlikely to return to practice, but prior to the amendment, OCTC policy required quarterly written status reports on each case in the inventory that was suspended due to the attorney’s incapacity. Similarly, State Bar Court conducted periodic status conferences on filed cases that were suspended due to the attorney’s incapacity. The practical effect of the amendment is to allow OCTC to move to dismiss filed matters and to close suspended matters, where attorneys are enrolled under one of these subsections, and where it is more likely than not that the attorney will never return to practice. At the same time, if the attorney does return to practice, OCTC is not limited by the rule of limitations, to re-file charges. Many of the cases that were in OCTC’s inventory because of the inactive enrollments, were in backlog.

Implementation of New Case Management System

- In 2019 OCTC converted from a years-old DOS based case record system to a new case management system, “Odyssey.” Odyssey has allowed OCTC to move from maintaining paper files to maintaining and utilizing files electronically. Doing so has increased

efficiencies in that multiple staff members can work files at the same time and tasks are “moved” electronically to staff without the added need to wait for the receipt of a paper file. Some efficiency has been lost, however, in that moving within the electronic file is slowed because doing so requires multiple “clicks.” In addition, OCTC is capturing significantly more data per file, requiring more staff resources to actually input that data. However, capturing that data is important for purposes of reporting and study.

- In August 2020, OCTC integrated the online complaint portal with the case management system so that, after verification, complaints submitted, including attachments, are automatically uploaded to the case management system and a new case is opened. This eliminates the need for staff to manually enter data for complaints submitted on-line.

Case Prioritization System Facilitates Focus on Addressing Highest Priority

- In 2018 OCTC implemented a case prioritization system with BOT approval. Instead of just working the oldest cases first, regardless of the public protection risk, OCTC now prioritizes the cases posing the most significant public protection risks first, regardless of age. In addition, OCTC identifies cases that likely, with a little work, can resolve quickly. Those cases are assigned to expeditor teams, who work only those cases. In those cases, OCTC has eliminated a number of processes required in other cases (for example, no investigation plan is necessary), to expedite the movement of those cases. The practical effect of expediting teams is the movement of some cases faster, and the reduction of caseloads for others working higher priority cases.

Policies and Procedures that Improve Efficiency at Each Stage of the Discipline Process

Investigation Stage

- Rule 2409 of the Rules of Procedure of the State Bar of California, which allowed respondents to receive an automatic two-week extension of time to respond to an investigatory letter, if requested, was amended in 2011. The change required respondents to demonstrate good cause for an extension thereby cutting down on delays in the investigation process.
- In 2017 OCTC began requesting that financial records be provided in an electronic format when subpoenaed during an investigation, and in 2018, purchased software to scan paper and electronic financial records to pull out transactions and expedite fund tracing exercises involving voluminous records. Prior to this, financial records were catalogued by staff manually.
- In 2018 OCTC sought amendments to Rule 2409 of the Rules of Procedure of the State Bar of California to eliminate delays caused by mailing letters to respondents which describe allegations and requests a response, to allow posting of those letters to the My State Bar Profile page of the respondent attorney. This reduces the amount of time OCTC staff would otherwise wait, due to communication via the U.S. Postal service.
- Prior to mid-2020, OCTC required that staff call a complaining witness upon closure of any investigation. That call is in addition to a required detailed closing letter staff draft and send

to the complaining witness. Seeking to reduce a redundancy in order to more efficiently resolve cases, OCTC participated in an experiment in order to determine what, if any effect, eliminating the closing call had on a complaining witness' perception that OCTC was accessible and fair. At the conclusion of the experiment, results indicated that the perception was impacted, but not in a statistically significant manner such that the impact did not militate against adoption of a new policy. Thus, staff is no longer required to place calls in all cases. OCTC still requires calls in some cases, including those in which the complaining witness is in a vulnerable category and detailed closing letters are still required in all cases.

Pre-Filing & Post-filing Stages

- In 2011 OCTC discontinued a years-long practice of informally meeting and conferring with respondents for settlement discussions. The process was referred to as a “20-day meeting” and occurred in addition to, and in advance of, the ENEC process. Finding that the process created an extra layer of delay, OCTC issued a policy directive discontinuing the practice.
- In 2013 The BOT adopted an OCTC agenda item to move to short-form notice pleading away from long-form fact pleading. This was a significant shift in practice and was made to help expedite the movement of cases. Prior to the change, OCTC’s fact-pleading was lengthy and onerous. Virtually every key fact the attorney expected to prove at trial, was plead in the notice of disciplinary charges. OCTC determined that not only was that level of detail unnecessary, but it served to slow the charging of cases. As a result, OCTC moved to notice-based pleading, similar to that in criminal prosecutions. In notice-based pleading, only the facts supporting each element of the violation are plead. In notice-based pleading, time is not lost on reciting numerous facts that are not relevant, nor necessary, to prove the violation.
- In 2018 OCTC eliminated an office policy prohibiting nolo contendere pleas—often cited by members of the defense bar as a barrier to the efficient resolution of cases.
- In 2018 OCTC sought a change to Rule 5.140 of the Rules of Procedure of the State Bar of California allowing the court to take judicial notice of noncertified court records. Prior to the rule change, OCTC secured certified court records to ensure admissibility at trial. OCTC was charged for doing so and at times, the cost would be significant. In addition, cases could be delayed from moving forward, while staff waited for receipt of those records. The rule now expressly authorizes the court to take judicial notice of noncertified records, which are often times, easily accessible by printing online.
- In July 2020, OCTC sought approval from the Board of Trustees to update the Rules of Procedure of the State Bar to permit electronic service, the use of electronic signatures, and the exchange and lodging of electronic trial exhibits. That proposed rule is out for public comment and will return to the BOT agenda in September 2020.