



The State Bar of California

OPEN SESSION AGENDA ITEM 703 NOVEMBER 2020

DATE: November 19, 2020

TO: Members, Board of Trustees

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

SUBJECT: Implementation of Changes to Address Disparities in the Discipline System: Update

EXECUTIVE SUMMARY

This agenda item follows up on the July and September 2020 meetings of the Board of Trustees at which the Board directed State Bar staff to evaluate and implement five changes recommended by Professor Christopher Robertson to address the disparate discipline imposed on Black attorneys.

BACKGROUND

Following receipt of a report on disparities in the discipline system conducted by Professor George Farkas in November 2019, the Board directed staff to develop an action plan to address the factors that are associated with the 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, who is an 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 investigations, and return to the Board with fully developed recommendations. Professor Robertson presented those recommendations at the July 2020 Board meeting and the Board directed staff to engage in five projects to implement these reforms. At the September 2020 Board meeting, staff

presented a status report to the Board, who in turn directed staff to conduct additional work, particularly surrounding the topic of Reportable Action Bank Matters.

DISCUSSION

Below is a summary of the recommendations and the subsequent staff work implemented.

Archive Five Years of Closed Complaints

Professor Robertson recommended that OCTC archives complaints closed without discipline to prevent them from building bias into attorneys' complaint histories. The Board directed staff as follows:

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 continued work 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:

- OCTC reviewed with the chair and vice chair of the Regulation and Discipline Committee several categories of cases that needed further consideration as to whether they should be archived. The consensus was to archive closed cases of all types and origins that were filed more than five years ago, with the following exceptions: (1) cases that resulted in either discipline, an agreement in lieu of discipline, or the issuance of a warning letter, directional letter, or resource letter; (2) the respondent has a pending case in investigation, pre-filing or in State Bar Court; or (3) the respondent was disbarred or resigned. It was also decided that for cases that were reopened after initially being closed, the five years would be calculated from the reopen date, not the initial opening date.
- With these parameters, staff in ORIA developed code that identified and tagged nearly 400,000 complaints that satisfied the criteria for archiving.
- Odyssey's vendor, Tyler Technologies, created a programming routine that will automatically archive complaints while retaining access for certain staff. At the time of this writing, staff was finalizing plans to use this automated routine to archive the nearly 400,000 complaint described above.

- Staff has begun to develop an automated system for archiving future complaints that meet the parameters described above.

All deliverables for this project are nearly complete.

Reportable Action Bank Matters

Professor Robertson recommended a number of potential reforms, including revising the policy for handling *de minimis* bank overdrafts, currently defined as overdrafts of less than \$50, and exploring options to prevent overdrafts in the first place by allowing attorneys to create a “cushion” with their own funds in a client trust account (similar to the manner in which attorneys may deposit a reasonable amount of their own funds to cover bank fees).

In July 2020, the Board directed staff to evaluate RA-Bank matters further to understand the impact on public protection of modifying the *de minimis* threshold for closing RA-Bank matters. Staff in ORIA then conducted an analysis of more than 100,000 RA-Bank cases from 1991 to 2018 that represented more than 22,000 attorneys. At the September 2020 Board meeting, staff reported that the analysis suggested that small-amount, RA-Bank matters actually posed a public protection risk, making an increase in the *de minimis* closing threshold problematic.

The Board then directed staff to:

...explore options for a more robust pro-active 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.

Below is a summary of proactive preventative work completed to date.

Modification of OCTC Letters Regarding Reportable Action Bank Matters

Under Business and Professions Code section 6091.1, banks are required to report insufficient funds activity in an attorney’s client trust account. In most cases, OCTC staff will prepare a letter to the attorney requesting an explanation for the insufficient funds activity. In many cases, RA-Bank cases are closed at the intake stage after reviewing the attorney’s response and one of the following letters is issued:

De Minimis Letter. A case may close with a *De Minimis* letter if the amount of the insufficient funds activity is \$50 or less and there are no other pending bank RAs. The *De Minimis* letter encourages the attorney to pay greater attention to the management of the client trust account and take appropriate corrective action to avoid future reports of insufficient funds activity.

Closing Letter. Staff will usually issue a Closing letter when the attorney’s response shows that a client trust account check was mistakenly issued, an automatic payment was mistakenly

linked to the client trust account, the attorney relied on the bank's indication that deposited funds were available, or the attorney is a victim of fraud.

Resource Letter. A case may close with a Resource letter when, for example, the attorney disbursed funds prior to depositing entrusted funds into the client trust account, provided a client with a postdated check and asked for the client to wait for the deposit to clear, or the attorney made an accounting error that would have been realized with a monthly reconciliation. This resource letter contains resources such as information about the State Bar Client Trust Account School, the Handbook on Client Trust Accounting, and the phone number to the State Bar Ethics Hotline.

Warning Letter. A case may close with a Warning letter when, for example, there is a clear violation but it is unlikely to result in discipline, such as failing to promptly withdraw attorney's fees from the client trust account, or failure to conduct monthly reconciliations of the client trust account. A warning letter may also be issued when the attorney previously received a resource letter.

OCTC sent out nearly 60 *De Minimis* letters, over 670 Closing letters, over 40 Resource letters, and 11 Warning letters in 2019.

OCTC recently reviewed these four letters and made the following modifications for the purpose of taking a more preventative approach.

- Added information about all resources typically reserved for the Resource letter to the *De Minimis*, Closing, and Warning letters.
- Expanded the descriptions of resources by adding more details such as whether resources are offered remotely and hyperlinks that take respondents directly to resources.
- Added the State Bar Ethics School as a resource.
- Added a list of additional "other client trust account resources," including online reading materials, articles, and a link to a COPRAC opinion addressing the topic.
- Added language warning attorneys that "when a bank reports insufficient funds activity on a client trust account, it is a red flag that the public may be at risk due to an attorney's negligent oversight or misappropriation of entrusted funds" and that "failure to adhere to basic principles of client trust fund accounting can lead to serious consequences, including suspension or disbarment." and
- Concluded the letters with a paragraph about the importance of treating substance abuse and mental health disorders, as well as information about the State Bar's Lawyer's Assistance Program.

As noted above, because information about resources was only included in the Resource letter, only 40 respondents received this information in 2019. If numbers remain consistent, nearly

800 respondents will receive letters with the resources and language described above on an annual basis.

An example of the new Closing letter is provided as Attachment A.

Staff will work with the Office of Information Technology to track respondent engagement with the new Closing letters to determine whether respondents open the letters within My State Bar Profile and click on links to resources listed in the letters. Tracking respondent engagement will allow for future evaluation of the relationship between accessing these letters and the incidence of RA-Bank matters, complaints, or disciplinary action related to client trust accounting.

Qualitative Study of Letters Related to Reportable Action Bank Matters

The State Bar 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.

Professor Sklar proposes a qualitative study of the letters by receiving feedback from intended users of RA-Bank matter letters when revised in the following manners:

- **Revision A.** Utilizes risk-aversion language with a statistic and anecdotal example of how RA-Bank Matters have led to more serious disciplinary action.
- **Revision B.** Incorporates economic incentives where the fee is waived for the Client Trust Account School and State Bar Ethics School.

At this time, Professor Sklar is working with staff to identify an appropriate sample of 15 attorneys to invite for a 30-minute structured online interview in which the interviewer would share the various letters and ask for general reactions, then specifically if anything was unclear or if more information was needed regarding any of the resources, including *how to access* them. Structured questions would address topics such as:

1. Whether they perceive these resources as helpful (including if some are perceived as more helpful than others);
2. Which barriers may exist in utilizing these resources (relatedly, would it be preferable to fill out a form versus contacting a State Bar staff member, such as the Ethics Hotline Research Assistance Request Form;
3. How they perceive the examples in the letter (i.e., the risk aversion approach); and
4. Whether economic incentives would make it more likely to utilize the resources.

This project will help inform whether the letters themselves, the resources offered, and the proposed language and incentives align with greater utilization of resources, or whether alternative approaches should be considered. Staff will continue to work with Professor Sklar on this project, including arranging for internal stakeholder review of letter revisions A and B as a first step with plans to begin recruitment for the study in January 2021.

Staff will keep the Board of Trustees apprised of this project's status.

Attorney Self-Assessment: Client Trust Accounts

Pursuant to Strategic Plan Goal 2, Objective (e), at its July 2020 meeting, the Board of Trustees authorized the implementation of a self-assessment program to create interactive e-learning assessment tools on various topics, starting with the subject of client trust accounting duties. The purpose of this program is to facilitate a practitioner's self-awareness of gaps in prudent law office management practices and compliance with professional responsibilities. The approval of this program coincides with the necessity to take a more proactive preventative approach for attorneys who experience RA-Bank Matters.

The Office of Professional Competence has submitted a project initiation request form with the Office of Information Technology to explore how the forthcoming interactive self-assessment tool developed by an outside vendor will be incorporated into the existing learning management system.

Staff will keep the Board of Trustees apprised of this project's status.

Respondent Representation by Counsel

Professor Farkas' study found that representation by counsel during the discipline process was a statistically significant predictor of attorney discipline, and that Black respondents were roughly twice as likely not to be represented by counsel, in contrast with white respondents. 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 messages 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 to:

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.

ORIA is leading this work in collaboration with OCTC and Professor Robertson.

- In collaboration with the leadership of the Regulation and Discipline Committee, the State Bar has developed an informational letter to distribute to respondents advising

them of the importance of securing counsel and directing them to the Association of Discipline Defense Counsel (see Attachment B). The document will be posted to respondents' My State Bar Profile page at the same time OCTC posts a letter to respondents that notifies them of an open investigation, summarizes the allegations, and requests a response. For the purpose of testing whether receiving this document has an impact on respondents securing counsel, respondents will be randomly assigned to two different groups and only one group will receive the document. Staff will conduct this randomization test for approximately three to five months. Staff expects to start distributing the document in randomized fashion within two weeks.

- Staff has submitted a project initiation request form with the Office of Information Technology to track if respondents open the letter and if they click on the link embedded within the letter.
- Professor Robertson will conduct a study that seeks to illuminate issues surrounding respondents' decisions to retain counsel. The study will consist of a survey administered to all attorneys who are contacted by OCTC with notice of an investigation for the purpose of comparing the group of respondents that received the informational letter and those who did not. Survey topics include barriers to retaining counsel (such as affordability) and self-rated understanding of the procedures of OCTC's investigation process, State Bar Court procedures, and the perception among respondents of their overall competence in handling disciplinary complaints. Staff is working with Professor Robertson to develop this project for execution in 2021.
- ORIA worked with OCTC to operationalize a metric that measures respondent representation and shared its recommendation with the leadership of the Regulation and Discipline Committee. The "Percent of Respondents That Retained Representation" metric will be based on closed cases of all types that reached the investigation stage. For 2019, the metric's value was 14 percent. Staff will generate the metric's value for 2020 and report to the Board of Trustees at the January 2021 meeting with this value serving as this metric's baseline.

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

Research on Complaints Not Leading to Discipline

Professor Robertson proposed exploring a proactive nondisciplinary system to support attorneys at higher risk of future complaints given the disproportionate filing of complaints against Black attorneys, which in turn increases the odds of discipline. 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. The solutions to be explored will provide dual benefits of improving client satisfaction through communication and education, while potentially improving the overall quality of legal practice. This potential reform aligns 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 to “evaluate complaints closed without discipline to determine whether specific issues can be identified that allow for proactive regulation.” This research will be conducted in two phases.

Phase One. Generate Empirical Research on Allegations among Dismissed Complaints

In this phase, ORIA staff will undertake a research plan to understand broad patterns of allegations and case closure reasons among nearly 60,000 Original Matter cases that closed without discipline between 2015 and 2019. These cases represent a total of nearly 157,000 allegations, at an average of 3.8 allegations per case. Nearly two-thirds of these cases were closed in intake.

Preliminary analyses of cases closed in intake show:

- Three-fourths were closed with no action taken;
- There were 2.8 allegations per case on average;
- One-third of the allegations were related to performance, one-quarter was related to interference with justice, and over 10 percent were related to “duties to client”; and
- These three categories comprised nearly 70 percent of all allegations dismissed in intake.

Additional analyses will explore how allegations cluster together within complaints and how allegations are correlated with respondent characteristics.

Phase Two. Pilot Test Proactive Nondisciplinary Interventions

Professor Sklar will review the results generated in Phase I and recommend potential interventions to pilot test. An interim report on findings and recommendations for proactive nondisciplinary interventions will be shared with the Board of Trustees in January 2021.

FISCAL/PERSONNEL IMPACT

Costs associated with studies proposed by our consultants are modest and will be shared with the Board of Trustees once the project plans are finalized.

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 the Board of Trustees directs staff to continue its work on projects that address disparities in the discipline system and provide an update to the Board of Trustees at the January 2021 meeting.

ATTACHMENT(S) LIST

- A.** OCTC Reportable Action Bank Matters Closing Letter
- B.** Letter to Respondent Regarding Representation



The State Bar of California

OFFICE OF CHIEF TRIAL COUNSEL

October 2, 2020

PERSONAL AND CONFIDENTIAL**Via Email**

Name

Email Address

RE:	Reportable Action Number:	XX-O-XXXXX
	Financial Institution:	Bank of America
	Trust Account Ending in:	XXXX

Dear Ms. XXXXXXXX:

Thank you for your response concerning the insufficient funds activity in your client trust account as reported by your bank pursuant to Business and Professions Code section 6091.1.

Based on the information provided, we are closing our file at this time without prejudice.

Attorneys are fiduciaries of client funds, and they must manage those funds appropriately. When a bank reports insufficient funds activity on a client trust account, it is a red flag that the public may be at risk due to an attorney's negligent oversight or misappropriation of entrusted funds. Failure to adhere to basic principles of client trust fund accounting can lead to serious consequences, including suspension or disbarment. Even minor transgressions may create a track record warranting closer scrutiny and possible State Bar investigation for subsequent offenses. Failure to address client trust fund accounting problems could result in additional reports from your banking institution to the State Bar and possible complaints related to your law office management.

Although the present matter does not place you at risk of severe discipline, nevertheless, we are concerned that you may need to pay greater attention to the management of your client trust account. To reduce the likelihood of future actionable matters with the State Bar, we strongly recommend you take advantage of the following resources.

- **State Bar Client Trust Account School:** a three-hour course offered by the State Bar regarding Client Trust Accounts, which addresses the common pitfalls attorneys encounter and how to

avoid them. The cost of the course is \$100, and the course is approved for three (3) units of MCLE credit in ethics. You may enroll in this course by contacting Norma Murray at (213) 765-1712 for scheduling information. The course is also offered remotely.

- <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Ethics-Schools>
- **Handbook on Client Trust Accounting:** a handbook on client trust accounting for attorneys which is available to download from the State Bar's website at www.calbar.ca.gov/ethics . The handbook is also provided with enrollment in the Client Trust Account School.
 - <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Client-Trust-Accounting-Handbook>
- **Other Client Trust Account Resources:**
 - <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Client-Trust-Accounting-Resources>
 - CAL 2005-169 – COPRAC opinion addressing overdraft protection and ethical obligations when a check is issued resulting in insufficient funds
 - Los Angeles County Bar Association article offers practice tips
 - ABA article written by Carole Buckner on IOLTA accounts
- **State Bar Ethics Hotline:** The Hotline staff can direct you to applicable rules, cases, and ethics opinions regarding various ethical issues attorneys face. Attorneys can request a call from the Hotline staff by completing the online Ethics Hotline Research Assistance Request Form. A Hotline staff person will return your call between the hours of 9:00 a.m.– 5:00 p.m., Monday through Friday. If this is a time-sensitive matter involving potential imminent physical harm or extreme urgency, you may call: 415-538-2148.
- **State Bar Ethics School:** a six-hour course providing insight into the common issues faced by attorneys in practice. The course is approved for six hours of MCLE credit. The cost of the course is \$150.000. Scheduling information is available by contacting Norma Murray at 213-765-1712. The course is also offered remotely.
 - <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Ethics-Schools>

October 2, 2020

Also, research confirms that legal professionals suffer from mental health issues and addiction at much higher rates than the general population. Substance abuse and mental health disorders are not moral issues. They are treatable illnesses with effects that result in the deterioration of moral and ethical practices. If you are struggling with a challenge like this, the State Bar offers the Lawyer's Assistance Program, a confidential resource that can help.

<http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program/Resources>

Sincerely,

A handwritten signature in black ink, appearing to read 'Ann J. Kim', with a stylized, cursive flourish.

Ann J. Kim
Deputy Trial Counsel

To: State Bar of California Licensee
From: The State Bar of California



Your California Bar License Is at Risk.

Take Action.

The Office of Chief Trial Counsel of the State Bar of California has opened a formal investigation into potential ethical violations that you may have committed.

Disbarment Is a Real Risk. Over 100 California attorneys are disbarred every year, and about as many more are suspended from the practice of law. Even if this case does not seem substantial, an adverse finding can be used against you in a future case, increasing your chances of severe discipline.

Reduce Your Risk. Share your side of the story and mitigation evidence. Early intervention can also minimize the costs of the discipline process.

Do Not Assume You Can Handle This Yourself. Professional discipline is a complex area of practice, with its own rules of procedure. Counsel can help you navigate the process, provide an objective evaluation, and negotiate a favorable resolution.

Representation Can Help. State Bar research has found that attorneys who are not represented during the discipline process have a greater risk of being suspended or disbarred compared with attorneys who are represented by counsel.

Attorneys Are Available to Help You. In California, there is a robust practice area of attorneys who specialize in professional discipline cases. Find an attorney to provide competent advice on your discipline case. One source is the directory for the [California Association of Discipline Defense Counsel](#).*

* The Association of Discipline Defense Counsel (ADDC) is independent of the State Bar of California, and membership in the ADDC is not required to participate in State Bar investigations or appear before the State Bar Court. The State Bar does not endorse ADDC or any member thereof, but only provides this link as an informational service.