



The State Bar of California

OPEN SESSION AGENDA ITEM 701 MARCH 2021

DATE: March 18, 2021

TO: Members, Board of Trustees

FROM: Dag MacLeod, Chief of Mission Advancement & Accountability Division
Lisa Chavez, Director, Office of Research & Institutional Accountability

SUBJECT: Status Update on Recommendations to Address Disparities in the Discipline System

EXECUTIVE SUMMARY

In July 2020, Professor Christopher Robertson presented a set of potential reforms that addressed disparate discipline imposed on African American male attorneys. The State Bar engaged in work on a subset of these reforms through the end of 2020. This agenda item follows up on the January 2021 planning meeting at which the Regulation and Discipline Committee directed State Bar staff to return to the Board with a status report on the reforms recommended by Professor Christopher Robertson that were not acted upon in 2020.

BACKGROUND

In 2019, the State Bar of California initiated a study to assess the impact of race/ethnicity on attorney discipline and determine whether there was disparate treatment of attorneys of colors in the State Bar discipline system. The results of that study, conducted by Professor George Farkas, Distinguished Professor in the School of Education at the University of California, Irvine, were presented to the Board of Trustees 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.

In late 2019, State Bar staff invited Professor Christopher Robertson, N. Neal Pike Scholar and Professor at the School of Law of Boston University, and Visiting Scholar and Special Advisor at the James E. Rogers College of Law of the University of Arizona, to evaluate the findings of

Professor Farkas's report, study the discipline system more closely, and make recommendations.

In January 2020, Professor Robertson met with staff and leadership in the Office of Chief Trial Counsel (OCTC), reviewed documents related to OCTC process and policy, and delivered a preliminary "menu of ideas" to the Board of Trustees at its January planning meeting.

In July 2020, Professor Robertson presented an interim report, which focused on thirteen potential reforms across three broad areas: (1) client trust fund accounting, (2) the treatment of prior complaint and discipline history, and (3) securing legal representation for those facing discipline.

The Board then directed staff to engage in five projects that addressed a subset of the potential reforms he recommended. Staff updated the Board on the status of these projects in September and November 2020. Staff also updated new Board members on the Farkas report, Professor Robertson's report, and work conducted to date in January 2021.

As part of its 2021 work plan, the Regulation and Discipline Committee (RAD) directed staff to work with RAD leadership to review the potential reforms Professor Robertson recommended in July 2020 that the State Bar had not yet acted upon and report back to the Board. The State Bar engaged Professor Robertson to review the status of this subset of reforms and, where applicable, work directly with State Bar staff to move them forward.

DISCUSSION

The narrative below describes the status of each potential reform that Professor Robertson recommended in his July 2020 report, organized in the order which he recommended them. In some cases, the potential reform was completely implemented as recommended. In others, they were modified as needed.

Reportable Action Bank Cases

Professor Farkas's report found that among attorneys with large number of complaints against them, Black male attorneys were more likely to have a large number of Reportable Action Bank (RA-Bank) cases. These are cases where a bank reported insufficient funds activity in an attorney's client trust account as required under Business and Professions Code section 6091.1. Professor Robertson recommended the following reforms.

Potential Reform 1.1 – For the purpose of de minimis closing of RA Bank cases, OCTC could specify a higher monetary threshold and one that allows a number of prior cases over a period of time, before triggering investigation.

State Bar staff conducted an analysis of more than 100,000 RA-Bank cases from 1991 to 2018 that represented more than 22,000 attorneys. The analysis suggested that small-amount, RA-Bank matters posed a public protection risk, making an increase in the *de minimis* closing

threshold problematic. Staff recommended that this reform not be pursued because small infrequent cases are red flags that are associated with future discipline. Staff determined that it is better to receive, investigate, and act on the information so that serious problems can be identified.

The Board affirmed this decision in September 2020 and directed staff to explore proactive preventative options for attorneys who experience low-level RA-Bank matters that also ensures public protection is not compromised.

In response to this directive, OCTC reviewed the four types of letters it sends attorneys in response to a notice of insufficient funds. Of these four, only one (the Resource Letter) offered attorneys a set of resources for preventing RA-Bank matters in the future. OCTC revamped the list of resources by expanding descriptions, adding resources, and added this list to all four letters. OCTC also added language to all four letters warning attorneys that “failure to adhere to basic principles of client trust fund accounting can lead to serious consequences, including suspension or disbarment.” 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.

The Office of Professional Competence (OPC), meanwhile, had initiated a separate project that takes a proactive preventative approach to attorney misconduct. Pursuant to the Strategic Plan Goal 2, Objective (e), at its July 2020 meeting, the Board of Trustees authorized OPC to implement a self-assessment program based on 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 OPC 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.

Potential Reform 1.2 – The State Bar could clarify its rules to allow attorneys to deposit a specific amount of funds into client trust accounts as a cushion when errors occur.

State Bar staff considered this reform upon completing the analysis described above and decided not to move it forward because it would allow attorneys with problematic accounting practices to have multiple errors that are not reported to the State Bar. As described above, RA-Bank notices are a valuable signal that the State Bar uses to provide attorneys the notice, support, and training needed to solve financial accounting problems before they become larger and more problematic. Rather than reducing the number of signals that the State Bar receives; it will endeavor to do a better job utilizing those signals to protect the public while avoiding disparities.

Potential Reform 1.3 – The State Bar could revise its guidance to encourage attorneys to reasonably rely on systems of professionals and technologies to prevent trust accounting errors.

This reform was not among those initially prioritized by the Board in July 2020, but Professor Robertson is now pursuing it, working with the OPC. While maintaining longstanding clear guidance that attorneys are ultimately responsible for client funds entrusted to them, OPC has agreed with the principle that systems of professionals and technologies may be helpful to improve performance of those duties. Accordingly, OPC is now reviewing its client trust accounting resources, including the Handbook on Client Trust Accounting for California Lawyers to determine what revisions may be appropriate. By May 1, 2021, OPC expects to have a plan in place, which may include short-term changes (e.g., to the handbook) and longer-term changes (e.g., consideration of new ethics opinion, which involves a committee drafting process that includes a period of public comment).

Potential Reform 1.4 – The State Bar could develop a turnkey banking, checking, bookkeeping, and accounting solution for client trust funds.

This reform was not among those prioritized in July 2020, in part because this reform seems more applicable to an attorney membership organization than the attorney licensure agency. Nonetheless, if successfully brought to fruition, it may serve the goal of better protecting the public and reduce racial disparities in discipline. Professor Robertson is exploring whether the State Bar can have a constructive role in clarifying the permissible use of such a system (as in Reform 1.3) and facilitating conversations among the relevant stakeholders. He is presently working with the Office of Access & Inclusion to convene a stakeholder meeting, given their work directly with Interest on Lawyers' Trust Accounts (IOLTA) banks.

Treatment of Prior Closed Complaints

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

Two of the potential reforms in this area suggested by Professor Farkas pertain to shielding decision-makers from information that is potentially prejudicial.

Potential Reform 2.1 – The State Bar could expunge after five years complaints closed without discipline.

This reform has not been pursued because State Bar staff determined that most of the advantages could be secured with the less extreme reform of archiving as proposed in 2.2 below.

Potential Reform 2.2 – The State Bar could archive complaints closed without discipline, so that they would be accessed rarely upon written application to a supervising attorney.

State Bar staff implemented this reform in late 2020. Nearly 400,000 closed complaints of all types and origins that were more than five years old were archived from view 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. Staff also created an automated routine to archive cases moving forward as they met the requirements above and will undertake an evaluation within 6–12 months to assess compliance with the new policy and to determine how often archived cases are being accessed.

Potential Reform 2.3 – The State Bar could develop a proactive nondisciplinary system to support attorneys at higher risk of future complaints.

This potential reform dovetails with the work of the 2020 Governance in the Public Interest Task Force by proposing that the data from closed complaints be mined to identify attorneys at risk of future complaints. State Bar staff has initiated a research plan to understand broad patterns of allegations and case closure reasons among Original Matter cases that closed without discipline. Additional analyses will explore how allegations cluster together within complaints and how allegations are correlated with respondent characteristics.

Increasing Attorney Representation

The final issue evaluated by Professor Robertson was the fact that African American respondents were much less likely to be represented by counsel when facing a disciplinary investigation by the State Bar. As with the number of investigations opened against an attorney, the percentage of cases in which the respondent attorney is not represented by counsel was a statistically significant predictor of attorney discipline. As a starting point, Professor Robertson suggested the potential reforms simply of tracking the rates of representation in the discipline system:

Potential Reform 3.1 – The State Bar could track and report the proportion of discipline cases lacking representation as a key performance indicator.

State Bar staff operationalized a metric “Percent of Respondents that Retain Representation” that 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 report this metric quarterly beginning in March 2021 with the 2019 value serving as its baseline. Preliminary analyses show that the representation rate has been increasing substantially, even prior to implementing reforms described below. State Bar staff is exploring the cause of this increase.

Potential Reform 3.2 – The State Bar could inform attorneys facing discipline about the increased statistical likelihood of probation or disbarment if they fail to secure counsel.

This reform was implemented at the end of 2020. In collaboration with the leadership of the RAD Committee, State Bar staff developed a one-page flier for OCTC to distribute to respondents advising them of the importance of securing counsel. The document is posted to respondents' My State Bar Profile at the same time OCTC posts a letter to respondents that notifies them of an open investigation. To facilitate recipients to secure representation, the flier also includes a link to the membership directory of the Association of Discipline Defense Counsel Association (ADDC), and staff are monitoring the number of link clicks per month. The flier also includes several other messages which Professor Robertson developed with experts in behavioral sciences to combat various biases including overconfidence. To test whether receiving this document has an impact on respondents securing counsel, respondents are randomly assigned to two different groups and only one group is currently receiving the flier. Beginning in May 2021 Professor Robertson will work with State Bar staff to use the metric described in Potential Reform 3.1 to assess whether the flier has increased rates of representation. At that point staff will consider revising the flier and distributing it to all attorneys facing an investigation.

Potential Reform 3.3 – The State Bar could develop a roster of attorneys who agree to provide pro bono one-hour consultations and provide a subset of these along with the notice contemplated in 3.2.

Professor Robertson is now working with leaders of ADDC and the RAD Committee to explore this strategy. Although many ADDC members already provide free consultations, Professor Robertson is exploring whether that process can be formalized for counselors to indicate their willingness to provide extensive and substantive discussions on their ADDC membership directory listing. If so, the 3.2 flier may be revised to emphasize this availability.

Potential Reform 3.4 – The State Bar could facilitate sliding-scale fee representation by the private defense bar.

Professor Robertson is also working with ADDC and RAD Committee to explore the feasibility of this "low-bono" approach. One focal point is the State Bar's current statutory mechanism for providing a 25 percent reduction in licensing fees for attorneys earning less than \$60,478.35 per year. Professor Robertson is exploring whether ADDC members would be willing to use that same means-testing mechanism to provide reduced fee services to attorneys facing discipline. Current discussions focus on whether 25 percent is an appropriate reduction in fees charged to

low-income attorneys at this threshold, or whether a flat reduced fee may be more appropriate.

Beyond free initial consultations (3.3) and reduced-fee (low-bono) services (3.4), there is also interest in providing more substantial pro bono services at later stages in the discipline process, including perhaps having a “lawyer for the day” servicing the State Bar Court. One barrier that Professor Robertson has identified is the professional liability insurance deductible for attorneys providing such pro bono services, given a recent case involving a court-appointed lawyer. Professor Robertson has learned that this perceived risk presently serves as a disincentive to providing pro bono services to low-income attorneys facing discipline. Another potential concern is about whether and how the scope of this low-bono representation can be appropriately limited, to respect the interests of both the attorneys and the clients.

Finally, Professor Robertson proposed creating an office to oversee initiatives related to equity in the discipline system.

Potential Reform 3.5 – The State Bar could create a Discipline Equity Office to implement the foregoing reforms, minimize disparities, ensure that discipline decisions are rendered on the merits, and support unrepresented attorneys.

This reform was not prioritized in summer 2020, due to resource constraints. Nonetheless, several of the foregoing reforms may be implemented without State Bar staff support or with support from the Mission Advancement & Accountability Division (MAAD). For example, Professor Robertson’s proposal to use the current means testing mechanism for license fee reductions could also be used for reduced attorney’s fees, with little or no additional staff work. For another example, MAAD is hiring a new principal analyst position, who could work with Professor Robertson, or other consultants, and the State Bar Court to develop attorney self-help materials that could be helpful for unrepresented attorneys navigating disciplinary charges.

FISCAL/PERSONNEL IMPACT

None

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 July 2021 meeting.

ATTACHMENT(S) LIST

None