



The State Bar of California

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TO: Members, Board of Trustees

FROM: Donna S. Hershkowitz, Interim Executive Director

SUBJECT: Report from Executive Director

Under the leadership of the Board of Trustees, the State Bar of California is moving quickly through the last year of its Five-Year Strategic Plan. As we head toward a new evaluation of what we want to achieve over the next five years, we have a unique opportunity to reflect on some of the critical attributes of the reforms and initiatives that have been undertaken in recent years. What follows is hardly an exhaustive list but rather a sampling of projects, initiatives, and reforms, both completed or ongoing, categorized by the key pillars guiding our efforts: accountability, transparency, efficiency, and access. Some of the listed items could fall under more than one of the pillars; their placement is somewhat subjective.

ACCOUNTABILITY

Accountability has been a watchword of many of the reforms, initiatives, and reports launched or implemented in recent years by the State Bar. The agency has undertaken efforts to be more accountable to the Board of Trustees, our oversight bodies (including the Supreme Court and the State Legislature), and those that we regulate, license, and discipline. Just a few examples of the efforts undertaken to demonstrate and be more accountable include:

- **Disparities in the Discipline System:** In 2019, the State Bar initiated a study to determine if there is disparity by race, ethnicity, or gender in the its discipline system. We were aware of similar studies in the criminal justice system and believed it important to understand if bias contributed to the outcomes in State Bar discipline. To ensure the evaluation's rigor and independence, we contracted with a Distinguished Professor of Education at the University of California, Irvine, Dr. George Farkas.

A basic analysis found that, without controlling for any factors potentially associated with case outcomes, there are statistically significant disparities for both probation and disbarment, with the largest gender/race disparities be seen when comparing Black to

white male attorneys. The final analysis found that when controlling for other factors—such as whether the attorney had representation during the process, the number of prior complaints against the attorney, and the number of prior investigations—statistically speaking, disparities in the discipline system can be explained primarily by factors not related to race/ethnicity. However, because of the importance that the Board attaches to the issue of fairness, we continue to look at the factors that lead to a higher number of complaints against African American male attorneys, a higher number of complaints moving to the investigation phase, and also to conduct an in-depth analysis of processes in the Chief Trial Counsel’s Office that could be improved to ensure a fair and effective discipline system.

- **Deunification and Review and Reform of Governance of Subentities:** The State Bar underwent a significant structural reform in 2018 with the separation of the regulatory functions and the trade associational functions, allowing the State Bar to truly focus its efforts on its public protection mission. Following the recommendations of the Governance in the Public Interest Task Force, the Board launched a review of the many volunteer subentities that provide support to State Bar work and initiatives. Although the size and structure of the subentities made sense when State Bar goals included advancing the professional interests of lawyers, it was less sound for a regulatory entity: “The sheer number of volunteers makes governance more difficult. When so many are involved it becomes increasingly difficult to focus effort, ensure alignment, and accomplish practical work based on shared goals and priorities. Thus, the Board’s ability to achieve effective oversight is compromised.” Changes to the role, size, and structure of the subentities were implemented in 2019.
- **Metrics:** In March 2019, the Board of Trustees was presented with a set of agencywide metrics adopted to quantify and monitor successes and areas needing improvement. “Performance measurement” is a process by which a public service organization undertakes regular collection of outcomes and/or output data to determine how efficiently and effectively it is managed. It includes quantifying the value delivered for customers and other stakeholders. As we have presented monthly, quarterly, and annual metric goals, we have offered adjustments developed by examining the metrics over time. To better engage the Board and to provide visibility and accountability for which the metrics report was designed, going forward, we will present the metrics report as a separate agenda item and not as part of the executive director report.
- **Differential Item Functioning Analysis of the Bar Exam:** The State Bar initiated an evaluation of the fairness of the bar exam by analyzing the potential differential impact of exam questions by race, gender, and other factors. The statistical technique applied to assessing individual questions on an exam is referred to as Differential Item Functioning (DIF) analysis. DIF analysis evaluates whether different groups perform consistently better or worse on specific questions. DIF analysis relies on Multistate Bar Exam (MBE) test scores to control for test takers’ underlying abilities. Items or questions are flagged as showing signs of DIF when the analysis reveals statistically

significant performance differences for test-takers across otherwise comparable groups—findings of DIF help to identify potential issues of bias in a test item.

With regard to race/ethnicity effects, DIF flags were identified in 16 percent of the questions for African American takers, with white takers as the reference group. The proportions of questions identified with DIF for Asian and Latino takers were lower, at 7 and 5 percent, respectively. All of the DIF results by race/ethnicity are in favor of white test-takers. However, the analysis results for African Americans were less reliable than the others identified because of the large differences in sample size between African American and white bar exam takers. When all nonwhite takers are grouped together and compared with white takers, the overall DIF results were flagged for only 5 percent of questions reviewed. Currently, an effort is underway to review those test questions with DIF flags to develop guidelines for drafting essay and performance test questions to avoid DIF.

- **Annual Discipline Report and Discipline System Statistical Report (DSSR):** At each meeting of the Regulation and Discipline Committee, staff present the DSSR, reporting on key statistics to assess the health and efficacy of the discipline system in protecting the public. The Annual Discipline Report, submitted to the Legislature by April 30 of each year, provides an overview of the State Bar’s attorney discipline system: its workload, operations, initiatives, and performance in fulfilling its statutory obligation to protect the public from attorney misconduct. Although the discipline system is made up of multiple interdependent components of the State Bar, the ADR primarily focuses on the Office of Chief Trial Counsel (OCTC), the office that receives, investigates, and, where appropriate, prosecutes attorney misconduct.
- **2018 Workload Study:** Approximately 250 staff from OCTC, Probation, and State Bar Court (SBC) participated in a time study in fall 2017, providing detailed information regarding their allocation of time across various work activities. Combined with caseload data, a staffing model was created to measure the time required to process cases from initiation to final disposition. These case weights, measured as minutes per case, provided baseline measures representing staff resources needed to process cases at various stages, including Intake and Enforcement in OCTC; Probation; and the three departments in SBC: Hearing, Review, and Effectuations. The study’s purpose was an assessment of the adequacy of staffing levels given the statutorily defined backlog target of processing cases within 180 days. Following input from the Legislative Analyst’s Office, and in preparation for presenting to the Legislature an updated assessment of staffing needs, a new Workload Study launched March 8 for OCTC and Probation. At their request, the study was deferred to a later date for the State Bar Court.
- **MCLE Provider Upload:** Goal 2(c) of the 2017–2022 Strategic Plan calls for the State Bar of California to “[b]egin auditing attorney compliance with MCLE requirements in the most cost effective and efficient manner no later than December 31, 2020.” To accomplish this goal, the State Bar developed an automated system that requires MCLE

providers to transmit MCLE attendance information electronically in lieu of simply having attorneys self-report general compliance with their triennial requirements. The State Bar can use automation to effectively, efficiently, and comprehensively audit attorney compliance with MCLE requirements. The new system launched by the December 2020 deadline, although refinements are being implemented to ensure usability by the full MCLE provider population.

- **Ad Hoc Commission on the Discipline System:** The Board created the Ad Hoc Commission on the Discipline System to inventory changes that have been proposed and implemented in OCTC since 2016 and evaluate their impact on public protection. The commission will be looking to ensure a fair and effective discipline system, and will be evaluating processes, policies, and procedures to ensure they have had their intended effect, do not create inequity, and further the State Bar's public protection mission and goals.
- **Fingerprinting Initiative:** The State Bar identified a statutory requirement—that the State Bar receive notification of attorney arrests and convictions from the California Department of Justice—with which we had been out of compliance for years. To come fully into compliance, the State Bar launched an extensive effort to re-fingerprint all licensed attorneys. Nearly all attorneys complied by the deadline, and the agency is now meeting its obligations under the statute.
- **Bar Exam Studies:** Since 2017, the State Bar has conducted numerous studies to explore the reasons for the low passage rates on the California Bar Examination, and ways to improve the bar exam, including:
 - An analysis of bar exam pass rates and trends from 2008, 2012, and 2016.
 - A standard-setting study to determine the appropriate passing score.
 - A content validation study to determine if the content of the bar exam aligns with the knowledge, skills, and abilities required of entry-level attorneys (as then understood).
 - An examination of the changes in characteristics of the students taking the bar exam to provide a better understanding of the declining bar passage rates.
 - A California-specific practice analysis to determine the knowledge, skills, and abilities required for entry-level attorneys, as a first step in analyzing future bar exam content.
 - An audit by the Department of Consumer Affairs of State Bar procedures and processes and how they compared with best practices in testing.
- **Board Approval of Contracts:** Pursuant to Business and Professions Code section 6008.6, the Board of Trustees now reviews and approves plans to contract for goods, services, or both that are in excess of \$50,000, or for information technology goods, services, or both, in excess of \$100,000. Contracts for review are set forth on each Board agenda.

- **Board Review of Board and Executive Travel:** To increase transparency and to ensure public confidence in the operations of the State Bar at all levels, each quarter the Audit Committee and the Board review reports of travel and business expenditures of senior management and members of the Board of Trustees.
- **Fraud Alerts:** The State Bar began proactively issuing fraud alerts to warn the public to report and watch out for potential legal fraud following federal warnings about mass family deportations, the losses suffered by massive wildfires in northern and southern California, and most recently, COVID-19. These fraud alerts provided information on how to protect against fraud. The State Bar also alerted attorneys to trust account scams that were targeting attorneys, phishing, and identity theft.

TRANSPARENCY

As crucial as accountability has been, and as we have labored to transform the State Bar into a regulatory agency, we have undertaken numerous efforts to improve transparency—both external and internal, including:

- **Posting of Agenda Items:** While the Bagley-Keene Open Meeting Act requires the posting of agendas, the State Bar has gone a step further. State Bar policy is that open session *agenda items* are posted five days in advance of a meeting to provide members of the entity and the public the opportunity to sufficiently review the matter that will be discussed.
- **Rubrics for Grant Making:** At the direction of the Board, the Legal Services Trust Fund Commission has developed rubrics for the evaluation of competitive grants, including partnership grants, homelessness prevention grants, and grants for provisionally licensed attorneys to work in legal services organizations. The rubrics provide visibility into the evaluation and selection process and ensure consistent application of rules and requirements.
- **Update and Posting of Decision-Making Tools for Moral Character Determinations:** The Moral Character Working Group (MCWG) was created to review and evaluate the existing methodology for determining whether an applicant for admission to the State Bar possesses the requisite moral character, develop clear and appropriate standards and guidelines for moral character determinations, ensure greater uniformity and consistency in decision-making, provide transparency into the moral character evaluation process, and ensure that the State Bar gives appropriate consideration for rehabilitative efforts undertaken by applicants. On the recommendation of the MCWG, the Board adopted Decision Matrices to reflect the methodology for analyzing issues relevant to determining whether an applicant possesses the requisite moral character for licensure to practice law.
- **Improved Internal Communications:** In an effort to ensure a widespread sharing of information across the State Bar, we have instituted monthly newsletters,

supplementing the information contained in weekly updates sent agencywide from the executive director. Surveys demonstrate a widespread belief that staff feel informed about ongoing activities at the State Bar.

- **Attorney Census:** Launched in 2019, the State Bar's online Attorney Census collects information from attorneys annually to get a snapshot of the profession. This greatly enhanced data set enables us to track changes in the diversity of the profession, career satisfaction by practice sector, gender, and race/ethnicity, among other important characteristics of the profession. Information from the census is reported in the Report Card on the Diversity of California's Legal Profession; Bar Briefs; at diversity summits, educational events, and other settings. The data result in "Calls to Action" for lawyers and employers.
- **Discipline Summaries and Cease and Desist Notices:** The State Bar now posts high-level discipline summaries, searchable by county, on the public website, so members of the public can easily see if an attorney they are considering hiring has been subject to discipline. In addition, cease and desist notices sent to those engaged in the unauthorized practice of law are also posted and searchable by county.
- **Law School Data:** To better understand the attrition rates of diverse students in California Accredited Law Schools and Registered Law Schools as compared to other students, reporting requirements were updated. This data will assist the State Bar in identifying schools that employ more successful tools to retain diverse students and in sharing best practices statewide.
- **Simulation of Impact of Different Bar Exam Cut Scores on Bar Passage by Gender, Race/Ethnicity, and Law School Type:** To further explore the impact of the bar exam cut score on diversity in the legal profession, and in response to requests for this data, in March 2020, the State Bar released a simulation of the impact of different bar exam cut scores on bar passage by gender, race/ethnicity, and law school type.

EFFICIENCY

The State Bar also undertook several initiatives to improve the efficiency of its processes and procedures:

- **New Case Management System for Discipline System:** The State Bar instituted Odyssey, a new case management system for OCTC, the State Bar Court, and Probation. Replacing an outdated system, Odyssey provides access to better information to manage cases and has enabled the online posting of more robust information about State Bar Court proceedings. While we continue to enhance and improve the functionality of Odyssey, it has provided increased access to case management information.
- **New Case Management System for Admissions:** In time for the opening of registration for July 2019 bar exam, we launched AIMS, the Admissions Information Management

System, to provide a comprehensive modern case management system for the functions housed within the Office of Admissions. The system's Applicant Portal streamlines applicant interactions and vastly reduces the need for paper documentation.

- **New Enterprise Resource Planning System:** The State Bar launched a modern enterprise resource planning system internally, including modules and services for personnel management, recruiting, payroll, expense reporting, budgeting, and forecasting. A performance management module will soon be rolled out.
- **Streamlining of Process of Phased Grading on the Bar Exam:** Following a psychometric analysis, the Committee of Bar Examiners and the Board approved changes to streamline the grading process without sacrificing validity and reliability. Changes implemented included increasing the number of graders per question, eliminating the third phase in the grading process, and changing the "regrade band," which determines if an applicant should get a second read of their written exam.
- **Remote Calibration of Bar Exam Grading:** In response to the COVID-19 pandemic, the traditional in-person method for ensuring accurate and consistent grading of bar exam answers across graders had to be retooled. Calibration sessions of the graders were held remotely. The ability to transition to remote calibration also enabled the expansion of the grader pool, which had previously been mostly Bay Area, allowing for greater diversity amongst graders.

ACCESS

Access, encompassing access to the State Bar, access to the legal profession, and access for the public to legal services, was also a significant driver of State Bar initiatives and reforms. Just a few of the things done to improve access are detailed below:

- **State Bar Court Remote Proceedings:** In response to the pandemic and the closure of State Bar offices beginning March 2020, the State Bar Court transitioned to remote court events, starting with status conferences, moving to oral arguments, and ultimately to trials. In 2020, the State Bar Court conducted more than 1,300 remote court events.
- **New Special Admissions Rules to Increase Access to Legal Services:** The State Bar reviewed and revised the rules regarding special programs that allow non-California attorneys to practice law in California, with the goal of making changes to support increased access to legal services and removing unnecessary roadblocks to gain special admission. The Board also approved rules to create a new Special Admissions category for attorney spouses of active-duty military personnel stationed in California who are licensed outside of California.
- **Justice Gap Study:** In 2019, the State Bar completed the first-ever comprehensive study of the California Justice Gap, measuring the State's civil legal needs and the gap between those needs and the resources available to meet them. The study found,

through interviews with thousands of Californians, that the Justice Gap is pervasive and multifaceted, having two dimensions: (1) a knowledge gap; and (2) a service gap.

- In the year prior to the study, 55 percent of Californians at all income levels experienced at least one civil legal problem in their household, yet nearly 70 percent of them received no legal assistance.
- Fewer than one in three Californians sought legal assistance to address their problems.
- Even when experiencing problems that have a significant impact on them, most do not receive legal help: 27 percent of low-income Californians received some legal help, while 34 percent of middle-income individuals did.

The California study also explored how the cost of legal education affects access to justice by researching how debt influences the career choices of law school graduates, diverting them away from public interest careers.

The report included recommendations that policymakers, funders, researchers, and members of the legal services community can use to begin closing the California Justice Gap.

- **Homelessness Prevention Funding:** Following the appropriation of additional funding for legal services to address growing homelessness problems, the State Bar, through the Legal Services Trust Fund Commission, worked quickly to allocate \$20 million in formula funding and competitive grants in 2019 and early 2020 for homelessness prevention services. The Legislature and Governor Newsom appropriated an additional \$31 million as part of the 2020 budget act for the same purposes, which has also been allocated through a mixture of formula funding and competitive grants.
- **Provisional Licensure Program:** In 2020, the State Bar developed the Provisional Licensure Program in response to the COVID-19 pandemic and its impact on applicants' ability to study for and take the October 2020 Bar Exam, and the economic realities that made earning income as a lawyer critical for many families. The program was developed and deployed in a few short months and provides a meaningful opportunity for recent law graduates to practice law. Two months after it launched, the original program was expanded to also create a pathway to licensure for individuals who scored between 1390 and 1439 on a bar exam administered between July 2015 and February 2020.
- **Paraprofessional Program:** To help close the justice gap, the State Bar, through the Paraprofessional Program Working Group, is currently developing comprehensive recommendations for the licensure, regulation, and discipline of paraprofessionals. The working group is examining the subject matters and tasks that lend themselves to being performed competently and effectively by licensed paraprofessionals and is also developing robust recommendations for entry requirements and continuing education.
- **Exploration of a Regulatory Sandbox:** The Closing the Justice Gap Working Group has

recently begun its exploration of the use of a regulatory sandbox to foster experimentation with innovative legal services delivery systems in a manner that protects the public and increases access to legal services. Among other approaches, the working group will consider the use of technology and online legal service delivery models to enhance the delivery of—and access to—legal services.

- **California Bar Exam Strategies and Stories:** The State Bar partnered with a team of law and psychology researchers from Indiana University, University of Southern California, and Stanford University to assess whether there are ways to help California Bar Exam takers better prepare and improve their performance. The research team used surveys and focus groups of recent California Bar Exam participants to help develop the *California Bar Exam Strategies and Stories Program*. The program was offered for the first time to all applicants for the July 2018 bar exam, and a second time to all applicants for the July 2019 bar exam. It was also offered to October 2020 and February 2021 exam takers, and will be offered again before the July 2021 bar exam.

The online program includes an introductory film, stories from prior test-takers, and a writing activity in which participants share insights and strategies that may be useful to them and future test takers.

Results from the first two years have been promising: the program increased the likelihood of participants passing the bar exam ranging between 6.8 to 9.6 percentage points, controlling for other factors. The impact was even higher for applicants in disadvantaged groups, including those in underrepresented racial/ethnic populations and first-generation college students.

- **Online Complaint Portal:** The State Bar created a portal to enable consumers with complaints against lawyers to submit their complaints, and related documentation, online. Prior to this, complaints needed to be submitted by paper, often with significant paper documentation provided. The advent of online complaints increased the number of complaints submitted to OCTC. This portal was recently fully integrated with Odyssey so that complaints and supporting documents that are submitted through the portal are automatically entered into the case management system.
- **Online Complaint Forms in Multiple Languages:** Originally launched only in English, the complaint portal expanded to Spanish, Vietnamese, Korean, Russian, and Chinese. For those not wanting to submit a complaint online, there are forms available in these same languages and in Tagalog.
- **Consumer Pamphlets in Seven Languages:** The State Bar updated a series of legal resources for consumers—available in English, Spanish, Tagalog, Vietnamese, Korean, Russian, and Chinese—to provide consumers basic information to help find and hire an attorney, access legal aid, work with and avoid problems with attorneys, and what to do if they encounter problems. Available pamphlets include:

- Legal Resources for Immigrants
- Legal Resources for Veterans and Service Members
- Legal Assistance Following a Disaster
- What Consumers Should Know Before Hiring an Attorney
- If You Have a Problem with an Attorney
- Client Security Fund
- Avoiding Notario Fraud by Nonattorneys
- How Seniors Can Avoid Legal Fraud

The work highlighted above is representative of our continuous efforts in furtherance of the State Bar's mission, which 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."

I encourage the Board to continue to think about these important pillars of accountability, transparency, efficiency, and access as we close out the current Five-Year Strategic Plan and begin to think about our strategic goals for the next five years.