



# The State Bar *of California*

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## **OPEN SESSION AGENDA ITEM 702 JULY 2021**

**DATE:** July 23, 2021

**TO:** Members, Board of Trustees

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

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

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### **EXECUTIVE SUMMARY**

This agenda item gives an update on the State Bar's work to implement policy reforms to address the disparate discipline imposed on Black attorneys as recommended by Professor Christopher Robertson and approved for implementation of further study by the Board of Trustees.

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### **BACKGROUND**

In 2019, the State Bar of California initiated a study to assess the impact of race and ethnicity on attorney discipline and determine whether there was disparate treatment of attorneys of color in the State Bar discipline system. This study, conducted by Professor George Farkas of the University of California, Irvine, found that Black male attorneys were more likely to be disciplined. Controlling for other factors, however, Dr. Farkas found that several facially neutral factors explained those disparities.

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

In July 2020, Professor Robertson presented an interim report, which focused on 13 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 take action to address a subset of the potential reforms. Staff has regularly reported back to the Board on the status of these projects.

At its January 2021 planning meeting, the Regulation and Discipline Committee directed State Bar staff to return to the Board with a status report on the reforms recommended by Professor Robertson that were not acted upon in 2020. In March 2021, staff identified a subset of potential reforms to work on in consultation with Professor Robertson during the calendar year. Since then, Professor Robertson has worked directly with State Bar staff, and met with stakeholders and various committees and task forces to move this work forward.

## **DISCUSSION**

The narrative below describes the progress made on potential reforms related to two areas: client trust fund accounting and attorney representation.

### **REPORTABLE ACTION BANK CASES**

Professor Farkas's report found that among attorneys with more than 10 complaints against them, Black male attorneys were more likely to have a large number of 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 proposed the following potential reform:

**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.

In spring 2021, Professor Robertson worked with the Office of Professional Competence (OPC) to advance this proposal. OPC staff drafted possible revisions to the Handbook on Client Trust Accounting for California Lawyers (CTA Handbook). The CTA Handbook is a primary reference used by the Ethics Hotline staff in providing research assistance to attorneys who have ethics questions, such as questions about trust accounting duties. The CTA Handbook also is used in State Bar Ethics School and Client Trust Account School. In addition, the CTA Handbook has been cited in ethics opinions by bar ethics committees.

The revisions drafted by OPC staff refer to an attorney's option of using other professionals and technologies to assist with client trust accounting duties so long as the attorney provides adequate supervision. These revisions would change the guidance issued by the State Bar in a manner consistent with Professor Robertson's Potential Reform 1.3. Proposed changes to the CTA Handbook as well as background information that informed the proposed changes are in Attachment A.

As a longer-term objective, OPC is exploring the development of a formal ethics opinion, a Minimum Continuing Legal Education (MCLE) self-study article, and updated e-learning content that will similarly refer to an attorney's option of using other professionals and technologies to assist with client trust accounting duties as long as the attorney provides adequate supervision. This proposed plan for preventative education will be described in depth at the Board of Trustees' July 2021 meeting in a separate agenda item.

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

Professor Robertson is working with the Office of Access and Inclusion (OAI) to understand whether Interest on Lawyers' Trust Accounts (IOLTA) have a full range of features, such as online banking and integration with bookkeeping software, and if not, whether those features can be added. He and OAI recently hosted a focus group with bankers from IOLTA-eligible financial institutions and other consultants. OAI is currently surveying 20 financial institutions with the highest number of IOLTA accounts to learn more about which features are currently available for IOLTA accounts in comparison to their most full-featured business banking accounts.

## **INCREASING ATTORNEY REPRESENTATION**

Professor Farkas's research found that the percentage of cases in which the respondent attorney is not represented by counsel was a statistically significant predictor of attorney discipline and Black respondents were much less likely to be represented by counsel than their white counterparts when facing a disciplinary investigation by the State Bar.

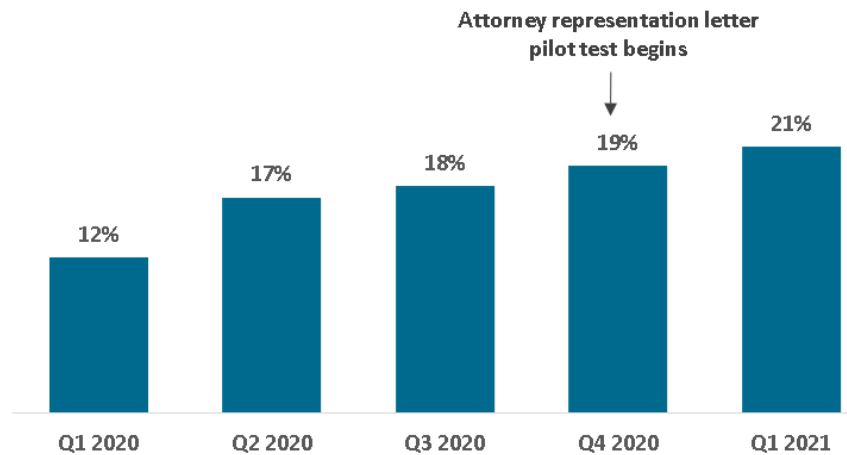
**Potential Reform 3.1** – Track and report the proportion of discipline cases lacking representation as a key performance indicator.

State Bar staff developed a metric, "Percent of Respondents that Retain Representation," based on respondents whose cases reached the investigation stage. All case types and closure reasons are included. This metric will be reported regularly in the State Bar Metrics Report beginning in July 2021. Figure 1 displays the results of this metric for the most recent five quarters.

The percent of respondents that retained representation steadily increased throughout 2020, even before staff began pilot-testing a letter that informs attorneys about the importance of getting representation and refers them to a directory of attorneys who specialize in such work (see Potential Reform 3.2 below).

This metric will be used to assess the impact of reforms the State Bar implements to address attorney representation.

**Figure 1. Percent of Respondents that Retain Representation**



**Potential Reform 3.2** – Inform attorneys facing discipline about the increased statistical likelihood of discipline without counsel.

In collaboration with the leadership of the Regulation and Discipline Committee, the State Bar developed an informational letter to distribute to respondents advising them of the importance of securing counsel. The letter also contains a link directing them to the Association of Discipline Defense Counsel. To test whether receiving this document has an impact on respondents securing counsel, respondents were randomly assigned to two different groups and only one group received the document. This pilot test began in November 2020. Professor Robertson has been tracking the number clicks that the link to Association of Discipline Defense Counsel directory has received each month, and later this summer, he will collaborate with State Bar staff to evaluate the impact of the letter on attorneys securing representation.

**Potential Reform 3.3** – Develop a roster of attorneys who agree to provide low-cost and pro bono consultations with Attorney Discipline Defense Counsel.

Professor Robertson has been in discussions with the Association of Discipline Defense Counsel about developing pro bono, one-hour consultations or more extensive sliding-scale fee representation, for attorneys of limited means. Questions to resolve include how to protect pro bono attorneys from facing legal malpractice liability, and how to rigorously apply means testing, so that fees can be adjusted appropriately. Finally, Professor Robertson has been contributing to parallel discussions with the State Bar Court and State Bar staff to develop self-help materials to assist attorneys who remain unrepresented in the discipline process.

## **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 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 State Bar of Trustees at its November 2021 meeting.

### **ATTACHMENT LIST**

- A.** Office of Professional Competence Proposed Amendments to Client Trust Accounting Resources and Guidance



# The State Bar of California

## OFFICE OF PROFESSIONAL COMPETENCE

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Date: May 3, 2021

To: Christopher Robertson, JD, PhD

From: Randall Difuntorum, Director, Professional Competence  
Andrew Tuft, Supervising Attorney, Professional Competence

Subject: Client Trust Accounting Resources and Guidance

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### INTRODUCTION

As you know, the Office of Professional Competence (OPC) manages professional responsibility resources that promote awareness of, and compliance with, the California Rules of Professional Conduct, including duties concerning funds held in a client trust account. This memorandum presents proposed changes to client trust accounting resources and guidance administered by OPC. The proposed changes respond to the recommendation for Potential Reform 1.3 in your interim report to the Board of Trustees entitled “Potential Reforms to Mitigate Racial Disparities in the California State Bar Attorney Discipline Process.”

Potential Reform 1.3 provides that:

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

OPC reviewed its client trust accounting resources and has considered proposed changes, including proposed amendments to the [\*Handbook on Client Trust Accounting for California Attorneys\*](#) (“CTA Handbook”). The CTA Handbook is a primary reference used by the Ethics Hotline staff for providing research assistance to attorneys on trust accounting issues and the full text is available on the State Bar’s website. The CTA Handbook amendments are summarized in this memorandum and can be implemented immediately, and this would effectuate a concomitant change to the assistance provided to attorneys by the Ethics Hotline. Other OPC changes under consideration are also identified, such as new ethics opinions, MCLE self-study articles, and updates to e-learning course modules.

## BACKGROUND

As we have previously discussed, to provide context for the proposed changes, an understanding of the longstanding approach to the issue of client trust accounting duties and an attorney's reliance on other support staff to assist in this work is helpful. The original content of the CTA Handbook was developed by staff in the Office of the Chief Trial Counsel (OCTC) and OPC.<sup>1</sup> This means that the approach used in the book incorporates the combined perspectives of the State Bar's attorney disciplinary system and OPC's work with the Ethics Hotline program.

Significant in the State Bar's discipline system experience are the decisions of the State Bar Court and the California Supreme Court on the issue of a lawyer's personal responsibility for client trust accounting. The following cases are illustrative examples.<sup>2</sup>

- *In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627. Respondent attorney did not sign checks drawn on her client trust account, but instead authorized her staff to do so by using a rubber stamp of her signature. The attorney did not review any of the client trust account statements herself, never reconciled the client trust account, and never compared the settlement checks received with the deposits in the account. This lack of oversight resulted in major theft by her staff of funds belonging to clients and their medical providers.

The State Bar Court observed that:

Respondent was not charged with, nor found culpable of, failing to prevent her employees' theft of trust account money. Rather, the gravamen of this case is respondent's complete failure to have adequate office procedures in place to protect client funds and to adequately supervise her subordinate staff to ensure that those procedures were followed. The misconduct here involves respondent's actions and inactions, not those of her staff. ¶ . . . In the present case, respondent gave control of her trust account to her bookkeeper and then failed to supervise the management of the account or to examine the bank statements or other records. The result was the theft of \$1.7 million.

(*In the Matter of Malek-Yonan*, at pp. 634 – 635.)

- *Waysman v. State Bar* (1986) 41 Cal.3d 452 [714 P.2d 1239, 224 Cal.Rptr. 101]. Attorney was disciplined for commingling and misappropriating client funds. In part, the

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<sup>1</sup> The primary attorney contributors to the original version of the CTA Handbook were Dominique Snyder, former Senior Trial Counsel, and Karen Betzner, former Senior Executive for Professional Competence.

<sup>2</sup> Source: Handbook on Client Trust Accounting for California Attorneys, Appendix 3: Index of Selected Cases and Opinions by Topic, at page 66.

misconduct resulted from the attorney's practice of allowing pre-signed checks to be used by the attorney's secretary. Although observing that the attorney appeared to have acted without any intent to defraud his client, the court characterized the attorney as negligent in supervising his office and financial affairs.

- *In the Matter of Steele* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 708. An attorney was not absolved of his own duty to monitor the client trust account where the attorney delegated responsibility of supervising the client trust account to his legal assistant and the legal assistant became a signatory on the attorney's general and client trust account. Legal assistant failed to balance both the client trust account and business account and embezzled client funds. Specifically, it was noted that for more than two years, the attorney allowed the nonlawyer assistant to sign client trust account checks and handle all financial records without adequate supervision.
- *In re Basinger* (1988) 45 Cal.3d 1348 [249 Cal.Rptr. 110]. Attorney gave secretary/office manager a general power of attorney to handle firm's accounts and issue checks. Secretary and attorney were convicted of grand theft of client and partnership monies.

As indicated above, case law precedent is a basis for concern that lawyers who find themselves in the discipline system for mishandling trust funds include practitioners who rely on others to manage accounts, control recordkeeping, and disburse funds. Significantly, these cases are not limited to intentional attorney misconduct. However, the cases also suggest that delegation of trust accounting tasks, such as recordkeeping, are not prohibited so long as there is adequate supervision and the attorney remains personally accountable.

OPC's experience with the Ethics Hotline program is also informative as it indicates that the topic of trust accounting duties is a frequently posed issue. OPC tracks the primary issue category for each attorney inquiry that is completed by staff. For the years of 2019 and 2020, the table below presents the categories of primary issues by percentage of total completed calls.

Ethics Hotline Calls – Primary Issues		
Issue Category	Average % 2019	Average % 2020
Fees and Costs for Legal Services	19%	19%
Conflicts of Interest	14%	16%
Client Confidential Information	12%	13%
Communications with Clients, Adverse Party and Others	20%	12%
Attorney Advertising and Solicitation	9%	8%
Misconduct/Moral Turpitude/Trial Conduct	9%	8%



As indicated above, a frequent issue category for both 2019 and 2020 is “Fees and Costs for Legal Services.” This category encompasses questions concerning both fee arrangements and client trust accounting duties. Anecdotal information from the Ethics Hotline staff suggests that within this category, compliance with the Board adopted standards for trust account recordkeeping are among the specific questions frequently posed by Ethics Hotline callers.

Rule 1.15(e) of the California Rules of Professional Conduct provides that: “The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what ‘records’ shall be maintained by lawyers and law firms in accordance with paragraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.”

These standards include requirements to create and maintain written ledgers and account journals, and to conduct monthly reconciliations. The Ethics Hotline’s research assistance facilitates compliance with these standards and the CTA Handbook is the main reference for providing guidance. This preventative activity is consistent with the importance of recordkeeping noted by the California Supreme Court. The Supreme Court has observed that “the purpose of keeping proper books of account, vouchers, receipts, and checks is to be prepared to make proof of the honesty and fair dealing of attorneys when their actions are called into question, whether in litigation with their client or in disciplinary proceedings and it is part of their duty which accompanies the relation of attorney and client.” (*Dixon v. State Bar* (1985) 39 Cal.3d 335, 344 [216 Cal.Rptr. 432].)

The CTA Handbook was written to help lawyers understand their trust accounting duties and carry out their recordkeeping responsibilities. The CTA Handbook provides model forms for client ledgers and account journals and detailed instructions for conducting a reconciliation, together with representative examples of how to locate and correct accounting discrepancies. This responds to the personal accountability articulated in the disciplinary case law as it equips a lawyer to manage their own account or acquire a level understanding necessary to supervise accounting assistants or to select and use accounting applications.

Given the case law emphasis on a lawyer’s ultimate responsibility for trust accounting, OPC’s resources and guidance, including the CTA Handbook and Ethics Hotline, focus on a lawyer’s personal responsibility to carry out accounting duties or to provide necessary supervision as this addresses the great risk that a lawyer’s delegation of trust accounting duties might result in a lawyer’s inadvertent failure to assure the proper handling of entrusted funds.

## **DISCUSSION**

On February 17, 2021, we met by teleconference and you provided an excerpt from your interim report to the Board entitled “Potential Reforms to Mitigate Racial Disparities in the California State Bar Attorney Discipline Process” (“Interim Report”). (See Attachment A for the excerpt from the Interim Report.) We discussed some of the background and you presented the broad concept that public protection could be enhanced by various reforms, including initiating

exploration by the State Bar of a new integrated approach to client trust accounting that would include online banking and perhaps client transparency, while recognizing the need for a vendor to come up with such a solution and questions about the appropriate role of the licensure agency to endorse it.

As a more immediate and specific proposal directed at OPC, we discussed Potential Reform 1.3 which seeks revisions to the State Bar's resources and guidance on compliance with client trust accounting duties. As discussed, these revisions would modify the current emphasis on a lawyer's nondelegable responsibility for client trust accounting duties and personal performance of the Board's recordkeeping standards. Specifically, the changes would encourage attorneys to reasonably rely on systems of professionals and technologies to maintain compliance and prevent trust accounting errors.

Among the Interim Report's specific points in support of this reform are:

1. Individual lawyers may lack the skillset and demeanor to do careful bookkeeping, and their clients are often better served (with more value for money) if that work is performed by another professional, such as a bookkeeper or accountant, or with technology, such as an online banking solution. In healthcare, similarly, there is a growing movement towards "interprofessionalism," realizing that coordination of healthcare across the several professions is often more important than any one profession performing its role. (Interim Report, at p. 17.); and
2. In the legal field, Rule 5.1 already recognizes that need for a systems approach. In a firm, lawyers "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that lawyers in the firm" will comply with their professional responsibilities. This approach provides a template for trust accounting as well. (Interim Report, at p. 17.)

After discussion, OPC staff agreed that so long as there is sufficient continuation of the longstanding message that attorneys are ultimately responsible for funds entrusted to them, changes to resources can be implemented to add a new focus on the general principle that professional assistance and accounting technology are helpful to improve a lawyer's compliance with trust accounting duties. This would include a shift in emphasis to recognize that lawyers may reasonably rely, for example, on an accounting professional as a matter of first resort and general practice, rather than only in case-by-case instances where a lawyer is unable to personally resolve a particular recordkeeping discrepancy.

#### Proposed Amendments to the CTA Handbook

In follow-up to our meeting, OPC has prepared the CTA Handbook amendments summarized below.

- 1) **SECTION IV: OPENING A CLIENT TRUST BANK ACCOUNT** (See CTA Handbook, at pp. 9 – 10.)

In this section, the proposition that a lawyer should limit accessibility to trust funds is revised. New language states that using a bookkeeper or other supervised assistants can be a prudent step for a lawyer who lacks accounting skills.

- **Should** limit accessibility of funds. ~~Ideally you should be the only person authorized~~ Exercise due care in authorizing signatories to your trust account or otherwise authorizing others to sign client trust bank account checks ~~and otherwise~~ or to pay out client funds. ~~However, for practical reasons may~~ Many practitioners make their secretaries, bookkeepers or spouses authorized signatories and reasonably supervise these assistants. This might be prudent if you lack bookkeeping skills or if acting as the sole signatory on your trust account detracts from your focus on providing legal services to your clients. However, do not discount the fact ~~Since you~~ that you are individually, personally accountable for all client funds you receive or hold in trust, and since this accountability can't be delegated to anyone else, allowing other people access to your client trust bank account ~~is risky~~ does not absolve you of your responsibility to supervise the management of your trust account. In addition, you should never pre-sign client trust bank account checks and leave them for employees to issue.

## 2) **SECTION VII: RECORDKEEPING** (See CTA Handbook, at pp. 19 – 20.)

In this section, revisions are made to help convey that accounting applications and other technological tools are an option for handling accounting duties, including the creation of required records. Additional edits update the text to recognize current practices, such as cloud storage of electronic data, and new risks associated with the use of technology. Although risks are identified, the section concludes with new language on the advantages of technology and this is intended to undercut any misperception that the use of technology is being discouraged.

### **What If You Have a Computerized System?**

A computerized accounting system, applications, or other technology tools ~~is acceptable~~ are an option for helping you with your trust accounting duties, including required recordkeeping. However, you should consider generating and keeping hard copies of all the records required by the rule (including bank-created records). You can use computer printouts instead of hand-written ledgers for the records you are responsible for creating, but just having the data stored electronically in the cloud, on a ~~disk~~ drive (local or external), or saved to storage media is risky. ~~(It's a good idea to have these printouts dated and signed by the preparer to show when and by whom they were generated.)~~

~~If you're~~ When using a computerized accounting system, applications, or other technology tools, ~~you should remember~~ be mindful of the fact that computer data can be lost ~~through~~ in the event of a natural disaster ~~(like earthquake or fire)~~, power or equipment failure, cyber attack, ~~and or~~ human error. For your own protection, make hard copies regularly and have all of your computer records regularly backed up ~~onto disks~~ to the cloud, on a drive (local or external), or on storage media. In addition, ~~if you~~

~~use computerized records,~~ remember that if ~~the~~ computer records are offered as evidence, they must be authenticated as business records pursuant to Evidence Code sections 1270-1272. (See Appendix 2 for the text for those sections and Evidence Code sections 1552 and 1553.)

Beyond preservation of the computer data, you also should be ~~very~~ careful when changing or upgrading your specific accounting software application, your overall computer operating system, and the computer hardware itself. Different software applications and newer versions of your same software application may not be fully compatible with the data generated by your current software application. Similarly, changing computers or operating systems can cause ~~difficult~~ compatibility problems. These days, it is not unusual for computer technology to advance dramatically in a ~~five year~~ short time period, rendering some applications or data obsolete and problematic to use. In addition, a special note for web-based applications is that browsers change over time and it is not unusual for a common component or functionality of a browser to be discontinued or no longer be supported at some point in the future. An example is the 2020 end of life for Adobe Flash support that impacted many browser-based applications in 2021.

To avoid problems, a person's ordinary use of a smartphone requires responsible steps, such as regularly backing-up data, and this is true of accounting technology. Accounting technology should not be avoided simply because there are potential problems as it offers the advantages of efficiency and reliability and can avoid the errors that arise from manual entries on hard copy accounting forms.

### 3) **SECTION VIII: RECONCILIATION** (See CTA Handbook, at p. 26.)

In this section, the following two paragraphs are revised to recognize that accounting software, a bookkeeper, or other assistants may be used to perform the monthly reconciliation required by the Board adopted recordkeeping standards.

Rule 1.15(d)(3) and (e) requires that your client trust bank account records be reconciled every month and that you create a written record that shows you went through the reconciliation process. It's alright to use accounting software applications and to hire a properly supervised bookkeeper or the equivalent, especially if you lack accounting skills, but you are still personally responsible for accounting to your clients and to the State Bar for the money in your client trust bank accounts. Therefore, even if you ~~never intend to do the reconciling~~ do not personally carry out the monthly reconciliation, you should understand the process and exercise supervisory oversight. (Regarding software and other accounting technology, see the discussion of computerized systems in Section VII: Recordkeeping.)

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**Reconcile the Account Journal with the Client Ledgers** (See CTA Handbook, at p. 28.)

When the “Total Client Ledger Balance” *doesn’t* exactly match the “Month Ending Account Journal Balance,” don’t panic; you’ve found a mistake, and that’s what reconciliation is for. ~~You can call in a bookkeeper to help you, or make the correction yourself~~ (see **Finding and correcting mistakes**, below). Bookkeepers and other accounting professionals may have skills that you do not personally possess so relying on a properly supervised assistant to identify and correct mistakes may be prudent and offer a reasonable option for compliance with your recordkeeping duties. When ~~you’ve a mistake is~~ found and corrected by you, your bookkeeper, or other assistant~~the mistake,~~ move on to step 2.

**4) APPENDIX 5: WHAT TO DO WHEN THE RECONCILED TOTAL AND THE BANK STATEMENT BALANCE DON’T EXACTLY MATCH** (See CTA Handbook, at p. 73.)

In this section, new language states that the use of a bookkeeper can be a prudent option for generally managing a trust account. Without this language, a lawyer might misconstrue this section, captioned “Call in a bookkeeper,” as suggesting that other professionals are only appropriate to aid with discrete accounting problems that occasionally arise.

7. **Call in a bookkeeper.** You have now gone through all of the steps necessary to check your own records. The mistake is in there, but the chances are that you aren’t going to find it. It’s also possible that the difference between the reconciled balance and the bank statement balance is caused by something you can’t find this way. Don’t waste any more of your valuable time hunting; call in a professional. If you have never sought assistance with your client trust account, then an unresolvable issue is the time to seriously consider consulting or retaining a professional. You should remember that a bookkeeper or other accounting professional who is properly supervised may be a prudent option for generally handling all of your recordkeeping duties. Especially if you find yourself repeatedly wrestling with accounting problems, choosing to retain and rely on a properly supervised professional to generally manage your trust account might even result in more time to focus on rendering legal services to your clients.

Ethics Hotline Research Assistance

The above revisions will change the assistance provided by the Ethics Hotline because the CTA Handbook is a key resource used for assisting lawyers who have client trust accounting questions. OPC supervisors will present the CTA Handbook revisions at a staff meeting to help the Ethics Hotline staff understand the goal of conveying the concept that a lawyer may reasonably rely on professional assistants and technologies to maintain compliance with trust accounting duties. At the same time, it will be clarified that this approach is not intended to

dilute the message that attorneys are fiduciaries who have important obligations to provide adequate oversight and supervision for the handling of trust funds.

#### Ethics Opinion, MCLE Self-Study Article, Updated e-Learning Content

As a more long-term initiative, OPC will explore the development of an ethics opinion or MCLE self-study article that addresses the use of professional assistance and technology in carrying out trust accounting duties. Publication of an ethics opinion would provide guidance that is different from the assistance provided by the Ethics Hotline as the Ethics Hotline does not provide legal advice or render an opinion to an inquirer. An ethics opinion<sup>3</sup> or MCLE self-study article<sup>4</sup> can use a detailed hypothetical fact pattern to apply the relevant rules and offer findings and a conclusion. An opinion or article on the ethical use of professional assistance and technology for client trust accounting duties would be posted on the State Bar website, publicized by the State Bar, and used by the Ethics Hotline staff in assisting lawyers. In addition, an opinion or article on technology tools for client trust accounting would serve as an opportunity to address the recent revision to the competence rule. Rule 1.1 of the California Rules of Professional Conduct addresses the duty of competence and this rule was recently revised, operative March 22, 2021, to add a comment stating that: “The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.”

In addition to opinions and articles, OPC staff will review the content of the e-learning courses, including existing courses and courses that are in production, to ascertain if revisions might be made to the client trust accounting content. Such revisions would be consistent with the changes to the CTA Handbook. Existing e-learning courses include a training on the comprehensive amendments to the Rules of Professional Conduct that became operative on November 1, 2018. Courses in development include a client trust accounting module that will be integrated into an attorney self-assessment program.

### **CONCLUSION**

OPC staff recognizes that changes to the regulation of professional conduct can promote the twin goals of access to justice and public protection. OPC has served as primary staff to the [Task Force on Access Through Innovation of Legal Services](#) and currently is staff to the [Closing the Justice Gap Working Group](#). The changes to OPC resources and guidance presented in this

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<sup>3</sup> Prior State Bar ethics opinions issued by the Committee on Professional Responsibility and Conduct (COPRAC) regarding the use of technology in the practice of law include opinions addressing the following topics: communicating with a potential client in a chat room (State Bar Formal Op. No. [2004-166](#)); confidentiality and competence when using technology to transmit or store confidential client information (State Bar Formal Op. No. [2010-179](#)); and practicing in a virtual law office (State Bar Formal Op. No. [2012-184](#)).

<sup>4</sup> MCLE self-study articles authored by COPRAC members have addressed: [online lawyer advertising](#) (Cal Bar Journal, November 2010); [social media postings as evidence](#) (Cal Bar Journal, May 2012); and [responding to online reviews](#) (Cal Bar Journal, November 2014).

memorandum are consistent with these broad reform studies and OPC is open to contributing to similar future efforts to enhance lawyer compliance with trust accounting duties.

## Attachment A

# POTENTIAL REFORMS TO MITIGATE RACIAL DISPARITIES IN THE CALIFORNIA STATE BAR ATTORNEY DISCIPLINE PROCESS

Christopher T. Robertson, JD, PhD  
University of Arizona and Boston University

*an interim report to*

The California State Bar Board of Trustees

*Comments to [Robertson@arizona.edu](mailto:Robertson@arizona.edu)*



### C. Upstream Prevention

Besides any case-handling reforms by OCTC, the State Bar may have the biggest effect on this problem if it works further upstream to reduce the number of times that attorneys have this sort of problem, which, if successful, will reduce the racial disparity and better protect the public. To do so will require a reconceptualization of this problem, from individuals to systems.

Currently, a bounced check is viewed as a failure of the particular attorney who has responsibility over that account—it is a potential violation of his or her professional responsibilities. Accordingly, the attorney is admonished or perhaps required to take continuing education courses on the topic. This notion of individual responsibility reflects a longstanding paradigm for legal ethics. To the extent that lawyers are unaware of whether and how to maintain client funds in trust, even more such training could be worthwhile – e.g., new attorneys could be required to take prophylactic education specifically on the topic, before opening their first client trust fund.

However, in many domains, the optimal protection of the public often requires more than individual discipline—it requires systemic solutions. By way of comparison, in a landmark study by the Institute of Medicine (IOM), “To Err is Human,” a national task force confronted the devastating number of preventable medical injuries (which were estimated to impact 3-4 percent of all patients). It concluded that, “The focus must shift from blaming individuals for past errors to a focus on preventing future errors by designing safety into the system.”<sup>34</sup> The IOM report relied on a range of prior studies of accidents, including the Three Mile Island nuclear disaster and the Challenger space shuttle explosion.<sup>35</sup> Occasional lapses and mistakes are to be expected in any system with humans, but the question is how to design larger systems to ensure that those errors are minimized and caught before they can hurt someone. Compared to any particular slipup, the latent failure to design the system appropriately is the greater error.<sup>36</sup>

The healthcare analogy suggests two insights: (1) that occasional lapses and errors are to be expected, but systems should be designed to minimize actual harm to clients, and (2) those systems will often require the incorporation of other technologies, professionals, and organizational supports, rather than individual-focused remedies such as discipline or retraining.

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supporting the proposition that, “it is probable that implicit racial biases will cause judges, prosecutors, and defense lawyers to draw adverse inferences from ambiguous facts more readily when defendants are Black.”).

<sup>33</sup> See Sah, Robertson, & Baughman *supra* note 7 (discussing the need to redact names in order to protect prosecutorial discretion). See also Roland G. Fryer Jr. and Steven D. Levitt. *The Causes and Consequences of Distinctively Black Names*. 119 *QUARTERLY J. ECON.* 767 (2004).

<sup>34</sup> Linda T. Kohn, Janet Corrigan, and Molla S. Donaldson, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM*, Washington, DC: National Academies Press, Vol. 6, p. 5 (2000).

<sup>35</sup> *Id.*, at 51-52.

<sup>36</sup> See *id.*, at 55-56.

The second insight from healthcare suggests a systems-based approach to problem-solving. For an example, consider that there is a basic professional duty for surgeons to use sterile equipment. We might well discipline a surgeon who failed in this duty by reusing a scalpel. However, if we truly care about infections, we will worry even more about hospitals' systems of equipment procurement and maintenance, and staff oversight and management, to prevent a dirty scalpel from reaching the surgery suite in the first place. To require the surgeon to attend a Continuing Medical Education program on the importance of clean scalpels or to suspend her license might well miss the point, because unless the systemic factors are addressed, more patients will be infected by that surgeon and other surgeons. Indeed, it is possible that the specialized surgeon may not even know *how* to check whether the scalpel has been sanitized or to operate the complex equipment required to sterilize a scalpel properly. Instead, he or she reasonably relies on other professionals to do so as part of a broader health care team.

For the legal profession and trust accounting in particular, this insight suggests,

**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.

In contrast, the California State Bar's present approach seems to be one of stark individualism. For example, the official State Bar publication's *The Handbook on Client Trust Accounting*, directs attorneys: "Don't rely on others to do your client trust accounting. It's your responsibility."<sup>44</sup> Imagine telling surgeons not to rely on janitors, phlebotomists, nurses, pharmacists, or fellow physicians in order to keep patients safe. Although I find no basis in the California Rules of Professional Conduct, the State Bar's guidance reflects caselaw holding that the attorney's duty is "nondelegable."<sup>45</sup>

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<sup>44</sup> California State Bar, "Handbook on Client Trust Accounting for California Attorneys," p. 43 (2018).

<sup>45</sup> *In Matter of Marchiondo*, No. 12-O-13556, 2015 WL 9260836, at \*3 (Cal. Bar Ct. Nov. 16, 2015)(citing *Coppock v. State Bar* (1988) 44 Cal.3d 665, 680).

Of course, other caselaw reflects that reliance on others can be reasonable or unreasonable.<sup>46</sup> I would suggest greater emphasis on the concept of reasonable reliance, since in reality, both physicians and lawyers rely on others, and this is a mark of quality not irresponsibility. Individual lawyers may lack the skillset and demeanor to do careful bookkeeping, and their clients are often better served (with more value for money) if that work is performed by another professional, such as a bookkeeper or accountant, or with technology, such as an online banking solution. In healthcare, similarly, there is a growing movement towards “interprofessionalism,” realizing that coordination of healthcare across the several professions is often more important than any one profession performing its role. But even there, the movement is in its adolescence.<sup>47</sup>

In the legal field, Rule 5.1 already recognizes that need for a systems approach. In a firm, lawyers “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that lawyers in the firm” will comply with their professional responsibilities.<sup>48</sup> This approach provides a template for trust accounting as well.

Accordingly, I suggest revising and clarifying guidance as part of a broader culture change in how the State Bar and its attorneys approach trust fund accounting. In my view, that work could go so far as changing the Rules themselves, to explicitly require a systems-based approach rather than an individualistic approach.

However, changes in guidance alone are unlikely to be sufficient if the fundamental economics and industrial organization do not support such changes. In healthcare, “fragmentation” has been noted as a primary challenge to efficiency, quality, and safety.<sup>49</sup> With its robust sector of solos and small-firm practice, law is arguably even more fragmented, and the high rate of problems in these settings is to be expected. In contrast, larger firms reflect this sort of systems-approach, which explains why larger law firms have fewer disciplinary filings than solo and small-firm practitioners, and the mechanism is particularly obvious in the RA Bank context. Rather than relying so much on individual lawyers to be error-free, larger firms are presumably more likely to have robust bookkeeping and accounting services, often in-house, taking advantage of the skills of specialists employed by the firm.<sup>50</sup> For solos and small firms the solution is to outsource such services, using technology vendors and service providers, but even building such a working approach can involve heavy transaction costs.<sup>51</sup>

These considerations suggest,

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<sup>46</sup> See *In re Blum*, No. 96-O-03531, 2002 WL 1067225, at \*5 (Cal. Bar Ct. May 24, 2002) (rejecting hearing judge’s finding that attorney had reasonable relied, where there was “no evidence that respondent established or agreed ... on procedures for the operation of the trust account.”) *Id.* at \*7 (Although “duties are nondelegable...[t]his does not mean that an attorney is culpable of a moral turpitude violation by not personally managing his or her trust account, provided that attorney reasonably relies on a partner, associate, or other responsible employee to care for that account. However, even that reasonable reliance on another to care for the trust account does not relieve the attorney from the professional responsibility to properly maintain funds in that account.”)

<sup>47</sup> See Scott Reeves, et al., *Interprofessional Collaboration to Improve Professional Practice and Healthcare Outcomes*, COCHRANE DATABASE OF SYSTEMATIC REVIEWS 6 (2017).

<sup>48</sup> California Rules of Professional Responsibility 5.1. Comment 1 describes “internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.”

<sup>49</sup> See e.g., Stephen M. Shortell and Sara J. Singer, *Improving Patient Safety by Taking Systems Seriously*, JAMA 299, no. 4, 445-447 (2008).

<sup>50</sup> See generally, Bart Nooteboom, *Firm Size Effects on Transaction Costs*, SMALL BUSINESS ECONOMICS 5, no. 4, 283-295 (1993).

<sup>51</sup> *Id.*

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

When properly operating, this “solution” would make it virtually impossible for an attorney to be responsible for writing a check with insufficient funds in a client account. When a check needs to be written on a client trust fund, the attorney would call (or use an app) to request the check, but it would not be written against insufficient funds. PR1.4 implicates a broader movement towards “FinTech,” and the State Bar should ensure that it is part of the solution rather than being part of the problem.<sup>52</sup>

My interviews suggest that there is a range of technologies and services available for this “solution”—including a mix of online banking, accounting software, and bookkeeping services, but it may be challenging for solo and small firms to determine the right mix and establish key workflows.<sup>53</sup> Rather than having thousands of individual attorneys attempt to figure this out, a single team of State Bar experts could do so. Moreover, the solution may ultimately achieve economies of scale, unavailable to solo attorneys or small groups cobbled together themselves. Indeed, a more centralized approach may lead to innovations and partnerships (e.g., with IOLTA Leadership Banks), that no single attorney could bring to fruition.

This potential reform leaves much to be determined, including the mix of technology and professional services to be provided. I would start with the working assumption that it should be self-sufficient financially, funded by service fees.

One model would be to create an office within the State Bar itself, or the California Lawyers Association (CLA), to contract with vendors and employ staff to create the solution, and then subcontract the package to attorneys. Alternatively, the State Bar could negotiate a deal or set of deals that a vendor or vendors agree to provide to California attorneys, contracting directly with them (making the State Bar or CLA into a mere facilitator or broker). Or, minimally, the State Bar could issue a set of criteria and workflows that any vendor could certify that they utilize. That standardization and accreditation alone might facilitate individual California attorneys knowing what they are getting, in apples-to-apples comparisons with other providers.

Notably, the CLA already works in partnership with CalBar Connect, which is managed by Cal Bar Affinity, a subsidiary of California ChangeLawyers (formerly California Bar Foundation). They offer several business services, including mechanisms to accept client credit cards, track time, and have virtual receptionists.<sup>54</sup> However, it does not currently include bookkeeping or banking service, and definitely not the sort of integrated turnkey solution, envisioned by PR1.4.

Once this turnkey solution is in existence, the State Bar could take various measures to support its adoption. Of course, it could be marketed to attorneys at greatest risk, using firm size and affinity groups to target and reach them. A stronger approach would be to make the solution the default rule, requiring that every attorney who takes client funds use the solution, unless they present an alternative plan for complying with their professional responsibilities. To minimize disruption and paperwork, this default rule could be rolled out gradually, applicable to only new attorneys or

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<sup>52</sup> See generally, Rory Van Loo, *Making innovation More Competitive: the Case of Fintech*, 65 UCLA L. REV. 232 (2018).

<sup>53</sup> See e.g., Billpay.com (“Pay, get paid, and manage your payments process from one place. ... Built to integrate and share financial data with your accounting system”) and Trustbooks.com (bookkeeping software specifically for attorney trust funds). My interviews suggest that these two tools are not presently integrated to work together.

<sup>54</sup> See Cal Bar Affinity, Business Services, available at <https://www.calbarconnect.com/business-services/>.

attorneys changing practice settings. Finally, OCTC could mandate use of this solution as a condition of discipline, for attorneys who repeatedly receive RA Bank notices.<sup>55</sup> For such repeat violators, the turnkey solution could ensure no further violations that put the public at risk.

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<sup>55</sup> See Cal. Bus. & Prof. Code § 6068 (“It is the duty of an attorney to do all of the following: ... (k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney. (l) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.”)

<sup>56</sup> See MacLeod and Pi *supra* note 1, at Attachment A,

<sup>57</sup> Imagine, for example, an attorney working a large law firm, litigating a single case for a huge multinational corporation for more than a year. If that client is dissatisfied with the attorney’s work because of a violation of the Rules of Professional Conduct, he may simply complain to the partner managing the client relationship, rather than complaining to the state bar.

<sup>58</sup> W. Levinson, D. L. Roter, J. P. Mullooly, V. T. Dull, and R. M. Frankel, *Physician-Patient Communication: The Relationship With Malpractice Claims Among Primary Care Physicians and Surgeons*, JAMA, 277(7), pp.553-559 (1997).

<sup>59</sup> See e.g., Bertrand and Mullainathan *supra* note 32 (employers); Scott W. Duxberry et al., *Mental Illness, the Media, and the Moral Politics of Mass Violence: The Role of Race in Mass Shootings Coverage*, J. RES. CRIME & DELINQ. 1, 1 (2018).