



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM 60-3 MARCH 2023**

**DATE:** March 16, 2023

**TO:** Members, Board of Trustees,  
Sitting as the Regulation and Discipline Committee

**FROM:** George S. Cardona, Chief Trial Counsel

**SUBJECT:** Board Directive Regarding Archiving of Prior Closed Complaints

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### **EXECUTIVE SUMMARY**

This agenda item requests a modification of the Board's directive regarding the archiving of prior closed complaints, one of the policy reforms adopted by the Board to address Professor George Farkas's finding of disparities in discipline imposed based on race and gender. As adopted in July 2020, this directive exempted from the archiving process closed complaints "resolved with a warning letter, directional letter, resource letter or agreement in lieu of discipline." In response to a recommendation contained in State Audit Report 2022-030 (April 2022), the Office of Chief Trial Counsel (OCTC) has implemented policies under which resource letters are favored as a means of closing cases, and mandated for closing all bank reportable action and most client-trust account related matters, even where OCTC determines there is no basis for a finding that misconduct has occurred. Given the increased use of resource letters in such instances, OCTC recommends that matters closed using resource letters no longer be exempted from the archiving policy. In response to another recommendation in the same State Audit report, OCTC has implemented policies under which OCTC may resolve cases with an admonition under circumstances similar to those in which it would resolve matters with a warning letter. The State Bar Court also may resolve cases through issuance of an admonition, which does not constitute discipline but reflects a determination that a violation has occurred. As a result, OCTC recommends that matters resolved by OCTC or the State Bar Court with an admonition be exempted from the archiving policy.

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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, Distinguished Professor in the School of Education at the University of California, Irvine, found that, without controlling for other factors, there were disparities in discipline based on race and gender. In particular, Professor Farkas found that African American, male attorneys were three times as likely to be placed on probation, and almost four times as likely to be disbarred as white, male attorneys. Controlling for other factors, however, Dr. Farkas found that several facially neutral factors explained those disparities, including in particular a higher number of complaints against African American, male attorneys.

The Board directed staff to develop an action plan to address the factors identified as being associated with 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. See Attachment A. The Board directed staff to take action to address a subset of these potential reforms.

As one reform, at its July 2020 meeting, the Board directed OCTC that it:

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

See Attachment B. Staff reported on implementation of this directive at Board meetings on September 24, 2020, November 20, 2020, and March 18, 2021. See Attachments C, E, F. As reported, 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. This archiving approach was formalized within OCTC through issuance of a November 12, 2020, policy directive.

Professor Robertson proposed a number of possible reforms regarding the handling of matters based on bank reports of insufficient funds transactions in client trust accounts (RA-Bank cases). Among these potential reforms was the possible increase in the *de minimis* threshold for closing such matters from an insufficient funds transaction of \$50 or less to some significantly higher amount. In July 2020, the Board directed staff to evaluate RA-Bank matters further to understand the impact on public protection of increasing the *de minimis* threshold for closing RA-Bank matters. Staff in the Office of Research & Institutional Accountability (ORIA) (now the Mission Accomplishment and Accountability Division (MAAD)), then conducted an analysis of more than 100,000 RA-Bank cases from 1991 to 2018 that represented more than 22,000 attorneys. At the September 2020 Board meeting, staff reported that the analysis suggested that small-amount, RA-Bank matters actually posed a public protection risk, making an increase in the *de minimis* closing threshold problematic. See Attachment C.

The Board then directed OCTC to:

... explore expeditiously options for a more robust pro-active preventative approach for attorneys who experience low-level RA-Bank matters that also ensures public protection is not compromised. This approach will take into account the number of prior RA-Bank matters and their clustering for the purpose of preventing future misconduct related to client trust accounts.

See Attachment D. In November 2020, staff reported to the Board on implementation of this directive. As reported, OCTC had reviewed the four letters it used to close RA-Bank matters (de minimis letter, closing letter, resource letter, warning letter), modified those letters so that all included information about resources that previously had been included only in the resource letter, and enhanced the resources referenced in the letters for purposes of taking a more preventative approach. Staff estimated that, if numbers remained consistent, as compared to only 40 respondents who received this resource information in 2019, these changes would result in approximately 800 respondent receiving letters with provisions regarding resources on an annual basis. See Attachment E.

In California State Auditor Report 2020-030 (April 2022), the State Auditor examined OCTC's closure of RA-Bank matters and found instances in which OCTC had closed complaints as de minimis without contacting the attorney to provide guidance for avoiding future complaints. As an example, the State Auditor cited one attorney as to whom OCTC had closed three RA-Bank matters over the course of four years but had not sent the attorney a resource letter when it closed any of the cases. As the State Auditor noted, because this attorney did not receive the resource letter, they were not referred to the various resources the State Bar provides attorneys to help them avoid client trust account issues in the future. Based on these findings, the State Auditor recommended that OCTC "require a letter with client trust account resources be sent to the attorney after the closure of every bank reportable action."

OCTC implemented this recommendation with respect to not only all RA-Bank matters but also all complaints alleging client-trust account violations in which the respondent has been notified of the investigation prior to closing, requiring that in all such matters, the closing letter to the respondent or respondent's counsel must include language directing the respondent to resources regarding the management of client trust accounts. As of December 2022, OCTC modified the macros used to generate closing letters to include the required resource language.

The State Auditor also examined the State Bar's use of a number of types of nonpublic measures, including, for example, resource letters, directional letters, warning letters, and agreements in lieu of discipline, to close matters. The State Auditor noted that use of these nonpublic measures may have less of a deterrent effect on attorney misconduct because current and potential clients cannot find out about the underlying attorney behavior. The State Auditor found that while OCTC's policies provided general guidelines for deciding when to use nonpublic measures, the policies lacked the details necessary to ensure that they were implemented consistently to ensure that nonpublic measures were used only when appropriate. As a result, the State Auditor recommended that, "to ensure that it uses nonpublic measures to close complaints only when such use is consistent and appropriate," OCTC should revise its policies "to define specific criteria that describe which cases are eligible to be closed using nonpublic measures and which are not eligible."

To comply with this recommendation, effective October 31, 2022, OCTC issued a revised policy directive regarding the use of nonpublic measures to close cases. OCTC reported regarding this revised policy at the Board's January 2023 meeting. See Attachment G. As reported, the new policy incorporates the requirement that resource letters be used to close all RA-Bank matters and all complaints alleging client-trust account violations in which the respondent has been notified of the investigation prior to closing, and also favors use of resource letters in other cases, even where OCTC determines there is no basis for a finding that misconduct has occurred, whenever all the circumstances, including a lawyer's prior history of complaints or discipline, suggest a cause for concern that, absent guidance, future misconduct may occur. As a result, it is expected that resource letters will increasingly be used to close cases in which OCTC has determined that there is no basis for a finding that misconduct has occurred.

As reported, OCTC's revised policy directive also addresses use of admonitions as another nonpublic measure that may be used as an alternative to a warning letter to close a matter where OCTC determines that the facts are sufficient to establish by clear and convincing evidence only minor violations that did not cause significant harm to a client, the public, or the administration of justice and are unlikely to result in the imposition of discipline by the State Bar Court. See Attachment G. OCTC has authority to issue admonitions under State Bar Rule of Procedure 2602, which provides that OCTC "may, in its discretion, dispose of any matter before it by an admonition to the attorney" and that "the fact of the admonition shall be communicated to the complainant, if any, but otherwise shall not be public."

The State Bar Court may also resolve a matter by an admonition to the attorney "if the subject matter of a pending disciplinary proceeding does not involve a Client Security Fund matter or a serious offense, and the Court concludes that the violation(s) were not intentional or occurred

under mitigating circumstances, and no significant harm resulted.” State Bar Rule of Procedure 5.126(A). An admonition is “not equal to imposing discipline on the attorney” and, while the admonition is sent to the complainant and complainant’s counsel, if any, and the file in the disciplinary proceeding remains public, may not otherwise be actively publicized by either the State Bar or the State Bar Court. Rule 5.126(C), (D).

## **DISCUSSION**

As noted above, one of the factors that Professor Farkas found correlated with disparities in discipline against African American, male attorneys was the number of complaints filed against those attorneys. Looking at the number of attorneys against whom complaints are filed, Professor Farkas found that approximately 32 percent of white, male attorneys, but 46 percent of African American, male attorney had at least one complaint filed against them. OCTC considers prior complaints, including closed complaints, when evaluating whether a new complaint fits within a pattern of prior alleged misconduct and so should be given additional scrutiny that may result in the new complaint moving forward for additional investigation.

The archiving of closed complaints limits the ability of observed disparities in the numbers of complaints to carry forward and result in disparities in the numbers of complaints that move forward to investigation. The exceptions to archiving differentiate between complaints that are simply closed with no action, and those that are closed after a determination by OCTC that some action is warranted.

OCTC has always sent resource letters in matters where it has determined that there is no basis for a finding that misconduct has occurred. As a result of an increasing emphasis on prevention, resource letters are now being sent in all RA-Bank matters and other client-trust account related complaints, without any determination that the circumstances suggest a cause for concern that, absent guidance, future misconduct may occur. There is also the possibility that OCTC will expand its use of resource letters to be standard for other types of complaints as well. Given this, it appears consistent with the intent of the archiving exceptions to treat resource letters as more akin to a straight closure (subject to archiving) than to warning letters, directional letters, or agreements in lieu of discipline (excepted from archiving), all of which are issued after a determination by OCTC that there is a basis for a finding that misconduct has occurred. Accordingly, OCTC recommends that matters in which resource letters are issued be included in archiving.

On the other hand, both OCTC and the State Bar may resolve matters with an admonition. OCTC uses admonitions as an alternative to warning letters, both predicated on a determination by OCTC that there is a basis for a finding that misconduct has occurred. The State Bar may issue an admonition as an alternative to imposing discipline after a determination that a violation has occurred. Given this, it appears consistent with the intent of the archiving exceptions to treat admonitions as akin to warning letters, directional letters, and agreements in lieu of discipline, and exempt them from archiving.

## **FISCAL/PERSONNEL IMPACT**

None

## **AMENDMENTS TO RULES**

None

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS**

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- c. 1. Implement reforms and recommendations to reduce inequities identified in the 2019 report: Discrepancies by Race and Gender in Attorney Discipline by The State Bar of California: An Empirical Analysis.

## **RECOMMENDATIONS**

**Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Board of Trustees, sitting as the Regulation and Discipline Committee, modifies its prior July 16, 2020 direction to the Office of Chief Trial Counsel, and hereby directs that the office should implement as an interim reform that prior, closed complaints and reportable actions more than five-years old, as measured from either the opening date or, in the event of reopened complaints and reportable actions, the reopening date, should not ordinarily be considered in evaluating and investigating a new complaint, with exceptions permitted based on a written showing to an attorney at the level of assistant chief trial counsel or higher within the Office of Chief Trial Counsel; and it is

**FURTHER RESOLVED**, that closed complaints and reportable actions for purposes of this resolution shall include those resolved with a resource letter but shall not include those resolved with a directional letter, warning letter, admonition, or agreement in lieu of discipline, or those resulting in the imposition of discipline; and it is

**FURTHER RESOLVED**, that exceptions to the archiving policy may include the following, at the discretion of the Office of Chief Trial Counsel: (1) closed complaints and reportable actions will not be archived if the lawyer has been disbarred or resigned; and (2) closed complaints and reportable actions that otherwise meet the five-year criteria for archiving while the lawyer has another pending case in the Office of Chief Trial Counsel in the investigation or prefiling stage or in the State Bar Court will not be

archived until the case pending in the Office of Chief Trial Counsel in the investigation or prefiling stage or in the State Bar Court is resolved.

## **ATTACHMENTS LIST**

- A.** July 16, 2020, Agenda Item 701, Consideration of Recommendations to Implement Changes to Address Key Finding of the Disparities in the Discipline System Study
- B.** September 10, 2020, Agenda Item, Open Session Minutes Approval – July 16, 2020, Meeting
- C.** September 24, 2020, Agenda Item 704, State Bar Discipline System: Implementation of Changes to Address Disparity; Past and Planned Changes to Improve Efficiency, Process, and Experience; and Recommendation for Ad Hoc Commission on the Discipline System
- D.** January 10, 2021, Agenda Item, Open Session Minutes Approval – September 24, 2020, Meeting
- E.** November 19, 2020, Agenda Item 703, Implementation of Changes to Address Disparities in the Discipline System: Update
- F.** March 18, 2021, Agenda Item 701, Status Update on Recommendations to Address Disparities in the Discipline System
- G.** January 19, 2023, Agenda Item 60-6, State Bar’s Use of Nonpublic Discipline



**OPEN SESSION  
AGENDA ITEM  
701 JULY 2020**

**DATE:** July 16, 2020

**TO:** Members, Board of Trustees

**FROM:** Dag MacLeod, Chief of Mission Advancement & Accountability Division

**SUBJECT:** Consideration of Recommendations to Implement Changes to Address Key Findings of the Disparities in the Discipline System Study

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**EXECUTIVE SUMMARY**

This agenda item follows up on the January planning meeting at which the Board of Trustees directed State Bar staff to return to the Board with detailed recommendations to address the disparate discipline imposed on African American attorneys. Looking in detail at five issues presented to the Board of Trustees in January, this agenda item summarizes 12 potential reforms developed by Professor Christopher Robertson of Boston University and the University of Arizona. Detail on the methods and rationale for these potential reforms is provided in the attached report by Professor Robertson.

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**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 color 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.

Professor Farkas' study looked at over 110,000 attorneys admitted to the Bar between 1990 and 2009 and followed them throughout their careers up until 2018. The study found that, without controlling for any other factors, there was disproportionate discipline, in particular, against African American, male attorneys who were three times as likely to be placed on probation, and almost four times as likely to be disbarred as their white, male counterparts.



The study also looked at the mechanisms associated with the racial/ethnic disparities. Using multiple regression analysis to control for a range of different variables—for example, allegation type, firm size, and years of practice—the study found that the racial disparities were explained statistically by a higher number of complaints against African American men, more investigations opened against them, and a lower likelihood of being represented by defense counsel in State Bar discipline proceedings. When these factors were included in the multiple-regression model, the disparity based on race became statistically insignificant.

The fact that disproportionate discipline against African American, male attorneys can be explained statistically by these factors, however, does not change the fact that these attorneys are more likely to be disciplined by the State Bar. Moreover, many of the variables in the statistical model that explain the disproportionate discipline are likely also affected by race. Thus, after receiving the report from Professor Farkas, the Board of Trustees directed State Bar staff to evaluate the process of attorney discipline to understand and address the mechanisms that appear to contribute to disproportionate discipline.

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 review the report on disproportionate discipline and explore possible remedies to address the problem. 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.

Professor Robertson’s menu of ideas included five areas to explore further including:

1. The handling of Reportable Action Bank cases (reports that come to the State Bar from banks when a client trust account is overdrawn);
2. The treatment of prior complaints that are closed with no discipline imposed on an attorney;
3. Options for encouraging the representation of attorneys in the discipline system;
4. “Blinding” of respondent attorney identities to reduce the likelihood of implicit bias entering into the process; and
5. The diversity of staff in OCTC.

The Board of Trustees directed staff to examine these issues and any additional issues that came to light in this subsequent evaluation and report back to the Board in July.

The remainder of this agenda item summarizes the findings of Professor Robertson, detailed in the attached report, and makes recommendations for action that the State Bar can take.

In the preparation of his report, Professor Robertson drew heavily on the expertise of OCTC staff and leadership: his report could not have been written without their able, unguarded, thoughtful assistance which throughout the process was focused on improving the State Bar discipline system. In addition, early drafts of Professor Robertson’s reports benefitted from stakeholder review including discussions with the State Bar’s Bench-Bar Committee,

representatives from the Council on Access and Fairness, and the Chair and Vice-Chair of the Committee on Regulation and Discipline.

## DISCUSSION

It should be noted at the outset that the finding of disproportionate discipline does not, by itself, indicate that African American attorneys have been disciplined more harshly than is warranted by an objective standard. What it tells us is that they have been disciplined more than other racial/ethnic groups.

While there is abundant evidence of systemic racism and reason to believe that the disproportionate discipline is related to the larger social-political system in which we live, because disproportionate discipline necessarily refers to a comparison between groups, it could be that the cause of the disproportionality is less about excessive discipline against African American attorneys than about insufficient discipline imposed on other groups. Or the reverse could be true.

Because of this, in exploring potential remedies to the disproportionality, proposals that tend to make it more difficult to prosecute attorneys for misconduct may have the unintended consequence of making it more difficult to prosecute attorneys for legitimate misconduct. The potential remedies, then, need to be viewed through the lens of the State Bar's public protection mandate in addition to its access to justice and fairness mandates.

### Reportable Action Bank Cases

Reportable Action Bank (RA-Bank) cases were not a separate component of the multiple-regression model looking at statistically significant variables associated with attorney discipline. These cases, however, presented an interesting and potentially useful area of inquiry for a number of reasons. First, among attorneys with large numbers of complaints against them, African American, male attorneys were more likely to have a large number of these types of cases. Second, because RA-Bank cases are generated by an objective trigger—the overdraft of a client trust account—the issue appears to relate more to systemic factors than individual discretion.

As Professor Robertson writes:

the disparity [in this case type] likely depends on other institutional or systemic factors, which are correlated with race, including variations in practice settings, which may have Black attorneys being more likely to handle client funds at all and have more transactions on those accounts.<sup>1</sup>

In his exploration of this topic, Professor Robertson proposes a number of potential reforms related to the handling of RA-Bank cases. One of the recommendations relates simply to revising the rules for handling *de minimus* bank overdrafts, currently set at \$50.

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<sup>1</sup> Page 9.

Potential Reform 1.1 – For the purpose of *de minimus* 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.

The other potential reforms that Professor Robertson proposes related to RA-Bank matters look “upstream” at the prevention of overdrafts in the first place. These proposals involve various different options including allowing attorneys to create a “cushion” with their own funds in a client trust account (similar to the way in which attorneys may deposit a reasonable amount of their own funds to cover bank fees), or by the adoption, encouragement, or (in cases of attorneys who repeatedly over-draw their accounts) a requirement that attorneys use services that prevent client trust account overdrafts.

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.

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.

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

### **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. By increasing the scrutiny of African American attorneys, the disproportionate filing of complaints against Black attorneys, by itself, increases the odds of discipline.

However, while OCTC has no control over the complaints that are filed by clients, it does have control over how it assesses the complaints. One issue of particular interest with regard to how OCTC assesses complaints was the status of *prior complaints that are closed without the imposition of discipline*. In State Bar Court, prior complaints that are closed without discipline have no probative value. But closed complaints may be useful when evaluating whether a new complaint fits a pattern of misconduct.

Professor Robertson talked with intake attorneys in OCTC, reviewed OCTC policy for the handling of complaints, and discussed the issue with OCTC leadership. Because this issue bears some resemblance to the disproportionate impact of arrest records and criminal history information on African Americans, Professor Robertson also analogizes to the criminal justice system in his evaluation of this issue.

Two of the potential reforms in this area suggested by Professor Robertson overlap with the option of “blinding” insofar as they would shield decision-makers from information that is potentially prejudicial. The first of those potential reforms suggests that the value of closed complaints for establishing patterns of misconduct may decline over time, thus:

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

The second potential reform in this area would retain the information but archive it and establish a threshold for gaining access to it:

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.

A third potential reform in regard to closed complaints 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.

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

### **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. Looking across the entire population of attorneys in the Farkas study, on average African American attorneys were about twice as likely *not* to be represented by counsel.

Citing this disparity in representation, Professor Robertson goes on to argue that:

The racial disparity we see is problematic on its own, but it also suggests that the discipline system is resolving cases on factors other than the merits, and thus is failing to optimally achieve its policy goals of protecting the public.

As a starting point, Professor Robertson suggests the potential reform 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.

Moving beyond simply tracking rates of representation, Professor Robertson proposes that the State Bar evaluate different modes of communication with respondent attorneys to determine which messages are most likely to increase respondent representation. Although the State Bar already informs respondents of the value of representation, Potential Reform 3.2 would involve actual pilot testing of different messages to ensure their efficacy.

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.

Going further still and recognizing that the State Bar discipline system has no equivalent to a public defender function, Professor Robertson interviewed attorney defense counsel in California and Arizona and examined models of representation in other states. To increase the rates of representation among respondent attorneys Professor Robertson proposes:

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 PR3.2.<sup>2</sup>

Continuing along this same line of thinking:

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

Finally, Professor Robertson proposes the creation of 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.

In addition to the three areas discussed here, Professor Robertson recommends continued study of two additional questions, which appeared in his January presentation: blinding and diversity of OCTC staff.

### **“Blinding” of respondent attorney identities to reduce the likelihood of implicit bias entering into the process**

In January, Professor Robertson suggested the possibility of blinding OCTC staff to prevent exposure to the race of respondent attorneys. Blinding in the context of decision-making and organizational behavior involves the intentional shielding of information that may be prejudicial. Given research that has shown even names on applications can serve as proxies for

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<sup>2</sup> An analysis would need to be performed to ensure the State Bar does not cross the line into becoming a lawyer referral service.

racial/ethnic identity and, thus, produce disparate outcomes, effectively blinding an entire record will require additional study.<sup>3</sup> The elements of a thorough blinding of the record touch on technology—the availability and display of data in case management systems—as well as organizational process, policy, and workflow. Under current conditions, with OCTC staff working remotely, a detailed workflow analysis may not be possible.

It should be noted, however, that Possible Reforms 2.1 and 2.2 contain elements of blinding: by expunging prior records, or archiving them to increase the cost of accessing them, potentially prejudicial information is shielded from view.

### **Staff Diversity in OCTC**

In January, Professor Robertson also suggested a comprehensive statistical review of the diversity of the OCTC staff, because diversity in decision makers may be important for minimizing biases and increasing perceived legitimacy.

Data on the race / ethnicity of State Bar staff is compiled by staff in the Office of Human Resources. Upon joining the State Bar, new staff complete paperwork that includes forms providing for self-identification of race/ethnicity. In the process of evaluating data available to assess the racial/ethnic make-up of OCTC, staff learned that missing data from the self-identification forms has in the past been completed by Human Resources staff.

The tainting of the data by the ascription of race/ethnicity led staff to determine that new data will need to be collected to complete this portion of the work.

## **FISCAL/PERSONNEL IMPACT**

None

## **AMENDMENTS TO RULES OF THE STATE BAR**

None

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

None

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<sup>3</sup> See “Whitened Resumes: Race and Self-Presentation in the Labor Market,” Sonia Kang, Katy DeCelles, Andras Tilcsik, and Sora Jun, *Administrative Sciences Quarterly*, September, 2016.

## 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 develop plans to implement reforms 3.1, 3.2, and 3.3, specifically to:

1. Develop a metric and begin regular reporting of data on representation by respondent attorneys;
2. Pilot test different messages to respondent attorneys regarding the value of representation by counsel in attorney disciplinary proceedings and evaluate the most effective method of encouraging representation; and
3. Begin discussions with Attorney Discipline Defense Counsel representatives to develop and distribute a roster of attorneys who could provide low-cost and pro bono case evaluations to respondent attorneys.

**FURTHER RESOLVED**, that the Board of Trustees directs State Bar staff to evaluate reforms 1.1 and 2.3, specifically:

1. Evaluate RA-Bank matters to understand the impact on public protection of modifying the *de minimus* threshold for closing RA-Bank matters. Specifically, staff should evaluate:
  - a. The volume of RA-Bank matters organized by the amount of the over-draft;
  - b. Whether low-level RA-Bank matters are useful as predictors of subsequent malfeasance related to client trust accounts or other misconduct;
  - c. Whether modifications of State Bar rules to allow for attorneys to place a specified amount of money in a trust account would have any impact on the incidence of over-drafts from client trust accounts.
2. Evaluate complaints closed without discipline to determine whether specific issues can be identified that allow for proactive regulation.

## ATTACHMENT(S) LIST

- A. Potential Reforms to Mitigate Racial Disparities in the California State Bar Attorney Discipline Process – Interim Report to the California State Bar Board of Trustees by Professor Christopher Robertson.

# 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)*



## TABLE OF CONTENTS

Executive Summary.....	4
Background .....	6
1) Client Trust Funds .....	9
A. Background and Analysis .....	9
B. Case Handling .....	12
Potential Reform 1.1 – For the purpose of <i>de minimus</i> 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. ....	13
C. Upstream Prevention .....	14
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. ....	15
Potential Reform 1.3 – The State Bar could revise its guidance to allow attorneys to reasonably rely on systems of professionals and technologies to prevent errors. ....	16
Potential Reform 1.4 – The State Bar could develop a turnkey banking, checking, bookkeeping, and accounting solution for client trust funds. ....	18
2) Consideration of Prior Closed Complaints .....	19
A. Background and Analysis .....	19
B. Record Retention.....	22
Potential Reform 2.1 – The State Bar could expunge complaints closed without discipline after five years.....	22
C. Case Handling .....	23
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. ....	24
D. Upstream Prevention .....	26
Potential Reform 2.3 – The State Bar could develop a proactive non-disciplinary system to support attorneys at higher risk of future complaints.....	26
3. Representation of Responding Attorneys.....	27
A. Background and Metric Tracking.....	27
Potential Reform 3.1 – The State Bar could track and report the proportion of discipline cases lacking representation as a key performance indicator.....	28
B. Improving the Rates of Representation .....	28
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. ....	29
Potential Reform 3.3 – The State Bar could develop a roster of attorneys who agree to provide <i>pro bono</i> one-hour consultations and provide a subset of these with the 3.2 notice.....	30

Potential Reform 3.4 – The State Bar could facilitate sliding-scale fee representation by the private defense bar. ....	32
C. Improving Outcomes for Those Without Representation .....	32
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. ....	33
Next Steps .....	34

## EXECUTIVE SUMMARY

In 2019, the California State Bar commissioned a report by Dr. George Farkas to examine whether there were disparities in the attorney discipline system, in terms of race, gender, or firm size. The November 2019 report found that there were dramatic differences in the rates at which some populations of attorneys were disciplined, with the disparity being greatest for Black males compared to White males. Dr. Farkas identified several potential reasons for the disparity, including that Black males receive public complaints and reportable actions more often, and they are less often represented by attorneys when defending those complaints.

For the Board of Trustees to address the disparities in outcomes, it must work backwards to target the underlying factors that generate those outcomes. My work so far has focused on: (1) instances of insufficient funds in client trust fund accounts (“bank-reportable actions”), (2) the Bar’s handling of prior complaints closed without discipline, and (3) representation of responding attorneys.

For bank-reportable actions, the type of complaint that Black male attorneys receive most disproportionately, I develop the theory that an underlying wealth disparity may be the mechanism, rather than disparities in the frequency at which attorneys misappropriate funds. Accordingly, when OCTC receives such notices, it could use a higher threshold for closing cases as *de minimus*, which alone would substantially reduce the number of times that Black attorneys are scrutinized for discipline. Going upstream to prevent problems and drawing on the safety-systems approach of healthcare and other fields 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. Accordingly, I suggest allowing attorneys to deposit a cushion into client trust accounts and the development of a turnkey trust banking/accounting service leveraging technology. These reforms could reduce the number of insufficient funds cases that occur in the first place.

Since prior complaint history is infected by a racial disparity, the State Bar must be careful to avoid allowing that disparity to infect its decisions. It is important to distinguish between prior cases of discipline, which involve a finding of misconduct, versus prior complaints that were closed without discipline (like mere arrests on a rap sheet). Since State Bar Court rules are clear that mere closed complaints do not support an inference of misconduct, OCTC could expunge old closed complaints and quarantine more recent closed complaints in an archive, so they are not routinely used for evaluating new complaints. Instead, when OCTC is unsure about whether a new complaint should be formally investigated, and especially if the complaining witness (CW) appears to be a member of a vulnerable population, it could more often undertake preliminary inquiries to explore the plausibility of the complaint. In addition, the State Bar could develop a proactive non-disciplinary support system, which may use prior closed complaints as a factor for identifying attorneys at risk of discipline and intervening to reduce the likelihood of future actionable complaints against them.

For representation of attorneys facing discipline, I recommend focal study of several potential reforms, which could increase the proportion of respondents who get counsel, and moreover improve the performance of even those who do not get such help. First, the State Bar could begin systematically tracking rates of representation as a key performance metric for the discipline system. It could also notify all attorneys facing formal discipline about the statistical advantage of getting representation, and provide them with a referral to a specific attorney willing to provide a free one-hour consultation. Going further the State Bar could create a Discipline Equity Office to

facilitate these and other reforms to reduce disparities, and provide assistance to self-represented attorneys, following the model that California courts have adopted to provide resources for self-represented litigants. That new office might also help facilitate means-testing for sliding scale fees by private counsel.

In a concluding section, I suggest that these twelve potential policy reforms may reduce the disparity in attorney discipline, but each of them raises questions about feasibility and implementation. In addition, there are other areas suggested by the Farkas report for analysis and exploratory study. Finally, I emphasize that I have so far taken the Farkas report at face value, but future study should embrace other statistical methods and look at other racially disparate drivers of attorney discipline, including for example, interactions with the criminal justice system, where similar disparities have been documented.

## BACKGROUND

In 2019, the State Bar “initiated a rigorous, quantitative analysis to determine whether there is disproportionate representation of nonwhite attorneys in the attorney discipline system and, if so, to understand its origins, and take corrective action.”<sup>1</sup> Dr. George Farkas, Distinguished Professor in the School of Education at the University of California, Irvine, was commissioned to perform the first phase of that work, which he provided in a November report, analyzing data for 116,363 attorneys admitted to the Bar between 1990 and 2009, using self-reported race information. From the Mission Advancement and Accountability Division, Dag MacLeod and Ron Pi summarized the topline findings:

The analyses revealed that, without controlling for any factors potentially associated with case outcomes, there are statistically significant disparities with respect to both probation and disbarment. The largest gender/race disparities can be seen when comparing Black to White, male attorneys. The probation rate for Black, male attorneys over this time period was 3.2 percent, compared to 0.9 percent for White, male attorneys. The disbarment/resignation rate for Black, male attorneys was 3.9 percent compared to 1.0 percent for White males. Race differences were smaller for Hispanic males and for Black and Hispanic females compared to White females. There were no meaningful differences for Asians compared to Whites.<sup>2</sup>

I accordingly focus on the disparities (or disproportionalities) for Black men.<sup>3</sup>

Dr. Farkas found that once statistical control variables are applied—including previous discipline history, the number of investigations opened, and the percentage of investigations in which the attorney was not represented by counsel—the effects of race become statistically insignificant (for some outcomes, such as probation as in Table 7 Model 6) or even become slightly negative (for outcomes such as disbarment, as in Table 10 Model 6). Nonetheless, it bears emphasis that no statistical model includes the primary variable of interest (the underlying rates of misconduct, which we have no independent way of measuring), and other included variables are likely themselves infected by race, in both their real frequency and in their measurement.<sup>4</sup>

Accordingly, it would be wrong to infer that these other variables “explain away” any racial disparities.<sup>5</sup> Yet the models do suggest mechanisms driving the disparities in outcomes. These

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<sup>1</sup> Dag MacLeod and Ron Pi, “Cover Memorandum for Report on Disparities in the Discipline System, to Members of Board of Trustees,” November 19, 2019 at 1, available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025090.pdf>.

<sup>2</sup> Id., at 2.

<sup>3</sup> A note on terminology: some scholars use the term “disproportionality” to refer to raw differences across races, but reserve the term “disparities” for only those differences that remain when all other factors are held equal. The latter has more of a normative sense. To the contrary, I use these terms interchangeably, for lack of any plausible mechanism of holding all other factors equal. Susan A. McCarter, *Racial Disparities in the Criminal Justice System*. in TERRY MIZRAHI AND LARRY E. DAVIS, *ENCYCLOPEDIA OF SOCIAL WORK* (2018).

<sup>4</sup> See D. James Greiner & Donald B. Rubin, *Causal Effects of Perceived Immutable Characteristics*, 93 REV. ECON. & STAT. 775, 783-84 (2011); Andrew Gelman, Alex Fiss, Jeffrey Fagan, *An Analysis of the NYPD's Stop-and-Frisk Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASSOC. 813, 818-20 (2007).

<sup>5</sup> See Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking about Detecting Racial Discrimination*. 113 NW U L. REV. 1163, 1171 (2019) (“One implication of the social constructivist theory is that race cannot be conceptualized as an isolated treatment in the counterfactual causal model, and accordingly, racial discrimination cannot be defined as the treatment effect of race. If we accept the constructivist theory of race, then we must reject attempts to detect racial discrimination that seek to isolate the causal effect of race alone because it rests on a sociologically incoherent conception of what race references and how it can cause a distinctive form of action called

variables are a roadmap for my initial work, allowing us to see where State Bar policy choices, even if facially-race neutral and well-intentioned, may be causing disparate outcomes, placing black attorneys at greater risk of disbarment.<sup>6</sup>

Because we are unable to observe the true rates of professional misconduct by California attorneys, we cannot in the aggregate say that Black attorneys are being disbarred too often or White attorneys being disbarred not enough (or both, or neither).<sup>7</sup> I am also mindful that the State Bar has multiple mission functions, including protection of the public and preserving access to justice, both of which may be impacted by the racial disparity in outcomes and potential reforms.<sup>8</sup> So, simply ratcheting up or down disbarments for one group or the other is unlikely to be a feasible or worthwhile solution.

In January 2020, I was asked to review the State Bar's practices and policies to develop potential reforms that could mitigate the disparity in outcomes. After some very preliminary interviews with key personnel, I made a framing presentation to the Board of Trustees, identifying potential reforms in each of five different areas: bank reportable actions, handling of attorneys' prior record of discipline, representation of attorneys facing discipline, removing racial identifiers from files at key stages (aka "blinding"), and diversity of Office of Chief Trial Counsel (OCTC) staff. In the intervening months, I have focused primarily on the first three of these.

My process has included:

- interviews with leadership of the State Bar and the Office of Chief Trial Counsel (OCTC);
- interviews with staff attorneys in OCTC;
- review of selected OCTC policies and excerpts of internal staff manuals;

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discrimination"). See also *id.*, at 1188 (discussing the debate between Jeff Fagan and Dennis Smith, expert witnesses in the NYPD stop-and-frisk litigation, concerning which variables should be included in regressions).

<sup>6</sup> Similarly see Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, NYU JOURNAL OF LEGISLATION AND PUBLIC POLICY 16, 821–851 (2013) (discussing the Prosecution and Racial Justice Program of the Vera Institute of Justice, which collected and published data on defendant and victim race for each offense category and the prosecutorial action taken at each stage of criminal proceedings. These data exposed that similarly situated defendants of different races were treated differently at each stage of discretion: initial case screening, charging, plea offers, and final disposition.); Andrew Golub et al., *The Race/Ethnic Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIM. & PUB. POL'Y 131, 137 (2007) (showing how the massive increase in marijuana enforcement during the 1990s disproportionately affected Black and Latinos)

<sup>7</sup> Similarly see Michelle Alexander, *THE NEW JIM CROW*, The New Press, Kindle Edition (2020), at p.123 ("[R]ates and patterns of drug crime do not explain the glaring racial disparities in our criminal justice system. People of all races use and sell illegal drugs at remarkably similar rates."); Sunita Sah, Christopher T. Robertson, and Shima B. Baughman, *Blinding Prosecutors to Defendants' Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System*, 1 BEHAVIORAL SCIENCE & POLICY 23, 27 (2015) ("Both unjustified leniency for Whites and unjustified harsher punishments for Blacks were revealed in 2015 by the U.S. Department of Justice Civil Rights Division's investigation of the Ferguson (Missouri) Police Department. ... Whites were more likely to have citations, fines, and fees eliminated by city officials, whereas Blacks were punished for the same minor transgressions with expensive tickets and judgments punishing their perceived lack of personal responsibility.") (citing United States Department of Justice, Civil Rights Division. (2015). Investigation of the Ferguson Police Department, available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf)). See generally, R. Jensen (2005). *THE HEART OF WHITENESS: CONFRONTING RACE, RACISM AND WHITE PRIVILEGE*, San Francisco, CA: City Lights Books; B. S. Lowery, E. D. Knowles and M. M. Unzueta, *Framing Inequity Safely: Whites' Motivated Perceptions of Racial Privilege*, PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 33, 1237–1250 (2007); Daria Roithmayr, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE*, NYU Press (2014).

<sup>8</sup> Similarly see, Angel Onwuachi-Willig, *Just Another Brother on the SCT: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 962 (2004) (describing the complex politics of race and criminal justice, where some claim "that the 'real victims' ... are law-abiding members of the black community, who are denied equal protection under the law of the death penalty because people who kill Whites are significantly more likely than those who kill Blacks to receive the death penalty.")

- review of attorney guidance documents, CLE curricula, and handbooks related to client trust fund management;
- a preliminary framing presentation to the Board of Trustees in January 2020 and discussion of potential next steps;
- interviews with accounting service providers and accounting software vendors regarding the prevention of trust account overdrafts;
- interviews with the leadership of the California Association of Discipline Defense Counsel (ADDC) and two other respondents counsel;
- an informal survey of a subset of OCTC intake attorneys followed by a Zoom focus group session, facilitated by Dr. MacLeod along with fellow consultants Tara Sklar and Leah Wilson;
- written surveys of disciplinary counsel in other jurisdictions;
- interviews with disciplinary counsels and respondent attorneys in other states;
- review of the scholarly literature and outreach to law professor experts in attorney discipline, racial disparities, and criminal justice; and
- legal research on relevant standards, admissibility of prior discipline, confidentiality of records, and retention of records.<sup>9</sup>

I have also had the opportunity to share drafts of this report with key people inside and outside the California State Bar to ensure that I accurately represent the complexity and nuance of the discipline system, and have revised the report where appropriate, based on my independent judgment. From outside the State Bar, I appreciate the scholarly experts who reviewed the report and provided feedback, including Tammi Walker (University of Arizona), Veronica Root Martinez (Notre Dame), Daria Roithmayr (University of Southern California), and Angela Onwuachi-Willig (Boston University). Of course, the report ultimately reflects my own judgments and professional opinions.

As explained further in the concluding section, I have so far been working from the Farkas report and other publicly-available data summaries. I have not had access to raw data from the discipline system to perform additional analyses of my own. Importantly, I also have not yet had the opportunity to interview substantial numbers of attorneys who experienced the discipline process. There are other directions to investigate quantitatively and qualitatively, however, both to explore additional mechanisms and predict the likely impact of potential reforms. Each of these policy options can be viewed as a hypothesis subject to testing.

Ultimately, this report does not present recommendations so much as potential reforms that merit further development and study. I hope that my identification of concrete policy options -- informed by the broader literatures on race, professional discipline, economics, psychology, and criminal justice -- is helpful to focus that work.

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<sup>9</sup> Nothing in this report should be construed as legal advice, but rather context for policymaking.

## 1) CLIENT TRUST FUNDS

Although most complaints concern White attorneys given their sheer numbers, Dr. Farkas found that on a *per capita* basis, Black attorneys were at a greater risk of receiving complaints. Yet, this disproportionality was heterogenous across complaint types. For some types of cases, such as fees and loan modification, Black attorneys were at a lower risk of receiving complaints compared to White attorneys. In contrast, Black attorneys received more complaints on a per capita basis in the category of “Reportable Action -- Bank” (RA Bank).<sup>10</sup> This sort of case is also quite frequent, with the State Bar receiving nearly 2,000 reports and OCTC filing about 100 such cases in State Bar Court, yielding about 55 closures with discipline annually.<sup>11</sup>

With both large disproportionality and high frequency, this issue is of priority concern, although the Farkas report does not allow us to separate out the causal impact of this particular case type on disciplinary outcomes. Courts consider trust fund accounting to be quite serious and even petty offenses may create a track record that motivates closer scrutiny, putting attorneys at greater risk of future discipline.<sup>12</sup> Indeed, the racial disparity related to this overtly economic factor echoes broader disparities in America and in California, which the judicial system reinforces.<sup>13</sup>

### A. Background and Analysis

Bank notifications to the State Bar flow from a statutory mandate, triggered by an attorney having insufficient funds on a client trust account (aka an overdraft or bounced check).<sup>14</sup> Because the reporting of these cases is triggered by an objective measure related to the client trust account, this mandated reporting mechanism suggests that implicit or explicit racial prejudice is not the cause of the disparity at this point in the process, since it does not depend on any individual discretion.<sup>15</sup> Instead, the disparity likely depends on other institutional or systemic factors, which are correlated with race, including variations in practice settings, which may have Black attorneys being more likely to handle client funds at all and have more transactions on those accounts. In addition, we do

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<sup>10</sup> See Farkas Report *supra* note 1 at Table 4, showing that among attorneys with ten or more complaints, Blacks had an average of 6.8 bank reportable actions, while whites had an average only 3.7

<sup>11</sup> See State Bar of California, “2019 Annual Discipline Report,” at SR-15-16, available at <http://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf>.

<sup>12</sup> See Hal R. Lieberman, *How to Avoid Common Ethics Problems: Small Firms and Solos Are Often Subject to Disciplinary Complaints and Malpractice Claims*, N.Y.L.J., Oct. 28, 2002, at p. 14 (noting that “failure... to adhere to the basic principles of client/fiduciary trust accounting is the single major reason today why lawyers are disbarred or suspended”); Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 358 (2004) (“escrow account violations ... are viewed as the most egregious violations of client trust, and therefore result in the most severe discipline.”).

<sup>13</sup> See Alexandra Natapoff, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL, Basic Books (2018), p. \_\_ (“The misdemeanor system widens the rich-poor gap by punishing low-income and working people on a grand scale. It makes it a crime to do lots of things that poor people can’t help doing, like failing to pay fines, fees, speeding tickets, or car registrations. ... This is not an entirely new problem: the American criminal system has an ignominious history of punishing the poor. It is equally if not more infamous for punishing people of color, especially African Americans, and misdemeanors have long been central players in that shameful drama. ... Today, the misdemeanor system is the frontline mechanism through which many people of color are drawn into the criminal system in the first place, arrested, marked, and convicted for minor offenses, or sometimes for no crimes at all.”); Issa Kohler-Hausmann, MISDEMEANORLAND, Princeton University Press (2018) (describing how New York’s “Broken Windows” policing effort led to people who are marked, tested, and subjected to surveillance and control even though about half the cases result in some form of legal dismissal).

<sup>14</sup> Cal. Bus. & Prof. Code § 6091.1.

<sup>15</sup> Even if the bank exercises discretion to honor the check, it must still send the notice. *Id.*



know that Black attorneys are more likely to be in smaller firms and, as a result, presumably frequently lack staff to provide bookkeeping or accounting support.<sup>16</sup>

When a bank sends a reportable action notice, it is a red flag, which may reveal misappropriation of client funds (aka stealing) or negligent oversight of the client trust account, which present real risks to the public.<sup>17</sup> To be sure, attorneys are fiduciaries of client funds, and they must manage those funds appropriately, whether in an individual client trust account or an IOLTA account.<sup>18</sup> Yet, the Rules of Professional Conduct do not directly speak to this issue of having insufficient funds in a trust account.<sup>19</sup> Further analysis suggests two primary variables: (1) whether the client, or anyone else, is harmed by the overage, and (2) the state of mind of the attorney.

On the first factor (harm), even while issuing an RA Bank, the financial institution sometimes honors the check, and protects the payee from harm, by extending temporary credit, perhaps under discretion or with an “overdraft protection plan.”<sup>20</sup> Even when there is harm, it is often temporary, rectified by simply re-presenting the check in a few days, once funds are available, and by the attorney paying any bank fees. Finally, when (if) someone learns that they are actually harmed by an overdraft, that victim is free to report it to the State Bar as a public complaint and of course litigate in civil court.<sup>21</sup>

On the second factor (intent), I am told that OCTC does not seek disbarment from attorneys merely due to even repeated negligence in client trust fund accounts – something more, like recklessness

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<sup>16</sup> The prefatory memo to the Farkas report, *supra* note 1 at 5, provides analyses of firms and concludes: “As a result of receiving more complaints than attorneys in large firms or other practice settings, solo and small firm attorneys are faced with a higher chance of being investigated and ultimately disciplined.” Dr. Farkas shows that when adding a firm size variable to the regression on disbarment, the coefficient is significant and reduces the race coefficient, which suggests that the two factors are correlated. *Id.*, at Attachment A, p.15.

<sup>17</sup> See e.g., *Edwards v. State Bar*, 52 Cal. 3d 28, 36–37, 801 P.2d 396, 401 (1990) (“Petitioner received funds belonging to ... client, and he deposited the funds in his client trust account. Petitioner then withdrew funds from the account and spent them for his own benefit without his client’s authorization. When the time came to pay the client, the account contained insufficient funds.”) See also *id.*, at 38-39 (discussing a range of culpability from negligence to willful fraud).

<sup>18</sup> See California Rules of Professional Conduct, 1.15. “IOLTA” stands for “Interest on Lawyers’ Trust Accounts.” See generally, The State Bar of California, Client Trust Accounting & IOLTA, “Guidelines for Attorneys,” <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Guidelines>.

<sup>19</sup> See California Rules of Professional Conduct, 1.15. See also *id.* at (d) (“a lawyer shall ... (3) maintain complete records of all funds, securities, and other property of a client or other person coming into the possession of the lawyer or law firm; (4) promptly account in writing to the client or other person for whom the lawyer holds funds or property”), and *id.*, at (e) (“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.”)

<sup>20</sup> Given the broader social facts that Black Americans have more difficulty accessing credit, this dimension may also create further disparities, if Black attorneys are less likely to receive this forbearance. Therefore, I do not recommend that the State Bar consider whether the bank honors the check. See Board of Governors of the Federal Reserve System, “Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances,” Sept 27, 2017 available at <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm> (“Black and Hispanic families have the highest incidence of credit constraints, with about one-third reporting they were either denied credit or did not apply for credit because they feared denial.”). See also *In the Matter of Robins* (Review Dept. 1991), 1 Cal. State Bar Ct. Rptr. 708 (Attorney disciplined despite the fact that the attorney genuinely was unaware of CTA shortfalls because they were masked by overdraft protection).

<sup>21</sup> This fact suggests another potential policy mechanism. Upon receiving a RA Bank, the State Bar could begin a practice of reaching out to the payee on the check, asking them to file a complaint with the State Bar if the issue is not resolved within 30 days. The logistics of such a reform would require further study (e.g., whether contact information for the payee could be secured, or whether this duty could be delegated to the attorney, with copy to the State Bar for confirmation).

or willful misappropriation, is required. Similarly, California law does not criminalize the mere writing of bad checks, without a willful intent to defraud and actual knowledge of insufficient funds.<sup>22</sup> Similarly the caselaw for attorney discipline does not generally ascribe malfeasance to bounced checks *per se*.<sup>23</sup> In some cases indeed, an attorney may be acting with a good purpose -- e.g., trying to rush a check to a client so she can make her own rent payment, even though a more prudent course would be to wait for an incoming check to clear before making that disbursement. When the incoming check bounces, it creates a chain reaction.

It goes without saying that bounced checks are less likely for those who have more money in their accounts, even if people are equally careful about their bookkeeping.<sup>24</sup> Like the United States a whole, California suffers from radical economic disparities along racial lines.<sup>25</sup> Nationwide, the median white family holds assets worth fifteen times those of the median black family.<sup>26</sup> Similarly, if Black attorneys are more likely to serve Black clients, who predictably have smaller stakes in their cases, we would expect a similar disparity in client trust fund account balances. Future research could test this hypothesis using as data the balances that IOLTA banks submit for purposes of monitoring compliance with the IOLTA program, cross-referenced with lawyer demographics.

In this way, smaller trust fund balances create a greater risk of RA Banks, even if Black attorneys are equally careful about trust fund bookkeeping as White attorneys. Figure 1 illustrates this phenomenon, where two attorneys (W & B), are each equally in error because they fail to record a \$200 check written against their client trust fund account. One attorney (W) is protected against an RA Bank, simply because the client trust fund account has sufficient funds to cushion the error, at least until the attorney or a bookkeeper does a complete reconciliation. The other attorney, having equal levels of professionalism, nonetheless triggers a BA Rank because he has a smaller balance in his client trust fund account.

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<sup>22</sup> See Cal. Penal Code § 476a (West) (“Any person who ... willfully, with intent to defraud, makes or draws or utters or delivers a check ... for the payment of money, knowing at the time [that the account] has not sufficient funds in, or credit with the bank or depository ... is punishable by imprisonment in a county jail for not more than one year...”).

<sup>23</sup> See also *Bowles v. State Bar*, 48 Cal. 3d 100, 109, 768 P.2d 65, 70 (1989) (“It is settled that the “continued practice of issuing [numerous] checks which [the attorney knows will] not be honored violates ‘the fundamental rule of ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice.’ ” (quoting *Alkow v. State Bar* (1952) 38 Cal.2d 257, 264, 239 P.2d 871, with bracketed modifications made by the Bowles court, emphasis added by me). But see *id.*, (“mere fact that balance in attorney’s trust account is below total of amounts deposited supports conclusion of misappropriation”)(citing *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474, 169 Cal.Rptr. 581, 619 P.2d 1005).

<sup>24</sup> See Alina Tugend, *Balancing a Checkbook Isn’t Calculus. It’s Harder*, NY TIMES, June 24, 2006, <https://www.nytimes.com/2006/06/24/business/24shortcuts.html> (“As Lewis Mandell, a professor of finance and managerial economics at the State University of New York at Buffalo, sees it: ‘Some people don’t need to balance their checkbooks. If they have sufficient assets and overdraft protection, there’s no real need to worry about balancing their checkbook.’”)

<sup>25</sup> See State Bar of California, *The California Justice Gap: Measuring the Unmet Civil Legal Needs of Californians*, 18 (2019) available at <https://www.calbar.ca.gov/Portals/0/documents/accessJustice/California-Justice-Gap-Report.pdf> (22% of non-Hispanic Blacks live below 125% of the federal poverty rate, which is double the 11% rate of non-Hispanic Whites.)

<sup>26</sup> DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA*. Univ of California Press, 1 (2010). See also Federal Reserve *supra* note 20 (showing that Black net worth is 15% that of White net worth).

**Figure 1: Illustration of Two Attorneys That Each Fail to Record a Check; Only One Gets Insufficient Funds**

	<b>Attorney W</b>	<b>Attorney B</b>
Trust fund starting balance:	\$5000	\$500
Writes <i>but fails to record</i> check #1 of:	\$200	\$200
Actual balance:	\$4,800	\$300
Writes check #2 of:	\$400	\$400
Actual balance:	\$4,400	<b>-\$100</b>
<b>Result:</b>	Check clears – OCTC never learns of error	Check bounces – OCTC receives RA Bank

It bears emphasis that attorneys are always acting as the fiduciaries of a clients' interests, and the actual funds in a bank account are only the most quantifiable aspect of that general duty. In this light, having insufficient funds in a client trust fund account is similar to other occasional bumps in the road, which occur in a busy legal practice. An attorney may submit a summary judgment brief without citing a new favorable case. Or an attorney may miss a key deadline for filing a response brief, which could in theory yield a default judgment. Of course, these problems *could* be due to a real problem of professionalism, *e.g.*, sheer incompetence, a debilitating addiction, or sabotaging the case due to a conflicting interest. And if someone reported them, OCTC could investigate them as potential violations of rules. But the vast majority of the time, it is simply an oversight, one that is frequently harmless. And rarely would such oversights come to the attention of the OCTC.

In contrast, for RA Bank, the legislature's automatic reporting scheme for the particular sort of violation would seem to have a disparate racial impact, since it is triggered by a confluence of two factors – bookkeeping accuracy and account balances, one of which is related to professionalism and the other likely infected by systemic racism.<sup>27</sup> To counterbalance this problem, the State Bar could increase scrutiny on other attorneys, for example, by instituting random audits of client trust fund accounts, even where there has not been an RA Bank. New Jersey has such a program.<sup>28</sup> Such an approach could reduce the disparity, but only by increasing enforcement and at some substantial cost to the State Bar.

In what follows, I explore two sets of potential policy reforms. One focuses on how OCTC handles the RA Banks that it receives. The other goes further upstream to consider how the State Bar could reduce the number of RA Banks in the first place.

## B. Case Handling

On its face, the California statute that requires banks to send these notices does not require that OCTC do anything in particular with them.<sup>29</sup> Thus, it is a question for State Bar policymakers. One way to reduce the impact of the incoming disparity is simply to screen out more of those cases from scrutiny for discipline.

Currently, upon receiving an RA Bank, OCTC intake attorneys first consider whether to perform a *de minimus* closing, which results in only a letter being sent to the responding attorney, with no required follow-up. The intake manual provides two criteria for the “typical” *de minimus* closing:

<sup>27</sup> Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, U. CHI. LEGAL F. (2016): 485 at 498 (“the choice to prioritize marijuana enforcement in the first place was a choice-one that did not have to be made, and could be reversed -- which had strongly racially disparate consequences.”)

<sup>28</sup> See New Jersey Courts, What is the Random Audit Program, <https://njcourts.gov/attorneys/oa.html#audits>.

<sup>29</sup> Cal. Bus. & Prof. Code § 6091.1.

(1) “the amount of the NSF activity is under \$50” and (2) “there are no other pending RA Banks or prior history of RA Banks.”<sup>30</sup>

My interviews and research did not reveal any basis for using these particular thresholds of \$50 and “no ... prior history of RA Banks.” Nor have I learned the date at which these thresholds were first set.

Having such a monetary threshold make sense, both because it suggests that any harm is small and that it is unlikely to be the result of illicit misappropriation (one does not put their license in jeopardy and risk prison for a trifling sum). Nonetheless if the \$50 threshold was set a long time ago, its value may have eroded with inflation.

The review of prior history is for the putative purpose of determining whether there is a pattern of similar conduct (whether negligence or malfeasance). However, such a signal is nearly meaningless, without knowing the denominator of how many checks an attorney has written over a period of time. It’s one thing if she bounces 5 checks per 1000; another if she bounces 5 checks per 50.<sup>31</sup>

Especially for high-volume practices, merely having one prior RA Bank, perhaps for a trivial amount many years ago, may not support an inference of negligence or misfeasance, and thus may not be the best use of OCTC resources to investigate. Accordingly, if it is necessary to consider prior history of RA Banks, the threshold could be made higher than zero (e.g., five prior RA Banks). The threshold could also be time-scaled (e.g., one prior RA Bank within the last year), and I understand that intake attorneys may already consider the passage of time informally. Finally, prior *de minimus* RA Banks could be treated differently than major overdrafts in the prior history.

These considerations suggest,

**Potential Reform 1.1** – For the purpose of *de minimus* 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.

In short, PR1.1 suggests that OCTC wait until there is a substantial overdraft, or at least a substantial number of smaller overdrafts, before it begins turning the expensive wheels of justice. Rather than chasing down the second case where someone has a \$50 overdraft, it arguably should allocate those scarce staff resources elsewhere, including to the prevention of overdrafts in the first place, as I suggest below. OCTC could also clarify that prior *de minimus* RA Banks do not count against the threshold as well.

I have not done an empirical analysis of how rigidly the current thresholds are applied in practice. To the extent that intake attorneys are already using some of these or other considerations in their discretion, there is a risk of implicit bias.<sup>32</sup> Even an attorney’s name often carries race cues.<sup>33</sup> It

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<sup>30</sup> Office of Chief Trial Counsel Intake Manual, §5.2. Note: I have been provided with excerpts of the Intake Manual, but have not received or reviewed the full document.

<sup>31</sup> This problem of “denominator neglect” is common in many domains, including medicine. See e.g., Rocio Garcia-Retamero, Rocio, Mirta Galesic, and Gerd Gigerenzer, *Do Icon Arrays Help Reduce Denominator Neglect?*, 30 MEDICAL DECISION MAKING 672 (2010).

<sup>32</sup> See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, AM. ECON. REV. 991, 991 (2004) (showing that employers presented with resumes with racialized names were less likely to invite black applicants for interviews); L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 866 (2016) (reviewing literature

may be worthwhile to revise the *de minimus* rule to implement these considerations more systematically, to reduce even the risk of bias.

An example of such a new guidance would be: The intake office would close RA Bank cases as *de minimus*, if the amount of the insufficient funds overage is less than \$500 and the attorney has had no more than five RA Banks greater than \$500 within the last three years. With some data modelling based on the archive of prior cases (or a sample thereof), the State Bar could predict the impact of various such reforms (*i.e.*, how many more cases will become *de minimus* at any proposed threshold). It may be reasonable to reduce the number of preliminary investigations by 50% or more.

### 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.

For an example of the first principle in another domain: automobile designers now expect that there will be accidents, some caused by negligence, but they design cars with seatbelts and airbags to minimize the harm thereof. Similarly, the field of aviation builds in various alerts and alarms and copilots to ensure that human oversights do not lead to disaster. The analogy applied to client trust fund accounting would be to place a small amount of the attorneys' funds in the account as a hedge against the inevitable mathematical errors. To the contrary, the official State Bar Handbook on Trust Accounting says, "you can't deposit any money belonging to you or your law firm into any of your client trust bank accounts (except for the small amounts of money necessary to cover bank charges)."<sup>37</sup>

For the legal profession and RA Banks in particular, these insights suggest:

**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.

To protect clients from insufficient funds, PR1.2 suggests specifying an amount (say, \$1,000) of attorney funds, which could be kept in a client trust fund to prevent RA Banks from being issued for temporary errors, unless the error is repeated or goes above that amount. The motivation for this reform is similar to the existing policy for *de minimus* closings, recognizing that small overages are unlikely to reveal substantial violations of professional responsibility. It is, frankly, no more disturbing than the present practice of comingling various client funds into a single IOLTA account, where each can serve as the cushion for each other.

PR1.2 responds directly to the wealth-gradient phenomenon discussed above, which showed how even among people with equally careful bookkeeping, an occasional oversight or problem caused by others, will be inconsequential for those who have a cushion of other funds in the account.<sup>38</sup> Currently it is simply riskier to practice in a setting where trust fund balances are closer to zero, and PR1.2 allows attorneys to take the same sort of precaution that many of us take in our personal lives. Admittedly, this reform depends on attorneys having funds to deposit to create that cushion, which will suffer from this same wealth disparity, but it may be helpful on the margin, given that some attorneys will have more disposable wealth, and perhaps less volatility, than their clients have funds in trust.

Normally, the comingling of client and attorney funds is considered problematic, and the paradigm case is putting client funds in an attorney's personal account, where the attorney may draw upon it (misappropriation) or the attorney's creditors make seek to recover from the client's funds. To distinguish this proposal clearly from the real concerns related to comingling of funds, PR1.2 proposes to allow a *specific, relatively small*, amount of comingled *attorney funds in the client's own account*, which would seem to moot those policy concerns.

For similar reasons, current rules already allow this sort of comingling for the specific purpose of depositing funds foreseeably needed to pay bank maintenance charges on the account.<sup>39</sup> But the rules do not provide guidance on what amount that should be.<sup>40</sup> Clarity alone may motivate reform.

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<sup>37</sup> California State Bar, "Handbook on Client Trust Accounting for California Attorneys," p. 2 (2018).

<sup>38</sup> See discussion *supra* surrounding note 24.

<sup>39</sup> California Rules of Professional Conduct, 1.15(c) ("Funds belonging to the lawyer or the law firm shall not be deposited or otherwise commingled with funds held in a trust account except: (1) funds reasonably\* sufficient to pay bank charges...")

Importantly, PR1.2 may require a change to the rules governing lawyers.<sup>41</sup> In 1979, the California Supreme Court upheld a violation where an attorney engaged in precisely this practice of depositing personal funds and unearned fees into the CTA to provide a “margin” against overdraft.<sup>42</sup> However, many other factors were at play, including actual misappropriation of funds and failure to provide an accounting to clients, when repeatedly requested.<sup>43</sup>

If such a revised rule were adopted or clarified, and if attorneys utilized this new provision, it would reduce the number of RA Banks received by OCTC, allowing it to focus its scarce resources elsewhere. PR1.2 would, incidentally, also create more revenues for the State Bar’s access-to-justice programs, by increasing average balances in IOLTA accounts.

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>40</sup> *Id.*

<sup>41</sup> See State Bar Formal Op. No. 2005-169, available at: [http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2005-169\\_03-0005\\_Published\\_Version\\_12-20-05-wpd-PAW.pdf](http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2005-169_03-0005_Published_Version_12-20-05-wpd-PAW.pdf) (“...maintaining a cushion of attorney funds in a CTA beyond an amount reasonably sufficient to cover bank charges [is] a practice that has been prohibited”)(citing *Silver v. State Bar* (1974) 13 Cal.3d 134, 145, footnote 7 [117 Cal.Rptr. 821]).

<sup>42</sup> *Jackson v. State Bar* (1979) 25 Cal.3d 398.

<sup>43</sup> *Id.*

<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.

## 2) CONSIDERATION OF PRIOR CLOSED COMPLAINTS

The Farkas report (Tables 8 and 10) showed that, when various factors are accounted for in regression models, the racial disparity in probation and disbarment (“severe discipline”) disappears.<sup>56</sup> One of these factors is that attorneys who have more formal investigations opened are more likely to then suffer severe discipline. That record of past formal investigations is a function of both complaints received by the State Bar, and how the State Bar handles those complaints.

### A. Background and Analysis

The Farkas report also shows severe racial disparities in the numbers of complaints received by the California State Bar, and this is especially true for Black males (see Tables 1, 2 and 4). This disparity could arise if attorneys have different frequencies of unprofessional conduct, but it could also arise from several other causes. If attorneys work in different practice settings (e.g., with higher volume, or more contentious parties, or smaller firms with fewer alternative mechanisms for dispute resolution), we would expect more complaints, even from attorneys with equal levels of professionalism.<sup>57</sup> Likewise, attorneys’ different communication styles could produce different amounts of complaints, just as physician’s communication styles have been shown to predict malpractice risk.<sup>58</sup> Finally, members of the California public may suffer from implicit (or more rarely, explicit) racism that could motivate the filing of complaints, not unlike the biases that have been shown to infect employers and the media.<sup>59</sup>

Future research could explore the reason for this disparity in complaints and seek upstream solutions. Yet, the point is that one cannot assume that the different rates of complaints reflect different rates of unprofessional conduct.

Even if it is a cause of disparate outcomes, the generation of complaints from the public is not directly within the control of the State Bar. The State Bar cannot simply decline to open formal investigations as a solution to racial disparities. However, in between these two observed disparities (complaints filed and formal investigations opened), there is an important opportunity for reform.

The State Bar presently retains the tens of thousands of prior closed complaints in its case management system, which is used to log new complaints and resolve them. The vast majority of

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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).

complaints received from the public do not directly lead to discipline, but are, instead, closed at some point along the way, without a finding of misconduct.<sup>60</sup> In most cases, OCTC does not even open a formal investigation, because the complaint does not allege a “colorable violation” of the Rules of Professional Conduct.<sup>61</sup>

According to the State Bar Standards, prior discipline can of course be a basis for increasing sanctions for new misconduct, since the prior discipline is predicated upon findings of actual misconduct.<sup>62</sup> A warning letter, resource letter, or directional letter may also be probative to show that an attorney was on notice of a problem. However, mere prior closed complaints have no probative value for the State Bar Court in determining whether discipline is appropriate or how severe it should be.<sup>63</sup> Indeed, state law considers mere complaints to be highly confidential and privileged information, which the public does not have a right to know when selecting their attorney.<sup>64</sup> This policy reflects the lack of probative value for mere complaints.

Nonetheless, in making the decision about whether to formally investigate a case (and presumably also further downstream, when considering what disciplinary sanctions to pursue), OCTC attorneys are instructed to refer back to the prior closed complaints, which form something like a rap sheet.<sup>65</sup> This usage is well-intentioned to detect patterns and practices that may reflect attorney incompetence or negligence, and may yield commensurate benefits.

Yet, if done frequently (which is not completely clear based on my interviews), this use of complaint history is a plausible cause of disparate discipline outcomes, since we know the prior record of complaints is infected with a racial disparity. Exposure to this prior rap sheet can affect attorneys implicitly, even where the old prior complaints are completely frivolous or completely irrelevant. For example, a prior alleged failure to return a file not found to be colorable should have no bearing on whether a current complaint of a conflicting interest gets forwarded for investigation. But like an

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<sup>60</sup> See State Bar of California, “2019 Annual Discipline Report,” at SR-4 available at <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf>.

<sup>61</sup> See OCTC Intake Manual Section 4.3 (“To determine whether a complaint alleges a colorable violation and warrants investigation, intake staff will conduct a legal review of the complaint to identify the facts alleged by the complainant in order to answer three questions: 1. Are the facts specific enough to establish a violation? 2. Are the sources of facts credible? (Every complainant is presumed credible unless there is information to suggest otherwise.) 3. Could the alleged violations, if proved, result in discipline or an alternative to discipline such as a warning letter or agreement in lieu of discipline?”)

<sup>62</sup> See “Standards for Attorney Sanctions For Professional Misconduct,” Section 1.8 (predicating increased sanctions on “prior record of discipline”), available at <https://www.statebarcourt.ca.gov/Portals/2/documents/Rules/Rules-of-Procedure-State-Bar.pdf>

<sup>63</sup> See “Rules of Procedure of the State Bar of California,” Rule 5.108, available at <https://www.statebarcourt.ca.gov/Portals/2/documents/Rules/Rules-of-Procedure-State-Bar.pdf> (“If the attorney introduces evidence that no complaints or charges have been made, then evidence of any complaints or charges is admissible in rebuttal. Evidence of the facts underlying a record of complaint or unproven charge may be admitted to prove a fact in issue. Otherwise, evidence of complaints or unproven charges is inadmissible.”)

<sup>64</sup> Cal. Bus. & Prof. Code § 6094. See *Chronicle Pub. Co. v. Superior Court In & For City & Cty. of San Francisco*, 54 Cal. 2d 548, 567, 354 P.2d 637, 646 (1960) (“The State Bar will accept a complaint from any member of the public who feels, whether rightly or wrongly, that he has been aggrieved ... These complaints are confidential unless they result in disciplinary action taken against the attorney.”)

<sup>65</sup> See “Office of Chief Trial Counsel Intake Manual,” Section 4.3 (“Intake will conduct a legal review of the entire complaint and attached documents and also review the case management system and member information to determine if the attorney has a history of closed complaints, closed investigations, discipline, or pending matters. Such a review is necessary to assess the possibility of a pattern of complaints or misconduct.”)(emphasis added). See also discussion *infra* of how intake attorneys actually apply this guidance.

infection of someone exposed, even irrelevant information has been shown to bias decisions in all sorts of contexts.<sup>66</sup>

To illustrate this dynamic: consider that the Farkas report found that 68% of White male attorneys have zero complaints on their record, while only 54% of Black male attorneys have zero complaints on their record (see Table 1 of Farkas report, reproduced below with highlighted statistics). So when a new complaint comes in, if the intake attorney is unsure of whether to move it forward to formal investigation (what is sometimes called “a wobbler”), and looks to the record of prior complaints, the intake attorney is more likely to give a White attorney the benefit of the doubt for having a “clean” record, even if the intake attorney does not know the respondent’s race. In this way, the prior complaint record becomes a proxy for race, which may exacerbate disparities, especially when a close case could go either way.

**Table 1. Attorneys Admitted from 1990 to 2009  
By Race/Ethnicity, Gender, and the Number of Complaints Received**

Number of Attorneys						Percent of Total				
# of Complaints	Asian	Black	Hispanic	White	Total	Asian	Black	Hispanic	White	Total
<i>Male</i>										
0	5,812	996	2,266	32,432	41,845	73%	54%	56%	68%	67%
1-4	1,564	463	1,148	11,147	14,444	20%	25%	28%	23%	23%
5-9	307	153	330	2,220	3,044	4%	8%	8%	5%	5%
>=10	275	217	314	1,911	2,758	3%	12%	8%	4%	4%
Total	7,958	1,829	4,058	47,710	62,091	100%	100%	100%	100%	100%

*Data source: Farkas report, supra note 1 at p.4 (partial table reproduced here).*

Even worse than the sheer disparity in numbers, this practice of consulting prior complaints may allow implicit biases to exacerbate the problem as well, given that it is not particularly clear what can be inferred from ambiguous prior records.<sup>67</sup> As noted for RA Bank cases above, the incoming complaints only reflect a numerator, but an evaluation of an attorneys conduct should be more like a proportion or ratio.<sup>68</sup> Decades of research show that especially in domains of ambiguity, even well-intentioned persons without explicit prejudices nonetheless rely on heuristics and stereotypes to make decisions that cohere with and reinforce those same heuristics and stereotypes.<sup>69</sup> Fortunately, it helps to mitigate the problem, if decision makers can rely on pre-specified explicit criteria to resolve ambiguous decisions, as I suggest below.<sup>70</sup>

<sup>66</sup> See e.g., Timothy D. Wilson and Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOLOGICAL BULLETIN 117 (1994). Birte Englich, Thomas Mussweiler, and Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 188 (2006).

<sup>67</sup> See sources cited supra note 32-33.

<sup>68</sup> See generally Garcia-Retamero, Galesic, and Gigerenzer *supra* note 31.

<sup>69</sup> See e.g., E. L. Uhlmann and G. L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, PSYCHOLOGICAL SCIENCE, 16(6), pp.474-480 (2005).

<sup>70</sup> Id.

## B. Record Retention

Criminal law presents a useful analogy as arrests are known to be racially disparate, not unlike bar complaints.<sup>71</sup> The Supreme Court has long recognized that arrests lack probative value.<sup>72</sup> Recognizing that consideration of arrests can have unfair and disparate impacts, scholars, prosecutors, and court officials have recently proposed a model law that would generally expunge arrest records after a period of time.<sup>73</sup> Justice Sonia Sotomayor recently explained: “Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the ‘civil death’ of discrimination by employers, landlords, and whoever else conducts a background check.”<sup>74</sup>

California is a leading state in this wave of reform: the state’s “ban the box” law not only prohibits employers from asking about or conducting a search for prior criminal convictions until after a provisional employment offer has been made, but altogether prohibits consideration of arrests not followed by conviction, except in very narrow circumstances.<sup>75</sup> Even for convictions, in October 2019, Governor Newsom signed a criminal justice bill, AB1076, which automatically expunges records of low-level offenses.<sup>76</sup>

Similarly, at the very least,

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

Other states, such as Illinois and Minnesota, use a 3-year lookback before expunging closed complaints, which California could consider alternatively.<sup>77</sup> I selected the five-year period simply because it may already be legally authorized in California. Though a formal legal opinion could resolve this question more definitively, it appears that the California Legislature has already decided to allow the State Bar to expunge closed complaints after five years.<sup>78</sup> The California Supreme Court has also adopted a record retention policy for attorney discipline, which defines “complaint” to include only those that OCTC determined to warrant investigation, and requires permanent retention of records related to “formal disciplinary proceedings.”<sup>79</sup> Arguably thus, the

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<sup>71</sup> See generally, Angela J. Davis, ed., *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT*, Vintage (2017). See also Shima Baradaran, *Race, Prediction, and Discretion*, GEO. WASH. L. REV., 81, p.157 (2013).

<sup>72</sup> *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 241 (1957) (“[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”)

<sup>73</sup> “Model Law on Non-Conviction Records,” Collateral Consequences Res. Ctr. (2019), available at <http://ccresourcecenter.org/model-law-on-non-conviction-records/>

<sup>74</sup> *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (Sotomayor, J., dissenting) (citing G.J. Chin, *The New Civil Death*, 160 U. PA. L. REV. 1789, 1805 (2012)).

<sup>75</sup> Cal. Gov’t Code § 12952 (West).

<sup>76</sup> See “Governor Newsom Signs Criminal Justice Bills to Support Reentry, Victims of Crime, and Sentencing Reform,” October 8, 2019, available at <https://www.gov.ca.gov/2019/10/08/governor-newsom-signs-criminal-justice-bills-to-support-reentry-victims-of-crime-and-sentencing-reform/>.

<sup>77</sup> See e.g., Illinois Supreme Court Rule 778; Minnesota Rule of Professional Conduct 20 (e). See also Michael Hoover, *Expunction Of Dismissed Complaints*, BENCH & BAR OF MINNESOTA (September 1983) available at <http://lprb.mncourts.gov/articles/Articles/Expunction%20of%20Dismissed%20Complaints.pdf> (explaining the process and reasoning.)

<sup>78</sup> See Cal. Bus. & Prof. Code § 6092.5 (“the disciplinary agency shall... (d) Maintain permanent records of discipline and other matters within its jurisdiction, and compile statistics to aid in the administration of the system, including, but not limited to, a single log of all complaints received...”); *id.* at §6080 (“In disciplinary proceedings in which no discipline has been imposed, the records thereof may be destroyed after five years.”).

<sup>79</sup> See California Supreme Court Standing Order 8-22-2007. Closer review may suggest that the Supreme Court requires retention of complaints that were dismissed after formal investigation, which is somewhat narrower than the

State Bar has authority to adopt PR2.1 already. But if not, it could seek that authority to avoid perpetrating racial disparities.

Of course, the State Bar is often asked to provide discipline records, including closed complaints, to stakeholders including the Commission on Judicial Nominees Evaluation, out-of-state licensing agencies, and State Bar committees. Yet, here again, one should worry about the racial disparities and lack of probative value being passed over to those other entities. And of course, the State Bar has no obligation to share records that it has expunged according to explicit legal authority.

PR2.1 does not apply to records of prior discipline, which arguably has a more legitimate rationale for consideration in the context of subsequent discipline compared to mere closed complaints. PR2.1 could also exclude cases that resulted in warning letters, resource letters, or directional letters.

The current approach of permanently retaining disciplinary records reflects a notion that prior discipline reflects an indelible stain on a person's character. As scholars explain, "however, psychological research suggests a more complex story: that those who commit ethical infractions are not necessarily 'bad apples,' but are human beings. Many ethical lapses result from a combination of situational pressures and all too human modes of thinking."<sup>80</sup>

In this light, PR2.1 is, frankly, a modest reform, as it only applies to complaints that did not lead to discipline. More ambitiously, the State Legislature and Supreme Court could consider expunging a range of prior discipline cases, even where misconduct was found, just as the Legislature has done for low level criminal convictions.<sup>81</sup> The probative value of older discipline cases is also undermined, if some of those disciplinary outcomes were obtained because the attorney lacked representation to help the tribunal see both sides of the case, as the Farkas report suggests. Even if there is some probative value, such a move is necessary to ensure that the historical record of racially disproportionate attorney discipline does not continue to resonate disparities into the future.

### C. Case Handling

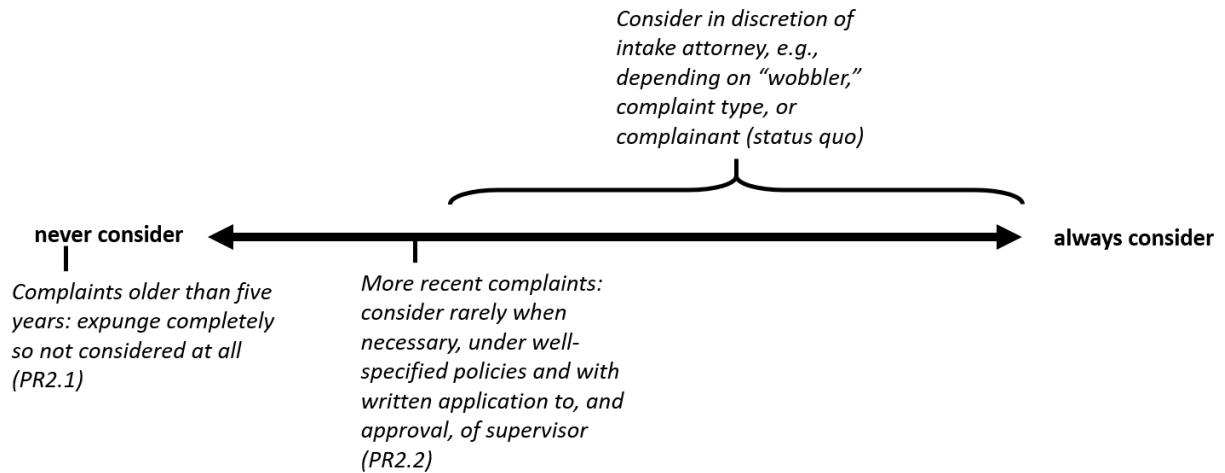
Even if the State Bar adopts PR2.1 (or a more ambitious version thereof), OCTC will still have more recent closed complaints in their files, and these could have disparate effects on their decision making. Figure 2 reflects the potential range of policies and practices for consulting prior complaints in deciding how to dispose of a new complaint. It shows the status quo, which appears to vary in the amount of consideration depending on the intake attorney, and a proposed reform, discussed below.

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expungement allowed than the legislature, which depends on whether discipline was imposed. If there is a difference I would suggest that the Supreme Court consider revising its order to allow the broader expungement contemplated by the legislature.

<sup>80</sup> Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013) 1107, 1111 (2013)

<sup>81</sup> See supra note 76.

**Figure 2 – Range of Potential Approaches to Considering Prior Closed Complaints in Disposing New Complaint**

Building on but also clarifying and revising current practice,

**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.

This reform is complementary to PR2.1 but could also be adopted independently, regardless of whether that reform is adopted. It bears emphasis that PR2.2 does not apply to concurrent open complaints, which should be reviewed to determine if they include evidence of the same or related allegations. Further study could refine PR2.2, for example to determine whether and how it should apply to past warning letters or resource letters that are issued for probable violations of the rules, which were not forwarded to formal investigation. Another possible exception would be for prior complaints that present a *prima facie* case of misconduct, but could not be sent to formal investigation due to the rule of limitations.<sup>82</sup> Finally, it may be worthwhile to have a paralegal routinely consult the archive just to determine whether a “new” complaint is actually just an additional communication from a complaining witness, providing more information.

For PR2.2, I considered simply recommending that while keeping the record fully available, intake attorneys should not *consider* the prior complaint record. However, cognitively, it is unrealistic for people to be exposed to information, but then be asked not to consider it.<sup>83</sup> This approach also would not allow robust tracking of how often and why prior complaints were consulted, or the results thereof. Nonetheless, I have not explored the logistical aspects of archiving prior closed complaints, whether within the Odyssey case management system or in a separate parallel system, including time and costs of doing so.

Importantly, PR2.2 should not be interpreted as making the disciplinary process more lenient. Since we do not have any independent way of knowing the optimal rate at which new complaints should be put forward to investigation, we cannot say whether the Black rate is too high or the

<sup>82</sup> See California State Bar Rule 5.21.

<sup>83</sup> See generally, Christopher T. Robertson and Aaron S. Kesselheim, Eds., *BLINDING AS A SOLUTION TO BIAS: STRENGTHENING BIOMEDICAL SCIENCE, FORENSIC SCIENCE, AND LAW*, Elsevier (2016).



white rate is too low. A racial disparity in formal investigations can arise if Black attorneys are suffering discipline too often and too much (a “false positive” problem), or it can arise if white attorneys are getting disciplined too rarely and too little (a “false negative” problem). Currently, the practice of consulting prior closed complaints plausibly causes either sort of error, depending on whether the subject attorney has a long history or no history of prior closed complaints.

It bears emphasis that considering prior closed complaints is only one tool in the toolbox of an intake attorney, and for OCTC more broadly. Alternatively, when there is a close call, intake attorneys may undertake additional intake workup -- e.g., calling the complainant to clarify the situation or reviewing a court docket.<sup>84</sup> Upon that basis, the intake attorney may then make a decision that falls within the four-corners of the enhanced material received. This sort of effort is especially important when the complaint appears to come from a more vulnerable population (e.g., an elderly person) or someone who may have difficulty communicating a *bona fide* violation of the rules (e.g., a non-native speaker).

These additional intake workups help to minimize false negatives, to ensure that OCTC opens formal investigations when appropriate, and especially for vulnerable populations. The State Bar’s mission to protect the public requires that when complaints are filed, they are properly considered before being closed. Moreover, under current procedures, Complaining Witnesses may also request review of cases that they believe were improperly closed.<sup>85</sup> If these processes of consideration are working appropriately, then closed complaints truly have no evidentiary value for subsequent discipline, making PR2.2 appropriate.

Other State Bar consultants and I considered developing some sort of decision matrix specifying whether and how OCTC attorneys should routinely consider prior closed complaints. While that work may well continue, I am concerned that the underlying racial disparity in public complaints and their lack of probative value once closed are together strong enough to counsel against any routine use of prior complaints, even with a decision matrix.

While PR2.2’s provision for accessing the archive on written application to the supervising attorney retains flexibility, it may help reduce implicit biases in both the decision about whether to consult prior complaints and in their interpretation. This process benefits from having an arms-length evaluation from the supervisor, but even if (hypothetically) he or she were to rubber-stamp every application, the process itself may be salutary. Research suggests that interrupting an automatic

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<sup>84</sup> See OCTC Intake Manual Section 4.3 (“Additional Intake Work-Up- Some complaints have insufficient information to ascertain whether a colorable violation exists and require further information before intake can make an informed decision whether an investigation is warranted. Complainants are not expected to provide every fact needed to establish a violation or correlate their facts to specified violations. But, when a complainant raises facts that, in conjunction with additional facts, may result in a colorable violation, intake attorneys should seek to determine whether those additional facts exist. Intake attorneys may seek further information from a court docket, the internet, or conduct legal research in order to complete their legal review.”)

<sup>85</sup> “Complainants are entitled to request that the State Bar Office of General Counsel’s Complaint Review Unit (CRU) review OCTC’s decisions to close a case. If CRU finds that the case was not closed properly, or if it the complaining witness presents new evidence it will refer the complaint back to OCTC with a recommendation that it be reopened for investigation. Should CRU decline to recommend reopening a case, it will notify the complainant and inform them of their right to request the California Supreme Court review the complaint pursuant to *In re Walker*, 32 Cal.2d 488 (1948) to determine if it should be reopened.” California State Bar, 2019 Annual Discipline Report, at p.3, n2, available at <http://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf>.



process and asking people to make an active choice, plan their work, and specify their goals, reduces bias.<sup>86</sup>

#### D. Upstream Prevention

The foregoing recommendations suggest that prior closed complaints should not be accessible to OCTC attorneys in routine cases. However, it may be imprudent for the State Bar to ignore them altogether. Analogously, in April 2019, the California State Auditor faulted the Commission on Judicial Performance for, among other things, “not periodically evaluat[ing] its complaint data to identify when patterns of complaints exist that could merit investigation, even if the individual complaints themselves do not warrant investigations.”<sup>87</sup> For the reasons stated above, I am concerned that such regurgitation of prior closed complaints may exacerbate racial disparities, but prior complaints may well be used for proactive support purposes that prevent subsequent problems from arising. Accordingly,

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

In this way, prior closed complaints could be inputs into upstream solutions to reduce the number of cases that are filed. If that effort succeeds, it should disproportionately benefit Black attorneys who now disproportionately receive those complaints.

This reform contemplates that the California State Bar should consider a non-disciplinary program of identifying attorneys who more frequently have complaints, and then proactively reaching out to them to determine whether the underlying problems, if any, can be identified and resolved. The Governance in the Public Interest Task Force (GTF) recently released a report on such efforts of “proactive regulation,” explaining that it should not be punitive, both for the sake of due process and to avoid replicating the same racial disparities explained above.<sup>88</sup> “However, such a predictive model could be the basis of supportive interventions such as providing information, conducting outreach, educating the regulated population about the risks, and providing resources to mitigate them.”<sup>89</sup> This proactive mechanism could initially rely on a merely qualitative triage process. For example, an intake attorney may decide, upon closing a complaint for lack of an allegation meriting discipline, to refer it to the proactive support team for outreach.<sup>90</sup> Alternatively or in addition, a risk score could be calculated for each practicing attorney, based on a range of factors including, but not limited to prior complaint history (if it is shown to have statistical reliability for that purpose).

To the extent that, on the merits, either the qualitative or quantitative approach tends to disproportionately identify Black male attorneys for outreach and support, and to the extent that it helps successfully reduce the number of complaints and formal investigations entered against them, it will help resolve the upstream disparity in public complaints. The downstream disparity in severe discipline will be improved as well.

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<sup>86</sup> See J. B. Soll, K. L. Milkman and J. W. Payne, *A User’s Guide to Debiasing*, THE WILEY BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, 2, pp. 924-951 (2015).

<sup>87</sup> <http://bsa.ca.gov/pdfs/reports/2016-137.pdf> at p 2.

<sup>88</sup> The State Bar of California, “Report of the 2020 Task Force on Governance in the Public Interest,” p. 12 (May 15, 2020), available at <http://www.calbar.ca.gov/Portals/0/documents/reports/2020-Governance-in-the-Public-Interest-Task-Force-Report.pdf>.

<sup>89</sup> Id., at 14 (citing Philip K. Dick’s 1956 short story, “The Minority Report” and 2002 movie of the same name, directed by Steven Spielberg and starring Tom Cruise.)

<sup>90</sup> While it’s true “where there is smoke there is fire,” the difference is between assuming it’s arson and sending the police to arrest the homeowner, versus sending the firetrucks to put out the fire.

This approach towards proactive regulation is in its infancy. In addition to the triage challenge of identifying *which* attorneys to select for proactive outreach and support, a second challenge will be developing interventions that actually reduce the risk of subsequent complaints and discipline. These are likely to be domain specific—for example, a resource letter may suffice to help attorneys avoid breaching a certain rule, if they are actually unaware of the rule’s existence. But a resource letter is unlikely to help to solve more complicated problems. Ideally, such interventions should be tested empirically.

The OCTC operates in a resource-constrained environment, as does the State Bar more generally.<sup>91</sup> Thus it is essential to test any of these potential reforms against a realistic cost estimate, which has not yet been done. Hypothetically, by removing closed complaints from routine consideration (as in PR2.1 and PR2.2), it may be possible that intake attorneys will process cases more efficiently and/or forward to investigation fewer “false positive” cases that turn out to be meritless. Further, it is possible that the proactive intervention team contemplated by PR2.3, may succeed in preventing future complaints from being made at a rate more substantial than if those same resources could have been deployed to clear complaints once filed (having fewer harmed or dissatisfied members of the public). Ultimately, even if these reforms do have net costs in the end, those costs must be weighed against any improvements in the racial disparities shown by the Farkas report.

### 3. REPRESENTATION OF RESPONDING ATTORNEYS

"Lawyers are necessities, not luxuries," said the U.S. Supreme Court in 1963, establishing a Federal Constitutional right to representation in criminal cases.<sup>92</sup> Indeed, Dr. Farkas found that when California attorneys face disciplinary charges without representation by counsel, they were much more likely to be disbarred.<sup>93</sup> Black respondents are approximately twice as likely not to be represented by counsel during the investigation phase of a discipline case. Together, these two differences – between races getting representation and rates of disbarment conditional on representation -- are a plausible mechanism for the ultimate disparity in racial outcomes.

#### A. Background and Metric Tracking

The statistics tell us that without representation, respondents are more likely to suffer disbarment (all other observable factors being equal), but they do not necessarily tell us whether the association is causal.<sup>94</sup> It may be, for example, that respondents with stronger cases are more likely to retain counsel, or that respondents who retain counsel are also better able to promote their own cases in other ways. For example, there are presumably cases in which the respondent is so incapacitated by an addiction that she altogether defaults on her case, and that same addiction precludes the securing of counsel. The underlying functional incapacity of the respondent may be

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<sup>91</sup> The recent Bar Discipline report makes this clear. See note 60 *supra*.

<sup>92</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>93</sup> Farkas report *supra* note 1.

<sup>94</sup> Compare D. J. Greiner, C. W. Pattanayak and J. Hennessy, *The Limits of Unbundled Legal Assistance: a Randomized Study in a Massachusetts District Court and Prospects for the Future*, HARV. L. REV. 126, p.901 (2012) (reviewing literature and presenting a randomized study of the effects of representation for clients facing eviction, finding that, “Approximately two-thirds of occupants in the treated group, versus about one-third of occupants in the control group, retained possession of their units at the end of litigation.”) James Grenier and Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make*, YALE L.J. 121, 2118 (2011). (“Our randomized evaluation [in the context of a law school clinic handling administrative appeals to a to state administrative law judges of eligibility for unemployment benefits] found that the offers of representation from the clinic had no statistically significant effect on the probability that unemployment claimants would prevail in their ‘appeals,’ but that the offers did delay proceedings by, on average, about two weeks.”)

the real problem. Thus, more quantitative and qualitative study on the issue of representation could be worthwhile, as the subject of its own report.

Nonetheless, my interviews suggest that representation is indeed effective by helping respondents meet key deadlines, develop a more objective view of the complaint, understand the nuances of this relatively technical and obscure legal specialty, and develop mitigation strategies in particular – all of which help ensure that discipline cases are resolved on the merits. The racial disparity we see is problematic on its own, but it also suggests that the discipline system is resolving cases on factors other than the merits, and thus is failing to optimally achieve its policy goals of protecting the public.

For these reasons, it would be wrong for the State Bar to approach this issue with either an adversarial attitude (supposing that we seek the most severe sanctions in every case and representation of respondents would only create obstacles to that goal) or a *laissez faire* attitude (supposing that respondents can get representation if they want it, and that there is a free market of attorneys who can try to sell their services to those respondents). Instead, at least for cases that threaten disbarment, the California State Bar should view any disciplinary case where the responding attorney is unrepresented as a risk-factor for failing to achieve its policy goals.

In this light, I recommend minimally,

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

It has been said that you cannot manage what you do not measure. So, for starters, this approach simply suggests that the State Bar should keep an eye on this metric just as it does other metrics in its annual discipline report. The effort to track and report the data will hopefully direct sustained attention to this particular issue, allowing leadership to monitor the success of implementing subsequent recommendations. Over the longer term, attention to that metric may also generate other solutions, beyond those considered here.

## B. Improving the Rates of Representation

Moving from merely tracking this metric to attempting to improve the metric will require some theory about *why* attorneys facing discipline, and especially Black ones, fail to secure representation. Research could explore that question with focus groups and surveys of attorneys who have faced discipline without attorneys.

But for now we can speculate: If we consider this outcome of being non-represented to be the result of the respondent's own decision (which is just one possible frame for analysis), several well-documented heuristics and biases may be relevant. These include optimism bias, having an unrealistic view of one's own case, assuming that a favorable outcome is likely regardless of having an attorney, making the effort to secure one unnecessary.<sup>95</sup> Overconfidence is another documented bias, which involves having a rosy view of one's own abilities, here the ability to serve as one's own lawyer, and thus produce a favorable outcome without help.<sup>96</sup> Indeed, some research suggests that

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<sup>95</sup> See Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1338–39 (1995) and Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659–63 & n.23 (1998) (reviewing literature on “optimism bias”). See also D. Dunning, E. Balcetis, *Wishful Seeing: How Preferences Shape Visual Perception*, CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 22 (1), 33–37 (2013).

<sup>96</sup> See A. O. Baumann, R. B. Deber, G. G. Thompson, *Overconfidence Among Physicians and Nurses: the ‘Micro-Certainty, Macro-Uncertainty’ Phenomenon*, SOCIAL SCIENCE AND MEDICINE 32 (2), 167–174 (1991); Catherine O'Grady, A

confidence is poorly correlated, or even inversely correlated, with competence, such that the most confident people may actually be the least likely to succeed.<sup>97</sup> These sorts of biases thrive in situations of uncertainty, where someone is undertaking guesswork that succumbs to motivated reasoning.

As a solution, it is sometimes helpful simply to provide true information. This suggests,

**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 approach is a form of “nudge” a term which is used in the policy and law literature to indicate a concerted effort to change behavior.<sup>98</sup> Accordingly it should be more than just a pro forma or milquetoast advisory, but rather should be developed and tested as an intervention that will actually change the behavior of responding attorneys, measurably increasing the proportion of cases in which they secure representation. The goal is to make this information very salient to the responding attorney, not mere boilerplate to gloss over (as might be given in a *laissez faire* mindset).

There are a range of questions that still need to be resolved, including the timing of this intervention (whether at the opening of a formal investigation or the filing of charges), the mode (whether as a mailed letter and email or a call); the specific language, numbers, and graphics to utilize (e.g., whether to use a figure showing differential rates of discipline with versus without representation, and/or use quotations from prior attorneys explaining why being represented was valuable to them), the customization of the letter (e.g., to show statistics tailored to the particular charge), and potential follow-up related thereto (e.g., weekly reminders perhaps even including a phone call by an ombudsperson, see below).

Because the rate of representation is a very proximate and measurable outcome (tracked as per PR3.1), it would be feasible to approach these questions through experimentation. For example, at no additional cost, the State Bar could roll out a letter gradually, initially to 25% of attorneys facing new investigations, then 50%, then 100%, and randomly assign respondents to receive two or more different versions of the letter. This stepwise process would allow rigorous evaluation of what tactics optimize the proportion securing representation.

Overall, the notice contemplated by PR3.2 is a relatively simple and inexpensive proposal. However, even if optimized, I would expect the impact to be relatively modest, as the provision of mere information is rarely a complete solution to a policy problem. The fundamental problems are rarely just decisional – they are often fundamentally economic.

In economic terms, legal representation is a “credence good,” meaning that it is difficult for the consumer of the service to evaluate its value.<sup>99</sup> If I spend \$5,000 to have an attorney help me with

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*Behavioral Approach to Lawyer Mistake and Apology*. 51 NEW ENG. L. REV. 7, 17 (2016) (reviewing the literature in the legal setting).

<sup>97</sup> See David Dunning, “The Dunning-Kruger Effect: On Being Ignorant of One’s Own Ignorance,” in *Advances in Experimental Social Psychology*, vol. 44, pp. 247-296. Academic Press (2011).

<sup>98</sup> See Christopher T. Robertson and I. Glenn Cohen and Holly Fernandez Lynch, Introduction, *NUDGING HEALTH: HEALTH LAW AND BEHAVIORAL ECONOMICS*, Johns Hopkins University Press, 2016, available at SSRN: <https://ssrn.com/abstract=2805664>.

<sup>99</sup> See U. Dulleck and R. Kerschbamer, *On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods*, JOURNAL OF ECONOMIC LITERATURE, 44(1), pp.5-42 (2006).

this discipline complaint, will I get more than \$5,000 of value in return? To start to answer that question, a respondent might start calling specialist attorneys and begin interviewing them, but unlike criminal defense or personal injury (for examples), the legal practice of attorney discipline is relatively obscure. Finding and then evaluating such a specialist attorney can be time consuming -- what economists call “search costs,” which must be sunk before you even get a chance to evaluate the potential service provider.<sup>100</sup> For these reasons, a rational respondent might just shrug and decide to go it alone – forgoing the potential benefits of getting representation to at least avoid the risks of wastefully searching for and selecting one.

For these reasons, the State Bar should make the steps from intention to action as small as possible. This suggests,

**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 PR3.2.

Having a list of qualified specialists and their phone numbers is quite helpful to reduce the respondent attorneys’ search costs and support the desired behavior to get representation. Of course a simple link to a statewide directory could suffice, however to avoid “choice overload,” some research suggests that a curated list, tailored at least by geographic proximity, or perhaps even with random selection to a single name, may be more effective.<sup>101</sup> A long list can cause people to procrastinate or avoid choosing altogether, out of implicit concern with making a poor choice.<sup>102</sup> In this way, PR 3.3 is designed to make it extremely clear what the respondent should do next (i.e., pick up the phone to call the suggested attorney), without any handwringing. Just do it. Of course, respondents are still free not to use an attorney or to select a different one.

In addition, PR3.3 suggests making that first phone call to an attorney specializing in bar discipline cases be offered for free and be substantial enough (one hour) to help the respondent temper her overconfidence about her case, get a sense of how to proceed with the complaint, and really evaluate whether the attorney is likely to be helpful. The State Bar could, of course, secure funding actually to pay for these initial consultations for all attorneys that utilize them. However, I am envisioning a *simple quid pro quo* – for an attorney to get the State Bar’s marketing help, in exchange they have to agree to free one-hour consultations.<sup>103</sup> Attorneys may find that doing this service to their fellow attorneys rebounds in goodwill, and some substantial subset of the free consultations will convert to paid representation thereafter.

Other states, such as Arizona and Oregon, approach this issue by coordinating volunteer attorneys. In Arizona, the Association for Defense Counsel’s *pro bono* committee coordinates a panel of attorneys with expertise in professional discipline cases. Along with notice of a formal investigation, the Arizona State Bar provides an explanatory flier with a number for respondents to call to get matched with a willing attorney, who then provides a one-hour free consultation. My interview with one of the co-chairs of this service suggests that the consultations are often

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<sup>100</sup> See J. Yannis Bakos, *Reducing Buyer Search Costs: Implications for Electronic Marketplaces*, MANAGEMENT SCIENCE 43, no. 12, 1676-1692 (1997).

<sup>101</sup> See Christopher Robertson, EXPOSED: WHY OUR HEALTH INSURANCE IS INCOMPLETE AND WHAT CAN BE DONE ABOUT IT, Cambridge, Harvard U Press: 2019, Chapter 2 (reviewing the literature on choice overload).

<sup>102</sup> See also the literature on omission bias. *Id.*

<sup>103</sup> The fact that the respondent will receive a *pro bono* consultation, not merely a sales pitch, distinguishes PR3.3. from lawyer referral services. Business & Professions Code section 6155(c)(3).

substantive, giving respondents a clear sense of the severity of the charges they face, how the complaint should be appropriately addressed, and the potential benefits of getting representation.

My preliminary interviews in California suggest that the bar of attorneys specializing in lawyer discipline is somewhat more robust, not merely a subset of the more general defense bar, as in Arizona. I am told that California discipline bar members typically already provide free phone consultations for potential new clients, but these are often limited to about 20 minutes and typically are more like sales pitches, rather than case evaluations.

To the extent that these conversations are substantive, involving an actual evaluation of the case based on information shared on the phone (which seems to be the Arizona model, at least), it raises concerns about malpractice liability, confidentiality and privilege, scope of representation, and conflicts with other clients.<sup>104</sup> Some of these issues arise even from the status quo practice of offering 20-minute sales conversations.<sup>105</sup> Enforceable liability waivers may be part of the solution, but would require revision of the California Rules of Professional Conduct.<sup>106</sup> I expect that all these questions are resolvable, but require some prospective thought and guidance, possibly from the courts. It is key to ensure that antiquated formalism does not get in the way of solving the policy problem.

The foregoing potential policy reforms may substantially increase the proportions of respondents who get representation, and PR3.3 will even give a clear-headed case evaluation to those who do not get representation. But there will likely remain a substantial number of attorneys who fail to do so, and it may reflect the same racial disparity presently observed.

Frankly, many social problems are ultimately problems of wealth distribution, and mechanisms that do not address that fundamental problem will only have marginal effects. Here, I would speculate that a substantial proportion of attorneys who proceed through the discipline process without representation are doing so because they simply cannot afford to hire an attorney, and that may be more often true for Black attorneys. To remedy that problem, the Legislature or the State Bar could, ambitiously, create a public defender system for attorneys charged with misconduct, creating a rules-based or statutory right to representation, even if not recognized by the state or federal constitutions. Given the relatively small numbers of attorney discipline cases per year, it may only require a few fulltime staff to provide that support. However, the finances and politics of such a move might be challenging, and a poorly funded and overworked public defender might not provide substantial benefits, due to sheer lack of bandwidth.<sup>107</sup> This suggests,

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<sup>104</sup> See *People ex rel. Dep't of Corps. v. Speedee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1147–48, 980 P.2d 371, 379–80 (1999) (“The fiduciary relationship existing between lawyer and client extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result. ... When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie. ... The absence of an agreement with respect to the fee to be charged does not prevent the relationship from arising.”)(quoting prior cases).

<sup>105</sup> See *Edwards Wildman Palmer LLP v. Superior Court*, 231 Cal. App. 4th 1214, 1225, 180 Cal. Rptr. 3d 620, 628 (2014) (“California’s attorney-client privilege is embodied in section 950 et seq. and protects confidential communications between a client and his or her attorney made in the course of an attorney-client relationship. ... Section 951 defines ‘client,’ for purposes of the privilege, as ‘a person who ... consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity....”)

<sup>106</sup> See California Rules of Professional Conduct, Rule 1.8.8 Limiting Liability to Client (“A lawyer shall not: (a) Contract with a client prospectively limiting the lawyer’s liability to the client for the lawyer’s professional malpractice.”).

<sup>107</sup> See Alexander supra note 7 at 289 (“Public defender offices should be funded at the same level as prosecutor offices.”).

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

Differential pricing is an important economic tool that can increase access for lower-income consumers while also increasing profits to sellers, enhancing overall welfare, but it is difficult to organize in a competitive market.<sup>108</sup> My interviews suggest the defense bar may be interested in providing services on a sliding scale but is uncomfortable with the role of actually doing the means-testing required to determine whether a given respondent qualifies for a given level of discount, based on assets and income. This is a challenge for any scheme of pure differential pricing, since individuals would always prefer to pay less, even if they are able to pay more, making the sorting task essential and potentially resource-intensive, *i.e.*, to secure and review reliable documentation of assets and income. Nonetheless, the California State Bar already takes into consideration “ability to pay” for various programs, including the lawyer assistance program, licensing fees, and court transcripts. These mechanisms could be unified and the State Bar could then certify that a given attorney is also eligible for reduced fee representation.

To ensure that the State Bar court gets the full benefit of the adversarial process in every case, the sliding scale for attorneys fees should go all the way to zero, where necessary.<sup>109</sup> Anecdotally, I understand that some lawyers may be struggling financially to such a great extent that even a small fee could be preventative. It bears emphasis that a robust adversarial process benefits the State Bar and the public it is trying to serve and protect, not just the accused attorney.

Even more than the other suggestions, PR3.4 requires further study. It is difficult to tell whether the private defense bar will be willing to provide substantial enough discounts for large enough numbers of responding attorneys or even provide pro bono representation to some attorneys on the extreme. Price discrimination works in other contexts, such as pharmaceutical drugs being sold in relatively rich countries at a high price and in relatively poor countries at a much lower price, in part because the marginal cost to produce pills is quite low and the cost to research and develop the drug is sunk. Legal services, on the other hand, have higher marginal costs of production – an attorney has to give up his or her time, which could be spent serving another full-price client instead. To help address this problem, PR3.4 could be fleshed out to include an allocation of funds from the State Bar, to “top up” the reduced fees paid by the responding attorney.

### C. Improving Outcomes for Those Without Representation

The foregoing suggestions are unlikely to get representation for all the respondents who could benefit. Accordingly,

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<sup>108</sup> See Christopher T. Robertson, *Scaling Cost-Sharing to Income: How Employers Can Reduce Healthcare Spending and Provide Greater Economic Security*, 14 YALE JOURNAL OF HEALTH POLICY, LAW, AND ETHICS 239, 265 (2014) (“Variants of this strategy include pure price discrimination, as well as the differentiation of very similar products (e.g., Honda and Acura), so that individual consumers can reveal their own willingness to pay. Coupons are thought to have a similar effect, allowing consumers with greater price sensitivity (and lower opportunity costs for their time) to gain access to consumer products that would otherwise be too expensive”). See generally Daniel J. Gifford & Robert T. Kudrle, *The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation?*, 43 U.C. DAVIS L. REV. 1235, 1241–42 (2010) (discussing the varieties of differential pricing). The concept is often called “price discrimination,” but not in the pejorative sense.

<sup>109</sup> The State Bar could also consider partnering with a law school to operate a clinic focusing on defense of attorney discipline cases. Such a clinic could be an excellent way to teach professional responsibility to future California attorneys, while helping to ensure an adequate defense for financially destitute attorneys. It might also introduce more young lawyers to this area of practice, which could then further expand the availability of private representation.

**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 is a complex and novel set of functions to be performed by this new entity. Of course, attorneys facing discipline are a distinct population from the typical civil litigant trying to resolve a divorce or eviction without the support of counsel, but the Farkas report suggests a similar need for representation, or at least support.

PR3.5 uses the working title “Discipline Equity Office” (DEO), but some of these functions are similar to an “ombudsperson,” which other California state agencies employ.<sup>110</sup> Similarly, the U.S. Food and Drug Administration has an Office of the Ombudsman, which “serves as a neutral and independent resource for members of FDA-regulated industries when they experience problems with the regulatory process that have not been resolved at the center or district level.”<sup>111</sup> The Federal Internal Revenue Service has an independent organization called the Taxpayer Advocate Service, which helps individuals resolve problems and also addresses systemic issues.<sup>112</sup> Regardless of the label, the idea is to have someone in the State Bar, independent of OCTC, who can engage with and support members who are facing discipline.

Another analogy is to a trend in district attorneys’ offices to create “conviction integrity units,” whose role is “to prevent, identify, and remedy false convictions.”<sup>113</sup> We have no reason to believe that there are analogously “false disbarments.” But these offices reflect a similar insight that the prosecutor does not merely exist to get convictions, but to pursue justice in protecting the public, and sometimes that requires an independent second look at a case.<sup>114</sup>

The DEO could answer questions and produce self-help materials, such as procedural roadmaps, explainers, smart forms (like TurboTax), and exemplar pleadings for attorneys representing themselves, which is analogous to the self-help centers that exist in every California State Court, a national model that other states are only beginning to implement.<sup>115</sup> Such centers, “help unrepresented litigants with their cases in any way possible, short of giving legal advice.”<sup>116</sup>

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<sup>110</sup> See S. Van Roosbroek and S. Van de Walle, *The Relationship Between Ombudsman, Government, and Citizens: A Survey Analysis*, NEGOTIATION JOURNAL, 24(3), pp. 287-302 (2008) (“The first modern ombudsman’s office was established in Sweden in 1809. Its task was to protect the rights of citizens against the executive branch. ... For citizens ...[i]ndividual problems are often solved in a quick and flexible way. This is the individual role of ombudsmen. Based on their experience with citizens’ complaints, ombudsmen give recommendations that seek to alter laws, regulations, and/or organizational structures. This is the collective dimension of the ombudsman function. The ombudsman does not have the power to make binding decisions but does have the right to reveal problems within organizations and persuade those organizations to follow his or her recommendations.”) See e.g., California Department of Corrections and Rehabilitation, Office of the Ombudsman, <https://www.cdcr.ca.gov/ombuds/>.

<sup>111</sup> U.S. Food and Drug Administration, Office of the Ombudsman, <https://www.fda.gov/about-fda/office-chief-scientist/office-ombudsman>.

<sup>112</sup> U.S. Internal Revenue Service, Taxpayer Advocate Service, <https://www.irs.gov/taxpayer-advocate>.

<sup>113</sup> See National Registry of Exonerations, Conviction Integrity Units, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx>.

<sup>114</sup> See also California Rules of Professional Conduct, Rule 5-110 Special Responsibilities of a Prosecutor (discussion: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

<sup>115</sup> See California Courts Self-Help Center, <https://www.courts.ca.gov/selfhelp.htm>. See e.g., San Francisco Superior Court, Assisting Court Customers with Education and Self-help Services, <https://www.sfsuperiorcourt.org/self-help>. See generally, Self-Represented Litigation Network, <https://www.srln.org/>.

<sup>116</sup> Deno Himonas & Tyler Hubbard, *Democratizing the Rule of Law*, 16 STANFORD JOURNAL OF CIVIL RIGHTS & CIVIL LIBERTIES 47, 53 (2020).



Still, research on self-help suggests that it is not always effectual, especially where focused on “educating[individuals] about formal law, and second, by considering the task complete once the materials have been made available to self-represented individuals. In particular, modern self-help materials fail to address many psychological and cognitive barriers that prevent individuals from successfully deploying the substance of the materials.”<sup>117</sup> Some respondents may feel overwhelmed and suffer from anxiety, and some may be coping with denial, which threatens disbarment out of sheer inaction on a pending complaint.<sup>118</sup> These considerations suggest that psychology and social work will be as important as legal advocacy.

PR3.5 also suggests that the DEO could perform a casefile review, seeking to find instances where the discipline standards may be yielding unnecessarily harsh sanctions and where the adversarial process may be breaking down. As a matter of triage, the process would presumably focus on the cases where an attorney is unrepresented, but is facing disbarment.

Further study will be required to determine the optimal institutional structure for the DEO. It would presumably not be housed within OCTC itself, but may be part of the broader State Bar, perhaps related to the Lawyer Assistance Program, or in the State Bar Court, not unlike the self-help centers in California civil courts.<sup>119</sup>

Altogether, PR3.1 to PR3.4 are designed to try to increase the proportion of attorneys, especially Black attorneys, who get representation, which may then help them avoid disbarment. PR3.5 tries to narrow the performance gap, so that even attorneys who do not get representation may nonetheless have greater success in representing themselves.

## NEXT STEPS

I have suggested twelve potential reforms across three primary areas of inquiry – bank reportable actions, the use of prior closed complaints, and the representation of attorneys facing discipline. To the extent that State Bar leadership is persuaded that any of these deserve further study towards implementation, I would suggest that it appoint a State Bar staff member to “own” each initiative, with the support of consultants and volunteers as may be helpful.

To be sure, these insights do not exhaust the range of potential opportunities suggested by the Farkas report. I recommend further study of the other hotspots where the State Bar receives disparate numbers of complaints. Table 4 in the Farkas report shows that, in addition to Bank Reportable Actions, Black male attorneys are more likely to receive complaints about Performance, Duties to Client, and Funds.<sup>120</sup> Future work could explore each of those areas, both upstream trying to understand the underlying problems that give rise to complaints and downstream how those complaints are handled by the State Bar once received. My analysis of the bank reportable actions issue is an example of how that work may proceed.

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<sup>117</sup> See D. James Greiner, Dalie Jimenez, and Lois R. Lupica. *Self-help Reimagined*. 92 IND. LAW JOURNAL 92 (2016).

<sup>118</sup> Id., citing Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and the Importance of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 126–27 (Pascoe Pleasence, Alexy Buck & Nigel J. Balmer eds., 2007) (reviewing the reasons that many individuals do nothing in response to legal problems) and SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013).

<sup>119</sup> See Administrative Office of the Courts, Guidelines for the Operation of Self-Help Centers in California Trial Courts (2011), available at [https://www.courts.ca.gov/documents/self\\_help\\_center\\_guidelines.pdf](https://www.courts.ca.gov/documents/self_help_center_guidelines.pdf) (discussing need for independence).

<sup>120</sup> Farkas report *supra* note 1.

I would also recommend another round of quantitative analysis, building on and extending beyond the work done for the Farkas report. Statistical analysis of race is profoundly difficult.<sup>121</sup> Even prosaically, I will note that I have relied heavily on Farkas Table 4 to prioritize study of the types of allegations where the racial disparity is greatest, but that table only shows averages for attorneys with ten or more complaints, and it does not disaggregate particular complaint categories (e.g., particular types of Performance problems).

The Farkas report also does not explore the fact that Black Americans are disproportionately targeted for arrest and criminal prosecution.<sup>122</sup> This may be an additional source of the ultimate disparity in attorney disbarment, since felony convictions are a substantial cause of disbarment.<sup>123</sup>

Longitudinal analyses would be worthwhile as well, to see if the racial disparity is changing over time. The Farkas report had impressive statistical power, but only at the cost of merging recent and older data into a single pool.

Most fundamentally, I would note that Dr. Farkas's regressions focused on the licensed attorney as the unit of analysis, and examined variables associated with being put on probation or disbarred, across the attorney's career. Another approach would be to examine complaints (or cases) as the unit of analysis and explore the variables that are associated with each complaint being resolved with probation or disbarment.<sup>124</sup> The case-approach may yield new insights, e.g., showing which sorts of complaints create the greatest racial disparity in outcomes once filed, or show which sorts of complaints provide the greatest benefit of representation.<sup>125</sup>

In addition, I recommend ongoing study of several contextual factors, including the racial demographics of the Office of Chief Trial Counsel staff and the risk of complaints and discipline by attorneys in various practice areas, which may disproportionately involve attorneys of certain races. My understanding is that both of these sets of data are being collected and analyzed.

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<sup>121</sup> See sources cited *supra* note 4.

<sup>122</sup> See generally Alexander, *supra* note 7.

<sup>123</sup> See Annual Discipline Report, *supra* note 11 at SR-27 (showing 23-33 disbarments per year based on felony convictions). See also *id* at SR-16 (showing 31-59 cases per year filed in State Bar Court around filing of misdemeanor or felony charges, and 2-21 cases filed over criminal convictions).

<sup>124</sup> See *Starr* *supra* note 27 at 502 ("Usually, when we ask causal questions about racial discrimination, we are not asking about the lifelong effects of race, but rather about discrimination in a particular decision process (e.g., arrest). The counterfactual is how the decision-maker would have responded had she encountered a person of a different race whose relevant characteristics (as perceived by the officer) were otherwise similar.")

<sup>125</sup> For an example of some of the sophisticated empirical work around detecting and analyzing disparate treatment, see Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, AM. J. CRIM. L. 45, 95 (2018) (showing "how prosecutors' differential treatment of specific case characteristics based on the victim's race contributes to the overall racial disparity").



# The State Bar of California

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## ATTACHMENT B

### AGENDA ITEM

#### **SEPTEMBER 10 – Open Session Minutes Approval – July 16, 2020, Meeting**

Regular Meeting of the Board of Trustees

The State Bar of California  
Zoom

Thursday, July 16, 2020

9:30 a.m. –

**Time Meeting Called to Order:** 9:52 a.m. [Closed session commenced at 3:15 p.m. and concluded at 3:56 p.m. followed by adjournment of Meeting in Open Session.]

**Time Meeting Adjourned:** 3:59 p.m.

**Chair:** Alan Steinbrecher

**Secretary:** Sarah Cohen

**Members Present:** Mark Broughton, Hailyn Chen, José Cisneros, Sonia Delen, Ruben Duran, Chris Iglesias, Renée LaBran, Debbie Manning, Joshua Perttula, Sean SeLegue, Brandon Stallings

**Members Absent:** Juan De La Cruz

### **OPEN SESSION**

#### **Public Comment:**

**Ryan Harrison:** Ryan Harrison, Council on Access and Fairness (COAF) member, delivered remarks prepared by COAF Chair Hon. Brenda Harbin-Forte (ret.) regarding Agenda Item 701 on racial disparities in the discipline system. COAF urges the Board to implement all of the recommendations in the report. COAF believes, however, that the issues addressed in the report are just the tip of the iceberg and that the recommendations should be implemented without delay and further study. As an example of action that could be taken immediately, the presenter urged the Board to implement a rule raising the threshold amount for a trust account overdraft to \$500 before a bank is required to report the overdraft to the State Bar as a

potential ground for discipline. COAF would like the Board to take three actions: (1) appoint a task force to evaluate the entire discipline system and make recommendations for a new more democratic system, including consideration of whether the State Bar Court judges should be governed by an entity independent of the State Bar; (2) remove the State Bar Seal from the State Bar Court to eliminate the appearance that the prosecutor and the judge are playing for the same team; and (3) impose a moratorium on the filing of new disciplinary actions arising out of misdemeanor criminal convictions based on conduct occurring over four years ago that did not involve moral turpitude. Judge Harbin-Forte is aware of a licensee who was convicted of a DUI in 2009 and 2011, sought treatment and became clean and sober. The presenter stated that the old DUIs came to the State Bar's attention only recently due to the fingerprinting requirement and the licensee was asked to either agree to public discipline or face prosecution. According to the presenter, although the State Bar ultimately decided to drop the matter, these matters are embarrassing for licensees and should not be pursued in the first place.

**Aaron S:** Aaron S, who attended a California accredited law school, spoke about his brother being shot twice in the stomach, his father becoming a quadriplegic after being infected with the West Nile virus, and his own brain tumor diagnosis after graduating from law school and getting married. The presenter has taken the bar exam multiple times while dealing with these challenges and has not passed the exam, which has taken a toll on his family financially. The presenter urged the Board to adopt diploma privilege. The presenter has worked in law offices and would be happy to work under attorney supervision.

**Savannah Wadsworth:** Samantha Wadsworth, a bar exam applicant, spoke regarding Agenda Item 704. The presenter commented that even if diploma privilege were established, there is still a need to discuss the future of the bar exam. The presenter raised the issue of accommodations in a pandemic, commenting that applicants needing accommodations should not be singled out to take the exam in-person while other bar exam takers are allowed to take the exam online. Such an accommodation puts at risk the health of people with autoimmune diseases and other health issues. The presenter expressed concern about the artificial intelligence software picking up movements that single out people specifically because of their disabilities.

**Jake Pillard:** Jake Pillard, a recent graduate from University of the Pacific McGeorge School of Law, addressed two agenda items, the ExamSoft contract approval item, which the presenter believes is for the online bar exam, and the potential postponement of the September bar exam. The presenter stressed that exam takers do not enjoy the same testing environments; some have families with small children, some live near construction zones, some do not have a quiet room, and some have roommates. Regarding the potential postponement of the bar exam, the presenter stated that some have quit jobs to study for the bar exam and many are experiencing hardships. The presenter urged the Board to stop moving the goalpost.

**Maya Blasberg:** Maya Blasberg, a recent graduate, seeks clarity on when the bar exam is going to be given. The presenter commented that the State Bar's applicant portal shows that the exam date has been changed to October 5, but as of the day before, the exam was still scheduled for September. The presenter stated that applicants have been left in the dark and

are waiting for an official announcement regarding the postponement of the exam to October. The presenter echoed previous comments about the inequities of a bar exam, advocating for diploma privilege.

**Melinda Murray:** Melinda Murray, president of the California Association of Black Lawyers and deputy district attorney for the County of Los Angeles for over 30 years, addressed Agenda Item 701. The presenter stated that the association represents approximately 6,000 Black lawyers, judges, law professors, and law students and has affiliate chapters in San Diego, Inland Empire, Orange County, Los Angeles, Santa Clara, and the Bay Area. The presenter expressed support for two of the reform measures regarding disproportionate enforcement actions against African American male attorneys. The presenter stated that reform item 1.1 would greatly reduce reportable actions triggered by overdrawn trust accounts, noting that education about financial management is a more equitable solution. The presenter also supports reform item 3.1, noting that the lack of legal representation in the discipline system is a statistically significant predictor of attorney discipline. The presenter believes that the reform measures will promote diversity in the legal profession.

**Unidentified speaker:** The presenter commented on an agenda item regarding COAF's mission to advance the State Bar's diversity and inclusion goals. The presenter focused on a recorded meeting with bar applicants during which students of color and low income students asked for consideration of their hardships. The presenter believes that empathy and compassion were not shown in that students with disabilities requesting a fair and equitable playing field were cut off from speaking. The presenter believes that major access to justice issues are woven into the fabric of the legal profession, and that the Board's commitment to diversity and inclusion are empty promises.

**Pilar Escontrias:** Pilar Escontrias, part of a coalition advocating for diploma privilege, expressed disappointment at how the State Bar has handled the bar exam, and asked three questions: (1) why did the State Bar update its online portal to reflect an October bar exam when the chair had said that the Supreme Court will make the final decision; (2) why won't the Board identify how many individuals are present at the meeting; and (3) what did the Board think about the behavior of the Subcommittee on Examinations at a meeting the day before. The presenter stated that public comment was limited to 15 minutes at that meeting, but presenters were not given 15 minutes. The presenter asserted that careless words were used, and said it was egregious that the committee did not give proper consideration to applicants with disabilities who were present on the call.

**Tom Gordon:** Tom Gordon, Executive Director of Responsive Law, a national organization working to expand access for users of the legal system, expressed support for establishing the Closing the Justice Gap Working Group in Agenda Item 702. The presenter appreciates the diversity of experiences and backgrounds of the proposed members of the working group, but believes that the consumer presence should be expanded. The presenter expressed concern that there are five spots designated for lawyer group representatives and only one spot for consumer group representatives, adding that several of the other positions such as trial judge and legal ethics expert will also be filled by lawyers. The presenter believes that there should be

consumer representatives from different socioeconomic backgrounds, including representatives for seniors, tenants, small business owners, and medium-sized business owners—all of whom use or should be able to use the legal system regularly and whose perspectives would be extremely valuable.

**Banafsheh Akhlaghi:** Banafsheh Akhlaghi, Chair of the Legal Services Trust Fund Commission, spoke about the effort to have the policy side of the Office of Access & Inclusion inform the grant-making side and vice versa, and about how the diversity and inclusion work stewarded by COAF informs all of the work of the Office of Access and Inclusion. The presenter commented that legal services grants are awarded to organizations that employ Black lawyers and lawyers of color who serve people of color, noting that the justice gap study revealed the recruitment and retention challenges faced by these organizations. The presenter observed that the disproportionate number of Black lawyers being disciplined or potentially disbarred compounds the problem of the shrinking pool of legal aid lawyers. The presenter stated that retaining legal aid lawyers of color is important to the State Bar's work in expanding access to and inclusion in the legal system for California's most vulnerable populations.

**Allyssa Scheyer:** Allyssa Scheyer, part of the diploma privilege coalition, asked three questions: (1) how many people are on the call; (2) what is the Board's response to the meeting the day before regarding accommodations; and (3) why has the State Bar updated the online portal to reflect on October bar exam. The presenter also urged the Board to reconsider the contract with ExamSoft, a company that, according to the presenter, cannot deliver on what was promised. The presenter asserted that there are multiple states that will be using ExamSoft software on October 5–6, which will result in tens of thousands of students using the same limited software capacity at the same time. The presenter asserted that technical experts have testified that the exam will be a catastrophic failure. The presenter urged the Board to consider the company's lack of transparency on privacy issues and the discriminatory effect of facial recognition software.

**James Aguirre:** James Aguirre, a former member of the Board of Trustees, former member of the Committee of Bar Examiners, and a practicing lawyer for 40 years, believes that, given the complexities of the administration and grading of the bar exam, the only reasonable approach in the current climate is diploma privilege.

**Haley Cohen:** The presenter believes it unconscionable to limit public comments at yesterday's bar exam accommodations subcommittee meeting to one minute, and atrocious to limit the total public comment period to eight minutes. The presenter received testing accommodations requiring the test to be administered and proctored in-person, but has not received information regarding the specifics since May 4, when the only information communicated was that the exam would be postponed to September. The presenter spoke about financial hardships during the pandemic, forcing the presenter to move home to live with parents who are at high risk and work in high-risk medical fields. The presenter believes it horrifying to risk the presenter's own life and the lives of the presenter's parents and patients by requiring the presenter to sit for an accommodated in-person bar exam. The presenter believes the best case scenario is to take the experimental online paperless and AI proctored exam at home, but

based on rumors about what is flagged as cheating, the presenter believes that the presenter's test taking would be flagged. The presenter believes that administering the bar exam in the midst of an ongoing pandemic is grossly uncomfortable, inequitable and unduly burdensome, and urges that the Board adopt diploma privilege as the only solution.

**Nicole B:** The presenter, a law school graduate, spoke about using ExamSoft throughout law school and how it has failed for many people, and inquired how the company and the State Bar will ensure that the software works when thousands will be using it at the same time. The presenter requested that the Board consider the issues posed by an online exam, and reconsider the ExamSoft contract. The presenter supports diploma privilege.

**Julian Sarkar:** The presenter, an attorney licensed to practice in California and New York, commented on the proposed blue ribbon commission and its intention to create a definition of an entry level attorney, which the presenter claims shows that there is no justification for the bar exam. The presenter stated that the State Bar makes tens of millions of dollars on the bar exam without any factual support that it tests for minimum competence. The presenter, referencing the ExamSoft contract agenda item, requested that the Board disclose its relationships with all commercial business partners in conducting the California bar exam, claiming that in 2017 the Board misrepresented its relationship with Dr. Roger Bolus, the psychometrician. The presenter asserted that it was represented that Dr. Bolus has worked for the State Bar for four years, but the presenter claims it has been 38 years.

**Maryam Sonboli:** The presenter, a 2020 NYU law school graduate, urged the Board not to ratify the ExamSoft contract and to consider the inequities of an online bar exam, including the disparities in the availability of quiet space and the racial inequities posed by AI. The presenter stated that during a California fire season, online exam takers could experience power outages with no notice and that the proposed solution of a telephone hotline does not address the reality that phones will likely not be permitted in the exam room. The presenter supports diploma privilege as the only equitable solution.

**Jackie Nicole:** The presenter, while supporting diploma privilege, urges the Board to consider issues relating to security and scratch paper for a remote performance test. The presenter suggests an open note exam to level the playing field and eliminate security issues. The presenter noted that there was no opportunity to speak at yesterday's bar exam accommodations subcommittee meeting, and wanted to say that there is a wide range of medical issues that make people with disabilities more vulnerable to the complications of the novel corona virus. In remission from thyroid cancer, the presenter said that it would be difficult to sit for an in-person exam and that an in-person accommodated exam is discriminatory. The presenter stated that a remote exam should be made available for all test takers including those requiring accommodations for disabilities.

**Esfeh:** The presenter, who has asthma and lives with two toddlers and elderly grandparents, requested that accommodation options include a remote exam or, if in-person, a private room or something that reduces the risks.

**Britteny Leyva:** The presenter supports diploma privilege and commented on reports about the discriminatory nature of artificial intelligence. The presenter urged the Board to read the ACLU report and a study conducted by MIT related to the utilization of artificial intelligence. The presenter also commented on the contract, asking what will happen with the biometric information collected from test takers after the exam is administered.

**Jake O'Neal:** The presenter, commenting on the change in date for the bar exam and the proposed ratification of a three million dollar contract with ExamSoft, believes the Board has succeeded in forcing an online bar exam in October. The presenter asked whether the Board has plans for defending lawsuits the presenter believes the Board is likely to face, citing intentional and negligent infliction of emotional distress as bases.

**Octavia:** The presenter expressed discomfort and anxiety with the idea of AI technology being used during the exam, believing that a robot looking into apartments collecting and using data violates privacy rights. The presenter stated that this technology is discriminatory against, and presents complications for, Black applicants, and would like an explanation of what mitigation measures will be taken.

**Juan Manuel Suero:** The presenter, an attorney in practice for 27 years, raised the issue whether the bar exam determines the competence of lawyers and encouraged the Board to seek all options to protect the consumers.

**Hani Habbas:** The presenter commented on technical errors with an online exam, including the availability of a hotline but the restriction on having phones in the exam room. The presenter expressed concern that that hotline will be overloaded with thousands of calls at the same time. The presenter was not necessarily advocating for diploma privilege as the way to become licensed and expressed a willingness to go one way or the other, but after having put in more than 300 hours in bar exam study time, would like the opportunity to practice with the ExamSoft software before taking the exam.

**Bacilio Mendez II:** The presenter, whose post-bar employment offer was rescinded, has a partner who works as a nurse at St. Francis Hospital and, because of the partner's employment, can buy food, make rent, enjoy a stable internet connection, and afford a bar prep course. The presenter expressed concern about the next phase of reopening in San Francisco given that the infection numbers are not getting better and is worried about the exposure faced by the partner and the partner's colleagues daily. The presenter asked the Board to take the advice offered by the law school deans and consider diploma privilege, with guardrails if necessary, as the only humane option for applicants. The presenter said that many friends were not born in this country and are facing deportation, the timing of which is impacted by the delay in exam administration, receipt of exam results and ability to seek employment.

**Victor Lopez:** The presenter, a recent law school graduate who works from home and is a single father with full custody of two kids (one of whom homeschooled since March), stated that it is extremely hard to focus on studying. The presenter stated it took six years to graduate, knows



what hard work looks like, and is not one to shy away from it; the presenter wanted to share this story.

**Whitney Thompson:** The presenter supports diploma privilege, but in the event of a remote exam would like the Board to consider an open note or open book exam. The presenter stated that the practice of law is open book, and an open book exam will alleviate concerns about security, discrimination and being flagged by the AI software for cheating. As a student with testing accommodations, the presenter hopes not to put life at risk by having to take the test in person while everyone else is allowed to take the exam remotely, and urges the Board to consider everyone's health.

**Beth Patel:** The presenter urges the Board to advocate for diploma privilege. The presenter questions whether the bar exam is a measure of competence, believing that no competent attorney would ever rely on what they memorized for the bar exam in representing a client. The presenter stated that the bar exam has a disparate impact on people of color and especially Black applicants. The presenter believes that neither the Committee of Bar Examiners nor the California Supreme Court can ensure that the exam will be standard if taken at home.

**Matt Chipman:** The presenter noted that there were five people wishing to give public comment who have not been able to talk because they had internet connection issues or were unable to unmute. The presenter believes these are people who might fail the bar exam because of internet connection issues, and not because of what they know. The presenter urged the Board to not ratify the contract with ExamSoft and consider diploma privilege with guardrails and supervised practice.

**Betsy Crowder:** The presenter supports diploma privilege, but in the event of a bar exam believes that a remote exam is discriminatory. The presenter believes that taking a test without scratch paper is impossible, and that some applicants will have access to computers that work like tablets with the capacity to underline and highlight whereas other applicants will not, giving the former a big advantage.

#### **End of Public Comment**

#### **10 MINUTES**

#### **Open Session Minutes–May 14, 2020**

Adoption of Open Session Minutes – Moved by Manning, seconded by Cisneros.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue, Stallings

Noes – n/a

***Motion carries.***

### **30 CHAIR'S REPORT – *oral***

### **40 STAFF REPORTS**

#### **41 Executive Director**

##### **1. Report from Executive Director – *informational***

**50 CONSENT** – All items on the consent calendar except 50-2, 50-8, 54-111, and 54-117, were approved by unanimous consent. Agenda items 50-2, 50-8, 54-111, and 54-117 were pulled from the consent calendar.

#### **50-1 Approval of Specified Contracts Pursuant to Business and Professions Code Section 6008.6**

- 1. For Online Legal Research, with: Lexis Nexis**
- 2. For Interim Information Technology Director, with: Eduardo Frias**
- 3. For Program Management Consulting Services, with: Brian Richart**
- 4. For Legal Specialization Examination, with: Christopher Frick**
- 5. For Legal Specialization Examination, with: Dennis Peter Maio**
- 6. For Legal Specialization Examination, with: Laura Meyers**
- 7. For Legal Aid Community Facilitation & Coordination, with: Legal Aid Association of California**

**RESOLVED**, that the Board of Trustees approves execution of the contract listed herein.

#### **50-3 Approval of Revisions to Rules and Regulations Pertaining to the Employment of Executive Staff Employees and Rules and Regulations Pertaining to the Employment of Confidential Staff Employees**

**RESOLVED**, that the Board of Trustees adopt the amended Rules and Regulations Pertaining to the Employment of Executive Staff Employees and the amended Rules and Regulations Pertaining to the Employment of Confidential Staff Employees, as set forth above.

#### **50-4 Approval of Revisions to Rules and Regulations of the State Bar of California Pertaining to the Benefits, Terms, and Conditions Governing State Bar Court Judge Service**

**RESOLVED**, that the Board of Trustees adopt the amended Rules and Regulations of the State Bar of California Pertaining to the Benefits, Terms and Conditions Governing State Bar Court Judge Service, as set forth above and in Attachment A.

## **50-5 Receipt and Filing of 2016 Judicial Diversity Summit Report**

**Updated 2017-2022 Strategic Plan Rev. 3 : 4.o.**

**RESOLVED**, that the Board of Trustees receives and files the 2016 Judicial Diversity Summit Report; and it is

**FURTHER RESOLVED**, that the Board of Trustees refers the 2016 Judicial Diversity Summit Report to the Council on Access and Fairness for its review and recommendations, consistent with its charge and amended work plan.

## **50-6 Annual Recommendation to the Supreme Court of California for Suspension of Licensee Fees, Penalties, or Costs**

**RESOLVED**, that the Board of Trustees forward to the Supreme Court of California the names of those licensees to be suspended from the practice of law in California for failing to pay State Bar fees, penalties, or costs on or before September 30, 2020, and hereby:

(a) finds that State Bar staff performed the ministerial functions for determining that each person who is to be recommended to the Supreme Court of California for suspension due to nonpayment of fees is licensed by the State Bar of California;

(b) concludes that State Bar staff determined that each such person failed to fully pay fees, penalties, or costs as established pursuant to the provision of sections 6086.10, 6140, 6140.5(c), 6140.55, 6140.6, 6140.7, 6140.9 and 6141 of the Business and Professions Code;

(c) ascertains that State Bar staff have sent to each such person, at their address of record with the State Bar of California, two months' written notice of their delinquency which included notice of section 6143 of the Business and Professions Code;

(d) and recommends to the Supreme Court of California that each such person's State Bar license be suspended, which would suspend them from the practice of law in the State of California, effective October 1, 2020, until such time as they may be reinstated, upon the payment of the delinquent fees, penalties, or costs and of such additional fees, penalties, or costs as may have accrued at the time of such payment; and it is

**FURTHER RESOLVED**, that for the purpose of withdrawing the foregoing recommendation for suspension in particular cases, State Bar staff is authorized and directed to notify the Clerk of the Supreme Court of California of the name of any licensee of the State Bar who by proper remittance and prior to the effective date of the Supreme Court of California order of suspension based hereon, pays to the State Bar fees, penalties, or costs in the amount in which they are delinquent; and to notify the Clerk of the Supreme Court of California of the consequent withdrawal of the Board of Trustees' recommendation for suspension; and it is

**FURTHER RESOLVED**, that for the purpose of modifying the recommendation to the Supreme Court of California for suspension for nonpayment of fees, penalties, or costs, State Bar staff is authorized and directed to change the data as to status or the amounts of delinquency of any licensee and to notify the Clerk of the Supreme Court of California accordingly of the consequent modification of the Board of Trustees' recommendation for suspension.

**50-7 Annual Recommendation Regarding Licensees not in Compliance with Minimum Continuing Legal Education (MCLE) Requirement**

**RESOLVED**, pursuant to California Rule of Court 9.31 and the Rules of the State Bar, that the Board of Trustees hereby authorizes that those attorneys in MCLE Compliance Groups 1, 2 and 3 who do not bring themselves into compliance with their MCLE requirements by September 30, 2020, be enrolled as inactive and placed on "Not Eligible to Practice" status, effective October 1, 2020; and it is

**FURTHER RESOLVED**, that the Board of Trustees hereby authorizes staff to remove individual attorneys from inactive status once they have provided proof of compliance and paid all noncompliance fees.

**54-111 Commission on Judicial Nominees Evaluation - Annual Appointment of Officers, Members and Alternates**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, appoints Stella Ngai to serve as the Chair of the 2021 Commission on Judicial Nominees Evaluation (JNE) and Alana D. Arcurio to serve as the Vice-Chair of the 2021 JNE Commission, each for a one-year term commencing at the close of the last business meeting of the 2020 JNE Commission on April 24, 2021, and expiring at the close of the last business meeting of the 2021 JNE Commission on April 23, 2022, or until further order of the Board of Trustees, whichever occurs earlier; and it is

**FURTHER RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, reappoints the current members of the Commission on Judicial Nominees Evaluation (JNE) to the 2021 JNE Commission per Attachment C; each for a one-year term commencing at the close of the last business meeting of the 2020 JNE Commission on April 24, 2021, and expiring at the close of the last business meeting of the 2021 JNE Commission on April 23, 2022, or until further order of the Board of Trustees, whichever occurs earlier; and it is

**FURTHER RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, appoints new members and alternates to the 2021 Commission on Judicial Nominees Evaluation (JNE) per Attachment C; each for a one-year term commencing upon administration of the oath of office at the January 15<sup>th</sup> 2021, orientation meeting, and

expiring at the close of the last business meeting of the 2021 JNE Commission on April 23, 2022, or until further order of the Board of Trustees, whichever occurs earlier.

**54-112 Review Committee of the Commission on Judicial Nominees Evaluation - Annual Appointment of Officer and Extension of Terms of Members**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee appoints Angelique Bonanno as Chair of the Review Committee of the Commission on Judicial Nominees Evaluation, for a one-year term, commencing at the close of the September 2020 meeting of the Board of Trustees, and expiring at the close of the September 2021 meeting of the Board of Trustees, or until further order of the Board of Trustees, whichever occurs earlier; and it is

**FURTHER RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, extends the three-year terms of David George, Angelique Bonanno and Jody Nuñez to four years, with the terms of David George and Angelique Bonanno expiring at the close of the September 2022 meeting of the Board of Trustees, and the term of Jody Nuñez expiring at the close of the September 2023 meeting of the Board of Trustees, or until further order of the Board of Trustees, whichever occurs earlier.

**54-113 Judicial Council of California - Withdrawal of Appointment and Appointment of Member**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, withdraw the appointment of David Fu and reappoint Gretchen Nelson to the Judicial Council for a three-year term to commence on September 15, 2020, and to expire on September 14, 2023, or until further order of the Board, whichever occurs earlier.

**54-114 Legal Services Trust Fund Commission - Annual Appointment of Officers and Members**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, approves the reappointment of Amin Al-Sarraf and Eric Isken, each as an attorney member, for one four-year term, and the appointment of Catherine Blakemore as an attorney member filling a vacancy due to resignation to serve out the remainder of the existing term (through September 2022); and it is

**FURTHER RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, approves the reappointments of Banafsheh Akhlaghi as Chair and Eric Isken as Vice-Chair of the Legal Services Trust Fund Commission for one-year terms commencing at the close of the September 2020 meeting of the Board of Trustees and expiring at the close of September 2021 meeting of the Board of Trustees.

#### **54-115 Council on Access and Fairness - Annual Appointment of Officers and Members**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, approves the appointment of Novella Coleman, Sarah Good, Michael Rhoads, Chalak Richards, and Stephanie Santoro as COAF members for one, four-year term to commence at the close of the September 2020 meeting of the Board of Trustees, and expiring at the close of the September 2024 meeting of the Board of Trustees; and it is

**FURTHER RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, extends the term of Judge Esther P. Kim for one year, and approves the appointment of Judge Esther P. Kim as the Chair and Ryan Harrison as the Vice-Chair of COAF for the 2020-2021 term, commencing at the close of the September 2020 meeting of the Board of Trustees, and expiring at the close of the September 2021 meeting of the Board of Trustees.

#### **54-116 California Rural Legal Assistance - Appointment to Serve on Board of Directors**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, appoints the following representatives to the Board of Directors of California Rural Legal Assistance for a three-year term effective at the close of the July 2020 Board meeting through July 2023: Michael Bracamontes, Peter Carson, and Nicole Philips; and it is

**FURTHER RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, reappoints the following representatives to the Board of Directors of California Rural Legal Assistance for a three-year term, effective at the close of the July 2020 Board meeting through July 2023: Alejandro Delgado, Anthony LoPresti, David Martinez, Camille Pannu, and Jacq Wilson.

#### **54-118 Client Security Fund Commission - Annual Appointment of Officers and Members**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, approves the recommended appointments for members and officers of the Client Security Fund Commission.

#### **54-119 California Board of Legal Specialization - Annual Appointment of Officers and Members**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, appoint Robert Hershenson and reappoint Mark A. Lester as Chair and Vice-Chair, respectively, to the California Board of Legal Specialization, each for a one-year term effective at the start of the 2020–2021 State Bar year; and it is

**FURTHER RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, appoint Jake Yoon to the California Board of Legal Specialization as member for a four-year term effective at the start of the 2020–2021 State Bar year.

**54-121 Amendments to Rules 3.513(F) and 3.550(E)(2) of the Rules of the State Bar of California (Electronic Service of Process and Videoconference Appearances in Fee Arbitration Proceedings) - Return from Public Comment and Request for Approval**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee, approves the proposed amendments to Rules 3.513 and 3.540 of the Rules of the State Bar of California and Rules 27.3-27.4 of the State Bar of California Model Rules of Procedure for Fee Arbitrations as set forth in Attachments A, B, and C respectively.

**54-122 Amended Interim Rule of Procedure 5.26.1 (Electronic Service of Process in State Bar Court Proceedings) - Request for Approval**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee, having determined pursuant to Rule 1.10(C) of the Rules of the State Bar of California that an emergency justifies immediate enactment of this interim measure without public comment, hereby enacts amended interim Rule 5.26.1 of the Rules of Procedure as set forth in Attachment A.

**54-123 Proposed Amended Rules of Professional Conduct 1.1 and 5.4 - Return from Public Comment and Request for Adoption of Rule 1.1 and Additional Public Comment for Rule 5.4**

**Updated 2017-2022 Strategic Plan Rev. 3 : 4.d.**

**RESOLVED**, that upon recommendation of the Regulation and Discipline Committee, the Board of Trustees adopts amendments to Rule of Professional Conduct 1.1 as set forth in Attachment A; and it is

**FURTHER RESOLVED**, that staff is directed to submit the amended rules to the Supreme Court of California with a request that the rules be approved.

**54-141 Licensee Requests for Adjustment of Fees, Penalties and Charges**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Finance Committee approves the fee adjustments for the State Bar licensees as presented this day, and on file in the San Francisco office of the State Bar.

## **CONSENT CALENDAR APPROVAL**

Moved by Stallings, seconded by Cisneros.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue, Stallings

Noes – n/a

***Motion carries.***

## **PULLED FROM CONSENT**

### **50-2 Report of Action Taken by Executive Director Approving Specified Contracts Pursuant to Business and Professions Code Section 6008.6**

- 1. For Examination Laptop Licenses, with: ExamSoft Worldwide, Inc.**
- 2. For Enhancements to the Odyssey Case Management System, with: Polyrific, LLC**
- 3. For Desktop / Laptop Refresh Project, with: Insight Public Sector**

**WHEREAS**, the contracts listed herein required execution before the next regularly scheduled meeting of the Board of Trustees; and

**WHEREAS**, on June 24, 2020, the executive director, after consultation with and approval by the designated committee for advising the executive director on such matters, approved said contracts; it is hereby

**RESOLVED**, that the Board of Trustees affirms the action taken by the executive director on behalf of the Board.

Moved by Duran, seconded by Delen.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue

Noes – n/a

Recused – Stallings

***Motion carries.***



## **50-8 California Paraprofessional Program Working Group - Appointment of Members**

**Updated 2017-2022 Strategic Plan Rev. 3 : 4.f.**

**RESOLVED**, that the Board of Trustees authorize the Chair of the California Paraprofessional Program Working Group to appoint members to fill the remaining two vacancies on the CPPWG.

Moved by Stallings, seconded by Duran.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, Manning, Perttula, SeLegue, Stallings

Noes – n/a

Recused – LaBran

***Motion carries.***

## **54-111 Commission on Judicial Nominees Evaluation - Annual Appointment of Officers, Members and Alternates**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, appoints Stella Ngai to serve as the Chair of the 2021 Commission on Judicial Nominees Evaluation (JNE) and Alana D. Arcurio to serve as the Vice-Chair of the 2021 JNE Commission, each for a one-year term commencing at the close of the last business meeting of the 2020 JNE Commission on April 24, 2021, and expiring at the close of the last business meeting of the 2021 JNE Commission on April 23, 2022, or until further order of the Board of Trustees, whichever occurs earlier; and it is

**FURTHER RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, reappoints the current members of the Commission on Judicial Nominees Evaluation (JNE) to the 2021 JNE Commission per Attachment C; each for a one-year term commencing at the close of the last business meeting of the 2020 JNE Commission on April 24, 2021, and expiring at the close of the last business meeting of the 2021 JNE Commission on April 23, 2022, or until further order of the Board of Trustees, whichever occurs earlier; and it is

**FURTHER RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee, appoints new members and alternates to the 2021 Commission on Judicial Nominees Evaluation (JNE) per Attachment C; each for a one-year term commencing upon administration of the oath of office at the January 15<sup>th</sup> 2021, orientation meeting, and expiring at the close of the last business meeting of the 2021 JNE Commission on April 23, 2022, or until further order of the Board of Trustees, whichever occurs earlier.

Moved by Manning, seconded by Broughton.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue

Noes – n/a

Recused – Stallings

***Motion carries.***

**54-117 Committee on Professional Responsibility and Conduct - Annual Appointment of Officers and Members**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee approve the appointment of the following new members, officers, and special advisor to serve on the Committee of Professional Responsibility and Conduct beginning in the 2020–2021 committee year:

**Officers**

Dena Roche, Chair

Justin Fields, Vice-Chair

**Member Appointments**

Seth Flagsberg

Kyla Rowe

Hunter Starr

**Special Advisor**

Stephen Bundy

**Alternate Member Appointments**

Joel Mark

Jeffrey Aaron

Michael Yraceburn

Moved by Manning, seconded by Broughton.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue

Noes – n/a

Recused – Stallings

***Motion carries.***

## 100 REPORTS OF BOARD COMMITTEES

**The committee member presenter is presumed to be the “mover” of the recommended action; no second is required because the motion is being brought by the committee.**

### 110 Board Executive Committee

#### 119.1 Approval of Addition to Legislative Priorities

**Presenter/Mover:** Alan Steinbrecher, Board Executive Committee, Chair

**RESOLVED**, that the Board of Trustees, upon recommendation of the Board Executive Committee approve the addition to the State Bar’s 2020 legislative priorities included in this item.

Ayes – Broughton, Cisneros, Delen, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue

Noes – n/a

Absent for vote – Chen

***Motion carries.***

### 120 Regulation and Discipline Committee

#### 124 Consideration of Attorney Self-Assessment Models

**Presenter/Mover:** Brandon Stallings, Regulation & Attorney Discipline Committee, Chair

**Updated 2017-2022 Strategic Plan Rev. 3 : 2.e.**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee, approves the staff-recommended model of a self-assessment program and authorizes development of an implementation plan for that model with client trust accounting as the first topic; and it is

**FURTHER RESOLVED**, that a staff working group led by representatives of the Office of the Chief Trial Counsel and the Office of Professional Competence should be convened as needed to develop the subject matter for future topics to be included in the self-assessment program, in consultation with the leadership of the Regulation and Discipline Committee.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue

Noes – n/a

***Motion carries.***

## 700 MISCELLANEOUS

### 701 Consideration of Recommendations to Implement Changes to Address Key Findings of the Disparities in the Discipline System Study

**Presenters:** Chris Robertson, James E. Rogers College of Law, Professor  
Dag MacLeod, Mission Advancement & Accountability Division, Chief

**RESOLVED**, that the Board of Trustees directs staff to develop plans to implement reforms 3.1, 3.2, and 3.3, specifically to:

1. Develop a metric and begin regular reporting of data on representation by respondent attorneys;
2. Pilot test different messages to respondent attorneys regarding the value of representation by counsel in attorney disciplinary proceedings and evaluate the most effective method of encouraging representation; and
3. Begin discussions with Attorney Discipline Defense Counsel representatives to develop and distribute a roster of attorneys who could provide low-cost and pro bono case evaluations to respondent attorneys.

First Resolution moved by Stallings, seconded by Duran.

Ayes – Broughton, Cisneros, Delen, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue, Stallings

Noes – n/a

Absent for Vote – Chen

***Motion carries.***

**FURTHER RESOLVED**, that the Board of Trustees directs State Bar staff to evaluate reforms [and work with the leadership of the Regulation & Discipline Committee \(RAD\) and the Board of Trustees on the implementation of recommendations](#) 1.1 and 2.3, specifically:

1. Evaluate RA-Bank matters to understand the impact on public protection of modifying the *de minimus* threshold for closing RA-Bank matters. Specifically, staff should evaluate:
  - a. The volume of RA-Bank matters organized by the amount of the over-draft.
  - b. Whether low-level RA-Bank matters are useful as predictors of subsequent malfeasance related to client trust accounts or other misconduct.

- c. Whether modifications of State Bar rules to allow for attorneys to place a specified amount of money in a trust account would have any impact on the incidence of over-drafts from client trust accounts.

2. The Office of Chief Trial Counsel should evaluate the results found in Item one as soon as possible, adopt an interim reform as the results might support and bring the results of the investigation and interim reform to the Board for further consideration at its next meeting.

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

~~2.4.~~ The Office of Chief Trial Counsel should implement an interim reform that prior, closed complaints more than five-years old should not ordinarily be considered in evaluating and investigating a new complaint, with exceptions permitted based on a written showing to an attorney at the level of Assistant Chief Trial Counsel or higher within the Office of Chief Trial Counsel. Prior closed complaints for purposes of this resolution do not include those resolved with a warning letter, directional letter, resource letter or agreement in lieu of discipline.

Second Resolution, with Member SeLeague's two friendly amendments (sections 2 and 4) and Member Duran's one friendly amendment (introductory language) to the staff resolution, moved by Delen, seconded by Stallings.

Ayes – Broughton, Cisneros, Delen, Duran, Iglesias, LaBran, Manning, Perttula, SeLeague, Stallings

Noes – n/a

Absent for Vote – Chen

***Motion carries.***

## **702 Closing the Justice Gap Working Group - Approval of Proposed Charter and Composition**

**Updated 2017-2022 Strategic Plan Rev. 3 : 4.d.**

**Presenter:** Randy Difuntorum, Office of Professional Competence, Program Director

**RESOLVED**, that the Board of Trustees adopts the charter for the Working Group on Closing the Justice Gap in the form attached to these minutes; and it is

**FURTHER RESOLVED**, that the Board of Trustees directs staff to carry out appointment outreach and an application process to be completed in time for the appointment of the working group at the Board's September 24–25, 2020 meeting.

Moved by Cisneros, seconded by Manning.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, Manning, Perttula, SeLegue, Stallings

Noes – n/a

Recused – LaBran

***Motion carries.***

**703 Approval of Proposed Interest on Lawyers Trust Account (IOLTA) Grant Distribution for 2021 and Review of Planned Distribution for 2020**

**Updated 2017-2022 Strategic Plan Rev. 3 : 4.a.**

**Presenter:** Banafsheh Akhlaghi, Legal Services Trust Fund Commission, Chair  
Doan Nguyen, Office of Access & Inclusion, Program Supervisor

**RESOLVED**, that the Board of Trustees maintains the 2020 IOLTA distribution at \$55,294,144,<sup>1</sup> leaving net assets in the amount of \$19,684,821 (projected); and it is

**FURTHER RESOLVED**, that the Board of Trustees approves the 2021 IOLTA distribution in the amount of \$23,546,275, with a projected reserve of \$8,170,928 at the end of 2021; and it is

**FURTHER RESOLVED**, if changes to the Equal Access Fund or other funding sources occur, impacting IOLTA-funded grantees, the Board of Trustees will delegate authority to the Legal Services Trust Fund Commission to determine whether increases or decreases to the 2020 and/or 2021 IOLTA distributions are appropriate.

Moved by Manning, seconded by Iglesias.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, Manning, Perttula, SeLegue, Stallings

Noes – n/a

Recused – LaBran

***Motion carries.***

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<sup>1</sup> The amount the Board of Trustees initially approved for distribution in 2020 was \$55.5 million. However, due to changes in eligibility for some organizations in the ensuing months, the commission made adjustments to the distribution, leading to \$55.3 million.

**704 Supreme Court / State Bar Blue Ribbon Commission on the Future of the Bar Examination - Approval of Proposed Charter and Composition (Lisa Chavez)**

**Updated 2017-2022 Strategic Plan Rev. 3 : 2.n.**

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

**RESOLVED**, that the Board of Trustees adopts the charter for the new Blue Ribbon Commission on the Future of the Bar Exam, as set forth in Attachment A, [as amended](#), and directs staff to finalize the Charter in consultation with the Supreme Court; and it is

**FURTHER RESOLVED**, that upon finalization of the Charter, the Board of Trustees directs State Bar staff to solicit nominations for the Blue Ribbon Commission to be appointed by the Supreme Court from the categories of stakeholders listed in Attachment A; and it is

**FURTHER RESOLVED**, that the Commission will begin its work in the fall of 2020 and present a final report on its findings and recommendations no later than June 30, 2022, with periodic status updates to be provided to the State Bar Board of Trustees.

Moved, as amended, by Cisneros, seconded by Stallings.

Ayes – Broughton, Chen, Cisneros, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue, Stallings

Noes – n/a

Recused - Delen

***Motion carries.***

**705 Consideration of Issues Related to the Postponement of the July 2020 Bar Examination**

**Presenter:** Donna Hershkowitz, Interim Executive Director

**RESOLVED**, that, in anticipation that the Supreme Court will imminently issue its direction to the State Bar regarding plans for licensure for attorneys in the fall of 2020, and that quick and decisive action will need to be taken to implement that direction, the Board of Trustees appoints Josh Perttula to work with staff on efforts related to an online bar exam, if any, and Hailyn Chen to lead implementation efforts related to any other direction the Supreme Court may provide; and it is

**FURTHER RESOLVED**, that the Board of Trustees delegates to Hailyn Chen the authority to appoint a working group or take other steps necessary to implement the direction of the Supreme Court.

Moved by Perttula, seconded by Cisneros.

Ayes – Broughton, Chen, Cisneros, Duran, Iglesias, LaBran, Manning, Perttula, SeLegue

Noes – n/a

Recused – Delen, Stallings

***Motion carries.***





**OPEN SESSION  
AGENDA ITEM  
704 SEPTEMBER 2020**

**DATE:** September 24, 2020

**TO:** Members, Board of Trustees

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

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

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**EXECUTIVE SUMMARY**

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

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**BACKGROUND**

**Public Protection and Disparate Discipline**

The mission of the State Bar "is to protect the public and includes the primary functions of licensing, regulation, and discipline of attorneys; the advancement of the ethical and competent practice of law; and support of efforts for greater access to, and inclusion in, the legal system." In 2018, the State Legislature adopted language from the State Bar's mission statement and added it to the Business & Professions Code, thereby directly linking access and inclusion to the State Bar's public protection mission. Effective January 1, 2019, Business and

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

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

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

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

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

### **Organizational Change in OCTC**

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

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

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

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

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

## **DISCUSSION**

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

### **IMPLEMENTATION OF CHANGES TO ADDRESS DISPARITIES**

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

#### **Archive Five Years of Closed Complaints**

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

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

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<sup>3</sup> See California State Auditor Report, 2015-030, "State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability," <https://www.bsa.ca.gov/pdfs/reports/2015-030.pdf>; also see "State Bar of California Workforce Planning: Report to the Office of the Executive Director," May 10, 2016, [http://www.calbar.ca.gov/Portals/0/documents/reports/2016\\_Workforce\\_Planning\\_Report\\_May\\_15.pdf](http://www.calbar.ca.gov/Portals/0/documents/reports/2016_Workforce_Planning_Report_May_15.pdf)

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

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

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

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

### **Research on Complaints Not Leading to Discipline**

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

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

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

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

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

### **Reportable Action Bank Matters**

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

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

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

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

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

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

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

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

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

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

*Respondents (N = 22,568)\**

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

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

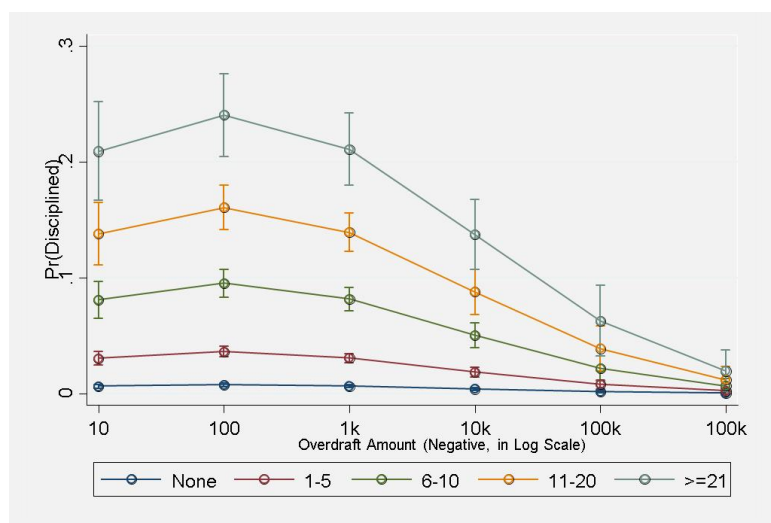
<sup>4</sup> Overdraft here is defined as the difference between the available balance in a client trust account and the amount of the check presented against that account.

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

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

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

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



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

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

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

### **Respondent Representation by Counsel**

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

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

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

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

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

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



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

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

### **CHANGES IN OCTC THAT IMPROVE EFFICIENCY, PROCESS, AND EXPERIENCE**

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

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

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

### **ONGOING AND PLANNED RESEARCH ON EFFICIENCY, PROCESS, AND EXPERIENCE**

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

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

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

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

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

### **Pilot Testing of Alternatives to Warning and Resource Letters**

The State Bar issues over 800 resource and warning letters annually when complaints allege low level or aberrational violations unlikely to result in discipline. The Governance in the Public Interest Task Force report of 2020 recommended evaluating warning letters to determine the most effective way to “nudge” attorneys toward improvements in their practice, including encouraging them to recognize and address the relationship between personal problems and professional misconduct. This project will involve a comprehensive empirical assessment of these letters including evaluating which letter is more effective at reducing the number of future complaints and/or the severity of complaints resulting in discipline and how this relates to respondent demographic background and practice characteristics.

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

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

### **Research on the Predictors of Complaint Risk**

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

### **2020 Workload Study**

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

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

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

## **AD HOC COMMITTEE**

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

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

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

## **FISCAL/PERSONNEL IMPACT**

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

## **AMENDMENTS TO RULES OF THE STATE BAR**

None

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

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

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

## **RECOMMENDATIONS**

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

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

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

and it is

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

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

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

and it is

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

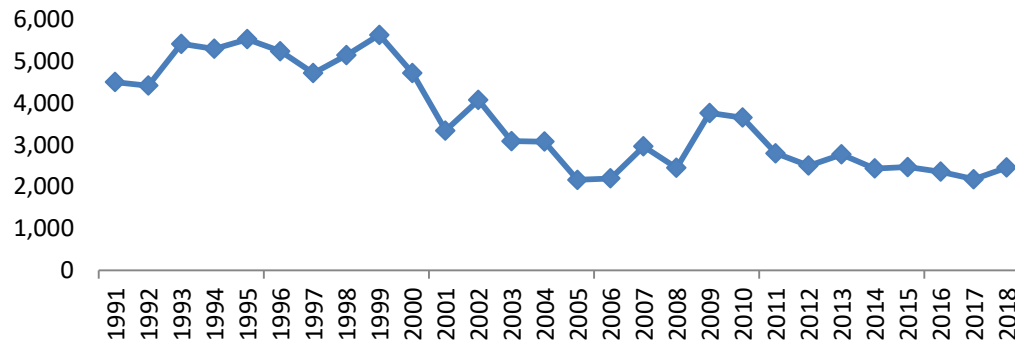
## **ATTACHMENT(S) LIST**

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

## Analysis of Reportable Action Bank Matters

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

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



### Case Characteristics in Check Amount and Account Balance

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

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

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

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

### Cases, Respondents, and Disposition Outcomes

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

**Table 2. Prior History in RA-Bank Cases**

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

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

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

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

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

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

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

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

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

### **Balance Amount and Other Factors on Disposition Outcome**

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

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

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



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

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

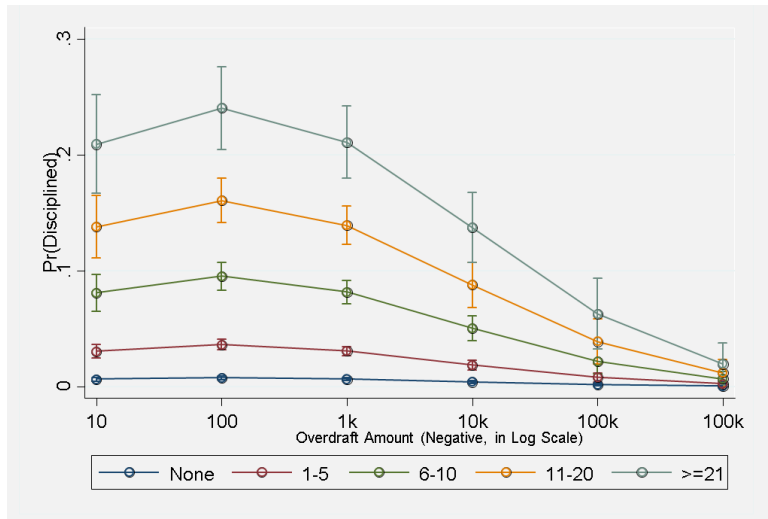


Figure 2 summarizes the relationship among three variables estimated from the multivariate models: probability of a case being disciplined (on vertical axis); NSF overdraft amount (in log scale, on horizontal axis); and prior RA-Bank history, grouped into five categories and each displayed in its curvilinear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

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

### **Online Complaint Portal**

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

### **Targeted Services and Outreach to Vulnerable Populations**

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

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

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

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

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

### **Changes in OCTC Supervisors, Teams, and Administrative Functions**

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

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

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

### **Implementation of New Case Management System**

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

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

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

### **Case Prioritization System Facilitates Focus on Addressing Highest Priority**

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

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

#### **Investigation Stage**

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

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

### **Pre-Filing & Post-filing Stages**

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



# The State Bar of California

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## ATTACHMENT D

### AGENDA ITEM

#### **JANUARY 10 – Open Session Minutes Approval – September 24, 2020, Meeting**

Regular Meeting of the Board of Trustees  
(Final Meeting of the 2019-2020 Board)

The State Bar of California  
Zoom

Thursday, September 24, 2020  
10:30 a.m. –

**Time Meeting Called to Order:** 10:38 a.m. [Closed session commenced at 3:25 p.m. and concluded at 4:36 p.m. followed by adjournment of Meeting in Open Session.]

**Time Meeting Adjourned:** 4:41 p.m.

**Chair:** Alan Steinbrecher

**Secretary:** Sarah Cohen

**Members Present:** Mark Broughton, Hailyn Chen, José Cisneros, Juan De La Cruz, Sonia Delen, Ruben Duran, Chris Iglesias, Renée LaBran, Joshua Perttula, Sean SeLegue, Brandon Stallings

**Members Joined in Progress:** Arnold Sowell, Jr.

**Members Absent:** N/A

### **OPEN SESSION**

#### **Public Comment:**

**Jason Solomon:** Jason Solomon, Executive Director of the Stanford Center on the Legal Profession, credited State Bar staff for assembling a sandbox working group proposed slate that combines expertise and stakeholder representation. The presenter, however, expressed concern about the lack of consumer representatives. As explained, in a legal services market, there are sellers and buyers, and consumers and providers; for anti-trust purposes, per Federal Trade Commission (FTC) guidance, there cannot be a majority active market participants, defined as those licensed by the State Bar or those who are sellers of legal services. According

to the presenter, between 11 and 13 of the 17 people on the slate are active market participants; although some people listed on Attachment B are identified as “non-attorneys,” they are sellers of legal services. The presenter urged the Board to appoint more consumers.

**Art Lachman:** Art Lachman, a practitioner in Seattle, Co-Chair of the Association of Professional Responsibility Lawyers (APRL) Future of Lawyering Committee, and participant in reform efforts around the country, addressed the Board in a personal capacity. The presenter expressed concern that lawyers are driving the conversation around regulatory reform. The presenter stated that there can be no meaningful discussion about how legal services should be regulated without giving consumers a substantial voice and without examining the risks and benefits of any proposal through the prism of their interests. The presenter stated that there is often a disconnect between what clients are protected from in the regulatory regime and what consumers actually think they need protection from; and that it may be better to offer solutions involving transparency and consent rather than strict prohibitions or to, in some cases, eliminate the prohibitions altogether. The presenter urged that additional consumer members be placed on the working group.

**Tom Gordon:** Tom Gordon, Executive Director of Consumers for A Responsive Legal System, a national organization working to expand access and affordability in the legal system, echoed the comments of the previous two presenters, particularly the note about the overwhelming majority of potential nominees to the committee being lawyers, i.e., market participants. The presenter observed that there is a super majority of lawyers on the slate, which provides red meat for antitrust enforcement efforts by the Federal Trade Commission (FTC) or others, particularly given that there are spots reserved not just for lawyers generally but for particular market segments of legal service providers, e.g., the California Lawyers Association, a consumer attorney representative, a California defense counsel, a California legal services lawyer, a national legal services lawyer. The presenter noted that a consumer attorney representative is not representative of consumers; they are representative of consumer attorneys. At the July 2020 Board meeting, the presenter recommended that the Board add six actual consumer members to the panel to offset the spots held by representatives of the legal profession, and at this meeting, the presenter renewed the request, asking the Board to appoint individual consumers from a range of socioeconomic backgrounds - a small family business owner, a medium business owner, etc. If the trustees are unable to find individual consumers for these spots, the presenter urged the Board to fill the spots with non-lawyer representatives of these constituencies rather than with lawyers who may happen to represent these people as clients; that would give voice to consumers rather than to lawyers who provide services to consumers. According to the presenter, adding six consumers would turn an 11-6 lawyer majority to a 12-11 non-lawyer majority.

**Kyle Jackson:** Kyle Jackson, a licensee, is seeking a refund of State Bar fees. The presenter stated that he could not get a job as a lawyer for many years, so seized the opportunity during the coronavirus pandemic to open an online law practice dedicated to helping people apply for pandemic unemployment assistance. The presenter explained that in order to open the practice, substantial fees had to be paid to the State Bar to become current (in good standing). The presenter planned to recoup the money through the online practice, but things did not



work out as hoped. With the presenter's fee waiver request before the Board (Agenda Item #54-141), the presenter wanted the Board to know that young lawyers are struggling to get jobs as lawyers, which makes it difficult to pay fees.

**Claire Solot:** Claire Solot, Provisional Licensure Working Group attendee, expressed concern about the lack of representation from the legal aid community on that group and on other State Bar committees. Running a legal services funder network of 70 Bay Area affiliated organizations, the presenter has yet to be engaged in a public-private partnership with the State Bar. The presenter urged the Board to reach out to organizations in the philanthropic sector that support legal services providers.

**Azita Rahim:** Azita Rahim, an examinee who has met the 1390 cut score, requested that retroactivity be applied to that new cut score. The presenter also requested that requirements different than those applicable to 2020 graduates be applied under the provisional licensure program to those who have already met the new cut score because competence has already been demonstrated. For example, the presenter believes that for those examinees who have already met the 1390 cut score, the bar exam requirement should be waived.

**Gabriel Huelna:** Gabriel Huelna, a February 2020 examinee who met the 1390 cut score, echoed the comments of the previous presenter in expressing support for retroactivity and, in the alternative, provisional licensure. Commenting on the extreme economic despair in California and the added difficulty presented by an online exam for those with vision conditions and other disabilities, the presenter stated that granting the presenters' requests would eliminate suffering for thousands.

**Malissa:** Malissa, echoing the comments of the previous two presenters, requested that the provisional licensure program be expanded to individuals who previously met the 1390 cut score and include an exam waiver upon completion of a reasonable set of requirements. According to the presenter, this diverse applicant group already demonstrated competency required to practice in California; best interests are served by allowing these qualified applicants to practice and help communities as quickly as possible; and granting the presenters' requests would demonstrate the State Bar's commitment to diversifying the profession and breaking down historic barriers.

**Edie Sussman:** Edie Sussman, a 40-year public interest attorney in Sonoma County, echoed the comments of the previous presenters, in supporting cut score retroactivity, bar exam waiver, and different rules. The presenter, however, wanted to focus the Board's attention on the fact that communities already struggling with homelessness and medical care and mental health issues are now hurting from the wildfires and the pandemic, and need these competent young people to step in and help. The presenter is aware of at least examinees who have met the 1390 cut score and are waiting to do the pro-bono, legal aid, and community service work, which is so desperately needed in these communities.

**Sanaz Nikbakhsh:** Sanaz Nikbakhsh, one of the 397 February 2020 bar examinees who met the 1390 cut score, urged the Board to consider retroactive admission for this group. Turning to the

online bar exam, the presenter was not able to download ExamSoft and spent two full days calling the State Bar and ExamSoft. Because the presenter's children and husband are going to school and working from home, there is no quiet space to study or take the exam. Although approved to take the exam in person, the presenter is concerned about contracting COVID-19. The presenter observed that the cut score was lowered just months after the February bar exam, and that those who met the lowered cut score should be granted retroactive admission.

**Matt Spolsky:** Matt Spolsky, a 2018 graduate who took the bar exam four times and met the 1390 cut score on the last three exams, supports retroactivity and the provisional licensure program. The presenter urges that the provisional licensure program be extended to those who have met the 1390 cut score.

**Patrick Martinez:** Patrick Martinez, an applicant eligible for provisional licensing if it applies to those who previously met the 1390 cut score, brought to the Board's attention the names of the following organizations and individuals supporting retroactivity and H.R 103: San Diego County Bar Association; Eastbay La Raza Lawyers Association; California Association of Black Lawyers; John Langston Bar Association; Tom Homann LGBT Law Association; Alameda County Bar Association; Bay Area Lawyers for Individual Freedom; Lawyers for One America; Asian American Bar of the Greater Association of the Bay Area; Joanna Mendoza, a former trustee of the State Bar; and Senator Scott Wiener. The presenter expressed support for provisional licensing for those who have met the 1390 cut score.

**Jasmine Martin:** Jasmine Martin, an Inland Empire mother who met the 1390 cut score on the February 2020 bar exam, commented on the difficulty of facing the bar examination during the pandemic, with daycare being risky and schools being closed. The presenter also commented on the disproportionate impact of the bar exam on people of color and the working class. The presenter is aware there are many people working in the public interest who, having met the 1390 cut score, are seeking retroactivity in order to work in their communities and focus on their families.

**Kathleen Beckett:** Kathleen Beckett, an applicant who met the 1390 cut score on the February 2020 bar exam, voiced support for extending the provisional licensure program to all people who met the 1390 cut score on the February 2020 bar exam, as they have already proven their competence (to the extent the bar exam measures competence). The presenter believes that it is fundamentally unfair to extend provisional licensure to December 2019 graduates who score below 1390 while denying it to people who have proven their minimum competency by scoring 1390 or above. The presenter also believes that those who took the February 2020 exam were equally affected and adversely impacted by COVID-19.

**Chantel Johnson:** Chantel Johnson expressed support for Agenda Item #708 and the recommendations for the California provisional license program, particularly the option of working for a government agency as one possible path towards licensure.

**Rajesh Vodadar:** Rajesh Vodadar, an attorney in practice in Boston, New York City, and the Silicon Valley for over 15 years who met the 1390 cut score on the February 2020 bar exam,

echoed the comments of previous presenters. The presenter requests that, if retroactive admission is not possible, examinees who met the 1390 cut score on the exam, or on the first read, be allowed some avenue to get their professions started.

**Selena Copeland:** Selena Copeland, Executive Director of the Legal Aid Association of California, encouraged the paraprofessional working group to continue to engage the legal aid community to better understand their capacity to serve lower income individuals who are between 125 and 200 percent of poverty. The presenter appreciates committee leadership for scheduling future meetings to discuss the Justice Gap Study in order to dive deeper into the need before returning to the discussion of possible solutions. The presenter also appreciates the provisional licensure working group for accepting a few of the association's suggestions, specifically the reduced fees to participate in the program and the allowance of multiple supervisors, explaining that these measures will make it easier for legal aid organizations to hire provisionally licensed attorneys and move them to substantive areas of the most need, which right now is housing due to the COVID-19 crisis.

**Andre Shevwitz:** Andre Shevwitz, an engineer interested in patent law and trying to pass the bar exam, voiced support for the provisional licensure program for those who have met the 1390 cut score. Working from home with three children, the presenter finds it difficult to focus on studying for such a demanding exam. According to the presenter, any proposal that reduces the need to administer an exam is meritorious on its face and should be considered.

**Leona:** Leona, grieving the loss of a loved one who died overseas from COVID-19, commented on the financial hardships endured during this time. Because of wildfire evacuations, the presenter withdrew from the October exam. The presenter urged the Board to support the provisional licensure program and extend it to those who have met the 1390 cut score on the exam, or first read, in the last five years and to those already licensed in another state.

**Mr. Khan:** Mr. Khan, a practicing attorney in Orange County, expressed support for the latest provisional licensing proposal. The presenter pointed out that an applicant who meets the 1390 cut score on the October 2020 exam will automatically become a licensed attorney, but an applicant who met the 1390 cut score on the February 2020 exam, also during the pandemic, will be required to go through two years of provisional licensing requirements. Although the presenter has committed to supervising at least two people, the presenter is unsure if other practitioners will do the same. The presenter urged the Board to instead implement additional Continuing Legal Education (CLE) or other approaches that will allow everybody the opportunity to move forward and will help everybody facing evictions and job losses in the coming months.

**Victoria:** Victoria, a foreign attorney who met the cut score on the July 2019 bar exam, urged the Board to extend the provisional license program to five years. The presenter believes the Board should adopt the New York provisional license model, which requires only that applicants provide 50 hours of pro bono work under the supervision of an attorney. According to the presenter, adopting the New York model will help low-income families in California as well.

**End of Public Comment**

## 10 MINUTES

### Open Session Minutes–July 16, 2020

### Open Session Minutes–September 4, 2020

Adoption of Open Session Minutes – Moved by Cisneros, seconded by Delen.

Ayes – Broughton, Chen, Cisneros, De La Cruz, Delen, Duran, Iglesias, LaBran, Perttula, SeLegue, Sowell, Stallings

Noes – n/a

***Motion carries.***

## 30 CHAIR’S REPORT – ***oral***

30-1 Appreciation to Retired State Bar Employee Marilyn Tichenor – ***informational***

## 40 STAFF REPORTS

41 Executive Director – ***oral***

41-1 Report from Executive Director – ***informational***

41-2 Appreciation for Outgoing Chair and Members of the 2019–2020 Board of Trustees

**RESOLVED**, that the Board of Trustees adopt the following resolution of appreciation to the outgoing chair and Board Members:

**WHEREAS**, Alan Steinbrecher, chair of the Board of Trustees for the 2019–2020 Board year and vice-chair for the 2018–2019 Board year, served this Board and the State Bar of California with devotion and distinction, and exercised impeccable leadership; and

**WHEREAS**, Renée LaBran and Debbie Manning, members of the Board of Trustees, have served this Board and the State Bar of California with extraordinary commitment to carrying out the mission of public protection, including access and diversity and inclusion, and served the Board and the State Bar with devotion and distinction;

**WHEREAS**, it is appropriate that the minutes of this meeting officially record the warm gratitude and respect, both personal and professional, of their fellow Board members; and it is

**FURTHER RESOLVED**, that the Board of Trustees hereby expresses to Alan Steinbrecher, Chair, and Renée LaBran and Debbie Manning, members of the Board of Trustees, its sincere appreciation for their admirable accomplishments and selfless efforts expended

on behalf of the State Bar, and also expresses to them the high esteem and personal affection of their fellow members of the Board.

Moved by SeLegue, seconded by Stallings.

Ayes – Broughton, Chen, Cisneros, De La Cruz, Delen, Duran, Iglesias, LaBran, Perttula, SeLegue, Sowell, Stallings

Noes – n/a

***Motion carries.***

## **50 CONSENT**

### **50-1 Approval for Specified Contracts Pursuant to Business and Professions Code Section 6008.6**

- 1. For government affairs and legislative representation, with: Wada Government Services**
- 2. For bar card manufacturing and mailing, with: SoftFile**
- 3. For Office of Chief Trial Counsel case file auditing, with: Alyse Lazar**
- 4. For workload study and survey, with: Qualtrics**
- 5. For online legal research, with: Thomson Reuters**
- 6. For testing accommodation consultant, with: MD Psychiatric Forensics**
- 7. For ad hoc psychometric and statistical analytic projects, with: Research Solutions Group**
- 8. For testing accommodation consultant, with: Michael D. Shore, PhD**

**RESOLVED**, that the Board of Trustees **approves execution of the contracts listed herein.**

### **50-2 Report of Action Taken by Executive Committee Approving Specified Contracts Pursuant to Business and Professions Code Section 6008.6**

- 1. For interim Chief Financial Officer services, with: Kevin Harper CPA & Associates**

**WHEREAS**, the contract listed herein required execution before the next regularly scheduled meeting of the Board of Trustees; and

**WHEREAS**, on September 15, 2020, the Board Executive Committee, approved said contracts; it is hereby

**RESOLVED**, that the Board of Trustees affirms the action taken by the Board Executive Committee on behalf of the Board.

**50-3 Report of Action Taken by Executive Director Approving Specified Contracts Pursuant to Business and Professions Code Section 6008.6**

**1. For consultant services for California Paraprofessional Program Working Group, with: Leah Wilson**

**WHEREAS**, the contract listed herein required execution before the next regularly scheduled meeting of the Board of Trustees; and

**WHEREAS**, on July 31, 2020, the executive director, after consultation with and approval by the designated committee for advising the executive director on such matters, approved said contracts; it is hereby

**RESOLVED**, that the Board of Trustees affirms the action taken by the executive director on behalf of the Board.

**50-4 Approval of Rule Change Regarding First-Year Law Students' Examination Due to COVID-19 as Requested by the Supreme Court of California**

**RESOLVED**, that the Board of Trustees approves and recommends to the Supreme Court the attached change to Admission Rule 4.31 for review and approval upon the adoption of AB 3362.

**FURTHER RESOLVED**, that the change takes effect on January 1, 2021 in conformance with the statutory changes to California Business and Professions Code Section 6060(h) included in that legislation.

**54-121 Proposed Amendments to Rules and Proposed New Rules Regarding Electronic Service and Electronic Signatures - Return from Public Comment and Request for Approval**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee adopts the proposed amendments to: Title 5, Division 1, Chapter 1, Rule 5.4, Rules of Procedure of the State Bar; Title 5, Division 2, Chapter 1, Rule 5.26, Rules of Procedure of the State Bar; Title 5, Division 2, Chapter 1, Rule 5.27, Rules of Procedure of the State Bar; Title 5, Division 2, Chapter 1, Rule 5.28, Rules of Procedure of the State Bar; and proposed new rules 5.26.1, 5.26.2, and 5.27.1, as set forth in Attachment A; and it is

**FURTHER RESOLVED**, that the proposed amendments to the above rules become effective on November 1, 2020; and it is

**FURTHER RESOLVED**, that amended rule 5.26.1 supersedes Interim Rule 5.26.1 on November 1, 2020.

**54-122 Proposed Amendments to Rule of Procedure Regarding Electronic Trial Exhibits -  
Return from Public Comment and Request for Approval**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee adopts the proposed amendments to: Title 5, Division 2, Chapter 5, Rule 5.101.1, Rules of Procedure of the State Bar; and it is

**FURTHER RESOLVED**, that the Regulation and Discipline Committee recommends that the proposed amendments to the above rule become effective on November 1, 2020.

**54-123 Proposed Amended Rule of Professional Conduct 5.4 - Return from Public Comment  
and Request for Adoption**

**Updated 2017-2022 Strategic Plan Rev. 3: 4.d.**

**RESOLVED**, that upon recommendation of the Regulation and Discipline Committee, the Board of Trustees adopts the amendments to Rule of Professional Conduct 5.4 as set forth in Attachment A; and it is

**FURTHER RESOLVED**, that staff is directed to submit the amended rule to the Supreme Court of California with a request that the rules be approved.

**54-141 Licensee Requests for Adjustment of Fees, Penalties and Charges**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Finance Committee approves the fee adjustments for the State Bar licensees as presented this day, and on file in the San Francisco office of the State Bar.

**54-142 Proposed 2021 Changes to Schedule of Licensee Fees, Penalties, Charges and  
Deadlines**

**RESOLVED**, that upon recommendation of the Finance Committee and subject to AB 3362 becoming law, the Board of Trustees approves and sets the annual licensing fee for 2021 at \$515 for active status and at \$182.40 for inactive status; and it is

**FURTHER RESOLVED**, that as required by Business and Professions Code section 6140.05, a \$5 deduction from annual fees be available for any attorney who elects not to fund State Bar lobbying and other legislative activity; and it is

**FURTHER RESOLVED**, that a \$2 deduction from annual fees be available for any attorney who elects not to fund State Bar programs that support the elimination of bias; and it is

**FURTHER RESOLVED**, that for the Legal Services Assistance Fee under Business and Professions Code section 6140.03, a \$45 deduction from the annual fee be provided to each attorney who elects not to have this amount allocated to support nonprofit organizations that provide free legal services to persons of limited means; and it is

**FURTHER RESOLVED**, that the 2021 annual fees for new attorneys admitted in 2021 be set as follows: fees of \$515 for those admitted between January 1 and May 31, 2021, and \$257.50 for those admitted between June 1 and November 30, 2021; and it is

**FURTHER RESOLVED**, that the deadlines and penalties as proposed on the attached Appendix A: Schedule of Charges and Deadlines for 2021 (Attachment A) be applied to delinquent 2021 annual fees; and it is

**FURTHER RESOLVED**, that the MCLE noncompliance fee remains set at \$75, the MCLE audit deficiency fee remains set at \$200, and the MCLE reinstatement fee to terminate MCLE inactive enrollment remains set at \$200; and it is

**FURTHER RESOLVED**, that the interest on assessed costs for reimbursement to the Client Security Fund be set at 10 percent annually calculated from the date of disbursement as set forth by the Board, pursuant to Business and Professions Code section 6140.5(c); and it is

**FURTHER RESOLVED**, that the administrative penalty on failure to comply with binding arbitration is charged at a fee not to exceed 20 percent of the amount ordered refunded to the client or \$1,000, whichever is greater.

#### **54-143 1st Quarter 2020 Financial Statement Report**

**RESOLVED**, that the Board of Trustees approve the 2020 First Quarter Financial Report in the form presented this day before the Board, for the three months ending March 31, 2020, as certified by the Chief Financial Officer, and on file with the San Francisco office of the State Bar.

#### **54-144 2nd Quarter 2020 Financial Statement Report, Investment Report, Client Security Fund Report**

**RESOLVED**, that upon recommendation of the Finance Committee, the Board of Trustees approves the 2020 Second Quarter Financial Report in this form on this day before the Board, for the six months ended June 30, 2020, as certified by the Chief Financial Officer and filed with the San Francisco office of the State Bar.

#### **54-181 2nd Quarter 2020 Board and Management Travel Expenses**

**RESOLVED**, that upon recommendation of the Audit Committee, the Board of Trustees approves the second quarter of 2020 Board and Management Travel Expenses in the form hereby presented for the three months ending June 30, 2020, as certified by the Chief Financial Officer and filed with the San Francisco office of the State Bar.

**Approval of the Consent Agenda:** Moved by Duran, seconded by De La Cruz

Ayes – Broughton, Chen, Cisneros, De La Cruz, Delen, Duran, Iglesias, LaBran, Perttula, SeLegue, Sowell, Stallings

Noes – n/a

***Motion carries.***



## **100 REPORTS OF BOARD COMMITTEES**

### **110 Board Executive Committee**

### **120 Regulation and Discipline Committee**

### **140 Finance Committee**

#### **145 Approval of Refinancing of 2012 Bank of America Loan (Related to 845 South Figueroa Street)**

**RESOLVED**, that the Board of Trustees recommends proceeding with the refinancing of the 2012 Bank of America Loan with Sterling Bank and the 15-Year Term Sheet, and it is

**FURTHER RESOLVED**, that the Board of Trustees approve Attachment A, a Resolution Adopted by the Board of Trustees for the Approval of Refinancing the 2012 Loan related to 845 South Figueroa Street, Los Angeles, California, and it is

**FURTHER RESOLVED**, that the Board of Trustees approve the Debt Management Policy.

Because the motion comes from a Board committee, no mover or seconder required

Ayes – Broughton, Chen, Cisneros, De La Cruz, Duran, Iglesias, LaBran, Perttula, SeLegue, Sowell, Stallings

Recused – Delen

Noes – n/a

***Motion carries.***

### **180 Audit Committee**

## **700 MISCELLANEOUS**

#### **701 Real Estate Analysis and Strategy Development Update (Mazer) – *informational***

#### **702 Closing the Justice Gap Working Group - Appointment of Members (Difuntorum)**

#### **Updated 2017-2022 Strategic Plan Rev. 3: 4.d.**

The Board rejected the recommended resolution contained in the agenda item in favor of the following alternate motion:

**RESOLVED**, that the Board elects not to take action on this item today, asks the incoming Chair to consult with staff regarding issues raised at the September 24, 2020, Board meeting, and

delegates to the Board Executive Committee the authority to act on this item, including approving the slate, prior to the next scheduled Board meeting in November 2020.

Moved by SeLegue, seconded by Duran.

Ayes – Broughton, Chen, Cisneros, De La Cruz, Delen, Duran, Iglesias, Perttula, SeLegue, Sowell, Stallings

Absent for vote – LaBran

Noes – n/a

***Motion carries.***

**703 California Paraprofessional Program Working Group - Status Update (Iglesias) – *informational***

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

**Updated 2017-2022 Strategic Plan Rev. 3: 2.b.**

**RESOLVED**, that staff will continue its work on projects, in conjunction with the Chair and Vice Chair of the Regulation and Discipline Committee (RAD), that address disparities in the discipline system and provide an update to the State Bar of Trustees at its next meeting; and it is

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

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

- Review reforms implemented that address disparities and evaluate if the reforms had their intended effect and recommend additional or revised reforms;
- Review all other OCTC reforms implemented and evaluate if the reforms have had their intended effect and recommend additional or revised reforms;

- Review research studies that have been completed and determine whether additional research or change is needed;
- Review research studies in progress and generate policy recommendations as results become available; and
- Identify processes, policies, procedures and areas of the discipline system that need examination; and it is

**FURTHER RESOLVED**, that the ad hoc committee will begin its work in early 2021 and present a final report on its findings and recommendations no later than June 30, ~~2022~~ 2021, subject to extensions by the Board of Trustees, with periodic status updates to be provided to the State Bar Board of Trustees at each regularly scheduled meeting beginning in January 2021.

Moved by Stallings, seconded by SeLegue.

Ayes – Broughton, Cisneros, Delen, Duran, Iglesias, Perttula, SeLegue, Sowell, Stallings

Absent for vote – Chen, De La Cruz, LaBran

Noes – n/a

***Motion, as amended, carries.***

**705 Exemption to CalPERS 180-Day Wait Period in Order to Appoint Marilyn Tichenor as Retired Annuitant under Government Code section 21224 (Lee)**

**Updated 2017-2022 Strategic Plan Rev. 3: 2.a.**

**RESOLVED**, that the Board of Trustees adopts the resolution set forth in Attachment A and appoints Marilyn Tichenor as a retired annuitant.

Moved by Cisneros, seconded by Delen.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, Perttula, SeLegue, Sowell, Stallings

Absent for vote – De La Cruz, LaBran

Noes – n/a

***Motion carries.***

**706 Exemption to CalPERS 180-Day Wait Period in Order to Appoint Jenice Housman as Retired Annuitant under Government Code section 21224 (Lee)**

**RESOLVED**, that the Board of Trustees adopts the resolution set forth in Attachment A and appoints Jenice Housman as a retired annuitant.

Moved by Cisneros, seconded by Chen.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, Perttula, SeLegue, Sowell, Stallings

Absent for vote – De La Cruz, LaBran

Noes – n/a

***Motion carries.***

**707 Changes in Elimination of Bias (EOB) Requirement in Minimum Continuing Legal Education (MCLE) Rules - Return from Public Comment and Request for Approval (Carroll/Hom)**

**Updated 2017-2022 Strategic Plan Rev. 3: 4.m.**

**RESOLVED**, that the Board of Trustees hereby approves and adopts proposed amendments to Rules of the State Bar 2.52, 2.71, and 2.72, related to licensee requirements, set forth in Attachment B; and proposed amendments to Rules of the State Bar 3.601, 3.602, 3.603, and 3.604, related to MCLE provider requirements, set forth in Attachment C.

Moved by Stallings, seconded by Iglesias.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, SeLegue, Sowell, Stallings

Absent for vote – De La Cruz, LaBran, Perttula

Noes – n/a

***Motion carries.***

**708 Provisional Licensure Rule of Court - Return from Public Comment and Request for Adoption by the Board of Trustees for Approval by the Supreme Court (Chen/Hershkowitz)**

**RESOLVED**, that the Board of Trustees approves the proposed Provisional Licensure Rule of Court, set forth as Attachment A (with correction of typographical error on page 2 identified by Member SeLegue); and it is

**FURTHER RESOLVED**, that the Board of Trustees directs staff to submit the proposed Provisional Licensure Rule of Court to the Supreme Court for adoption; and it is

**FURTHER RESOLVED**, that the Board of Trustees directs the Provisional Licensure Working Group to set a further meeting to further discuss whether to recommend extending the Provisional Licensure to individuals who previously scored 1390 or greater on the bar exam, and if so, whether to recommend granting these individuals admission to the State Bar following

the successful completion of a defined number of hours of supervision as a Provisionally Licensed Lawyer.

Moved by Chen, seconded by Broughton.

Ayes – Broughton, Chen, Cisneros, Delen, Duran, Iglesias, SeLegue, Sowell

Recused – Stallings

Absent for vote – De La Cruz, LaBran, Perttula

Noes – n/a

***Motion carries.***



# The State Bar of California

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## ATTACHMENT E

### OPEN SESSION AGENDA ITEM 703 NOVEMBER 2020

**DATE:** November 19, 2020

**TO:** Members, Board of Trustees

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

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

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### EXECUTIVE SUMMARY

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

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### BACKGROUND

Following receipt of a report on disparities in the discipline system conducted by Professor George Farkas in November 2019, the Board directed staff to develop an action plan to address the factors that are associated with the disproportionate discipline of Black, male attorneys. The State Bar contracted with Professor Christopher Robertson to evaluate the findings of Professor Farkas' report, study the discipline system more closely, and make recommendations.

Professor Robertson, who is an N. Neal Pike Scholar in Health & Disability Law at Boston University and a specialist in issues of diversity and inclusion and organizational design, presented preliminary observations about a possible course of action at the January 2020 Board planning session. The Board then directed staff to continue working with Professor Robertson to evaluate the preliminary observations more closely, conduct more detailed investigations, and return to the Board with fully developed recommendations. Professor Robertson presented those recommendations at the July 2020 Board meeting and the Board directed staff to engage in five projects to implement these reforms. At the September 2020 Board meeting, staff

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

## **DISCUSSION**

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

### **Archive Five Years of Closed Complaints**

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

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

OCTC continued work with the Office of Research and Institutional Accountability and the Office of Information Technology to develop a system for "archiving" complaints within Odyssey, the State Bar's case management system. The following project milestones have been met:

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

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

All deliverables for this project are nearly complete.

### **Reportable Action Bank Matters**

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

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

The Board then directed staff to:

*...explore options for a more robust pro-active preventative approach for attorneys who experience low-level RA-Bank matters that also ensures public protection is not compromised. This approach will take into account the number of prior RA-Bank matters and their clustering for the purpose of preventing future misconduct related to client trust accounts.*

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

### **Modification of OCTC Letters Regarding Reportable Action Bank Matters**

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

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

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



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

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

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

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

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

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

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

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

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

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

### **Qualitative Study of Letters Related to Reportable Action Bank Matters**

The State Bar has retained the consulting services of University of Arizona Professor Tara Sklar, an expert in risk-based regulation who also led an innovative study to determine the characteristics of attorneys who were disciplined in the Australian state of Victoria.

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

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

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

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

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

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

### **Attorney Self-Assessment: Client Trust Accounts**

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

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

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

### **Respondent Representation by Counsel**

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

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

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

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

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

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

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

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

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

### **Research on Complaints Not Leading to Discipline**

Professor Robertson proposed exploring a proactive nondisciplinary system to support attorneys at higher risk of future complaints given the disproportionate filing of complaints against Black attorneys, which in turn increases the odds of discipline. Such a system would include "upstream" prevention strategies and interventions that range from outreach efforts to formal programs. Outreach efforts could include providing information, educating the regulated population about legal misconduct and the State Bar's role to regulate it, and offering resources to mitigate it. The solutions to be explored will provide dual benefits of improving client satisfaction through communication and education, while potentially improving the overall quality of legal practice. This potential reform aligns with the work of the 2020 Governance in the Public Interest Task Force whose final report recommended analyzing closed

complaints to identify attorneys at risk of future complaints. Professor Robertson recommended exploring closed complaints to inform the development of such a system as a first step. The Board directed staff to “evaluate complaints closed without discipline to determine whether specific issues can be identified that allow for proactive regulation.” This research will be conducted in two phases.

### **Phase One. Generate Empirical Research on Allegations among Dismissed Complaints**

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

Preliminary analyses of cases closed in intake show:

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

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

### **Phase Two. Pilot Test Proactive Nondisciplinary Interventions**

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

## **FISCAL/PERSONNEL IMPACT**

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

## **AMENDMENTS TO RULES OF THE STATE BAR**

None

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

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

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

## **RECOMMENDATIONS**

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

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

## **ATTACHMENT(S) LIST**

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



# The State Bar of California

OFFICE OF CHIEF TRIAL COUNSEL

October 2, 2020

## **PERSONAL AND CONFIDENTIAL**

### **Via Email**

Name

Email Address

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

Dear Ms. XXXXXXXX:

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

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

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

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

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

October 2, 2020

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

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




October 2, 2020

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

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

Sincerely,

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

Ann J. Kim  
Deputy Trial Counsel

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



## Your California Bar License Is at Risk.

### Take Action.

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

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

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

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

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

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

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



# The State Bar of California

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**ATTACHMENT F**

**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

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## **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.

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## **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



The State Bar *of California*

# State Bar's Use of Nonpublic Discipline

George Cardona, Chief Trial Counsel

Regulation and Discipline Committee, January 19, 2023

# Categories of Resolutions

Nonpublic	<ul style="list-style-type: none"><li>• Resource letter</li><li>• Directional letter</li><li>• Warning letter</li><li>• Admonition letter</li><li>• Agreement in lieu of discipline</li><li>• Private reproof prior to filing of NDC</li></ul>	Not Discipline
Public	<ul style="list-style-type: none"><li>• Private reproof after filing of NDC</li><li>• Public reproof</li><li>• Probation w/ stayed suspension</li><li>• Probation w/ actual suspension</li><li>• Disbarment</li></ul>	Discipline





# Reported in ADR

## Table SR-6B: Formal Disciplinary Outcomes

- Disbarments
- Probation with Actual Suspension
- Probation with Stayed Suspension
- Public Reproval
- Private Reproval

## Table SR-7B: Specified Dispositions

- Admonitions
- Agreements in Lieu of Discipline
- Warning Letters
- Directional Letters
- Private Reprovals



## Nonpublic Measures (State Audit 2022-030, Figure 2)

### RESOURCE LETTER



Describes resources, such as ethics training or client trust account training, along with a summary of the conduct of concern and ways to rectify it.

### DIRECTIONAL LETTER



Directs action on the part of an attorney. This can include direction to return a client file or to communicate with a client.

### WARNING LETTER



Informs an attorney of his or her ethical obligations when there is substantial evidence that he or she committed a violation that may be misconduct.

### AGREEMENT IN LIEU OF DISCIPLINE



A written agreement that may involve conditions of practice or further legal education or rehabilitation.

### PRIVATE REPROVAL



A censure or reprimand that may include conditions. Private reproof is the only nonpublic measure that the State Bar considers to be discipline.



Case Example 1

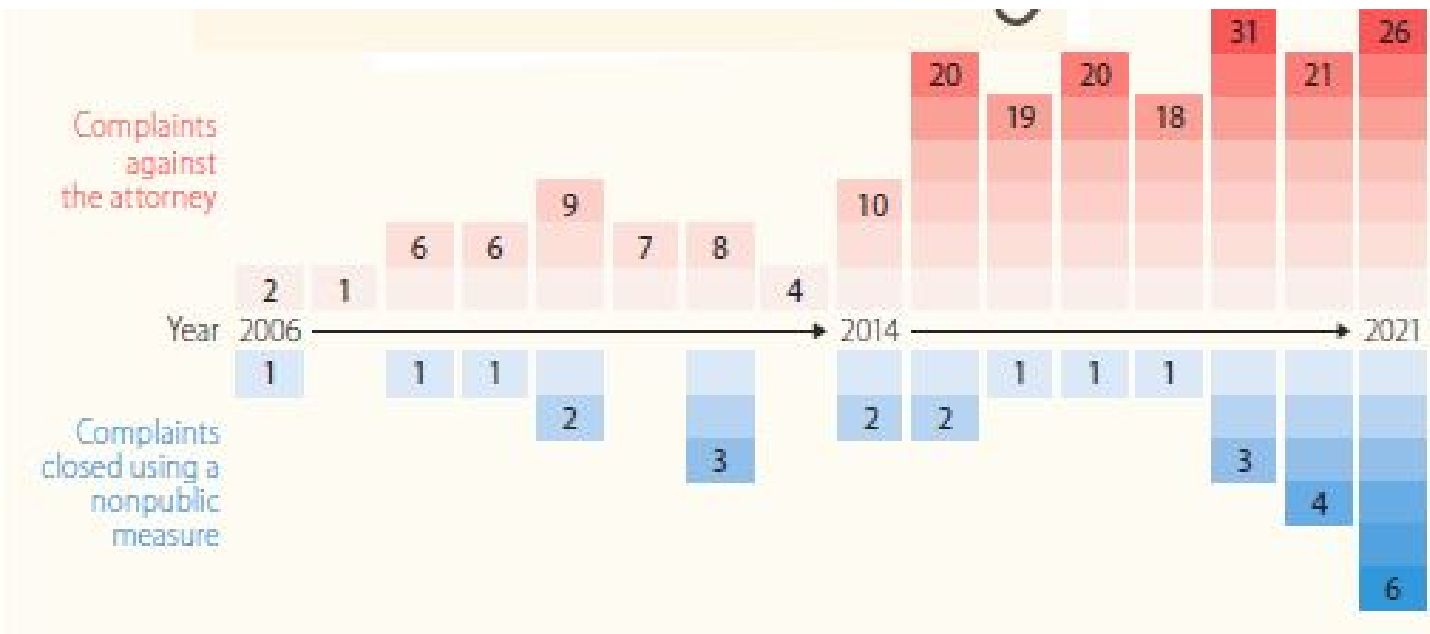
An attorney exhibited a pattern of failing to provide settlement payments or to provide files to clients until the client complained. The State Bar closed cases against this attorney 28 times over 16 years using nonpublic measures and all of the other closed cases were closed outright. However, complaints against the attorney continued to increase. From 2014 to 2021, the attorney was the subject of 165 complaints. Despite the high number of complaints, many for similar matters, the State Bar has imposed no discipline, and the attorney still maintains an active license.

In one early case, the State Bar issued a warning letter to the attorney for failing to release a client’s case file for nearly a year. However, the attorney has continued to generate complaints from other clients for this same issue. In the 11 years since the State Bar issued that warning letter, complaints have led the State Bar to issue 11 directional letters requiring the attorney to return client files.



Case Example 1

“patterns of attorney misconduct suggest that the State Bar is overusing nonpublic measures”





# State Audit 2022-030 (April 2022)

## Findings:

- “the State Bar closed many cases through nonpublic measures, such as warning letters, but it lacks clear policies on when it is appropriate for staff to use these nonpublic measures”
- “although the State Bar’s policies provide general guidelines for deciding when to use nonpublic measures, the policies lack the details necessary to ensure that they are implemented consistently”.patterns of attorney misconduct suggest that the State Bar is overusing nonpublic measures”

## Recommendation:

- “To ensure that it uses nonpublic measures to close complaints only when such use is consistent and appropriate, the State Bar should revise its policies by October 2022 to define specific criteria that describe which cases are eligible to be closed using nonpublic measures and which are not eligible.”





## Resource Letters

- Preventative measure issued in lieu of straight closing letter where determination has been made that facts are insufficient to move the case forward
- Includes information on resources available to assist in complying with lawyer's obligations
- Must be used for closing: (a) all bank reportable actions and (b) all complaints alleging client-trust account violations in which the respondent has been notified of the investigation prior to closing
- Other situations discretionary based on whether based on all the circumstances, including respondent's prior history, there is cause for concern that, absent guidance, future misconduct may occur



# Directional Letters

- May issue where facts establish only certain violations amenable to remediation based on action that can be taken by lawyer in response to direction (e.g., return file) and violations have not resulted in significant harm to client, public, or administration of justice that cannot be remedied by the directed action.
- Discretionary evaluation of all circumstances, including respondent's prior history, to determine whether likely to comply with direction provided or whether more serious response is warranted
- Provides summary of basis for violation, clear directions for action within specified time, and caution that failure to comply may result in matter being reopened for more serious action



# Warning Letters

- May be issued where:
  - (a) facts sufficient to establish by clear and convincing evidence only minor violations that did not cause significant harm to client, public, or administration of justice and are unlikely to result in imposition of discipline by State Bar Court; or
  - (b) facts constitute substantial evidence of non-minor violations but there remain serious questions whether evidence available for presentation at trial would be sufficient to establish the violations by clear and convincing evidence.
  - Violations are not considered minor if:
    - (a) they involve dishonesty, moral turpitude, or corruption; or
    - (b) the presumed sanction under the Standards is no lower than disbarment or actual suspension
- Discretionary evaluation of all circumstances, including respondent's prior history, to determine whether warning letter is sufficient to deter future misconduct by the attorney, or whether a more serious response is warranted
- Other requirements:
  - May issue only after respondent has opportunity to respond to allegations
  - Must provide summary of basis for violation
  - May be contingent on completion of specified conditions
  - Respondent may request OCTC administrative review of issuance
  - OCTC may rescind warning letter and reopen based on new evidence or other good cause



# Admonitions

- Alternative to warning letter where facts sufficient to establish by clear and convincing evidence only minor violations that did not cause significant harm to client, public, or administration of justice and are unlikely to result in imposition of discipline by State Bar Court
- If “within two years after the date of the admonition letter, a State Bar Court proceeding is filed against the attorney based upon other alleged misconduct, the matter terminated by admonition may be reopened. All Policy Directive 2022-07 October 31, 2022 Page 13 applicable time limitations shall be tolled during the period between the issuance of the admonition and the filing of the notice of disciplinary charges.” Rule 2602(b).
- Other requirements:
  - May issue only after respondent has opportunity to respond to allegations
  - Must provide summary of basis for violation
  - May be contingent on completion of specified conditions
  - Must advise respondent that, upon written request of the attorney, mailed within fifteen days after service of the admonition letter, the admonition shall be set aside and the investigation may be resumed. Rule 2602(c).



## Agreements in Lieu of Discipline

- Another alternative to warning letter where facts sufficient to establish by clear and convincing evidence only minor violations that did not cause significant harm to client, public, or administration of justice and are unlikely to result in imposition of discipline by State Bar Court
- Differs from warning or admonition letter in that attorney is required to agree that misconduct has occurred and agreement typically includes formal periodic reporting on compliance with conditions
  - Monitoring by OCTC
  - If respondent fulfills conditions, OCTC cannot reopen the matter or bring a new one based on the same misconduct. Rule 5.124(H).



# Nonpublic Private Reprovals

- Private reproof agreed to by parties and approved by State Bar Court prior to filing of Notice of Disciplinary Charges that initiates public disciplinary proceeding.
- Submitted as a stipulation for approval by the State Bar Court – constitutes discipline.
- OCTC may agree to this where facts sufficient to establish by clear and convincing evidence only minor violations that did not cause significant harm to client, public, or administration of justice and are unlikely to result in imposition of discipline by State Bar Court at the level of a public reproof or higher.
- Discretionary evaluation of all circumstances, including respondent's prior history, to determine whether sufficient to deter future misconduct by the attorney, or whether public discipline is warranted
- "A private reproof imposed before a State Bar Court proceeding begins is part of the attorney's official State Bar attorney records, but is not disclosed in response to public inquiries and is not reported on the State Bar's web page. The record of the proceeding is not available to the public unless it becomes part of the record of any later proceeding in which it is introduced as evidence of a prior record of discipline." Rule 5.127(C).



# Questions?

