The State Bar of California

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**

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.

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.[1]

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.

[1] 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.[2]

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

[2] 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.[3] 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

[3] 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.

Attachment A

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

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

an interim report to

The California State Bar Board of Trustees

Comments to Robertson@arizona.edu

TABLE OF CONTENTS

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."[1] 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.[2]

I accordingly focus on the disparities (or disproportionalities) for Black men.[3]

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.[4]

Accordingly, it would be wrong to infer that these other variables "explain away" any racial disparities.[5] Yet the models do suggest mechanisms driving the disparities in outcomes. These

---

[1] 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.

[2] Id., at 2.

[3] 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).

[4] 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).

[5] 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.[6]

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).[7] 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.[8] 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;

---

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).

[6] 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)

[7] 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). 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).

[8] 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.[9]

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.

[9] 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).[10] 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.[11]

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.[12] Indeed, the racial disparity related to this overtly economic factor echoes broader disparities in America and in California, which the judicial system reinforces.[13]

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).[14] 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.[15] 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

---

[10] 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

[11] 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.

[12] 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.").

[13] 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).

[14] Cal. Bus. & Prof. Code § 6091.1.

[15] 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.[16]

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.[17] 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.[18] Yet, the Rules of Professional Conduct do not directly speak to this issue of having insufficient funds in a trust account.[19] 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."[20] 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.[21]

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

---

[16] 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.

[17] 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).

[18] 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,

[19] 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."

[20] 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).

[21] 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.[22] Similarly the caselaw for attorney discipline does not generally ascribe malfeasance to bounced checks *per se*.[23] 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.[24] Like the United States a whole, California suffers from radical economic disparities along racial lines.[25] Nationwide, the median white family holds assets worth fifteen times those of the median black family.[26] 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.

---

[22] 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 depositary … is punishable by imprisonment in a county jail for not more than one year…").

[23] 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).

[24] 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.'")

[25] 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.)

[26] 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

	Attorney W	**Attorney B**
Trust fund starting balance:	$5000	$500
Writes *but fails to record* check #1 of:	$200	$200
Actual balance:	$4,800	$300
Writes check #2 of:	$400	$400
Actual balance:	$4,400	-$100
Result:	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.[27] 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.[28] 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.[29] 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:

---

[27] 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.")

[28] See New Jersey Courts, What is the Random Audit Program, https://njcourts.gov/attorneys/oae.html#audits.

[29] 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."[30]

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.[31]

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.[32] Even an attorney's name often carries race cues.[33] It

---

[30] 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.

[31] 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).

[32] 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."[34] 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.[35] 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.[36]

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.

---

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.").

[33] 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).

[34] 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).

[35] Id., at 51-52.

[36] 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)."[37]

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.[38] 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.[39] But the rules do not provide guidance on what amount that should be.[40] Clarity alone may motivate reform.

---

[37] California State Bar, "Handbook on Client Trust Accounting for California Attorneys," p. 2 (2018).

[38] See discussion supra surrounding note 24.

[39] 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.[41] 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.[42] However, many other factors were at play, including actual misappropriation of funds and failure to provide an accounting to clients, when repeatedly requested.[43]

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."[44] 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."[45]

---

[40] Id.

[41] 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 ("...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]).

[42] *Jackson v. State Bar* (1979) 25 Cal.3d 398.

[43] Id.

[44] California State Bar, "Handbook on Client Trust Accounting for California Attorneys," p. 43 (2018).

[45] 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.[46] 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.[47]

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.[48] 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.[49] 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.[50] 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.[51]

These considerations suggest,

---

[46] 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.")

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

[48] 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."

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

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

[51] 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.[52]

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.[53] 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.[54] 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

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

[53] 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.

[54] 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.[55] 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.[56] 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.[57] Likewise, attorneys' different communication styles could produce different amounts of complaints, just as physician's communication styles have been shown to predict malpractice risk.[58] 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.[59]

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

---

[55] 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.")

[56] See MacLeod and Pi *supra* note 1, at Attachment A,

[57] 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.

[58] 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).

[59] 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.[60] 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.[61]

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.[62] 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.[63] 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.[64] 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.[65] 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

---

[60] See State Bar of California, "2019 Annual Discipline Report," at SR-4 available at http://www.calbar.ca.gov/Portals/0/documents/reports/2020/2019-Annual-Discipline-Report.pdf.

[61] 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?")

[62] 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

[63] 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.)

[64] 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.")

[65] 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.[66]

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
Male										
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.[67] 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.[68] 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.[69] 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.[70]

[66] 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).

[67] See sources cited supra note 32-33.

[68] See generally Garcia-Retamero, Galesic, and Gigerenzer *supra* note 31.

[69] 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).

[70] Id.

B. Record Retention

Criminal law presents a useful analogy as arrests are known to be racially disparate, not unlike bar complaints.[71] The Supreme Court has long recognized that arrests lack probative value.[72] 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.[73] 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."[74]

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 vary narrow circumstances.[75] Even for convictions, in October 2019, Governor Newsom signed a criminal justice bill, AB1076, which automatically expunges records of low-level offenses.[76]

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.[77] 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.[78] 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."[79] Arguably thus, the

---

[71] 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).

[72] *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.")

[73] "Model Law on Non-Conviction Records," Collateral Consequences Res. Ctr. (2019), available at http://ccresourcecenter.org/model-law-on-non-conviction-records/

[74] *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)).

[75] Cal. Gov't Code § 12952 (West).

[76] 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/.

[77] 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.)

[78] *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.").

[79] *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."[80]

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.[81] 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.

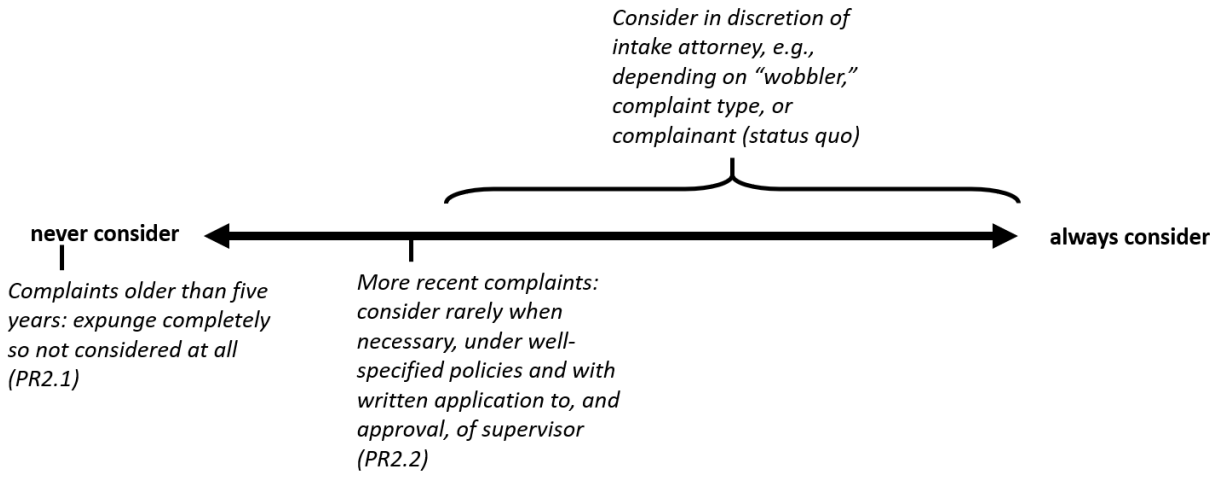
---

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.

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

[81] 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.[82] 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.[83] 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 <u>not</u> 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

[82] See California State Bar Rule 5.21.

[83] 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.[84] 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.[85] 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

[84] 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.")

[85] "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.[86]

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."[87] 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.[88] "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."[89] 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.[90] 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.

---

[86] 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).

[87] http://bsa.ca.gov/pdfs/reports/2016-137.pdf at p 2.

[88] 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.

[89] 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.)

[90] 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.[91] 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.[92] Indeed, Dr. Farkas found that when California attorneys face disciplinary charges without representation by counsel, they were much more likely to be disbarred.[93] 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.[94] 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

---

[91] The recent Bar Discipline report makes this clear. See note 60 supra.

[92] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[93] Farkas report *supra* note 1.

[94] 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.[95] 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.[96] Indeed, some research suggests that

[95] 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).

[96] 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.[97] 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.[98] 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.[99] If I spend $5,000 to have an attorney help me with

---

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

[97] 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).

[98] 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.

[99] 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.[100] 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.[101] A long list can cause people to procrastinate or avoid choosing altogether, out of implicit concern with making a poor choice.[102] 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.[103] 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

---

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

[101] 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).

[102] See also the literature on omission bias. Id.

[103] 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.[104] Some of these issues arise even from the status quo practice of offering 20-minute sales conversations.[105] Enforceable liability waivers may be part of the solution, but would require revision of the California Rules of Professional Conduct.[106] 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.[107] This suggests,

---

[104] 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).

[105] 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....")

[106] 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.").

[107] 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.[108] 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.[109] 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,

---

[108] 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.

[109] The State Bar could alco 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.[110] 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."[111] The Federal Internal Revenue Service has an independent organization called the Taxpayer Advocate Service, which helps individuals resolve problems and also addresses systemic issues.[112] 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."[113] 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.[114]

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.[115] Such centers, "help unrepresented litigants with their cases in any way possible, short of giving legal advice."[116]

---

[110] 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/.

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

[112] U.S. Internal Revenue Service, Taxpayer Advocate Service, https://www.irs.gov/taxpayer-advocate.

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

[114] 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.").

[115] 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/.

[116] 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."[117] 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.[118] 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.[119]

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.[120] 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.

---

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

[118] 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).

[119] 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 (discussing need for independence).

[120] 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.[121] 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.[122] This may be an additional source of the ultimate disparity in attorney disbarment, since felony convictions are a substantial cause of disbarment.[123]

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.[124] 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.[125]

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.

---

[121] See sources cited *supra* note 4.

[122] See generally Alexander, *supra* note 7.

[123] 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).

[124] 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.")

[125] 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").