

ADDRESSING PERCEIVED RACIAL AND ETHNIC DISPARITIES IN ATTORNEY DISCIPLINE

Susan Saab Fortney* & Heather Zirke**

ABSTRACT

Perceived racial and ethnic disparities in attorney discipline threaten public confidence in the legal profession's fairness and equity. This Article explores whether lawyers of color are subject to a disproportionate number of disciplinary actions. It draws on studies that reveal patterns of disparate outcomes tied to factors such as practice setting, representation during proceedings, and decision-maker bias. The authors assess how systemic issues may contribute to these disparities and highlights gaps in research and transparency. To address these challenges, the Article recommends a multi-faceted approach. This includes better collection and analysis of demographic data, procedural reforms to ensure equitable treatment, and the adoption of proactive measures to support attorneys most at risk of complaints. These reforms aim to enhance the consistency and impartiality of disciplinary systems while fostering trust and accountability among all stakeholders in the legal profession.

INTRODUCTION

Miles to Go: Progress of Minorities in the Legal Profession, a 2004 Report evaluating the American Bar Association's (ABA) Commission on

* Stephen Alton University Professor, Law Professor, and Director of the Program for the Advancement of Legal Ethics at Texas A&M University School of Law.

** Assistant Professor and Director of the Joseph G. Miller and William C. Becker Center for Professional Responsibility at the University of Akron School of Law. The authors appreciate the assistance of the members of the *Journal of Law & Policy* at Washington University in St. Louis School of Law and the valuable feedback from other authors who participated in the workshop organized for the Symposium: New Frontiers in Attorney Regulation. The authors also thank the following individuals for their insights: George Cardona, Paula Frederick, Mike Gentithes, Eby Kalantar, Vera Korzun, Jon Lee, Myles Lynk, Milan Markovic, Wendy Muchman, Chris Robertson, Jack Sahl, Joann Sahl, Mark Schultz, Tracy Thomas, Maret Vessella, and Yun Xiang. Professor Fortney appreciates the capable research assistance of James Connolly and Zachary Cunyus.

Ethnic and Racial Diversity in the Profession, emphasized the importance of data in assessing the legal profession's progress toward "full and equal" racial integration.¹ Based on data, the report found that minorities in general "continue to face significant obstacles to 'full and equal' participation in the legal profession."²

Fast-forward to a June 2024 letter from the President of the ABA to ABA members. In referring to the fallout following the U.S. Supreme Court decision dismantling affirmative action in higher education, President Mary L. Smith stated, "despite these challenges, our dedication to diversity, equity and inclusion remains unwavering."³ She noted that Goal III in the ABA's mission explicitly commits the ABA to eliminating bias and enhancing diversity within the Association itself and the legal profession at large.⁴

Often, discourse related to diversity in the legal profession focuses on law school admissions. On the admissions front, the good news is that the latest data from the Law School Admission Council (LSAC) indicated that the national law school applicant pool includes more than 43% people of color—the highest percentage on record.⁵ While the number of applications from people of color is only one metric,⁶ demographic information on admitted lawyers also reveals that bar membership has steadily become more diverse, although white lawyers are still overrepresented as compared with their presence in the general population.⁷ According to the ABA *National Lawyer Population Survey*, the percentage of lawyers of color nearly doubled in the past decade.⁸

Although these trends are noteworthy, questions persist on how lawyers

1. ELIZABETH CHAMBLISS, *Executive Summary*, in MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 3–7 (2004).

2. *Id.* at 3, 6.

3. See Mary L. Smith, *The ABA's Unyielding Fidelity to Diversity*, 110 A.B.A. J. 6, 6 (2024).

4. See *id.* (noting that the pursuit of diversity involves "laying a foundation for the ABA and the nation to make it clear that equal opportunities must truly be available to all.").

5. Karen Sloan, *Law School Applicant Pool is Most Diverse Ever Amid Affirmative Action Ban*, REUTERS (Jan. 5, 2024, 1:31 PM), <https://www.reuters.com/legal/legalindustry/law-school-applicant-pool-is-most-diverse-ever-amid-affirmative-action-ban-2024-01-05/> [<https://perma.cc/VQ23-S32U>].

6. Law school acceptance rates and attrition, as well as bar passage and employment rates, impact the percentages of lawyers of color entering law practice. For a discussion of the differentials among racial and ethnic groups revealed in recent ABA data, see James Leipold, *Incoming Class of 2023 Is the Most Diverse Ever, But More Work Remains*, LSAC (Dec. 15, 2023), <https://www.lsac.org/blog/incoming-class-2023-most-diverse-ever-more-work-remains> [<https://perma.cc/7EF2-PKGY>].

7. See AM. BAR ASS'N, *Demographics*, in PROFILE OF THE LEGAL PROFESSION 23–24 (2023).

8. *Id.* (noting that the biggest change was in the number of Asian American lawyers).

of color are treated by the organized bar and regulators once the lawyers are admitted to practice. Specifically, a few authors have alleged disparate discipline of lawyers of color.⁹ As bluntly stated by one journalist, “[i]t’s all well and good for the State Bar to encourage people to become lawyers, but drop-kicking them once they passed the bar is not so helpful as discipline can range from private reproof to disbarment.”¹⁰

In support of the assertions and perceptions of disparities in discipline of lawyers of color, critics rely on the results of a small number of studies revealing disproportionality in sanctions imposed on Black and Hispanic lawyers. With limited scopes of inquiry, some of those studies point to disparate outcomes for lawyers of color, while identifying questions, possible interventions, and areas meriting further research. This article examines the issues related to disparities in attorney discipline systems and provides jurists, regulators, bar leaders, and other decision-makers with guidance on studying and addressing possible disparities.

Part I provides background information related to articulated concerns and perceptions regarding disparate treatment of lawyers of color who are respondents in disciplinary matters. Part II outlines the findings and recommendations of select studies related to disparities in attorney discipline. Drawing on those studies, Part III outlines research agendas for regulators to study possible disparities. Part IV identifies steps that regulators should take to rethink disciplinary procedures and practices to both tackle possible disparities and improve regulation, while advancing public protection. The conclusion links the role of asking hard questions, investigating concerns, and analyzing data with regulators’ responsibility to administer disciplinary systems that are consistent, fair, and impartial with respect to the treatment of both complainants and respondents.

This article covers research results and reports published since the 1980’s. Over this period of time, terminology has changed. This article adopts the terminology used in the original source. Otherwise, the article uses the phrase “lawyers of color” to refer collectively to lawyers who do

9. E.g., Andrea A. Curcio & Alexis Martinez, *Are Discipline Code Proceedings Another Example of Racial Disparities in Legal Education?*, 22 U. MD. L.J. RACE RELIGION GENDER & CLASS 1, 19–22 (2022).

10. Jill Switzer, *Inequalities in Lawyer Discipline Demand Action*, ABOVE THE L. (Feb. 11, 2021, 6:18 PM), [https://abovethelaw.com/2021/02/inequalities-in-lawyer-discipline-demand-action/#:~:text=The%20Farkas%20study%20found%20significant,than%20attorneys%20in%20larger%20firms.\[https://perma.cc/N7B9-ZHZ3\]](https://abovethelaw.com/2021/02/inequalities-in-lawyer-discipline-demand-action/#:~:text=The%20Farkas%20study%20found%20significant,than%20attorneys%20in%20larger%20firms.[https://perma.cc/N7B9-ZHZ3]).

not identify as white or of European origin.¹¹

I. CONCERNS RELATED TO DISPARATE TREATMENT OF LAWYERS OF COLOR IN THE DISCIPLINE PROCESS

Lawyers who were respondents in disciplinary matters, as well as commentators, have raised serious concerns about the disparate treatment of lawyers of color who face professional discipline. The following section examines criticism and concerns articulated by those who question whether attorney disciplinary processes are neutral or are affected by the race and ethnicity of the lawyer-respondents.

Developments and reports in California illustrate how lawyer-respondents may assert discrimination when defending disciplinary charges. Gregory Harper, a Black California attorney, challenged his disbarment in a petition to the California Supreme Court, alleging that the sanction he received was more severe than the sanction a white attorney would have received for similar misconduct.¹² Based on the results of a 2019 State Bar of California study that revealed disparate rates of probation and disbarment between Black male attorneys and white male attorneys, the Supreme Court of California ordered Harper's case to be returned to the State Bar Court of California's hearing department, and that discovery be reopened to permit Harper to obtain all data used in the study.¹³ After an evidentiary hearing, the State Bar Court found there was insufficient evidence to prove racial discrimination against Harper.¹⁴ He was disbarred in January 2024.¹⁵

Chima Anyanwu, another Black attorney from California, told the Los Angeles Times that he was an "easy target" for bar authorities when he was disciplined for minor violations of the ethics rules while prominent and

11. See *NIH Style Guide: Race and National Origin*, NAT'L INST. HEALTH (Jan. 17, 2024), [https://www.nih.gov/nih-style-guide/race-national-origin#:~:text=General%20guidance&text=Avoid%20using%20Black%20and%20White references%20to%20race%2C%20including%20White](https://www.nih.gov/nih-style-guide/race-national-origin#:~:text=General%20guidance&text=Avoid%20using%20Black%20and%20White references%20to%20race%2C%20including%20White.). [https://perma.cc/JAA6-BY58].

12. Cheryl Miller, *California Supreme Court Disbars Attorney Who Alleged Racial Bias Tainted His Discipline Case*, LAW.COM: THE RECORDER (Jan. 12, 2024, 6:46 PM), <https://www.law.com/therecorder/2024/01/12/california-supreme-court-disbars-attorney-who-alleged-racial-bias-tainted-his-discipline-case/> [https://perma.cc/LG9V-AHB3].

13. See *id.*

14. *Id.*

15. *Id.*

wealthy attorneys escaped accountability for egregious misconduct.¹⁶ Anyanwu, a solo practitioner, was accused of failing to promptly withdraw a \$4,000 legal fee from his client trust account.¹⁷ During the years that Anyanwu was being investigated, disciplinary authorities in California closed seven cases with no finding of wrongdoing against Tom Girardi—a well-known white lawyer—who had been accused of misappropriation, fraud, and other serious misconduct.¹⁸ Since then, it has been revealed that Girardi misappropriated millions of dollars from his clients and had more than 150 complaints made against him before the disciplinary authorities took formal action.¹⁹

Other Black attorneys, including Harper, told the Los Angeles Times they practice law in fear of making small accounting mistakes while white, well-off lawyers in big firms avoid the scrutiny of regulators.²⁰ Attorney Carl Douglas, who served on O.J. Simpson’s defense team, said, “[t]here is less rope Black lawyers are allowed before complaints are generated.”²¹ Los Angeles Times reporters learned that the tendency of California regulators to pursue minor misconduct was likely caused by pressure from state legislators, who fund the discipline system, to keep the number of pending cases low.²² Any “backlog” of cases was deemed by state legislators to be a sign of poor staff performance warranting less funding.²³ The reporters concluded the pressure on regulators to complete cases as quickly as

16. Harriet Ryan & Matt Hamilton, *As Tom Girardi Skated, California State Bar Went After Black Attorneys*, L.A. TIMES (Dec. 16, 2022, 7:49 AM), <https://www.latimes.com/california/story/2022-12-16/as-tom-girardi-skated-the-state-bar-went-after-black-attorneys> [<https://perma.cc/S65F-ER7R>].

17. *Id.* Anyanwu secured a settlement of \$64,000 for sixteen homeless people who had been evicted from an encampment. *Id.* All the clients received what they were owed but Anyanwu did not promptly withdraw his \$4,000 fee because he went abroad shortly after the settlement. *Id.* The withdrawal was delayed by five weeks. *Id.* For this, and two other small infractions, the Supreme Court of California imposed a thirty day suspension, ordered two years of probation, and required the attorney to retake a legal ethics examination. *Id.*

18. *Id.*

19. *Id.* Girardi was disbarred in 2022 and convicted of stealing \$15 million in settlement funds from his clients. See David Thomas, *California Jury Finds Ex-Lawyer Tom Girardi Guilty in Fraud Case*, REUTERS (Aug. 27, 2024, 2:37 PM), <https://www.reuters.com/legal/california-jury-finds-ex-lawyer-tom-girardi-guilty-fraud-case-2024-08-27/>.

20. See Ryan & Hamilton, *supra* note 16. Harper fought his disbarment over a \$21,000 dispute with a client, but this was the third time he faced discipline in thirty-two years. *Id.*

21. *Id.* Douglas received a public reproof in 1997 for allowing his secretary and an investigator to sign three subpoenas on his behalf while he worked on the Simpson case. *Id.*

22. *Id.*

23. See *id.*

possible means they have “little incentive to take on complex cases or those involving the rich and well-connected.”²⁴

Commentators have also raised concerns relating to the fairness of attorney disciplinary systems and the treatment of lawyers of color. As a starting point, some scholars have recognized that bar leaders and regulators cannot address these issues due to the lack of transparency in the disciplinary process, which makes it difficult to study whether there are disparate outcomes for lawyers of color.²⁵ Others have pointed to the lack of demographic data about lawyer-respondents that makes it nearly impossible to study whether outcomes for different groups of lawyers are proportionate to their representation in the bar.²⁶

In discussing possible disparate outcomes for lawyers of color, some critics have identified the lack of diversity among decision-makers imposing sanctions.²⁷ The underrepresentation of lawyers of color among

24. *Id.*

25. *See, e.g.*, Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 7 (2007). Professor Levin explains the unavailability of discipline information hurts the public and the profession because the secrecy in the process makes it difficult to learn (1) the extent of recidivism, (2) whether diversion programs work, (3) fairness based on firm size, and (4) fairness to minorities. Levin points to the perception among lawyers of color that they are treated differently than others in the disciplinary process and that the long history of secrecy in the process makes it hard to determine whether disciplinary agencies are acting fairly. *Id.* at 2–9; *see also, e.g.*, Jon J. Lee, *Private Sanctions, Public Harm?*, 48 BYU L. REV. 1255, 1341 (2023) (noting even though disciplinary authorities made modest efforts to improve transparency, more information is needed about use and effectiveness of private sanctions to better understand what types of attorneys typically receive private sanctions and to address whether private sanctions are disproportionately imposed along lines of race or gender-identity); Nancy Leong, *State Court Diversity and Attorney Discipline*, 89 FORDHAM L. REV. 1223, 1224 (2021) (noting that secrecy in attorney disciplinary proceedings obscures potential racial and gender disparities in who is sanctioned).

26. *See, e.g.*, Curcio & Martinez, *supra* note 9, at 19, 21 (noting most state bars do not maintain or publish data on race and ethnicity in discipline matters, but the few that do have found racial disparities, and the handful of studies that have been done began with the collection of demographic data); Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 786, 789, 794 (2004) (describing difficulty of determining gender of the disciplined lawyers when studying whether a “gender gap” exists in attorney discipline); Bruce A. Campbell & Ruth A. Kollman, *The Lady or the Tiger? Opening the Door to Lawyer Discipline Standards*, 1 FLA. COASTAL L.J. 231, 232 (1999) (when examining whether the disciplinary system in Texas had established uniformity, consistency, and predictability in the imposition of sanctions, researchers noted data was not maintained in a consistent manner and that a sophisticated analysis by age or gender demographics was impossible); Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 6 (1998) (cautioning that inadequate record-keeping and other issues make it difficult to obtain a clear picture of the consistency, efficacy, or fairness of imposing lawyer discipline sanctions).

27. *See, e.g.*, Lissa L. Broome & John M. Conley, *Diversity From the Perspective of Corporate*

regulators and adjudicators raises questions related to the role that implicit bias, stereotyping, and lack of empathy may play at different stages of disciplinary proceedings, possibly contributing to differential treatment and outcomes for lawyers of color.²⁸

A few experts recognize that lawyers of color may be subject to what appears to be a disproportionate number of complaints because they disproportionately work in solo and small firm practices.²⁹ Disciplinary reports from multiple U.S. jurisdictions reveal that lawyers in solo and small firm practices are disciplined at far greater rates than lawyers who work in other settings.³⁰ Another explanation offered for possible disparate outcomes relates to the fact that lawyers of color in solo and small firm practices may not be represented by counsel when responding to disciplinary complaints.³¹

Board and Lawyer Disciplinary Boards, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 121, 140 (2021) (pointing to Texas State Bar's efforts to have local disciplinary committees "fairly represent the racial, ethnic, and gender makeup of the [lawyers in the] districts they serve"); Leong, *supra* note 25, at 1223, 1234 (calling for more diversity in state supreme courts which are the ultimate arbiters of attorney behavior).

28. Curcio & Martinez, *supra* note 9, at 28–32.

29. *E.g.*, Broome & Conley, *supra* note 27, at 138–39 (explaining that individual clients file more complaints than corporate clients, and individuals are typically represented by solo practitioners and small firms); *see also* Caroline Spiezio, *Racial Bias in Attorney Discipline? Few States Track for It*, REUTERS (June 29, 2020), <https://www.reuters.com/article/idUSL1N2E60D2/> [<https://perma.cc/46AE-NKD2>] (quoting Professor David Wilkins, a Harvard Law Professor who studies legal ethics and race in the legal profession).

30. *See* Leslie C. Levin, *The Ethical World of Solo and Small Firm Lawyers Practitioners*, 41 HOUS. L. REV. 309, 312–314 (2004) (discussing disciplinary statistics and challenges faced by solo and small firm attorneys). As noted by Professor Levin:

Individual clients with personal plight problems may be more likely than corporate clients to file discipline complaints against their lawyers. This may occur because individuals of moderate means have fewer mechanisms for redress when their lawyers engage in wrongdoing than do corporate clients. In addition, individuals are more likely to be emotionally invested in their personal plight matters or more adversely affected by their outcomes. It may be easier for under-financed discipline systems to successfully prosecute cases against solo or small firm practitioners — who have fewer resources to defend against these complaints — than it is to pursue large firm lawyers who may be able to hide behind the conduct of others. Finally, bias within the disciplinary system may account for a disproportionate amount of discipline being imposed on solo and small firm practitioners.

Id. at 314 (citations omitted).

31. Curcio & Martinez, *supra* note 9, at 34 (referring to findings in a study conducted in California).

II. STUDIES INVOLVING DISPARITIES IN ATTORNEY DISCIPLINE

Despite the challenges, several U.S. regulators have analyzed data related to perceptions of, experiences with, and outcomes in the attorney disciplinary process. This section reviews some of the efforts to examine and improve the disciplinary process.

A. *State Bar of New Mexico*

The State Bar of New Mexico took an early lead in examining issues related to diversity of bar membership. In 1987, the Board of Bar Commissioners created the Task Force on Minorities in the Legal Profession (New Mexico Task Force).³² Among other responsibilities, the New Mexico Task Force was charged with studying whether a disproportionate number of minority attorneys in New Mexico had been subject to disciplinary proceedings and, if so, to discover the reasons for the disparity and steps the State Bar could take to correct it.³³

The New Mexico Task Force's first report in 1988 stated that Hispanic attorneys, who are the largest group of minority lawyers in the state, were being disciplined at a highly disproportionate rate when compared with the percentage of Hispanic attorneys who were active in-state bar members.³⁴ Although Hispanic attorneys constituted 14% of the lawyers in New Mexico, 29% of the lawyers sanctioned were Hispanic—a rate of more than two to one.³⁵

Task Force members surmised the reason for the disparity was because, of the 256 Hispanic attorneys in private practice in 1988, 125 or 49% were solo practitioners, and 78 or 30% were employed in firms with two to five attorneys.³⁶ “In other words, 79% of Hispanic attorneys in private practice were engaged in the type of practice with the greatest risk of receiving

32. TASK FORCE ON MINORITIES IN THE LEGAL PRO. II, STATE BAR OF N.M., THE STATUS OF MINORITY ATTORNEYS IN NEW MEXICO—AN UPDATE 1 (1990–1999) [hereinafter NEW MEXICO TASK FORCE II REPORT], <https://www.sbnm.org/Portals/NMBAR/PubRes/Reports/minoritytaskforcereportupdate.pdf?ver=Ie3xBOrH-XGOvAFFdOy-Mw%3D%3D> [https://perma.cc/MH7N-69B5].

33. *Id.* at 2.

34. *Id.* at 44.

35. TASK FORCE ON MINORITY INVOLVEMENT IN THE PRO., STATE BAR OF N.M., FINAL REPORT 67 (1990), https://www.sbnm.org/Portals/NMBAR/docs/Committees/Diversity/1989StatusofMinorities.pdf?ver=ccYUie0P4m_XluC-FxJmLA%3d%3d [https://perma.cc/C4V6-ST27].

36. NEW MEXICO TASK FORCE II REPORT, *supra* note 32, at 44 (summarizing the 1989 report).

sanctions, while only 53 Hispanic attorneys (21%) were employed in firms with six (6) or more attorneys with the lowest risk of receiving sanctions.”³⁷

Subsequently, a second Task Force, formed to monitor the status of minorities in the legal profession, published its report covering 1990–1999.³⁸ The report revealed little had changed for Hispanic attorneys during the 1990’s.³⁹ Between 1988 and 1997, Hispanic attorneys represented between 14% and 17% of all active in-state attorneys in New Mexico, but they received 26% of all serious discipline sanctions.⁴⁰ The Task Force believed the observations in 1988 report about Hispanic attorneys working primarily in solo and small firm practices held true in 1999.⁴¹

The second Task Force Report discusses reasons related to the disproportionate incidence of disciplinary sanctions for solo and small firm practitioners.⁴² In referring to an interview of the Chief Disciplinary Counsel Virginia L. Ferrara, the report offers the following explanations:

1. Solo and small firm practitioners commonly practice criminal law, domestic relations, personal injury, and bankruptcy—which are practice areas that often-times leave clients dissatisfied and more likely to file complaints;
2. They often take on more work than they can handle or lack the experience in particular fields to handle matters effectively and timely;
3. They lack effective guidance and mentoring;
4. They did not receive training in accounting or law office management; and

37. *Id.*

38. *Id.* at 4.

39. *Id.* at 45. Task Force II limited its comparative analysis to Hispanic attorneys because the number of minority attorneys other than Hispanics was too few to support any meaningful conclusions. *Id.*

40. *Id.* at 45–46. Task Force II limited its analysis to the most significant sanctions: (1) disbarment, (2) suspension (indefinite and time certain), (3) public censure, (4) formal reprimand, (5) informal admonition, (6) probation, and (7) letter of caution. *Id.* at 45.

41. *Id.* at 44.

42. *Id.* at 46–47.

5. The increasing number of attorneys in major communities prompts them to take on marginal cases which have a higher incidence of unsatisfactory results and disgruntled clients.⁴³

To address the concerns about the risks posed by solo and small firm practice, the Task Force made recommendations “to provide the training, support and guidance necessary to effectively address the practice and management problems chronically encountered by solo and small firm practitioners.”⁴⁴ The proposals included training for law students to learn about: small firm operation and client fund management, mandatory law office operation and trust fund accounting (for new admittees, solos and small firm lawyers), and the creation of cost-affordable, on-demand law office management courses.⁴⁵

A third, detailed study by the Committee on Diversity in the Legal Profession of the State Bar of New Mexico revealed that Hispanic attorneys continued to be disciplined at rates higher than their relative percentage of bar membership.⁴⁶ For example, between 2000 and 2007 Hispanic attorneys received 27% of the major sanctions but comprised only 18% of the membership of the bar.⁴⁷ Other minority groups were sanctioned at rates consistent with their membership levels, while white non-Hispanic members received fewer sanctions relative to their membership level.⁴⁸ In addition to the disparity between white and Hispanic lawyers sanctioned in New Mexico during this time period, the Committee also found a disparity between male and female attorneys. Male attorneys received 82% of the sanctions issued between 2000 and 2007, while female attorneys received

43. *See id.* at 46–47 (referring to regulator’s opinions about “why solo and small firm practitioners invariably find themselves in disciplinary problems”).

44. *Id.* at 47–48.

45. *Id.*

46. COMM. ON DIVERSITY IN THE LEGAL PRO., STATE BAR OF N.M., THE STATUS OF MINORITY ATTORNEYS IN NEW MEXICO—AN UPDATE 11 (1999–2009) [hereinafter NEW MEXICO TASK FORCE III REPORT],

<https://www.sbnm.org/Portals/NMBAR/docs/Committees/Diversity/2009StatusofMinorities.pdf?ver=XQeEQ1JSjVpfCKGe06dpdA%3D%3D> [https://perma.cc/J2B4-KDGF]. The Committee on Diversity in the Legal Profession is the successor in interest to the Standing Committee on Minorities in the Profession and the Task Force on Minorities in the Legal Profession. *Id.* at 2.

47. *Id.* at 11 (indicating the number of Hispanic attorneys in New Mexico also increased during this time).

48. *Id.*

only 18% of the major sanctions imposed despite comprising 37% of bar membership.⁴⁹

In the most recent study, the State Bar of New Mexico compared the number of complaints resulting in a sanction and the race or ethnicity of the lawyer-respondents with the membership numbers of all lawyers of the same race or ethnicity.⁵⁰ The results indicated that whites and Hispanics are the groups most likely to be the subject of complaints.⁵¹ However, Hispanic and Black bar members receive sanctions significantly higher than their bar membership levels, while white lawyers receive sanctions that on average are 20% less than their bar membership levels between 2009 and 2018.⁵² The report noted that Black and Hispanic members of the bar received sanctions in some years almost twice as high as their membership levels.⁵³

B. Virginia State Bar

In Virginia, a legislative committee recommended conducting a study to analyze the consistency of decision-making in the Virginia State Bar disciplinary system.⁵⁴ The Virginia Commonwealth University's Center for Public Policy examined whether there was a statistical difference in outcomes based on race, gender, age, firm size, and number of complaints.⁵⁵ Researchers observed differences in the frequencies of dismissals by race and gender.⁵⁶ A separate analysis was conducted to determine if the odds of receiving a sanction were statistically different based on specific

49. *Id.* at 11–12. The Task Force III Report noted no hard data about practice setting among those disciplined were available because attorneys were not required to report their practice setting when they received a disciplinary action. *Id.* at 11. The findings related to gender differences in discipline are consistent with findings in other studies. *See, e.g.,* Hatamyar & Simmons, *supra* note 26, at 799–800; LESLIE C. LEVIN & SUSAN SAAB FORTNEY, REPORT TO THE WISCONSIN OFFICE OF LAWYER REGULATION: ANALYSIS OF GRIEVANCE FILED IN CRIMINAL AND FAMILY MATTERS FROM 2013–2016, at 27 (2020).

50. COMM. ON DIVERSITY IN THE LEGAL PRO., STATE BAR OF N.M., THE STATUS OF MINORITY ATTORNEYS IN NEW MEXICO REPORT 63 (2019), <https://www.sbnm.org/Portals/NMBAR/PubRes/Reports/StatusMinorityAttys2019.pdf?ver=Ie3xBOrH-XGOvAFFdOy-Mw%3D%3D> [<https://perma.cc/AS62-2ZWE>].

51. *Id.*

52. *Id.*

53. *Id.*

54. MICHAEL D. PRATT, AN ANALYSIS OF THE CONSISTENCY OF DECISION-MAKING WITHIN THE VIRGINIA STATE BAR DISCIPLINARY SYSTEM 17–21 (2020).

55. *Id.*

56. *Id.*

demographics.⁵⁷ Researchers did not find that race, gender, or age made a difference in the outcome of a case, but firm size and the number of concurrent discipline cases were significant factors.⁵⁸ The final report to the Virginia State Bar, released in March 2000, summarized the findings by stating:

[We] find no statistical evidence that an attorney's race, gender or age affects the resolution of a case. However, it was determined that, for the study period, firm size and number of concurrent cases initiated during the study period are statistically significant in explaining the odds of receiving a sanction. The greater the number of attorneys in practice, the lower is the odds of being sanctioned. The greater the number of concurrent complaints initiated during the study period, the greater is the odds of being sanctioned. Each of these results likely reflects the nature of the legal practice. One might expect that in smaller firms, attorneys are more vulnerable to circumstances that affect the flow of their caseloads and practice requirements. Also, an attorney who has had a number of complaints received for investigation during a given period of time, is likely to have experienced business, professional and/or personal problems that affected their standards of practice.⁵⁹

C. Illinois Attorney Registration and Disciplinary Commission

Regulators in Illinois also took steps to study various issues related to

57. *Id.* A logit analysis was used to determine if the odds of receiving a sanction are statistically different based on gender, race, age, firm size, and number of concurrent cases initiated during the study period. *Id.* Because gender and race are qualitative variables, researchers used dummy variables in the logit regression. *Id.* The dummy variable, race, was set equal to one if the attorney is Black and set equal to zero for races other than Black. *Id.* Researchers explained the odds ratio can be interpreted to reflect the relative odds of a case associated with a Black attorney to be sanctioned relative to a case associated with a white attorney. *Id.* The dummy variable, gender, was set equal to one if the attorney is female and set equal to zero if the attorney is male. *Id.* Again, the odds ratio can be interpreted to reflect the relative odds of a case associated with a female being sanctioned compared to a case associated with a male. Gender, race, age, and firm size information was provided by survey respondents. *Id.* A closing survey by the Virginia State Bar provided the number of concurrent complaints. *Id.*

58. *Id.*

59. *Id.*

perceptions and treatment of lawyer-respondents. In 2002, the Illinois Attorney Registration and Disciplinary Commission (ARDC) of the Supreme Court of Illinois retained a research firm to survey Illinois lawyers to assess their perceptions of the fairness of ARDC's disciplinary process, particularly regarding racial issues.⁶⁰ The survey revealed approximately three-quarters of white and Black lawyer-respondents indicated that the disciplinary process was "very fair" or "somewhat fair," although Black lawyers were more likely than white lawyers to indicate that the process was "somewhat fair," as opposed to "very fair."⁶¹ Specifically, 47.2% of Black respondents rated the disciplinary process as "somewhat fair," compared to 33.2% of white respondents.⁶²

Notwithstanding the fairness ratings, the ARDC report stated "a majority of [B]lack lawyers, but few white lawyers, believe that race plays a role in the ARDC's disciplinary processes."⁶³ When asked whether they believe race plays a part in ARDC's investigating or disciplining a lawyer, 43.6% of Black lawyer-respondents indicated that they "strongly agree" or "somewhat agree" that race plays a role.⁶⁴ However, only 4.2% of white lawyer-respondents reported that they "strongly agree" or "somewhat agree" that race plays a role in the disciplinary process.⁶⁵

Both Black and white lawyers agree it is important for ARDC to know more about lawyers' perceptions regarding issues that involve race.⁶⁶ More than 95% of Black lawyer-respondents believe it is "very important" or "somewhat important" for regulators to be aware of lawyers' perceptions about race-related issues.⁶⁷ About two-thirds of white lawyer-respondents

60. ATT'Y REGISTRATION AND DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., 2002 ANNUAL REPORT 16 (2003) [hereinafter ARDC 2002 ANNUAL REPORT], <https://www.iardc.org/Files/AnnualReports/AnnualReport2002.pdf> [https://perma.cc/Y5XD-YD67]. The survey was done by telephone with 1,000 lawyers selected at random to participate. *Id.* at 16. Approximately 300 lawyers were chosen from *The Guide to Chicago's Black Lawyers* and the rosters of other African-American bar groups to ensure feedback was obtained from Black lawyers. *Id.* Only the perceptions of Black and white lawyers are discussed in the 2002 report. *Id.*

61. *Id.* at 17.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* When asked whether they believe the race of a complaining witness influenced the ARDC's decision whether to act on a case, 31.4% of Black lawyers reported they "strongly agree" or "somewhat agree" that the race of the complaining witness plays a role in acting on a case, while only 7.7% of white lawyers had the same perception. *Id.*

66. *Id.*

67. *Id.* Among Black lawyer-respondents, 76.6% said it is "very important" for ARDC to know

said it is “very important” or “somewhat important” for regulators to be aware of these perceptions.⁶⁸

Researchers also surveyed ARDC Board members, who handle disciplinary cases, to assess their perceptions of the disciplinary process.⁶⁹ Of the 82 Board member-respondents, 96% indicated that the race of the lawyer-respondent does not affect discipline, that they have not observed racial prejudice in the disciplinary process, and they have not observed the race of the lawyer-respondent or complaining witness playing a role in the disciplinary process.⁷⁰

Following the telephone survey, the ARDC took steps to address the perceptions of those who indicated that they did not have confidence in the racial fairness of the disciplinary system.⁷¹ According to its 2002 Annual Report, the ARDC engaged in dialogue regarding the survey findings with various groups including members of bar associations, the African-American legal community, and the National Organization of Bar Counsel.⁷² The 2002 report indicated that the ARDC was “attempting to gather demographic information on a sampling of lawyers who have been disciplined to see if discipline falls disproportionately on identifiable groups of lawyers, and, as the critical backdrop, to develop demographic data on the profession in general.”⁷³

The year after the perception survey, the ARDC released the results of a follow-up study on the demographic data of Illinois lawyers disciplined over a five-year period.⁷⁴ The ARDC staff and others who had been involved in disciplinary cases between 1998 and 2002 were asked to report

more about lawyers’ perceptions regarding issues that involve race. *Id.* Another 19.1% said it is “somewhat important.” *Id.*

68. *Id.* The survey shows 32.9% of white lawyer-respondents said it is “very important for ARDC to know more about lawyers’ perceptions regarding issues that involve race.” *Id.* And another 33.5% said it is “somewhat important.” *Id.*

69. *Id.* At the time of the survey in 2002, 25 of the 119 Board members were Black. *Id.*

70. *Id.* at 17–18. “Board members rated the disciplinary process as very fair (83%) or somewhat fair (12%), with 5% of respondents not answering that question.” *Id.* at 18.

71. *Id.* at 18.

72. *See id.* The ARDC 2002 Report on the perception survey concluded by stating that the ARDC “remains committed to a continuing dialogue with all members of the legal professional to investigate and address the causes of diverging views.” *Id.*

73. *Id.*

74. ATT’Y REGISTRATION AND DISCIPLINARY COMM’N OF THE SUP. CT. OF ILL., 2003 ANNUAL REPORT 18 (2004) [hereinafter ARDC 2003 ANNUAL REPORT], <https://www.iardc.org/Files/AnnualReports/AnnualReport2003.pdf> [<https://perma.cc/EE2M-YNUC>].

on the race, practice setting at the time the underlying misconduct occurred, and information about impairments that surfaced during the proceedings.⁷⁵ Of the 519 lawyers disciplined during this time period, 84% were identified as white, 11% were identified as Black, and the other 5% were identified as Hispanic, Asian/Pacific Islander, or unknown.⁷⁶ The study did not compare the percentages of lawyers in racial and ethnic groups to the percentages of groups represented within the total number of lawyers, but the report revealed the percentage of lawyers sanctioned who were solo practitioners at the time of the misconduct “far exceeds the percentage of Illinois lawyers who practice as solos.”⁷⁷ Regulators suggested several factors that may explain the higher incidence of discipline among solo practitioners including lack of oversight by other lawyers, few support staff, less sophisticated or nonexistent office systems, and representation of modest-means clients who may be more likely to file complaints with the ARDC.⁷⁸

D. State Bar of Texas

The State Bar of Texas Commission for Lawyer Discipline (Texas Commission) has published disciplinary statistics in its annual reports since at least the 2015–2016 bar year.⁷⁹ In recent years, the demographic information in the reports has become more detailed. The reports for 2015–2016 and 2016–2017 contained information relating to the number of complaints resolved by the Texas Commission and the number of attorneys sanctioned.⁸⁰ The Texas Commission also reported on the diversity of the

75. *Id.* at 18. The report notes 110 lawyers who were reciprocally disciplined based on sanctions imposed in another jurisdiction were excluded from the study. *Id.* at 18 n.1.

76. *Id.* at 18. Staff identification of respondents’ race and ethnicity, rather than self-reporting, raises questions on accuracy of the staff assessment.

77. *See id.* at 20.

78. *Id.*

79. COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT JUNE 1, 2015–MAY 31, 2016, at 17 (2016) [hereinafter TEXAS STATE BAR 2015–16 ANNUAL REPORT], https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&Template=/CM/ContentDisplay.cfm&ContentID=55305 [https://perma.cc/5DRP-SA4G]. The 2015–2016 Annual Report is the oldest report available online.

80. *Id.*; *see also* COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANN. REPORT JUNE 1, 2016–MAY 31, 2017, at 7 (2017) [hereinafter TEXAS STATE BAR 2016–17 ANNUAL REPORT], https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&Template=/CM/ContentDisplay.cfm&ContentID=55309 [https://perma.cc/WBC4-2DS4].

grievance committee membership.⁸¹

In the Annual Report for 2017–2018, the Texas Commission began including the race and gender of the lawyers disciplined.⁸² That report notes the “information regarding race and gender is based on information voluntarily provided by bar membership in the attorney profiles maintained by the State Bar of Texas and is therefore not a complete picture of gender and racial statistical information.”⁸³

In its reports for the past seven years, including its most recent report, the Texas Commission has not compared the percentages of lawyers disciplined to the diversity of the lawyer population of the State Bar of Texas.⁸⁴ However, it does compare the diversity of its grievance committee membership with State Bar membership and notes the importance of having its members “fairly represent the racial, ethnic, and gender makeup of the districts they serve.”⁸⁵

81. TEXAS STATE BAR 2015–16 ANNUAL REPORT, *supra* note 79, at 16; TEXAS STATE BAR 2016–17 ANNUAL REPORT, *supra* note 80, at 7.

82. COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT JUNE 1, 2017–MAY 31, 2018, at 8 (2018) [hereinafter TEXAS STATE BAR 2017–18 ANNUAL REPORT], https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&Template=/CM/ContentDisplay.cfm&ContentID=55299 [<https://perma.cc/VDL8RXA2>].

83. *Id.*

84. *See* COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT JUNE 1, 2023–MAY 31, 2024, at 5 (2024) [hereinafter TEXAS STATE BAR 2023–24 ANNUAL REPORT], https://www.texasbar.com/AM/Template.cfm?Section=Grievance_and_Ethics_Information1&Template=/CM/ContentDisplay.cfm&ContentID=65619 [perma.cc/AZ22-MU5U]; COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT JUNE 1, 2022–MAY 31, 2023, at 5 (2023), https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&ContentID=61567&Template=/CM/ContentDisplay.cfm [<https://perma.cc/3NMZ-XJ87>]; COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT JUNE 1, 2021–MAY 31, 2022, at 5 (2022), https://www.texasbar.com/AM/Template.cfm?Section=Grievance_and_Ethics_Information1&Template=/CM/ContentDisplay.cfm&ContentID=63431 [perma.cc/2P62-WN9F]; COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT JUNE 1, 2020–MAY 31, 2021, at 5 (2021), https://www.texasbar.com/AM/Template.cfm?Section=Grievance_and_Ethics_Information1&Template=/CM/ContentDisplay.cfm&ContentID=63430 [perma.cc/ZT72-5A33]; COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT JUNE 1, 2019–MAY 31, 2020, at 7 (2020), https://www.texasbar.com/AM/Template.cfm?Section=Grievance_and_Ethics_Information1&Template=/CM/ContentDisplay.cfm&ContentID=63429 [perma.cc/5YJ5-D68R]; COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT JUNE 1, 2018–MAY 31, 2019, at 8 (2019), https://www.texasbar.com/AM/Template.cfm?Section=Grievance_and_Ethics_Information1&Template=/CM/ContentDisplay.cfm&ContentID=63428 [perma.cc/N5LH-9HVV]; TEXAS STATE BAR 2017–18 ANNUAL REPORT, *supra* note 84, at 8.

85. TEXAS STATE BAR 2023–24 ANNUAL REPORT, *supra* note 84, at 13.

E. State Bar of California

In response to anecdotes about the over-representation of people of color among those attorneys disciplined, the State Bar of California “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.”⁸⁶ The State Bar of California retained George Farkas, a Distinguished Professor in the School of Education at the University of California, Irvine, to study California attorney data and evaluate the likelihood of different racial/ethnic groups and genders being placed on probation or being disbarred.⁸⁷

The data set was based on information from 116,363 attorneys admitted to the bar between 1990 and 2009 for whom race/ethnicity and gender information was available.⁸⁸ This sample represented 95% of all attorneys admitted during this period.⁸⁹ In analyzing the data, researchers evaluated the two most serious types of discipline imposed: probation and disbarment (including resignation with charges pending).⁹⁰

i. Farkas Study Findings

Professor Farkas’s study report to the State Bar of California (Farkas Study) included significant findings related to disciplinary outcomes. Researchers found the largest gender/race disparities between Black and white male attorneys.⁹¹ The probation rate for Black, male attorneys during

86. Dag MacLeod & Ron Pi, *Executive Summary, in Open Session Agenda Item 705*, STATE BAR OF CAL. 1 (2019), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025090.pdf> [https://perma.cc/VM7Q-MRTS].

87. *Id.* at 1–2.

88. *Id.* at 2. Demographic information came from the admissions database provided by the attorneys at the time they applied for the bar exam. GEORGE FARKAS, STATE BAR OF CAL., DISCREPANCIES BY RACE AND GENDER IN ATTORNEY DISCIPLINE BY THE STATE BAR OF CALIFORNIA: AN EMPIRICAL ANALYSIS 3 n.2 (2019), attached in *Open Session Agenda Item 705*, STATE BAR OF CAL. [hereinafter Farkas Study].

89. Macleod & Pi, *supra* note 86, at 2.

90. *Id.* “Case outcomes were used to create two measures: (1) Was the attorney ever placed on probation at least once but never disbarred during this period?; and (2) Was the attorney disbarred or did the attorney resign with charges pending during this period.” *Id.*

91. *Id.*

the study period was 3.2% compared to 0.9% for white, male attorneys.⁹² The disbarment/resignation rate for Black, male attorneys was 3.9% compared to 1% for white males.⁹³ Without controlling for other factors, the Farkas Study report concluded that Black, male attorneys were more than three times as likely to be placed on probation, and almost four times as likely to be disbarred as white, male attorneys.⁹⁴ The study found a similar pattern in comparing probation rates for female attorneys.⁹⁵

Honing in on the differences in discipline outcomes between Black male and white male attorneys, researchers used multiple regression analysis to control for nonracial factors that could explain the disparities.⁹⁶ After controlling for variables, including allegation type, firm size, and years of practice—the Farkas Study found that the racial disparities were statistically explained by larger numbers of complaints against Black male attorneys, more investigations opened against them, and a lower likelihood of being represented by defense counsel in disciplinary proceedings.⁹⁷ Among these findings, the number of prior complaints against an attorney was a significant predictor of whether the attorney would be put on probation, be disbarred, or resign.⁹⁸ Black male attorneys had the highest average number of complaints.⁹⁹

ii. The Robertson Report

Following the Farkas Study, the State Bar of California moved toward possible steps to address the factors that appeared to account for the disparities in disciplinary case outcomes. The State Bar of California retained Professor Christopher Robertson, then Professor at University of Arizona, now N. Neal Pike Scholar and Professor at the School of Law at

92. *Id.*

93. *Id.*

94. Farkas Study, *supra* note 88, at 7, 12–13.

95. *See id.* at 7. White female attorneys were put on probation at a rate of 0.4% compared to 0.9% for Black female attorneys and 0.5% for Hispanic female attorneys. *Id.*

96. *Id.* at 16–17.

97. *See id.*

98. *Id.* at 11–12.

99. Macleod & Pi, *supra* note 86, at 3–4. Probation and disbarment/resignation rates of Black male attorneys were greatly reduced, to 1.4% for probation and 1.6% for disbarment/resignation, when researchers attributed the number of complaints against white lawyers to Black lawyers during simulations. *Id.* at 4.

Boston University, to review the findings in the Farkas Study and recommend changes to the disciplinary system.¹⁰⁰ Professor Robertson provided a report to the State Bar of California (Robertson Report) outlining potential reforms and, in an oral presentation to the Board of Trustees, he proposed exploring five key areas that corresponded to the three main factors accounting for the racial disparities between Black male and white male attorneys: (1) the number of complaints, (2) the number of investigations opened, and (3) the likelihood of being represented by counsel in discipline proceedings.¹⁰¹ Professor Robertson delivered the following “menu of ideas” for exploration in his presentation to the Board of Trustees:

1. The handling of Reportable Action, Bank cases (RABs) concerning trust account nonsufficient fund (NSF) overdrafts;
2. Access to prior complaints that are closed with no discipline imposed;
3. Encouraging attorneys to seek counsel in a discipline investigation;
4. “Blinding” regulators from respondent attorney identities to reduce implicit bias in the process; and
5. The diversity of the Office of Chief Trial Counsel (OCTC) staff.¹⁰²

iii. Warning Language in Overdraft Letters and Updates to Overdraft Resources

Professor Robertson recommended several reforms to address the Farkas Study, finding that Black male attorneys were more likely to have a large number of RABs in which a bank reports an NSF overdraft of a

100. Dag MacLeod, *Executive Summary, in Open Session Agenda Item 701*, STATE BAR OF CAL. 1–2 (2020), <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000027646.pdf> [https://perma.cc/LR5V-TJ7S].

101. *Id.* at 2.

102. *See id.* at 2–7.

lawyer's trust account.¹⁰³ In examining the options for reform, the Office of Research & Institutional Accountability (ORIA) analyzed more than 100,000 RABs from 1991 to 2018 to determine whether RABs are a useful predictor of misconduct.¹⁰⁴ Surprisingly, the ORIA analysis showed the chance of a lawyer-respondent being disciplined is greater when the amount of the NSF overdraft is smaller.¹⁰⁵ When it comes to overdraft amounts greater than \$100, larger negative balances correlate with lower discipline risks.¹⁰⁶ To proactively warn attorneys that they could be in danger of facing a sanction, the California regulator now includes language in all RAB letters notifying attorneys that the failure to comply with trust account rules could lead to “serious consequences, including suspension or disbarment.”¹⁰⁷

iv. Prior Closed Complaints

The Farkas Study found that the number of prior complaints against an attorney is one of the variables most closely linked to probation and

103. See CHRISTOPHER T. ROBERTSON, POTENTIAL REFORMS TO MITIGATE RACIAL DISPARITIES IN THE CALIFORNIA STATE BAR ATTORNEY DISCIPLINE PROCESS 9–19 (2019), *attached in Open Session Agenda Item 701*, STATE BAR OF CAL. (2020) [hereinafter Robertson Report]. Although RABs were not part of the multiple regression analysis, Professor Robertson believed they were an interesting area of inquiry because (1) among attorneys with large numbers of complaints, Black attorneys were more likely to have a large number of RABs; and (2) because RABs 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.” Macleod, *supra* note 100, at 3; see also Farkas Study, *supra* note 88, at 6 tbl.4 (showing among attorneys with more than ten complaints, Black male attorneys had an average of 6.8 RABs compared to an average of 3.7 for white male attorneys).

104. Lisa Chavez, *Open Session Agenda Item 704*, STATE BAR OF CAL. 5–7 (2020), <https://board.calbar.ca.gov/Agenda.aspx?id=15820&tid=0&show=100026317&s=true#10034462> [<https://perma.cc/ECW3-ZS5U>].

105. *Id.* at 7.

106. *Id.* One OCTC staff attorney observed that larger NSF overdrafts were typically the result of occasional mistakes in account maintenance while smaller overdrafts, especially involving multiple incidents, were more often a reflection of more serious misconduct. *Id.*

107. Dag MacLeod & Lisa Chavez, *Open Session Agenda Item 701*, STATE BAR OF CAL. 3 (2021), <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000027245.pdf> [<https://perma.cc/Q7FG-DYLT>]; see also E-mail from Ann J. Kim, Deputy Trial Couns. at Off. of Chief Trial Couns., State Bar of Cal. (June 10, 2021) (on file with STATE BAR OF CAL.), [agendaitem1000027647.pdf](https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000027647.pdf). (ca.gov) [<https://perma.cc/3U4V-ENPP>] (warning “[f]ailure to adhere to basic principles of client trust fund accounting can lead to serious consequences, including suspension or disbarment” in e-mail with hidden recipient). The RAB closing letter also includes resources to assist attorneys in trust account management including a State Bar Client Trust Account School, a Handbook on Client Trust Accounting and the number for the State Bar Ethics Hotline. *Id.*

disbarment.¹⁰⁸ Regulators acknowledge they have no control over the complaints that are filed against attorneys, but they do have control over how they assess the complaints including the consideration of prior complaints that are closed without the imposition of discipline.¹⁰⁹ Given that a disproportionate number of complaints are filed against Black attorneys, regulators looked at whether their consideration of prior closed complaints when deciding whether to move a new case forward for investigation increased the odds of discipline.¹¹⁰

Professor Robertson made three recommendations related to the handling of prior closed complaints.¹¹¹ He suggested the State Bar could (1) expunge prior closed complaints after five years,¹¹² (2) archive complaints so that access would be rare and only upon written request to a supervisor,¹¹³ and (3) review prior closed complaints to identify at-risk attorneys who could benefit from proactive, non-disciplinary support.¹¹⁴ After considering Professor Robertson's recommendations, the Board of Trustees for the State Bar of California adopted an interim reform requiring the OCTC to archive prior closed complaints that are more than five years old and not take them into consideration in evaluating new complaints.¹¹⁵ Certain closed complaints were initially excluded from being archived; but in 2023, the Board of Directors expanded the reform to archive more complaints to further reduce the number of prior matters considered in the evaluation of new complaints.¹¹⁶

108. Macleod & Pi, *supra* note 86, at 4.

109. See Robertson Report, *supra* note 103, at 19–27.

110. See *id.*

111. See *id.*

112. *Id.* at 22.

113. *Id.* at 24.

114. *Id.* at 26.

115. *Regular Meeting of the Board of Trustees, Open Session Minutes Approval—July 16, 2020, Meeting*, STATE BAR OF CAL. 18–19 (2020) [hereinafter July 2020 Minutes Approval], <https://board.calbar.ca.gov/docs/agendaitem/public/agendaitem1000026574.pdf> [https://perma.cc/Y4NN-5BYM]. The interim reform permits exceptions with a written showing to an Assistant Chief Trial Counsel or higher within the OCTC. *Id.* At that time, prior closed complaints did not include those resolved with warning letters, directional letters, resource letters, or agreements in lieu of discipline. *Id.*

116. *Regular Meeting of the Board of Trustees, Open Session Minutes—Thursday, March 16, 2023*, STATE BAR OF CAL. 5–6 (2023), <https://board.calbar.ca.gov/docs/agendaitem/public/agendaitem1000030814.pdf> [https://perma.cc/CG8A-3KYS]. The Board of Trustees permitted the archiving of files closed with resource letters and also gave the OCTC discretion to grant certain exceptions to the archiving policy. *Id.*

v. Increasing Attorney Representation

Because the Farkas Study revealed that, on average, Black attorneys were about twice as likely to not be represented by counsel in disciplinary matters,¹¹⁷ Professor Robertson recommended steps to address the lack of legal representation.¹¹⁸ In order to encourage attorneys to retain counsel, Professor Robertson suggested that the bar test different messages to lawyers to ensure their efficacy, including messages explaining the increased likelihood of probation or disbarment if they fail to secure counsel.¹¹⁹ Other recommendations included tracking and reporting the number of discipline cases where the lawyer-respondent appears pro se as a key performance indicator and developing a roster of attorneys who could provide free, one-hour consultations.¹²⁰ The State Bar of California now sends a warning letter to all lawyers under investigation putting them on notice that their bar license is at risk and encouraging them to retain counsel.¹²¹ Case reports show an increase in the percentage of lawyer-respondents who retain representation since the bar began sending the warning letter.¹²²

vi. Staff Diversity

Professor Robertson also recommended a thorough review of the diversity of the OCTC staff.¹²³ He emphasized the important role of diverse decision-makers in minimizing biases and improving the perception of the OCTC's legitimacy.¹²⁴

117. Farkas Study, *supra* note 88, at 12.

118. Robertson Report, *supra* note 103, at 27.

119. *Id.* at 28–30.

120. *Id.* at 27–28, 29–31.

121. See E-mail from George S. Cardona, Chief Trial Couns., Off. Chief Trial Couns., State Bar of Cal., to Heather Zirke, attachment Licenseatrisk.pdf (July 28, 2024, 03:22 PM EST) (on file with authors).

122. Yun Xiang, *Open Session Agenda Item 60-2*, STATE BAR OF CAL. 20 (2023), <https://board.calbar.ca.gov/Agenda.aspx?id=17069&tid=0&show=100036479&s=true#10045247> [<https://perma.cc/E84A-HH9V>] (showing 10% increase in respondents retaining counsel between 2019 and 2021).

123. Robertson Report, *supra* note 103, at 35.

124. MacLeod, *supra* note 100, at 7. Generally, when new staff members joined the State Bar, they provided information about their race or ethnicity. *Id.* During the process of examining those records, staff learned that Human Resources employees were filling in any missing data about race or

vii. Ongoing Examination and Expungements

The State Bar of California’s Board of Trustees approved the formation of the Ad Hoc Commission on the Discipline System in November 2020.¹²⁵ Among other things, the Trustees charged the Commission with evaluating “procedural justice and the experiences and perceptions of the system by complaining witnesses and respondents” as well as internal operations.¹²⁶ It is noteworthy that the State Bar of California is continuing to gauge perceptions of the disciplinary system as it moves toward improvement of the process.

For the first time, the 2023 Annual Discipline Report released by the State Bar of California included the race/ethnicity and gender of disciplined attorneys.¹²⁷ The Supreme Court of California also amended its rules to require reporting of practice areas, websites, and firm size.¹²⁸ Given the recognized connection between firm size and practice areas, this move will provide meaningful data in studying whether race and ethnicity plays a role

ethnicity which meant the data were tainted. *Id.* It was recommended that new data be collected about the race or ethnicity of staff members. *Id.*

125. *Meeting of the Board of Trustees, Open Session Minutes Approval–November 19, 2020, Meeting*, STATE BAR OF CAL. 4 (2021) [hereinafter November 2020 Minutes Approval], <https://board.calbar.ca.gov/docs/agendaitem/public/agendaitem1000027022.pdf> [https://perma.cc/PN43-3JLN]. Professor Robertson had proposed the creation of an office to oversee efforts to establish equity in the discipline system that could be called the Discipline Equity Office. *See* Robertson Report, *supra* note 103, at 32–34.

126. November 2020 Minutes Approval, *supra* note 125, at 4 (approving the Ad Hoc Committee Charter); *see also* Lisa Chavez, *Open Session Agenda Item 702*, STATE BAR OF CAL. 2–3 (2020), <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000026770.pdf> [https://perma.cc/4JZX-KEPQ] (recommending Ad Hoc Committee composition and charter).

127. Press Release, State Bar of Cal., Attorney Race/Ethnicity and Gender Discipline Analysis Included in Annual Discipline Report (Oct. 30, 2023) [hereinafter California State Bar Press Release], <https://www.calbar.ca.gov/About-Us/News/News-Releases/attorney-raceethnicity-and-gender-discipline-analysis-included-in-annual-discipline-report> [https://perma.cc/VJ2E-ZWUA]. The report showed Black attorneys comprised 3% of California licensed attorneys and 3% of those who were disciplined and white attorneys comprised 65% of California licensed attorneys and 67% of those disciplined. *Id.* There was a significant disparity in the gender analysis with women making up 42% of attorneys and only 18% of those disciplined and male attorneys comprising 55% of licensed attorneys received 77% of all discipline. *Id.*; *see also* STATE BAR OF CAL., ANNUAL DISCIPLINE REPORT: FISCAL YEAR ENDING JUNE 30, 2023 (Oct. 23, 2023), <https://www.calbar.ca.gov/Portals/0/documents/reports/2023-Annual-Discipline-Report.pdf> [https://perma.cc/AX2S-MBNV].

128. *See* Merrill Balassone, *California Supreme Court Amends Rules of Court Related to State Bar of California*, CAL. CTS. NEWSROOM (Dec. 21, 2023), <https://newsroom.courts.ca.gov/news/california-supreme-court-amends-rules-court-related-state-bar-california> [https://perma.cc/R5G9-BJKG].

in attorney discipline.

In May 2024, the State Bar of California's Board of Trustees approved a recommendation of the Ad Hoc Commission calling for the expungement of discipline records of lawyers who have not been disbarred after eight years if there is no further discipline.¹²⁹ In reviewing the rates of recidivism, lawyers who committed new misconduct typically did so within the first few years after their first disciplinary action.¹³⁰ The expungement plan is expected to benefit thousands of lawyers who would otherwise have to petition the Supreme Court of California for expungement.¹³¹ Approval of rule changes by the trustees and later approval by the Supreme Court and legislature are required before the plan can be implemented.¹³²

In 2024, the State Bar of California will complete a new discipline disparity study to follow-up on the Farkas Study.¹³³ The new study explores factors that contribute to any noticeable disparities, including race/ethnicity, gender, age, practice area and setting, and firm size.¹³⁴ The bar plans to release the study's findings in 2025.¹³⁵

III. DEVELOPING RESEARCH AGENDAS FOR EXAMINING DISPARITIES

The studies and assessments discussed in Part II provide a groundwork for regulators and bar leaders interested in examining and addressing concerns associated with possible disparate treatment and outcomes when lawyers of color face professional discipline. Building on steps that have been taken or recommended, this part discusses a range of strategies for studying possible disparities and perceived disparities.

129. Debra Cassens Weiss, *California Bar Plans to Expunge Attorney Discipline Records Under Certain Conditions*, A.B.A. J. (May 20, 2024, 9:21 AM), <https://www.abajournal.com/news/article/plan-to-expunge-attorney-discipline-records-after-this-occurs-gets-california-bar-approval> [<https://perma.cc/7KQZ-W84X>].

130. Lynn LaRowe, *Calif. Bar Approves Plan to Expunge Nondisbarment Records*, LAW360 (May 17, 2024, 4:26 PM), <https://www.law360.com/legalethics/articles/1838617/calif-bar-approves-plan-to-expunge-nondisbarment-records> [perma.cc/GG87-2W5Q].

131. *See id.*

132. Weiss, *supra* note 129.

133. California State Bar Press Release, *supra* note 127, at 7.

134. *Id.*

135. *See* E-mail from Yun Xiang, Deputy Chief Mission Off., Mission Advancement and Accountability Div., State Bar of Cal., to Susan Fortney, Professor, Tex. A&M Univ. Sch. of L. (June 6, 2024, 12:13 PM CST) (on file with authors).

A. Recognizing the Concern Related to Discriminatory Treatment and Outcomes

As a starting point, regulators, bar leaders, and jurists who oversee the legal profession should recognize the importance of addressing perceptions and questions related to disparities in attorney disciplinary systems. Although critics have asserted since at least the 1990's that race and ethnicity play a role in the experience of lawyers responding to professional discipline complaints, the issue of racial and ethnic disparities has largely been unexamined by state bars and regulators.¹³⁶ While the studies discussed in Part II provide some insights, the research was limited by scope and jurisdiction.

State regulators across the country should take note of the limited research on racial and ethnic disparities and undertake their own assessments to determine if problems exist in their own jurisdictions. As stated by Professor Andrea Curcio, “[t]he bottom line is that states should study this and, if they find problems, begin to study why the problems exist and how to remedy them.”¹³⁷

B. Collecting Demographic Data

The challenge in studying possible racial and ethnic disparities is most jurisdictions do not keep or publicize statistics on the race and ethnicity of lawyer-respondents in disciplinary matters.¹³⁸ Testing questions related to disparities requires such demographic data.¹³⁹

Lawyer-respondents may seek data to support their claims alleging discrimination by disciplinary authorities. This recently occurred in California when Gregory Harper, a lawyer referred to in Part II, obtained data underlying the Farkas Study and Robertson Report through

136. See Andrew Strickler, *The Bar's Unasked Question About Race and Atty Discipline*, LAW360 (May 8, 2023, 4:45 PM), <https://www.law360.com/articles/1604821/the-bar-s-unasked-question-about-race-and-atty-discipline> [<https://perma.cc/EK-X2-W4SR>] (stating that the “hot-button issues” of racial disparities in disciplinary actions is often recognized but rarely discussed directly and “largely unexamined by state bars”).

137. *Id.* (quoting Professor Andrea Curcio).

138. Curcio & Martinez, *supra* note 9, at 19.

139. Strickler, *supra* note 136 (quoting Professor Leslie Levin). For a discussion of collecting racial and ethnicity data, see Ryan & Hamilton, *supra* note 16.

discovery.¹⁴⁰ Although the Supreme Court of California eventually disbarred Harper in 2024, the controversy illustrates the relevance of data to lawyer-respondents asserting disparate treatment.¹⁴¹

Other individual lawyer-respondents may need data to prove claims of discrimination. At the same time, some members of the bar may express misgivings on the collection and use of data because these efforts may be viewed through a political lens.¹⁴²

Going beyond the interests of individual lawyer-respondents seeking data to establish discrimination, members of the bench and bar concerned about a perceived lack of equitable treatment and integrity in the disciplinary process should consider approaches to allay concerns related to data collection. Because demographic information needs to be collected to study possible disparate treatment and outcomes based on race and ethnicity, regulators should consider approaches that allow them to collect race and ethnicity data, while addressing the concerns and unintended consequences of doing so.

In formulating an approach to data collection, regulators could consult leaders of minority bars, as well as persons who have objected to asking lawyers to report their race and ethnicity. In such consultations, regulators and bar leaders might explain that analyzing possible disparities requires demographic information on lawyer-respondents' race, ethnicity, and gender.¹⁴³ Through collaborative discourse, participants may be able to develop a demographic collection procedure that addresses the concerns of those who have criticized and resisted demographic reporting.

140. See Miller, *supra* note 12. In remanding the matter to the State Bar Court hearing body in 2021, the California Supreme Court stated, “[t]he Hearing Department shall reopen discovery to permit Harper to obtain all data reviewed for purposes of the Farkas study and the Robertson report with identifying information redacted.” *Id.*

141. *Id.* Following an evidentiary hearing, a State Bar Court judge found there was insufficient evidence to establish Harper had been discriminated against on the basis of race. *Id.*

142. See Strickler, *supra* note 136. It is hard to imagine in this day and age a bar not collecting basic demographic data: “[u]nfortunately, any conversation about that is often viewed in the lens of ‘progressives’ or being political and too left . . . so even asking for this data is a huge political challenge.” *Id.*

143. Persons who develop the questions related to race, ethnicity, gender, and other demographic information should follow the best practices recommended by experts in designing choices that are inclusive. See, e.g., *Creating Inclusive Surveys*, PENN LIBR. (July 7, 2022, 11:52 AM), <https://guides.library.upenn.edu/inclusive-surveys/demographics> [https://perma.cc/E7TL-DU6T] (recommending approaches including allowing participant to provide multiple answers because people may identify with more than one group).

A concern associated with data collection relates to how such information may affect the handling of disciplinary matters. This risk may be addressed by disassociating the collection of demographic information from the disciplinary process.¹⁴⁴ One approach for doing so would be to only compile and assess the demographic data after disciplinary matters are dismissed or completed. This could be accomplished by pulling the demographic information from the attorney registration or admission records that reveal attorneys' race, ethnicity and gender.¹⁴⁵ In jurisdictions where annual registration forms request demographic information, one option would be to allow attorneys to self-identify their race, ethnicity, and gender. Attorneys who do not want to reveal such information may be given an option to decline to answer those questions.¹⁴⁶ A problem related to allowing attorneys to opt out of disclosing demographic information is it may skew the results of any study if there are a significant number of persons who do not reveal their race, ethnicity, and gender.¹⁴⁷ This type of

144. This "color-blind" approach would only apply to the disciplinary records. It does not deal with race or ethnicity influencing regulators or decisionmakers who learn the race or ethnicity of respondents through internet searches, other research, or personal communications with respondents. Even if the records available to regulators and decisionmakers do not reveal the race and entity of respondents, persons handling disciplinary complaints may attempt to assess race and ethnicity of respondents based on the respondents' appearances in hearings and other interactions.

145. See Spiezio, *supra* note 29 (reporting that 2019 California report was created by linking demographic information from attorney admission records to separate discipline history data).

146. In the past, the Illinois ARDC also used a voluntary disclosure approach. ARDC 2003 ANNUAL REPORT, *supra* note 74, at 5. According to an ARDC annual report, the ARDC requested that Illinois lawyers voluntarily provide information about their race and practice setting. *Id.* The following describes the motivation for seeking information and the representations made on access to the information:

Recognizing competing views on whether the information should be collected, the [ARDC] decided to make the request in light of the scarcity of data available from other sources and the importance of being able to assess how [ARDC] policies impact identifiable segments of the lawyer population. The [ARDC] pledged that any information reported would be maintained separately from registration or disciplinary data, in such a way that it would be accessible only to computer staff for purpose of demographic studies directed by the [ARDC], and that no [ARDC] staff who work on disciplinary cases would be able to access the data on race or practice setting.

Id.

147. When the ARDC's 2004 annual registration asked lawyers to voluntarily provide their race and practice setting, one-third of the lawyers who registered volunteered the data. *Id.* Due to the response rate and because the responses are not random, the 2003 Annual Report stated that it was "unclear that the data is statistically reliable." *Id.* Demographic information from registration and admissions records may also be used for studying non-disciplinary issues. *Id.*

non-response error would need to be considered during data analysis.

C. Systematically Studying Perceived Disparities

By having databases with demographic information, stakeholders can move forward with a systematic study of whether there is disparate treatment and outcomes for lawyer-respondents of color. Given the complex and sensitive nature of such a study, bar leaders and regulators should carefully investigate and vet who will conduct the study and the proposed methodology. Although some state bars or regulators may consider relying on internal investigators, such as professionals in a state bar research office, studies related to possible disparities may gain more credibility with the general public and lawyer groups if independent experts serve as the principal researchers. In evaluating prospective experts, bar leaders should consider researchers with training and experience in conducting statistical studies, such as studies related to discrimination and disparate treatment and impact. Equally as important are empirical researchers who understand attorney discipline systems.

Depending on the circumstances and availability of experts, decision-makers may assemble a team to formulate the methodology and conduct the research. The study design and research questions will depend on the needs in the jurisdiction, as well as the disciplinary system's structure, procedures, and available sanctions. A larger advisory group with representatives from diverse sectors of the bar could provide feedback and guidance on the proposed research design and questions.

Researchers selected to study possible disparities will benefit from learning about approaches, inquiries, and findings from studies completed in other jurisdictions. Most notably, this includes the Farkas Study provided to the California Board of Trustees in 2019, as well as the California Study scheduled for release in 2025.¹⁴⁸ For example, the Farkas Study found that the rate of discipline for solos was 5% for both probation and disbarment, while the rate of discipline for all other groups combined were 1.5% for probation and 1.9% for disbarment.¹⁴⁹ As with other studies, this suggests the importance of considering the impact of firm size and the relative high percentage of lawyers of color in solo and small firm practices where

148. See *supra* note 86; see *supra* note 135 and accompanying text.

149. Macleod & Pi, *supra* note 86, at 5.

disciplinary complaints are more common compared to other practice areas.

Because practice type is a race-neutral explanation known to affect the numbers of disciplinary complaints, any study of disparate treatment based on race and ethnicity should examine the impact of firm size. The Executive Summary of the 2019 Farkas Study appeared to recognize the importance of factoring in practice type in future research. In recommending that practice type be examined, the Executive Summary accompanying the Farkas Study recommended that the State Bar of California seek data on the distribution of complaints across different practice areas or practice settings.¹⁵⁰ As suggested by the Executive Summary, any jurisdiction studying possible disparate treatment and outcomes should include some analysis of practice size, complaints data, discipline rates, and the percentage of lawyer-respondents of color working in solo or small firm practices.¹⁵¹

Other studies may also inform the scope of inquiry. Although it may make sense to start an examination with possible disparate outcomes involving suspensions and disbarments, narrowing the analysis to such serious sanctions does not capture many other points in the disciplinary process when discrimination could occur. For example, jurisdictions should consider studying dismissal rates of complaints against lawyers of color compared to white lawyers. Recognizing difficulties in making comparisons, researchers could evaluate the percentages of lawyers offered alternatives to discipline, such as diversion. This type of examination will likely involve considerable time and resources but promises to result in a more complete picture of possible disparities.

Some jurisdictions may not have the capacity to commission a comprehensive study. Those jurisdictions may determine that it is feasible to limit the scope of inquiry. For example, a state may use an approach similar to California, by starting with an analysis of the matters where lawyers were suspended or disbarred.

Those states that do not conduct research on outcomes may consider studying bar members' and complainants' perceptions of the disciplinary system.¹⁵² Obtaining quantitative and qualitative data may help regulators

150. *Id.* at 6.

151. *Id.*

152. *See, e.g.*, ARDC 2002 ANNUAL REPORT, *supra* note 60 (annual report discussing a perception study conducted by the ARDC).

consider steps to address why lawyers and participants in the disciplinary system may believe that individuals are not treated fairly and equitably.

Finally, any examination of issues related to disparities in discipline should consider studies conducted in other countries. Notably, the Solicitors Regulation Authority (SRA)—the regulator for solicitors and law firms in England and Wales—commissioned a major study to examine overrepresentation of Black, Asian and minority ethnic (BAME) solicitors in disciplinary complaints.¹⁵³ This study by an independent consortium of teams from three universities involves an objective and in-depth analysis of datasets, as well as interviews, to explore the experiences of solicitors and behaviors among legal service users.¹⁵⁴

The first step in the SRA study was a systematic literature review, released in 2023.¹⁵⁵ This literature review identified a range of factors that may explain why BAME solicitors are overrepresented in complaints.¹⁵⁶ The researchers highlighted two potential explanations. First, the literature review noted that BAME solicitors are “more likely to be reported because of the socio-cognitive biases in those making complaints about potential misconduct.”¹⁵⁷ Second, the literature review noted that BAME solicitors “may be more exposed to individual, organisational, and case-related factors that either increase the likelihood of complaints being made about potential misconduct, or impact the risk of misconduct itself.”¹⁵⁸ Although the regulatory regime for solicitors may be different from disciplinary systems in the U.S., U.S. regulators examining disparity issues should consider the literature review conducted for the SRA, as well as study findings and recommendations to be released. The SRA research and recommendations may help inform the factors that U.S. regulators attempt

153. Paul Philip, *Complaints to the SRA—Addressing Over-Representation of BAME Solicitors*, LAW SOC’Y GAZETTE (June 23, 2023), <https://www.lawgazette.co.uk/commentary-and-opinion/complaints-to-the-sra-addressing-over-representation-of-bame-solicitors/5116429.article> [<https://perma.cc/4B9P-PZP3>].

154. *Id.*

155. *Id.*; For the literature review, see UNIV. OF YORK ET AL., OVERREPRESENTATION OF BLACK, ASIAN AND MINORITY ETHNIC SOLICITORS IN REPORTS TO THE SRA: A REVIEW OF THE RELEVANT LITERATURE (2023), <https://www.sra.org.uk/sra/research-publications/over-rep-black-asian-minority-ethnic-solicitors-reports> [<https://perma.cc/P5H6-UGGY>].

156. See UNIV. OF YORK ET AL., *supra* note 155, at 19–45.

157. *Id.* at 5. “Socio-cognitive biases relate to how a person’s cultural or societal background may influence their conscious and unconscious perceptions or expectations of others. This in turn may make some groups more likely to complain about certain other groups.” *Id.*

158. *Id.*

to study, as well as possible strategies to address disparity concerns.

IV. STRATEGIES TO ADDRESS POSSIBLE DISPARITIES AND PERCEIVED DISPARITIES

Even when bar leaders and jurists demonstrate the will to study and devote resources to systematically examining possible disparities, designing the study and obtaining results may take years. In the meantime, bar leaders and regulators may consider steps to improve disciplinary processes, the equitable treatment of all lawyer-respondents, and public protection measures. The initiatives described below could also be pursued in jurisdictions where decision-makers are unwilling, unable, or lack the resources to formally study possible disparities.

A. Facilitating Representation by Experienced Respondent Counsel

In the Farkas Study, representation by counsel was the second strongest predictor of probation and disbarment.¹⁵⁹ Recognizing that representation of lawyer-respondents was an underlying factor that generated disparate outcomes, Professor Robertson made specific recommendations related to representation of lawyer-respondents.¹⁶⁰ The recommendations suggested, at a minimum, that the State Bar of California track and report the proportion of discipline cases lacking representation as a key performance indicator.¹⁶¹ By tracking this information, Robertson suggests that the State Bar can better monitor the success of other recommendations to improve the rates of representation.¹⁶² To overcome the resistance of lawyers to retain counsel, another recommendation is that the State Bar inform attorneys facing discipline about the increased statistical likelihood of probation or disbarment if they fail to secure counsel.¹⁶³ To make it easier for lawyer-respondents to find and secure counsel, Professor Robertson also recommended that the State Bar develop a roster of attorneys who agree to

159. Farkas Study, *supra* note 88, at 16.

160. *See supra* notes 100–102 and accompanying text.

161. Robertson Report, *supra* note 103, at 28. For a complete discussion of Professor Robertson's assessment and recommendations, see *id.* at 28–32.

162. *Id.* at 28.

163. *Id.* at 29 (referring to the “nudge” approach used in policy and law literature to indicate a concerted effort to change behavior).

provide pro bono, one-hour consultations and provide a subset of names in the letter informing lawyer-respondents about the impact of hiring counsel.¹⁶⁴ Another reform he proposed was related to facilitating sliding scale representation.¹⁶⁵

Regulators, bar leaders, and jurists who oversee lawyer regulation in a state should consider the Robertson recommendations and other steps that might increase the percentage of lawyer-respondents represented by counsel. Members of the National Organization of Bar Counsel could consult with respondent counsel in the Association of Professional Responsibility Lawyers to develop strategies and incentives for lawyers to provide pro bono, limited scope, and reduced fee representation for lawyer-respondents. For example, regulatory and respondent counsel could explore the possibility of an appointment wheel for respondent counsel who volunteer to represent lawyer-respondents who meet eligibility criteria. Bar groups could also play a role in educating lawyers on the terms of lawyers' professional liability insurance policies, including those that may provide limited defense costs for disciplinary matters.¹⁶⁶

B. Steps to Advance More Consistency in the Handling of Complaints and Imposition of Sanctions

Based on their own experiences and public reports of discipline of other lawyers, lawyers of color have asserted that sanctions imposed on them are more severe as compared to sanctions imposed on white attorneys for similar or more serious alleged misconduct.¹⁶⁷ To address concerns related to possible disparate treatment, some commentators have urged disciplinary authorities to take steps to promote more transparency, consistency, and fairness in their prosecution decisions and imposition of sanctions.¹⁶⁸

164. *Id.* at 30 (identifying Arizona and Oregon as two states where the bar assists with coordinating volunteer attorneys who may advise respondents).

165. *Id.* at 32 (indicating that interviews with the defense bar suggest interest in alternative fee arrangements, but further study is necessary).

166. See Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PROF. 41, 45 (2004) (noting that legal malpractice policies must expressly provide for coverage for defense costs in disciplinary matters).

167. See *supra* notes 12–21 and accompanying text.

168. See, e.g., Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151, 180 (2022) (examining problems created by selective disciplinary enforcement); Stephen Gillers, *Lowering the Bar, How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB.

“[C]onsistency is important to the credibility, effectiveness, and fairness of any discipline system, and efforts to achieve some measure of consistency are essential even if they do not succeed in all respects.”¹⁶⁹

i. Addressing Inconsistency in Screening Matters

As a starting point, regulators should determine whether their jurisdictions’ rules of disciplinary procedure or their equivalent articulate clear standards for determining when a filing made by a complaining person merits investigation, dismissal or other action. For screening allegations against attorneys, a jurisdiction’s rules may adopt the general approach used in the ABA Model Rules of Disciplinary Enforcement. As stated in Rule 11:

The disciplinary counsel shall evaluate all information coming to his or her attention by complaint or from other sources alleging lawyer misconduct or incapacity If the information, if true, would not constitute misconduct or incapacity, the matter may be referred to the central intake office, or to any of the component agencies of the comprehensive system of lawyer regulation established by Rule 1, or dismissed. If the lawyer is subject to the jurisdiction of the court and the information alleges facts which, if true, would constitute misconduct or incapacity, disciplinary counsel shall conduct an investigation.¹⁷⁰

Although this rule does not provide much guidance on the evaluation process, Rule 4 states that the duties of disciplinary counsel include: “[Issuing] written guidelines for use by the central intake office and disciplinary counsel to determine which matters shall be dismissed for failing to allege facts that, if true, would constitute grounds for disciplinary action.”¹⁷¹

POL’Y 485, 493–94 (2014) (urging the use of statewide standards to bring New York courts closer to “imposing substantially the same sanction in similar circumstances throughout the state”).

169. Levin, *supra* note 30, at 31.

170. MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 11(A) (AM. BAR ASS’N 2002).

171. *Id.* at r. 4(B)(7). Compare *id.* with RESTATEMENT (THIRD) OF L. GOVERNING LAWS. ch. 1, topic 2, intro. note (AM. L. INST. 2000) (stating ABA Model Rules for Lawyer Disciplinary Enforcement charge professional disciplinary counsel with the responsibility to prosecute offenses, often following review by a screening body to determine whether probable cause exists warranting formal charges).

Jurisdictions that do not have parameters for evaluating whether matters should be dismissed, referred, or investigated should adopt guidelines that expressly describe what should be considered in the determination of whether a matter constitutes professional misconduct. Although the practice may involve determining if the submitted information constitutes professional misconduct if true, written guidelines should clearly describe the evaluation process. For example, guidelines could specify an “eight corners approach” requiring a comparison of the “four corners” of the written submission, taken as true, to the “four corners” of the rules of professional conduct. Such screening guidelines could clarify the evaluation standards and help avoid situations where screeners use their own criteria when considering which matters proceed to investigation. Clarification could also provide more transparency on when a disciplinary authority makes “institutional choices” on prosecuting types of alleged misconduct.¹⁷² For consistent treatment of attorneys, the chief disciplinary counsel or someone else in the office should also periodically monitor office practices to determine if the screeners are following the adopted guidelines.

ii. Examining Standards for Imposing Sanctions

Discourse related to consistency in lawyer discipline often focuses on the use and efficacy of the ABA Standards for Imposing Lawyer Sanctions (ABA Standards), the resource that the majority of states consult in determining the appropriate sanction in professional discipline cases.¹⁷³ The ABA House of Delegates adopted the ABA Standards in 1986 and amended them in 1992.¹⁷⁴ Although the ABA Standards were published—in large

172. Compare Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 806–15 (2004) (examining data and advantages supporting disciplinary authorities’ institutional choice to defer litigation misconduct to the courts) with Jona Goldschmidt, *How Do Lawyer Disciplinary Agencies Enforce Rules Against Litigation Misconduct? Or Do They? Results of a Case Study and a National Survey of Disciplinary Counsel*, 27 SUFFOLK J. TRIAL & APP. ADVOC. 1, 4–5 (2022) (asserting that disciplinary authorities should pursue matters involving litigation misconduct to maintain their independence from the courts and retain public trust and confidence in the justice system).

173. Alex B. Long, *Imposing Lawyer Sanctions in a Post-January 6 World*, 36 GEO. J. LEGAL ETHICS 273, 284 n.80 (2023) (identifying jurisdictions that use ABA Standards for Imposing Lawyer Discipline).

174. AM. BAR ASS’N, *ABA Standards for Imposing Lawyer Sanctions*, in ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 347 (2002) [hereinafter ABA Standards for Imposing Sanctions].

part—to address the concern over inconsistency in disciplinary systems, an examination of the content of the ABA Standards and their application reveals that questions related to consistency and fairness persist. As described by Professor Leslie C. Levin, in her thorough analysis of the ABA Standards:

The Standards were an important first attempt to provide consistency and fairness in the imposition of sanctions A review of the ABA Standards and their application by the courts shows, however, that their voluntary nature and their lack of specificity invite inconsistency in their application. They provide little more than a loose framework for approaching the sanctioning decision and, as a result, they leave considerable room for bias in the process and for ineffective discipline.¹⁷⁵

In her critique, Professor Levin identified specific problems with the ABA Standards and their failure to “promote the considered decision-making or provide the consistency sought by the ABA Sanctions Committee” that developed the ABA Standards.¹⁷⁶ Professor Levin followed her discussion of flaws and problems with specific recommendations for improving the content and use of standards to better meet the goals of lawyer discipline.¹⁷⁷

In 2023, Professor Alex Long revisited the issue of imposing sanctions and the role of the ABA Standards. In criticizing the ABA Standards, he described various shortcomings and how the shortcomings sometimes resulted in “inconsistent and lesser sanctions, both of which undermine the goals of the disciplinary system.”¹⁷⁸ After describing the “deeply flawed approach” used in the ABA Standards and the changes in the legal profession over thirty years since the ABA Standards were last amended, Professor Long calls for the legal profession to revisit the ABA Standards.¹⁷⁹

175. Levin, *supra* note 30, at 6.

176. *Id.* at 38–39.

177. *Id.* In critiquing the ABA Standards, Professor Levin identifies numerous problems with the initial sanction determination, as well as problems with the aggravating and mitigating factors. *Id.* at 39–59.

178. Long, *supra* note 173, at 279.

179. *See id.* at 308 (noting that updating standards would be a means of addressing the shortcomings and lead to more consistent application of the ABA Standards by courts that currently rely

Those concerned about possible disparate treatment of lawyers of color should join critics who have called for reexamination of standards for imposing sanctions and the lawyer discipline system more generally.¹⁸⁰ The ABA should spearhead a thorough study of the content of the ABA Standards, as well as the manner in which they are applied. “Unless [standards] are uniformly and consistently applied, the resultant sanctions will be unfair to the respondents or the public and are unlikely to be proportional to the misconduct.”¹⁸¹ The interest of promoting fairness and transparency in the application of ABA Standards is best served “if courts and disciplinary authorities throughout the country articulate the reasons for sanctions imposed.”¹⁸²

iii. Taking Steps to Centralize More Decision-Making

Dating back to 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) recognized numerous problems associated with decentralized procedures that rely on local professionals to address alleged misconduct.¹⁸³ The concerns associated with a local and fragmented disciplinary structure included lack of uniformity and selective prosecution.¹⁸⁴ To address these concerns, the Clark Committee recommended statewide centralization of disciplinary jurisdiction under the ultimate control of the highest court in the state.¹⁸⁵

Twenty-two years after this recommendation, the ABA Commission on

upon the standards, and possibly cause courts and disciplinary authorities in states that do not currently rely upon them to take a “second look”).

180. See e.g., Lucian Pera, *It’s Time for the ABA to Renew its Role in Attorney Discipline*, US LAW WEEK (Feb. 7, 2023, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/its-time-for-the-aba-to-renew-its-role-in-attorney-discipline> [<https://perma.cc/4DYE-YMW7>] (opinion joined by six other legal ethics experts).

181. Barrie Althoff, *Lawyer Disciplinary Sanctions*, 2001 PROF. LAW. 105, 128 (2001) (noting “[a] system that cannot assure fairness will lack credibility and will fail.”).

182. See AM. BAR ASS’N, *supra* note 174, at 355.

183. SPECIAL COMM’N ON EVALUATION OF DISCIPLINARY ENF’T, AM. BAR ASS’N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 24 (1970), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/reports_migrated/Clark_Report.pdf [<https://perma.cc/8QKX-L2TU>].

184. *Id.* at 24–27 (explaining a centralized disciplinary structure provides uniformity in disciplinary enforcement throughout the state since only a single court and a single disciplinary agency are involved). “A disciplinary system centralized on a statewide basis . . . provides the greatest degree of structural impartiality.” *Id.* at 26.

185. *Id.* at 24.

Evaluation of Disciplinary Enforcement (McKay Commission), repeated the call for jurisdictions to restructure their disciplinary systems to eliminate overdecentralization.¹⁸⁶ In its comprehensive report, the McKay Commission recognized that decentralized decision-makers (such as local bar investigative committees) foster cronyism as well as prejudice against unpopular lawyer-respondents.¹⁸⁷ Despite the clear recommendations for more centralization, numerous jurisdictions still do not have a central intake system.¹⁸⁸ Jurisdictions that continue to rely heavily on local committees and decision-makers should seriously consider the advisability and feasibility of moving to a statewide system to provide more uniformity and impartiality.

In the interest of promoting more consistency through a smaller number of decision-makers, regulators should explore the possibility of utilizing full-time adjudicators who serve as referees or disciplinary court judges. In this examination, jurisdictions can learn from the experience of Colorado and Arizona, two states that use experienced professional judges.¹⁸⁹ Professor Wendy Muchman, former bar regulator and president of the National Organization of Bar Counsel, believes that paid, professional judges tend to have more consistency in outcomes and avoid many of the delay issues that often plague jurisdictions staffed by volunteers.¹⁹⁰ One

186. AM. BAR ASS'N, *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT* 66 (1992) [hereinafter McKay Report], https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ [https://perma.cc/5KGB-3MFW].

187. *See id.*

188. *See* STANDING COMM. ON PRO. REGUL., AM. BAR ASS'N, *2021 SURVEY ON LAWYER DISCIPLINE SYSTEMS* 5–7 (2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sold-survey/2021/2021-sold-report-final.pdf [https://perma.cc/AMS3-G9RJ]. Of the forty-three disciplinary agencies responding to the ABA Survey question related to centralization, seventeen respondents reported that they did not have central intake or a consumer assistance program. *Id.*

189. In 1999, the Colorado Supreme Court instituted a new regulation system to replace a hearing panel system with a judicial process overseen by the Presiding Disciplinary Judge. Office of Presiding Disciplinary Judge, *The PDJ's Role*, COLO. SUP. CT., <https://coloradopdj.com/about> [https://perma.cc/W833-TZXW]. For information on the Arizona Presiding Disciplinary Judge, see *Presiding Disciplinary Judge*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/pdj> [https://perma.cc/88WR-GYZE]. In 2017, the Oregon Supreme Court created the professional position of adjudicator to serve as the Disciplinary Board's presiding officer. Mark A. Turner, *New Position Guides the OSB's Disciplinary Board: The Adjudicator's First Year*, 79 OR. ST. B. BULL. 9, 9 (2019).

190. E-mail from Wendy Muchman, Professor of Prac., Nw. Univ. Pritzker Sch. of L., to Professor Susan Fortney, Texas A&M University School of Law and Heather Zirke, Assistant Professor, University of Akron School of Law (Aug. 28, 2024, 11:48 PM) (on file with authors).

limitation of professional judges is that they may not be steeped in the day-to-day realities of managing law practices. This concern may be addressed if some body of lawyers assists in advising regulators on prosecution of matters.¹⁹¹

In addition to appointing disciplinary judges to serve as decision-makers in the adjudication of disciplinary matters, jurisdictions may also utilize a centralized body to make decisions on particular disciplinary matters, such as those where suspensions and disbarments are sought. For example, the Supreme Court of Texas created the Texas Commission on Lawyer Discipline (Texas Commission) to address the need for consistency in disciplinary proceedings.¹⁹² The Texas Commission serves as the decision-maker for all disciplinary matters after a just cause finding of professional misconduct.¹⁹³ A chair of the Texas Commission noted that the local district committee previously serving as the decision-maker “often resulted in disparity in outcomes and sanctions.”¹⁹⁴

Even when disciplinary procedures do not include a centralized decision-making body for all grievances, all jurisdictions should consider delegating to one person or body all decisions in matters when disbarment, suspension, and reinstatement are possible. Presumably, someone serving in the position of Chief Disciplinary Counsel, or its equivalent, provides such oversight in most states with one disciplinary system.¹⁹⁵

iv. Consistently Offering and Tracking Alternatives to Discipline

Any examination of possible disparities in disciplinary systems should also consider whether diversion is being offered to lawyer-respondents in a consistent manner. The ABA Model Rules for Disciplinary Enforcement provide that disciplinary counsel may offer alternatives to discipline for matters involving lesser misconduct.¹⁹⁶ If the lawyer-respondent accepts the

191. See *infra* notes 192–194 and accompanying text (describing role of the Texas Commission on Lawyer Discipline).

192. Ron Bunch, *Debriefing the Chair: An Insider’s Take on the Texas Commission for Lawyer Discipline*, 76 TEX. BAR J. 1057, 1057–1058 (2013) (providing information on the history and function of the Texas Commission on Lawyer Discipline).

193. *Id.*

194. *Id.*

195. For a thorough examination of intrastate disparities among New York Judicial Departments, see Gillers, *supra* note 168, at 503–515.

196. MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 11(G)(1) (AM. BAR ASS’N 2002)

offer, the lawyer-respondent and disciplinary counsel will negotiate an agreement that specifies terms tailored to the individual circumstances.¹⁹⁷ When the lawyer-respondent satisfies the conditions specified in the agreement, the matter will be terminated,¹⁹⁸ enabling the attorney to avoid discipline. Failure to satisfy the conditions will subject the attorney to discipline.¹⁹⁹

Currently, regulators in thirty-five U.S. jurisdictions may offer lawyer-respondents the opportunity to avoid discipline for misconduct.²⁰⁰ To learn how well diversion in lieu of discipline is working in the U.S. in 2022, Professors Leslie C. Levin and Susan Fortney interviewed disciplinary authorities in twenty-nine of the jurisdictions that offer diversion.²⁰¹ In the study, the “interviewees uniformly described diversion as a useful opportunity to help lawyers remedy certain problems they encounter in practice and to better protect the public.”²⁰² Because diversion enables lawyer-respondents to avoid discipline and regulators exercise a good deal of latitude in offering diversion to lawyer-respondents to qualify, Professors Levin and Fortney recommended that regulators should consider steps to promote consistent treatment of lawyer-respondents.²⁰³ As stated:

In jurisdictions where eligibility for diversion is not well-defined, regulators should develop written internal guidelines for evaluating whether matters are appropriate for diversion. Regulators should also develop a review and consultation process to systematically evaluate whether diversion is being offered to lawyers on a consistent basis. While there are inevitably hard-to-quantify elements involved in the diversion decision — such as the respondent attorney’s apparent willingness to learn from mistakes — there are other elements of the decision,

[hereinafter MRLDE].

197. MRLDE r. 11(G)(4).

198. MRLDE r. 11(G)(7)(a).

199. MRLDE r. 11(G)(7)(b) (stating a material breach of the contract shall be cause for termination of the respondent’s participation in the diversion program and disciplinary proceedings may be resumed or reinstated).

200. Leslie C. Levin & Susan Saab Fortney, “*They Don’t Know What They Don’t Know*”: *A Study of Diversion in Lieu of Lawyer Discipline*, 36 GEO. J. LEGAL ETHICS 309, 313 (2023).

201. *Id.* at 323–24 (describing study methodology).

202. *Id.* at 340 (reporting on interviewees opinions on the value of diversion).

203. *Id.* at 341.

including the nature of the misconduct, which should be treated comparably. . . . At a minimum, a written record of all diversions should be maintained, and systems should be implemented to ensure that all individuals who play a role in offering diversions are doing so in a consistent manner.²⁰⁴

Tracking diversions will provide regulators with data to assess whether they are offering diversion in appropriate cases and doing so in a consistent and unbiased fashion.²⁰⁵

C. Providing More Training on Trust Account Management

As discussed above, the Farkas Study revealed that among attorneys with large numbers of complaints Black male attorneys were more likely to have a large number of Reportable Action Bank cases (RABs) in which banks report non-sufficient funds overdrafts on a lawyer's trust account. When attorneys are disciplined for client trust account violations, California now requires that they attend Client Trust Account School.²⁰⁶ An additional approach to help lawyers avoid misconduct is to require trust account training for all newly licensed attorneys,²⁰⁷ as well as periodic required trust account training for attorneys who transition to private practice settings where they will need to manage their own client trust accounts.²⁰⁸

204. *Id.* at 341–342.

205. *Id.* (describing processes to help with consistency).

206. *Ethics & Client Trust Account Schools*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Ethics-Schools> [<https://perma.cc/9QG5-EGWB>].

207. For example, New Jersey requires newly licensed attorneys to earn sixteen continuing legal education credit hours, at least one of which must be in New Jersey attorney trust and business accounting fundamentals. Peter G Verniero et al., *Continuing Legal Education Requirement for Lawyers Admitted to the New Jersey Bar in 2024*, SUP. CT. OF N.J., BD. ON CONTINUING LEGAL ED., www.njcourts.gov/sites/default/files/attorneys/continuing-legal-education/cleadmitted2024.pdf [<https://perma.cc/KV5L-Y7QH>].

208. When attorney's registration materials reveal transition to a small or solo practice, the Colorado Supreme Court Office of Attorney Regulation sends the attorneys emails with resources, including information on Colorado's trust account school. Laurel Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717, 758 (2016).

D. Expunging and Archiving Prior Closed Complaints

Regulators should also seriously examine how they handle prior dismissed complaints. The Farkas Study found that prior discipline history had the strongest effect on discipline outcomes and solo attorneys had the highest rates of complaints.²⁰⁹ Other study reports found solo attorneys are more likely to be lawyers of color and more likely to practice in high conflict or emotionally-charged areas of law including criminal law, domestic relations, personal injury, and bankruptcy—where clients more frequently complain to disciplinary authorities due to experiencing delays or dissatisfaction with the outcomes.²¹⁰ While many meritless complaints are filed and dismissed,²¹¹ some colorable allegations of misconduct may be reported, but are nevertheless dismissed.²¹² In such situations where regulators dismiss complaints involving minor misconduct, they may take action such as advising attorneys of their ethical obligations and suggesting steps to avoid future problems.²¹³ This poses challenges for regulators who should avoid allowing meritless dismissed complaints to impact the review of new matters, but who believe they should consider past complaints involving minor misconduct to identify potential patterns of ethical misconduct to take action to protect the public.

In the interest of public protection, as well as consistency and fairness, regulators should consider adopting a policy for handling prior dismissed/closed complaints.²¹⁴ Expunging closed cases is one strategy to address the disparate number of complaints and prevent tainting the

209. See MacLeod & Pi, *supra* note 86, at 4–5.

210. See *e.g.*, NEW MEXICO TASK FORCE II REPORT, *supra* note 32, at 46 (expressing the opinions of Chief Disciplinary Counsel, Virginia L. Ferrara).

211. Thy Vo, *Ore. Watchdog Says Open Discipline Makes ‘Stronger’ Attys*, LAW360 (May 31, 2024, 7:38 PM), <https://www.law360.com/articles/1843215/ore-watchdog-says-open-discipline-makes-stronger-attys> [<https://perma.cc/8UZL-YJAX>] (panelist reports that 80 to 85% of complaints against attorneys are dismissed).

212. “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.” MODEL RULES OF PRO. CONDUCT Pmb1. & Scope 20 (AM. BAR ASS’N 2024).

213. See July 2020 Minutes Approval, *supra* note 115, at 19 (the State Bar of California closes some complaints involving minor misconduct with warning letters, letters with educational resources, and letters providing specific direction to address issues and initially excluded these files from being archived).

214. See MacLeod, *supra* note 100, at 4 (prior closed complaints have no probative value in the California State Bar Court, but may be useful in evaluating whether a new complaint indicates a pattern of misconduct).

evaluation of new matters.²¹⁵ In developing a policy, regulators may consider approaches used in other jurisdictions. For example, Illinois expunges records of dismissed investigations after three years.²¹⁶ Other states also expunge prior closed complaints, but regulators exercise more discretion.²¹⁷

Another option, which draws on actions taken by the State Bar of California, is for regulators to study archiving prior closed complaints. By archiving closed complaints, regulators are shielded from irrelevant information about past complaints while not completely foreclosing the opportunity to review information that may be relevant in the future.²¹⁸ Moreover, similar to the action taken by the State Bar of California, a provision could be included to permit access to archived files by submitting a written application to a supervising attorney.²¹⁹ This additional step in the process would mean archived files are rarely accessed and may help reduce implicit bias in both the decision about whether to consult a prior complaint and in the interpretation of the contents.²²⁰

E. Expunging Prior Discipline

A somewhat controversial approach to disciplinary reform is the automatic expungement of certain types of prior discipline. This approach would follow expungement initiatives in two states. In May 2024, the State Bar of California's Board of Trustees approved a measure to expunge discipline records of lawyers who have not been disbarred after eight years if there is no further discipline.²²¹ This move may be supported by research

215. Expungements in the disciplinary process are sometimes used in connection with diversion programs. *See* Levin & Fortney, *supra* note 200, at 337.

216. ILL. SUP. CT. R. 778 (b) (stating that destruction of the investigative file includes any computer record identifying the lawyer who was under investigation).

217. *See e.g.*, ARIZ. ST. SUP. CT. R. 71(a)-(b), (e) (requiring expungement of closed complaints after three years, except for a docket entry with the names of the respondent and complainant, the final disposition, and date of expungement; upon good cause shown, expunged records may be retained for three additional years at the request of bar counsel or a respondent); MINN. CT. R. PRO. RESP. R. 20(e) (requiring expunction of all records "of the existence of a dismissed complaint" and upon a showing of good cause, records may be retained for up to three years).

218. *See* Robertson Report, *supra* note 103, at 4 (noting OCTC's complaint history is "infected by a racial disparity").

219. July 2020 Minutes Approval, *supra* note 115, at 19.

220. Robertson Report, *supra* note 103, at 25.

221. Weiss, *supra* note 129.

on recidivism rates suggesting that lawyers who commit new misconduct typically did so within the first few years after their first disciplinary action.²²² This may benefit thousands of lawyers who could petition the Supreme Court of California for expungement.²²³ In addition to California, the North Carolina Senate passed a bill in May 2024 to permit attorneys to expunge certain prior disciplinary violations.²²⁴ The North Carolina State Bar has been directed to create temporary rules to implement the expungement process with the goal of having permanent rules in place by early 2025.²²⁵

On the other hand, legitimate concerns related to the lack of transparency in the disciplinary process suggest that the expungement of prior discipline could represent one more piece of information that is unavailable to the public. Expungement prevents clients from having disciplinary information about an attorney in whom they may entrust their legal matters. Arguably, consumers should be entitled to access prior discipline records and exercise their own judgment about the relevance of any sanctions imposed at any time. Yet, expungement of a low-level sanction after some period time may enable a lawyer to move forward without the continuing stigma of a prior sanction followed by years of a clean record.

F. Providing Implicit Bias and Cultural Competence Training for Professional Staff, Adjudicators, and Volunteers in the Disciplinary System

Regulators, jurists, and other decision-makers should recognize and take steps to address how implicit bias may affect the fairness and integrity of the disciplinary process. Implicit biases are prejudices based on

222. See LaRowe, *supra* note 130.

223. See *id.*

224. Travis Bland, *NC Bill Will Let Attys Expunge Discipline Records*, LAW360 (May 24, 2024, 4:17 PM), <https://www.law360.com/articles/1841017/nc-bill-will-let-attys-expunge-discipline-records> [<https://perma.cc/H7ZV-VHFU>]. The recent efforts to reform the disciplinary system in North Carolina have apparently been driven by lawyers who believed the grievance process lacked sufficient due process and was not because of concerns about racial disparities. See Hayley Fowler, *North Carolina Grievance Process Fixes Would Empower Attys*, LAW360 (Mar. 4, 2024, 4:01 PM), <https://www.law360.com/articles/1809633/north-carolina-grievance-process-fixes-would-empower-attys> [<https://perma.cc/QYN5-7SFZ>].

225. See Bland, *supra* note 224.

stereotypes and social norms that people are not even aware they hold.²²⁶ Because most people are unaware of their tendency to favor one group to the detriment of another based on hidden prejudices, implicit bias is also referred to as unconscious bias.²²⁷ Given the number of people involved in disciplinary systems, implicit bias may affect many areas of the process, including the assessment and handling of matters by professional staff, as well as adjudicators. The Robertson Report pointed to several areas where implicit bias may be infecting California's disciplinary system and where reforms may reduce bias.²²⁸

State and federal courts recognize the importance of implicit bias training to improve fairness and decision-making and some of the available resources intended to help the judiciary and their staff are relevant for regulators and others involved in attorney discipline.²²⁹ In response to a 2020 joint resolution of the Conference of Chief Justices and the Conference of State Court Administrators that called on courts to "identify and address unconscious bias, and facilitate the uncomfortable conversations that arise from the recognition of such bias," the National Center for State Courts updated its resources on implicit bias.²³⁰ The National Center for State Courts's online report, *The Evolving Science on Implicit Bias*, contains a detailed summary for understanding implicit bias and a discussion of the importance of developing structures to replace ambiguous decision-making

226. See Donald J. Polden & Jenna M. Anderson, *Leadership to Address Implicit Bias in the Legal Profession*, 62 SANTA CLARA L. REV. 63, 82–88 (2002) (urging leaders in the legal profession to recognize their own biases, take steps to unlearn these mental shortcuts, and inspire and motivate their constituents to do the same).

227. See *id.* at 70.

228. See Robertson Report, *supra* note 103, at 13 (exercise of discretion in handling trust account overdrafts cases (i.e., RABs) presents a risk of implicit bias); *id.* at 19 (implicit or even explicit racism may motivate the filing of complaints by members of the public against lawyers of color); *id.* at 19–21 (consulting prior closed complaint may allow biases to exacerbate the problem of the disparate number of complaints against lawyers of color); *id.* at 25 (accessing archived files upon a written application to a supervising attorney may help reduce implicit bias in the decision about whether to consult prior complaints and in the interpretation).

229. *E.g.*, U.S. CTS, HUMAN RESOURCES—ANNUAL REPORT 2023 (2023) <https://www.uscourts.gov/statistics-reports/human-resources-annual-report-2023> [https://perma.cc/KC2J-3X5P].

230. JENNIFER K. ELEK & ANDREA L. MILLER, NAT'L CTR. FOR STATE CTS., *THE EVOLVING SCIENCE ON IMPLICIT BIAS: AN UPDATED RESOURCE FOR THE STATE COURT COMMUNITY* iii (2021) [hereinafter NCSC Report], <https://nscs.contentdm.oclc.org/digital/collection/accessfair/id/911> [https://perma.cc/CL49-KEW8].

procedures.²³¹

When individuals make decisions without specific criteria or standards, it is more likely that decisions will be made based on their biases.²³² For example, without a policy in place for consulting prior closed complaints, regulators likely will use their own judgment in deciding whether to use prior closed complaints in their evaluation of new misconduct. Jurisdictions need to examine their own processes to identify where people may be using their own judgment in handling cases because research shows individual decision-making creates room for bias and prejudice to manifest as discrimination and inequality.²³³

Training should also cover cultural competence. Developing cultural competency will help regulators, jurists, and other decision-makers in the disciplinary process to adapt, work, and manage successfully in new and unfamiliar cultural settings.²³⁴ Cultural competence does not mean fully understanding cultural norms or adopting a new set of beliefs—rather it is an awareness of how culture can influence values, behavior, thoughts, and ways of communicating.²³⁵ Cultivating an awareness and appreciation of cultural differences would improve the ability of those in attorney discipline to communicate and interact with complainants and lawyer-respondents and to develop systems to effectively serve increasingly diverse communities.

G. Taking Steps to Promote Broader Participation in the Discipline System

Another consideration relates to the identity of decision-makers, whether they be staff and lawyers in disciplinary counsel offices or

231. See *id.* at 14.

232. See *id.*

233. See *id.*; see also Leslie C. Levin & Jennifer K. Robbennolt, *To Err is Human, To Apologize is Hard: The Role of Apologies in Lawyer Discipline*, 34 GEO. J. LEGAL ETHICS 513, 542 (2021) (suggesting cultural differences may complicate the evaluation of apologetic communications by respondent lawyers).

234. See Sylvia Stevens, *Cultural Competency: Is There an Ethical Duty?*, ORE. STATE BAR BULLETIN (Jan. 2009), <https://www.osbar.org/publications/bulletin/09jan/barcounsel.html> [<https://perma.cc/9B3C-ARP3>].

235. See *id.*; see also Aastha Madaan Farr, *Cultural Competence and the Practice of Law in the 21st Century*, AM. BAR ASS'N (Mar. 1, 2017), https://www.americanbar.org/groups/real_property_trust_estate/resources/probate-property/2016-2022/cultural-competency-practice-law-21st-century/?login [<https://perma.cc/4YLR-VRFV>] (suggesting probate attorneys need cultural competence to deliver effective legal services in increasingly diverse society).

adjudicators. Over thirty years ago, the McKay Commission Report recommended that courts balance appointments of disciplinary adjudicators to ensure appropriate representation of all segments of the public and the legal profession.²³⁶ The McKay Commission Report warned:

[F]ailing to include women, minority, and solo or small firm practitioners in the adjudicative process creates suspicion that it is biased. It is true that lawyers from larger firms often are more able to volunteer their time to the disciplinary agency. The highest court in each jurisdiction should therefore affirmatively seek out qualified members of the public and minority, women, and solo or small firm practitioners who would be willing to serve.²³⁷

The Report also noted that the court should maintain data on the number of women, minority, and solo or small firm practitioners currently serving to assure that disciplinary appointments are balanced.²³⁸

In analyzing the role of state court diversity and attorney discipline, Professor Nancy Leong drew on literature and studies regarding perceived disparities among members of different groups and the influence of identity on judicial decision-making.²³⁹ As noted by Professor Leong, research reveals that people tend to empathize more with those to whom they relate and that people are more likely to relate to those who share their race and gender.²⁴⁰ Referring to a substantial body of research on in-group empathy, Professor Leong suggests that it might explain potential disparities in the frequency and severity of attorney discipline.²⁴¹ Professor Leong recognized that lawyers practicing in solo and midsize firms are more likely to receive sanctions than those who practice with large firms and solo practitioners and attorneys in midsize firms are also more likely to be people of color.²⁴² Even if sanctions disparities can be “fully explained by nonracial factors,” Professor Leong recognized that “perceptions also matter, and available evidence indicates that attorneys of color have less confidence in the

236. See McKay Report, *supra* note 186, at 64–65.

237. *Id.* at 66.

238. *Id.*

239. See Leong, *supra* note 25, at 1227–29.

240. *Id.* at 1229–30.

241. *Id.* at 1230.

242. *Id.*

disciplinary review process.”²⁴³ Given the important role of perceptions and the identity of adjudicators, bar leaders and jurists should redouble their efforts to recruit and support lawyers of color, as well as solo and small firm practitioners serving on disciplinary bodies. For instance, the Illinois ARDC seeks diversity in appointing volunteer lawyers and even non-lawyers to serve on disciplinary boards to ensure members reflect the population they serve.²⁴⁴ Utilizing inclusive language in job or volunteer descriptions conveys that an organization seeks to build a more diverse team.²⁴⁵ Standardizing interviews by asking candidates the same set of questions in the same order also creates a more equitable evaluation process.²⁴⁶

Starting in 2007, the Grievance Oversight Committee of the Supreme Court of Texas (Texas GOC) undertook a review of the diversity of the Texas grievance system because complainants and respondent attorneys asserted that the “system did not reflect a true diversity and as a result some complainants, and even some respondent attorneys, felt that the grievance outcomes were being impacted by this perceived lack of diversity.”²⁴⁷ Although the Texas GOC noted that a snapshot of limited available data on staff and volunteers in the grievance system largely mirrored the make-up of the State Bar of Texas, the Texas GOC acknowledged the perceptions that there was a lack of diversity in grievance governance and that grievance outcomes were impacted by the perceived lack of diversity.²⁴⁸

The Texas GOC identified a number of steps to improve diversity among decision-makers.²⁴⁹ Recommendations included providing

243. *Id.*

244. *See Diversity, Equity & Inclusion*, ARDC OF THE SUP. CT. OF ILL., <https://www.iardc.org/About/DiversityAndInclusion> [<https://perma.cc/JL59-BW35>] (noting the diversity of ideas, backgrounds, and experience is crucial to promoting and protecting the integrity of the legal profession).

245. *See, e.g.,* Becca Carnahan, *6 Best Practices for Creating an Inclusive and Equitable Interview Process*, HARV. BUS. SCH. INSIGHTS & ADVICE BLOG (May 25, 2023), <https://www.hbs.edu/recruiting/insights-and-advice/blog/post/6-best-practices-to-creating-inclusive-and-equitable-interview-processes> [<https://perma.cc/7VMG-TBSK>] (listing recommendations to counter bias in the interviewing process beginning with an inclusive job description).

246. *Id.* (noting standardized interviews help to reduce bias).

247. GRIEVANCE OVERSIGHT COMM., SUP. CT. OF TEX., 2007 REPORT TO THE SUPREME COURT OF TEXAS 4, https://www.txgoc.com/_files/ugd/531469_f9c8d304ef3c42e1a73de0315eba710b.pdf [<https://perma.cc/SGC2-D42V>] (reporting that respondent attorneys and members of minority bar associations indicated that the “people making [disciplinary] decisions are not able to identify with, or understand, their issues”).

248. *See id.*

249. Susan Saab Fortney, one of the co-authors, served as a member of the Texas GOC that issued

continuing legal education and other credit for volunteer service in the grievance system, widely publicizing information about openings, soliciting nominations, allowing self-nominations from public interest groups and minority bar associations, and using night panels to facilitate participation by lawyers—such as solo practitioners—who may find it difficult to meet during normal office hours.²⁵⁰ To enable more minority law students to seek State Bar opportunities once they become lawyers, the Texas GOC recommended the implementation of a summer law clerk program.²⁵¹ By working with regulators, students of color learn about the disciplinary process and later may be more inclined to play some role in the disciplinary system.²⁵² Notably, the Texas GOC recommended continued study of the diversity issues and the collection of data that covered the type of practice of respondent attorneys.²⁵³

H. Proactively Providing More Practice Management Assistance

Many of the above steps recommend initiatives to better understand and improve disciplinary processes from initial intake through adjudication. Steps taken should promote fairness and consistency in the disciplinary system, while advancing the purpose of disciplinary systems. Courts have typically characterized the purpose of professional discipline as “protecting the public.”²⁵⁴ Unfortunately, complaints-driven disciplinary systems deal with misconduct only after it occurs. Rather than relying solely on the traditional approach of prosecuting complaints, regulators may use

the 2007 Report. *See id.* at 1.

250. *See id.* at 5–6 (noting recruiting solo and small firm attorneys might be enhanced by providing Continuing Legal Education credit for serving as a volunteer in the disciplinary system).

251. *Id.* at 6. Susan Saab Fortney, one of the co-authors, created and supervised externships for law students to earn course credit for working in disciplinary regulators’ offices.

252. *See id.*

253. Data collection should be voluntary and treated confidentially to ensure that the collection of statistics is not interpreted as “determinative in the processing of a complaint.” *Id.* In a subsequent report, the Texas GOC referred to a 2011 annual report of the Texas Chief Disciplinary Counsel that included the diversity breakdown of Grievance Committee Membership. GRIEVANCE OVERSIGHT COMM., SUP. CT. OF TEX., 2012 REPORT TO THE SUPREME COURT OF TEXAS 7 (2012), https://www.txgoc.com/_files/ugd/531469_6d319441fe394816ba4e153cdf287a0d.pdf [<https://perma.cc/39RK-4BQU>]. The Texas Grievance Committee recommended that statistical breakdowns reflect separately the diversity of the public members of the grievance committees, as well as the breakdown for attorney committee members. *Id.*

254. Fred C. Zacharias, *The Purpose of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 677 (2003).

“proactive regulation” to prevent lawyer regulatory and service problems from occurring.²⁵⁵ Increasingly, regulators are approaching proactive measures in a more comprehensive and systematic manner by using forms of proactive, management-based regulation (PMBR).²⁵⁶ Although PMBR programs take different forms, the efforts tend to focus on assisting lawyers to address law practice management and related concerns.²⁵⁷

In his report based on the California disparity study, Professor Robertson identified one form of PMBR in recommending that the State Bar of California develop a “proactive non-disciplinary system to support attorneys at higher risk of future complaints.”²⁵⁸ In such a system, he proposed a predictive model using prior closed complaints as “inputs into upstream solutions to reduce the number of cases that are filed.”²⁵⁹ He described the reform as follows:

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.²⁶⁰

If the efforts succeed in helping “at risk” attorneys avoid misconduct and complaints, Professor Robertson suggests that the efforts would benefit the Black attorneys who now disproportionately receive those complaints.²⁶¹

Professor Robertson recognized the challenges of identifying which

255. See Susan Saab Fortney, *Promoting Public Protection Through an “Attorney Integrity” System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, 23 PROF. LAW. 16, 16 (2015) (suggesting possibilities to use management-based principles to improve lawyer regulation and transform the disciplinary approach to an “integrity” system in which lawyers and regulators work in partnership to raise the ethical bar in the interest of public protection).

256. See Susan Saab Fortney, *Keeping Lawyers’ Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession*, 33 GEO. J. LEGAL ETHICS 891, 899–909 (2020) [hereinafter *Keeping Lawyers’ Houses Clean*] (reviewing regulator PMBR initiatives in Australia, U.S., and Canada).

257. See Mark W. Gifford, *PMBR: The Future of Attorney Regulation*, 41 WYM. LAW. 1, 12 (2018) (chief regulator in Wyoming refers to the benefits of assisting lawyers with practice management).

258. Robertson Report, *supra* note 103, at 26.

259. *Id.*

260. *Id.*

261. *Id.*

attorneys to select for proactive outreach and support, as well as the challenge of developing interventions that actually reduce the risk of subsequent complaints and discipline.²⁶² To meet these challenges, California and other jurisdictions can learn from empirical research conducted on PMBR,²⁶³ as well as experiences of those regulators who have implemented versions of PMBR. For example, Illinois adopted rules that require uninsured attorneys to complete an educational, self-assessment program.²⁶⁴ Because a large percentage of uninsured attorneys are solo practitioners,²⁶⁵ the Illinois program targets solo attorneys—a group that tends to be at high risk of disciplinary complaints. The Colorado Office of Attorney Regulation Counsel also worked with a diverse number of stakeholders to design a voluntary self-assessment process that includes a number of checklists for solo and small firm practices.²⁶⁶

In exploring and developing PMBR, regulators should include diverse stakeholders interested in designing proactive approaches suitable and effective for lawyers in their particular jurisdiction and practice settings most “at risk” for complaints.²⁶⁷ As suggested by Professor Robertson, proactive measures should be tested empirically.²⁶⁸

Whether regulators assist “at risk” lawyers or more generally implement proactive initiatives to help lawyers improve practice management and avoid problems, such efforts help transform the relationship between

262. *Id.* at 27.

263. See Susan Saab Fortney & Tahlia Gordon, *Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152, 152–182 (2012) (reviewing results from three studies on the Australian approach to proactive regulation).

264. See Matthew Hector, *New Rule Requires Uninsured Lawyers to Do Self-Assessment*, 105 ILL. BAR J. 22, 24 (2017).

265. *Id.* (referring to Illinois regulator who reported that 41% of solo practitioners do not carry malpractice insurance).

266. See *Colorado Lawyer Self-Assessment Program Checklists*, COLO. SUP. CT. OFF. OF ATT’Y REGUL. COUNS., <https://coloradosupremecourt.com/AboutUs/SelfAssessmentProgramChecklist.asp> [<https://perma.cc/4AN2-FBEY>]; see also Jonathan P. White, *Self-Assessment Program Aims to Enhance Lawyer Competency and Client Satisfaction*, 46 COLO. LAW. 10, 12 (2017) (referring to diverse range of practice areas and sizes represented by subcommittee members).

267. Susan Saab Fortney, *Designing and Improving a Systems of Proactive Management-Based Regulation to Help Lawyers and Protect the Public*, 2016 J. PROF. LAW. 91, 99–106 (2016) (drawing on author’s mixed-method study to make recommendations for improving and developing PMBR programs).

268. Robertson Report, *supra* note 103, at 27. A few regulators used pilots to test the proactive interventions. See *Keeping Lawyers’ Houses Clean*, *supra* note 256, at 901–905 (describing study and pilot programs).

regulators and members of the bar. By helping lawyers improve practice management and avoid problems, regulators advance public protection rather than limiting their role to disciplining lawyers after misconduct occurs.

I. Monitoring Results and Impact

In moving forward with various initiatives to advance fairness, consistency, and equitable treatment—regulators should make efforts to monitor the impact of the measures. They should consider collecting both qualitative and quantitative data to evaluate programmatic changes.

CONCLUSION

Despite the lack of data in most jurisdictions, some lawyers perceive racial and ethnic disparities in the disciplinary process. Systematic studies are necessary to determine if disparities actually exist. Thorough research should go beyond numerical comparisons, but should consider the complex circumstances of representation that impact complaints and various explanations for any identifiable overrepresentation of lawyers of color in disciplinary statistics. As concluded in a 2014 Independent Case Review conducted for the Solicitors Regulation Authority that found disparities along ethnic lines in a number of key areas, the “results are not immediately interpreted as evidence of discrimination or racism on an institutional level.”²⁶⁹ As explained in the Case Review Report, a “number of complex socio-economic and political factors must be considered as part of a comprehensive discussion of disproportionality.”²⁷⁰ Such socio-economic, political, and race-neutral factors may impact the percentages of lawyers of color subject to discipline, notwithstanding the regulators’ efforts to promote equitable treatment. Collecting and analyzing data provides a meaningful basis for identifying such factors and dealing with structural and other problems that may be present.

If research reveals race-neutral treatment and outcomes, regulators will have data to counter negative perceptions. By tackling perceptions and

269. GUS JOHN, SOLIC. REGUL. AUTH., INDEPENDENT COMPARATIVE CASE REVIEW REPORT 11 (2014).

270. *Id.*

issues related to racial and ethnic disparities, courts and regulators demonstrate that they are not taking an ostrich approach, but committed to handling “individual cases of lawyer discipline and disability in a manner that does not discriminate by race, creed, color, sex, sexual orientation or national origin.”²⁷¹

Addressing actual problems that exist, as well as perceptions, will also foster both complainant and respondent confidence in the disciplinary system. Lawyers of color who trust disciplinary systems may be more likely to participate in attorney regulation and activities of the organized bar. Such involvement helps signal that the bar embraces all its members, and treats them fairly, impartially, and respectfully once they are in the door.

The recommendations made above are proposed to help address perceptions and issues of possible disparities in lawyer discipline, while promoting more consistency for all lawyer-respondents. The observations are not intended to cast doubt on jurists’ and regulators’ commitment to nondiscrimination in fulfilling their public protection roles. Rather the recommendations are suggested to assist regulators in critically examining their structures and practices, exploring proactive measures to advance public protection, and improving processes to make disciplinary systems more effective, fair, and equitable for all complainants and respondents.

271. See MODEL RULES OF L. DISCIPLINARY ENF’T, pmbl. (AM. BAR ASS’N 2020) (referring to court’s exclusive responsibility for structure and administration of state’s lawyer discipline and disability system).