

# STATE BAR OF CALIFORNIA

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*Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*

— Business and Professions Code § 6001.1

The State Bar of California was created by legislative act in 1927 and codified in the California Constitution at Article VI, section 9. The State Bar was established as a public corporation within the judicial branch of government, and licenses all attorneys practicing law in California. The Bar enforces the State Bar Act, Business and Professions Code section 6000 *et seq.*, and the Rules of Professional Conduct. The Bar's attorney discipline system includes an online complaint form and in-house professional investigators and prosecutors housed in the Office of the Chief Trial Counsel (OCTC). The California Bar's attorney discipline system also includes the nation's first full-time professional attorney discipline court which neither consists of, nor is controlled by, practicing lawyers. The State Bar Court consists of the Hearing Department (which includes five full-time judges who preside over individual disciplinary hearings) and a three-member Review Department which reviews appeals from hearing judge decisions. State Bar Court decisions must be appealed to the Supreme Court, and its review is discretionary. The Bar may impose a wide range of potential sanctions against violators of the State Bar Act or the Rules of Professional Conduct; penalties can range from private reproof to disbarment, and may include "involuntary inactive enrollment" (interim suspension) under Business and Professions Code section 6007. In connection with its

discipline system, the Bar operates two client assistance programs: its [Client Security Fund](#), which attempts to compensate clients who are victims of attorney theft; and its [Mandatory Fee Arbitration Program](#), which arbitrates fee disputes between attorneys and their clients in an informal, out-of-court setting.

January 1, 2018, marked a historic organizational shift for the State Bar when [SB 36 \(Jackson\) \(Chapter 422, Statutes of 2017\)](#) became effective, mandating that the Bar “deunify” its trade association function from its regulatory function. [[23:1 CRLR 157](#)] At that time, the 16 State Bar Sections and the California Young Lawyers Association separated from the Bar and formed a new, private, nonprofit entity called the California Lawyers Association (CLA). SB 36 also eliminated elected members from the Board, reducing the Board of Trustees from 19 to 13 members, and eliminated trustee officer elections, providing that the Supreme Court will approve the Chair and Vice Chair of the Board of Trustees on an annual basis.

With the transition, the Board now consists of 13 members: five attorneys appointed by the California Supreme Court, two attorneys appointed by the legislature (one appointed by the Senate Committee on Rules and one by the Speaker of the Assembly), and six public, non-attorney members, four of whom are appointed by the Governor, one appointed by the Senate Rules Committee, and one appointed by the Assembly Speaker. Trustees serve four-year terms.

Effective January 17, 2020, the Executive Director of the Board of Trustees, Leah Wilson, [stepped down](#) to pursue other career interests. Wilson first joined the Bar as its Chief Operations Officer in 2015 and assumed the Executive Director role in 2017. Chief of Programs Donna Hershkowitz is now serving as the interim Executive Director. Wilson will continue to support the transition in a consulting capacity at the request of the Board of Trustees.

# HIGHLIGHTS

## Bar Focuses on Fairness in the Discipline System for 2020

At the Board of Trustees' January 24, 2020 [meeting](#) [[Agenda Item 41-1](#)], Ms. Hershkowitz, announced in her [Executive Director Report](#) that in 2020, the State Bar will highlight and focus on Goal 2 from the [2017–2022 Strategic Plan](#), to “ensure a timely, fair, and appropriately resourced . . . discipline and regulatory system for the more than 250,000 lawyers licensed in California.” This announcement followed a 2019 report on Disparities in the Discipline System.

The announcement comes after the Board received a [report](#) on Disparities in the Discipline System at its November 14, 2019 [meeting](#) [[Agenda item 705](#)]. According to the staff [memo](#), the State Bar heard anecdotes of attorneys-of-color being over-represented in the State Bar disciplinary system and authorized a rigorous, quantitative analysis by George Farkas, a Distinguished Professor in the School of Education at the University of California, Irvine, to determine whether there was disproportionate representation of nonwhite attorneys in the attorney discipline system and, if so, to understand its origins, and take corrective action.

The [report](#) (see attachment A) revealed that, without controlling for any factors potentially associated with case outcomes, there are statistically significant disparities with respect to both probation and disbarment. The largest gender/race disparities can be seen when comparing Black to White, male attorneys. The probation rate for Black, male attorneys over this time period was 3.2 percent, compared to 0.9 percent for White, male attorneys. The disbarment/resignation rate for Black, male attorneys was 3.9 percent compared to 1.0 percent for White males. Race differences were smaller for Hispanic males and for Black and Hispanic females compared to White females.

However, the report concluded that the main factors affecting the attorney discipline case outcomes were: Differential Rates of Complaints (the State Bar receives more complaints against Black, male attorneys than against other attorneys), Impact of Practice Type, Impact of Counsel Representation (lack of counsel in disciplinary hearings), and Impact of Prior Discipline.

On January 24, 2020, at the Regulation and Discipline Committee (RAD) [meeting](#), RAD discussed and adopted its [2020 RAD Work Plan](#), which includes additional analyses into the fairness of the disciplinary system. The Committee expects a report on its overall findings by November 2020. RAD will be discussing and considering its interim results at its May 2020 and July 2020 public meetings.

## **Justice Gap Study Shows “Public Interest Drift” Among Law Students**

At the Board of Trustees’ January 23, 2020, [meeting](#) [Agenda item I], the staff presented key findings of the first ever [California Justice Gap Study](#), which gathered data on both California’s public civil legal needs and the amount of legal resources available to California’s public, as well as the results of a law student survey.

As one objective of the Justice Gap Study, the Bar analyzed whether the cost of legal education impacts law graduates’ decisions to pursue a career in public interest law, and whether a loan repayment program would increase access to justice. The Justice Gap Study’s law student survey portion gathered data from approximately 2,500 California law students to track what the report describes as “public interest drift”—when a law student goes to law school with the purpose of pursuing a public interest legal career, and then leaves law school pursuing a legal career in another field.

According to the [Public Interest Drift Findings](#), the current public interest drift is 49%. Essentially half of the students who go to law school with the purpose of pursuing a public interest career ultimately choose to pursue another career. According to the findings, the number one self-reported reason for public interest drift is that students need to make more money than public interest jobs pay because of educational debt. In American Bar Association accredited law schools in California, 81% of law students graduate with a median of \$147,000 in law school debt. Black and Latino law students have disproportionately higher debt. The study also showed that students who had drifted from their original plan to pursue a public interest career had 40% more debt on average. Not only is significant law school debt weighing on students, but a majority of students also did not have confidence in their respective law school's Loan Repayment Assistance Programs (LRAP) or the federal Public Service Loan Forgiveness program, for which recent reports indicate that less than 2% of all applications were approved as of July 2018.

The report contains a regression model of the data which estimates factors that might reduce public interest drift. According to the model, drift would drop to 39% if educational debt decreased, down to 33% if law students felt confident in their law school loan repayment assistance programs and the federal student loan repayment program. The drift would drop even further down to 27% if law students held internships at public interest law firms.

Based on this analysis, the Report concludes that initiatives to reduce law school loan debt and improve student confidence in debt assistance programs are critical to mitigating public interest drift, as is promoting, and supporting internships in public interest organizations.

At its March 12, 2020 [meeting](#) [Item 701], the Board of Trustees voted to adopt [staff's recommendations](#) to approve updating the [2017–2022 Strategic Plan](#) to include additional Access to Justice objectives in light of the California Justice Gap Study, and add the following objectives

to Goal 4 of the Strategic Plan: Support public education about key problems not recognized as legal issues; and support efforts to attract and retain lawyers in legal aid organizations.

## **Board Postpones Votes on Several Recommendations from the Access Through Innovation of Legal Services Task Force**

At the Board of Trustees' March 12, 2020 [meeting](#), [Agenda Item 702], the Task Force on Access Through Innovation of Legal Services (ATILS) presented its [Final Report](#) with seven recommendations to the Board. Last year, the Board authorized the formation of ATILS to identify options to enhance the delivery of, and access to, legal services through the use of technology, in order to increase access to justice. [[24:2 CRLR 119](#)] The Board's formation of ATILS was in response to the access to justice gap, as further defined by the California-specific [Justice Gap Study](#). According to the study, 55% of Californians experienced at least one civil legal problem last year, and Californians received inadequate or no legal services for 85% these problems. The study observes that this gap exists because of a lack of knowledge and a lack of accessible legal services.

In July 2019, ATILS [issued](#) for public comment 16 options for innovation in the delivery of legal services. [[25:1 CRLR 127](#)] The extensive input gathered from public comment informed the development of the final seven recommendations presented to the Board. After presentations, discussion, and public comment, the Board approved ATILS' recommendations to release for public comment a proposed amendment to the comments section of Rule of Professional Conduct 1.1: duty of competence, clarifying that this duty includes the duty to keep abreast changes of law and practice, including benefits and risks associated with technology. The Board also accepted the recommendation, and voted to release for public comment, a proposed amendment to Rule of Professional Conduct 5.4 that would expand existing exceptions for fee sharing arrangements with

nonprofit organizations. Finally, the Board approved the [charter and proposed composition](#) of the California Paraprofessional Program Working Group, charged with developing recommendations for consideration by the Board of Trustees for the creation of a paraprofessional licensure or certification program to increase access to legal services in California. The ATILS report also supported this recommendation and provides guidance based on the task force’s research for such a program.

With respect to ATILS’ remaining recommendations, however, the Board voted to table discussion and vote until its May meeting, in order to gather input from stakeholders. Perhaps the most significant of these recommendations was the task force’s recommendation that the Board create a new working group “to explore the viability of developing a regulatory sandbox as a means for evaluating possible changes to existing laws and rules that otherwise inhibit the development of innovative legal services delivery systems.” According to the report, “such an approach would provide data on any potential benefits to access to legal services and any possible consumer harm if prohibitions on unauthorized practice of law, fee sharing, nonlawyer ownership, and other legal restrictions are modified or completely suspended for authorized sandbox participants.” As detailed in the report, the proposal would use Utah’s proposed regulatory sandbox as a model.

The Board heard a series of public comments in support of this recommendation, and one comment in opposition from the Consumer Attorneys of California. After hearing the comments, the Board’s Chair, Alan Steinbrecher, and Vice Chair, Sean SeLegue, encouraged the Board to table any vote on this recommendation until the Board leadership has had a chance to confer with unidentified stakeholders, and assured ATILS Chair, Justice Lee Edmon, that the Board would consider and vote on the remaining recommendations at its May meeting. Ultimately the Board agreed with the Chair’s recommendation and tabled the sandbox working group, as well as three

other ATILS recommendations, until the May meeting. The Board will reconvene on May 14, 2020, to reconsider and vote on the tabled recommendations.

## **State Bar Amends Rules Addressing Public Licensee Information and Required Reporting**

On January 24, 2020, the Board of Trustees voted to approve proposed amendments to State Bar Rule 2.2 and to repeal Rules 2.3, and 2.4 regarding the information attorneys must report to the Bar as a condition of licensure. According to the [staff memo](#), the proposed amendments (attachment A) compile all existing licensee reporting requirements into a single rule under Rule 2.2 by repealing both Rule 2.3 and 2.4. Furthermore, the proposed amendments align Rule 2.2 with Objective “g” of Goal 2 of the State Bar Strategic Plan, which seeks to “require all attorneys to report firm size and practice type to the State Bar.” Specifically, amended Rule 2.2 now requires licensees to report to the State Bar: law firm size, practice sector, and law firm website information. The new rule also discontinues the collection of undergraduate school information, as well as the option for licensees to submit a professional photograph. Additionally, staff also reported that the new rule resolves a potential conflict with the California Public Records Act (CPRA), which applies to the State Bar of California pursuant to Business and Professions Code section 6026.11, by clarifying what information licensees must report to the State Bar for official licensee records, and adding language notifying licensees that all reported information is subject to public disclosure pursuant to CPRA.

At its September 2019 meeting, the Board’s Programs Committee authorized a 60-day [public comment](#) period on the reporting, display, and public nature of licensee information. [\[25:1 CRLR 136–137\]](#) The public comment period ended on December 15, 2019, and the State Bar received 116 [public comments](#) (attachment C).



The public comments expressed concern for confidential attorney information being made public on the State Bar website, potential discrimination stemming from required attorney photographs, and disadvantages to solo practitioners in reporting law firm size. In response to these concerns, the Bar made some additional modifications to the final rule (such as deleting the professional photo option), and also advised commenters the State Bar will not publicly display licensees' nonpublic email addresses, practice sector, law firm size, IOLTA account information, and other jurisdictions where the licensee was admitted or disciplined.

The new rules become effective with the launch of the 2021 billing cycle.

## **Board of Trustees Creates Working Group to Consider Paraprofessional Program**

At its January 24, 2020 [meeting](#), the Board of Trustees adopted a resolution directing staff to consult with the Board's Access Liaisons to form a working group to develop recommendations to the Board by the end of 2020 for a paraprofessional program in California. Specifically, the resolution instructs staff to "develop a draft charter, identify the appropriate size and composition of the working group, and solicit interest in participation in the working group." During discussion, several Board members emphasized a need for this working group to address issues such as paraprofessional licensing requirements, educational programs, scope of "nonlawyer" services, liability insurance requirements, and regulatory schemes. Staff reported that the Bar's [ATILS](#) contemplates similar recommendations in its report which the Board considered at its March 12, 2020 meeting.

At its January 23, 2020 [meeting](#), the Board heard from a variety of witnesses and held a longer discussion about the potential formation of a paraprofessional program. Staff presented to the Board the State Bar's history in attempting to implement similar programs dating back to the

1990s, provided examples of other states considering similar programs, and provided a [chart](#) informing the Board of the various existing California statutes that authorize four categories of nonlawyers to provide limited legal services to the public: Business and Professions Code sections 6400–6415 (legal document assistants and unlawful detainer assistants); 22440 (immigration consultants), and 6450 (paralegals).

Staff also [presented](#) to the Board key results from the [California Justice Gap Study](#). It defined the justice gap as “the difference between the civil legal problems [Californians] face and the resources available to resolve them.” According to the Study, 55% of Californian’s experienced at least one civil legal issue within the past year; 13% of Californians experienced six or more problems; but fewer than one in three Californians sought legal help. Health, Finance, and Employment were the main legal problem types faced by Californians, regardless of income. Staff advised the Board that these results highlight a knowledge gap about legal issues. In addition, existing Legal Aid programs only fully resolve one-third of the problems presented by low-income Californians highlighting one area of the service gap. They estimated \$900 million in additional funding for legal aid would be needed to fully address this gap.

The Board also heard from Paula Littlewood, former Executive Director of the Washington State Bar Association (WSBA), Steve Crossland, former President of the WSBA, and President-Elect Kyle Sciuchetti, who presented to the Board about Washington’s experience implementing a Limited Licensed Legal Technician (LLLT) program. Such LLLTs obtain a license to independently practice in the family law setting, in a narrower scope than attorneys, but must inform clients to seek attorney services in matters outside of their authorized scope. The Washington officials reported that they expanded accessibility to the LLLT program by allying with community colleges to create pathways to the LLLT profession that require an associate level

degree, experiential requirements, and examinations, and hope to expand the program to additional practice areas soon. They also did caution the Board that the startup costs for establishing a new licensing category, and a separate oversight board, exceeded the licensing fees they charge LLTs.

At its March 12, 2020 meeting, the Board [approved](#) the Paraprofessional Program Working Group's proposed charter and appointment of members. The [charter](#) (attachment A) requires the Working Group to develop recommendations for the creation of a paraprofessional licensure/certification program. These recommendations must include the following: eligibility requirements, types of practice areas to offer, types of tasks paraprofessionals will perform, business and financial responsibility requirements, rules of conduct, data collection to assess effectiveness, and ways to increase awareness on how to seek legal help. According to the [staff memo](#), the Working Group's recommendations are expected to help increase access to legal services in California. The Board also extended the due date for submission of the Working Group's final report to July 31, 2021.

## **State Bar's 2020 Governance in the Public Interest Task Force to Focus on Risk-Based Regulation**

At its November 14, 2019 [meeting](#), the State Bar's 2020 [Governance in the Public Interest Task Force](#) voted to focus its efforts and report on proactive regulation, also known as risk-based regulation, which seeks to prevent lawyers from harming the public rather than retroactively fixing such harm. Pursuant to Business and Professions Code section 6001.2, the Task Force is charged with preparing and submitting a report to the Supreme Court, the Governor, and the Assembly and Senate Committees on Judiciary that includes its recommendations for enhancing the protection of the public, and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys. By statute, the Task Force is comprised of seven appointed

members: three attorney members of the Board of Trustees, three public members of the Board of Trustees, and the Chair of the Board of Trustees, and must convene and submit its report every three years.

In its latest [report](#), the 2017 Governance in the Public Interest Task Force recommended organizational changes to the State Bar’s sub-entities, altering the composition and size of the Board of Trustees, and separating certain sub-entities whose functions did not align with the State Bar’s priorities. [[24:2 CRLR 120–126](#)]

At its February 7, 2020 [meeting](#), the 2020 Task Force began its review of proactive regulation and defined risk-based regulation as the use of data to identify lawyers who are at-risk of receiving complaints or discipline. During the meeting, Professor of Health and Law at Stanford University, David Studdert, presented on risk-based regulation in the medical profession. Specifically, he advised the Task Force that medical regulatory bodies use collected data about physicians to predict the likelihood that a physician will receive a complaint. The medical profession assigns “PRONE scores” to each physician that receives a complaint. The PRONE score determines the physician’s risk level based on factors such as the number of prior complaints, times since last complaint, sex, profession or specialty, and age. Professor Studdert emphasized that for the State Bar to successfully implement risk-based regulation, it must follow predictions with effective interventions for at-risk lawyers. For example, the Task Force explained that such risk-based regulation may benefit the State Bar’s Office of Chief Trial Counsel (OCTC) by creating a mechanism that identifies common complaints against lawyers so that OCTC may allocate its resources to preventative education for at-risk lawyers.

At its March 5, 2020 [meeting](#), the Task Force discussed the State Bar’s attorney discipline system, and reviewed other jurisdictions that implemented risk-based regulation. Tara Sklar,

Professor of Health and Law at University of Arizona presented the procedures and findings from her study on risk-based regulation of lawyers in Australia. Her presentation revealed that 4% of lawyers accounted for 58% of the total complaints submitted to Australia’s regulatory body. The presentation also indicated that solo practitioners were more likely to receive complaints than lawyers employed by law firms. This demonstrates a “clustering” of complaints where lawyers with certain characteristics receive most of the complaints. Risk-based regulation can be used to recognize these clusters in order to identify lawyers in need of support, avert careers of misconduct, enhance protection for vulnerable clients, target scarce regulatory resources, reduce overall complaints, and improve the public’s satisfaction with the complaint process. The Task Force plans on utilizing Professor Sklar’s presentation in its final report to make recommendations for implementing a proactive discipline system in California.

The Governance in the Public Interest Task Force is expected to submit its final report to the Supreme Court, the Governor, and the Legislature by its statutory deadline on May 15, 2020.

## **MAJOR PUBLICATIONS**

The following reports/studies have been conducted by or about the State Bar of California during this reporting period:

- [2020 Adopted Final Budget](#), State Bar of California Office of Finance, February 28, 2020 (Incorporates the increased licensing fee revenue approved by the legislature and Governor through [SB 176 \(Jackson\) \(Chapter 698, Statutes of 2019\)](#). [See [25:1 CRLR 129](#)] The 2020 budget projects total revenue of \$211.9 million with expenses of \$242.5 million.)
- [2020 California Justice Gap Study](#), State Bar of California, January 23, 2020 (Pursuant to Goal 1 of the 2017–2022 Strategic Plan in the mission to pursue access to justice. The study contains four components: California Justice Gap Survey, Intake Census, Legal Aid Recruitment

and Retention Study, and Law Student Survey. It also recommends solutions to reduce the justice gap in California. (see HIGHLIGHTS)).

- [\*State Bar of California Task Force on Access Through Innovation of Legal Services Final Report and Recommendations\*](#), State Bar of California, March 6, 2020 (Presents findings and recommendations from task force assigned to study possible regulatory changes for enhancing the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. (see HIGHLIGHTS).)
- [\*Commission on Judicial Nominees Evaluation 2019 Statewide Demographics Report\*](#), Commission on Judicial Nominees Evaluation, March 1, 2020 (Pursuant to Government Code section 12011.5(n)(B), provides statistical analysis of the demographics of judicial candidates in the areas of ethnicity, race, disability, veteran status, gender, gender identity, sexual orientation, and employment.)
- [\*Lawyer Assistance Program 2019 Annual Report\*](#), Lawyer Assistance Program Oversight Committee, March 1, 2020 (Pursuant to Business and Professions Code section 6238, provides information on the operation of the Lawyer Assistance Program; key statistical evidence concludes 296 total cases, 31% of 172 cases closed met their stated program goals, and 40% of participants enrolled for help with substance use disorder.)

## **RULEMAKING**

- *OCTC Recusal* (On November 14, 2019, the Board [approved proposed changes](#) to State Bar Rule of Procedure 2201 to lift the grounds for OCTC’s mandatory recusal from a judicial conflict of interest standard to a prosecutor’s conflict of interest standard; allow the Special Deputy Trial Counsel to handle matters where the OCTC has a conflict; designate certain mandatory conflicts as discretionary conflicts; revise current mandatory recusal to only apply to the CTC; and

include all attorney conflicts for Board of Trustee members in the discretionary recusal section. [[25:1 CRLR 140](#)])

- ***Vexatious Complainants*** (On January 24, 2020, the Board [approved](#) corrected [proposed changes](#) to State Bar Rule of Procedure 2605, to allow designation of a vexatious complainant, effective *nunc pro tunc* to September 19, 2019. [[25:1 CRLR 138](#)])

- ***Lawyer’s Duty of Competence*** (On March 12, 2020, the Board authorized a 60-day public comment period with respect to [proposed changes](#) to California Rule of Professional Conduct 1.1 to add new comment about lawyer’s duty of competence regarding changes in the law and practice to include technological advances. This is a recommendation of the ATILS task force (see HIGHLIGHTS). Public comment period ends May 18, 2020.)

- ***Fee Sharing*** (On March 12, 2020, the Board authorized a 60-day public comment period with respect to [proposed changes](#) to California Rule of Professional Conduct 5.4 to expand exceptions for fee sharing arrangements with certain nonprofit organizations. This is a recommendation of the ATILS task force (see HIGHLIGHTS). Public comment period ends May 18, 2020.)

- ***Proposed Changes to Elimination of Bias MCLE Rules*** (On March 12, 2020, the Board requested [public comment](#) by June 30, 2020 for the [proposed revisions](#) (attachments B–E) to State Bar Rules 2.52, 2.71, 2.72, 3.601, 3.602, 3.603, and 3.604. These revisions would align the Mandatory Continuing Legal Education (MCLE) rules with Business and Professions Code section 6070.5 by forming MCLE provider requirements, increasing bias training from one to two hours, and creating an implicit bias sub-topic.)

- ***Proposed Amendments to Rules of Professional Conduct 1.4, 1.16, and 3.8*** (On January 24, 2020, the Board [approved](#) the [proposed amendments](#) to Rules of Professional Conduct

1.4, 1.16, and 3.8 and directed staff to submit to the California Supreme Court with a request for approval. The amendments emphasize a lawyer’s statutory duty to retain client files for the term of imprisonment relating to criminal matters and alert prosecutors to preserve criminal evidence.)

## **LEGISLATION**

- [SB 1151 \(Jones\)](#), as introduced on February 20, 2020, would amend section 6140.9 of the Business and Professions Code to extend through 2021 the lowered fees for the Lawyer Assistance Program from \$10 to \$1 for active licensees and zero for inactive licensees. *[S. Jud]*
- [SB 1382 \(Hueso\)](#), as introduced February 21, 2020, would amend sections 6126.4, 6401, and 22440, et seq. of the Business and Professions Code to replace the term “immigration consultant” with “immigration form assistant,” impose various disclosure requirements for individuals who hold themselves out in this role. *[S. Jud]*