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Diversity from the Perspective of Corporate Boards and Lawyer Disciplinary Boards

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**DIVERSITY FROM THE PERSPECTIVE OF CORPORATE BOARDS
AND LAWYER DISCIPLINARY BOARDS**

LISSA L. BROOME* AND JOHN M. CONLEY**

ABSTRACT

This Article addresses the organizing question of this symposium—whether diversifying state medical boards (SMBs) would improve their effectiveness in disciplining doctors—by drawing on the comparable experiences of corporate boards of directors and lawyer disciplinary boards. Reexamining our own qualitative study of corporate board diversity conducted several years ago, we find that almost of all of the arguments for board diversity raised in the business literature or our own interviews also tend to support diversity on SMBs. Reviewing the legal profession’s experience with the diversity question on lawyer disciplinary boards, we find that many of these arguments have also been recognized, at least implicitly, by state bars and are embodied in the legal profession’s initiatives to improve diversity in its disciplinary processes. Based on these two sources of evidence, our recommendation is that SMBs should continue and strengthen their efforts to pursue diversity. Specifically, we recommend that each board publish its demographic diversity targets along with an annual report on a standard form reporting the board’s diversity compared to those targets and an explanation whenever a diversity target is not achieved. Energizing external actors like medical professional associations to support and advocate for SMB diversity efforts may also be helpful along with considering how to make SMB service more attractive to potential diverse members.

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I. INTRODUCTION

The project that is the subject of this symposium recommends that state medical boards (SMBs) “[t]o the extent practicable . . . reflect the geographic, racial, ethnic, and gender diversity of the State.”¹ We offer board diversity discussions from two different contexts that may help inform this recommendation. We draw on a qualitative study of corporate board diversity that we conducted several years ago, as well as our experience in teaching professional responsibility in law school. First, we briefly recount the reasons often given for board diversity in corporate and other contexts. Then, we review the different approaches that have been tried in order to increase diversity on the boards of directors of for-profit corporations. Next, we discuss diversity efforts on state lawyer disciplinary boards, which are even more analogous to SMBs than corporate boards of directors. Finally, we conclude with several observations from these two contexts that may be helpful in informing medical board diversity efforts.

II. LESSONS FROM CORPORATE BOARDS

A. *Background: The Value of Diversity on Boards*

Many arguments have been advanced in support of increasing diversity on governing boards. These include a general argument based on fairness—the “social cause”² case—as well as numerous business justifications. The social cause argument states that diversity is the “right thing to do,”³ and that board membership opportunities—like employment opportunities—should be available to all.⁴ This argument has been more widely accepted in other cultures and has had “limited appeal within the U.S. shareholder welfare-focused paradigm.”⁵

Numerous business justifications have been advanced for increasing diversity on corporate boards. One justification is based on evidence that suggests that more board diversity is correlated with better corporate financial performance—what those in the field often call the business case.⁶ Several

1. Elizabeth Pendo et al., *Protecting Patients from Physicians Who Inflict Harm: New Legal Resources for State Medical Boards*, 15 ST. LOUIS U. J. HEALTH L. & POL’Y 7, 22 (2022).

2. Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 149, 159 (2019) (characterizing the “social cause case” for gender diversity).

3. Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 857 (2011).

4. Nili, *supra* note 2, at 159.

5. Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 763 (2011) [hereinafter *Dangerous Categories*].

6. See, e.g., JASON M. THOMAS & MEGAN STARR, GLOBAL INSIGHTS: FROM IMPACT INVESTING TO INVESTING FOR IMPACT 2, 5 (2020), <https://www.carlyle.com/sites/default/files/>

business case studies show a correlation between board diversity and better financial performance,⁷ but there is no hard evidence that greater board diversity causes better financial performance.⁸

There are several other business justification arguments for greater board diversity. One argument states that diverse board members may help reduce agency costs by monitoring management to ensure that management is maximizing the interests of the owner-shareholders.⁹ This has also been discussed under the rubric of improving investor protection.¹⁰ Diverse boards may possess a higher quantity and quality of information, consider “more varied alternatives to any given course of action, and generate higher-quality decisions.”¹¹ Diverse boards may also be more likely to engage in “robust dialogue and better decision making,” avoid “groupthink”¹² and, consequently, realize more effective corporate governance.¹³ As one scholar concluded,

2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf (finding that its portfolio companies with two or more diverse directors had significantly higher annual earnings over a three-year period than portfolio companies with no diverse directors); FCLTGLOBAL, *THE LONG-TERM HABITS OF A HIGHLY EFFECTIVE CORPORATE BOARD* 11 (2019), <https://www.fcltglobal.org/resource/the-long-term-habits-of-a-highly-effective-corporate-board/> (companies with the most diverse boards had a greater return on capital as compared to companies with the least diverse boards); *see also* The Nasdaq Stock Market LLC, *SR 2020-081 Amendment 1, Proposed Rule Change*, LISTING CTR. 13 (Feb. 26, 2021), https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081_Amendment_1.pdf [hereinafter Nasdaq Proposal] (pointing to a number of studies that “identified positive relationships between board diversity and commonly used financial metrics”).

7. THOMAS & STARR, *supra* note 6; FCLTGLOBAL, *supra* note 6; Nasdaq Proposal, *supra* note 6.

8. Nili, *supra* note 2, at 161 (“the business case in its narrowest sense—a positive effect on accounting measures or stock price—has yet to definitively establish that gender diversity is the cause of an increase in the bottom line”); Jesse M. Fried, *Will Nasdaq’s Diversity Rules Harm Investors?* 2 (Eur. Corp. Governance Inst. L. Working Paper, Paper No. 579/2021, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812642 (citing some “rigorous scholarship . . . [that] suggest[s] that increasing board diversity can actually lead to lower share prices”). *But see* Richard W. Painter, *Board Diversity: A Response to Professor Fried* 35 (Apr. 12, 2021) (working draft) (on file with Social Science Research Network) (concluding that Professor Fried “ignores . . . the many conceptual arguments that board diversity increases shareholder value over the long term”).

9. Renée V. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 292, 304–05 (2009) (concluding that female directors monitor more aggressively than men).

10. Nasdaq Proposal, *supra* note 6, at 29–35 (summarizing studies that find positive association *between* gender diverse audit committees and the quality of earnings, financial reporting, and public disclosure, along with studies showing a positive association with overall board gender diversity and various investor protections).

11. *Dangerous Categories*, *supra* note 5, at 765 (citing research on the value of heterogeneity in groups).

12. Nasdaq Proposal, *supra* note 6, at 36.

13. *Id.*

“heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences.”¹⁴

Greater board diversity may also send important signals of inclusivity to observers such as employees and customers.¹⁵ Another, somewhat cynical, justification for increased board diversity is that it may quiet diversity advocates and remove that distraction from the boardroom.¹⁶

Research in other areas, including studies of multi-member judicial panels, indicates that panel diversity may be a net positive in judicial decision-making.¹⁷ Indeed, some studies have found differences between the results reached by male and female judges in similar cases (referred to as “individual effects”) and also that female judges influence male judges when sitting on a panel of judges (as often occurs in the appellate setting) when dealing with sex discrimination cases (“panel effects”).¹⁸

B. *Our Empirical Research on Corporate Boards*

Because of the inconclusiveness of the empirical business case research on the effect of board diversity on corporate performance,¹⁹ we began a qualitative study of how board diversity affected the operation of boards and the performance of corporations.²⁰ We conducted over fifty interviews with members of corporate boards (diverse and non-diverse) and others who interacted frequently with boards.²¹ Most of our interviews were conducted over a three-year period beginning in 2008 as the global financial crisis was

14. Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1391 (2002).

15. *Dangerous Categories*, *supra* note 5, at 762, 764; *see also* Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 457 (2008) (discussing signaling in detail) [hereinafter *Signaling Through Board Diversity*].

16. *Dangerous Categories*, *supra* note 5, at 764.

17. *Id.* at 767.

18. *Id.*; Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 400–06 (2010).

19. *See supra* notes 6–8 and accompanying text.

20. *Dangerous Categories*, *supra* note 5, at 768; *see also* Kimberly D. Krawiec, John M. Conley & Lissa L. Broome, *A Difficult Conversation: Corporate Directors on Race and Gender*, PACE INT’L L. REV., Spring 2014, at 13, 14; Kimberly D. Krawiec, John M. Conley & Lissa L. Broome, *The Danger of Difference: Tensions in Directors’ Views of Corporate Board Diversity*, 2013 U. ILL. L. REV. 919, 919–20 (2013); Lissa Lamkin Broome, John M. Conley & Kimberly D. Krawiec, *Does Critical Mass Matter? Views from the Boardroom*, 34 SEATTLE U. L. REV. 1049, 1056 (2011); *Signaling Through Board Diversity*, *supra* note 15, at 432.

21. *Id.*

unfolding. During that period, most corporate boards were not very diverse, with women or people of color having token representation, at best.²²

Our interview subjects confirmed many of the business justifications discussed above. Interestingly, the fairness argument, stressing the moral imperative of ensuring that corporate board diversity reflects that of the population, was rarely raised, and when it was mentioned, it was often in conjunction with other, more functional, justifications for diversity.²³ During these interviews, we heard that the perspectives provided by diverse board members helps to avoid groupthink,²⁴ in part by introducing “a diversity of experiences and sensibilities” that “promotes richer discussions.”²⁵ A subset of these functional explanations about the value of diversity noted that women and men may approach problems and issues differently, as suggested by a book popular at the time—*Men Are from Mars, Women Are from Venus*.²⁶ This rationale seemed to rely on the difference in the interpersonal skills of men and women and their potentially different sensibilities and ways of reasoning.²⁷ Often, however, after mentioning these purported differences, respondents backpedaled, implicitly acknowledging that they might be engaged in stereotyping.²⁸ Sometimes, when respondents commented on important contributions of female or racially diverse directors, the focus of the contribution was not related to their gender or racial diversity, but rather reflected a specific skill set that the director brought to the table.²⁹

Some of our respondents confirmed that diverse board members do send a signal to employees “that the company cares about the interests and welfare of female and minority employees, and that the organization is one in which members of these groups can rise to the highest ranks.”³⁰ Indeed, we observed that female directors sometimes commented that they had more empathy for lower-level employees than male directors showed.³¹

Other observations about the value of board diversity added to the theoretical justifications for diversity recounted earlier. One such argument included the benefits of accessing the heretofore untapped or underutilized talent pool of diverse board candidates.³² By overlooking diverse candidates, boards

22. See *infra* notes 37–41.

23. *Dangerous Categories*, *supra* note 5, at 799.

24. *Id.* at 778–79.

25. *Id.* at 777.

26. JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS passim* (1992).

27. *Dangerous Categories*, *supra* note 5, at 780.

28. *Id.* at 781–82.

29. *Id.* at 782.

30. *Id.* at 792.

31. *Id.* at 793–95.

32. *Dangerous Categories*, *supra* note 5, at 764 & n.3.

were missing “really talented people.”³³ Another significant claim about board diversity’s value in our interview study, one that was also outside the theoretical literature, “involved the recruitment and promotion of managers and succession planning for the ‘C-suite.’”³⁴ The presence of diverse board members often led to discussions of diversity as it related to succession planning in senior executive ranks.³⁵ In some cases, having diverse board members also led to increased scrutiny on retention and promotion of a diverse workforce.³⁶

During these interviews, however, we heard relatively few meaningful or detailed examples of the benefits of diversity on corporate boards, outside of the development of the executive pipeline. We posited that this may have resulted from the dangerousness of the diversity categories based on gender, race, and ethnicity:

The argument for diversity requires the assumption that people of diverse demographic backgrounds really are *different* in some meaningful way—but difference is a concept that must be handled with great delicacy. Those who are not members of traditionally unrepresented groups do not want to be accused of stereotyping or essentializing by identifying particular unique contributions of members of those groups; no one wants to say anything like “*they* are especially good at that.” Conversely, those who are members of traditionally unrepresented groups have a vested interest in presenting themselves as *not* being different: not as token members of a group, but as individuals who have been selected based on their own merit.³⁷

C. Corporate Board Diversity Numbers

Corporate board diversity increased substantially between 2010 (the time of our board interview study) and 2020, but the representation of women and people of color on corporate boards still significantly lags behind the demographics of the population of the United States. In 2020, the percentage of Fortune 500 board seats held by women was 26.5%, up from 15.7% in 2010, but far less than the 50% that one would expect.³⁸ The 2020 percentage of board seats held by people of color was 17.5%, up from 12.8% in 2010,³⁹ but far less than the almost 40% of the U.S. population composed of people of color.⁴⁰

33. *Id.*

34. *Id.* at 795.

35. *Id.*

36. *Id.* at 797–99.

37. *Dangerous Categories*, *supra* note 5, at 805.

38. DELOITTE & ALL. FOR BOARD DIVERSITY, MISSING PIECES REPORT: THE BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 18 fig.8 (6th ed. 2021).

39. *Id.*

40. *Quick Facts: United States*, U.S. CENSUS BUREAU (Jul. 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/IPE120219> (as of the 2020 Census, 60.1% of the population was White alone, not Hispanic or Latino).

Moreover, the boards of smaller companies outside of the Fortune 500 tend to be even less diverse.⁴¹ Corporate boards, even after the progress made in the last decade, do not represent the gender, racial, or ethnic make-up of the United States population. As a result, numerous approaches have been introduced to attempt to increase corporate board diversity, with perhaps lessons for increasing diversity on state medical boards (SMBs).

D. Approaches to Improving Corporate Board Diversity

Many of the approaches to increasing corporate board diversity described below have been put in place relatively recently, and it may be too soon to fully assess their efficacy. Efforts to increase board gender diversity were kickstarted by a 2006 Norwegian statute mandating at least forty percent representation of both men and women on Norwegian corporate boards.⁴² Attention to racial and ethnic diversity has increased more recently, as evidenced by a 2020 California state statute⁴³ and a 2021 rule by the U.S. Securities and Exchange Commission (SEC) adopting Nasdaq's proposal that all companies listed on the Nasdaq have at least two diverse directors or explain why they do not.⁴⁴

As described below, a variety of approaches have been used to try to increase corporate board diversity, including mandates, targets (often coupled with a "comply or explain" requirement), disclosure, explanation of how diversity factors into the director nomination process, and financial pressure exerted by institutional investors, proxy advisors, and other observers.

1. Mandates

The most effective approach to increasing board diversity, but also the most controversial, is the imposition of a government mandate requiring a certain level of board diversity. In 2006, Norway adopted a gender diversity mandate or quota requiring that Norwegian corporate boards achieve forty percent female board representation by 2008, or be delisted.⁴⁵ There was full compliance with this statute by 2009.⁴⁶ Many other countries followed suit.⁴⁷

41. See *North Carolina Corporate Board Diversity 50 Largest North Carolina Companies: 2018 Survey*, UNIV. OF N.C. SCH. OF L., <https://ddi.law.unc.edu/boarddiversity/> (last visited Oct. 13, 2021) (chart comparing 2018 corporate board diversity of Fortune 100, Fortune 500, and NC Top 50—which only has a few Fortune 500 companies in it).

42. DELOITTE, *WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE* 134 (6th ed. 2019).

43. See *infra* note 50 and accompanying text.

44. See *infra* notes 56–57 and accompanying text.

45. *WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE*, *supra* note 42; AARON A. DHIR, *CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY* 76–77, 105 (2015).

46. DHIR, *supra* note 45, at 105.

47. See *generally* *WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE*, *supra* note 42, at 4, 16. There are now board gender diversity quotas mandating forty percent female board

In 2018, California adopted its first board diversity mandate, requiring that by the end of 2019 there be at least one woman director on the board of any company either incorporated or headquartered in California.⁴⁸ Depending on the size of the board, additional female board members may be required by the end of 2021.⁴⁹ A \$100,000 fine will be levied against companies that are not in compliance with the statute, and the fine increases to \$300,000 for the second and subsequent violations.⁵⁰ In 2020, a second board diversity mandate followed when California added representational requirements for other underrepresented groups as demonstrated by race, ethnicity, or LGBTQ+ status.⁵¹ This representation must be achieved by December 31, 2021.⁵² The California statutory diversity mandates are controversial and are being challenged as a violation of the equal protection clause of both the United States and the California state constitutions.⁵³

The California gender diversity mandate has had a significant impact on the gender composition of California public company boards. According to a progress report issued by the California Partners Project, since 2018, the number of public company board seats held by women has increased 93.6%, from 766 to 1483.⁵⁴ Moreover, in 2021, 93% of California's 142 smallest public companies now have at least one female board member, up from only 47% with at least one female board member in 2018.⁵⁵

2. Board Diversity Targets with Consequences

In a major development, on August 6, 2021, the SEC adopted a proposal by Nasdaq, one of the two major public exchanges for trading stock in the United States.⁵⁶ The SEC added to the requirements for a company's shares to be listed

representation in France and Iceland; thirty-three percent female representation in Belgium, Italy, and Portugal; thirty percent in Austria, Germany, Malaysia, and the Netherlands. *Id.* at 80, 84, 102, 106, 115, 120, 130, 142, 214.

48. S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018) (codified as amended at CAL. CORP. CODE. § 301.3 (West 2020)).

49. *Id.* If the corporation has five directors, then there must be a minimum of two female directors by December 31, 2021, and if the corporation has six or more directors, then the minimum number of female directors increases to three. *Id.*

50. *Id.*

51. A.B. 979, 2020 Assemb., Reg. Sess. (Cal. 2020) (codified as amended CAL. CORP. CODE. § 301.3 (West 2020)).

52. *Id.*

53. Malathi Nayak, *Lawsuits Challenge California's Corporate Board Diversity Quotas*, L.A. TIMES (July 13, 2021, 3:45 PM), <https://www.latimes.com/business/story/2021-07-13/california-corporate-board-diversity-quotas-face-legal-challenge>.

54. CAL. PARTNERS PROJECT, CLAIM YOUR SEAT: WOMEN OF COLOR ON CALIFORNIA'S PUBLIC COMPANY BOARDS 8 (2021).

55. *Id.* at 7.

56. Order Approving Proposed Rule Changes to Adopt Listing Rules Related to Board Diversity, 86 Fed. Reg. 44,424, 44,424–25 (Aug. 6, 2021).

on Nasdaq a board diversity target of at least two diverse members, coupled with a uniform board diversity disclosure requirement.⁵⁷ In the event the company does not meet the target, it must explain why not.⁵⁸ Of the two “diverse” directors, at least one must be a self-identified female and at least one must self-identify as an underrepresented minority or LGBTQ+.⁵⁹ One of the justifications for the Nasdaq proposal was the connection between greater diversity and investor protection, including “enhancing the quality of a company’s financial reporting, internal controls, public disclosures, and management oversight.”⁶⁰

The state of Washington adopted a statute in 2020 that requires all publicly traded companies incorporated in Washington to have at least twenty-five percent female board members by January 1, 2022, or explain how the company considered diverse groups (not just women, but also racial minorities and other historically underrepresented groups) during the board nomination process.⁶¹ Australia, Finland, Sweden, New Zealand, Canada, and the United Kingdom also have board diversity “comply or explain” requirements.⁶²

3. Legal Disclosure Requirements

Nasdaq’s board diversity rule also mandates disclosure in a uniform format of the self-identified gender, race, and LGBTQ+ status of a listed corporation’s directors.⁶³ Nasdaq cited the cost and time burden for multiple interested observers to collect the same information from companies as one justification

57. *Id.* Nasdaq’s original proposal was filed with the SEC on December 1, 2020. *Id.* at 44,424. It filed an amended proposal on February 26, 2021, which provided some additional flexibility for companies. *See* Nasdaq Proposal, *supra* note 6, at 1, 73. For instance, for a “Smaller Reporting Company” as defined by market capitalization or revenues, the amended proposal provides that the second diverse director may be a second female. Nasdaq Proposal, *supra* note 6, at 85; Order Instituting Proceedings to Adopt Listing Rules Related to Board Diversity, 86 Fed. Reg. 14,484, 14,486 & n.24 (Mar. 10, 2021). The amended proposal permits a company with five or fewer board members to have just one diverse member. Nasdaq Proposal, *supra* note 6, at 86; Order Instituting Proceedings to Adopt Listing Rules Related to Board Diversity, 86 Fed. Reg. 14,484, 14,486 (Mar. 10, 2021).

58. Nasdaq Proposal, *supra* note 6, at 9.

59. Order Instituting Proceedings to Adopt Listing Rules Related to Board Diversity, 86 Fed. Reg. 14,484, 14,485 (Mar. 16, 2021). “Underrepresented Minority” is defined to include someone “who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities.” *Id.* LGBTQ+ is defined as “an individual who self-identifies as any of the following: Lesbian, gay, bisexual, transgender, or as a member of the queer community.” *Id.*

60. *Id.* at 14,490; Nasdaq Proposal, *supra* note 6, at 29 (and studies reviewed at pages 29–35).

61. Subst. S.B. 6037, 66th Leg., 2020 Reg. Sess. (Wash. 2020) (codified as amended at 805 WASH. REV. CODE § 23B.08.120 (2020)).

62. Nasdaq Proposal, *supra* note 6, at 120.

63. Order Instituting Proceedings to Adopt Listing Rules Related to Board Diversity, 86 Fed. Reg. at 14,488.

for this aspect of its proposal.⁶⁴ Moreover, it noted that in the business world, “what gets measured, gets managed,” as further reason to provide transparency around board diversity metrics.⁶⁵ At the state level, Illinois,⁶⁶ Maryland,⁶⁷ and New York⁶⁸ have mandated disclosure of certain board diversity metrics.

Effective in 2010, the SEC amended Regulation S-K, which prescribes the contents of proxy statements and other filings, to require disclosure of whether and how a board’s nominating committee considers diversity in identifying board candidates.⁶⁹ Further, if the board has a policy regarding diversity and the identification of board nominees, the proxy should describe how that policy is implemented and assess the effectiveness of the policy.⁷⁰ A board diversity policy, however, is not mandated. In addition, each company may define “diversity” for itself, and some companies have defined diversity to include a variety of factors that may or may not include gender, racial, or ethnic diversity.⁷¹ A perhaps unintended consequence of the SEC regulation is that companies may decline to create a diversity policy, so they do not have to describe its implementation and assess its effectiveness.⁷²

64. See Nasdaq Proposal, *supra* note 6, at 59.

65. *Id.* at 121 (quoting Acting Securities & Exchange Commission Chair Allison Herren Lee); *Id.* at 52 (“It is difficult to improve what one cannot accurately measure.”).

66. H.B. 3394, 101st Gen. Assemb., Reg. Sess. (Ill. 2019) (codified as amended at 805 ILL. COMP. STAT. ANN. 5/8.12(c) (Lexis Nexis 2019)) (requiring corporations with their principal executive office in Illinois to disclose information about the racial, ethnic, and gender diversity of their boards).

67. H.B. 1116, 2019 Leg., Reg. Sess. (Md. 2019) (codified as amended at MD. CODE ANN., TAX-PROP. § 11-101(c)(2) (LexisNexis 2019)) (requiring all business entities, including nonprofits with an annual operating budget exceeding \$5 million, with corporate headquarters in Maryland to disclose the number of female directors and the total number of directors).

68. S.B. 4278, 2019 Gen. Assemb., Reg. Sess. (N.Y. 2019) (codified as amended at N.Y. BUS. CORP. LAW § 408.3-1(d) (McKinney 2019)) (requiring all foreign and domestic corporations, publicly traded and privately held, to report the number of directors and how many of the directors are female).

69. Proxy Disclosure Enhancements Final Rule, 74 Fed. Reg. 68,334, 68,343–44 (Dec. 23, 2009) (codified at 17 C.F.R. § 229.407(c)(2)(vi)).

70. *Id.*

71. Nili, *supra* note 2, at 187 (“[M]any companies comply with the letter of the regulation by defining diversity broadly enough to incorporate any possible difference between people.”). However, the number of Fortune 100 companies mentioning gender, racial, or ethnic diversity as a factor in director selection increased for each factor for the first year the proxy rule was in effect: gender (nine to forty-one companies), race (two to twenty-five companies), and ethnicity (seven to twenty-seven companies). Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 U. DAYTON L. REV. 39, 69–70 (2011).

72. Nili, *supra* note 2, at 188 (describing the disincentive to creating a diversity policy); Hazen & Broome, *supra* note 71, at 65–66 (finding that in the first year this disclosure was in effect, twenty-eight of the Fortune 100 companies “specifically stated that they did *not* have a diversity policy even though they may have ‘considered’ diversity in selecting director-nominees” perhaps

4. Investor Influence and Advocacy Groups

Several large corporate institutional investors have also announced their desire for their portfolio companies to achieve certain board diversity targets, with the consequence for failure to achieve the goal being that the investor will vote against some or all of the company's director nominees in the next director election. BlackRock, the largest worldwide institutional investor, encourages its portfolio companies to have diverse boards that include at least two female board members⁷³ and encourages its portfolio companies to disclose the demographic data regarding the diversity of their boards.⁷⁴ If a company has "not adequately accounted for diversity in its board composition within a reasonable time frame . . . [BlackRock] may vote against members of the nominating/governance committee for an apparent lack of commitment to board effectiveness."⁷⁵ Without naming a specific diversity target, Vanguard Asset Management, another large institutional investor, will vote against the chairs of nominating or governance committees where there is a sufficient lack of progress on board diversity.⁷⁶

The two main proxy advisory firms that advise shareholders how to vote in corporate elections are Glass Lewis and Institutional Shareholder Services (ISS).⁷⁷ Glass Lewis recommends withholding votes from the chair of the company's nominating committee if there are not at least two women on the board by 2022, while ISS recommends withholding votes if there is a lack of racial and ethnic diversity or lack of disclosure regarding such board diversity by 2022.⁷⁸

In a parallel development, there are a number of prominent organizations, such as the U.S. Chamber of Commerce, that are using their platforms to advocate for increased board diversity.⁷⁹ Consulting firms and search firms are

because of the additional requirements regarding a description of implementation and an evaluation of effectiveness).

73. BLACKROCK INV. STEWARDSHIP, PROXY VOTING GUIDELINES FOR U.S. SECURITIES 6 (2021), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>.

74. *Id.*

75. *Id.*

76. VANGUARD, SUMMARY OF THE PROXY VOTING POLICY FOR U.S. PORTFOLIO COMPANIES 6–7 (2021), https://about.vanguard.com/investment-stewardship/portfolio-company-resources/2021_proxy_voting_summary.pdf.

77. *See* Nasdaq Proposal, *supra* note 6, at 55.

78. *Id.*

79. *NACD and U.S. Chamber of Commerce Partner to Accelerate Progress on Diversity in America's Boardrooms*, U.S. CHAMBER COM. (Jan. 29, 2021), <https://www.uschamber.com/diversity/nacd-and-us-chamber-of-commerce-partner-accelerate-progress-diversity-america> (describing a partnership between the U.S. Chamber of Commerce and the National Association of Corporate Directors to advance board diversity by identifying at least 250 Black executives to enter the NACD's Accelerate board training program by 2022).

also providing research and thought leadership to advocate for increased board diversity.⁸⁰

5. New Networks that Promote Potential Diverse Directors

Board platforms such as Diligent and Equilar, which are used by sitting corporate executives and board members to initiate executive and board searches, have invited members of various corporate board diversity-focused organizations to join their databases.⁸¹ There are a growing number of organizations that work with various pools of diverse board candidates.⁸² Most of these organizations maintain databases for companies to use to gain access to diverse talent or post open board position descriptions for their members to view and self-nominate.⁸³ Nasdaq also commits to providing complimentary access for a limited period of time to a board recruiting tool that is used to assist companies in recruiting diverse board candidates.⁸⁴

6. A Broader View of Who Would Be a Good Director

In prior years, when companies sought new directors, they looked primarily for sitting or recently retired chief executive officers or chief financial officers.⁸⁵ This limited pool had very few diverse candidates. As attention on greater board diversity has increased, many companies have widened their lens and have also tried to be more strategic in identifying and matching skill sets that would be

80. See, e.g., Maria Castañón Moats & Paul DeNicola, *Boardroom Diversity Should Top Directors' Agenda*, PWC, <https://www.pwc.com/us/en/services/governance-insights-center/library/boardroom-agenda-diversity.html> (last visited Oct. 13, 2021); SPENCERSTUART, 2020 U.S. SPENCER STUART BOARD INDEX 1–2 (2020), https://www.spencerstuart.com/-/media/2020/december/ssbi2020/us_spencer_stuart_board_index_2020.pdf (discussing board diversity).

81. *A Board Diversity Network for Modern Governance Leadership*, DILIGENT, <https://info.diligent.com/solutions/diversity/> (last visited Oct. 13, 2021) (describing the Diligent Modern Leadership Network to assist corporations in finding diverse board candidates); *Equilar Diversity Network*, EQUILAR, <https://www.equilar.com/diversity> (last visited Oct. 13, 2021) (describing the Equilar Diversity Network).

82. *Director Diversity Initiative*, UNIV. OF N.C. SCH. OF L., <https://ddi.law.unc.edu/> (last visited Oct. 13, 2021) (One such organization is the Director Diversity Initiative at the University of North Carolina School of Law, which is headed by Lissa Broome. The DDI works with women, people of color, and other groups that are underrepresented on corporate boards on training and through a database to help corporations find diverse potential directors) [hereinafter *Director Diversity Initiative Homepage*]; *Director Diversity Initiative: Other Organizations*, UNIV. OF N.C. SCH. OF L., <https://ddi.law.unc.edu/organizations/> (last visited Oct. 13, 2021) (The DDI maintains a list of many of the other organizations similarly focused on increasing diversity on corporate boards) [hereinafter *Other Organizations*].

83. *Director Diversity Initiative Homepage*, *supra* note 82; *Other Organizations*, *supra* note 82.

84. See Nasdaq Proposal, *supra* note 6, at 20.

85. *Id.* at 19 (noting that in the traditional nomination process, directors look “within their own social networks for candidates with previous C-suite experience”).

helpful to the company in achieving its objectives. This has led to consideration of a broader pool of board candidates, with less regard for titles. Division presidents and others with extensive profit and loss experience are now often considered for board roles, even if they have not been part of a C-suite. In making the newly adopted SEC diversity proposal, Nasdaq noted that the corporate leaders it spoke with “reinforced the notion that if companies recruit by skill set and expertise rather than title, they will find there is more than enough diverse talent to satisfy demand.”⁸⁶

E. Summary

There are many arguments made in the corporate context about why diversity improves governing board performance.⁸⁷ In recent years, legislators and regulators have seemingly adopted these arguments and have acted upon them by passing laws or stock exchange rules that address board diversity in the variety of ways discussed above.⁸⁸ If a state believes that SMB diversity is important, the most effective way to achieve it is by a legal mandate.⁸⁹ The mandate may be easier to achieve for a government-created legal body, like an SMB, than in the corporate sector.

III. CAN MEDICINE LEARN FROM THE LAWYER DISCIPLINE EXPERIENCE?

Because of the many similarities between the legal and medical professions, the bar’s experience with discipline and diversity might well be useful to medicine. Lawyers, like doctors, are state-licensed and state-regulated professionals.⁹⁰ Both groups are capable of inflicting significant harm on those they purport to serve. The perceived complexity of both professions has led to the conclusion that the public is incapable of judging their members’ competence, and that those judgments must largely be left to the profession itself.⁹¹ In the case of lawyers, state legislatures have delegated to a state-sanctioned lawyers’ organization—usually called the state bar, as distinct from state bar associations, which are private trade organizations—the tasks of assessing and admitting candidates for licensure, setting standards for professional conduct, and adjudicating alleged violations of those standards.⁹²

86. *Id.* at 19–20.

87. *See supra* notes 2–18 and accompanying text.

88. *See supra* notes 56–64 and accompanying text.

89. *See supra* notes 45–55 and accompanying text.

90. *Lawyer Licensing*, A.B.A., https://www.americanbar.org/groups/legal_services/flh-home/flh-lawyer-licensing/ (last visited Oct. 13, 2021).

91. *See* THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 23–24 (2010) (describing professional work as “so specialized as to be inaccessible” to outsiders).

92. *Consumer FAQs*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/resources/resources_for_the_public/consumer_faqs/ (last visited Oct. 13, 2021).

A. Patterns of State Bar Discipline

Examples drawn from the bars of the two largest states by population will illustrate the variations on this structural theme. In Texas:

The Supreme Court of Texas has the constitutional and statutory responsibility within the State for the lawyer discipline and disability system and has inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline and disability in a manner that does not discriminate by race, creed, color, sex, or national origin. To carry out this responsibility, the Court promulgates the following rules for lawyer discipline and disability proceedings [the substantive Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure]. Subject to the inherent power of the Supreme Court of Texas, the responsibility for administering and supervising lawyer discipline and disability is delegated to the Board of Directors of the State Bar of Texas. Authority to adopt rules of procedure and administration not inconsistent with these rules is vested in the Board.⁹³

The disciplinary system is overseen by the Commission for Lawyer Discipline.⁹⁴ It has twelve members: six lawyers appointed by the president of the State Bar and six public members appointed by the Texas Supreme Court.⁹⁵ In consultation with the State Bar Board of Directors, the Commission supervises the Office of Chief Disciplinary Counsel (CDC), which administers the attorney discipline system.⁹⁶ When it receives a complaint against a lawyer, the CDC refers it to one of seventeen geographic District Grievance Committees (DGCs).⁹⁷ The DGCs are staffed by 357 volunteer members, two-thirds of whom are lawyers; the remaining one-third are members of the public with no financial interest in the practice of law.⁹⁸ All members are nominated by the State Bar director for the particular district and appointed by the State Bar president.⁹⁹ The DGC reviews the complaint and has the ultimate say on “whether the case should be dismissed or proceed to prosecution.”¹⁰⁰ If the case proceeds, the DGC “sit[s] as an administrative tribunal to determine whether professional misconduct was committed and assess an appropriate sanction.”¹⁰¹

93. THE SUP. CT. OF TEX., TEXAS RULES OF DISCIPLINARY PROCEDURE 3 (2021).

94. *Id.* at 28–29.

95. COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT: JUNE 1, 2019 – MAY 31, 2020 2–3 (2020), https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&Template=/CM/ContentDisplay.cfm&ContentID=54491.

96. *Id.* at 9.

97. *Id.* at 13.

98. *Id.*

99. *Id.*

100. COMM’N FOR LAW. DISCIPLINE, *supra* note 95, at 13.

101. *Id.*

A lawyer may appeal a decision of the DGC within the State Bar system and, ultimately, to the Texas Supreme Court.¹⁰²

Demographically, the DGCs are fairly representative of Texas lawyers, and slightly more diverse than the lawyer population as a whole. Of the attorney members of the DGCs, fifty-eight percent are male and forty-two percent are female, versus sixty-four percent and thirty-six percent for the overall State Bar of Texas membership.¹⁰³ The attorneys on the DGCs are seventy percent white, five percent Black or African American, and sixteen percent Hispanic/Latino; the corresponding percentages for the bar as a whole are seventy-nine percent, six percent, and ten percent.¹⁰⁴

The lawyers who are disciplined are far less representative of the demographics of the legal community. During the 2019–2020 year, when disciplinary proceedings were delayed by the pandemic, there were 403 total disciplinary sanctions; 30 Texas lawyers were disbarred or resigned in lieu of discipline, and another 181 were suspended or publicly reprimanded.¹⁰⁵ (There are about 93,000 lawyers in Texas.)¹⁰⁶ Seventy-nine percent of the disciplinary respondents were male, though men comprise only sixty-four percent of the bar.¹⁰⁷ But while seventy-nine percent of lawyers are white, only fifty-four percent of those disciplined were.¹⁰⁸ Conversely, thirteen percent of the disciplinary respondents were Black/African American, despite being only six percent of the total bar membership; Hispanic/Latino lawyers comprise twenty-one percent of those disciplined versus ten percent of the bar.¹⁰⁹ For whatever reason, then, Black and Hispanic lawyers are disciplined at about twice their rate of representation in the bar, whereas white lawyers are disciplined at a rate that is about seventy-five percent of what would be predicted from bar membership.

In California, complaints against lawyers are initially investigated by the State Bar's Office of Chief Trial Counsel (OCTC).¹¹⁰ If the OCTC determines that charges are warranted, it files and prosecutes them in the State Bar Court, "an independent professional Court dedicated to ruling on attorney discipline cases" that is the only one of its kind in the country.¹¹¹ The Bar Court is staffed by a presiding judge and two other review judges appointed by the California

102. TEXAS RULES OF DISCIPLINARY PROCEDURE, *supra* note 93, at 21–22. A lawyer may also opt out of the State Bar procedure and elect to have the complaint heard in court. *Id.* at 22.

103. COMM'N FOR LAW. DISCIPLINE, *supra* note 95, at 14.

104. *Id.*

105. *Id.* at 5, 7.

106. AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.

107. COMM'N FOR LAW. DISCIPLINE, *supra* note 95, at 7, 14.

108. *Id.*

109. *Id.*

110. *Conduct & Discipline*, STATE BAR CAL., <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline> (last visited Oct. 13, 2021).

111. *Home*, STATE BAR CT. CAL., <http://www.statebarcourt.ca.gov/> (last visited Oct. 13, 2021).

Supreme Court, and five hearing judges appointed by the California Supreme Court and the legislature, all full-time.¹¹² Cases proceed from trial before a hearing judge to appellate review by the review judges, with final appeal available to the California Supreme Court.¹¹³ The Bar Court has authority to issue a full range of sanctions, from “private reprovings” to recommendations that the Supreme Court suspend or disbar a lawyer.¹¹⁴ In 2020, the OCTC opened nearly 17,500 cases against lawyers and other people fraudulently claiming to be lawyers, filed 180 cases in State Bar Court, and recommended disbarment for 97 lawyers and suspension for another 114.¹¹⁵

There are currently 190,000 licensed lawyers on active status in California.¹¹⁶ According to the most recent detailed statistics (2017), about fifty-seven percent identify as male and forty-one percent as female.¹¹⁷ Of these licensed lawyers, 80.3% are white, 5.9% are Asian, 4.6% are Hispanic, and 1.9% are Black.¹¹⁸ About twenty-one percent of lawyers are in solo practice and eighteen percent are in small firms; the next two largest practice categories are corporate in-house (nine percent) and large firms (eight percent).¹¹⁹ That said, most California lawyers are male, a large majority are white, and a significant plurality practice in small or solo settings.

Against this background, in 2019, the State Bar commissioned a study of racial disparities in lawyer discipline by George Farkas, an education professor at the University of California, Irvine.¹²⁰ Farkas used data on all lawyers admitted in California from 1990 through 2009 (more than 116,000 lawyers) and evaluated disciplinary actions from 1990 through 2018.¹²¹ The key findings of the study were:

112. *Id.*

113. *Id.*

114. *Id.*

115. *Discipline Statistics*, STATE BAR CAL., <http://apps.calbar.ca.gov/discipline> (last visited Oct. 13, 2021).

116. *Historic Demographics*, STATE BAR CAL., <http://www.calbar.ca.gov/About-Us/Who-We-Are/Historic-Demographics> (last visited Oct. 13, 2021).

117. OFF. OF RSCH. & INST. ACCOUNTABILITY, THE STATE BAR OF CAL., SUMMARY RESULTS OF FIVE-YEAR ATTORNEY SURVEY, 2017 14 (2017), <http://www.calbar.ca.gov/Portals/0/documents/reports/ORIA/Survey-2017.pdf>.

118. *Id.*

119. *Id.* at 1.

120. THE STATE BAR OF CAL., STATE BAR CONDUCTS FIRST OF ITS KIND STUDY ON RACIAL DISPARITIES IN ATTORNEY DISCIPLINE (Nov. 13, 2019), <https://www.calbar.ca.gov/Portals/0/documents/factSheets/Racial-Disparities-in-Attorney-Discipline-Fact-Sheet.pdf> [hereinafter CAL. STATE BAR STUDY].

121. *Id.*

- During the study period, 3.2 percent of black male attorneys were placed on probation, compared to 0.9 percent of white male attorneys.
- During the study period, 3.9 percent of black male attorneys were disbarred or resigned, compared to 1.0 percent of white males.
- Differences were smaller for Latino males and for black and Latino females compared to white females.
- There were no meaningful differences for Asians compared to whites.¹²²

These disparities were statistically significant,¹²³ meaning that they cannot be plausibly attributed to chance. The study also found that solo practitioners—more than one in five California lawyers, and the largest single category among practice settings—were more likely to be disciplined than lawyers in larger firms, by a statistically significant margin.¹²⁴

The study considered factors that could account for these differences. With respect to the racial disparities in suspension and disbarment rates, the study found that the differential rates are largely explained by:

- an attorney's previous discipline history, which was found to have the strongest effect on discipline outcomes;
- the number of complaints received about an attorney;
- the number of investigations opened against an attorney; and
- the percentage of investigations in which the attorney was represented by counsel.¹²⁵

While these explanatory factors may be statistically sound in the sense that they correlate strongly with disciplinary outcomes, the first and third seem circular from a real-world perspective. The fact that Black male lawyers tend to have more extensive prior discipline histories and are more often investigated does not “explain” why they are disciplined at a disproportionate rate. Rather, these seem to be alternative measures of the same phenomenon: the bar takes disciplinary steps against Black male lawyers significantly more frequently than their representation in the bar would predict. The second factor—number of complaints received—depends on the actions of clients, not the bar; as discussed below, it is susceptible to multiple interpretations.¹²⁶ The fourth factor—representation by counsel—has a plausible (and non-circular) explanation: retaining counsel may increase the likelihood of a successful defense to a complaint, and we speculate that Black lawyers are less likely to be able to pay for representation. The same analysis would seem to be true with respect to the

122. *Id.*

123. *Id.*

124. *Id.*

125. CAL. STATE BAR STUDY, *supra* note 120.

126. *See infra* Section III.B (discussing possible explanations for the disciplinary disparities observed).

solo practitioner disparity, where the Farkas study identified the same set of explanatory factors but found that controlling for them did not make the underlying disparity go away.¹²⁷

B. What Could Explain These Disparities?

In seeking real-world explanations for the disciplinary disparities observed in Texas, California, and elsewhere, one possible interpretation of the data is that Black and (in Texas) Hispanic lawyers more often engage in unprofessional conduct. There is no *a priori* reason to accept this hypothesis. In fact, there is no reason at all, unless we assume that bar discipline, from complaint to sanction, is a race- and ethnicity-neutral process. But, as explained below, the state bars themselves have not made this assumption.¹²⁸

Moving to other possible explanations, an obvious potential explanation is bias of various forms, among clients, the bar, or both. Clients may be more prone to see the work of Black and (in Texas) Hispanic male lawyers as falling short of their expectations, and then to report them to the state bar. The state bars, in turn, may be more willing to take disciplinary action against such lawyers than they are against lawyers in other demographic categories. This explanation would be consistent with California's Farkas study.¹²⁹ The likelihood of discipline correlates significantly with the number of complaints previously filed against a lawyer.¹³⁰ If Black and Hispanic men have disproportionately more complaints filed against them, even a nondiscriminatory disciplinary system would be expected to sanction them more often; that disparity would only increase if the system were also motivated by bias.

Another plausible story focuses on the disparate rates of client complaints, as well as factors other than bias. A starting point is that individual clients file far more complaints than corporate clients, and individuals are typically

127. With respect to the solo practitioner disparity, the Farkas study identified the same set of explanatory factors, but found that controlling them did not make the underlying disparity go away: "When the statistical model evaluating discipline by firm size controls for other factors, such as number of complaints and percentage of investigations in which the attorney was represented by counsel, the disproportionate impact on solo practitioners declines substantially, but remains statistically significant for the likelihood of an attorney being placed on probation." CAL. STATE BAR STUDY, *supra* note 120. It should also be noted that Farkas' data on disciplinary bias against solo practitioners is consistent with substantial qualitative evidence that solo and small-firm lawyers *believe* that they are targeted for bar discipline. As one solo lawyer memorably put it, "[w]hen you look at them, when you read the decisions as I do, it's a disproportionate number of solo guys who get nailed and I don't believe in a heartbeat that the Wall Street guys are so much more ethical." Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 372 (2004).

128. *See infra* Section III.C.

129. CAL. STATE BAR STUDY, *supra* note 120.

130. *Id.*

represented by solo practitioners and small firms.¹³¹ Moreover, most individuals rarely use lawyers and their matters are of relatively greater importance to them, often involving life crises like arrest, divorce, or a significant personal injury.¹³² When things go wrong, any perceived shortcoming on the part of the lawyer will be magnified. On the other hand, businesses, especially larger ones, are regular legal customers. When businesses are dissatisfied with their legal services—unless they view the lawyer’s conduct as truly egregious—they just hire a new law firm.¹³³ Filing a complaint with the bar would be a lot of trouble with little prospect of economic return, and doing so might make it harder to hire lawyers in the future.¹³⁴ Because small-practice lawyers represent the kinds of clients who are more likely to complain, they receive a disproportionate amount of complaints and, consequently, a disproportionate share of the discipline that state bars mete out.¹³⁵ Moreover, because minority lawyers are more likely to work in smaller practices,¹³⁶ they, too, are more likely to be involved in the disciplinary process for reasons only secondarily related to race.

Neither the data reported above nor any other data we have discovered enables us to separate the respective effects of race and firm size on discipline, and thus to choose between race as a causal or coincidental factor in accounting for disparate discipline rates. The state bars of Texas and California have taken

131. Lynn Mather & Leslie C. Levin, *Why Context Matters*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 3, 13 (Leslie C. Levin & Lynn Mather eds., 2012).

132. See Lynn Mather & Craig A. McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 63, 71–78 (Leslie C. Levin & Lynn Mather eds., 2012) (providing multiple examples of such crises and their impact on clients).

133. See Mather & Levin, *supra* note 131, at 13. These explanations are consistent with the data reported by the Texas bar, which shows that the largest proportion of sanctions occur in the practice categories of civil law, which is undefined but presumably relates to litigation (thirty percent); family law (twenty-seven percent); criminal law (twenty-two percent); and personal injury (fourteen percent). *COMM’N FOR LAW. DISCIPLINE*, *supra* note 95, at 15.

134. See *What If I Am Unhappy with My Lawyer?*, A.B.A. (June 7, 2018), https://www.americanbar.org/groups/public_education/resources/public-information/what-if-i-am-unhappy-with-my-lawyer/ (illustrating the difficulty of filing a grievance). In the computerized systems that many law firms use to screen prospective clients, the lawyer proposing the representation is routinely asked whether the new client has recently fired other lawyers or firms or has a reputation for doing so. Some processes may also ask whether the client has filed bar complaints or malpractice claims. See, e.g., STATE BAR OF GA., PROSPECTIVE CLIENT INTERVIEW, <https://www.gabar.org/committees/programssections/programs/lpm/upload/pci.pdf> (providing a sample client interview form that asks if the client has previously consulted other attorneys in the matter and why the client was dissatisfied with those attorneys).

135. See Mather & Levin, *supra* note 131, at 13.

136. THE STATE BAR OF CAL., REPORT CARD ON THE DIVERSITY OF CALIFORNIA’S LEGAL PROFESSION 8 (2020), <http://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf>.

the disparities as troubling evidence of potential bias and have begun to address the issue.

C. *State Bar Responses*

The Texas bar has focused on the makeup of its local disciplinary committees, or DGCs. As noted above, the DGCs are already more diverse than the bar itself.¹³⁷ In its 2020 report, the bar endorses such representation, affirming that DGCs should “fairly represent the racial, ethnic, and gender makeup of the [lawyers in the] districts they serve.”¹³⁸ The bar specifically commits “to make appointments that maintain this diversity in membership.”¹³⁹ Significantly, this commitment includes “the goal that lawyer members reflect various practice areas and law firm size[s].”¹⁴⁰ The bar observes that “[t]he most common areas of practice by committee membership are general practice, criminal law, family law, personal injury law, and probate law, which are also the most common types of law related to filed grievances.”¹⁴¹

In a vague response to the Farkas study, the California state bar promised further research on “disparities in the number of complaints filed by attorney race, gender, and solo practice status; how complaints and prior discipline are taken into account during the State Bar investigations process; and the bases for the differential impact of counsel representation on disciplinary outcomes.”¹⁴² Specific measures will await the recommendations of a future consultant.

D. *Summary and Implications for Medicine*

As the preceding Sections make clear, the state bars of the two largest states think that diversity is relevant to discipline. Both California and Texas perceive a problem with the disparate impact of bar discipline, especially against Black male lawyers.¹⁴³ There is also shared concern with the way discipline affects small and solo practices and the areas of law in which smaller practices tend to concentrate. Whether the race and firm size effects are unrelated, correlated, or causally related remains an open question, with plausible arguments available to support all three positions.

The California and Texas bars are also manifesting a belief that diversity within the groups that carry out professional discipline is important to ensure both the appearance and the reality of fairness. A secondary objective is to make

137. COMM’N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT: JUNE 1, 2020 – MAY 31, 2021 16 (2020), https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&Template=/CM/ContentDisplay.cfm&ContentID=54492.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. CAL. STATE BAR STUDY, *supra* note 120.

143. *See id.*

aggrieved clients more comfortable about asserting complaints and more confident in the justice of outcomes.¹⁴⁴ Nonetheless, neither state cites—nor could cite, to our knowledge—hard empirical evidence that disciplinary board diversity has an impact on disciplinary outcomes or on the comfort or confidence of clients.

It is not clear that these bar disciplinary developments can be directly applied in the medical context. The major difference is that whereas medicine is worried primarily about the lack of professional discipline and its impact on patient safety,¹⁴⁵ the bar's diversity initiatives are focused on a different problem: *protecting lawyers from unfair discipline*.¹⁴⁶ State bars are concerned about protecting clients, of course, but that concern tends to focus on finding and disciplining rogue actors and firms, not on the disciplinary process itself. Nonetheless, if, as our corporate board research suggests, diversity may improve the general quality of small-group decision making, then those benefits should be found in all contexts, including all forms of professional discipline. In the next Part, we return to the arguments that have been advanced in favor of corporate board diversity and consider which of them may be applicable to medical disciplinary boards.

IV. ARGUMENTS FOR BOARD DIVERSITY REVISITED: WHICH APPLY TO MEDICAL BOARDS?

In this Part, we revisit the arguments for corporate board diversity that we raised at the beginning of the article, drawing on both the relevant literature and our own qualitative research. Each of the arguments from the business literature was also made in our interviews and supplemented by additional rationales provided by our respondents for increasing board diversity. With respect to each argument, we ask whether it sheds any light on the value of diversity on SMBs. Where appropriate, we also mention specific points of learning from the bar discipline experience.

A. *Arguments from the Business Literature*

Fairness. This justification for board diversity takes both a broad and a narrow form. The broad argument is simply that fundamental fairness dictates that bodies as powerful as corporate boards should reflect the society that provides a corporation not only with its customers, but its very reason for

144. COMM'N FOR LAW. DISCIPLINE, *supra* note 95, at 7.

145. Pendo et al., *supra* note 1, at 20.

146. THE STATE BAR OF CAL., DIVERSITY, EQUITY, & INCLUSION PLAN: 2021–2022, BIENNIAL REPORT TO THE LEGISLATURE 12 (2021), <https://www.calbar.ca.gov/Portals/0/documents/reports/Diversity-Equity-Inclusion-Plan-Report-2021-2022.pdf>.

being.¹⁴⁷ A narrower version is that fairness requires that the board should reflect the internal diversity of the company. The legal profession has adopted both versions of this rationale in its concern with disciplinary board diversity.¹⁴⁸ The fairness argument applies directly in the medical discipline context. In fact, it is even more compelling in the case of professions like medicine and law, which presumably exist to serve society, and which enjoy the extraordinary legal privilege of self-regulation.

Business justifications. Because a medical disciplinary board, like a state bar, is not a for-profit entity,¹⁴⁹ the business case argument that board diversity is correlated with improved corporate performance is not applicable in the medical board context. The remaining business justifications—other than one—apply directly to medical boards.

- More diversity can reduce agency costs: These costs arise when corporate managers act in their own self-interest rather than in the interest of the company.¹⁵⁰ The argument here is that diverse boards may be less deferential to management than traditional senior, white male boards, and thus more likely to monitor and crack down on self-dealing. In this one instance, it is difficult to see the applicability to disciplinary boards since there is no manager-board member divide.¹⁵¹
- More diversity can lead to more and better information:¹⁵² People from different backgrounds (in every sense) are thought to possess different kinds of information, given different experiences and contacts, and to be able to bring that to board deliberations. This seems to apply strongly to disciplinary boards. The pool of potential patient-victims that the boards exist to protect is the entire population, so they can only benefit from improved information about as many segments of that population as possible.
- More diversity may cause boards to operate differently, and better:¹⁵³ The argument is that homogenous boards move quickly and tend toward rubber-stamping management recommendations, whereas more diverse boards slow down and talk things out, motivated by their different sensibilities and

147. Debra Rainey, *Does Your Board Reflect the Communities You Serve?*, INDEP. SECTOR (Feb. 7, 2020), <https://independentsector.org/news-post/does-your-board-reflect-the-communities-you-serve/>.

148. *See supra* notes 2–4 and accompanying text.

149. *Membership Information*, FED’N OF STATE MED. BDS., <https://www.fsmb.org/about-fsmb/fsmb-member-medical-boards/> (last visited Oct. 13, 2021).

150. *Dangerous Categories*, *supra* note 5, at 764.

151. Nonetheless, it might be argued that having the profession police itself (by other professionals) is an agency problem and that boards need more public members, who would be analogous to the corporate board’s individual members overseeing and policing corporate managers. Stephen E. Heretick, *The Role of Public Members on State Medical Boards*, J. MED. REGUL., Mar. 2010, at 6, 6.

152. *Dangerous Categories*, *supra* note 5, at 764.

153. *Id.*; *see supra* notes 12–14 and accompanying text.

information sources. Substitute “recommended discipline” for “management recommendations” in the preceding sentence, and this argument applies directly to medical disciplinary boards. Note that more careful deliberation could lead to more or less discipline in individual cases.

- Send the right signals to observers, principally employees and customers.¹⁵⁴ It is very unlikely that customers have any idea who is on a corporate board, and employees below the management level may also be unaware. But if the signals are received, they may well generate good will for and confidence in the signaling company. In the disciplinary board context, there are several layers of potential signal recipients: individual doctors facing discipline, patients who have filed complaints, the medical profession more generally, and the broader patient community. Those in the first category will be aware of who sits on their board, as will the complainants, if they participate directly in the process. Within the professional community in a given state, only those active in that community are likely to receive the signals, and the general patient community will almost certainly be unaware of board membership.¹⁵⁵ For those who do get the signals, the effect will likely be significant, if not necessarily reassuring.¹⁵⁶ Many patients will welcome seeing a range of backgrounds represented, while some accused doctors might prefer seeing a jury of people just like themselves.¹⁵⁷
- Diverse-looking boards will quiet diversity advocates.¹⁵⁸ This is the cynical argument that diversity has no real value, but attention to box-checking will get the shareholder activists off the board’s back. To the extent that some companies may follow this reasoning, it is an argument that might prove persuasive in any context that could draw public scrutiny, including medical discipline.

B. Arguments from Our Qualitative Research

Many of these academic arguments were given colloquial, sometimes colorful expression in our interview study. All of the arguments apply in varying degrees to medical boards.

154. *Dangerous Categories*, *supra* note 5, at 762, 764; see also *Signaling Through Board Diversity*, *supra* note 15, at 447.

155. *Signaling Through Board Diversity*, *supra* note 15, at 455, 458.

156. *Id.* at 453.

157. See Mary K. Totten, *How and Why to Increase Board Diversity*, AM. HOSP. ASS’N TR. SERVS., <https://trustees.aha.org/articles/916-how-and-why-to-increase-board-diversity> (last visited Oct. 13, 2021); Morgan Haefner, *‘We’ve Made No Progress’: Healthcare Boards 87% White, Leverage Network Study Finds*, BECKER’S HOSP. REV. (Feb. 23, 2021), <https://www.beckershospitalreview.com/hospital-management-administration/we-ve-made-no-progress-healthcare-boards-87-white-leverage-network-study-finds.html> (both sources making similar suggestions).

158. *Dangerous Categories*, *supra* note 5, at 793.

- Board diversity is a moral imperative:¹⁵⁹ As raised in our interviews, this argument tracks the fairness argument discussed above and applies to medical disciplinary boards in exactly the same way.¹⁶⁰
- Diverse perspectives help avoid groupthink:¹⁶¹ This is a specific version of the academic argument for heterogeneous boards.¹⁶² Many of our informants told us that “groupthink,” usually led by the most senior and prestigious members, is far less of a danger on boards that include people of different backgrounds and experience. None offered any significant examples, but, if it has validity, this argument would certainly apply to medical disciplinary boards.
- Perspectives from both Venus and Mars are valuable:¹⁶³ This argument is a gender-focused instance of the belief that diverse boards have better information and function more effectively.¹⁶⁴ It draws on both popular and academic psychology writings about fundamental differences in the ways that women and men approach and resolve problems. Here again, to the extent that the argument is valid, it would also support gender diversity on disciplinary boards. The recent trends in legal discipline reported in this Article, with state bars seeking greater diversity in their disciplinary boards, seem to embody this view.¹⁶⁵
- Diversity sends the right signals to employees:¹⁶⁶ The analysis of the signaling argument is the same as presented above. The critical issue is whether the target audiences are likely to receive the signals.
- Diverse boards will have greater empathy with employees and customers:¹⁶⁷ This argument first emerged from our interview data. Its point is that board members who have overcome barriers themselves are more likely to understand the needs and concerns of rank-and-file employees and ordinary consumers than those who have been insulated by privilege. This would seem to have direct applicability to disciplinary boards. We might expect that a more diverse—in every sense of the word, from demography to medical school to specialty to practice setting—disciplinary board would have greater empathy for both accused doctors and patients alleging misconduct. If so,

159. See *supra* note 22 and accompanying text.

160. See Lisa S. Rotenstein et al., *Addressing Workforce Diversity — A Quality-Improvement Framework*, 384 NEW ENG. J. MED. 1083, 1083 (2021) (discussing how workforce diversity in medicine “remains an elusive goal” and how medical boards should reflect the diversity of the health care profession).

161. See *Dangerous Categories*, *supra* note 5, at 761.

162. *Id.* at 765.

163. See *supra* notes 26–29 and accompanying text.

164. *Id.*

165. See *supra* Part III.

166. See *supra* note 29 and accompanying text.

167. *Dangerous Categories*, *supra* note 5, at 762, 786.

then greater fairness to all parties might be expected. The bar discipline examples reviewed above certainly reflect this view.¹⁶⁸

- Tap untapped talent pools:¹⁶⁹ This argument is straightforward and utilitarian—the failure to seek diverse and previously underrepresented people simply wastes a huge amount of potential talent. It is equally applicable to medical disciplinary boards. If SMBs need to be representative of the state, then this could be a problem, especially if SMB members must be physicians and if the physician population is not representative of the state’s demographic diversity.¹⁷⁰ Should SMBs look outside the medical profession and, in addition, to public members who are considered related health professionals (i.e., nurses)?
- Diverse boards will nurture broader executive pipelines and thereby promote better executive succession:¹⁷¹ This argument is a specific instance of the untapped talent pool argument from the business literature. Perhaps the most important function of any corporate board is to find and hire top executives. Some of our interview subjects contended that white males from elite backgrounds tend to limit their searches to people just like them, whereas diverse board members cast a bigger net and bring in more and potentially better candidates. In its simplest version, it is all about the definition of “qualified.” This argument applies indirectly to disciplinary boards. While diverse disciplinary board members do not hire anyone themselves, they become candidates for other leadership positions in the future, broadening the talent pool for those who will direct the medical profession. Their membership thus contributes to a virtuous circle of ever more inclusive leadership, versus the closed loop that ensues if disciplinary board membership is limited to senior and already prestigious doctors.

V. WHAT DO DIFFERENT APPROACHES TO CORPORATE BOARD DIVERSITY AND STATE BAR DISCIPLINE BOARDS SUGGEST FOR SMBs?

One of the reasons this symposium proposed increasing SMB diversity is to protect patients from egregious wrongdoing by physicians. The Nasdaq corporate board diversity proposal cites investor protection as a justification for greater corporate board diversity based on studies that show that more diverse boards often provide better oversight over a company’s actions.¹⁷² This indicates that board diversification is in the public interest.

To achieve greater diversity on an SMB, this project recommends a target approach so that the SMB reflects “[t]o the extent practicable” the “geographic,

168. See *supra* Section III.A.

169. See *supra* notes 31–32 and accompanying text.

170. See, e.g., *Board Members*, NEV. ST. BOARD OF MED. EXAM’RS, <https://medboard.nv.gov/About/Board/Members/> (last visited Oct. 13, 2021).

171. See *supra* notes 32–33 and accompanying text.

172. Nasdaq Proposal, *supra* note 6, at 29–35.

racial, ethnic, and gender diversity of the State.”¹⁷³ In contrast, the targets used in the corporate board diversity world are all much more specific, in some cases with the number of diverse candidates increasing as the size of the board increases.¹⁷⁴ Well-defined targets are much easier to hit than those that are vague. So, we suggest that consideration be given to either adopting specific numerical targets or requiring that each SMB determine the demographic makeup of its state and the acceptable range of representation on the SMB as compared to that makeup. For instance, if women make up fifty percent of the population, perhaps the percentage of female SMB members should be between forty-five and fifty-five percent of the board.

The target approach in the world of corporate boards often has two other components missing in the SMB proposal—a disclosure requirement and consequences for failing to meet the target. In the case of the Nasdaq proposal, the requirement that boards annually disclose their board diversity in a common format may end up being more impactful than the target of two diverse board members.¹⁷⁵ In reality, two diverse board members is not a very high bar, but as shareholders focus more on board diversity, knowing the exact composition of the board via self-disclosed racial, ethnic, and sexual orientation status provides important information, particularly as the expectations for diverse board members increase beyond the minimal requirement of two. It is also important that the disclosure is done uniformly, according to the same set of diversity terms with specific definitions so that the comparison between companies is apples-to-apples. The SMB proposal should consider requiring reporting of board diversity characteristics on a standard form according to common definitions. As a further refinement, if the target has been defined by the state demographics, the disclosure should include a comparison with the state’s demographic targets.

The Nasdaq proposal is also a form of “comply or explain.” If the company fails to meet the board diversity requirement, there is a consequence in that it must explain why it does not meet the target.¹⁷⁶ That may be a minimal consequence for failing to meet the target of two diverse board members, but is better than nothing. The SMB proposal should consider whether such an explanation would be helpful to the public. If the public did not find the explanation adequate, one could imagine that advocates would clamor for additional diversity or assist the SMB in overcoming the difficulties that it described for why it was unable to achieve SMB diversity consistent with the state’s demographic diversity.

We have yet to see what effect the Nasdaq’s target approach will have on corporate board diversity. The bar is not high, and there is always concern that

173. Pendo et al., *supra* note 1.

174. *See* Nasdaq Proposal, *supra* note 6, at 139.

175. *Id.* at 263–64.

176. *Id.* at 9.

a minimum requirement may be seen as sufficient to achieve the full effects of diversity when that is likely not to be the case. The concern is that the floor also becomes the ceiling and further diversity is not achieved. The SMB diversity threshold of diverse members consistent with state demographics is considerably more diverse than two diverse corporate board candidates (one of whom is a woman) so it is possible that this target (once numbers are put to it so the SMB knows when it has achieved the target) will be much more effective in achieving truly diverse SMBs that represent the population of the state.

Of course, mandating diversity such as in Norway or California is much more likely to be effective than suggesting a target and requiring an explanation if the target is not hit. This is not the approach put forward for SMBs and, as we have noted, this approach of mandates or quotas is likely to be resisted by some and potentially raise constitutional concerns.¹⁷⁷ Moreover, it may be equally ineffective if the consequences for failing to reach the mandate are not significant enough. Forty percent female representation has been achieved in Norway where the failure meant delisting.¹⁷⁸ The California statute requires a significant fine of \$100,000 for diversity non-compliance,¹⁷⁹ but the costs of recruiting a new director or paying a new director who is added to the board to meet the California mandate may be similar to the fine for non-compliance and, therefore, not a sufficient consequence to compel compliance with the mandate.

The SEC's first attempt at directing board diversity was to require boards to disclose whether they considered diversity in the process of nominating new boards.¹⁸⁰ This approach may have begun discussion in the boardroom about gender diversity, but also invited companies to avoid the burdens of assessing compliance with a diversity policy by not adopting one.¹⁸¹ It is doubtful that a requirement that SMBs describe how they considered diversity in selecting board members would be any more successful.

There are many organizations actively working to increase corporate board diversity, and many others, including institutional investors and proxy advisors, are strongly advocating for increased diversity.¹⁸² Notwithstanding these resources, corporate boards are still far from mirroring the diversity of the general population.¹⁸³ It might be important for SMB board diversity to be championed outside of this project by other thought leaders, like the American Medical Association or organizations of diverse medical professionals, so that pressure to increase SMB diversity continues over time and is exerted on more than one front.

177. *See supra* Section II.D.1.

178. DELOITTE, *supra* note 42, at 134.

179. CAL. CORP. CODE § 301.3(e)(1)(A)–(B) (West 2021).

180. *See supra* notes 68–71 and accompanying text.

181. *Id.*

182. *See supra* notes 72–78 and accompanying text.

183. *See supra* Section II.C.

Other approaches that have been successful in increasing corporate board diversity have included convincing nominating committees to think about the skills needed to be a successful board member and who might have those skills other than the senior corporate leaders who usually feed the corporate board pipeline.¹⁸⁴ We have heard anecdotally that legal disciplinary boards and SMBs are also often staffed by senior members of the profession who may not be representative of the state's population. This concern prompts consideration of how qualified board members are defined. In the case of the corporate boardroom, qualified directors are now being sought from further down in the corporate hierarchy, instead of exclusively from the C-suite.¹⁸⁵ Similarly, younger legal or medical professionals might be more demographically diverse than the more seasoned lawyers or doctors who might normally make up these disciplinary boards.¹⁸⁶ Another alternative in the case of law and medical boards would be to look to public, non-professional members to add gender, racial, and ethnic diversity or to increase the number of public members appointed to the disciplinary board with this goal of increasing diversity.¹⁸⁷

Broadening corporate board diversity may be easier in some respects than broadening medical or legal disciplinary board diversity. Corporate board seats are compensated and provide opportunities to be part of a group providing oversight and guidance to a management team running a company. SMB and lawyer disciplinary board participation may carry prestige and recognition from professional peers, but likely does not offer the often lucrative compensation of a corporate board seat. Moreover, the nature of the board work—sitting in judgment of another professional and potentially imperiling his or her ability to practice law or medicine—can be gut-wrenching and difficult, whereas corporate board service, while time-consuming, is working with a team to advance a company and increase value for its shareholders. So, it might be easier to recruit diverse corporate board members than it will be to recruit diverse SMB and lawyer disciplinary board members.

The SMB diversity proposal is a good start, but we believe it will be even more effective if each board is required to publish their demographic targets, along with an annual report on a standard form reporting the board's diversity compared to that target. Adding this disclosure requirement, as well as an explanation whenever a diversity target is not achieved, would also be good practice. Energizing external actors like medical professional associations to

184. *See supra* Section II.D.6.

185. *Id.*

186. Pendo et al., *supra* note 1, at 25; *The Young Professional Workforce: 2017 Fact Sheet*, DEP'T FOR PRO. EMPS. 3 (2017), https://www.dpeaflicio.org/s/Young-Professionals-2017_FINAL-Format-Update.pdf.

187. Heretick, *supra* note 151, at 6, 6–7; *cf.* Pendo et al., *supra* note 1, at 26 (The benefits of diversity for SMBs may not be fully realized if “individuals appointed as public members also serve as diverse members[.]”).

support and advocate for SMB diversity efforts may also be helpful. Finally, considering how to make SMB board service more attractive to potential members may be warranted.

VI. CONCLUSION

Although medical disciplinary boards differ in fundamental ways from the boards of directors of for-profit corporations, there are similarities in the governance goals and practices of companies and professions. It is thus not surprising that almost of all of the arguments for board diversity raised in the business literature or our own interviews also tend to support diversity on disciplinary boards. Many of these arguments have also been recognized, at least implicitly, by state bars and are embodied in the legal profession's initiatives to improve diversity in its disciplinary processes. Our research on corporate board diversity, backed by the experience of the legal profession, suggests that medical disciplinary boards should continue and strengthen their efforts to pursue diversity.

