FEATURE ARTICLE

FINAL REPORT OF THE STATE BAR DISCIPLINE MONITOR

by Robert C. Fellmeth

[EDITOR'S NOTE: In 1986, the California legislature passed SB 1543 (Presley), establishing the post of State Bar Discipline Monitor in Business and Professions Code section 6086.9. The Monitor was delegated the investigative powers of the Attorney General; charged with analyzing the State Bar's system of receiving, investigating, prosecuting, and adjudicating complaints against licensed attorneys; and directed to make recommendations for legislative and administrative changes to improve the Bar's discipline system.

In January 1987, Professor Robert C. Fellmeth, Director of the Center for Public Interest Law, was appointed to the position. During his tenure as Bar Monitor, Professor Fellmeth published an Initial Report in June 1987 and eight subsequent progress reports; helped to draft SB 1498 (Presley) (Chapter 1159, Statutes of 1988), which made substantial structural changes to the Bar's discipline system; and oversaw the Bar's implementation of hundreds of changes mandated by statute, suggested by the Monitor, or initiated by the Bar itself. Pursuant to Business and Professions Code section 6140.8, the Monitor published his Final Report on September 20, 1991. Following is a condensed version of that 143-page report, which necessarily excludes detailed descriptions and statistical tables and exhibits.[1]]

I. OVERVIEW

The State Bar's discipline system was described in detail in the Initial Report of the State Bar Discipline Monitor.[2] Prior to 1989, it was effectively controlled—except for California Supreme Court review of rules and final discipline recommendations—by the Bar's 23-member Board of Governors. Six of these persons are non-attorneys appointed by elected officials; the remaining seventeen are attorneys elected by other members of the Bar. The California Bar combines both professional association and state agency functions in a single "integrated" entity.

The Bar's discipline system generally consists of four elements: the Office of Intake/Legal Advice (sometimes referred to as the "Intake Unit"), the Office of Investigations (OI), the Office of the Chief Trial Counsel (which houses the Office of Trials (OT), the Bar's prosecution arm), and the State Bar Court. Two other Bar entities—the Complainants' Grievance Panel and the Client Security Fund Commission—also perform functions related to the discipline system.

As described below, the system has changed since 1987 such that the Office of the Chief Trial Counsel now controls the intake, investigation, and prosecution functions of the Bar's discipline system. Although now somewhat more independent from the Board of Governors than in 1987, this Office remains under the jurisdiction of the Board. The State Bar Court—consisting of six hearing judges and a three-member appellate panel—is now a substantially independent entity, appointed by the California Supreme Court.

Most Bar discipline cases begin at the Intake Unit, where incoming calls and letters from "complaining witnesses" (CWs) are designated as "complaints" (serious allegations which warrant formal investigation and some form of discipline), "inquiries" (allegations of less serious conduct which usually, in and of themselves, may not warrant formal Bar action), or "information" (cases outside the Bar's discipline jurisdiction, requests for information or referrals, etc.). The Intake Unit filters and prioritizes matters; enters complaints and inquiries into the Bar's sophisticated computer system; engages in limited investigation with an eye toward resolution of "inquiry" cases; and makes preliminary calls and requests for documents as to more difficult matters before forwarding them to OI for formal investigation. The Intake Unit is supervised by attorneys who review all case dispositions.

The Intake Unit has recently developed a number of proactive mechanisms for detecting certain types of transgressions at an early stage. These include the Campaign to Reduce Attorney Financial Thefts (CRAFTS), which evaluates notices of NSF checks written on client trust accounts forwarded by banks; and a "special channel" for receipt of complaints about attorneys from judges. In addition, the Bar refers cases against attorneys who are the subject of ten or more pending complaints to a special "Repeaters Task Force" which takes cases directly from Intake.

Meritorious cases forwarded to OI are formally investigated by trained Bar investigators who function in a team setting, guided by an attorney "legal adviser." Cases which are dismissed by either the Intake Unit or OI may be appealed by the CW to the Complainants' Grievance Panel (CGP), created in 1986 through SB 1543 (Presley).[3] CGP is a seven-member panel assisted by a small staff which is authorized to review case closures, order reinvestigations, and recommend that OT seek formal discipline.

After investigation by OI, and where formal discipline is recommended, the investigator drafts (and the legal adviser reviews) a "statement of the case" (SOC), which summarizes the factual findings and lists prospective allegations. Under relatively new procedures, the legal adviser also drafts the "notice to show cause" (NTSC), the Bar's formal charges against the accused attorney (the "respondent"). The legal adviser gives the respondent at least ten days' notice prior to filing the NTSC with the State Bar Court, and affords the opportunity for a pre-filing settlement (which is then subject to review by the State Bar Court).

In addition to formal discipline which may be pursued through an NTSC by OT, OT has two other options it may pursue instead of formal public charges. It may issue a letter of warning without prejudice to later discipline for the act alleged, or enter into an "agreement in lieu of discipline" (ALD) with the respondent, which requires the performance of certain terms and conditions in lieu of formal discipline.

Where a SOC has been issued, the NTSC prepared, and there is no pre-filing settlement, the NTSC is filed with the State Bar Court (thus rendering the case a matter of public information) and the case is transferred to OT for limited discovery and hearing. An NTSC may result in a "private reproval" (similar to a letter of warning, except the matter may not be reopened), "public reproval" (a private reproval made public), "admonition" (another kind of written warning),

suspension/revocation of the license, or terms of probation as a condition of suspension/revocation forbearance. Any of these results may be stipulated to by the parties or may follow an evidentiary hearing. In addition, an attorney may "resign with charges pending," which is treated as the functional equivalent of a disbarment disposition.

OT also handles non-CW-generated cases which enter horizontally directly into that Office, rather than from the Intake Unit and through OI. These special matters include State Bar-initiated investigations (or SBIs, which can also originate from Intake), reciprocal discipline matters, Rule 9–101 violations, applications for "involuntary inactive enrollment" (interim suspension), criminal conviction referrals, disabled attorney proceedings, probation revocations, and petitions for reinstatement by previously disbarred or resigned attorneys.

OT prepares cases for presentation to the State Bar Court, which adjudicates discipline cases. Until recently, this court was controlled by the Board of Governors. Historically, most Bar disciplinary hearings were presided over by volunteer (or per diem compensated) attorney referees or retired judges. The hearing referee made findings of fact and recommended discipline. In the past, all cases were then subject to review by a Review Department consisting of eighteen persons (twelve volunteer members of the Bar and six non-attorneys) who met approximately once a month for two days. The Review Department's decisions were subject to petition for review directly to the California Supreme Court, which as a matter of policy automatically reviewed all cases where severe discipline was sought to be imposed.

As restructured under SB 1498 (Presley) (Chapter 1159, Statutes of 1988), the current State Bar Court consists of six hearing judges (four in Los Angeles and two in San Francisco), and a three-judge review panel. One of the review judges must be a non-attorney. These judges are appointed by the California Supreme Court and serve with the protections and independence accorded members of the judiciary. Under the new procedure, an evidentiary hearing is held before one of the hearing judges (who has the authority to interim suspend an attorney). There is a single-step appeal to the review panel. Under the "finality rule" recently approved by the Supreme Court, the State Bar Court's judgment is adopted by the Supreme Court as soon as the time to seek review (60 days) has passed, unless the Supreme Court extraordinarily grants review *sua sponte* or in response to a petition for review by the respondent or the Chief Trial Counsel.

Clients of attorneys who have been disciplined for some form of dishonesty which has resulted in pecuniary loss to the consumer may seek compensation from the Bar's Client Security Fund, which is administered by the Client Security Fund Commission. All California attorneys with active licenses contribute to the Fund through their annual Bar dues. The Fund's coverage extends only to losses suffered through intentional attorney dishonesty within the scope of legal practice, not negligence or incompetence.

II. THE 1987–1992 EVOLUTION OF THE BAR DISCIPLINE SYSTEM AND FINAL RECOMMENDATIONS

Over the past five years, we have reviewed each component of the State Bar's discipline system. Following is a description of each component as we found it in 1987, its progress in implementing both mandated and suggested reforms to date, and our final recommendations.

A. Outreach

When we first surveyed the outreach system of the State Bar's discipline system in early 1987, we found the following:

(1) In 1986, the State Bar had initiated a statewide toll-free "hotline" number (1-800-843-9053) to facilitate consumer complaint receipt, but had not listed it in telephone books, either in the California State Government section or in any other location a consumer might logically look to find it.[4]

(2) More visible than the State Bar were local bar associations, which are private trade groups lacking state agency status and the concomitant ability to discipline licensees, and which were receiving large numbers of complaints. However, these local groups were not referring most complaints to the State Bar and not informing those complaining that they lack the authority to discipline errant attorneys. Most cases referred to the "client relations committees" of these local associations were not forwarded to the State Bar's system for pattern detection or other purposes.[5]

(3) Despite these impediments to Bar access, the State Bar received over 26,000 calls to its toll-free number during 1987. However, it had an insufficient number of lines and resources dedicated to complaint intake, and commonly had a busy rate of over 50%.[6]

In 1991, the situation is substantially different, although serious deficiencies remain. For example, the State Bar has for four years expressed its intent to publish its toll-free number at least in the state government section of telephone directories. At present, however, the State Bar listing is still regrettably absent from most of the major directories of the state—and this is true as to *any* State Bar telephone number, not merely the toll-free discipline number.

Further, we remain uncomfortable with the State Bar's policy regarding transmittal of complaints about attorneys by local bar associations to the State Bar. These local associations are private professional entities without any authority to discipline an attorney, and which may lack the procedural protections afforded to accused counsel available in state agency proceedings. Most of these associations have "client relations committees" and many calls are referred to them for handling. While well-intentioned, we are concerned that calls relevant to the pattern detection capability of the reformed Bar system are being lost. Many of these calls are still not transmitted to the State Bar—even on an information basis. Those handling these matters are untrained by the local bar or the State Bar in distinguishing what should or should not be referred to the only agency with the authority to discipline—the State Bar. Consumers are easily confused into thinking that a local bar association and the State Bar have a parent/subsidiary relationship, and that reporting to one is equivalent to reporting to the other.

However, the Bar has successfully embarked on a number of outreach endeavors, including planned inclusion of the toll-free complaint number in telephone directories under "California State Government," "Consumer Protection Organizations," "Attorneys," and in directory information. And although the ambitious outreach program outlined during 1987-90 by former Bar Senior Executive for Discipline and Adjudication Pauli Eaneman-Taylor was not fully implemented, many of its elements were adopted, including targeted mailings regarding the Bar's discipline system to district attorney's offices, judges, court clerks, consumer organizations and publications, a variety of media outlets, and local and specialty bar associations, and the implementation of a speakers bureau program.[7]

Perhaps most significantly, favorable media reports during 1988–91 (for perhaps the first time in a decade) have led to increased public confidence that the system may be worth reporting to. Members of the Board of Governors, and re-

cent Bar Presidents in particular, have been active in publicizing the system's reforms. Bar discipline staff have been more visible, including the Chief Trial Counsel and judges of the new State Bar Court. The Bar itself has published more frequent press releases. It now publishes a "media guide" to help journalists track discipline and report on it. For the first time, Bar staff released its own annual reports on the Bar discipline system in 1989 and 1990. The Bar has formally written to the judges of the state and established a special track for judicial complaints about attorneys. The Bar has also become more visible to local prosecutors.

Notwithstanding certain remaining deficiencies in the Bar's outreach efforts (discussed below), calls to the complaint hotline have been increasing. Table 1 below shows a remarkable increase of from 26,216 calls in 1987 to a current annual rate of approximately 70,000.

Recommendations. The Bar's outreach program is better than in previous years. However, as noted, the State Bar's toll-free hotline number is still not listed in most directories where it can be easily found. The State Bar should follow up to make sure the number is published in all telephone directories, at least in the white pages California State Government section. And the Bar must establish a clear policy requiring all local bar associations to (a) affirmatively notify a caller with a complaint about an attorney that only the State Bar has the authority to discipline any attorney, and (b) disclose on their own the hotline number of the State Bar. Failure of a local bar to adhere to this requirement should be a cause for Bar discipline applied to attorneys controlling the association, after fair warning. And the Bar must once again reduce the busy rate on its toll-free number from levels now above 50% to 10–25%.

B. Intake

In early 1987, we found the following major deficiencies in the Bar's system of initial complaint intake:

(1) Intake operators were insufficiently qualified, inadequately trained, and were not supervised closely by legally trained Bar prosecutors.

(2) Decisions not to designate a call as an "inquiry" (which means the call would not be recorded in any way) and to close a case designated as an inquiry were not reviewed by qualified persons.[8]

(3) Matters designated as inquiries and not transmitted to the Office of Investigations for further proceedings were recorded on 3"x5" cards which were not subsequently checked for possible pattern detection in a reliable manner.[9]

(4) Under the system then extant, the Bar relied upon the "complaining witness" (CW)—that is, the person informing the Bar of a possible problem licensee—to "carry the ball" and provide evidence. However, 80% of those complaining to the State Bar by phone did not bother to send in subsequently requested written material. When this occurred, the matter was dropped. With rare exception, the Bar viewed a complaint about an attorney as a matter between the CW and the attorney who was the subject of the complaint.[10]

(5) Information about lawyer misconduct from attorney self-reporting (required by the State Bar Act), judges, malpractice judgments, or other potentially rich sources of information about attorney wrongdoing was not reliably gathered, and was not systematically used for pattern detection purposes.

(6) At the same time, large numbers of relatively trivial matters were being transmitted to the Office of Investigations, which resulted in a suffocating backlog of cases needing investigation.[11]

Perhaps as in no other area of Bar operation, the intake function has improved to become what is close to a national model. Several remaining improvements must be made, particularly in reducing the busy rate on the toll-free line; however, the 1991 system has the following attributes:

(1) A coordinated group of 18 professional complaint analysts under the direct supervision of prosecutors handles the intake function. Twelve persons rotate between phones/visitor interviews and the review of written materials mailed in by CWs. A small number of investigators attempt to resolve relatively minor problems which do not warrant major investigation. However, all calls are recorded for pattern detection in a sophisticated computer file on all attorneys. All case closures must be reviewed by an attorney.

(2) The system has designated a special channel for the receipt of complaints about attorneys by judges.

(3) A wide range of information which is *not* generated by consumer complaint now enters the system and is reviewed. Criminal arrests, malpractice insurance claims against attorneys, judicial sanctions, self-reporting by attorneys in general (required by the State Bar Act), notices from banks of non-sufficient funds checks written on client trust accounts, and other information is gathered, compiled, and reviewed systematically.

(4) The intake system is filtering marginal cases, while recording them for overall pattern detection purposes. There is an immediate narrowing of cases flowing into formal and resource-exhausting investigations—permitting the diversion of adequate OI attention to high-priority cases and precluding the historical backlogs which had paralyzed the system though most of the 1980s.

Tables 1 and 2 illustrate the evolution of the intake function over the past five years. The number of calls received by the hotline has steadily increased year to year, as noted above. In addition, enhanced information is now recorded in the files of licensees independent from hotline calls—primarily from self-reporting and the ancillary sources listed above. However, the number of cases transmitted for formal investigation has declined to a large but manageable level. As Table 1 above indicates, in 1987 26,216 calls yielded 7,452 cases transmitted for formal and full investigation. By 1990–91, that ratio had changed markedly—to 6,000 cases transmitted for full investigation out of 70,000 calls received. Our review of cases over the past five years confirms that the cases passing into OI under 1991 practices are, by and large, the high-priority matters possibly deserving serious discipline and warranting the attention of investigation, prosecution, and State Bar Court resolution.

The findings of the Bar's Complainants' Grievance Panel (CGP) over the past several years in auditing and reviewing inquiry closures confirm that judgment. Very few—under 1%—of the many inquiry closures reviewed by CGP ever result in a recommendation for a

Table 1
Intake/Legal Advice
(includes the first half of 1991)

	1987	1988	1989	1990	1991
Inquiries received	11,081	17,462	19,797	20,057	9,771
Information requests	15,135	15,394	19,805	48,036	25,910
TOTAL:	26,216	32,856	39,602	68,093	35,681
Inquiries that advanced to complaint status	7,452	4,376	5,493	6,091	3,230

penalty beyond a possible warning. And, interestingly, of the cases passed on to OI for formal action, a consistent one-half to two-thirds involves attorneys with one or more other pending matters already under investigation.[12]

Table 2 presents the disposition of inquiries over the past two and one-half years. The first category ("PRG") refers to those cases purged because the CW has failed to return the complaint form! The two most important categories after that are the "NSF" category (closed for non-sufficient facts to justify discipline) and "INV" (cases transmitted to OI for possible formal discipline).

Recommendations. The Bar's complaint intake process is vastly improved, but additional information should be added to the Bar's computer system. The Attorney General's Arrest Notification System has not been implemented and should be included for automatic tracking of licensees from point of arrest; the filing of civil legal malpractice and fraud complaints against licensees should be added to the system by legislative act; and the recording of discipline by other jurisdictions must be made reliable and should be included.

In addition to receiving complaints, the Intake Unit also controls the amount and nature of information disclosed by the Bar about attorneys to inquiring consumers. The confidentiality rules of the Bar should be legislatively changed to allow disclosure of important information about attorneys requested by consumers. At present, the Bar does not reveal to a caller certain important public information about an attorney—even upon request and even if known by the Bar. Such information includes civil malpractice/fraud filings, contempt orders, sanctions, and criminal arrests (most criminal convictions are theoretically disclosed through membership records). Further, the Client Security Fund Commission's decisions to allocate public funds are considered confidential under the relevant statute as interpreted by the Bar's Office of General Counsel. All of this information, where otherwise public or involving information concerning the allocation of public funds, should be disclosed to an inquiring consumer upon request.

C. Investigations

In 1987, the Bar's Office of Investigations was structured as an independent entity, separate from the prosecutors responsible for charging and presenting discipline offenses to the State Bar Court. OI's operations included the following major problems:

(1) Bar investigators were hampered by a series of operational rules embarrassingly solicitous of attorney commercial needs and sensibilities. For example, no investigator could mention the name of the accused attorney he/she was investigating, even when writing the person who had complained

Table 2
Inquiry Summary

	CY 89	CY 90	1/91	2/91	3/91	4/91	5/91	6/91	7/91	YTD
On Hand	3,518	2,903	1,750	1,882	1,825	1,845	1,919	1,911	2,055	1,750
Received	19,797	20,057	1,744	1,367	1,588	1,682	1,738	1,652	228	9,999
Resolved										
PRG	6,130	6,235	335	324	355	273	435	364	32	2,118
CWF	502	232	13	14	13	18	23	18	1	100
NSF	2,349	2,598	187	147	177	169	121	141	27	969
INV	5,493	6,091	537	458	550	578	568	395		3,086
DPC	316	329	43	15	16	10	24	13		121
NMT	1,963	1,811	148	125	128	158	159	154	14	886
RSV	1,458	1,172	80	82	89	69	122	106	26	574
NSP	411	713	94	84	87	117	116	130	22	650
COM	316	392	44	47	46	83	79	73	12	384
ARB	378	451	44	54	25	46	35	43	7	254
WRN	14							1		1
LJR	462	771	50	40	44	46	51	41	5	277
REF	20	7					1			1
RSN	84	142	18	16	10	17	2	18	9	90
CLS	148									
DSB	66	67	5	4	6	9	2			26
CRI	112	35			2	2		1	1	6
CFL	10									
CNR	76	1	1							1
NCW	5	11								
ERR	72	123	9	11	6	6	7	7		46
???	15	9			1	1		2	1	5
DTH	12	8	3	3	1	1	1	1	1	11
POI	4	12	1		2					3
RPT					10	5				15
TOTAL:	20,416	21,210	1,612	1,424	1,568	1,608	1,746	1,508	158	9,624
Remaining	2,899	1,750	1,882	1,825	1,845	1,919	1,911	2,055	2,125	2,125

about that attorney (someone else might see the letter); and Bar investigators were prohibited from even *talking* to a non-complaining client of an accused attorney without a probable cause sign-off, after written application, by the Board of Governors' Discipline Committee (which is controlled by practicing attorneys).[13]

(2) Investigators lacked supervision by those responsible for prosecuting cases, as noted above.

(3) Perhaps most devastating, a backlog of more than 4,000 cases awaited investigation—more than 200 for each active investigator. Investigator productivity was effectively clogged, as they could consume most of a day simply answering inquiries about the status of cases assigned to them. The more complex and often more serious cases which could not be quickly closed as without merit tended to remain in the backlog, since statistical turnover—an important measure of output at the time—was not as easily accomplished by working difficult and important cases warranting disbarment. Hence, delays in dealing with "horror story" attorneys often involved not months but years of delay within OI.[14]

In 1991, the condition of the Office of Investigations is enormously improved. Investigators work more closely with the Office of Trials attorneys who prosecute Bar discipline cases. As we discuss below, the current arrangement is still excessively horizontal, involving too many hand-offs from office to office, and lacks the accountability and close supervision of the vertical structure we have long and strongly recommended. However, there is some verticality in the investigation of repeat offenders; legal advisers are more available for investigator guidance than in 1987; and no case is now closed without attorney review or in accord with guidelines.

Most important, the backlog is gone. We do not believe the backlog was resolved with the summary closure of cases. A large number have been fully investigated and forwarded for formal discipline, and the ratios over the past five years (and audits conducted by us and by the Complainants' Grievance Panel) do not indicate any wholesale "dumping" of strongly meritorious cases. Table 3 includes the basic measures of OI output over the past two and one-half years. The number of cases disposed of during this period generally exceeded the number of incoming cases, as the final backlog continued to be dissipated during this period. The two most important categories here are "DSM" (dismissed) and "SOC" (statement of the case, referring to those cases where formal accusations ("notices to show cause") were prepared for serious disciplinary actions before the State Bar Court).

Although there is a decline over the past two and one-half years in the number of SOCs submitted for NTSCs, that trend is not necessarily troubling. The number of cases submitted for formal discipline, plus those in which attorneys are subject to letters of warning or agreements in lieu of discipline, is close to one-half the number of investigations closed. This is a fairly high ratio, much higher than historically extant. Further, although the Complainants' Grievance Panel has found more investigations closed by OI to be worthy of further effort (as opposed to inquiries closed by the Office of Intake/Legal Advice), the vast majority of closed investigations appealed to CGP by consumers were confirmed as properly closed; of those in which reinvestigation was ordered, only a small percentage has resulted in formal discipline. Nor do the consumer representatives on that Panel, including well recognized consumer advocates, disagree with Panel judgments often in this regard.

As Table 4 documents, the backlog reduction in the Office of Investigations has been remarkable. Between 1985 and 1986, the number of backlogged cases (*i.e.*, pursuant to Business and Professions Code section 6140.2, those held over six months in OI) grew to almost 4,000 (over 3,700). Although the Bar's backlog reduction efforts began in late 1986, the real reduction difficulty rested with the egregious and sometimes complex cases which had been under investigation well over one year, some as long as three or four years. These were not seriously addressed until 1988 and 1989. By early 1990, OI had cleared out almost all of its backlog. As of 1991, those cases in the system less than six months predominate. Further, most of those in OI longer than six months are complex cases which are permitted by law to be in investigations for up to one year.[15] In 1985, over 2,000 cases were not only in the backlog, but they had been there more than one year. In 1991, only 29 out of the 1,781 pending cases exceed the statutory goal set for OI. While that is 29 cases too many, it is a very different situation than existed in 1985–1987.

Recommendations. Legislative focus on OI's performance through Business and Professions Code section 6140.2 has had a salutary impact on OI's output. However, we believe the Bar's current investigation/prosecution system has been and continues to be excessively horizontal. We discuss this concern in more detail below.

D. Complainants' Grievance Panel

Effective January 1987, SB 1543 (Presley) created a Complainants' Grievance Panel (CGP) composed of seven persons. This Panel is charged

Table 3
Office of Investigations Caseload Summary

	CY 89	CY 90	1/91	2/91	3/91	4/91	5/91	6/91	YTD
On Hand	5,792	4,976	4,794	4,721	4,541	4,606	4,502	4,369	4,794
Received	5,967	6,658	584	496	616	646	638	463	3,443
Disposed of:									
DSM:	4,263	4,336	361	461	337	540	357	272	2,328
FWD:	168	384	65	61	58	101	219	147	651
SOC:	1,774	1,522	143	55	107	72	116	84	577
TRM:	559	555	84	97	44	32	72	6	335
ALD:	1	3	3			1			4
ADM:	18	40	1	2	5	4	7	7	26
TOTAL:	6,783	6,840	657	676	551	750	771	516	3,921
Office Remaining	4,976	4,794	4,721	4,541	4,606	4,502	4,369	4,316	4,316

Table 4 Pendency of Open Complaints							
	1985	1986	1987	1988	1989	1990	1991
0–6 months	2,345	3,653	2,373	1,747	1,721	1,757	1,524
7–9 months	899	750	415	576	326	208	134
10–12 months	838	442	360	431	138	131	94
13 months +	2,027	—	—	—	—	—	—
13–21 months	—	874	772	598	52	71	23
21 months +	—	503	417	289	50	12	6
Total Pending:	6,109	6,222	4,337	3,641	2,287	2,179	1,781
Total Pending over 6 months:	3,764	2,569	1,964	1,894	566	422	257

with the review of closed investigations and closed inquiries, and cases in which admonitions, warning letters, or agreements in lieu of discipline have been issued instead of a notice to show cause. CGP's charge includes a review of investigative dispositions and is not intended to intrude into the jurisdiction of the State Bar Court. Its reviews are triggered by appeals from CWs or are based on its own authority to conduct random audits. Upon review, it has the power to order further investigation. The CGP may also transfer matters directly to OT with a recommendation to issue an admonition or file an NTSC.

The Panel's responsibility to audit the dismissals (closings) of complaints includes a requirement to write an annual report to the Discipline Committee of the Board of Governors, with findings and recommendations concerning Bar standards and performance.

The CGP is served by a staff group called the Complaint Audit and Review Unit (CAR). CAR staff receives requests for further investigation and responds with a postcard assigning the request a number and noting that the file has been requested. Under current practice, once the file is received, it is screened by paralegal staff of CAR to determine whether it fits within a defined "consent calendar" category. The requests are presented *en masse* to the Panel and denied categorically, unless a Panel member pulls it from the consent calendar for individualized consideration.

Despite recent staff increases, a choking backlog has developed in CAR. As of December 1989, CAR had 1,066 unscreened cases pending before it, up 50% from the previous six months. At this time, we are distressed to report that the backlog has jumped even more. The open cases before CAR include over 2,700 cases—two-thirds of them inquiries closed by Intake, and the remaining one-third more serious cases passing through intake but closed by OI. Almost half of the closed inquiries still open within the CAR backlog are more than one year old at this point. The OI-dismissed cases are generally older.

Requests for reinvestigation are coming in at a current rate substantially in excess of historical CGP disposition rates. The backlog is growing, not shrinking. However, in order to enable the Panel to make considered decisions, and recognizing that it is made up of volunteer appointees who meet once a month, CGP has necessarily limited itself to consideration of a defined number of cases per month, so that those warranting individualized attention receive it. Historically, this has meant CGP consideration of 30–60 cases per meeting outside the consent calendar.

CAR staff is attempting to remedy this problem through a series of measures, including expanded use of the consent calendar, its recent adoption of a modified standard of review (focusing on cases where discipline might be in the offing), a reduction of time to appeal from 90 days to 30 days, elimination of second review, temporary use of OI investigators to reduce the backlog, and the addition of more staff to CAR.

These are important steps but, in concert, we do not see them solving this problem if appeals continue to enter the system at over 200 each month—and especially if they increase further. We believe other measures not on the list should be considered.

Recommendations. Most important, CGP should cease its automatic review of closed inquiries upon request where the backlog jeopardizes more important individualized review of closed investigations. A very low percentage of closed inquiry appeals is upheld, and we are not aware of any case in which serious discipline has been imposed as the result of review of a closed inquiry. The Panel must have the legal option to review inquiry closures on an audit basis only, to keep Intake/Legal Advice honest, but without choking under a glut of cases which are unlikely to yield any empirical result.

The Bar should not impose a sixty-day turnaround time on OI for cases referred by CGP for reinvestigation (as has been proposed). Instead, it should properly staff CAR with sufficient investigative resources, and impose an investigation deadline on CAR.

Finally, we recommend that CGP add two public members, bringing total Panel membership to nine. The result would mean that public members would have a majority on the Panel. Since the Panel is intended as a check on the system, it should not be controlled by practicing attorneys. The addition of two persons would allow the Panel to divide into three divisions where workload so requires, with each division having the authority to make final decisions for the Panel, unless the Panel affirmatively objects. This structure, commonly followed by courts of appeal, permits more intensive inquiry into more cases than does *en banc* Panel consideration of every case.

Unrelated to the backlog problem, we also recommend that the Panel be structured so as to assure its independent status from the remainder of the Bar's discipline system. With the sunsetting of the position of State Bar Discipline Monitor on December 31, 1991, the Panel will be the only independent check internal to Bar discipline operations on investigation closures.

E. Office of Trials

In 1987, the then-Office of Trial Counsel (OTC) was beset with internal dissension. Turnover was high. The professional prosecutors who remained with the Bar felt unappreciated—even insulted—at their treatment by the Board of Governors, upper discipline staff, and the then-separate Office of Investigations. The specific problems confronting OTC included the following:

(1) Even experienced Bar prosecutors were not allowed to engage in simple discovery or settlement discussions without cumbersome bureaucratic review. Attorneys had few resources, were limited in discovery budget, and could utilize the services of a legal secretary with a word processor but two hours each day—with attorneys rotating in their use of the few secretaries and machines allocated to them. Further, both attorneys and investigators were paid substantially below market rates, exacerbating high turnover, particularly within the legal staff.[16]

(2) Aggressive action by OTC to protect the public was lacking. The num-

ber of interim suspensions sought was nil. Disability proceedings were confused. Enforcement of existing Rule 955 orders[17] by the California Supreme Court was impossible post-disbarment or resignation due to lack of statutory authority.

(3) Administratively, OTC was in disarray. Case abatement policies were unclear, and the Bar's investigation and prosecution of many serious cases were abated for years pending resolution of civil or criminal proceedings which warranted not delay but accelerated action by the Bar. Files whose use was needed post-adjudication (*e.g.*, to contest petitions for reinstatement) were shredded immediately after the conclusion of the Bar's disciplinary proceeding.

(4) The Bar irrationally took many cases to full investigation and hearing only to obtain an admonition or public reproval, while the same result could have been achieved simply by issuing a letter of warning without the resource waste (while retaining the right to litigate the matter in the future should related offenses occur).

(5) During the course of Intake/Legal Advice and OI reforms, the flow of cases into what is now the Office of Trials increased dramatically. Turnover and other problems resulted in a serious backlog problem in the drafting of NTSCs, and in initial settlement proceedings related to the drafting process. The number of such backlogged cases reached over 500 by 1989–1990. That number is close to the historical number of cases handled by the State Bar Court over an entire year.

In 1991, the Office of Trials continues to have turnover problems; however, the remaining problems (and others) have been largely addressed, as follows:

(1) The number of OT attorneys is substantially increased; the attorneys are supported by more adequate staff; and their pay is at or close to market levels.

(2) The Office is fully word processor computerized. Secretaries are available.

(3) Resources are allocated for discovery.

(4) The Chief Trial Counsel has established a new policy guiding settlements, including due deference to senior counsel.

(5) Case investigation and prosecution are not abated without specific justification; there is no automatic deferral to criminal or civil proceedings; and our review suggests that deferral to the latter is properly rare.

(6) Files are not destroyed until no reasonable possibility exists that they might be needed (five years after closure and, if formal discipline occurs, never).

(7) The Bar has adopted a "letter of warning" system instead of litigating cases to obtain less useful reprovals.

(8) The NTSC drafting backlog is gone.

Tables 5 and 6 below present the output of the Office of Trials over the past several years. As Table 5 indicates, the number of formal filings with the State Bar Court has increased steadily since 1987, and is reaching very high levels in 1991. In addition, increasing numbers of respondents are agreeing to stipulated discipline at point of the NTSC conference or before, eliminating the need for formal filing. The 288 total filings and stipulations in 1987 jumped to 443 in 1990. Based on the first half of 1991, the current year total projects to 674.

Table 6 presents the number of cases received and disposed of, and the manner of disposition, over the past two and one-half years. In general, about half of the cases received by OT result in the filing of a notice to show cause.[18] Another one-third of the cases result in a stipulated punishment or informal discipline (usually a letter of warning or agreement in lieu of discipline). About one-fifth to one-sixth of the cases are dismissed.

The filtering which is occurring is important. As we have recommended over the past four years, it is better to delineate the strength of a case as soon as its potential is responsibly explored; that is, make a quick decision whether to go forward, or to warn or enter into an "in-lieu" agreement. In these cases, the Bar retains the ability to sanction on the underlying offense if the agreement is violated or further violations occur. A visible and strong hammer is poised. To go through a formal disciplinary adjudication in a case where the outcome is likely to be either a dismissal or (given the prior record of the accused and the mitigating circumstances) a letter of reproval is counterproductive. In the latter situation, the Bar has fully litigated the matter at great expense and what has it achieved? Over the past three years, a high percentage of those cases litigated result in meaningful discipline: resignation with charges pending, disbarment, or actual suspension.

Tables 7, 8, and 9 present the evolution of other functions of the Bar's discipline system. Under the general jurisdiction of the Office of the Chief Trial Counsel, the Office of Intake/Legal Advice monitors pending criminal cases

Table 5
Office of Trials
Initial Filings in Original Disciplinary
Cases as of August 31, 1991

Type of Filing	1985	1986	1987	1988	1989	1990	YTD 1991
Notices to Show Cause	269	195	241	266	316	376	404
Pre-Notice Stipulations	42	38	47	48	41	67	71
TOTAL:	311	233	288	314	357	443	475

Table 6
Office of Trials Caseload Summary

	CY 89	CY 90	1/91	2/91	3/91	4/91	5/91	6/91	YTD
On Hand:	1,165	1,917	2,249	2,314	2,231	2,132	1,991	2,012	2,249
Received:	1,988	1,972	214	115	165	172	335	234	1,235
Disposed of:									
DSM:	210	266	14	28	38	149	32	37	298
TRM:	133	263	50	39	18	22	42	18	189
NTS:	662	855	58	118	174	111	178	210	849
STP:	81	96	11	5	11	13	27	15	82
ADM:	39	24	4	2	5	6	5	6	28
ALD:	9	52	9	2	14	5	22	3	55
RLS:	102	62	3	4	1	4	6		18
FWD:		22			3	3	2	3	11
TOTAL:	1,236	1,640	149	198	264	313	314	292	1,530
Office Remaining	1,917	2,249	2,314	2,231	2,132	1,991	2,012	1,954	1,954

Table 7
Conviction Referrals

	CY 89	CY 90	1/91	2/91	3/91	4/91	5/91	6/91	YTD
TRIAL COUNSEL:									
On Hand:	1	9	7	7	2		2	1	7
Received:	109	161	11	4	10	26	15	18	84
Disposed of:									
FWD:	100	150	9	4	11	24	15	18	81
TRM:		13	1	5	1		1		8
DSM:	1								
NTS:			1						1
TOTAL:	101	163	11	9	12	24	16	18	90
Office Remaining:	9	7	7	2		2	1	1	1
STATE BAR COURT:									
On Hand:	196	214	230	228	218	208	216	230	230
Received:	99	145	11	4	10	20	19	16	80
Disposed of:									
DSC:	45	99	2	12	12	9	4	11	50
TRM:	25	12	4		4	1	1	2	12
DSM:	11	17	6	2	4	2		1	15
RLS:		1	1						1
TOTAL:	81	129	13	14	20	12	5	14	78
Office Remaining:	214	230	228	218	208	216	230	232	232

Table 8
Special Filings

	1986	1987	1988	1989	1990	1991
Substantial threat of harm inactive enrollment:	N/A	19	31	28	11	8
Health-related disability inactive enrollment:	N/A	4	6	3	9	3
TOTAL:	N/A	23	37	31	20	11

and convictions against attorneys (see Table 7). It is currently monitoring 347 attorneys who have suffered criminal arrest and have cases pending, rather a shocking number and percentage. The number of cases being monitored and their method of detection is substantially improved from the Bar's 1987 reliance on newspaper clippings. Although automatic notification from the Office of the Attorney General through its Arrest Notification System is not yet implemented fully, it is authorized by statute as of 1989 and should be an increasingly important detection asset.

The first category of Table 8 tracks the Bar's "involuntary inactive enrollment" motions (equivalent to interim suspensions) under Business and Professions Code section 6007(c). The 1988 passage of the reform measure SB 1498 (Presley) substantially expanded the ability of the Bar to act quickly to protect the public from an errant attorney. The Bar was given three basic options: petition for interim suspension pending final disposition, petition for restrictions on practice (*e.g.*, review by another attorney, outside handling of money), and seek immediate effectuation of a disciplinary order following hearing and pending appeal. The last of these three options has been increasingly utilized by the Bar and represents almost all of the "substantial threat of harm inactive enrollment" entries in Table 8. The first two options have been underutilized by the Bar. The second category of numbers in Table 8 counts the number of Business and Profession Code section 6180 and 6190 disability petitions filed by the Bar to relieve an attorney—usually voluntarily—of his or her practice.

Table 9 presents Rule 955 violation data. In a final disciplinary order, the California Supreme Court typically includes a requirement that the disciplined attorney comply with Rule 955 of the California Rules of Court by notifying his/her clients, returning pertinent documents and other property to clients, refunding fees paid in advance, and notifying opposing counsel and courts in pending litigation. In 1987, prior to the passage of SB 1498 (Presley), any person who violated a Rule 955 order following disbarment or resignation was deemed to be beyond the jurisdiction of the Bar, and could not be effectively sanctioned by the Bar for violating orders of the State Bar Court or of the California Supreme Court (*e.g.*, orders requiring the return of files and protection of former clients). The new law has given the Bar additional authority and enforcement options. Rule 955 violation actions of the Bar have increased.

Recommendations. The Office of Trials must verticalize its handling of more cases. Verticalization means simply that one person—the prosecutor who must bring it to hearing or decide its other disposition—is in charge of a case from its inception, and that person is assisted by an investigator. Working as a team, the attorney/investigator assure continuity. The investigator has an attorney supervising the work to make sure that evidence of those elements necessary to prove the case is obtained in the first instance—and in a manner facilitating its introduction at hearing. The investigator stays with the case until conclusion. Hence, the OT attorney has an investigator available to accomplish any needed discovery after NTSC filing and also available at hearing to help prepare an often critical rebuttal case after the presentation of the defense at hearing.

The vertical approach also has other advantages. The case need not be relearned sequentially by different people as it progresses. Those making the decisions have more direct knowledge of the case, including the credibility of the witnesses and the defenses to be proffered. There is much in a case which cannot be memorialized in a memorandum and passed onto another level of review by investigators or attorneys new to the matter. And consumers who want to know about the status of the case have someone with whom to talk who knows the answers.[19]

While simple cases can be processed in assembly line fashion with many different handlers, numerous Bar discipline cases are not so constituted. The verticalized handling of these cases is desirable and could be accommodated in a system with a minimum number of hand-offs. Vertical teams are particularly appropriate where a level of substantive expertise is required of investigators in the subject matter of an investigation and/or direct attorney supervision of investigators is required. The CRAFTS program noted above is an example of such vertical treatment in a particular substantive area. We believe

Table 9: Rule 955 Violations									
	CY 89	CY 90	1/91	2/91	3/91	4/91	5/91	6/91	YTD
State Bar Court:									
On Hand:	34	53	69	63	73	66	69	80	69
Received:	38	61	3	10	7	6	16	7	49
Disposed of:									
DSC:	4	22	—	—	4	—	1	5	10
TRM:	10	13	8	—	7	3	3	—	21
DSM:	5	10	1	—	3	—	1	—	5
TOTAL:	19	45	9	—	14	3	5	5	36
Office Remaining	53	69	63	73	66	69	80	82	82

that such task force treatment should be organized for every substantive area where there is a critical mass of cases to justify it. Although the handling of 150–200 cases has been verticalized, these are generally confined to the repeat offender task force work which now covers respondents who have ten or more complaints pending in the system. We believe that task force should be expanded to handle those with five or more pending complaints, and other cases should be routinely handled vertically.

The Office of Trials must also make much greater use of the interim remedies available to it, particularly Business and Professions Code section 6007(h) restrictions on practice to protect the public. The Bar's section 6007(c) interim suspension orders have actually fallen substantially, from 31 in 1988 to 28 in 1989 to 11 in 1990. Further, our analysis of those cases, and the filings during 1991, indicates that most of them pertain to motions to impose discipline *after* the State Bar Court hearing judge has made a disbarment recommendation (*i.e.*, after pleadings, discovery, and full-fledged adjudicative hearing), or occur in the context of a respondent's default where practice appears to have terminated anyway. We have surveyed a sample of recent cases and believe that a substantial number of them are appropriate for interim remedy motions which are not occurring.

On a broader level, we believe that the Office of the Chief Trial Counsel should be somewhat structurally independent of the State Bar. At present, the Bar appoints the Chief Trial Counsel. We believe that the Governor or Attorney General should make this appointment directly, subject to Senate confirmation. We are not comfortable with the current arrangement where the Board of Governors of the State Bar—consisting of 23 persons, 17 of whom are attorneys elected by attorneys—selects and directs the prosecution of its own profession. We do not doubt the *bona fide* commitment of current Governors or recent Bar Presidents to the effective discipline of the profession. The past four years have witnessed extraordinary consumer sensitivity among Bar leaders. But the institutional problem remains.

F. State Bar Court

In 1987, the hearing department of the State Bar Court consisted of an elaborate system of volunteer practicing attorneys who served as "referees." Hearings were conducted by any one of hundreds of volunteers, each of whom heard very few cases per year. Most were not trained in administrative law or in the Rules of Professional Conduct. The instruction provided by the Bar was minimal. These referees did not know of the decisions of other referees or of the Bar's Review Department, and thus lacked the guidance of established precedent.

Cases could then be appealed to an 18-member Review Department, again consisting mostly of practicing attorneys (twelve attorneys and six non-attorneys). This panel met once every month or two and considered appeals as a collective body, although a thorough review of the record of cases was often delegated to only one particular member.

The work product of the State Bar Court was inconsistent and not of the highest quality. The California Supreme Court, in extraordinary frustration, openly criticized the work product of the State Bar Court in two published opinions: *Maltaman v. State Bar*, 43 Cal. 3d 924 (1987), and *Guzetta v. State Bar*, 43 Cal. 3d 962 (1987).

In 1991, pursuant to SB 1498 (Presley), the State Bar Court consists of six hearing judges and a three-judge Review Department appellate panel. These judges are all appointed by the Supreme Court. The Review Department includes by law at least one person who is not and has not been an attorney. The remainder are attorneys; all are professional, full-time judges who do not practice law nor hold any other employment position.

The new State Bar Court is not fragmented, and members know of each other's decisions. The public's confidence in this Court, which now does not consist of possible colleagues of the accused, has increased markedly by a number of measures.[20] The hearing judges are increasingly meeting their deadlines. Opinions are being written in due course. Hearings are scheduled consistent with timelines. The hearing process—from NTSC filing to decision—takes seven to nine months in general.

The consistency and predictability of the new State Bar Court system has resulted in an extraordinarily high settlement rate. The historical settlement rate of the State Bar Court has been in the 15–18% range. Recent changes by the Office of Trials to encourage *pre*-filing settlements, including the ALD procedures, necessarily filter out cases which might settle post-filing. However, in addition to higher settlement rates pre-filing, the State Bar Court has gradually, over the past year, increased its *post*-filing settlement rate to 25%, then to 30%, then to 40%. At present, it approaches 50% of filed cases. Some of these cases (up to 10%) are dismissals by the Office of Trials, but most of the remainder impose discipline along lines consistent with precedent.

Further, the rate of requests for review by the three-judge Review Department has now fallen to one-half of its previous level under the old 18-member Review Department. Although both respondents and OT are eligible to seek review, both are increasingly accepting the hearing judge's decision. The fact of this acceptance level from a pool of strongly contested cases (from which three times the previous number of settlements has been extracted) is all the more extraordinary.

The Supreme Court has upheld the decisions of the State Bar Court (39 of 41 reviewed decisions of the new Review Department have been adopted), and is pleased enough with its performance and structure to have approved an extraordinary "finality rule," giving its judgment the imprimatur of the Supreme Court unless the Supreme Court affirmatively decides otherwise or grants a petition for review (as with any appellate court decision).

Table 10 presents statistics on the number of complaints involved in State

Bar Court case dispositions over the past two and one-half years. As noted above, the number of complaints received has increased dramatically over the past two years. In prior years, 400–600 complaints would be involved in cases filed in the State Bar Court. In 1989, that number reached 756; in 1990, it reached 967. Moreover, initial 1991 figures indicate that the State Bar Court will receive cases involving close to 2,000 complaints, certainly over 1,800.[21]

Recommendations. In the past, we have expressed concern over the workload of the State Bar Court. The elimination of the OI backlog created a backlog in OT as a "bubble" of cases has moved through the system over the past four years. The State Bar Court is now receiving the full brunt of this bubble. Prior to 1989, the State Bar Court could expect to receive from 450 to 550 complaints in cases filed per year. As noted above, the Court will probably receive 1,800 complaints in cases filed in 1991. This influx has led the Bar to use pro tempore judges for a substantial number of cases. But for the increased settlement rate, the State Bar Court could well have been forced into massive use of the previous volunteer referee system, or compelled to add substantially more judge positions.

Although we do not favor the use of temporary judges except for emergency purposes, their current use is justified because the data upstream from the State Bar Court indicates that the bubble will pass through and the cases following it will be at a level which possibly may be accommodated by the current permanent court, with perhaps one or two hearing judges added at some point. Specifically, the number of complaints being transmitted to OI by intake is actually down somewhat, and levels into OT indicate that NTSC filings are likely to fall back to below 900 for 1992. If the settlement rates remain high, the current six hearing judges should suffice for that year, with heavy support from pro tems. One or two judges may need to be added by 1993 or 1994 as the population of attorneys continues to climb.

Second, we continue to recommend that the State Bar Court relinquish its Probation Department function (as it is now considering). At present, the entire probation operation of the Bar's system of discipline is run by the State Bar Court. The Court (through the chief probation monitor) is in the position of requesting the investigation of probation revocation complaints, and filing notices to show cause for probation revocation. The Court then hears the cases its subordinates have ordered filed. The separation of powers problem here is self-evident. And there is a coordination problem as well. Other entities of the discipline system do not receive information from the State Bar Court-controlled Probation Department. In fact, the Court and its Probation Department consider most of these records confidential and will not share them.

This Probation Department function should be operated independent of the State Bar Court, either as its own entity or preferably by the Office of Trials—with full information sharing with Intake. The State Bar Court favors divestiture of probation, either to OT or as a separate department. We favor the former approach.

Finally, we recommend that the Bar publish its proposed *State Bar Court Reporter*. The Board of Governors is hesitant to approve start-up funding for the publication because of budgetary uncertainties. We believe that the *Reporter* should be published even if it is a financial burden on the budget. The Bar has made a momentous investment at some cost to itself in creating an independent and professional court. To fully capitalize on that investment, it should formally publish the work product of its creation. Such publication has many advantages for the Bar and the public. First, it is a single accessible repository of caselaw about the obligations of an attorney. It enhances consistent application of the law, allowing for convenient comparisons between hearing judge decisions and enhancing settlement likelihood. It allows Bar discipline practitioners to practice more intelligently. Scholars who are interested in writing commentaries about professional responsibility and discipline issues will have an available repository of official caselaw from which to work. Other jurisdictions considering reform will have a body of law to gauge California's performance.

The proposed *Reporter* has symbolic as well as practical significance. In a sense, it becomes the flagship for the state's discipline efforts. Its existence says that these cases—this area of law and the ethical obligations of attorneys—are of great importance and worthy of official report.

Table 10
State Bar Court

	CY 89	CY 90	1/91	2/91	3/91	4/91	5/91	6/91	YTD
On Hand:	1,322	1,385	1,354	1,315	1,388	1,386	1,448	1,556	1,354
Received:	756	967	58	114	190	131	207	224	924
Disposed of:									
DSC:	516	743	56	5	161	41	85	78	426
TRM:	123	114	26	30	20	7	9	8	100
DSM:	40	122	4	4	6	18	1	4	37
ADM:	1	2	1	1			4		6
RLS:	8	12	10	1	5	3		3	22
SRJ:	3	5							

G. Client Security Fund

The Bar's Client Security Fund—currently financed by a $40 per year per active attorney Bar dues increment—is administered by the Client Security Fund Commission, and is intended to reimburse clients victimized by the intentional dishonesty of their attorneys. Over the past few years, we and others noted that the Fund could experience a shortfall in 1990 or 1991 if assessments were not raised. Since then, the Bar requested a $25 increased assessment per attorney to restore the Fund's viability, and received $15 of the requested sum. The increased contribution will likely assure the solvency of the Fund until the end of 1992. The rate of claims and awards has leveled off somewhat from their explosion in 1984–1987. Unless there is a clear leveling during 1991, the Fund will quickly become insolvent. The statistics from early 1991 suggest that amounts are not increasing dramatically, and the Fund should remain solvent through 1992.

Where the Bar fails to ameliorate the taking of funds, it must not attempt to underfund the Client Security Fund. That option puts pressure on CSF to deny claims. Rather, the alternative is another increase in contributions, and another, to always keep the Bar's promise to recompense the victims of dishonest attorneys. Consistent with that obligation is a duty to affirmatively advertise the availability of the Fund. We agree with the Bar's public service announcement intentions and hope the recently approved radio PSAs are completed and disseminated.

During our tenure, we have focused on two primary issues relating to the

CSF: the creation of a default procedure which would enable the CSF to make immediate payouts before final discipline is imposed where the accused attorney fails to respond to notice; and the consolidation of CSF proceedings with the disciplinary process.

In May 1989, the CSF Commission approved a modified default plan similar to the one we suggested. As noted in previous reports, this plan has been put into operation and authorizes the payment of claims under $5,000 which are facially within Fund jurisdiction where there is a failure to respond by the involved attorney after notice. In 1989, when the limit was a lower $2,500, this default procedure enabled CSF to close 115 matters representing a payout of $91,159.91. The average processing time for default matters was 319 days, compared to an average of 527 days for all other applications. In 1990, with the limit increased to $5,000, 181 matters were paid, increasing the default-based payouts to $203,635. The average processing time for default matters in 1990 was 308 days, compared to an average of 492 days for all other applications. Early 1991 data suggests further improvement.

As noted, we have also suggested that rather than beginning its process at the conclusion of discipline, where there is no default the CSF proceeding should run concurrently with discipline. Use of the Bar's discipline resources and the more predictable structure of the new State Bar Court system would accomplish Fund payout at point of discipline decision, rather than having that decision serve as the starting point for CSF's claim evaluation process.

CSF staff has taken several important steps to explore the viability of integrating claims processing with the disciplinary process. In October 1990, Commission staff met with OI, OT, and State Bar Court staff to outline the issues involved with consolidation. We do not see any of the issues identified as presenting significant barriers to the needed integration.

As we urged in the Seventh Progress Report, the rules of the State Bar Court and CSF Commission should be adjusted or, if necessary, appropriate legislation enacted to accomplish the inclusion of CSF decisions in State Bar Court proceedings. The CSF Commission should monitor such adjudications and alter its rulemaking as needed to guide the Court and consider itself only those cases not going to hearing.

Regrettably, the current rewrite of Client Security Fund rules does not properly address these concerns, nor move affirmatively to provide a more efficient system. Rather, rule 9 of the CSF's Rules of Procedure provides that reimbursement is only paid where there is a dishonest act of an attorney acting as a lawyer where he or she: "(a) died or was adjudicated mentally incompetent; (b) *was* disciplined, or voluntarily resigned from the practice of law in California; (c) became a judgment debtor of the applicant in a contested proceeding, or was judged guilty of a crime" (emphasis added). The next section of the rule allows the Commission to waive qualification under one of the three categories above in its "discretion." Hence, many of the reforms of the Commission, including its new default system, depend upon the use of the undefined discretionary power to waive.

Recommendations. The Client Security Fund default procedure has been a success and has accelerated payment to many clients victimized by attorney dishonesty. All Fund cases coextensive with disciplinary proceedings and not subject to default should be assumed by OT and decided by the State Bar Court together with the underlying discipline case, rather than considered separately and much later. The scope of Fund coverage should be expanded to guarantee payment of final arbitration orders or malpractice judgments where the attorney subject to them refuses to pay, with full subrogation rights to the Fund. The Fund's coverage caps should be lifted.

H. Total Output and Expedition

The budget of the Bar's discipline system was augmented by an increase in dues in 1989.[22] Compensating for inflation and the additional increase in the number of attorneys in California, the new system is about 40% "larger" per attorney than the pre-1987 operation.

However, as Table 11 outlining total formal attorney discipline indicates, the output of the system has increased much more. Public discipline increased markedly in 1988–1991 over the base level of 1982–1987. In 1985, discipline actions caused 51 attorneys to be removed from the profession (disbarred or resigned with charges pending). In 1987, this number was 80. In 1988, it increased to 112; in 1989, to 141; in 1990, to 147; and it is running at slightly above this level in the first half of 1991. Actual suspension—a very serious sanction for attorneys, who normally depend upon continuity of services to clients—has increased even more dramatically, from 51 in 1985 to 102 in 1989, followed by a major jump (concurrent to the major structural reforms) in 1990 to 212. The 1991 actual suspensions are at 128 at the halfway mark, indicating substantial further increase. Informal discipline (*e.g.*, reprovals or letters of warning) during 1990–1991 is meted out at levels more than twelve times their incidence during 1981–1986 (from 40–60 cases per year then to a rate of 800 per annum in 1991).

Further, the discipline system has achieved time savings in the following respects: (a) the average number of days a case historically has been "in investigations" prior to NTSC filing has been more than halved (to a median of eight months); (b) the number of cases settled prior to NTSC filing has increased,

Table 11
Lawyers Disciplined
As Of June 30, 1991

Disposition:	1985	1986	1987	1988	1989	1990	YTD 1991
Disbarment	20	27	37	51	51	67	37
Resignation with Charges Pending	31	66	43	61	90	80	38
Total Attorneys Removed	51	93	80	112	141	147	75
Discipline with Actual Suspension	51	65	63	89	102	212	128
Discipline, Probation; No Actual Suspension	27	34	31	21	26	59	30
Public Reproval	20	34	30	29	45	54	22
Private Reproval	38	33	18	22	24	50	38
Letters of Warning	N/A	N/A	N/A	N/A	357	550	407
Agreement in Lieu of Prosecution	N/A	N/A	N/A	N/A	N/A	N/A	59

partially due to the Office of Trials' ALD procedures; (c) as noted, the number of cases settled post-NTSC filing but prior to hearing has tripled (from 17% to almost 50%); (d) the number of cases in which a hearing judge decision is appealed and the decision is not immediately implemented has been halved; (e) the average time in Review Department appeal has been reduced slightly from previous levels to seven months; (f) due to the new "finality rule," the number of cases reviewed by the Supreme Court is likely to now decrease significantly; and (g) the time for effectuation of State Bar Court decisions will be substantially reduced due to their finality 60 days after filing with the Supreme Court, absent a petition for review or other unusual circumstances.

Where cases are contested vigorously, the entire process is now substantially shorter than a civil case on the "fast-track" reform plan of some jurisdictions. And the current time from NTSC filing to final effectuation of discipline, where contested administratively and judicially, is approximately one-third the time expended in the regrettable system of Administrative Procedure Act disciplinary proceedings used by most other agencies licensing various trades and professions in California. The total timeline—from initial consumer complaint to final discipline—now consumes one-fifth to one-third of the time of the Bar's historical norm.

III. THE DISCIPLINE SETTING: RECOMMENDATIONS CONCERNING COMPETENCE AND HONESTY ASSURANCE

The above description of the State Bar's evolution from 1987 to the present focuses on the reforms accepted and implemented by the Bar, and presents indices showing their impact. That discussion is not intended to be a testimonial; however, candor compels that the remarkable changes accomplished be catalogued and acknowledged. Having noted overall progress, an important *caveat* is in order. One of the factors accentuating Bar improvement is the degree of inadequacy of the Bar's discipline system in January 1987. Hence, progress to a much better system—which has occurred—does not mean that the Bar has created a perfect or model system. The State Bar has not yet created a final system which is ideal.

The final test of a properly functioning discipline system is its empirical impact on the profession. Certainly the enhanced discipline of the most visibly errant attorneys is important. More are being removed from the profession more quickly than ever before. But the fact remains that the legal profession remains disturbingly deficient in the two areas most critical to regulatory purpose: the personal dishonesty and incompetence of large numbers of licensees—large numbers.

The State Bar has failed to accomplish one of the two reasons justifying a regulatory system involving "prior restraint" licensing: It has not acted in any reasonable way to *assure competence*. It does not license in the actual area of attorney practice. It does not limit any attorney from practicing immigration law, patent law, bankruptcy law, family law, antitrust law, and criminal defense, or all of them, as counsel sees fit. It administers a single general knowledge and skills examination once at the beginning of an attorney's career. It requires minimal standards of the schools whose degrees make persons eligible for this single examination. It requires no evidence of actual competence, does not limit scope of practice, and does not require retesting—not once or in any area—over the entire thirty- to fifty-year career of a licensee. Ironically, the major purpose of prior restraint licensing is to prevent irreparable harm to consumers which flows from incompetent practice. And consumers do indeed rely on the license of the state in entrusting their affairs to counsel. Except for a new continuing legal education program, which does not assure competence by itself, the State Bar has abjectly failed to address this issue in an effective manner.

In addition to its failure to meaningfully address incompetence by way of licensure barriers to entry or by post-entry requirements, the Bar has not seriously disciplined incompetence, nor has it removed the incompetent from the profession except in the extreme cases of disability or client abandonment. Moreover, it has failed to require malpractice insurance of its licensees, and has limited its own Client Security Fund to reimbursing clients victimized by the dishonest acts of attorneys, precluding recovery from it for even gross incompetence. As discussed below, the measures undertaken by the Bar over the past four years to address the incompetence problem have been well-intentioned, but are grossly inadequate to accomplish a substantial result.

The failure of the Bar to establish overall standards of personal honesty is similarly stark. The prevalence of dishonesty among attorneys in their everyday behavior—particularly in civil practice billing, promises to clients, representations to the court, even in their points and authorities routinely submitted—is rightfully a source of profound embarrassment to many in the profession.

The requirement that attorney fee agreements be in writing, an ethics hotline, some fee arbitration reforms, the introduction of public members to some local bar panels, a substantial increase in informal discipline (particularly letters of warning), and the advent of pattern detection are all positive steps toward encouraging honesty. They are perhaps more significant than efforts in the area of competence. But the problem remains, as discussed below. We are less certain here of viable solutions. However, it may well rest in the education of law students and of attorneys, the revision of the Rules of Professional Conduct, the further reform of billing practices, and in the basic revision of the extreme "adversary"—all is fair—ethic, particularly in civil proceedings. This last problem has created a kind of amoral atmosphere which permeates and poisons much of the profession—without reliably producing the "truth from conflict" which is its raison d'etre.

We have some doubt that these kinds of reforms can be accomplished given the regrettable structure of Bar governance; that is, a system where the state agency regulating the profession in the interests of the larger body politic consists largely of members of the profession selected by the profession. Political reality makes it difficult for the Bar's governors or its electorate (here, attorneys electing the Board of Governors) to burden themselves substantially for the benefit of a larger population or purpose. That some such changes have happened in discipline, and in the institution of some continuing education requirements, is heartening. But taking a few loosely specified classes (which often assume over time the characteristics of professional tax-deductible tourism opportunities), and raising dues by over $100 per year to strengthen a discipline system (which will rarely apply to the more ethical and conscientious members of the profession sitting as its governors) does not exhaust the burdens required of the profession to truly assure competence and honesty. The State Bar of California is a long way from assuring acceptable attorneys for the public, particularly in terms of everyday personal honesty (short of financial theft) and competence. Here, the system remains only marginally effective. Here, it is not yet a model. Many of the

measures needed to address these problems do not rest within the jurisdiction of the discipline system itself—but they burden that system, and undermine its purpose.

A. Competence

Pursuant to SB 905 (Davis), beginning in 1992 attorneys must complete 36 units of minimum continuing legal education (MCLE) every three years. The requirement is welcome and is justified for at least three reasons: first, the number of sole practitioners or small offices staffed by young or inexperienced attorneys is large and growing larger. Second, as noted above, the Bar's discipline system attacks the incompetence problem *post facto* and at the extremes, focusing its resources on the obvious high-priority need to address dishonest conduct rather than incompetence. Third, the Bar's Client Security Fund only recompenses for dishonest attorney conduct, not for incompetence—even gross incompetence. The possibility of civil recompense is limited by the Bar's failure to require legal malpractice insurance. A disproportionately high percentage of small law offices lack such insurance and account for a disproportionately high source of complaints to the Bar's discipline system.

As noted above, the Bar has done little to assure competence in the past. It administers a generalized Bar exam. It does not require demonstration of competence in the specific area of practice engaged in by a licensee. A licensee may practice criminal law, bankruptcy law, antitrust law, tax law, probate law, and immigration law simultaneously without check by the Bar. Until 1992, no continuing education is required whatever, despite the uniquely fast-changing world of law. There are no retesting requirements.

The Bar has been studying these problems, both on its own and pursuant to statutory command. A consortium on competence including private practitioners, law professors, legal secretaries, and consultants has issued a report studded with recommendations to enhance the competence of attorneys; many of the consortium's recommendations focus on areas highly relevant to the current discipline workload. A Standing Committee on Competence was formed in 1990.

We do not comment here on the individual proposals of the consortium, retesting requirements, or other options. The suggestions made vary from those likely to have marginal impact on discipline to those promising a measurable ameliorating impact. Taken as a whole, we believe the training, pre-admission practice, continuing legal education, peer review panels, two-year residency, malpractice insurance, and other recommendations included in the pending proposals are likely to assist the discipline system in the most cost-effective manner, by preventing much of the behavior now complained about. Not only does such prevention lighten the load on discipline; it affects the many cases where abuses occur but are not reported to the Bar.

B. Honesty

The Bar must begin to search for ways to deter attorney deceit, particularly in the practice of civil law. The level of attorney dishonesty in representations to the court, in promises to clients, in dealings with adverse counsel, and perhaps especially in points and authorities and legal briefs, is embarrassing to anyone with a measure of intellectual pride. Regrettably, the large city practice, where an attorney's previous abuses do not become widely known so that his or her statements are then discounted based on reputation, means that misleading behavior is not deterred by the courts adequately, and can even be rewarded by the system.

Part of the problem has to do with the lack of certain sanctions for deceit. And part of it has to do with an adversary system which has gone awry. In the criminal case context the adversary system is more likely to work well since one of the two adversaries—the prosecutor—is not really an adversary, but a public official whose primary obligation is to the truth and the fair application of justice. On the civil side, the ethic has been distorted to justify deceit on a grand and institutionalized scale. It has reached the stage where any trier of fact is going to have difficulty in ferreting out the truth from two persons each bound and determined to mislead as much as possible.

What is needed are some bounds, some clear and defined limits. The Bar should consider examining with special care and with a fresh eye some of the underlying ground rules of civil representation. It is possible to develop new rules of behavior supervening adversary representation, and restoring a measure of honor to a profession which is in a current state of well-deserved dishonor.

C. Malpractice Insurance

Mandatory malpractice insurance is one issue relevant to competence where the Bar should consider action. The consequences of the Bar's failure to require such insurance are serious and embarrassing, especially in light of the avoidance of competence-related cases by the discipline system and the exclusion of negligence as a basis for recovery from the Client Security Fund.

Over 25% of practicing attorneys currently practice "naked," or without coverage. This percentage has been increasing over the past decade. Moreover, the group avoiding coverage is disproportionately subject to discipline, and is without question disproportionately committing malpractice. Sole practitioners and marginal attorneys are overrepresented in both groups. Their clients are disproportionately middle class and poor.

We have interviewed legal malpractice specialists and are convinced that the problem causes clear and present harm to those whom the Bar's statutory charter requires it to protect. Malpractice attorneys generally will not file an action without insurance coverage on the defendant. Marginal practitioners without coverage can and do cause irreparable harm to consumers. Since the Bar fails to license by actual practice specialty, discipline the incompetent, provide financial redress for incompetence, or require any retesting following initial Bar exam passage, the least it can do is to require malpractice insurance so that existing private remedies will allow consumers to collect on their meritorious judgments.

One argument against such a requirement is the concern that some practitioners may not be able to obtain insurance. We believe that there has been an increase in the number of carriers providing coverage, somewhat ameliorating this problem. However, the insurance industry has at times historically allocated territories or otherwise left certain markets in a highly concentrated format.

The Bar attempted to impose such a requirement several years ago and was presented with regrettable political opposition. We are not certain whether the same interests would oppose such a system under present circumstances, but we don't believe they should be allowed to prevent a needed requirement for the protection of the public.

The Bar is now involved in overseeing and developing a "State Bar approved professional liability insurance program." One goal is to assure a stable provider of such services should existing carriers suddenly leave the California market, as has been the case in the past. This effort does not address the

underlying problem facing victims of legal malpractice.

We would recommend that the Bar create an insurance pool analogous to the California Automobile Assigned Risk Plan (CAARP) for auto insurance. Where an applicant is refused insurance by two carriers, or certifies that no carrier is offering insurance in his or her geographic or subject area, the pooled program would provide it as an alternative. Rates would be actuarially responsible. With such an alternative, the Bar could sponsor appropriate legislation to require malpractice coverage at a minimum level.

IV. CONCLUSION

We have acknowledged the significant empirical improvement in the Bar's disciplinary performance, and noted some areas in which the Bar's system excels. Moving beyond the statistics, however, we offer the unsettling experience of listening to the hotline operation of the State Bar's toll-free complaint number. For two days (July 11 and 12, 1991), the Bar Monitor personally listened to the intake system, primarily to survey the efficacy of the complaint analysts. That is, we were able to listen to conversations between callers and Bar intake personnel without either knowing of the monitoring. Compensating for a number of factors—including the large number of attorneys currently practicing, the contentious nature of legal disputes, possible unrealistic expectations of litigants, and the fact that the caller is simply presenting one side of what may be a much more complicated factual situation, the experience was nevertheless deeply troubling. It is one highly recommended for the "defenders of the profession" who deny serious and endemic abuses practiced upon the public by the legal profession.

The sheer force of call after call after call after call is momentous. The vast majority of the callers did not project anger, hatred, or irrational expectations. In both tone and content, the callers, in general, conveyed befuddlement, disappointment, simple curiosity. They want to know why the attorney they called took a $5,000 retainer and has done nothing, has not called them, has not sent them any documents, and won't return their phone calls. They want to know if an attorney can agree to handle a matter for $20,000 and get a trust deed on their home to secure the amount, and then without discussion or warning bill for $40,000. They want to know if there is anything they can do when an attorney has promised to file a case, but has let the statute of limitations pass and has now told them they did not have that good a case anyway—after the matter has been involuntarily dismissed and without prior discussion. The tone of most of these many, many calls is not "I'm outraged, off with his head." It is "Hey, is this normal? And what do I do now?"

The first call: "My daughter went to a local night club and one of the employees injured her. It may have been an accident, but she has some serious bills. I went to Attorney Jones who has an office in the neighborhood and he told me I had no case, so I forgot about it. Yesterday I found out that this attorney is part owner of the night club. Isn't he supposed to tell me that before he tells me I have no case?"

Next call: "I had a family law problem and saw Attorney Johnson. She said it would cost $5,000. I paid. Some clerk-type person filled out some forms and now they've billed me for another $9,000. I only talked to the attorney twice and we never went to court and she never told me it would cost more than $5,000. This bill has some very strange entries on it. Can attorneys just bill you like that? She seems to thinks she's on my checking account with me, with one problem—she doesn't know my balance."

Next call: "I gave Attorney Smith $1,000 to file bankruptcy for me. It was really the last money I had. I want to pay my creditors, but I need more time, and this attorney said this was what I had to do, so I gave him the money. But I haven't heard anything from him since." "How long has it been?" "Eight months, and I've called over fifteen times, but he never will take my calls. He hasn't filed anything and now I'm getting my furniture repossessed. They took my car yesterday. What should I do? Can you recommend another attorney? Can I do something myself? What should I do?"

The number of calls of this type to the Bar is simply overwhelming. They represent a large proportion of about 75,000 calls to the Bar each year—two for every three attorneys in the state annually; one coming in every 80 seconds every business day. Switching from line to line for ten to twelve hours and listening to calm recitation after calm recitation of these alleged practices, whether all meritorious or not, elicits in any listener a sense of profound sadness.

The State Bar must understand that the disrepute of what should be a proud profession is not the product of media bias, and is not curable through public relations campaigns—such as the Bar periodically suggests. We believe that it is the cumulative impact of thousands upon thousands of these experiences, endured and then shared by word of mouth. This kind of problem is addressable only by a profound change in the way attorneys are educated, trained (the two are perhaps somewhat different), selected, monitored, and disciplined.

The State Bar, despite its acknowledged progress and new sensitivity, has yet to face up to the magnitude of its problem.

FOOTNOTES

1. The complete version of the Final Report of the State Bar Discipline Monitor includes 143 pages, 21 exhibits, and 14 tables. Copies of the Final Report, as well as the Initial Report and the eight progress reports, are available from the San Diego office of the Center for Public Interest Law.

2. Fellmeth, *Initial Report of the State Bar Discipline Monitor* (June 1987) (hereinafter "Initial Report") at 7–28; *see also* 7:3 **Cal. Reg. L. Rep.** 1 (Summer 1987) (condensed version).

3. *See* Business and Professions Code 6086.11.

4. Initial Report at 30–33; 7:3 **Cal. Reg. L. Rep.** at 5–6.

5. Initial Report at 34–36; 7:3 **Cal. Reg. L. Rep.** at 5.

6. Initial Report at 30–34; 7:3 **Cal. Reg. L. Rep.** at 6.

7. Exhibit E of the Second Progress Report of the State Bar Discipline Monitor (April 1988) presents a summary of the Eaneman-Taylor proposal; *see also* Exhibit 3 of the Fourth Progress Report of the State Bar Discipline Monitor (March 1989).

8. Initial Report at 46–54; 7:3 **Cal. Reg. L. Rep.** at 8–9.

9. Initial Report at 54–56; 7:3 **Cal. Reg. L. Rep.** at 9–10.

10. Initial Report at 63–66; 7:3 **Cal. Reg. L. Rep.** at 7–8.

11. Initial Report at 63–69; 7:3 **Cal. Reg. L. Rep.** at 10–14.

12. These comments do not alter the observations in Part III below concerning the efficacy of the Bar in preventing or deterring commonplace dishonesty by attorneys, rudeness, the ignoring of legitimate client inquiries, and more subtle but serious problems of incompetent practice.

13. Initial Report at 70–74; 7:3 **Cal. Reg. L. Rep.** at 12.

14. Initial Report at 63–69; 7:3 **Cal. Reg. L. Rep.** at 11–12.

15. *See* Business and Professions Code § 6094.5.

16. Initial Report at 96–107, 109–16; 7:3 **Cal. Reg. L. Rep.** at 14–20.

17. Under Rule 955 of the California Rules of Court, the California Supreme Court may require a disciplined attorney to notify clients of the disciplinary action, return documents and unearned fees to clients, and notify the court and opposing counsel in pending litigation of the disciplinary action.

18. The proportion of NTSCs to cases received is much higher for 1991: 849 NTSCs and 1,235 cases received. This is because OT is issuing cases from its backlog, beyond what it is receiving.

19. Letters complaining about Bar discipline system performance and two consumer surveys we have conducted reveal continuing consumer complaints about being shuffled from person to person and about the file on the matter passing through innumerable names. For many, the Bar has created the impression of an uncaring bureaucracy shuffling paper back and forth in a confused fashion.

20. *See, e.g.*, Table 1.

21. Once the "bubble" created by the dissipation of the OI and OT backlogs passes through the State Bar Court, we expect approximately 800–1,000 complaints per year to be included in cases (some of which are multi-count or -complaint cases) received by the Court, based on OI submission of approximately 110 SOCs to OT each month during 1991. We assume that this number may increase somewhat, offset by the consistent dismissal, informal discipline, or stipulated punishment of almost half of those cases received by OT.

22. AB 4391 (Brown) (Chapter 1149, Statutes of 1988) increased State Bar dues significantly to finance SB 1498's changes to the discipline system. This bill, combined with a subsequent dues hike, requires attorneys in practice for three years or more to pay $478 annually in Bar fees.