FINAL REPORT
OF THE
STATE BAR DISCIPLINE MONITOR

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by: Robert C. Fellmeth
Center for Public Interest Law
University of San Diego
Alcalá Park
San Diego, California 92110

State Bar Discipline Monitor

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University of San Diego School of Law
I. EXECUTIVE SUMMARY

The discipline system of the State Bar has made substantial progress over the four and one-half years since the appointment of the State Bar Discipline Monitor in January 1987. A large number of the reforms instituted during this period are the result of SB 1543 (Presley) (Chapter 1114, Statutes of 1986), or were advocated by State Bar leadership. Others originated with the Discipline Monitor, including many of the provisions of SB 1498 (Presley) (Chapter 1159, Statutes of 1988), a substantial number of adopted rules, and various altered administrative practices. As to this latter group, we have made over 200 suggested changes in policy since 1987 and report that, while all have not been adopted, the Bar has considered each of them in good faith. Further, it has implemented the vast majority of the suggested reforms.

Section III of this Final Report presents an overview of the evolution of the system as presented to the Monitor in 1987 to its current status. Both by measures of statistical output and by qualitative measures, the improvement is remarkable. The huge complaint backlogs which have historically choked the system have largely disappeared. For example, the backlog in the Office of Intake/Legal Advice is substantially reduced and, although the volume of Intake calls and inquiry designations remains disturbingly high, the new system is handling the load. Moreover, over the past two years the Bar has instituted the most sophisticated computerized intake and tracking system in the nation. Information about attorney arrests, court sanctions and contempt orders, complaints from consumers or courts, malpractice insurance claims, criminal prosecutions, non-sufficient funds reports on checks written on client trust accounts, and other information on attorney misconduct is available immediately to the Bar-trained Intake complaint analysts, professional investigators, and prosecutors managing the system as a whole. And hopefully, the Bar-consumer complaint hotline
number (1-800-843-9053) will soon be published in telephone directories in the location consumers are most likely to look: in the state government section of the white pages.

The Office of Investigations (OI) backlog is also substantially gone, and its productivity is at least close to the statutory goals established in SB 1498 (Presley) (Chapter 1159, Statutes of 1988). The Office of Trials (OT) disturbing backlog of cases awaiting Notice to Show Cause (NTSC) drafting appears to have dissipated as well.

The Bar’s stifling rules requiring investigators to obtain special permission from the Discipline Committee of the Board of Governors to question non-complaining clients of an attorney, and other similar policies overly solicitous of practitioner prerogatives, have been abolished. The Bar’s previously routine abatement of its investigation and/or prosecution of cases pending civil or criminal resolution is much more limited. Case files are no longer being shredded prematurely. Bar prosecutors have adequate facilities, equipment, and meaningful secretarial support.

Structurally, the Office of Trials now runs the prosecution of cases. The experiment to create an independent Office of Investigations which would hand cases off to those prosecuting them, and function substantially without the supervision of those who must prosecute the cases, has been replaced by a more accountable arrangement. The Office of Trials itself is more efficiently run, with adequate salary levels, secretarial and computer resources, useful space, and resources to engage in discovery.

And the Bar has supplemented all of this with a willingness to try new programs, such as a system of early detection of client trust fund fraud (CRAFTS), a special Ethics school (ARTS), and continuing legal education requirements now taking effect.

The restructured State Bar Court is now operating with increasing efficiency. Final Rules of
Procedure and Rules of Practice are being formulated, and there are important signs that the Court is beginning to function as anticipated. The rationale supporting creation of the Court was its ability to provide a high-quality hearing by independent expert judges, fostering consistency of judgment. Proponents of the new system argued that this consistency would create a predictability of result, stimulating settlements and enhancing the efficiency of the new system. The State Bar Court is now more fully staffed with court counsel and support staff. A review of the timelines of all cases before it indicate that it is hearing cases without undue delay. Most cases take seven to nine months from NTSC filing to hearing decision. If there is an appeal, there is a similar period to final adjudication by the three-judge Review Department. Further, of those cases which do not settle and proceed to hearing, an unusual number of hearing judge decisions are not being appealed by either the respondent or the Office of Trials.

The aggregate impact of these changes is momentous. The discipline system has achieved time savings in the following respects: (a) the average number of days a case historically has been under 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, partially due to the Office of Trials = Agreement in lieu of discipline (ALD) procedures; (c) 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 formal Notice to Show Cause 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.

The total output of the new system has increased steadily and substantially since 1987. 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 markedly, 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).

Parts IV and V of this Final Report include a presentation of the current status of the system (Part IV concerns the discipline system directly, whereas Part V covers related preventive efforts). These sections outline remaining deficiencies. In this regard, we do not disparage the progress made
by the State Bar. Indeed, we know of no precedent anywhere in the nation which can approach the
dramatic turnaround achieved from 1987 to 1991 in California. And we know of no other jurisdiction
with the resources, sophistication, technology, independence, or speed of the current California
discipline operation.

However, the Bar has not yet achieved the optimum system within its capability. In fact, as
reported in the Eighth Progress Report, it still has a substantial distance to traverse before
self-satisfaction is fully warranted. Our list of remaining recommendations is not short, nor are the
consequences of atrophy in these enumerated areas trivial. However, we would be remiss if we did
not observe for the record that there has been a clear and bona fide effort by a succession of
Discipline Committees, Boards of Governors, and Bar Presidents to make difficult and sometimes
unpopular decisions, involving a certain measure of sacrifice, and most critically involving the
surrender of institutional prerogatives. As observers of regulatory agencies, we can assure our fellow
California consumers: these are not events which commonly occur.

Our list of remaining concerns and recommendations include the following:

(1) The Bar’s outreach program is better than in previous years. However, the telephone
listing of the State Bar’s toll-free hotline number is still not 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, listed 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
local bars, 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%.**

(2) 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 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.

(3) **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 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.

(4) **The Office of Trials must verticalize its handling of more cases, and 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.** 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. That task force should be expanded to handle those with five or more pending complaints, and other cases should be routinely handled vertically.

The Bar’s section 6007(c) interim suspension orders have actually fallen substantially, from 37 in 1988 to 33 in 1989 to 13 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 cases and believe that a substantial number of cases are appropriate for interim remedy motions which are not occurring.

(5) 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 consists 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.

(6) The Complainants’ Grievance Panel (CGP) now has a large and debilitating backlog approximating 2,700 cases which must be handled properly by adding investigative resources, shifting to audits of closed inquiries, and adding two public members to facilitate three
divisions, each able to decide appeals. It is clear that this Panel must have six to eight of its own separate staff (four have recently been added) and use a consent calendar system. It must have the option of auditing closed inquiries rather than conducting a case-by-case reinvestigation of each matter appealed to it. It must not impose a guaranteed 60-day turnaround time for the cases where reinvestigation is requested of OI by the CGP.

The CGP should also add two public members to its current seven, permitting a public member majority, and allowing it to create three divisions of three panelists each where volume of work inhibits full consideration by the entire Panel.

Although the Bar has authorized an emergency allocation of OI investigators to reduce the backlog of closed inquiry appeals, that solution is confined to those defined cases and is wisely temporary due to the long-run need for CGP staff work to be fully independent from Bar discipline operations being reviewed.

(7) The State Bar Court should relinquish its Probation Department function (as it is now considering). At present, the entire probation operation of the Bar 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.

As is the monitoring of interim restrictions, this probation monitoring function is an area appropriate for the volunteer Bar, which has been so used to a limited extent for many years. Here, reliable practitioners can be trained and deputized, under the Office of Trials or an independent Probation Department, to supervise the probation of those subject to disciplinary orders of the State Bar Court and the California Supreme Court.

(8) 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 coverage caps should be lifted.

(9) The Board of Governors Discipline Committee should cease hearing adjudications to shorten time for reinstatement, as it is now considering. The State Bar Court should hear all such matters. (10) The State Bar should fund the State Bar Court Reporter to publish the opinions of the State Bar Court in a systematic and official manner. This proposed publication is of great import for the Court, practitioners, scholars, and reform efforts in other states. The amount of money involved is trivial compared to other Bar expenses, and most of it would be recoverable.
in subscription charges. It is a false economy to spend millions of dollars on a professional adjudicatory system and then foreswear several thousand dollars to print the decisional output of what has been created. The pared-down version now proposed by the State Bar Court includes only Review Department decisions and is inadequate and underfunded.

(11) The Bar should seek legislation to require malpractice insurance meeting **minimum standards for all practitioners.** At present, almost 25% of licensed members of the Bar are practicing without coverage. The current insurance costs for attorneys are but 10% of the cost for physicians. The amount is bearable, and if it grows higher, it is because the profession is not regulating the competence of its members properly. In no other trade or profession is mandatory malpractice insurance which socializes the cost of negligence to other practitioners more justified; because here, uniquely, the practitioners directly elect the majority of the Board of Governors controlling the agency. Leaving aside the propriety (or the political morality) of a state agency controlled by the interests it must restrain for the benefit of the public, those who bear the increased costs directly control the regulatory system able to ameliorate those costs. Regulation and self-interested economics coalesce.

(12) The Bar must address a continuing lack of public protection from attorney **incompetence.** The Bar neither assures competence meaningfully nor disciplines incompetence. The barrier to entry into the profession is a single generalized examination. The Bar does not license in the area of actual practice, or demand competence in the actual substantive areas where consumers will rely on attorney expertise. The license is to practice **law,** as if that assures equivalent ability to practice patent law, administrative law, criminal defense law, immigration law, real estate law, bankruptcy law, family law, or consumer law. No attorney is tested as a condition of licensure in the
actual area of practice, not even minimally; not even a ten-minute quiz on the three most recent leading cases. And there is no retesting in any area of law during the subsequent forty or fifty years of practice. Add to this the facts that the Client Security Fund does not cover malpractice or incompetence; as noted above, that no attorney is required to carry any malpractice insurance; and that incompetence except when it rises to the extreme level of client abandonment is not a basis for discipline.

The complaints we have reviewed, and which continue to arrive at Intake, indicate serious problems with the competence of many attorneys, particularly in litigation skills. The Bar is attempting to address this problem with its ARTS program, and with its new continuing legal education requirements. Both are laudable, but they are not enough. The Bar should require mandatory malpractice insurance, as noted above, and begin the process of evaluating the licensure of attorneys in areas of actual practice, with at least some retesting required no less than once every ten years. In this regard, it is interesting to listen to common attorney reaction to the proposed creation of the new class of independent paralegals (legal technicians). Much attorney comment has focused on the importance of assuring the competence of these new practitioners, the need to license them in the specific areas they practice, and the importance of retesting. We agree. What is sauce for the goose is sauce for the gander.

(13) The Bar must 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. Part of the problem has to do with the lack of certain sanctions for deceit. Some of it has to do with an adversarial system which has gone awry. What is needed are some bounds, some
clear and defined limits. The Bar could 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.

(14) **There is still a need for more effective early intervention to protect the public from alcohol- and drug-abusing counsel,** although the Chief Trial Counsel@Agreements in lieu of discipline@how some promise of efficacy. We believe that in this area, as in few others, volunteer practitioners should be used by the Bar to protect the public.

(15) **The State Bar should deputize, train, and supervise local practitioners to help with the filing and handling of attorney disability and major client abandonment cases in superior court (Business and Professions Code sections 6180/6190), and use such local volunteer monitors@or prevention, probation, and other functions.** Rather than the previous use of local volunteers as independent Adjudicators@determining recommended discipline for their colleagues or competitors, the above-enumerated roles are most appropriate for practicing counsel. They would operate under the direction of the state agency, assist practitioners needing help, and add local resources to the substantially centralized operation of the State Bar. Only they are in a position to physically monitor an attorney on the scene, help clients who have been abandoned, or perform many other important functions.

Part VI of this Final Report presents the results of our consumer survey. A surprisingly large return of more than 20% was received on a random sample of 3,000 questionnaires to persons who had filed written complaints with the Bar about attorneys. The results indicate that the largest single problem from the complaining client perspective is attorneys who lie to them. This is followed by
concerns over abandonment and billing practices. The discipline system responses indicate a generally low level of perceived performance, with the possible exception of the State Bar Court. However, interestingly, a year-to-year trend analysis shows that perception of the Bar system has measurably improved from initial very low levels to simply low levels. The most significant improvements seem to be post-1988, and especially in 1990, when most of the reforms began to function. Respondent opinion of the Complainants=Grievance Panel, however, has declined significantly after 1988, consistent with the development of backlogs and delays in its operations, as described below.

II. INTRODUCTION

SB 1498 (Presley) (Chapter 1159, Statutes of 1988), amending Business and Professions Code section 6086.9, requires the State Bar Discipline Monitor to make periodic written reports at six-month intervals concerning the progress of the State Bar in achieving an effective, speedy, and fair system for the discipline of attorneys.

Following his appointment in January 1987, and pursuant to SB 1543 (Presley), the Monitor issued an initial assessment report on June 1, 1987. Sequential progress reports were subsequently issued on November 1, 1987 (#1); April 1, 1988 (#2); September 1, 1988 (#3); March 1, 1989 (#4); September 1, 1989 (#5); March 1, 1990 (#6); September 1, 1990 (#7); and March 1, 1991 (#8). These reports were presented to the California Supreme Court, the legislature, and the public, as required by law.

The Monitor is required to submit a Final Report on September 30, 1991. As with the initial and first eight progress reports, this Final Report was submitted in draft form to the staff of the Bar in advance for correction, comment, or objection.
Part III of this Final Report presents an overview of the system, including the most pertinent statistical trends tracking the impact of implemented reforms. As befitting the Final Report after a five-year term, this section attempts to present an overall picture of the major changes undertaken in response to the most important initial problems in Bar operations identified in 1987.

Parts IV and V of the Final Report describe the current status of the State Bar discipline system, and list and discuss what we believe are its remaining deficiencies. This final list, submitted at the conclusion of the Bar Monitor term, indicates that substantial work remains before an ideal system is in place. The remaining months of the Monitor term, and for a short period thereafter, will include efforts to propose legislation and rules, as appropriate, to implement these final recommendations. Part IV also includes a number of empirical surveys similar to those undertaken for the Monitor Initial Report released in 1987. These include the following surveys, the results of which are presented directly in attached exhibits, or which are summarized in the text: (1) a survey of telephone directory listings of the Bar toll-free complaint hotline number (1-800-843-9053);

(2) a phone survey of local volunteer bar associations regarding State Bar discipline interaction (see Exhibit 6);

(3) a two-day onsite confidential listen-in review of incoming calls and Bar response on the toll-free discipline hotline;

(4) a survey of the Business and Professions Code section 6007(c) interim remedy motions of the Office of Trials, and an accompanying review of Notices to Show Cause to determine the number which might also be amenable to such motions;

(5) a survey of the Office of Trials Agreements in lieu of discipline with accused
respondents;

(6) a survey of all standard forms and mail-out forms used by the Bar Offices of Intake/Legal Advice, Investigations, and Trials, and the Complaint Audit and Review Unit.

Section VI presents a separate survey undertaken by the MonitorCa sampled survey of persons who have complained to the State Bar about attorneys. We randomly selected over 3,000 such persons who had submitted complaints over a three-year period. Over 500 responded to a detailed questionnaire, describing the nature of their allegations and their judgment of the State Bar response along a variety of criteria: courtesy, fairness, expedition, and others.


The State Bar discipline system was described in detail in the Initial Report of the State Bar Discipline Monitor [see Initial Report at 7–28]. Briefly, prior to 1989, it was entirely controlled by a 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 Bar combines both professional association and state agency functions in a single entity.

The discipline system itself has generally consisted of four elements: the Office of Intake/Legal Advice, the Office of Investigations (OI), the Office of the Chief Trial Counsel, and the State Bar Court. All four elements have been increasingly professionalized over the past decade, particularly in the last five years. As described below, the system has also changed so that the Office of Trials now controls the intake, investigation, and prosecution functions of the Bar 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 substantially an independent entity, appointed
by the California Supreme Court.

A. Outreach

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

(1) The State Bar had initiated a statewide toll-free hotline number in 1986 to facilitate consumer complaint receipt, but had not listed it in phone books in the state government section or in any other location a consumer might logically look to find it [see Initial Report at 30-33].

(2) More visible local bar associations, which are private trade groups lacking state agency status and the concomitant ability to discipline licensees, 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 system for pattern detection or other purposes [see Initial Report at 34-36].

(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 receiving complaints, and commonly had a busy rate of over 50% [Initial Report at 30-34].

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 regrettably absent from most of the major directories of the state. This is true as to any State Bar telephone number, not merely the toll-free discipline number. [See discussion of remaining outreach
deficiencies in Section III below.]

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 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 [Exhibit E of the Second Progress Report presents a summary of the Eaneman-Taylor proposal; see also Exhibit 3 of the Fourth Progress Report].

Perhaps most significantly, favorable media reports during 1988-91 (for perhaps the first time in a decade) have led to increased confidence that the system may be worth reporting to. Members of the Board of Governors, and recent 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 has published a media guide to help reporters 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 become more visible to local prosecutors. And there are other measures undertaken as well.

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.
TABLE 1: Intake/Legal Advice
(includes the first half of 1991)

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<tr>
<td>Inquiries received</td>
<td>N/A</td>
<td>11,081</td>
<td>17,462</td>
<td>19,797</td>
<td>20,057</td>
<td>9,771</td>
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<tr>
<td>Information requests</td>
<td>N/A</td>
<td>15,135</td>
<td>15,394</td>
<td>19,805</td>
<td>48,036</td>
<td>25,910</td>
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<tr>
<td><strong>TOTAL:</strong></td>
<td>N/A</td>
<td>26,216</td>
<td>32,856</td>
<td>39,602</td>
<td>68,093</td>
<td>35,681</td>
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<tr>
<td>Inquiries that advanced to complaint status</td>
<td>N/A</td>
<td>7,452</td>
<td>4,376</td>
<td>5,493</td>
<td>6,091</td>
<td>3,230</td>
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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 and were not supervised closely by legally trained Bar prosecutors.

2. Initial calls not designated as A inquiries@ and hence never recorded, and calls designated as A inquiries@ but closed, were not reviewed by qualified persons [see Initial Report at 46-54].

3. Matters designated as inquiries and not transmitted to the Office of Investigations for possible further proceedings were recorded on 3x5 cards which were not checked for possible pattern detection in a reliable manner [see Initial Report at 54-56].

4. Under the system then extant, the Bar relied upon the A complaining witness@CW) that is, the person informing the Bar of a possible problem licensee to A carry the ball@ and provide evidence. Eighty percent of those complaining to the State Bar by phone did not bother to send in subsequently requested written material. Where this occurred, the matter was dropped. The Bar viewed complaints about attorneys, with rare exceptions, to be matters between the CW and the attorney who is the subject of the complaint [see Initial Report at 63-66].
(5) Information 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 [see discussion below and Initial Report at 63-69].

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.

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

(3) A wide range of information which is not generated by consumer complaint now enters the system and is reviewed. Criminal arrests, malpractice and fraud filings against attorneys, judicial sanctions, self-reporting by attorneys in general (required by the State Bar Act), notices of non-sufficient funds checks written on client trust accounts, and other information is gathered, compiled, and reviewed systematically. [See discussion of present status of the system in Part IV below; see also presentation of Computer Screen Data Availability in Exhibit 1.]
(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 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 the self-reporting and 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 Complainants Grievance Panel (CGP) over the past several years in auditing and reviewing inquiry closures confirm that judgment. Very few of the many inquiry closures reviewed by CGP ever result in a recommendation for a 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. (These comments do not alter the observations in Part V 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.)

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).

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<thead>
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<th>TABLE 2: INQUIRY SUMMARY</th>
</tr>
</thead>
<tbody>
<tr>
<td>CY 89</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>On Hand</td>
</tr>
<tr>
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<tr>
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</tr>
<tr>
<td>PRG</td>
</tr>
<tr>
<td>CWF</td>
</tr>
<tr>
<td>NSF</td>
</tr>
<tr>
<td>INV</td>
</tr>
<tr>
<td>DPC</td>
</tr>
<tr>
<td>NMT</td>
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<tr>
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<tr>
<td>NSF</td>
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<tr>
<td>COM</td>
</tr>
<tr>
<td>ARB</td>
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<tr>
<td>WRN</td>
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<tr>
<td>LJR</td>
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<tr>
<td>REF</td>
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<tr>
<td>RSN</td>
</tr>
<tr>
<td>CLS</td>
</tr>
<tr>
<td>DSB</td>
</tr>
<tr>
<td>CRI</td>
</tr>
<tr>
<td>CFL</td>
</tr>
<tr>
<td>CNR</td>
</tr>
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<td>NCW</td>
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</tr>
<tr>
<td>DTH</td>
</tr>
<tr>
<td>PCH</td>
</tr>
<tr>
<td>RPT</td>
</tr>
<tr>
<td>TOTAL:</td>
</tr>
<tr>
<td>Remaining</td>
</tr>
</tbody>
</table>

C. Investigations

In 1987, the Bar Office of Investigations was structured as an independent entity, separate from the prosecutors charged with charging and presenting discipline offenses to the State Bar Court. Its operations included the following major problems:
(1) The 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 about that attorney (someone else might see the letter); no non-complaining client of an accused attorney could be talked to without a probable cause sign-off, after written application, by the Board of Governors = Discipline Committee controlled by practicing attorneys [see Initial Report at 70-74].

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

(3) Perhaps most devastatingly, there was a backlog of more than 4,000 cases awaiting 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 was not as easily accomplished by working difficult and important cases warranting disbarment. Hence, delays in dealing with attorneys often involved not months but years of delay within OI [see Initial Report at 63-69].

In 1991, the condition of the Office of Investigations is enormously improved. Investigators work more closely with Office of Trials attorneys. Once a case reaches OI, the same team of attorney advisers work with investigators. As we discuss in Part IV 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; the 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 (and audits by us and by the Complainants=Grievance Panel) over the past
five years 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 ADM (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).

<table>
<thead>
<tr>
<th>TABLE 3: OFFICE OF INVESTIGATIONS CASELOAD SUMMARY</th>
</tr>
</thead>
<tbody>
<tr>
<td>CY 89</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>On Hand</td>
</tr>
<tr>
<td>Received</td>
</tr>
<tr>
<td>Disposed of:</td>
</tr>
<tr>
<td>DSM:</td>
</tr>
<tr>
<td>FWD:</td>
</tr>
<tr>
<td>SOC:</td>
</tr>
<tr>
<td>TRM:</td>
</tr>
<tr>
<td>ALD:</td>
</tr>
<tr>
<td>ADM:</td>
</tr>
<tr>
<td>TOTAL:</td>
</tr>
<tr>
<td>Office Remaining:</td>
</tr>
</tbody>
</table>

Although there is a decline over the past two and one-half years in the number of SOCs
submitted for Notices to Show Cause, that trend is not necessarily troubling. The number of cases
submitted for formal discipline, or where 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 those 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=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. 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.
TABLE 4: PENDENCY OF OPEN COMPLAINTS

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>0B months</td>
<td>2,345</td>
<td>3,653</td>
<td>2,373</td>
<td>1,747</td>
<td>1,721</td>
<td>1,757</td>
<td>1,524</td>
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<tr>
<td>7B months</td>
<td>899</td>
<td>750</td>
<td>415</td>
<td>576</td>
<td>326</td>
<td>208</td>
<td>134</td>
</tr>
<tr>
<td>10B/12 months</td>
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<td>442</td>
<td>360</td>
<td>431</td>
<td>138</td>
<td>131</td>
<td>94</td>
</tr>
<tr>
<td>13 months +</td>
<td>2,027</td>
<td>C</td>
<td>C</td>
<td>C</td>
<td>C</td>
<td>C</td>
<td>C</td>
</tr>
<tr>
<td>13B/1 months</td>
<td>C</td>
<td>874</td>
<td>772</td>
<td>598</td>
<td>52</td>
<td>71</td>
<td>23</td>
</tr>
<tr>
<td>21 months +</td>
<td>C</td>
<td>503</td>
<td>417</td>
<td>289</td>
<td>50</td>
<td>12</td>
<td>6</td>
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<tr>
<td>Total Pending:</td>
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<td>6,222</td>
<td>4,337</td>
<td>3,641</td>
<td>2,287</td>
<td>2,179</td>
<td>1,781</td>
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<tr>
<td>Total Pending over 6 months:</td>
<td>3,764</td>
<td>2,569</td>
<td>1,964</td>
<td>1,894</td>
<td>566</td>
<td>422</td>
<td>257</td>
</tr>
</tbody>
</table>

In both resolving the backlog and in giving the Office of Investigations a strong sense of professional competence, the work of OI Director Clayton Anderson has been particularly noteworthy, as was the overall leadership during this period of then-Chief Trial Counsel Jim Bascue.

D. 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 [see Initial Report at 96-107,
(2) Aggressive action by OTC to protect the public was lacking. The number of interim suspensions sought was nil. Disability proceedings were confused. Enforcement of existing Rule 955 orders 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 investigation and prosecution of many serious cases were abated for years pending 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 disciplinary proceeding.

(4) The Bar irrationally took many cases to full investigation and hearing only to obtain the sanction of an Admonition or letter of 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 formal Notices to Show Cause, 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 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) There is a new policy guiding settlements, including due deference to senior counsel.

(5) Cases 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.

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
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<th></th>
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</thead>
<tbody>
<tr>
<td>NOTICES TO SHOW CAUSE</td>
<td>269</td>
<td>195</td>
<td>241</td>
<td>266</td>
<td>316</td>
<td>376</td>
<td>404</td>
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<tr>
<td>PRE-NOTICE STIPULATIONS</td>
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<td>38</td>
<td>47</td>
<td>48</td>
<td>41</td>
<td>67</td>
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<tr>
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<td>288</td>
<td>314</td>
<td>357</td>
<td>443</td>
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</tbody>
</table>

Tables 5 and 6 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 Notice to Show Cause 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 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 result in the filing of a Notice to Show Cause.\(^1\) Another one-third of the cases are subjected to a stipulated punishment, or informal discipline (usually a letter of warning or An agreement in lieu of discipline@. About one-fifth to one-sixth of the cases are dismissed.

<table>
<thead>
<tr>
<th>TABLE 6: OFFICE CASELOAD SUMMARY</th>
<th>OFFICE OF TRIALS</th>
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</thead>
<tbody>
<tr>
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<td>CY 89</td>
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<tr>
<td>On Hand:</td>
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<td>Received:</td>
<td>1,988</td>
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<td>DSM:</td>
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<tr>
<td>TRM:</td>
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<tr>
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<td>RLS:</td>
<td>102</td>
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<td>FWD:</td>
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<td>TOTAL:</td>
<td>1,236</td>
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<tr>
<td>Office Remaining:</td>
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</table>

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 to warn or enter into an An-lieu@ greement. 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 then poised. To go through a formal disciplinary

\(^1\) The proportion of NTSCs to cases received is much higher for 1991: 849 NTSCs and 1,235 cases received. This is because the Office is issuing cases from its backlog, beyond what it is receiving.
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 Office of Trials. The Office of Intake/Legal Advice, under the general jurisdiction of the Office of the Chief Trial Counsel, monitors pending criminal cases 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 use in 1987 of newspaper clippings. Although automatic notification from the Attorney General through the 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 Anvoluntary inactive enrollment@notions (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: to petition for interim suspension pending final disposition, to petition for restrictions on practice (e.g., review by another attorney, outside handling of money), and to 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 Asubstantial threat of harm inactive enrollment@
entries in Table 8. The first two options have been underutilized by the Bar (see below). In addition, 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 voluntarily of his or her practice.

**TABLE 7: CONVICTION REFERRALS**

<table>
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<th></th>
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<th>CY 90</th>
<th>1/91</th>
<th>2/91</th>
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<th>4/91</th>
<th>5/91</th>
<th>6/91</th>
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<tr>
<td><strong>TRIAL COUNSEL:</strong></td>
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<td></td>
</tr>
<tr>
<td>On Hand</td>
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<td></td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>Received</td>
<td>109</td>
<td>161</td>
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<td>4</td>
<td>10</td>
<td>26</td>
<td>15</td>
<td>18</td>
<td>84</td>
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<td></td>
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<td></td>
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<tr>
<td>FWD:</td>
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<td>150</td>
<td>9</td>
<td>4</td>
<td>11</td>
<td>24</td>
<td>15</td>
<td>18</td>
<td>81</td>
</tr>
<tr>
<td>TRM:</td>
<td>13</td>
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<td>1</td>
<td>1</td>
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<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DSM:</td>
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<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>NTS:</td>
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<td>9</td>
<td>12</td>
<td>24</td>
<td>16</td>
<td>18</td>
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<td>TOTAL:</td>
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<td>1</td>
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</tbody>
</table>

|                  |       |       |      |      |      |      |      |      |     |
| **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**

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Substantial threat of harm</td>
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<td></td>
</tr>
<tr>
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<td>11</td>
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<td>Health-related disability</td>
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<tr>
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<td>37</td>
<td>31</td>
<td>20</td>
<td>11</td>
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</tbody>
</table>

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 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.

<table>
<thead>
<tr>
<th>CY 89</th>
<th>CY 90</th>
<th>1/91</th>
<th>2/91</th>
<th>3/91</th>
<th>4/91</th>
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<tbody>
<tr>
<td>STATE BAR COURT:</td>
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<td>10</td>
<td>1</td>
<td>C</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td>36</td>
</tr>
<tr>
<td>TOTAL:</td>
<td>19</td>
<td>45</td>
<td>9</td>
<td>14</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td>36</td>
</tr>
<tr>
<td>Office Remaining:</td>
<td>53</td>
<td>69</td>
<td>63</td>
<td>73</td>
<td>66</td>
<td>69</td>
<td>80</td>
<td>82</td>
</tr>
</tbody>
</table>

**TABLE 9: RULE 955 VIOLATIONS**

E. Complainants=Grievance Panel

Before 1987, there was no Complainants=Grievance Panel. Created by SB 1543 (Presley) (Chapter 1114, Statutes of 1986), this Panel is another major reform to the discipline system. If the Bar decides to close a case without informal or formal discipline, the CW is now automatically notified of CGP=existence and jurisdiction to review these early closures, upon request. The Panel has the authority to consider these decisions, to order reinvestigations, and to recommend that the Office of Trials seek formal discipline. The Panel is an important check on the Bar, particularly since
the Monitor’s position sunsets on December 31, 1991, and since OT remains under the control of a Board dominated by practicing attorneys selected openly by members of the profession. The Panel’s audit powers are of particular import given the need to examine State Bar case closure policies in general, and not only where there is a complaint.

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, 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 (see Table 1 above at page 23; see also discussion in Part VI below).

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 approve 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>
<thead>
<tr>
<th>TABLE 10: STATE BAR COURT</th>
</tr>
</thead>
<tbody>
<tr>
<td>On Hand:</td>
</tr>
<tr>
<td>CY 89</td>
</tr>
<tr>
<td>1,322</td>
</tr>
<tr>
<td>Received:</td>
</tr>
<tr>
<td>756</td>
</tr>
<tr>
<td>Disposed of:</td>
</tr>
<tr>
<td>DSC:</td>
</tr>
<tr>
<td>TRM:</td>
</tr>
<tr>
<td>DSM:</td>
</tr>
<tr>
<td>ADM:</td>
</tr>
<tr>
<td>RLS:</td>
</tr>
<tr>
<td>SRJ:</td>
</tr>
</tbody>
</table>

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, 500-600 complaints would be involved in cases filed in the State Bar Court. In 1989, that number reached 756; and 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 1,700.  

G. Total Output and Expedition

The budget of the Bar discipline system was augmented by an increase in dues in 1989. Just over $120 of this increase was directed at discipline. Because of inflation and the additional increase in the number of attorneys in California, the raw budgetary figures indicate an increase of well over 60% in the Bar discipline budget. Compensating for these factors, the new system is about 40% larger than the pre-1987 operation. However, as Table 11 outlining total formal attorney discipline indicates, the output of the system has increased much more. The number of attorneys removed has about doubled; the number suffering actual suspension has more than tripled. And the system is meting out ten to twelve times the level of informal discipline as well, most of it in the form of letters of warning as to underlying matters which remain the subject of possible discipline. Closures, informal discipline, and a variety of new sources of information about attorney performance are all retained, and examined with each new complaint or addition for overall significance.

The 1987-1992 overview of State Bar discipline system changes described above includes only the central themes of the Initial Report and the eight subsequent Progress Reports of the Monitor. In addition, numerous other criticisms and suggestions as to specific practices and rules have been presented over the years. The State Bar has also initiated its own reform proposals in numerous areas apart from any suggestion or work of the Monitor, including significant reforms carried by prior Bar presidents Terry Anderlini (who supported and helped to develop the SB 1498

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2. 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.
reforms during his administration), and by his successors Colin Wied, Alan Rothenberg, and Charles Vogel. Exhibit 2 presents a more detailed listing of concerns and recommendations included in the Initial Report and the three most recent Progress Reports (#6, #7, and #8). Exhibit 3 presents a series of tables drafted by Bar staff in 1989 which listed the various proposals for change and reform from the Monitor directly, through the required implementation of SB 1498 (Presley) supported by both the Monitor and the Bar, and the Bar’s own separate reforms.

### TABLE 11: LAWYERS DISCIPLINED AS OF JUNE 30, 1991

<table>
<thead>
<tr>
<th></th>
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<tr>
<td>DISBARMENT</td>
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<td>27</td>
<td>37</td>
<td>51</td>
<td>51</td>
<td>67</td>
<td>37</td>
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<tr>
<td>RESIGNATION WITH CHARGES PENDING</td>
<td>31</td>
<td>66</td>
<td>43</td>
<td>61</td>
<td>90</td>
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<tr>
<td>TOTAL ATTORNEYS REMOVED</td>
<td>51</td>
<td>93</td>
<td>80</td>
<td>112</td>
<td>141</td>
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<tr>
<td>DISCIPLINE WITH ACTUAL SUSPENSION</td>
<td>51</td>
<td>65</td>
<td>63</td>
<td>89</td>
<td>102</td>
<td>212</td>
<td>128</td>
</tr>
<tr>
<td>DISCIPLINE, PROBATION; NO ACTUAL SUSPENSION</td>
<td>27</td>
<td>34</td>
<td>31</td>
<td>21</td>
<td>26</td>
<td>59</td>
<td>30</td>
</tr>
<tr>
<td>PUBLIC REPROVAL</td>
<td>20</td>
<td>34</td>
<td>30</td>
<td>29</td>
<td>45</td>
<td>54</td>
<td>22</td>
</tr>
<tr>
<td>PRIVATE REPROVAL</td>
<td>38</td>
<td>33</td>
<td>18</td>
<td>22</td>
<td>24</td>
<td>50</td>
<td>38</td>
</tr>
<tr>
<td>LETTERS OF WARNING</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>357</td>
<td>550</td>
<td>407</td>
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<tr>
<td>AGREEMENT IN LIEU OF PROSECUTION</td>
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<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>59</td>
</tr>
</tbody>
</table>

### IV. CURRENT STATUS OF BAR DISCIPLINE SYSTEM: FINAL RECOMMENDATIONS

#### A. Introduction

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 was the degree of inadequacy of the
Bar 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.

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 no 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 practitioners. 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 competency 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 for attorney-fee agreements to 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 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'être.

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 of those 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 competency 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.

B. The Nature of Current Complaints

As noted above, the final test of a regulatory system designed to assure an acceptable level of licensee competence and honesty rests with the performance of attorneys. We have attempted to trace the incidence of complaints in various categories to ascertain how the system may be affecting different types of consumer complaints. (The Bar is now conducting its own current study of the kinds and sources of initial consumer complaint.) We have used three sources of information: the Bar’s longstanding classification of complaints by type in its intake and complaint labeling process
over the past five years [see Exhibit 4]; our own direct consumer survey of those complaining during the 1986-1990 period [see Section IV discussion below; see also Exhibit 21]; and a two-day listen to complaints registered by consumers on the Bar toll-free hotline.

Caution is advised in measuring these indices. There are many kinds of abuse which may be serious, but which may not be reflected through consumer complaints. Low-level dishonesty, depredations against the inarticulate, unsophisticated, or meek, or abuses which may occur without the knowledge of a likely complainant may not reach the Bar intake system. Dishonesty may involve serious fraud, but the victims may be convinced by offending counsel that the outcome was proper a skill not always lacking among attorneys. And it may be difficult for a lay person to measure incompetence. In both cases, counting calls to the Bar complaining about attorneys may not reflect the entire scope of problems extant.

Not only are serious abuses likely to be missed where the regulatory agency relies primarily upon vocal complaints, but at the same time many of the most vociferous complaints lack merit, or at least lack the merit indicated by the fervor of their advocacy. It is naive not to realize that too many persons view litigation as a way not of settling disputes, but of imposing sanctions on others or gaining a measure of vengeance. Litigation and legal matters are often contentious and the expectations of parties may not be met, and may not be reasonably capable of being met.

Having warned about relying on the kinds of complaints received for a complete picture of legal practice or current abuses, the number of complaints by type is nevertheless of value. Exhibit 4 sets forth our compilation by year of the kinds of complaints received as the Bar has categorized them. Exhibit 21 sets forth the consumer response by type of complaint in our own consumer survey.
The results of these surveys may reflect how hesitant consumers are to complain about issues of competence. Rather, consumers are more certain about abandonment, direct and open misrepresentations to them directly (rather than to the court or others), and the taking of their money. Exhibit 4 includes the Bar’s own categories breaking down inquiries which were considered of sufficient merit under the Rules of Professional Conduct to advance to complaint status in the Office of Investigations. Most complaints deal with the performance of attorneys, with the handling of funds and duties to clients closely following. However, these categories and their subparts are much affected by the Bar’s self-perception of its discipline jurisdiction. Complaints about competence are less likely to make it to complaint status than are these other complaints. The State Bar, in an inappropriate but somewhat understandable fear of opening a Pandora’s box, interprets the Rules of Professional Conduct and its own jurisdiction narrowly in the area of competence. As a practical matter, it is not a significant part of the discipline effort at all. Similarly, fee disputes are often channelled into fee arbitration and do not often advance to complaint status. The fee category on page 1 of Exhibit 4 tends to concern allegations of fee acceptance with no performance that is, a form of outright client abandonment with an element of possible fraud added.

These classifications of complaints about attorneys reflect the Bar’s filtering of about 6,000 complaints from a universe of now over 70,000 calls and visits. Our own survey presented in Exhibit 21 is similarly biased since its respondents have passed through the same filtering, i.e., those who complain to the Bar become CWs and their cases only where the Bar accepts them as such within its defined parameters. Fee disputes, pedestrian dishonesty and incompetence do not normally so qualify, and are not in the system to classify.

Nevertheless, the kinds of complaints and their level of incidence remain very troubling. The
Bar categorization shows very high levels of client abandonment, levels which have not declined. Wholesale failure to perform, delay, and abandonment remain consistently the most common complaints. The related lack of communication/failure to communicate is second. The third most prolific category is failure to account for handling of funds. The fourth category is related to the first two: withdrawal from employment and failure to turn over file or documents. The general complaints of misrepresentation to client and operating without client authority also show a high and continuing incidence. Although duty to client offenses (such as operating without authority) interestingly appear to have lessened in the first half of 1991, the remaining alleged transgressions remain at high and constant levels.

Our own survey of those complaining to the State Bar may be saying the same thing in a slightly different way. It indicates that among our categories, respondents ranked as most important the following, in descending order:

1. Untruthful to me
2. Abandoned case
3. Kept (unearned) money
4. Never returned calls
5. Failed to investigate case
6. Overcharged
7. Lied to judge
8. Refused to see me
9. Insulting
10. Missed hearings
(11) **A**friendly to opponents@  

(12) **A**gnorant of law@  

Numbers 7 to 12 are fairly closely grouped. At a much higher incidence level, numbers 2 through 6 are also grouped together. This grouping corresponds to the categories the State Bar finds most fitting for perhaps half of the complaints opened. But the first category **CA**untruthful to me@ stands alone as the most significant problem among our respondents. Further, given the fact that only a limited number of respondents may have litigation involving a judge, a very high proportion also identified **Ai**ed to judge.@  

Moving beyond the statistics, 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 intake operators (**A**complaint analysts@ see discussion below). That is, we were able to listen to conversations between callers and Bar intake personnel without either knowing of the monitoring. This facility is built into the Bar’s current intake system to facilitate supervision and monitoring. Compensating for a number of factors **C**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 **A**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 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 outraged, off with his head. 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: A had a family law problem and saw Attorney Johnson. He said it would cost $5,000. I paid. Some clerk-type person filled out some forms and now I have a bill for another $9,000 here. I only talked to the attorney twice and we never went to court and he 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? He seems to think he’s on my checking account with me, with one problem: he doesn’t know my balance.

Next call: A 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.

**A** How long has it been?

**A** 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.

**C. Current Status: Flowchart**

Exhibit 5 presents the Bar’s 1989 complete flowchart, which remains substantially accurate. It contrasts markedly with the flowchart presented in the Initial Report (at pages 30-31) applicable to the system in 1987.
Most cases begin at the Office of Intake/Legal Advice (Intake Unit) where incoming calls and letters from complaining witnesses (CWs) are designated as complaints, inquiries, or information. The Intake Unit filters and prioritizes matters; engages in a limited investigation with an eye toward resolution of inquiry cases; and makes preliminary calls as to more difficult matters before forwarding them to OI for formal investigation. After investigation by OI, and where formal discipline is recommended, a statement of the case (SOC) is drafted by the investigator (and reviewed by the legal adviser) summarizing the factual findings and listing prospective allegations. Under relatively new procedures, the legal adviser then also drafts the formal Notice to Show Cause (NTSC). He or she gives the respondent at least ten days notice prior to filing the NTSC, and affords the opportunity for a pre-filing settlement, which is then subject to review by the State Bar Court.

Where there is no pre-filing settlement, the case is transferred to OT for limited discovery and hearing. OT also handles cases which enter horizontally directly into that Office, rather than from the Intake Unit and through OI. These special matters include 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 from previously disbarred or resigned attorneys.

OT prepares cases for presentation to the State Bar Court—the fourth element of the discipline system. This court, until recently appointed by the Board of Governors, adjudicates discipline cases. Historically, most of the hearings were presided over by volunteer (or per diem compensated) attorney referees or retired judges. The hearing referee made findings and recommended discipline. In the past, all cases were 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 cases where severe discipline was sought to be imposed.

As restructured by 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. These judges are appointed by the California Supreme Court and serve with the protections and independence accorded members of the judiciary. One of the review judges must be a non-attorney. Under the new procedure, there is an evidentiary hearing before one of the hearing judges (who also has 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.

D. Remaining Backlogs

1. Office of Investigations

Business and Professions Code section 6140.2 required the Bar to reduce by December 31, 1987 by 80% the number of cases pending on March 31, 1985 in OI for more than six months. The statute also requires the Bar to adopt as a goal a maximum six-month time period from the initial receipt of a complaint to the issuance of an admonition, dismissal, or the filing of formal charges. Most cases not so disposed of within the six-month time period become part of the OI backlog.

3. The section, as amended in 1988, allows the Bar to designate a number of cases as complex, with an expanded
When we began our work as State Bar Discipline Monitor in February 1987, the OI backlog was of extreme concern. At the time of the First Progress Report of the Bar Monitor (November 2, 1987), the OI backlog included approximately 2,500 investigations over six months old. As noted in Part III above, it has been dissipated to nominal levels. [For full discussion of backlog history, see Eighth Progress Report at 20-25.]

2. Office of Trials

As also noted above, the Office of Trials more recently developed its own serious backlog. The late 1987 diversion of OT resources toward OI backlog reduction decreased the number of attorneys available for the drafting of accusatory pleadings and the handling of subsequent hearings. The backlog of SOCs awaiting the preparation of accusatory pleadings quickly grew to 300 by January 1988, and as of March 1988 stood at 617. That figure was reduced to 568 as of July 1988, as most OT attorneys returned to their trial teams and accelerated NTSC drafting and filing. Increased recruitment further reduced this backlog to 272 by the end of January 1989. During 1989, however, it once again increased and, as of January 1990, it approximated 590 cases. During 1990 and 1991 it was gradually reduced, and now stands at negligible levels.

3. Office of Intake/Legal Advice

During 1988, a disturbing backlog grew within the Intake Unit itself, which we described in the Third Progress Report. This backlog was comprised of cases blocked or delayed at the front end, as the Intake Unit attempted to filter unmeritorious cases in order to facilitate manageable workload levels for OI (which was under legislative pressure to reduce its statutory backlog). However, this backlog has also been dissipated substantially. A number of cases remain in intake past the 60-day goal of no more than twelve months in investigation.

48
period established as a deadline, but that number has declined markedly.

Both the OT and Intake/Legal Advice backlogs must be monitored by the Bar with the same attention accorded to the backlog in OI.

4. Complaint Audit and Review Unit

At present, the most serious Bar backlog rests with the Complaint Audit and Review Unit (CAR), which serves as staff to the Complainants’ Grievance Panel (CGP). Although the existence of this backlog is generally known, it is much larger than the Bar’s Board of Governors or its Discipline Committee may fully appreciate. Over 2,700 separate cases are open before the CGP: approximately two-thirds of them are appeals of closed inquiries and the remainder are appeals of closed investigations. That is a huge total. Further, we calculate that approximately one-half of these matters have been open before CGP for over one year, many of them for over two years. They are not being worked. They are stuck in a backlog. Consumers were promised in writing a review of the Bar’s refusal to prosecute their complaint against an attorney. They wait months, and then years. They receive no resolution. This is not helpful to anyone. The current plans of the Unit to deal with the problem, and our additional suggestions are presented separately below in our discussion of the CGP.
E. Intake/Legal Advice

1. Load

Bar Intake is centrally located in Los Angeles. Experienced Deputy Chief Trial Counsel Fran Bassios now directs the Office of Intake/Legal Advice, which receives CW-generated telephonic and written complaints; prioritizes them and enters them into the Bar’s computer system; engages in limited investigation of minor cases; performs pre-investigation document gathering for cases which will be forwarded to OI; and, subject to attorney review and supervision, closes cases where appropriate.

The Intake portion of the unit now includes eighteen professional complaint analysts supervised by Assistant Chief Trial Counsel Paul Virgo and Intake Manager Karen Ortolani. These persons now handle five phone lines connected to the Bar’s toll-free hotline for consumer complaints (1-800-843-9053). The addition of the fifth line in 1990 was well justified by the volume of calls received. The busy rate ran from an acceptable 23% to a generally unacceptable 60% in early 1990. Problems clearly develop when the monthly calls received increase to above 7,000. The current busy rate level is again moving toward 50% and is a cause for concern.

Under the new system as of 1991, the eighteen complaint analysts each spend four to six hours on one of the five lines and one day off. While off, they attempt to resolve the calls they have taken. In many cases, this involves calling an attorney and reminding him/her of the obligation to return files or asking him/her to return a client call.

In a typical month, the Intake hotline in Los Angeles now handles between 6,000 and 7,500 calls (see total inquiries and information requests in Table 1 above). The 32,000 calls handled in 1988 have increased to a 1990-91 annual level of approximately 70,000. This represents an increase of
more than 100%.

Table 12 presents the most recent monthly data from Intake/Legal Advice. As shown, 109 matters remain within Intake longer than the goal of 60 days; however, this number is down from previous levels. As indicated above, the hotline consistently receives 6,000-7,500 calls per month. The number of inquiries opened is stabilizing at about 1,500 per month, and the number of matters sent to OI for formal investigation has remained steady over the past year at around 500 per month, with one-half to two-thirds of these cases concerning attorneys with one or more complaints already under investigation or prosecution.

2. Outreach

Notwithstanding these increases, the Bar has not yet managed to fulfill its commitment to make its hotline number adequately visible. The statistics indicate that persons are finding the hotline number; however, we believe that the number of consumers who would call if the hotline number were more accessible would be substantially greater. For example, during our two days of listening in to those who called the hotline number, more than a few callers complained in detail about their difficulty in finding the hotline number. Several recounted the fact that they had spent half a day looking in phone books, calling information, and calling local bar associations. Several finally obtained the number by directly asking a local bar association receptionist: AWhat is the number to call at the State Bar to complain about an attorney? Not you, the State Bar.@ That should not be necessary. And if we are hearing those comments from those who obtain the number, it is clear that many others give up.
TABLE 12: INTAKE/LEGAL ADVICE 1990-1991

<table>
<thead>
<tr>
<th></th>
<th>INQUIRIES OPENED</th>
<th>TELEPHONE CALLS HANDLED</th>
<th>LOBBY VISITS LA/SF</th>
<th>TOTAL INQUIRIES SENT TO O.I.</th>
<th>NEW RESPONDENT S</th>
<th>REPEAT RESPONDENT S</th>
</tr>
</thead>
<tbody>
<tr>
<td>JUNE 1990</td>
<td>1,615</td>
<td>5,533</td>
<td>83</td>
<td>484</td>
<td>144</td>
<td>348 (71.9%)</td>
</tr>
<tr>
<td>JULY 1990</td>
<td>1,586</td>
<td>5,337</td>
<td>75</td>
<td>536</td>
<td>153</td>
<td>383 (71.5%)</td>
</tr>
<tr>
<td>AUGUST 1990</td>
<td>1,813</td>
<td>6,265</td>
<td>93</td>
<td>478</td>
<td>152</td>
<td>326 (68.2%)</td>
</tr>
<tr>
<td>SEPTEMBER 1990</td>
<td>1,512</td>
<td>5,154</td>
<td>68</td>
<td>460</td>
<td>140</td>
<td>320 (70.0%)</td>
</tr>
<tr>
<td>OCTOBER 1990</td>
<td>1,827</td>
<td>6,368</td>
<td>77</td>
<td>590</td>
<td>192</td>
<td>398 (67.5%)</td>
</tr>
<tr>
<td>NOVEMBER 1990</td>
<td>1,445</td>
<td>5,440</td>
<td>64</td>
<td>457</td>
<td>148</td>
<td>309 (67.6%)</td>
</tr>
<tr>
<td>DECEMBER 1990</td>
<td>1,575</td>
<td>7,551</td>
<td>60</td>
<td>446</td>
<td>144</td>
<td>302 (67.7%)</td>
</tr>
<tr>
<td>JANUARY 1991</td>
<td>1,766</td>
<td>6,263</td>
<td>74</td>
<td>519</td>
<td>214</td>
<td>305 (58.8%)</td>
</tr>
<tr>
<td>FEBRUARY 1991</td>
<td>1,771</td>
<td>5,465</td>
<td>57</td>
<td>469</td>
<td>207</td>
<td>262 (55.9%)</td>
</tr>
<tr>
<td>MARCH 1991</td>
<td>1,486</td>
<td>6,156</td>
<td>55</td>
<td>544</td>
<td>245</td>
<td>299 (55.0%)</td>
</tr>
<tr>
<td>APRIL 1991</td>
<td>1,949</td>
<td>6,508</td>
<td>87</td>
<td>527</td>
<td>229</td>
<td>298 (56.5%)</td>
</tr>
<tr>
<td>MAY 1991</td>
<td>1,945</td>
<td>7,043</td>
<td>111</td>
<td>595</td>
<td>267</td>
<td>267 (44.9%)</td>
</tr>
<tr>
<td>JUNE 1991</td>
<td>1,501</td>
<td>6,248</td>
<td>79</td>
<td>556</td>
<td>285</td>
<td>271 (48.9%)</td>
</tr>
<tr>
<td>INQUIRIES OPEN AS OF JULY 1, 1991</td>
<td>871</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>INQUIRIES OPEN OVER 60 DAYS</td>
<td>109</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Despite our identification of this very basic outreach failure in the Initial Report of the State Bar Discipline Monitor in 1987, the Bar failed for four subsequent years to list its toll-free complaint number in any major telephone directory under an accessible listing. Currently, the Bar’s hotline number is listed consistently only in PacBell’s Smart Pages under Community Service Numbers and then further under legal services information@GTE’s directories while prominently displaying the telephone number of the California State Lottery do not include the Bar’s hotline number in its yellow pages reference section. Remarkably, the toll-free number is still not listed in any directory under the heading most consumers would look: in the white pages Government Section under State of California. Further, there are no listings under Attorney State Bar or Bar in the yellow or
white pages, except for one listing in the Sacramento white pages under State Bar of California. Local private bar associations lacking discipline powers are substantially more visible.

The Bar recently hired Christy Carpenter as its new Senior Executive for Communications and Public Education. Ms. Carpenter has assured us that the Department of General Services has finally withdrawn its apparent opposition to the listing of the State Bar in the government sections of telephone directories. According to the Bar, the Department previously took the rather curious position that the Bar is not a state agency and therefore could not be listed in the government section. (See exchange of letters in Exhibit 6.)

Also included in our Initial Report was criticism of the way in which local bar associations interfere with the discipline function of the State Bar. Our recent survey of these associations indicates some improvement (see Exhibit 7). They generally know the number of the Bar’s hotline and have some criteria for referring cases to it. However, we remain uncomfortable with the State Bar’s policy in these regards. These local associations are private professional entities without any authority to discipline an attorney, and lacking the independence or protections 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 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.
As we discussed in Section III above, the Bar has deliberately made its discipline operations more visible over the past four years. By way of example, Exhibit 8 includes a media relations guide which reflects much improved openness. However, it is important for the Bar not to confine its public relations to the trumpeting of what it has done; it must also make known to consumers how they can complain. The unavailability of the hotline number and the continuing and discouraging failure of Bar staff, over four years of remonstration, to get this simple job done is frustrating for us and should be embarrassing to them.

3. Filtering Calls and Attitude Toward Those Reporting

Between 40-50% of the calls received on the hotline lead the complaint analyst to mail a complaint form to the CW. In a typical month, 1,500-2,000 such forms are mailed. Of these, about 60% are normally given immediate inquiry case numbers, while about 40% are sent blank and without computer entry. The latter event occurs where a caller refuses to describe the nature of the complaint or refuses to identify the accused attorney.

Approximately one-third of the forms sent out are completed and returned by the CW. The end result of inquiries opened on the phone, plus the subsequent receipt of completed complaint forms from those where inquiry numbers were not originally assigned, is the opening of between 1,500-2,000 inquiries per month at current rates. We have been and remain concerned about the loss of over two-thirds of all calls describing what may be important deficiencies in attorney performance. This information is not recorded as an inquiry. The Bar’s assumption in receiving such calls and in requiring written submission is that the person providing such information has the burden of clarifying the problem. Moreover, our confidential listening in to the handling of consumers by complaint analysts further confirms the Bar’s mindset. Many of the Bar’s
intake analysts indirectly suggest that they are handling a private complaint by a complaining witness against an attorney who must carry the ball and provide the evidence.

To be sure, to some extent, the Bar must encourage the submission of evidence, and it has a right to expect some clarity in the filing of a complaint. Further, it is appropriate for the Bar not to discipline by formal suspension or disbarment based on the vast majority of calls it receives. But each complaint should be viewed by the Bar as a favor to it is a piece of information which may not warrant action in and of itself, but which should be recorded to afford a maximally complete picture of attorney performance. The Bar\#s staff must fully internalize its role: it does not handle outside disputes; it tries to identify and sanction attorneys who are violating the Rules of Professional Conduct. That is its job, and it is properly thankful to anyone who is willing to help. We believe that the Bar should consider capturing oral complaints into its pattern detection system even where no written complaint form is submitted, particularly where the subject matter of the complaint is at all serious.

4. Identification of Repeaters

In general, and as noted above and in the Seventh and Eighth Progress Reports, the number of inquiries is quite large. However, for the first time it is showing signs of leveling off at approximately the 1989 level, when 19,797 inquiries were entered on computer for pattern detection. A similar number of inquiries were opened in 1990 (20,057), and are projected from the first six months of 1991 (totalling 9,771 as of June 30). These entries are enhanced by attorney self-reporting and outside sources of information on attorney misconduct now being added into the system.

4. In this regard, the Bar also properly factors in the nature of practice of an attorney\Ca family law practitioner, for example, may be expected to yield a certain number of complaints even if exhibiting the efficiency of Perry Mason and the charm of Victor Sifuentes.
As noted in previous reports, the Intake Unit automatically passes through to OI those cases where the respondent named is the subject of other pending cases. The number of such repeat complaints is remarkable. As Table 12 above (see page 61) indicates, from 50-66% of the inquiries sent to OI concern respondents with other pending complaints. And a large number of the repeat complaints do not concern attorneys with just one or two other pending complaints, but with many such complaints often involving more than five independent CWs (see Exhibit 9). One to two hundred new respondents are added each month beyond those suffering repeated complaints.

These data suggest that there is a hard core of 1-2% of the profession (1,000-2,000 attorneys) accounting for an extraordinary proportion of consumer complaints. One Intake supervisor opined that at any one point in time, as few as 100 attorneys can account for almost one-half of the total complaints filtered through Intake to OI. The Bar has created a Repeaters Task Force which has identified just over 50 attorneys responsible for 570 currently open matters. It is now considering strategies to deal with them. We believe the best strategy is interim suspension (or involuntary inactive enrollment under Business and Professions Code section 6007(c)).

At present, this Task Force is tending toward vertical treatment of cases where there are ten or more pending complaints concerning a given attorney. We believe that the Task Force should handle those respondents with five or more complaints. Exhibit 9 presents a list of such persons with confidential information redacted. Those persons on the list with ten or more pending complaints and hence presently eligible for Repeater Task Force attention are indicated by a line following the current count applicable to each. As the list indicates, its expansion to all of those on the list is likely to be well warranted and is within the range of the Bar's resources that is, the number of eligible attorneys would expand from eight to 60. (Further, as discussed below, we believe
the Office of Trials should otherwise expand its vertical handling of cases.)

5. Court Channel

The Bar now designates Paul Virgo of the Office of Intake/Legal Advice to receive all complaints or leads about problem attorneys from courts. This special court channel is very important, since judges are in a unique position to observe dishonest or incompetent practice. The Bar’s efforts here are laudable but should be very much increased. First, all reversals for (or other findings of) incompetence of counsel, all contempt orders, and all non-fast-track and significant sanctions must be red-flagged and reviewed by senior OT prosecutors. Second, there must be more aggressive and a continuing, institutionalized outreach to all state and federal courts. Most do not know of Paul Virgo’s role, and many do not know of the obligation to report incompetence findings or contempt and sanction orders. The Bar should write each court in the state at least twice each year, provide model documents, visit courts, attend judicial conferences, and work with the Judicial Council more actively than it has to date.

6. Attorney Review

As noted in previous Progress Reports, the Bar adopted the Monitor’s recommendation to place attorneys in charge of case routing and closure. All mail from CWs is read currently by Intake attorney Miyuki Lappen. In addition to the eighteen complaint analysts, the Intake Unit has six investigators. Intake manager Karen Ortolani routes cases to these investigators as appropriate. The six investigators assigned to Intake investigate cases in order to close those without merit or to begin requests for needed documentation to expedite the OI review where the case is passed on to OI, e.g., to order immediately necessary documentation to evaluate certain claims, such as medical lien fraud allegations. All closures must be approved by an attorney, e.g., Lappen, Virgo, or one of the nine
7. Pattern Detection

Theoretically, a proactive intake system seeks out, collects, and arranges information relevant to attorney performance. The Bar discipline system should track a wide variety of information sources to detect attorney misbehavior and incompetence. It should not rely solely upon consumer complaints for a variety of reasons, including the fact that filing a formal complaint with the Bar is a difficult and intimidating task for many consumers. The fact that over two-thirds of those who call in a facially meritorious complaint then refuse to return a completed Bar complaint form may be one indication of this hesitancy. While a large number of complaints made lack merit, a large number of attorneys are victimizing people who are not able to articulate a well-documented complaint.

We have previously urged that other sources of information be used C those which are richer sources of evidence of attorney wrongdoing and likely future abusive practice than the complaint flow which enters the Bar’s Intake Unit. The current system previously relied substantially on self-reporting as its primary alternative source of information. Business and Professions Code section 6068(o)(1)-(10) requires attorneys to report to the Bar when any one of the following circumstances occur: (1) the filing of three civil malpractice cases within a twelve-month period against an attorney; (2) certain criminal accusations and convictions; (3) the imposition of sanctions by a court of over $1,000; (4) the imposition of discipline by another jurisdiction; and (5) the reversal of judgment in a proceeding based upon attorney misconduct, incompetence, or willful misrepresentation.

Our brief survey of these reports revealed very little compliance, which was confirmed by our interviews of Bar staff and by comparing the information received from self-reporting with
information from other sources.

The Bar’s computer system now makes available to Intake Unit and OI personnel the existence of other open or closed State Bar investigations and (since 1988) other State Bar inquiries, open or closed. It also reveals prior discipline imposed by the Bar. Criminal convictions have now been backloaded from January 1988. Other information which is now being made available through the intake system as it is evolving includes: (1) malpractice insurance claim filings; (2) major contempt/sanction orders; and (3) NSF checks written on client trust accounts. Since the publication of the Eighth Progress Report, the Bar has moved to use those three sources of information.

When an authorized State Bar official punches up the name of a licensed attorney on the current system, seven menus are presented. These include membership records, supplemental records, investigations, trial counsel, State Bar Court, inquiries, and conviction monitoring. If there is information about a member in any of these menu items, the menu title will appear. Membership records includes address, name of law school, and information about date of licensure and whether the attorney’s license is currently active. Supplemental records includes any prior public discipline or any current case(s) in which an NTSC has been filed. Investigations, trial counsel, and State Bar Court outline the status of any cases involving that licensee as the respondent which might be currently pending at those stages in the disciplinary process, including the names of OI/OT personnel assigned to the case and relevant dates of upcoming events. Inquiries is a new menu item and is critical to pattern detection. It includes inquiries not opened or those closed without transmittal to OI. Conviction monitoring includes official reports of criminal convictions, which are then evaluated by OT and sent to the State Bar Court for interim suspension where moral turpitude involved in the crime.
Complaint analysts under the direction of Trev Davis and Gloria Zank are now gathering NSF check information (and other new information now being gathered pursuant to SB 1498) and attempting to follow up on it. Interestingly, the NSF check information has already proven to be a useful tool in detecting financial abuse by attorneys at a very early stage of wrongdoing. An NSF check written on a client trust account may have an innocent explanation, including the bouncing of a deposit check victimizing the attorney. However, initial follow-up is relatively easy and is yielding information about serious offenses. Intake attorneys believe that as many as 25% of the NSF check reports indicate present or imminent discipline-related problems, a comparatively rich source of early detection. Attorneys working with the NSF check notices believe that even where bounced checks are not indicative of theft, they are very predictive of inadequate office management skills, and are closely related to alcohol/drug abuse, mental breakdown, or organizational incompetence. They also seem to correlate with attorneys who are the subject of subsequent complaints for refusing to answer calls, case abandonment, and legal malpractice.

The Bar has negotiated successfully with major banks to work out automatic submission of material to enhance the utility of client trust account information. For example, the tracing of deposit rejections from clients is important in eliminating rejections which may not be the fault of the attorney trustee. Mutually arranged forms and procedures have been approved for most of them.

The Bar has yet to hook into the Attorney General’s Arrest Notification System, as required by SB 1498. This failure will become increasingly important as additional numbers of new licensees are fingerprinted for possible inclusion. Already, over 10,000 persons should be in the system for immediate Bar notification upon arrest, and this number will increase steadily by 5,000-10,000 per year as new members are admitted.
The Bar’s concern with the core of recidivists accounting for a disproportionate share of complaints has led it to establish (in addition to the Repeaters=Task Force) a program termed Campaign to Reduce Attorney Financial Thefts@CRAFTS). This priority on financial taking is also fueled by two other factors: the often devastating personal impact these thefts can have on trusting clients, and the fact the growing number of claims on the Bar=Client Security Fund increasingly threatens its solvency, or requires spiralling contributions. Increased pressure on the Bar=Client Security Fund recently forced the Bar to seek and obtain a $15 per attorney per year increase in attorney contributions to the fund through annual Bar dues.

The CRAFTS task force consists of two parts: an intake increment will seek out early signs of theft, using NSF check information, criminal charges for embezzlement or theft, consumer complaints, and other information being gathered in the enhanced pattern detection computer entry system of the Intake Unit. In addition, a program of random audits of client trust accounts is planned. Such audits have been successful in other states, and the Bar intends to model its planned procedure on the successful New Jersey experience. Cases indicating thefts will be referred to an identified group of OT attorneys working with assigned investigators to handle the cases quickly and vertically.

In addition, the Bar is working on a number of early detection and preventive strategies to inhibit attorney theft. Exhibit 10 is a list of the brainstormed projects now under consideration for the CRAFTS program. It is an impressive list of creative ideas. OT is aware that random audits and required procedures applicable to client trust accounts have cut attorney theft cases to a small fraction of previous levels in jurisdictions such as New Jersey and North Carolina.

The Bar is loading substantial information into its system for useful pattern detection, including the NSF information noted above, criminal convictions and inquiries currently being
registered, judicial reports of contempts, sanctions, and reversals for gross incompetence, malpractice insurance claims, and discipline in other jurisdictions and from other regulatory agencies (many attorneys are also licensed as real estate brokers, accountants, or other professionals). Exhibit 1 presents sample screen formats indicating how the information will be displayed for the intake operator, and also indicates the extent and sophistication of Bar intake and pattern detection efforts.

As listed in our Seventh and Eighth Progress Reports, additional sources of information which the Bar should actively pursue and/or enter into its computer system some requiring legal authority or policy refinement are as follows:

a. Discipline in Other Jurisdictions. Although theoretically available, this information is not entirely complete. The ABA annually publishes, as a cooperative service for state discipline systems, lists of those disciplined. Unfortunately, the ABA lists do not include addresses. As a result, there has been a problem in identification. The ABA has created a new data bank for interjurisdictional sharing; however, Deputy Chief Trial Counsel Bassios reports that it still lacks a nationwide identifier for attorneys and relies on attorneys to self-identify that they have been admitted in other states.

b. Civil Filings. The early versions of SB 1498 (Presley) included a provision requiring any plaintiff filing a case alleging professional malpractice, fraud, or deceit against an attorney in his/her professional capacity to send a copy of the pleadings to the Bar. Those objecting to this provision contended that large numbers of initial filings do not pertain to the actual behavior of named defendants, but may be included to meet statute of limitations needs, only to be subsequently dismissed. Further, others pointed out that such a notice requirement must have some enforcement mechanism, and that the one proposed would jeopardize a plaintiff’s case if his/her
counsel failed to comply and the statute of limitations period passed. It would be ironic, these
commentators argued, if a provision designed to police attorney malpractice for consumer benefit
included as its enforcement mechanism the threat of dismissal of possibly meritorious cases. Other
alternatives, such as having court clerks send notice of civil filing against attorneys, present yet more
difficult practical impediments.

At present, this information is not available, except for the unreliable and limited
self-reporting where three or more malpractice actions are filed against an attorney in a twelve-
month period. As limited as it may be, this information is not systematically available to the Bar
Intake Unit or OI and is not displayed on screen.

c. Judgments and Settlements. Although Business and Professions Code section
6086.8 requires civil judgments to be reported, most cases are settled prior to judgment. Settlements
are not reported. To be sure, the statute also requires that they be reported, except it is worded to
require the reporting only of settlements which include admissions or findings of fact, which are
simply not made in practice. Further, our attempt to include in SB 1498 a settlement disclosure
requirement without this overwhelming exception (which swallows the rule) was met with strong
opposition from much of the profession and from the insurance companies. They argued that the
strong public policy favoring settlement of civil cases would be compromised if all settlements were
reported to the Bar. Critics of the proposed provision implicitly concede that the plaintiff in these
cases is able to negotiate for a settlement which avoids Bar notice. This is an inducement to settle
for which defendants will pay some amount. Our problem with this formulation is that it excludes
from these settlement negotiations the parties whom the Bar is entrusted to represent most
assiduously: the future clients of the defendant attorney.
Current law includes a provision requiring reporting of malpractice insurance claims. This requirement is imposed on the insurance companies providing malpractice coverage to attorneys. Arguably, these companies are best able to fulfill such a reporting requirement and it represents an important source of information. However, it does exclude two categories. First are filings against attorneys who lack malpractice coverage—now approximately 25% of all attorneys, including a large number of those who operate at the margin and who are disproportionately subject to consumer complaints. However, it is also true that attorneys at the margin and lacking such coverage are not likely to be the objects of civil malpractice suits in most cases due to probable collection problems. This source of information would be much more valuable with the initiation of mandatory malpractice insurance (discussed infra).

Second, the exclusion of civil filings, even with insurance claim reporting, leaves out the often egregious tort cases against attorneys where insurance coverage may not apply. Somehow, the Bar must systematically be made aware of serious allegations of breach of fiduciary duty, fraud, and deceit by attorneys. Where those allegations lead to large settlements or litigated judgments, the Bar has no way of knowing about them apart from the limited and unreliable self-reporting system. Ironically, consumers may erroneously believe that such filings automatically go to the Bar and may fail to report them independently to the Bar. Or they may refrain from such reporting in the belief that its threat may give them litigation leverage.

d. Court Contempt/Sanctions and Findings of Attorney Incompetence. Some hesitation about the definitions proposed and about the use to which the information might be put by the Bar led to the current permissive language authorizing courts to report contempt and serious sanctions in SB 1498 as enacted. Unlike the measure we proposed, the current version is strictly
voluntary. However, the Bar can facilitate and expedite its receipt of such information from judges by ensuring that appropriate forms are available in all benchbooks and by writing a periodic letter to all judges reminding them of the Bar’s interest in their contempt actions and evaluations of counsel, as suggested above. Bar notice of sanctions, contempt orders, reversals for incompetence, and criminal filings all depend upon court, court clerk, or prosecutor reporting, given the unreliability of self-reporting.

We have suggested that the Discipline Committee letter be sent routinely at least twice a year; and that the Bar work with the Judicial Council to develop forms and participate with special intensity in judicial training programs and intra-judicial communications. We would also urge that the federal judges sitting in California be included in such an outreach program.

This source of information is not analogous to a CW complaint. Each such report from a judge should be treated as an independent lead for a State Bar Investigation (SBI), and not depend upon judicial follow-up or evidence gathering. As noted above, court-originated reports are channelled to Paul Virgo and are given special attention. However, most courts still are not aware of the court channel and much more needs to be done to tap this kind of independent source of wrongdoing. Ideally, it would combine such outreach with the law amendment to make transmittal of such reports mandatory, as originally drafted. Only by proactive outreach can the Bar begin to treat the two areas in which it is most deficient in its basic coverage, and arguably the two areas of greatest current abuse (outside of billing practices): attorneys who are incompetent, and attorneys who lie.

In summary, the pattern detection feature of a more comprehensive reporting system should enable the complaint analyst in the Intake Unit who receives a consumer complaint which may not
of itself justify serious discipline to pull up a screen which shows a recent serious contempt order; two malpractice actions filed against the attorney in the past year resulting in insurance claims; and notice of three NSF checks written on the attorney’s client trust account. The Intake Unit complaint analyst, Intake attorney Paul Virgo, and Assistant Chief Trial Counsel Trev Davis receive the seemingly marginal incoming complaint in this context.

The import of detecting patterns is becoming increasingly apparent to those working with the system. In the one area where pattern detection has now become computerized and sophisticated—the tracking of inquiries and complaint investigations within the Bar itself—the results have been enlightening. Previously, those matters designated inquiries never made it into the computer. Three times as much input from consumers calling the Bar is now entered into the system for pattern detection purposes. The result? Between 65-80% of those cases passed from Intake to OI involve respondents who have other pending complaints in the system. This is an extraordinary level of pattern detection heretofore only minimally available. It is clear that in this area the California Bar leads the nation.

F. Office of Investigations

1. Structure

Both the Office of Investigations and the Office of Intake/Legal Advice operate under the general supervision of Chief Trial Counsel Bob Heflin, who replaced Jim Bascue in late 1990. Mr. Heflin is a veteran and respected professional prosecutor with many years of experience managing various units of the Los Angeles County District Attorney’s Office. Clayton Anderson, also with a strong reputation from the Los Angeles County District Attorney’s Office, serves as Director of Investigations.
As noted in prior progress reports and in Section III above, the structure of OI has changed dramatically since the term of Bar Discipline Monitor began in 1987. Rather than a structurally separate Office charged with investigating cases, exercising independent judgment, and passing cases on for prosecution to a distinct Office of Trials, the new arrangement puts the Chief Trial Counsel over the entire structure in a unified management system. This arrangement allows attorneys expert in the law to review and make final decisions to close cases, and to route high priority cases for special treatment at the outset. OT attorneys are not deprived of post-filing investigative help (at least structurally), and investigators have available legal guidance as they pursue their investigations. Resources for investigators have been enhanced and pay is now at market level.

The present five OI teams are approximately equal in size: four in Los Angeles total 43 investigators at present and the San Francisco unit has fourteen. They are undifferentiated in terms of type of case, except requests for reinvestigation or assistance to OT on those cases entering the system from the side (e.g., petitions for reinstatement) are generally handled in Los Angeles by the investigative unit of Phil Sartuche. Thus, Sartuche’s unit provides available investigative resources for OT to use for special cases and post-NTSC filing.

The interaction between attorneys and investigators from the other direction (attorneys helping investigators) is provided by a separate group of legal advisers supervised by Bill Davis within the Los Angeles Office of Intake/Legal Advice headed by Fran Bassios. Bassios has nine attorney advisers, seven in Los Angeles and two in San Francisco. These attorneys work as part of intake and with OI to approve disposition of investigations, SOC recommendations for NTSC issuance, or closure decisions.

As we have previously stated, the current structure of investigator/attorney interaction is not
ideal for many cases. For complex cases, the system is excessively fragmented. There has been internal discussion within the Bar staff over the concept of Averticalizing@ 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.5

We believe that the current system has been and continues to be excessively horizontal. A single case may be investigated by the complaint analyst for ten days, handed off to Miyuki Lappen

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5. Letters complaining about Bar discipline system performance and the initial consumer survey we discussed in the Fourth Progress Report reveal continuing consumer complaints about being shuffled from person to person and about the file on the matter passing through innumerable names. As noted in the Eighth Progress Report, recent letters from CWs to the Discipline Monitor indicate an upswing in the number of CWs confused about who is in charge of their case, and concerned about obtaining a timely response from the Bar on the status of their case. As noted above (and discussed in detail below), many of these complaints now originate with the backlog of the Complainants’ Grievance Panel as much as from Intake or OI. For many, the Bar has created the impression of an uncaring bureaucracy shuffling paper back and forth in a confused fashion.
when the paperwork arrives, assigned to one of six Intake investigators, moved to an OI team leader and then an OI investigator, be reviewed by that team’s legal adviser, and then by Bill Davis as head of legal advisers. Prior to recent changes, the case would enter OT: it would be assigned to a special OT attorney for the drafting of a Notice to Show Cause, then go to another attorney entirely for hearing, and then be reviewed for disposition by that attorney’s team leader. As noted below, one or several of these steps are being consolidated to create a somewhat more vertical structure.

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. For these cases, we have proposed evolution to a system where the complaint analyst who receives the call has the case for ten-day resolution and also handles the matter when the paperwork comes in during the off-phone days, as described above. Both the consumer and the accused attorney know who has the case. Then there is one hand-off to an attorney/investigator team assigned to the case from the special unit described below’s period. At that point, the matter has passed a jurisdictional and initial check threshold and will be decided by that identifiable and accountable team who will know the case directly.

One staff concern about such an arrangement is that it may lead to inconsistent decisions. But this theoretical problem is best resolved by the attorneys directing Intake at the complaint analyst stage and then by the OT team leaders. Critical decisions—e.g., to close, demand disbarment, et al.—are made only after supervisor review. Indeed, the current system involves such review; except that any one of six or seven supervisors at six or seven different stages, and in separate units, attempt to create that consistency. The result of the current system may be consistency within the complaint
analysts, or within the investigators working Intake, or within a given OI team, or within a given OT team. But consistency within a level does not mean systemwide consistency. An optimum system has both horizontal and vertical consistency. Too many people assigned the task of providing consistency may lead to inconsistency.

Another argument against vertical and in favor of horizontal teams has substantial merit: the economies of scale that may be available in the horizontal specialization of a task. OT is now grappling with various ways to accommodate verticalization in a system of intake specialization, numerous professional investigators, and attorneys.

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 that such task force treatment should be organized for every substantive area where there is a critical mass of cases along similar substantive lines to justify it.

The scope of attorney transgressions is broad. On the one hand, the common abandonment type of case does not require verticalization. It may be a waste of trial counsel time to be involved in supervising the gathering of routine evidence in a well-known and established format. On the other hand, a case involving incompetence in the practice of family law (a common and often complex allegation) may be best handled by an investigator and attorney together evaluating it for three advantages: mastery of what may involve some esoteric questions, subject matter consistency in handling, and accountability. We believe the leadership of OT agrees with some of our analysis of vertical prosecutions and its appropriate implementation; however, it is the natural tendency of
bureaucracies to horizontalize over time. It requires proactive effort to create vertical structures.

Such a structure may consist of a single OT counsel and investigator, each of whom is normally assigned defined cases at the outset. While OT has a mechanism for verticalizing any complex case immediately out of Intake, further refinements may be possible, as we have described, including the expansion of the Repeaters Task Force, which does operate vertically, to the handling of all respondents who have five currently pending cases, rather than the current standard of ten such pending cases.

We note that Business and Professions Code section 6007(c) interim suspension cases, section 6007(h) interim license restrictions to protect the public, and section 6180/6190 takeover of practice cases (where clients are threatened by an attorney’s disability) require the involvement of OT. Lacking an immediate vertical referral, the current low level of such 6007(c) protective actions will continue.6

2. Performance

During 1989, the Office of Investigations received 5,961 complaints for investigation, which represents a 15% increase over 1988. The 1990 total was 6,512, another 10% increase. The 1991 numbers appear to be running at about 8% above 1990 levels on a year-to-date basis (see Table 13). In general, the 500-600 inquiries sent to OI each month to open complaints concern only 140-280 new respondents, since one-half to two-thirds of them pertain to persons with one or more other complaints already pending in the system. During 1989, OI disposed of 6,796 complaints, up from

6. Chief Trial Counsel Heflin correctly notes that the Bar’s current low level of interim suspension action (involuntary inactive enrollment) is moderated by an increase in early voluntary resignations with charges pending. He is correct in that an early resolution by resignation is much preferred over interim remedies followed by resource-expending formal proceedings. But there is a substantial number of cases where we believe interim action may be warranted and where it is not occurring; see discussion of Office of Trials and our own surveys below.
5,159 during 1988. The number of complaints disposed of during 1990 was almost identical to 1989 levels, at 6,793. The number to date in 1991 projects to almost 8,000, a 26% increase (see Table 13).

<table>
<thead>
<tr>
<th></th>
<th>COMPLAINTS OPENED</th>
<th>COMPLAINTS DISPOSED</th>
<th>ACTIVE INVESTIGATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990 YEAR-TO-DATE</td>
<td>3,172</td>
<td>3,109</td>
<td>2,343</td>
</tr>
<tr>
<td>1991 YEAR-TO-DATE</td>
<td>3,443</td>
<td>3,921</td>
<td>1,781</td>
</tr>
<tr>
<td>% OF CHANGE</td>
<td>+9%</td>
<td>+26%</td>
<td>-24%</td>
</tr>
</tbody>
</table>

The number of OI cases sent for SOC, plus those terminated, is an important total since terminations are not dismissals, but occur only if there is a death, resignation, or removal of an attorney—often as a result of disciplinary action in another case. The ratio of this number to dismissals has been kept at a 1-to-2 ratio. The ratio has held reasonably steady through 1989, 1990, and 1991. More specifically, of the 6,840 cases disposed of by OI in 1990, 555 were terminated due to the death, retirement, resignation, or similar event affecting the accused. About 35% of the remainder suffered some form of discipline. The same ratios hold true for the first half of 1991 (see Table 3 at page 29).

The Bar’s numbers understate the actual level of discipline activity because of its failure to include consistently in its reporting the total number of letters of warning. We discuss below the proportion of cases now subject to informal discipline (letter of warning, admonition, reproval), those subject to closure, and those sent forward to OT for formal hearing and public discipline. In this latter category are SOC's sent to OT by OI following investigation, recommending the issuance

7. We note that the Bar includes private reprovals as a normal discipline because they are technically prior discipline, whereas letters of warning or admonitions are not (but are held for possible later use). We use the term
of a formal NTSC. The number of SOCs produced by OI for formal charges numbered 896 in 1987, 1,235 in 1988, 1,774 in 1989, 1,522 in 1990, and 577 during the first half of 1991 (see Table 3 at page 29). The 1990-91 decline, as discussed briefly above, is not necessarily worrisome.

Many of those cases not submitted for formal charges and hearing are resolved by two new forms of disposition: letters of warning and agreements in lieu of discipline. In general, both of these alternatives as currently used eliminate cases from formal accusation which would not result in serious discipline warranting those proceedings anyway. Rather than wasting resources on them, the Bar is able to use these two options to obtain what is a more effective remedy than the likely outcome of expensive and time-consuming formal proceedings. The latter are likely to produce a public reproval, which is then res judicata to the charged complaint. The letter of warning accomplishes the same end while retaining the underlying matter as a possible source of formal charges in the future should the behavior be repeated. The agreement in lieu of discipline provides a chance for detailed conditions agreed to by the attorney, including possible drug treatment and unannounced testing, supervision, training, ethics school, et al. Prosecution does not occur so long as the respondent complies with the conditions. Here, the hammer remains in place as well, with specific requirements imposed. The merit of these two options is clear to provide a disincentive to further violations more effectively than would be achievable through formal proceedings. It is important that these two tracks not become substitutes for more serious discipline where formal proceedings would produce such a serious result. Our own surveys of letters of warning and agreements in lieu of discipline, as well as the statistics showing increasing numbers of disbarments plus resignations with charges pending and actual suspensions coming from formal

An informal here in a broader context.
proceedings, suggest that the current use is appropriate and is achieving improved prosecutorial efficiencies (e.g., compare Tables 5 (page 34) and 11 (page 43)).

G. Office of Trials

1. Structure

Under the system operative prior to November 1989, Senior Trial Counsel Bill Davis reviewed all SOCs in Los Angeles and transferred them to Assistant Chief Trial Counsel Michael Saleen Special Proceedings OT Unit in Los Angeles. NTSCs were drafted within that unit and respondents given the opportunity to settle cases prior to filing in what is termed a ten-day conference; that is, an accused attorney is shown a summary of a proposed Notice to Show Cause accusation and told that an NTSC will be filed within ten days. If the attorney so desires, he/she then has that period of time within which to meet with Bar officials to negotiate a settled discipline result (or to try to dissuade them from filing).

During 1990, discipline system management was somewhat reorganized. Fran Bassios was placed in charge of Intake/Legal Advice. Clayton Anderson retained his responsibility as Director of Investigations. Michael Saleen was promoted to a co-equal status to these two as Director of the newly-formed Office of Trials (formerly the Office of Trial Counsel or OTC). In 1991, Mr. Saleen was replaced by Roberta Yang. The three Los Angeles trial teams under Yang are directed by Mike Gerner, Denice Brue, and Elise Lazar, respectively. Although previously focused on either short-cause, long-cause, or special proceedings, each of these trial units now handles all types of matters. Most recently, San Francisco has been divided into two OT trial teams, one directed by Rick Harker and the other by Shelly Drake. The San Francisco OT office is substantially verticalized, except for two attorneys (Mamet and Yen) who mirror the Office of Intake/Legal Advice in Los
During 1990-91, OT has suffered from some debilitating turnover, although much of it relates to family and unavoidable personal problems. Moreover, most of the 15 vacancies noted in the Eighth Progress Report are now either filled or about to be filled. Prior to his 1990 departure, Chief Trial Counsel Bascue made two helpful changes in OT. During early 1990, he delegated wider settlement authority to OT team leaders and to the legal advisers of the four Los Angeles and one San Francisco OI teams. And, as noted above, he gave NTSC drafting to the legal advisers of the OI teams investigating the cases as they were coming through the system. Meanwhile, a group of OT attorneys was assigned the task of attacking the NTSC drafting backlog of cases already submitted by OI. By August 1991, this backlog was largely dissipated and these attorneys are now free to return to their respective trial teams where a substantial number of pending NTSCs await their attention due to their prolific issuance during 1990 and 1991.

2. Interim Remedies

There are three kinds of interim remedies appropriate for delineation. First, Business and Professions Code section 6007(c) authorizes the State Bar to seek interim suspension of an attorney pending final discipline proceeding outcome. Second, the same section allows the Bar to move for immediate imposition of the disbarment recommendation of the hearing judge of the State Bar Court after hearing and issuance of that recommendation (i.e., pending its appeal). The third form of interim remedy authorizes the State Bar under section 6007(h) to impose restrictions short of license suspension to protect the public. These restrictions could consist of a prohibition on practicing a certain kind of law in which the respondent has demonstrated gross incompetence, a requirement that a monitor supervise case handling, the appointment of a trustee to supervise all
client trust accounts, or other measures as needed short of ending or interrupting the respondent’s practice.

The 1988 amendments in SB 1498 (Presley) were intended to make the first form of interim remedy described above more realistically possible, and for the first time authorized the latter two. The authors of these changes envisioned the following: a case enters intake and is evaluated in light of the full pattern of information available about the respondent. Where a public danger is indicated from continued practice, an attorney/investigator team is immediately assigned to the case to handle it vertically from that point. Records are immediately sought and one of these three interim remedies is pursued.

Unfortunately, that vision has not been fulfilled. As Table 7 above (see page 37) indicates, only 19 6007(c) proceedings have been filed during 1990-91. Further, we have surveyed in detail 17 of these 19 motions made available to us. Exhibit 11 presents timelines and summaries of each of these motions. As they reveal, half of them are of the second type described above—attempts to immediately implement the recommendation of a hearing judge. The proceedings are commonly filed not months but several years after the initial complaints are made about the respondent. Most of the remaining examples are made earlier, but in the context of a default of the respondent (failure to appear) or to his or her simple disappearance or stipulated resignation.

The Chief Trial Counsel notes that the first option, interim suspension at the outset, requires a hearing and carries a heavy burden of proof (as well it should). He argues that many cases are ended by stipulated discipline or resignation without the need for any hearing and are more quickly and economically accomplished by these means. This argument has theoretical merit, and there are examples where such agreements are obtained.
However, we also surveyed the first fifty Notices to Show Cause issued in 1991, reviewing the files and relevant documents and charges (see Exhibit 12). (One of the fifty files was effectively a duplication.) Although one hesitates to second-guess prosecution decisions, and there are always factors unavailable to outside counsel (e.g., availability of witnesses, credibility, document foundation problems, etc.), we believe that at least six of these 49 cases warranted vertical treatment and an attempt at some form of interim remedy prior to full NTSC hearing. In only one of the six was an interim remedy sought.

There are procedural difficulties in obtaining immediate interim suspension through section 6007(c). One impediment is the view that there must be an NTSC filed within 30 days and a hearing and decision within six months on the underlying case where interim suspension is ordered. If one has to do that, why not wait and just do it once, rather than have two hearings covering similar ground, inconveniencing witnesses, and wasting resources?

However, this timeline is not in the relevant statute and has been adjusted by rulemaking within the guidelines of Conway v. State Bar. Where the case is going to take more time than these timelines allow, we would recommend immediate proceedings under Business and Professions Code section 6007(h) to limit practice in the area of alleged abuse where needed for public protection. The Office of the Chief Trial Counsel recently stepped back successfully from a section 6007(c) to a section 6007(h) application in the Carruth case.

It is clear to us that much more use could be made of section 6007(h) interim restrictions short of suspension to protect the public. Such a proceeding does not require the difficulty of proof required of suspension, since the balancing here does not prejudice the respondent to the same extent as does suspension under the statute's balancing formula. It would only stimulate the further
settlement of the case, and would likely facilitate additional evidence where there are additional offenses.

Two State Bar reforms we otherwise recommend would facilitate such enhanced interim action. First, the State Bar must develop probation monitors for such proceedings. As discussed below, this is the kind of task appropriate for the Volunteer bar. Although such persons would be appointed by the Court (or preferably OT as discussed above) under section 6007(h), they can and should work under the direction of OT. Otherwise, their work is subject to the separate administration and confidentiality rules of the State Bar Court, which is not appropriate. Such a clarification of roles is consistent with the need discussed below to move the probation function en toto out of the State Bar Court. The management of probation and interim monitoring by the Court without involvement of OT creates separation of powers problems where there are violations of court orders. OT is in a position to seek court remedies; the State Bar Court should not be in the position of having to prosecute cases before itself. (See discussion of probation devolution from the State Bar Court in general in Part V below.)

Second, the enhancement of interim remedies discussed above is not realistic without immediate attorney/investigator referral in a vertical context.

3. Procedures: Letters of Warning/Agreements In Lieu of Discipline

Two of the devices being used by Intake/Legal Advice to expedite the administrative process at the pre-accusation stage is the Letter of warning first suggested in our Third Progress Report, and a new Agreement in lieu of discipline system developed by the Chief Trial Counsel. Both mechanisms recognize the high costs of formal adjudicatory proceedings and the desirability of reserving those proceedings for serious offenses likely to lead to meaningful suspension or
disbarment.

The letter of warning was suggested as a way to fill an important gap in the discretionary arsenal available to OT. At that time, the system used admonitions, private reprovals, and public reprovals. As discussed above, a private reproval may be a net gain for an accused attorney. No person knows of it, and it is collateral estoppel as to the alleged wrong. It is over and the result is negligible. The admonition is in many ways superior, even for marginal transgressions, because it abates the instant offense, keeping it open for reactivation if repetition occurs. However, the admonition requires the agreement of the accused attorney as do non-adjudicated (i.e., stipulated) private and public reprovals.

The letter of warning may now be issued by OI legal advisers or OT, whether the accused attorney agrees to it or not. It is simply issued. The matter is technically closed, but is recorded and is subject to reopening. If another matter or pattern is established justifying formal hearing and suspension or disbarment, it may be called up and added in. This alternative gives OI and OT a slot in which to put a substantial number of cases so they do not clog the process, while at the same time imposing quick and formal warnings and maintaining the matter on record for further use as appropriate. The Chief Trial Counsel adopted the method, and it is being used at both the OI and OT stages as appropriate.

During 1989, 357 such letters of warning were issued, 292 by OI legal advisers and the remainder by OT. All of them were registered in the file of the individual attorney for pattern detection purposes. In 1990, the total number increased to 550. The number in 1991 projects to 814 (see Table 11 above at page 43).

The second mechanism for expedited treatment is the ALD process developed by the Chief
Trial Counsel. In general, this process is somewhat analogous to diversion proceedings implemented on the criminal side for minor drug offenses. Where an accused attorney agrees to seek help or to perform specified conditions, the Chief Trial Counsel may agree to defer charges. The Chief Trial Counsel believes these decisions to defer prosecution are within the inherent powers of OT as the prosecuting agency. There are some advantages to such proceedings in limited circumstances, as follows: the matter complained of has not caused serious harm to consumers; the treatment or conditions specified have a reliable track record of success, and restitution to any injured consumers is a part of the process; and OT is able to monitor compliance and act quickly should the conditions not be met or continued unacceptable behavior occur.

The ALD procedure is perhaps most fruitfully used where an attorney has an alcohol or drug abuse problem which has not yet progressed to the point of serious consumer harm but may be anticipated to so progress. Where a successful program of treatment is available, a case may be made to try it prior to formal discipline.

In addition to supervising the OI legal advisers, senior OTC attorney Bill Davis has been directing the An lieu procedure. He has developed independent procedures for those signing such agreements. These include attendance at treatment centers and an agreement to submit to laboratory urine testing. The Bar has available to it services which, without warning and at periodic intervals, will demand and supervise the submission of a sample for testing. Subject to the caveats listed below, we support the Bar use of drug/alcohol testing of those who agree to it and of those found culpable of drug or alcohol abuse after hearing.

An lieu procedures may also be used to address competence problems. The Bar is implementing an Attorney Remedial Training System (ARTS). One tactic includes specific
education courses as an in lieu alternative to discipline. Bill Davis has noted that one early sign of imminent difficulty involves clear deficiencies in basic office management skills—keeping track of money, dates, and papers. These skills are not taught by law schools or tested in bar examinations. They are often in short supply and are particularly damaging to the single-person or small partnership efforts of recent law school graduates. Lacking any apprenticeship or mentoring system, the attorney regulatory system requires only generalized examination performance without demonstration of substantive knowledge of procedure in the actual likely area of substantive practice, or in the organizational skills which necessarily attend successful practice. As discussed below, waiting for problems to develop and treating them with education on a case-by-case basis is not the optimum strategy to address what is a prevalent failure of education and preparation. However, lacking preventive or educational measures, it may be necessary to adopt in lieu procedures on an early warning basis to cure office management and related deficiencies.

The ARTS program anticipated addressing 200-300 attorneys each year. The State Bar of California Ethics School has held several sessions, instructing 40 attorneys as of February 1991, and increasing markedly in attendance and number of sessions throughout this year. It appears that the total number taking the courses may exceed early estimates. The attorneys pay $75 each and sessions are held in alternative months in Los Angeles and San Francisco.

The Bar has received positive feedback from attendees. The course covers a broad range of common problem areas. Exhibit 13 presents the current course outline. Bar staff and other lecturers are supplemented by course materials, including model forms covering everything from attorney-client fee agreements to calendar memo forms to an office manual checklist. Given the number of sole practitioners lacking the basic skills covered, the course may be appropriate for
replication in other fora. We can testify that very little of the material covered is included in law
school curricula or in bar review preparation or examination. Perhaps those attorneys who seek to
begin practice in a partnership where none of the other attorneys have had more than two years of
practice experience should be required to take this course. This is clearly information any attorney
practicing from scratch needs to master in order to avoid the discipline system. If an ounce of
prevention is worth a pound of cure, why is not this important preventive measure applied before the
harm occurs? Where established firms hire counsel, these matters are institutionally handled, or an
apprenticeship is served. But there is no such safeguard where a practitioner seeks to practice alone,
or where others in the firm are also inexperienced.

The Ethics School has been expanded and is now required not only in ALD agreements, but
in most settlement stipulations, and the State Bar Court is increasingly requiring it as a condition of
probation. It is not funded in the budget and is currently being carried by Intake/Legal Advice as a
cross-subsidized service. It is unclear why the Education Section of the Bar does not pick up this
function.

The An lieu process does pose some dangers. Unlike diversion on the criminal side, it is
imposed by prosecutorial discretion prior to any public process. Hence, the embarrassment and
pressure of a prospective NTSC filing (which makes a Bar disciplinary matter public) is held out as
inducement to agree to the conditions of OT. And also unlike criminal diversion, there is no court
review or independent probation monitoring. Further, there is a danger that the process could be
overused to relieve OT hearing burdens and forego what may be appropriate formal and public
discipline. However, we believe that the criteria being developed by OT ameliorate many of these
concerns. So long as the option is confined to cases where harm is more prospective than realized

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and directs persons to programs of proven efficacy, it may be justified.

We have asked the Chief Trial Counsel to submit ALD cases to us for review. We have now received a substantial number of the agreements entered into, including all of those reached from November 1990 through June 1991. Our review indicates that the agreements are properly imposed for the kinds of problems amenable to An lieu@reatment. Generally, they are cases where an attorney is beginning to shade into a questionable practice either in his/her accounting, deposition practice, or advertising. The case is not yet damaging enough or the transgression clear enough for serious public discipline. However, a letter of warning is considered insufficient. The Chief Trial Counsel is using the An lieu@ procedure to obtain direct agreement to cease and desist certain accounting, advertising, or other practices with the club that failure to comply constitutes a breach of that agreement. We believe that OT’s application of the ALD procedure has been judicious and appropriate where it has been used thus far.

4. Use of the Volunteer Bar

The competence-enhancing options currently being explored by the Bar may include the use of local committees of practicing attorney volunteers. (See Business and Professions Code section 6040 et seq.) We believe that the volunteer Bar may be usefully employed for the following kinds of assistance: probation monitoring, re-education assistance, formulating examinations, administering oral examinations (subject to Bar review and conflict of interest protections), and helping to find substitute counsel for clients who are abandoned, either due to section 6180/6190 qualification, or for other reasons (e.g., a number of San Diego JAG Corps officers were reassigned on short notice to the Persian Gulf in early 1991). Decisions about whether to require an examination, what training should be required, and whether discipline should be foregone should
not be within the purview of volunteer practitioners, even as delegatees of the Bar.

In addition, and as mentioned in the Sixth Progress Report, OT should consider asking the Board of Governors to appoint esteemed experts in subject areas of import to Bar discipline. These outside volunteer panels could advise OT where allegations concern complex areas of substantive law. The panels could also serve as expert witnesses to facilitate informed decisions by the new State Bar Court where specialized issues arise.

We believe that the volunteer Bar is best used as probation monitors, client protection where there is abandonment, and as expert witnesses. In these capacities, those currently practicing in the profession provide invaluable information within their own personal knowledge or expertise, without inappropriately serving as the official decisionmakers of the state exercising direct police power authority. (See detailed discussion of the proper use of local bar versus State Bar officials in the handling of abandoned practice or disabled attorney cases under Business and Professions Code section 6180 in the Eighth Progress Report at 57-61.) In summary, the Bar should support clarifying legislation to give clear roles and appropriate titles to appointed local practitioners serving as probation officers, or as special officers to adjudicate or locally administer attorney disability or abandonment cases.

The Bar should schedule a one- or two-day training session for such local Bar monitors, and pay a symbolic stipend and out-of-pocket costs. The monitors should be supplied with forms and guidelines. Where an attorney seeks voluntarily to terminate practice and allocate clients, these monitors should have automatic authority to act quickly, with simultaneous notice to the Bar. Where an attorney resists assumption of practice, the monitor should then notify the Bar immediately, and act as local counsel operating at the direction of an immediately-assigned State Bar trial
counsel/investigator team to facilitate evidence gathering, petition filing and appearances, and client protection.

The State Bar is already considering a program of attorney mentors, to include 200-300 attorneys throughout the state able to help attorneys with difficulties as part of the ARTS program. That task should be expanded to include these section 6180/6190 functions, and probation monitoring as well as soon as probation can be separated out from the State Bar Court (discussed infra).

5. Public Disclosure

The Bar’s public disclosure policies regarding discipline proceedings remain unsettled. On the one extreme is a clear and strong public information policy, such as that of the Oregon Bar, which mandates full disclosure of the status of all matters, whether under investigation, post-filing of a formal accusation, or as to prior discipline. On the other extreme is the maintenance of confidentiality until or unless a finding of culpability has been sustained following appeal.

As explained in our Third through Eighth Progress Reports, the California Bar maintains the confidentiality of its investigations, and opens the process to public scrutiny only at point of NTSC filing or initial public proceeding (e.g., a motion for interim suspension prior to the filing of a NTSC). After a 1989 review, this policy was generally upheld by the Bar, although recent alterations to Rule 224 allowed the Chief Trial Counsel to disclose pending investigations and pending criminal proceedings under undefined criteria.

Effective January 1, 1991, Assembly Bill 3991 (Brown) amended Business and Professions Code section 6086.1 to provide that the Chief Trial Counsel or State Bar President, when warranted for the protection of the public and after private notice to the member, may issue one or more public
announcements confirming the fact of an investigation. The Chief Trial Counsel has proposed six guidelines to drive this disclosure decision: continuing pattern or ongoing misconduct, record of prior discipline, severity of probable disciplinary sanctions, waiver by the member, expected completion date of the investigation, and member non-cooperation with the Bar.

We agree with the thrust of the criteria proposed by the Chief Trial Counsel. Where there is a clear case of client harm occurring in generalized fashion by an attorney, there is a clear obligation to inform the public to mitigate future damage. There is no jury sequestration issue here; the trier of fact is a professional judge who will not be unduly prejudiced by such an announcement in later disciplinary proceedings. Of course, should the Bar be unable to support its contentions in those subsequent proceedings, it should not only pay the costs of the accused, but issue an even louder apology for the record.

However, the Chief Trial Counsel's proposals do not clarify what the Bar will disclose to consumers who call to ask about attorneys who are respondents under serious investigation. There may be 25 complaints against an attorney, many of them involving trust fund theft. But if the matters are all still under investigation, a consumer who seeks to retain that attorney and has the initiative to check with the Bar may be told that there is no record of discipline and no charges pending. That is a misleading message. This example is not entirely far-fetched, since many attorneys have more than five complaints pending against them. Further, the Bar often attempts to consolidate these complaints for one accusation and hearing. Considering the plethora of multi-count cases, the relatively few cases subjected to interim suspension (involuntary inactive enrollment) (which would make them disclosable prior to NTSC issuance), and the still-extant delay in OI, the Bar cannot justify applying this law simply by making an occasional announcement in the
most extreme case. Its adopted guidelines are sensible, but they must be applied outside the public announcement scenario, to the consumer’s request for information about an attorney. We believe that each case should be red-flagged where the evidence is strong and the counts multiple or abuse continuing, so that at the very least those who call will not be misled by the Bar’s response.

We have urged the Bar to adopt a policy under which it would disclose, upon inquiry, any pending criminal charges against an attorney; any other information on the public record relevant to attorney performance, including filed malpractice cases, criminal arrests, discipline by another California or out-of-state regulatory agency; any current Bar investigation designated Priority 1; and where three or more investigations from different complainants are pending against an attorney.8

As noted in several prior Progress Reports, these disclosures should include a scripted disclaimer where applicable that those matters are under investigation and that no decision to file an accusation has yet been made. In this manner, one or two pending complaints of low priority and any matter which has been closed for insufficiency of facts would not be disclosed. This policy would give the consumer sufficient information to preclude the lulling deception of Bar denial where serious cases actually do exist. At the same time, consumers would not be told of inquiries, NSF/closed cases, or of one or two low priority cases of very uncertain merit. The increasing quality of initial filtering and the priority system, together with the very important disclaimer, would allow the consumer to weigh

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8. In addition, and as the Bar’s Task Force on SB 1498 had tentatively recommended, all special proceedings (6007(c), 6180, 6190, perpetuation, etc.) should be affirmatively publicized due to the need for forewarning. Further, the Task Force has recommended disclosure of the following:
   1) instances wherein a respondent has been designated for a special proceeding;
   2) any situation wherein the respondent has authorized such a disclosure and to which the Chief Trial Counsel concurs;
   3) instances wherein a statement of the case has been accepted by the Office of Trials for NTSC preparation;
   4) in all instances wherein a Rule 224 waiver has been granted by the Chief Trial Counsel wherein he/she believes the public interest would be served; and
   5) arrest/conviction monitoring data as allowed by statute. Regrettably, these recommendations have been overridden by new Rule 224 and objections from the Bar’s Office of General Counsel.
the matter without excessive paternalism by the Bar.

With regard to one other confidentiality issue raised in our Seventh and Eighth Progress Reports, the current confidentiality of all actions under Business and Professions Code section 6007(b) is unjustified. That rule (section 225(a)(1) of the Bar’s Rules of Procedure) allows the Board to enroll inactive (i.e., suspend from practice) a member where he/she asserts mental incompetence, the court enters an order assuming jurisdiction over the law practice of a disabled attorney, or the Board finds that because of mental infirmity or illness, or because of habitual use of intoxicants or drugs, [the member] is (1) unable or habitually fails to perform his duties....@ Any of these circumstances is embarrassing and cause for some sensitivity. But, where the Bar is in fact proceeding formally under this section, the current rule that actions under this section are confidential is not in the public interest. These attorneys are, in fact, holding themselves out to the public. The public is relying on their services, trusting the license granted by the Bar. Should any of the circumstances described in this section give rise to any action by the Bar or by a court, it should be a matter of public information. The Court reserves the right to grant protective orders to seal specific records relevant to medical treatment privacy or related legitimate privacy rights, e.g., under California Constitution, Article I, section 1.

We also believe that those matters approved for disclosure by the Chief Trial Counsel should include all matters collected by the Bar which are otherwise part of the public record, such as arrests, civil malpractice filings, discipline by other agencies or jurisdictions, and public 6007(b) actions discussed above.

We reiterate our previous disagreement with the Bar’s Office of General Counsel concerning the proper role of the Bar in releasing public information about a member of the Bar concerning
discipline in other jurisdictions, criminal arrests, and civil malpractice filings. This information should be revealed, with appropriate disclaimers, to anyone who calls. The State Bar exists as a state agency to provide information to assist the public and to protect it from harm caused by its licensees. To fail to transmit relevant public information is an abdication of that duty. At present, consumers are not told of court sanctions or malpractice suits. They may be told of criminal convictions.

The cases which have previously been cited by the General Counsel justifying her cautionary advice are distinguishable as to State Bar records. (Supreme Court interpretations of Article I, section 1 privacy protections should not apply to matters: (a) on the public record; (b) relevant to the performance of a state licensee; and (c) continuously monitored and updated by the Bar for accuracy.) However, the advice of the General Counsel for a prophylactic statute to assure confidentiality to informants where appropriate, and to institutionalize accuracy controls, may be advisable.

We believe that the concerns of the General Counsel have merit where applied to the disclosure of NSF check reports from banks. This is more directly investigative, may involve issues relevant to the Right to Financial Privacy Act, and is not on the public record.

Finally, the General Counsel has opined that the actions of the Client Security Fund Commission may not be public to the extent they are part of a Bar investigation which must remain confidential under the terms of Business and Professions Code section 6094.5. The Commission feels that the decision of a public body to spend public money should be public. We agree, although there may be aspects of a Client Security Fund case involving ongoing investigative facts which are properly confidential. OT has expressed concern over how the Commission may make public its files on matters still under discipline investigation. Its concern is consistent with our position that where
there is such a discipline case, unless there is a default payment from the Fund, the Fund award should be folded into the OT case and awarded by the State Bar Court rather than subjected to after-discipline reinvestigation/adjudication involving duplication of effort and gratuitous delay, as is currently the case.

Exhibit 14 includes an initial draft of legislation designed to change current practice, and allow consumers who call in to be told by the State Bar, a public agency, public information about state licensees.

**H. Complainants——Grievance Panel**

Effective January 1987, SB 1543 (Presley) created a Complainants——Grievance Panel (CGP) composed of seven persons. This Panel is charged with the review of closed investigations, closed inquiries, admonitions, warning letters, or agreements in lieu of discipline issued prior to the issuance of a Notice to Show Cause. Its 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), formerly the Administrative Compliance Unit (ACU), directed by Lynne Geminder. In 1988, the CAR unit was understaffed in relation to what proved to be an increasingly heavy workload.
Geminder was then assisted by one staff attorney, one investigator, one paralegal, and two secretaries. In 1990, CAR grew inadequately to include Geminder, one Attorney IV, one Attorney III, one Attorney II, a paralegal, one administrative assistant, two legal secretaries, and a clerk.

The 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 the increases in staff, 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. In the Eighth Progress Report of the Bar Monitor, we analyzed the current serious delays attending this backlog (see especially Exhibit F of the Eighth Progress Report). In summary, close to one-half of the closed inquiries still open within the CAR backlog are more than one year old at this point. Further, 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, it 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.

We asked CAR Director Lynne Geminder to give us a list of the measures to be undertaken to dissipate the backlog. Her memorandum outlining in detail her intended steps was presented in Exhibit G of the Eighth Progress Report. Exhibit 15 below presents the most recent measures suggested by the CAR Director and CGP, which require Bar approval.

In general, CAR is attempting a thoughtful and sensible series of measures, including expanded use of the consent calendar, a modified standard of review now adopted (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, and the addition of more staff to CAR.

Most recently, CAR has proposed the use of OI investigators, chiefly the OI team leaders, to perform the necessary staff work to eliminate the backlog. There is an obvious danger to institutionalizing such a staff commitment. The task of the Panel is to perform an independent check on the rest of the Bar discipline system including OI. The excessive number of closures being appealed makes the Panel somewhat dependent on its staff. However, the OI work will be conducted by persons who did not conduct the initial investigations, and will focus on closed inquiries which were decided by Intake/Legal Advice personnel. Further, it is not intended to be institutionalized; it is scheduled as a one-time commitment of OI to dissipate only now-existing backlogged cases, with a specified sunset of December 31, 1992. After that date, CGP staff independent of OI and OT will attempt to staff all cases as they arrive.

The CGP list includes 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:

(1) Impose no turnaround time limit on OI\textsuperscript{re-investigation}, but impose one on CAR. This is where the delay exists.

(2) Most important, stop the 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 a result of a 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 result in any empirical result. (For a detailed discussion of the merits of this option, see Eighth Progress Report at 67-77.)

(3) We recommend that the Complainants=Grievance Panel add two public members. This would bring the total number 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 requires it, 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 \textit{en banc} Panel consideration of every case allows.

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=disciplinary 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.
We have written these suggested reforms into the draft measure included as Exhibit 14 below.

We wish to make our concerns about CAR and the Complainants' Grievance Panel clear. We agree in general with CGP's statutory mandate. We agree that the Panel has a point beyond the correction of erroneous closures. That additional purpose is twofold: first, to provide an avenue of final redress for consumers who lack confidence in the judgment or procedures leading to the closure of their complaints; and second, to provide an institutional check on Intake/Legal Advice and OI. We would argue that the latter institutional check purpose is more important than the avenue of redress function. There is both a theoretical and a practical basis for this judgment. Theoretically, institutions which are not working can be remedied by correcting their errors systematically so they work as intended, or by superimposing another set of decisionmakers to review the decisions case by case. A structural check which improves the quality of decisionmaking in the first place is preferred over one which institutionalizes distrust and retreads the same ground again and again. This Panel will be an important check on the performance of that part of the system which closes the vast majority of complaints against attorneys, prior to and without due process hearing for aggrieved consumers.

I. State Bar Court

In 1989, the California Supreme Court made all of its specified appointments to the new State Bar Court created by SB 1498 (Presley). Three review judges, including the State's first modern non-lawyer judge, and six hearing judges were appointed June 2, 1989; eight of the nine were sworn into office in July 1989, and the ninth in December 1989. The appointees are Presiding Judge Lise Pearlman, review judges H. Kenneth Norian and Ronald Stovitz, and hearing judges Alan
Goldhammer, Jennifer Gee, Christopher Smith, Carlos Velarde, Ellen Peck, and JoAnne Robbins.

The Court’s Executive Committee, which formulates Rules of Practice to guide its operations, has been selected. The Hearing Department has been hearing cases since September 1989, and the Review Department has been hearing oral arguments since January 1990.

We discussed the court’s format and set-up procedures in the Sixth and Seventh Progress Reports. The Court is now more fully staffed and, with the addition of five attorney positions to assist the hearing judges in June 1990, the initially sometimes tardy pace of hearing decision production has quickened.

1. Workload

We expressed concern about the workload of the Los Angeles hearing panel in our Seventh Progress Report. Our concern has since lessened partially because of the pleasant consequences of 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.

As noted in the Eighth Progress Report, State Bar Court Presiding Judge Lise Pearlman is unambiguous about the reason for the change. She has informed us that the new system of professional independent judges imposes such a consistency and predictability of result that experienced Bar and respondent counsel often stipulate to the anticipated outcome. There is perhaps
no better indication of a properly functioning adjudicatory system than a predictability level which makes its actual operation largely unnecessary. (Note that the classical Greeks believed that to qualify as a \textit{professional}, one must seek to eliminate the need for his/her services.)

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.

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 request 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. Presiding Judge Pearlman believes that this result is yet another consequence of predictability. We agree. It further shortens the average time between acts giving rise to discipline and effectuation of a penalty.

Exhibit 16 presents the sum total output of the Review Department of the new State Bar Court to January 23, 1991. The case type on the chart refers to original proceedings (o), moral character hearings (m), probation (p), or conviction referral (c). The x/c column identifies whether the case was contested throughout the Review Department proceeding (c). The chart does indicate that approximately twelve cases consumed more than one year in this review process. However, the longest case took about fifteen months. The average is 219 days from the filing of a request for review to final decision. The average time in drafting an opinion from submission of the case to filing is 71 days.
Exhibit 17 is a status report of Hearing Department cases submitted to the hearing judges as of May 31, 1991.

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. Table 14 includes the most recent data on State Bar Court output. However, Table 10 above reveals the trend over three years (see page 42). Prior to 1989, the State Bar Court could expect to receive from 450 to 550 complaints in cases filed per year. In 1989, it received a record 756 complaints. In 1990, the number climbed to 967. In 1991, the number by June 30 is 924, projecting to over 1,800. 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.

2. Procedures
The State Bar Court is now more fully staffed and beginning to develop its procedures. It is redrafting its Rules of Procedure for submission to the Board of Governors and hopes to have them approved next year. (Note that the Rules of Procedure are approved by the Bar Board of Governors, which provides a 90-day comment period.) The State Bar Court will also be making some refinements to the Rules of Practice. These rules pertain to the operations of the State Bar Court itself, and are adopted by the Executive Committee of the Court.

### 3. Finality

Critical to the success of the new discipline system has been the recent adoption by the Supreme Court of the Finality rule. Exhibit 18 presents the first aspect of the rule, which became effective on December 1, 1990. Under this rule, a State Bar Court recommendation of discipline may be adopted as a final order of the Supreme Court unless review is sought by either the respondent or the Chief Trial Counsel within 60 days. Hence, a stipulated judgment of the State Bar Court could be effectuated within 60 days of stipulation filing with the Supreme Court. The rule also includes detailed filing timelines and procedures for the nomination of vacant positions on the State Bar Court.

On February 1, 1991, another aspect of the finality rule became effective. California Supreme Court review of State Bar Court discipline decisions is now discretionary, as are petitions for review in other types of cases. This is a very important reform. Only about 10% of State Bar Court judgments historically result in petitions for review. But previously, where any meaningful discipline had been imposed, even a very short suspension, the Supreme Court examined each and every case. This consideration took substantial time, and distracted the Court from other very important cases.

And even where review is sought, the Court proposes to limit its discretionary review to
cases where there are important questions of law, the State Bar has operated in excess of its jurisdiction, the petitioner was not afforded a fair hearing, or the discipline is inappropriate in light of the record. Based on the safeguards built into the new model, it is doubtful that the Court will feel compelled to review more than several cases in any year.

In addition, the Supreme Court is entrusting the State Bar Court with the preparation of draft Supreme Court orders in uncontested cases and all of the decisions in the handling of conviction referrals, and in other areas where the State Bar Court can operate in a much more timely fashion. (See Table 14 at page 122.)

In total, the now-adopted finality rule of the Supreme Court is a quiet but essential endorsement of the reform structure established in SB 1498 (Presley). It is a vote of confidence manifested beyond rhetorical support. It is not merely an expression of approval, but is far more meaningful: a significant delegation of authority.
TABLE 14: STATE BAR COURT ACTIONS

<table>
<thead>
<tr>
<th>JUNE 1991</th>
<th>YTD 1991</th>
<th>ENTIRE 1990*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Augmented conviction referrals</td>
<td>8</td>
<td>25</td>
</tr>
<tr>
<td>Conviction referrals</td>
<td>16</td>
<td>90</td>
</tr>
<tr>
<td>Extend effective date of suspension order</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Dismissal due to resignation</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Extend time to comply with reproval conditions</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Extend time to pass PRE</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Interim suspensions</td>
<td>8</td>
<td>33</td>
</tr>
<tr>
<td>20-day notice to show cause (convictions)</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>Modify order of interim suspension</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Suspensions/failure to pass PRE</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>Vacate interim suspension orders</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Delay effective date of suspension</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Partial stay of interim suspension</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Rule 955 referral</td>
<td>6</td>
<td>26</td>
</tr>
<tr>
<td>Vacate Rule 955 referral order</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Vacate order, extend PRE time</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Delay effective date of interim suspension</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Deny petition interim suspension</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Vacate suspension/PRE</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Number of cases filed</td>
<td>107</td>
<td>593</td>
</tr>
<tr>
<td>Number of cases effectuated</td>
<td>40**</td>
<td>263***</td>
</tr>
<tr>
<td>Number of resignations filed</td>
<td>5**</td>
<td>45***</td>
</tr>
<tr>
<td>Number of convictions filed</td>
<td>14**</td>
<td>76***</td>
</tr>
</tbody>
</table>

PROBATION STATISTICS:

<table>
<thead>
<tr>
<th></th>
<th>JUNE 1991</th>
<th>YTD 1991</th>
<th>ENTIRE 1990*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of cases opened</td>
<td>30</td>
<td>238</td>
<td>419</td>
</tr>
<tr>
<td>Number of cases closed</td>
<td>21</td>
<td>93</td>
<td>252</td>
</tr>
<tr>
<td>Notices to show cause filed</td>
<td>7</td>
<td>44</td>
<td>31</td>
</tr>
<tr>
<td>Certifications of the file done for trial counsel</td>
<td>9</td>
<td>37</td>
<td>44</td>
</tr>
<tr>
<td>Testimony/declaration for trial counsel</td>
<td>2</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>955 noncompliance referred to hearing</td>
<td>6</td>
<td>41</td>
<td>35</td>
</tr>
<tr>
<td>9-101 referred to trial counsel</td>
<td>6</td>
<td>23</td>
<td>27</td>
</tr>
<tr>
<td>Referrals to presiding judge re:PRE/955 noncompliance</td>
<td>6</td>
<td>67</td>
<td>144</td>
</tr>
<tr>
<td>Cases opened for monitoring of 955 compliance only</td>
<td>12</td>
<td>93</td>
<td>N/A</td>
</tr>
<tr>
<td>Cases closed for monitoring of 955 compliance only</td>
<td>10</td>
<td>82</td>
<td>N/A</td>
</tr>
</tbody>
</table>

* Finality Rule did not exist prior to 1991 and data begins 1-1-91 for some categories.
** Numbers are for May 1991
*** Through May 1991
4. Output Performance

The output of the Bar discipline system is properly analyzed by adding disbarments, inactive enrollments for threat of harm, and resignations with charges pending as one category; and suspensions, straight probations, and public reprovals as additional respective separate categories of formal public discipline. In addition, interim suspensions or license restriction orders should be catalogued. Finally, and separate from the State Bar Court, the Bar should be grouping private reprovals, admonitions, and letters of warning into an informal discipline count.

Table 11 above (see page 43), presented in the Part III discussion of the last five years, outlines the evolution of State Bar Court output. As the Table well illustrates, the State Bar reforms have been accompanied by dramatic increases in the number of attorneys disciplined. In 1985, 51 attorneys were disbarred or resigned with charges pending. By 1991, that number had almost tripled, and is projected to 150 in the current year. The number of attorneys who suffered actual suspension has gone up five times, from 51 to a projected 256 for 1991. In terms of informal discipline, such as reprovals and letters of warning, the number has increased by more than twelve times.

5. State Bar Court Reporter

The State Bar has proposed the creation of a State Bar Court Reporter. The Board of Governors is hesitant to approve funding to start up the publication because of budgetary uncertainties. This is unfortunate and short-sighted. As Stuart Forsyth of the State Bar Court has projected, the Reporter will be self-supporting within three years of initial publication.

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 the 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.

J. Role of State Bar Court within the Discipline System

As we noted in the Seventh and Eighth Progress Reports, we are concerned about three structural issues relevant to the allocation of duties between the new State Bar Court and other aspects of Bar discipline.

1. Committee of Bar Examiners

The Committee of Bar Examiners (CBE) and the Client Security Fund Commission conduct separate proceedings outside the discipline system. Last year, CBE considered the removal of its moral character hearings from the Bar’s discipline system. (The Client Security Fund Commission is discussed separately below.) We believe that in both cases, the resources committed to and the independent structure of the State Bar Court should be fully used. In the case of the CBE, our reasons for this recommendation were set forth in some detail in the Seventh Progress Report. Since its issuance, the Bar Board of Governors has approved a version of Rule X, which promises the
continuation of moral character hearing proceedings within the State Bar Court. At present, 39 moral character matters are pending. Further, they are prosecuted by the Office of Trials, which is appropriate.

2. State Bar Court Probation Department

The second area of structural concern involves the probation activities of the State Bar Court. At present, the Office of the State Bar Court continues to include a probation function, which includes monitoring of probationers and submission of probation violations to OT for nondiscretionary prosecution. The new status of the State Bar Court as the only judicial review as of right probably mandates some alteration of this structure. It is inappropriate to have a State Bar Court system order discipline, monitor probation, detect possible violations, and then adjudicate the matter, all within the confines of a single office.

Further, it is the position of the State Bar Court that its Probation Department reports, interviews, and examination results vis-a-vis respondents and probationers are confidential and may not be shared with the Office of Trials. Hence, there is a regrettable fragmentation of information. If a probationer is engaged in violative behavior, the State Bar Court may receive notice but not transmit it to OT. If OT receives information indicating acts which would not warrant initiation of a discipline case but which may indicate violation of probationary terms, there is no assurance that there will be a combined evaluation for consideration of probation revocation. This bifurcated system does not work either in theory or practice.

Although we have suggested expansion of State Bar Court jurisdiction in general, here we believe it appropriate to divest the Court of the probation function and transfer that responsibility to the Office of Trials. Here, OT may more expansively use the volunteer bar to assist in probation
compliance and monitoring, and may make traditional decisions to seek probation revocation.

This transfer would have an important additional dividend. There is presently no automatic connection between the Office of Intake/Legal Advice and the probation system. Under the current structure, many inquiries and minor complaints may very easily be notice of probation violations, but they will not be detected as such. This is because the terms of probation, the intake computer array, complaint analyst training, and probation revocation decisions are not coordinated. There is no automatic cross-reference to see whether a de novo complaint concerns an existing term of probation, nor does the Intake Unit evaluate a new complaint for probation revocation purposes. That procedure should be the case, but it will not occur without the integration of probation and intake and the further refinement of the intake computer system.

3. Discipline Committee

A third area of structural concern is the continuing participation of the Discipline Committee in matters which should be reserved to the State Bar Court. The Board of Governors and its committees have serious responsibilities under the law. Those most appropriate for its composition involve rulemaking. Here the Board and its important Discipline Committee serve as quasi-legislators, filling in the broad language of enabling statutes by implementing rules, setting standards, and debating issues of professional conduct. In contrast, the functions of prosecution and adjudication are appropriate for professional, consistent judgment independent from that milieu.

The Bar has recognized this distinction by agreeing to divest itself of the adjudication of individual cases. We believe it is appropriate to consider the concomitant divestiture of the current jurisdiction of the Committee to hear petitions for aule waiver by respondents seeking reinstatement before the five-year minimum period. This is an adjudication masquerading as a aule
waiver, an individualized case argued on the evidence. It requires the application of facts to a standard in a consistent and equitable manner. The Discipline Committee is not the entity before which such matters should be decided. Yet the Committee has heard repeated petitions (in closed session) to shorten time for reinstatement in 1990 and in 1991.

This is an inappropriate function for the Committee, and we are pleased to report that the Bar is now seeking public comment on a proposed revision to Rule 662 to allow the State Bar Court to handle these matters.

K. Client Security Fund

1. Funding Adequacy

In our Seventh and Eighth Progress Reports, we noted that a 1989 actuarial study prepared for the CSF concluded that the Fund could experience a shortfall in 1990 or 1991 if assessments are 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 (see Exhibit 19) 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. (See our discussion of this subject and the citation of the Ohio policy in the Seventh and Eighth Progress Reports.)

2. Expediting Payment

a. The Default Procedure

In the past, we and others suggested a default procedure enabling the CSF to make immediate payment before discipline is imposed. This default option is enhanced by certain changes included in SB 1498, e.g., the requirement of Fund reimbursement by an attorney responsible for a claim payout. In May 1989, the CSF Commission, which had been considering sua sponte a simpler process for dealing with small claims, 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. The current version of applicable Rule 41, guiding default payments, is included in Exhibit K of the Eighth Progress Report.

b. Consolidation of CSF with the Disciplinary Process

In prior reports, we have 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 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 claim evaluation process.

Since our last report, CSF staff has taken several important steps to explore the viability of integrating claims processing with the disciplinary process. On October 24, 1990, the Commission staff met with OI, OT, and State Bar Court staff to outline the issues involved with consolidation. Exhibit 20 presents an outline of the issues listed. We do not see any of these issues as presenting a significant barrier 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 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.

3. Coverage

We also believe that the Fund should be expanded to cover two other situations. First, where there is a fee arbitration award against an attorney but he or she does not pay that award, it should be satisfied by the Fund, and the Fund should then assume the task of going after the attorney for recompenseCnot the aggrieved client. This reform was suggested on July 19, 1991 by James E. Towery, Presiding Arbitrator of the Fee Arbitration Department of the State Bar. We agree.

Second, the Fund should similarly assume payment for any legal malpractice award which is not paid by an attorneyCwith the right to litigate coverage where a default judgment is inappropriately rendered.

Finally, all caps on CSF awards should be eliminated. If an attorney expends the life savings of $100,000 of ten different families each, there should be full recovery.

These reforms are equitable and interact with the discipline system. Attorneys control and pay for the Client Security Fund. They also uniquely and directly control their own system of regulation. They created a fee arbitration system which is itself controlled by attorney arbitrators. They have chosen not to require malpractice insurance (discussed below). Where one of their number suffers a judgment for overcollection of fees or for damages caused by negligence and cannot pay, the amount is properly socialized to other attorneys, who are capable of excising the dishonest and incompetent from the profession through a discipline system they fund and still largely control. One way to provide a proper incentive to minimize such consumer losses, or the flouting of arbitration or court orders, is to make sure those capable of ameliorating the harm pay the price of its imposition. If the fees for the Client Security Fund rise as a result to $100 or higher, the
incentive to take preventive action is increased.

The managers of retirement or compensation funds, in general, often forget that the goal is payment where warranted, not preservation of the Fund. In our years of reviewing regulatory agencies, we have observed the phenomenon of fiduciary shift from payment to fund protection again and again. The CSF has to a large extent resisted this fiduciary shift, but its temptation is present. The CSF's orientation should be to pay and then to seek assessment to compensate the fund; the former must control the latter, not vice versa. Unlike one's personal finances, here Parkinson's Law is not foolhardy, but proper: income should rise to meet expenditures. If one wants to reduce outlays, reduce their cause, not compensation. Compensation and assessment must be spurred both for equity, and to maintain pressure to address causation.

L. Appointment of the Chief Trial Counsel

The prosecutor of the Bar's discipline system makes critical adjudicative decisions. Increasingly, cases are decided informally by letter of warning or by agreements in lieu of discipline. The Board of Governors of the State Bar is primarily a rulemaking body and is not designed or equipped to render adjudicative decisions, including whether individual cases should or should not be prosecuted. In addition, the Chief Trial Counsel provides critical information to the Board of Governors, Chief Justice of the California Supreme Court, and legislature about the status, needs, and problems in attorney discipline.

The conflict between the sensitivities of the non-discipline upper staff of the Board of Governors and these prosecutorial duties was recently highlighted by AB 687 (Brown), as amended. A respected trial attorney had been investigated by the Bar for billing more than the statutory maximum in a medical malpractice case. AB 687, currently pending in the legislature, would
remove that offense from Bar discipline jurisdiction.9

Bar staff, perhaps understandably hesitant to challenge a law authored by the Speaker given the Bar’s overall budget needs, initially declined to take a position on this bill which would divest the Bar of part of its discipline jurisdiction. When and if the Bar makes such a policy decision, the Chief Trial Counsel as the Board’s appointee under the present structure is obligated to stand silent. But the Chief Trial Counsel must be in a position to provide independent information and commentary on such matters; and he/she must be structurally free to make discipline prosecution decisions solely on the merits.

This example is not intended to be exhaustive of the reasons and rationale for OT and Chief Trial Counsel separateness from the Board of Governors and its own upper staff. We believe the law should be amended to make the Chief Trial Counsel appointed by either the Attorney General or the Governor, confirmed by the Senate, and given substantial independent powers.

IV. EARLY INTERVENTION/PREVENTION/PROTECTION

A. Trouble Spots and Advance Detection

In the Seventh and Eighth Progress Reports, we outlined in some detail the Bar’s efforts at alcohol and drug abuse prevention. In general, our recommendations remain unaltered.

The Seventh Progress Report also included a suggestion that the Bar concentrate on trouble spots such as the medical lien problem which appear again and again. The failure of attorneys to pay medical expenses and related medical lien problems alone account for 10-15% of all cases entering OI!

9. Under AB 687, any fee to which the client agrees, is not fraudulent, and is approved by the court, may not be the subject of discipline. But neither clients nor judges may know of the maximum fee limits, and the bill imposes no obligation on the part of the overcharging attorney to so inform them. With an ignorant or adhesive sign-off, the attorney
And we suggested that the Bar use the failure to pay Bar dues in a timely manner as a major trigger for its own inquiry. A full 40% of those later disciplined come from this relatively small group we have seen no other more reliable predictor of subsequent discipline.

Finally, we endorse the Bar’s current effort to add random financial audits and impose specific accounting requirements on all client trust accounts. Other states, including New Jersey and North Carolina, have significantly reduced client trust account thefts through such preventive efforts. Exhibit 10 presents a number of OT ideas to prevent attorney financial thefts, including these. The NSF reporting mandated by SB 1498 (Presley) is now being fully implemented (the large banks are now on line as of August 1991). But even on a reduced basis, the Bar received 120 NSF reports just during the months of November and December 1990. To be sure, some of these reports are the result of minor negligence or the bouncing of a deposit check beyond the control of the attorney; but a large percentage of them are indicative of dishonesty or dangerously negligent financial management.

The success of the NSF check notification process is an example of the benefit of early warning. Some of the additional CRAFTS proposals show promise of prevention, as we have noted. It is unfortunate that these measures are not in the Bar’s budget. They should be included. At least some of them are likely to save the rest of the operation and the Client Security Fund a great deal more than they will cost to implement.

B. Competence

Pursuant to SB 905 (Davis), beginning in 1992 attorneys must complete 36 units of mandatory 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 is able to violate the law with impunity from professional discipline.
inexperienced attorneys is large and growing larger. Second, the Bar’s discipline system attacks this 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 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 previously, 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.

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 at risk or without coverage. This number and 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 do not 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.

D. Honesty

The Bar must begin to search for ways to deter attorney deceit, particularly in the practice of
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 could 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.

V. CONSUMER SURVEY

Over the past few months, we mailed a substantial comprehensive consumer survey to approximately 3,000 complaining witnesses who lodged complaints with the Bar from 1982 to 1990. We received well over 500 responses, a statistically significant response, and a surprising one given
the four pages which had to be completed.

The survey results are presented in Exhibit 21. Although we have arrayed all of the data, the survey results for years 1982-84 are not statistically significant and consist of merely 1 to 6 responses each. However, the results from 1985-90, the intended focus of the survey, present relevant results. In general, these results indicate measurable and steadily increasing satisfaction with the performance of the Bar discipline system from 1985 to 1990 as the reforms have been implemented, with the most significant increases occurring during the most recent period. These results are consistent as to: difficulty of calling the Office of Investigations, courtesy of the receptionist, helpfulness of the receptionist, speed of investigation, thoroughness of investigation, and fairness of the investigation.

The results as to the Complainants Grievance Panel and the State Bar Court are substantially less reliable due to the much smaller number of persons interacting with them and hence able to respond. Nevertheless, the results are as follows: The one part of the Bar performance which fell substantially in 1990 by consumer perception is the speed of the Complainants Grievance Panel, which declined to a very low level of 2.0 in consumer satisfaction. This judgment of the respondents is well-supported by CGP backlog and by our analysis thereof in previous Progress Reports and above. Perhaps related, the thoroughness of the Panel investigations is similarly judged harshly, although its fairness is considered more generously. The State Bar Court fares much more favorably, although the number of responses here make conclusions hazardous by year.

Other results which have changed by year include the belief that Bar discipline has improved since 1986. (Keep in mind in reading the charts that a number of these responses have shown improvement from very low levels and remain at higher but still very low levels of consumer
confidence.)

In terms of overall levels, it is clear that consumers have the most confidence in the State Bar Court, and the least in the speed or thoroughness of the Complainants=Grievance Panel and in the attorney-controlled Bar=general supervision of attorney discipline.

We have also correlated judgments about the Bar, ranging from access (ease of calling OI), to courtesy, helpfulness, speed, and fairness of the respective discipline entities, with other categories to see whether they make a difference. We have included the status of the matter to see the extent to which a closure@versus imposed discipline makes a difference in the judgment of those who have complained. Unsurprisingly, respondents are highly complimentary of the Bar where discipline results. We also separated out the area of complaint by general category (family law, probate, criminal). In general, the results do not indicate marked variations. Finally, we have also presented separate results by type of complaint, whether one of abandonment, incompetence, untruthfulness to respondent, untruthfulness to judge, failure to return phone calls, ignorance of the law, insulting behavior, friendliness to other side, et al. The numbers presented can be correlated in a number of additional ways. In general, respondents did not exhibit undifferentiated hostility toward the Bar. Rather, their judgment about Bar performance, and the way it appears to be changing, is consistent with the empirical evidence of Bar performance. It is not altered significantly by area of law or by type of complaint. Except for the Complainants=Grievance Panel, there are signs of improvement, albeit in some aspects from a very low initial level.

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### TABLE OF EXHIBITS

1. Office of Intake/Legal Advice; Sample Computer Screen Formats
2. List of Concerns and Recommendations Made by the State Bar Discipline Monitor in the Initial Report and Progress Reports
4. State Bar's Complaint Classifications and Year-to-Year Incidence Trends
5. Flowchart of State Bar Discipline System
6. Monitor Correspondence Regarding Telephone Directory Publication of Bar's Toll-Free Complaint Number
7. Monitor's June 1991 Survey of Local Bar Associations
8. State Bar Media Guide/Memo to Reports (5/90)
9. List of Respondents with Five or More Open Cases in the Office of Investigations as of 5/31/91 (names redacted)
10. Inventory of CRAFTS Proposals (9/90)
11. Summaries of Section 6007(c) Motions Filed During 1990-
12. Summaries of First 49 Notices to Show Cause Filed During 1991
13. Course Outline: State Bar Ethics School
14. Monitor's Draft Legislative Changes re: Complainants' Grievance Panel and State Bar Disclosure of Public Information to Inquiring Consumers
15. Complaint Audit and Review Unit: A Wish List@
17. State Bar Court: Cases Submitted as of 5/31/91

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10. To request copies of exhibits, please contact the Center for Public Interest Law at (619) 260-4806.
18. Finality Rule
20. Outline of Issues: Consolidation of CSF Proceedings With Disciplinary Process
21. Client Survey Results