INITIAL REPORT TO THE ASSEMBLY AND
SENATE JUDICIARY COMMITTEES
AND CHIEF JUSTICE OF THE SUPREME COURT

A REPORT ON THE PERFORMANCE
OF THE DISCIPLINARY SYSTEM
OF THE CALIFORNIA STATE BAR

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Under Appointment by
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I. INITIAL INQUIRY

The State Bar Discipline Monitor (Bar Monitor® assisted by four attorneys from the Center for Public Interest Law (Julianne B. D’Angelo, James R. Wheaton, Kelly J. Salt, and Walter Heiser), commenced the initial inquiry into the disciplinary system of the State Bar in early February 1987, following the appointment of Professor Robert C. Fellmeth as Bar Monitor on January 21, 1987. The Bar Monitor and staff reviewed the State Bar Act and current Rules of Procedure and Rules of Practice relevant to the State Bar Court system. The Monitor and staff attended initial orientation meetings conducted by the upper staff of the State Bar system, including Executive Director Herb Rosenthal, Senior Executive for Discipline and Adjudication Paulette Eaneman-Taylor, Committee on Discipline Chair Don Mike Anthony, Office of Investigations Director Ken O’Brien, Acting Chief Trial Counsel Fran Bassios, and Office of State Bar Court Director Stuart Forsyth. The Monitor and staff requested organizational charts, previous analyses and reports, statistical information, forms, and other materials from the upper staff of the Bar. The Bar provided these and other information it thought relevant to the inquiry.

The Monitor and staff commenced an extensive review of the internal files of the Bar during February and March, 1987. This review included a reading and analysis of the majority of closed investigative files in southern California from January 1985 to the present. Certain Office of Trial Counsel files were examined in the Los Angeles office and more extensively in the San Francisco office of the State Bar. Two sets of document requests were made to the upper staff of the Offices of Investigations and Trial Counsel, respectively. These document requests sought both statistical and administrative file information deemed relevant to the inquiry.

The Monitor and staff also conducted interviews of approximately 100 persons; fifty persons were interviewed by the Bar Monitor directly. At the outset, these interviews have focused on those with line responsibility for the conduct of Bar disciplinary procedures over the past three years. We have extensively interviewed those who are currently working in the Office of Investigations and in the Office of Trial Counsel, many who left those offices during the past two years, and those outside the Bar involved in disciplinary matters. The Bar Monitor staff also attended a small number of State Bar Court evidentiary hearings; followed the proceedings of the Review Department during March,
April and May; and attended the March, April, and May 1987 meetings of the Board of Governors—Committee on Discipline.

The Monitor and staff conducted approximately twenty surveys of various aspects of the disciplinary system. These ranged from telephone queries of the Bar number concerning attorneys with known disciplinary records and problems, to statistical counts of reports made to other agencies (e.g., law enforcement agencies). Finally, the tentative concerns of the Monitor were drafted and presented for review and comment to the Bar’s upper management, including the Director of the Office of Investigations, Acting Chief Trial Counsel, Director of the Office of State Bar Court, Executive Director, and President of the Board of Governors. Where it was deemed appropriate, changes or adjustments were made to the text of the first draft based upon additional facts or meritorious arguments presented to the Monitor by Bar management after review of the preliminary draft.

II. BAR COOPERATION

The upper staff of the Bar has been cooperative with the efforts of the Monitor and his staff in the conduct of the instant inquiry. The Bar has provided onsite facilities in both Los Angeles and San Francisco for the use of the Monitor and his staff. These facilities have included telephone service, desk space, and access to copying facilities. The upper staff has also cooperated with the document requests of the Monitor. In particular, the Monitor would note that the middle-level staff members responsible for the investigative and advocacy work within the disciplinary system have spent substantial time with the Monitor and his staff on their own time, including after hours and weekends, when it would not interfere with their work duties. The Monitor would also note that all of his contacts with Bar management, ranging from the President of the Board of Governors to the upper administrative staff, have been cooperative, cordial, and have to this point indicated a quantum of open-mindedness which should presage flexible consideration of alternatives, including what may result in substantial structural alterations in the current system.

III. CAVEAT

The Bar Monitor respectfully issues the following caveat concerning the initial report following herewith. The disciplinary system of the Bar, as the organizational charts attached as early exhibits will attest, is complex. It is an administrative process very much *sui generis*. Among other
things, it involves the processing of original complaints from consumers, conviction referrals, interim suspensions, reinstatement petitions, and incapacitations, many of which call into play separate rules of procedure. Further, the process is substantially different than the Administrative Procedure Act applicable to the agencies regulating other professions and trades, and than standard criminal and civil proceedings generally.

In addition, the system is very much overloaded with multiple burdens at present. Without recounting its history in detail, a series of reform efforts and reports, including the 1984 Coyle Report, the 1985 Kroeker Report, the 1986 Subcommittee on OTC Administration Report, *et al.*, as well as staff turnover, have created continuous organizational change over the last two years. The Bar is now subject to increasing volumes of consumer-generated complaints. It is sensitive to recent legislative demands for backlog reduction and complaint-handling expedition. Finally, many of the Bar's own reform efforts are now under way, such that its disciplinary system is in a state of flux. Additional time may be appropriate before drawing final conclusions as to some of those reforms.

Moreover, the Bar Monitor has had only approximately ninety days of detailed inquiry time prior to the legislative deadline for formulation of a first draft of findings and recommendations. Although the work of the Bar Monitor has begun in earnest, there are still additional files which should be reviewed (particularly those of the State Bar Court), procedures to be examined, substantive areas to be researched, and at least another fifty individuals who should be interviewed in depth. Approximately thirty to forty of those who have already been interviewed should be reinterviewed and presented with findings and specific recommendations for comment and discussion.

The Bar Monitor is concerned that because of the pressure and flux of the system, the very obvious problems which currently beset the system, and the importance of a fair and efficient system of attorney discipline the next series of structural and procedural changes be the correct ones, based upon comprehensive research and thoughtful analysis. Hence, this initial report of the Bar Monitor consists of a description of the present system as it now operates, followed by a reasonably detailed description of initial concerns. These concerns should be characterized as tentative rather than final, although substantial evidence exists to support many of them. Following the description of concerns, the initial report lists those areas of recent Bar progress worthy of recognition and
preservation. Finally, the report concludes with a recitation of suggested goals for the disciplinary system, and a brief listing of ten areas where specific areas of suggested improvement will be forthcoming from the Bar Monitor.

The Bar Monitor will propose specific recommendations prior to the next report due to the Legislature and the Chief Justice. These more specific recommendations will be presented to the Bar within the first ninety days after the issuance of this initial report. The Bar Monitor believes it is appropriate to offer these specific recommendations for change to the Bar first for its direct implementation. The next report of the Bar Monitor, due November 1, 1987, will indicate the Bar’s receptivity to these specific reforms, and the success of the other reforms already being implemented through legislative and Bar initiation. We believe that some of the reforms necessary to correct this system so that it will operate effectively without future outside intervention may require legislative and structural change in the system. We hope to report in detail concerning the precise rule and legislative changes we would recommend to the Legislature based on this further review of progress and reform implementation.

We would also respectfully note to the Legislature and the Chief Justice, to whom this report is directly addressed, that the efficacy of the Bar Monitor concept depends upon their respective assistance and support. With that continued support, the Monitor is confident that the resources available to the State Bar through the assessment of the 100,000 attorneys in California permits the creation of an independent, speedy, fair and effective discipline system which can and should serve as a model for the nation.

IV. PRESENT BAR DISCIPLINE STRUCTURE

Initial document requests from the Monitor to the State Bar sought organizational and flow charts of the complaint-processing system both before and after the most recent reforms of 1985. Exhibit 1 presents the 1984 organizational chart; Exhibits 2, 3, and 4 present current overall and office organizational charts. Exhibits 5 and 6 present current overall and Office of Investigations flow charts. As detailed as Exhibits 5 and 6 appear to be in outlining the progress of a complaint through the Bar’s discipline system, a close examination of the system as it actually operates indicates that they are superficial and not entirely current. The Monitor presents in Exhibit 7 an
accurate graphic depiction of the flow of an original complaint through the process as it now exists after the 1986 reforms.

The first step in understanding how the system might be improved is to fully understand how it in fact works. The Monitor presents herewith a description of the progress of an original complaint generated by a consumer telephone call to the Bar’s 800 toll-free telephone number. The flow chart in Exhibit 7 identifies the eighteen (18) major steps involved in a typical externally-derived complaint entering the system at point of entry. The flow has numerous variations for particular exceptional proceedings entering the system at Step 10 or other locations (for example, reinstatement requests, conviction referrals, application of discipline imposed by other jurisdictions, probation revocations, interim suspensions, abandonment/incapacitation, etc.). We shall refer to Exhibit 7 both in our description of the system flow now in place and in our subsequent criticism of its dynamics.

A. OFFICE OF INVESTIGATIONS

Since the latter part of 1986, the Bar has had a toll-free 800 telephone number available to receive complaints (1-800-843-9053). Three lines terminate at an Intake Unit of the Office of Investigations (OI) located in Los Angeles. This Intake Unit, directed by Pat Grisinger, consists of seven persons, three of whom are available for phone duty at any given point in time. Six are investigators supervised by senior investigator Gita Saraydarian. Three of the six have phone duty on alternate days. A sorting system allocates the calls among the three lines to spread the number of calls received by each equitably.

The following Intake Flow Detail Chart tracks the matter through the OI Intake Unit. The OI Intake Unit operator evaluates the call, and determines it to be either an Inquiry or a possible Complaint. An Inquiry is defined by the Bar as a minor complaint unlikely to lead to discipline imposition, (e.g., an attorney’s failure to return a client’s phone calls or failure to return files or documents to a client). These Inquiries are distinguished from Complaints, which describe acts by an attorney which are unethical or unlawful, and which may warrant discipline. ..............

If the OI Intake operator designates the matter an Inquiry, he/she is free to attempt to resolve the matter through an immediate phone call to the attorney involved. IfResolved, a special Inquiry Form is completed and temporarily filed in the bottom drawer of a cabinet on the fifth floor
of the Los Angeles Third Street office of the Bar, designated at Step A on the Intake Flow Detail Chart.

Certain types of complaints are not accepted or investigated by the disciplinary arm of the State Bar. If, in the judgment of the operator, the caller’s problem is not within the jurisdiction of the Bar, the caller is so informed. For example, fee disputes are directed to the caller’s local bar association or to the State Bar fee arbitration system; complaints (not involving the Client Security Trust Fund) against persons who are not currently licensed by the Bar or where there is no current Bar jurisdiction are rejected. These forms are likewise deposited in the drawer at Step A, and then are destroyed periodically.

Where the OI phone Intake Unit investigator deems the matter to be a possible complaint appropriate for State Bar jurisdiction and discipline, he/she will send a complaint form to the consumer to be completed and returned. A standard letter asking for additional information is also included with the complaint form. The first three pages of Exhibit 15 include this form and letter. Although the OI Intake Unit operators have theoretical authority to open a formal complaint over the phone, almost all cases referred for further investigation arrive at the Bar in written format, either by way of letter and documentation or through the completion of the complaint form sent to the consumer by the Intake Unit phone operator, designated at Step B on the Intake Flow Detail Chart. A recent survey revealed that only 20% of the complaint forms sent at Step B (those which are facially meritorious from phone contact) are returned to the Bar for possible action (Step C).

These written materials sent to the Bar are reviewed every day by the three investigators who are not on phone duty. This Antake review@Step 4 on the Exhibit 7 flow chart; Step C on the Intake Flow Detail Chart) consumes several hours each morning. Here, once again, the matters may be rejected as inappropriate for further proceeding by one of the same group of Intake investigators, subject to review by investigator Gita Saraydarian. These rejections may also involve phone calls to the accused attorney to resolve the matter. Cases are automatically resolved where the consumer drops his/her complaint. This elimination of allegedly nonmeritorious cases by Anquiry closed designation at the Intake level is a relatively new phenomenon, and is one part of the Bar’s effort to reduce its backlog and delay problems. The Anquiry closed designation within the OI Intake Unit filters out substantial numbers of cases from further review. These cases are kept in the
top three drawers of the same cabinet containing phone inquiry rejects by attorney name, and are also periodically destroyed (current files go back just over one year). There is no computer record of Step A or D rejects.

Where the Intake Unit review by the three investigators described above results in a determination of a possible complaint, it is assigned a priority from \texttt{Aone@to Afour@the San Francisco office traditionally assigns priorities \texttt{Aone@through Afive@ Aone@indicates a high priority matter, possibly justifying disbarment, such as misappropriation of clients' funds. A Afour@or Afive@ designation indicates a matter appropriate for lesser discipline, should discipline be warranted at all. A document sometimes referred to as a Aprioris sheet@s attached to the complaint form or letter from the person complaining upon initial receipt at Step C. This sheet (which actually includes only very partial information regarding prior discipline) is kept with the file as it proceeds to Step F in the Intake Flow Detail Chart. The complaint is also, at this point (F), entered into the Bar = IBM computer system.\footnote{Note that the Bar is now transferring the six OI Intake Unit investigators to investigation units and is hiring six new persons C paralegal-trained complaint handlers C to perform this intake function as described above.}

The complaint is then transferred to one of the units of the relatively new Office of Investigations, directed by Kenneth O\texttt{Brien}. This department consists of three distinct units in Los Angeles and one unit in San Francisco. The unit in San Francisco is directed by Bob Sandstrom. The three units in Los Angeles are directed, respectively, by Philip Sartuche, Sherelle Brooks, and Al Fried.

\texttt{Al Fried=}\texttt{ASpecial Operations Division@was designed to be different from the other three general investigative units. It was to handle complex, difficult, or serious investigations. Two of the investigators in Fried=}\texttt{unit remain focused on serious cases of repeat offenders. However, the remainder of the unit is now engaged in general investigative work in order to reduce the backlog. In order to make a special effort toward backlog reduction, approximately five of the investigators within Al Fried=}\texttt{Special Operations unit now receive most of the complaints (priority 3 and 4 cases making up over 80\% of the cases) from the Intake Unit directly (Step 5 of Exhibit 7).}

Here, consumer complaints are once again reviewed by a group of investigators for possible culling of nonmeritorious cases, or cases which may be \texttt{Resolved@short of formal proceedings. This}
unit may redesignate a complaint received from the OI Intake Unit as an A\textit{quiry}, or may close the file as a A\textit{non-sufficient facts} (NSF) case. If an NSF determination is made, the complaint is listed as a closed file on the computer and is sent down to the closed investigative file room on the first floor of the Bar's Third Street office in Los Angeles. Just as in the OI Intake Unit, the intake unit of Special Operations may also spend some time attempting to resolve matters by calling the attorney involved and attempting an accommodation between the attorney and consumer (also known as the Acomplaining witness, or ACW, in Bar disciplinary parlance).

Should the intake unit of Special Operations believe the complaint justifies further investigation, it is then sent to one of two possible places. At present, it is sent to Step 6 on the Exhibit 7 flow chart C to the director of one of the four investigative teams listed above for assignment to a line investigator. Prior to assignment, each director has the authority to review and close out a case for non-sufficient facts, and to alter the priority designation assigned to the case by preceding investigators.

It should be noted, however, that the Bar is now reinstituting its A\textit{Volunteer Investigative Assistance Program} (VIAP). Under this program, a substantial number of cases (particularly when there is a backlog) are assigned to volunteer investigators that is, practicing attorneys who live and work in the communities where the complaints arise. These volunteer investigators are given some training by Bar attorneys and from five to fifteen case files to investigate, resolve, and recommend either closure or further proceedings. When used in the past, most of the work allegedly performed by the VIAP process has required further investigation by Bar line investigators at Step 8 in the Exhibit 7 flow chart.

Where the complaint flows to the director of the investigative team, he/she will assign it to an investigator within his/her team. Under new procedures, an attempt is made to assign multiple cases against the same respondent to the same line investigator.

The line investigator (Step 8 of Exhibit 7) also has the authority to recommend the NSF closure of a case, based on his/her investigation and without attorney review. That investigation is, except in rare instances, confined to letter writing and telephone calls. A typical investigative file reveals the usual procedure: if necessary, the CW is contacted for additional facts and documentation; the respondent is contacted, presented with a description of the CW's allegations,
and asked to respond with an explanation. The attorney may respond to the Bar investigator, and the CW may be requested to rebut the response. In any event, the respondent attorney is always contacted confidentially, and given an opportunity to explain and defend his/her alleged conduct.

Most of the southern California investigations are conducted by line investigators in southern California and all of the northern California investigations are conducted by line investigators from Bob Sandstrom=’s team in San Francisco. However, because of the surplus of complaints emanating from southern California and the lack of resources there, a substantial number of Los Angeles cases have been assigned to Bob Sandstrom=’s San Francisco unit for investigation from San Francisco.

Where the line investigator believes after investigation that a case warrants the issuance of formal charges, or a Notice to Show Cause (NTSC), he/she will so recommend to the director of his/her investigative team (Step 6). Upon the approval of the director (Sandstrom, Brooks, Fried, or Sartuche, respectively), the matter is sent to another new entity within the Office of Investigations, designated at Step 9 on the Exhibit 7 flow chart of the Office of Investigations. Since the Office of Investigations, pursuant to the 1985 Kroeker Report reforms, has been separated from the Office of Trial Counsel, it requires some legal advice and services. Four attorneys fulfill that function as the attorneys for the Office of Investigations: Paul Virgo, Lynne Geminder, and Dave Fuchs in Los Angeles; and Mary Yen in San Francisco. In Los Angeles, the investigative reports completed by the Office of Investigations are submitted to Lynne Geminder, who reviews a statement of the case (SOC) prepared by the line investigator. Geminder is responsible for assuring that the investigation is complete enough to warrant the issuance of an NTSC before the matter is transferred further. Thus, Step 9 (Exhibit 7) is the first time any attorney participates in the case routing or closing decisionmaking within the current Bar system. Geminder has the authority to NSF (close) a case, as do the prior personnel described above.

Dave Fuchs, within the same OI Legal Unit, handles possible admonitions. Admonitions are not disciplinary and are not reviewed by the Review Department or necessarily by a referee. They consist of a warning to the respondent, similar in tone to a reproval. They are kept open for two years. As with some of the drug diversion programs popular in the criminal justice system, if there is no repeat offense or further problem, the entire matter is then dismissed after that two-year period and will not be recorded as prior discipline.
If the OI Legal Unit believes that the investigation is complete and that further proceedings are warranted (i.e., the SOC is legally sufficient), the SOC and a recommendation for the issuance of a NTSC are then transferred to the Intake/Special Proceedings Unit of the Office of Trial Counsel, now separately constituted and designated at Step 10 of the Exhibit 7 flow chart. It is important to understand that under the new structure, the receipt and acceptance of the SOC by the Intake/Special Proceedings Unit of the Office of Trial Counsel is considered the termination of the responsibility of the separate Office of Investigations as to that matter.

B. OFFICE OF TRIAL COUNSEL

The Office of Trial Counsel (OTC), which has been directed by Acting Chief Trial Counsel Fran Bassios for over one year, includes one unit in San Francisco and three units in Los Angeles. The three units in Los Angeles are headed by three recently-hired Assistant Chief Trial Counsel: Mike Gerner (a veteran of the Bar’s Office of Trial Counsel), Ralph Helton, and Rick Harker. The San Francisco office is directed by Assistant Chief Trial Counsel Treö Davis. In Los Angeles, Unit #1 in the Office of Trial Counsel (Helton) handles the short-cause matters. New attorneys hired by the Bar are assigned to Unit #1 for training. Unit #2 (Gerner) handles long-cause matters (those expected to consume more than one hearing day). Unit #3 (Harker) handles OTC Intake and special proceedings (reinstatements, probation revocations, conviction referrals, and other matters, many of which enter the system not through the Office of Investigations but through the State Bar Court or other point of entry). (Harker, who is new to the system, is currently being assisted by Trev Davis in OTC intake matters.) Each unit employs from 8 to 14 attorneys.

The Intake/Special Proceedings section of Unit #3 is assigned the task of evaluating the case and drafting a Notice to Show Cause based on the SOC received from the Legal Unit of the Office of Investigations. The OTC Intake/Special Proceedings Unit in Los Angeles handles cases emanating from the Legal Unit of the Office of Investigations in Los Angeles.

In the smaller San Francisco office, a single attorney, Mary Yen, serves as counsel to the single investigations unit under Bob Sandstrom. Yen performs Geminder’s function in San Francisco and transfers the SOC to the single OTC team directed by San Francisco Assistant Chief Trial Counsel Trev Davis. Davis will either review the SOC or assign Senior OTC Counsel Marilyn Winch or Alan Cohen to do so. (Note: If the case is accepted for NTSC issuance in San Francisco,
Unlike Los Angeles, it is assigned to the line attorney who will be handling the matter and he/she drafts the NTSC and participates in the Antent@onference.)

The OTC Intake/Special Proceedings Unit also has the authority to NSF (close) the case or to issue an admonition. Notwithstanding the investigation and numerous reviews depicted in Steps 1B of the Exhibit 7 flow chart, a review of OTC close-out forms establishes that a substantial number of cases received by the Office of Trial Counsel are NSFed or result in the issuance of an admonition after arrival from the OI Legal Unit, particularly in Los Angeles.

Where the OTC Intake/Special Proceedings Unit believes that a Notice to Show Cause is warranted based on the SOC, in Los Angeles a line attorney within the OTC Intake/Special Proceedings Unit is given two weeks to draft an NTSC. That draft is reviewed by the director of Unit #3 and/or Trev Davis and Fran Bassios; the line attorney is then given another two weeks (four weeks total) to complete the final draft. At this point, the OTC Intake/Special Proceedings Unit issues a ANotice of Intent to Issue Notice to Show Cause@ to the respondent attorney. This notice invites a prospective respondent to a conference to discuss the possible filing of a NTSC. The attorney has ten days in which to respond to the notice of intent letter. If the attorney does respond, an Antent to issue@conference is normally held (Step 11 in the Exhibit 7 flow chart). At this point, the respondent is again given the opportunity to present his/her defense(s) to the OTC intake attorney who has drafted the Notice to Show Cause. A review of the action reports and internal commentaries on these conferences establishes that they often have a significant impact on the perceived strength of a case, on the nature of the NTSC to be filed, and often reveal a need for further case investigation.

First, where possible (and after consultation with the investigator handling the case if appropriate), the OTC Intake/Special Proceedings Unit may NSF the case at this point, classify it as a closed investigation, and return it to the first floor file room of the Third Street office of the State Bar in Los Angeles (or the second floor filing cabinet of the State Bar in San Francisco).

Second, the Office of Trial Counsel may stipulate with the respondent to issue a Aprivate reproval,subject to State Bar Court approval. A private reproval is a confidential letter of disapproval and warning to the attorney. It is theoretically made a part of a disciplinary record. The issuance of a private reproval is not always revealed to the CW (contrary assurances of upper Bar
staff notwithstanding). The OTC Intake/Special Proceedings Unit may also issue an admonition, which includes a letter of disapproval and a freezing of the matter for possible reactivation within two years should other matters arise. As explained previously, an admonition is not discipline and, if not reopened by the Bar, is automatically dismissed after two years. It is not reviewed by the State Bar Court.

Third, the OTC Intake/Special Proceedings Unit may determine, particularly based on new information which may be forthcoming from the intent to issue conference, that reinvestigation is required prior to the filing of the Notice to Show Cause. If this is the case, that additional investigation must be conducted by the OTC Intake/Special Proceedings Unit attorneys, particularly in Los Angeles. Under extraordinary conditions, the matter might be sent back to the Office of Investigations for additional investigation by that office this occurs more often in the more informal arrangements extant in San Francisco.

Fourth, it is possible that the Office of Trial Counsel and the respondent may stipulate to discipline at this stage in the proceedings. Should that be the case, the matter would then skip to Step 16 in the Exhibit 7 flow chart.

At this point in the discussion of the Bar's disciplinary process, it becomes important to focus on the length of time consumed by the process. Senate Bill 1569, enacted in 1985, requires the Bar to adopt as a goal a maximum six-month time period from receipt of the complaint to either dismissal, admonition, or the filing of a NTSC. Assuming that the investigations period (Steps 1-9 of Exhibit 7) for a complaint which appears to warrant the filing of a NTSC consumes four months, OTC is left with only sixty days in which to: (1) draft the NTSC; (2) schedule and hold the intent to issue conference; (3) reinvestigate if necessary; (4) decide to NSF or admonish, if appropriate; (5) negotiate a stipulation, if appropriate; (6) amend the NTSC based on new information elicited at the intent to issue conference; and/or (7) file the NTSC.

Note that OTC allows approximately thirty days for the drafting of the NTSC, and ten more days for the intent to issue conference. Thus, only twenty days following the conference are available for amendment of the NTSC, reinvestigation, approval of the final version of the NTSC by the Acting Chief Trial Counsel, and the actual filing of the NTSC. Any delay beyond this twenty-day time limit by OTC will place the Bar outside the six-month goal mandated by Senate Bill 1569.
If the NTSC is filed with the State Bar Court in Los Angeles, it is then referred to one of the Office of Trial Counsel team leaders, depending upon whether it is deemed to be a long matter or short matter. The team leader assigns it to an OTC line attorney for hearing preparation (Step 13 on the Exhibit 7 flow chart). In San Francisco, the same attorney assigned to draft the NTSC handles it thereafter.

C. STATE BAR COURT

The State Bar Court adjudicates all matters which fall within the regulatory functions of the State Bar, including original disciplinary proceedings, and special proceedings discussed separately in Section VI infra. These special proceedings are relevant to discipline and include:

1. Conviction referral proceedings;
2. Rule 955 violation proceedings (requiring attorneys leaving practice to provide client transition);
3. Probation revocation proceedings;
4. Expedited disciplinary proceedings (following discipline by another state where attorney is admitted);
5. Perpetuation of testimony of the record of a disciplinary investigation or proceedings;
6. Expedited Involuntary Inactive Enrollment proceeding; or proceeding to re-enroll as active;
7. Incapacity to attend to law practice proceeding;
8. Reinstatement proceedings;
9. Assume jurisdiction over incapacitated attorney practice proceeding;
10. Admissions/moral character proceedings;
11. Client Security Fund proceedings;
12. Mandatory fee arbitration proceedings;
13. Law corporation certification revocation or denial;
14. Revocation or denial of certificate of legal specialization proceedings;
15. Lawyer Referral Service proceedings; and
16. Legal Services Trust Fund proceedings after denials of grant applications.
The State Bar Court is organized into three departments: a Review Department (eighteen members), a Hearing Department (currently 52, referee positions), and a Probation Department (where 130 referees are assigned as probation monitors). Each department is headed by an Assistant Presiding Referee and the entire State Bar Court is headed by a single Presiding Referee. The Court is composed mostly of volunteer lawyers (448), with a number (80) of public (non-attorney) members.

The Hearing Department referees sit as sole referees or in three-member panels and conduct all initial adjudicative hearings within the jurisdiction of the State Bar Court. Both lawyers and public members serve in the Hearing Department.

The Review Department, which consists of twelve lawyers and six public members, meets ten times per year for one- or two-day meetings to review and make final recommendations on all disciplinary matters.

The Probation Department administers an expanded probation monitoring and compliance program under which volunteer referees work one-on-one with lawyers on probation to ensure compliance with the terms of probation. The Department has a contract with ESCCO, an alcohol and drug abuse evaluation and referral entity.

The Director of the State Bar Court provides overall staff leadership and management, and coordinates the State Bar’s adjudicative proceedings conducted by the 52, volunteer referees. In addition to managing the Office of the State Bar Court, the Director supervises the Court Clerk functions (performed in Los Angeles), provides advice and counsel to referees, and administers the State Bar’s Mandatory Fee Arbitration Program (performed in San Francisco). The Director counsels the Board of Governors’ Committee on Discipline. Policies and rulemaking are determined by an eleven-person Executive Committee composed of volunteer attorneys and public members, subject to Board of Governors’ approval.

The Office of the State Bar Court operates a Court Clerk’s Office to handle the assignment, calendaring, processing, and recordkeeping of all proceedings pending before the State Bar Court. The Office is divided into five support units: Hearing, Review, Effectuations, Probation, and Administration.
The Hearing Unit is responsible for case processing, assignment, calendaring and recordkeeping of all proceedings at the formal hearing stage.

The Review Unit is responsible for case processing, assignment, calendaring and recordkeeping of all proceedings at the review stage.

The Effectuations Unit is responsible for preparation and effectuation of all disciplinary records requiring transmittal to the Supreme Court of California.

The Probation Unit is responsible for probation monitoring and compliance in accordance with the California Supreme Court orders and State Bar Court Review Department decisions.

The Administration Unit is responsible for providing administrative, secretarial, clerical and data processing support to the other four units.

Currently, approximately 900 cases are pending in the State Bar Court system at various procedural stages. Exhibit 30 lists all of the categories of actions under State Bar Court jurisdiction.

Upon the filing of the NTSC with the State Bar Court and the contemporaneous assignment of the case to a line attorney within OTC, a settlement conference is set for ninety days thereafter. During the 90-day period, OTC counsel and the respondent conduct discovery and prepare for the hearing. The settlement conference will be heard by a volunteer referee. Presiding Referee Bill Mackey, a practicing attorney serving as presiding referee of the State Bar Court, makes decisions on initial procedural motions, including requests for three-member hearing panels. The State Bar Court has recently instituted a Master Calendar System designed to expedite hearings. A date is set for a settlement conference, and a volunteer available on that date is assigned from the settlement conference panel list maintained by the State Bar Court. As is Bill Mackey, these referees are practicing attorneys volunteering as referees or administrative law judges within the State Bar Court disciplinary system.

The Presiding Referee has proposed a new system to assign short-cause matters to a short-cause calendar, and assign them to volunteers from a list of short-cause referees. A single referee will be expected to handle these matters. Long matters, expected to last more than one hearing day, are now referred to a compensated referee, under a system authorized by recently-enacted Senate Bill 1543. These matters are also heard by a single referee, preferably by a retired judge under the statutory preference. But due to heavy demand for retired judge services, many will go to
experienced practicing or retired attorneys. Three-referee panels are theoretically available for matters lasting one day, where a party affirmatively requests it. Where there is such a three-referee panel, one of the referees is a public member (that is, not a currently-practicing attorney in the community). Within sixty days after the settlement conference, a hearing will be scheduled, usually in the Bar offices in Los Angeles or San Francisco, as appropriate. The State Bar Court is now considering a substantially accelerated schedule for short-cause and other matters.

The referee conducts the hearing, swears witnesses, makes evidentiary rulings, and receives admitted evidence and testimony. After the hearing, the referee will issue findings of fact, conclusions of law, and a recommended discipline.

Any matter subject to Notice To Show Cause filing, whether resolved by stipulation, dismissal upon the motion of the Office of Trial Counsel, or referee decision, is reviewed by the Review Department. This Review Department reviews all such matters, whether any party appeals or not. Either party or the Review Department itself may request oral argument. Further, under Rule 452, the referee’s decision is a recommendation to the Department, which shall independently review the record and may render findings of fact, draw conclusions...or take actions at variance with those of the hearing panel provided, however, findings of fact of the...panel shall be entitled to great weight.

The Review Department meets approximately ten times per year in Los Angeles or San Francisco, usually over a one- or two-day period. It consists of eighteen persons six public members and twelve currently-practicing attorneys. The current Chair of the Review Department is Jerome Craig. Because of the enormous number of cases and the voluminous paperwork on each case reviewed, cases are assigned to one member of the Review Department for in-depth review. That person is supposed to read the hearing transcripts, exhibits, findings of fact, etc., in the State Bar Court record for discussion with his/her Review Department colleagues and final recommended decisions. All members review the NTSC, referee findings or stipulations, and filed briefs, if any. The Review Department, designated at Step 16 in the Exhibit 7 flow chart, is a final stage for all recommendations of final disciplinary action after the issuance of a Notice To Show Cause. The Review Department has the authority to add, delete, or reject findings of fact or recommended
discipline and to remand the matter for revision or rehearing. The Review Department is not structured to conduct evidentiary hearings.

All matters in which the Review Department recommends discipline (involving disbarment or suspension) automatically go to the Supreme Court for review. All such discipline is recommended from the State Bar Court to the Supreme Court which has the final word. Although the Supreme Court may alter the decision of the Review Department, it normally gives great weight to the findings and recommended discipline of the State Bar Court (see Alberton v. State Bar, 37 C.3d 373 (1984)).

The Supreme Court normally does not accept briefs or hear argument unless it grants a petition for review. If the Supreme Court grants a petition to review findings of fact or recommended discipline, written and oral argument will be handled by the separate Office of General Counsel within the State Bar. This Office will take the position of the Review Department (as opposed to that of the Office of Trial Counsel or the hearing referee) in arguing the position of the Bar as to recommended discipline before the Supreme Court. Hence, the General Counsel will not petition for hearing, since the position of the Review Department is its client’s final decision, nor will it argue for discipline which is different than that recommended by the Review Department.

Under a recent reform, the Office of Trial Counsel may be empowered to appear before the Supreme Court where its position differs from that of the Review Department.

A second reform involves the creation of a Complainant Grievance Panel (Step A in the Exhibit 7 flow chart between Steps 10 and 11). This Grievance Panel is now in the process of being constituted. Whenever there has been an NSF closing or admonition pre-NTSC (Steps 1 through 11), the Complainant Grievance Panel is empowered, upon the request of the CW, to order reinvestigation leading to a possible NTSC filing, or to a stipulated discipline. This Grievance Panel consists of four practicing attorneys and three public members. The public members are appointed, respectively, by the Speaker of the Assembly, the Rules Committee of the Senate, and the Governor. Currently, Dave Fuchs within the Legal Unit of the Office of Investigations serves as the staff of the panel, and will investigate requests for further proceedings by consumers to determine whether to recommend to the panel a reinvestigation or reconsideration of an NSF or admonishment decision.
This Panel has yet to meet and is regrettably lacking the public appointments to be made by the Speaker and the Governor, both improvidently delayed.

Finally, where discipline is recommended involving suspension or disbarment, the Supreme Court must act and effectuate its decision. Note that many attorneys resign with charges pending during any of the stages of the disciplinary process. Often, this resignation is a product of discussions between the Office of Trial Counsel and the respondent. Where these resignations occur with charges pending, they are regarded by the Bar procedurally as roughly equivalent to a disbarment. (Resignations without charges pending are separately considered by the Board of Governors outside the disciplinary process and granted in that organizations’ formal minutes.) Where changes are pending, the resignation will be treated as a disbarment in that reinstatement will normally be contested by the Bar at least over the subsequent five-year period following resignation, and records of the offense may be perpetuated by the Bar, or kept at the ready should a petition for reinstatement be filed by the disbarred or resigned attorney under Rule 662. As a practical matter, few cases are perpetuated under current procedure.

V. INITIAL CONCERNS OF THE STATE BAR DISCIPLINE MONITOR CONCERNING DISCIPLINE PROCESS DEFICIENCIES

In examining and critiquing the actual operation of the disciplinary system, we shall continuously refer to the Exhibit 7 flowchart described above, which graphically depicts the sequence of procedures guiding current Bar discipline procedure.

It should be noted at the outset that the system described in Section IV supra is the result of several forces, including extreme public criticism of the prior system regarding delay, secrecy and leniency. Resulting legislation imposed certain required reforms described under Bar Progress, infra. The legislature has required the reduction of the momentous Bar case backlog by December of 1987 to specified levels, and has set as a statutory goal a maximum six-month period between the receipt of a consumer complaint and investigative disposition, either by close out, agreed discipline, or the filing of a formal Notice to Show Cause accusation for adjudication. Meanwhile, the Bar’s own efforts at improvement yielded several reports from a special Board of Governors Committee to expedite the process: the Coyle Report in 1984, and the Kroeker Report
in 1985. The latter, formulated under the direction of a Los Angeles police administrator, was largely implemented as reflected in the Section IV description.

A. INTAKE

In late 1986, the Bar laudably created an 800 toll-free number for consumer complaint information and for initial receipt of complaints. A single OI Intake Unit, directed by Pat Grisinger, and currently consisting of six investigators, performs this function. The unit operates under the general jurisdiction of the Office of Investigations (OI), directed by Ken O'Brien. Senior Executive for Discipline and Adjudication Pauli Eaneman-Taylor has described this toll-free number to the Board of Governors=Committee on Discipline as a channel of communication which is being gradually announced. Eaneman-Taylor contended that local bar associations and the state legislature are familiar with the number and that a pilot test in Fresno and San Diego Counties regarding a proactive outreach campaign about the availability of the number is being conducted to measure its impact on incoming call flow. Eaneman-Taylor also noted that a new consumer pamphlet is being formulated which will include the telephone number for the Bar fee arbitration program, as well as the new 800 number for discipline questions and complaints.

1. Outreach: Exposure Of Toll-Free Number

Preliminary investigation indicates that the toll-free number is little known. Those attorneys representing respondents and complaining witnesses in Bar proceedings we have interviewed, including several with many years experience as State Bar OTC attorneys, did not know this toll-free number existed. A survey of sixteen recently-published major California telephone directories, both white and yellow pages, including those published from January-March of 1987, do not include this or any number for attorney complaints under any headings a consumer might choose to search. Thirteen of these directories do not list any State Bar number. We searched in white pages directories under the following listings: in the California State Government section in the front of the book, we looked under Bar, State Bar of California, Attorneys, and Lawyers. In the white pages we searched under Bar and State Bar of California. In the yellow pages we searched for the toll-free number under Attorneys, Bar, and State Bar of California. The only directories in which the Bar is listed at all appear to be the white pages of the Los Angeles, San Francisco, and Sacramento directories; the listings, however, are not under Bar, nor are they in the California State
Government section. Each is under the State Bar of California, and only appear because the Bar has an office in those cities. Even here, none list discipline or investigations and none have the toll-free number.

Virtually every other state agency is listed in each of the directories searched. Local branch office numbers of these agencies as well as Sacramento and/or San Francisco addresses and telephone numbers are listed. The State Bar is not even listed in the official State of California Telephone Directory. Although the most recent edition of that Directory was published in July 1985 (before the toll-free number was in existence), no telephone number, address, or State Bar listing is contained anywhere in the book. Although most of these directories were published before the 800 toll-free number was implemented, the 800 number is not available currently from even Los Angeles or San Francisco Directory Assistance. It is available from directory assistance only! Nor are we aware of any plans or efforts to place the 800 number (or any Bar number) in telephone directories and with directory assistance over the past eight months.

The Bar’s contention that it has made the toll-free number available to legislators and local bar associations is also flawed. Conversations with the offices of various legislators indicate a general ignorance of the existence of a toll-free number or its identification. The Bar’s response to this criticism was to cite a single letter to the legislature mentioning the number.

Exhibit 9 attached hereto includes a survey of the five largest southern California county bar associations: San Diego, Los Angeles, Orange, Riverside, and Ventura counties. Two of these associations did not know the Bar’s toll-free number, and the third, San Diego County, just received the toll-free number on March 13, 1987. Also in Exhibit 9 are the results of the northern California survey of three large county bar associations: San Francisco, Sacramento and Santa Clara. Only Santa Clara knew of the toll-free number the Bar has had in place for eight months to receive all attorney complaint inquiries.

We find no proactive effort on the part of the Bar to inform consumers of the availability of the toll-free number, or indeed of any mechanism for redress against dishonest or incompetent attorneys, except for the existence of a single pamphlet on the subject which is now outdated. This pamphlet, concerning what to do when one has a complaint about his/her lawyer, is sent to those who have complaints and already have managed to reach the Bar. Ironically, it is one of the few
pamphlets generally not in stock at the main Los Angeles office of the Bar in the public waiting room brochure rack. An updated pamphlet is due by June 1987, but is a poor substitute for outreach and accessibility.

Middle-level Bar staff is candiE about the reason for the surreptitious implementation of consumer complaint channels. The Bar currently has a serious backlog, and is under statutory deadlines to diminish that backlog. Increasing the incoming flow of cases jeopardizes that effort. Further, notwithstanding the limited exposure of the 800 number and the lack of Bar efforts to publicize the discipline remedy availability to consumers, the toll-free number is not likely to be answered even if discovered and called by a consumer. Pacific Bell records indicate an on-line blocked busy rate of between 62%-72% during 1987. This busy rate is affirmed in a survey we took in the form of repeated phone calls to the toll-free number at approximately 15-minute intervals throughout several days. Exhibit 10 presents the results of that survey. Consistent with the Pacific Bell data, these surveys indicate that three calls are necessary in order to get through to the Intake Unit. Two out of every three attempts will result in a busy signal.

Despite the lack of publicity, the Intake Unit was contacted by consumers 2,496 times through the toll-free number during February 1987. It is not unrealistic to assume that the proper publicity of the availability of discipline remedies, and the proper listing of the Bar’s toll-free number in standard directories and elsewhere under a commonly-recognized title, would result in a substantial increase in that volume. It would appear appropriate for the Bar to anticipate a need for five to ten lines potentially required to handle the incoming flow.

2. Local Bar Association Barriers and Filtering

Many consumers who consult a local directory, or become aware of the presence of a local bar association, will make an initial contact there concerning a problem with an attorney. The information provided in Exhibit 9 -- a survey of eight California county bar associations -- suggests many of the problems in the current system before the Bar is able to obtain the complaint. Seven of the eight associations surveyed accept many complaints, although the categories of those accepted vary somewhat among associations. As the survey indicates, these associations generally refer these matters to practicing attorneys who serve on Client Relations Committees. They attempt to resolve the problem between the client and attorney. A complaint form is sent out by six of the eight
associations, designed for local use. Matters are then assigned for investigation by volunteer local practicing attorneys. In general, cases are not referred to the State Bar until or unless the local association determines it has no jurisdiction over the matter under its existing criteria. The State Bar is not informed of the existence of the complaint or the pendency of the investigation until it is rejected, and only then if the complaining witness sees fit to make separate contact with the Bar, where it must enter the Bar’s complaint procedure de novo. Occasionally, a local bar association may itself refer a matter to the State Bar or to other prosecuting agencies, but that is clearly not routine procedure.

It is important to understand that any investigation and resolution by local bar associations is handled by entities lacking any disciplinary authority over members of the State Bar. None of these associations have any license suspension or revocation powers, and have only the jawboning authority to influence attorney behavior. Note that these local bar associations are simply trade associations which are strictly voluntary in nature and that many attorneys in California do not belong to any local association.

It is unclear why the Bar does not require all such local associations to transmit to it immediately any information received, whether a memorandum of oral conversation, a complaint form, or written correspondence which indicates or describes conduct by a licensed attorney which may warrant discipline. At present, local bar associations receive substantial numbers of complaints. Their characterization as minor or otherwise within the jurisdiction of the local association is a matter determined solely by those local associations. Except in unusual circumstances, most local bar associations initiate no communication with the Bar concerning complaints, and there is commonly a six- to eight-month delay during which local associations may filter initial complaints prior to their receipt by the State Bar (unless the complaining witness is sufficiently sophisticated to lodge a contemporaneous complaint with the State Bar). Since the average consumer is not aware of the relationship (or lack thereof) between the State Bar and local bar associations, nor knowledgeable about their respective authorities, it is reasonable for a consumer to believe that the communication of a complaint to a local bar association constitutes contact with the State Bar discipline system as to that attorney. Such is not the case, but the State Bar has made few efforts to disabuse consumers of that misapprehension.

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Exhibit 14 presents the response of the Los Angeles County Bar Association to a series of our questions. Sixty-three percent of LACBA’s intake refers to what may involve client abandonment or lesser omissions warranting discipline. The county bar association has diverted from the State Bar 249 complaints in 1985, 319 in 1986 and 115 within the first four months of 1987. Of 249 files opened by LACBA in 1985, 234 were closed as of August 1, 1985.

3. Secrecy

As the state repository of information concerning the disciplinary record of practicing attorneys licensed in California, the State Bar is the authority which must be contacted in order to determine the record and standing of those attorneys. Hence, if a consumer is considering the retention of an attorney for an important task, he/she may be very interested in the kinds of complaints which have been lodged against that attorney, their resolution, whether disciplinary action has been taken, on what charges, when, and with what results.

The State Bar, however, will not reveal any information about any prior or ongoing investigations which have not resulted in the filing of a Notice To Show Cause. Only after the public filing of a Notice To Show Cause will OI or OTC disclose the identity of any attorney who may be under investigation. Hence, if an attorney is named in ten or fifteen pending complaints (and a surprising number of attorneys have five or more currently open investigations under way), no information will be released to the consumer about that fact. This nondisclosure problem is exacerbated because historically, matters have remained under investigation for two to five years prior to the issuance of a Notice To Show Cause; during this entire period, no information is revealed to the consumer.

Furthermore, where the Bar determines that an attorney has committed wrongdoing warranting a private reproval, the Bar simply writes a letter reproving the attorney for his/her improper conduct. A substantial number of cases are disposed of by this mechanism prior to the issuance of a Notice To Show Cause. Where this is the outcome, the matter is completely confidential, the file is closed, and no further action can or may be taken on the matter. The matter cannot be reopened and, sometimes, the complaining witness is not informed that a letter of reproval has been issued. We have reviewed several letters which misleadingly inform the CWs that the matter has been closed by the Bar with the clear implication that the complaint was totally without
merit. We have reviewed other letters to CWs which do note that there was a private reproval, but these never appear to specify what the reproval included.

The offense may also be disposed of by way of Admonition, as discussed above. An admonition is similar to a private reproval in that a letter of disapproval is sent to the respondent. Here also, its contents remain a secret. The admonition is not discipline, but a freezing of the case which remains open for possible reactivation for a two-year period. If additional complaints subsequently arise, the admonishment case may be reopened and added to subsequent complaints for a consolidated disciplinary action. After the two-year period, the matter is closed. It is not clear that admonitions are clearly delineated in the computer system as presently constituted, and may not be recognized where repeat incidents occur. Although they are marked ADM in the computer disposition code, OTC attorneys sometimes find that currently active admonitions (i.e., within the two-year activation period) are not noted on the IBM display.

As with private reprovals, a consumer requesting information about an attorney who has been admonished is not told of that fact. Our review of the files also indicates that, in at least several instances, even the complaining witness is not told of the admonition, notwithstanding Rule 415 (which requires that the CW be informed of the issuance of the admonition). See Exhibit 11, which includes an admonition and the Bar’s response to the complaining witness.

Under these policies, only disbarment, resignation with charges pending, suspension, probation, public reproval, or cases now pending after the issuance of a Notice To Show Cause may be disclosed to the public. This information is not available, however, through the toll-free number arranged by the Bar for public inquiry. Although some of this information is available on the IBM computer terminal accessible by OI Intake investigators, he/she will not provide that information to consumers. A detailed description of open cases pending in the State Bar system post-Notice To Show Cause is a goal of the IBM computer system which has not yet been completely achieved. At present, the computer will inform the Intake investigator whether a complaint is currently pending against respondent, the general nature of the allegations, and the identity of the OI investigator or OTC attorney handling the case. However, under present policy, that information is not revealed to consumers calling the toll-free number to request information about attorneys. Information about prior completed discipline is also not provided by OI Intake investigators.
Rather, the public inquiry is, at best, referred to the Membership Records number of the State Bar in San Francisco (which is not a toll-free number). A phone call to the Membership Records section, often requiring several attempts given a high busy rate, theoretically yields the fact of prior discipline and the State Bar Court file number. No further information is revealed by Membership Records, and the consumer must travel to the State Bar Court clerk's office in Los Angeles, look up the case number, and read the file for him/herself.

Exhibit 12 is a survey of disciplinary disclosure by the Bar on prior discipline and open cases. We chose a number of attorneys with a variety of disciplinary problems. We chose some with private discipline, some with public discipline, some with a few open cases in which NTSCs had been filed, and some with a very large number of reported complaints. We phoned the Membership Records number and asked what information could be provided to us concerning prior or current discipline of ten attorneys with a mix of past and current disciplinary problems. As expected, we were not told about private reprovals. We were also not told about admonitions. We asked about several attorneys with 20 recent investigations each pre-Notice to Show Cause. They were given a clean bill of health without mention of these allegations. More troublesome, we received erroneous and misleading information about many of the attorneys tested.

We were told by Membership Records that an NTSC meant that an attorney had to go to court to provide information. This is rather a soft characterization of an attorney who, after an investigation and opportunity to rebut those charges in an informal conference, is the respondent in two separate cases of formal disciplinary charges before the State Bar Court. Another attorney with a pending NTSC who we know has received a public reproval was identified as someone whose case had been dismissed. Another was curiously identified as having a case under investigation (which is not usually disclosed under present policy). Actually, the attorney had three formal NTSCs filed and pending. An attorney who resigned with charges pending disciplinary resolution which the Bar equates with a disbarment judgment in its procedures and statistics, was described simply as someone who has resigned from the Bar (see Exhibit 12).

These disclosure policies are the subject of legitimate debate with respect to disclosure made prior to existence of some quantum of probable cause. A major raison d'être for Bar licensing is to assure competent and honest practitioners for the public. Where the Bar has information to indicate
otherwise, even in the form of allegations, do the due process rights of the attorney preclude the transmittal of these accusations \textit{qua} accusations? Although this question is certainly open to debate, the meaningful, expedited disclosure of information about post-NTSC disciplinary proceedings under way in public State Bar Court proceedings and the imposition of prior discipline, both as to the nature of the Notice To Show Cause and the timing and nature of the discipline imposed, should be easily and accurately accessible to consumers. It is not.

4. Proactive Detection

A reading of hundreds of investigative files within the State Bar office generates one overwhelming impression: the detection and initial acceptance of the case for discipline depends on an aggressive and articulate complaining witness. The Bar Intake and Investigations process rely substantially upon the complaining client to make the allegations and provide the evidentiary support to justify a possible Statement of the Case leading to a Notice To Show Cause. Although several specialized matters, such as conviction referrals, can enter the Bar system directly into the Office of Trial Counsel, many categories of serious behavior not resulting in a criminal conviction will not be detected unless proactive monitoring and inquiry are conducted by the Bar.

Although the Bar haphazardly derives occasional cases from newspapers (usually after an embarrassing public disclosure of attorney misconduct by journalists), the Bar has no significant proactive detection program of its own. The closest it has come to such a program has been the ill-advised attempt by the Special Operations Unit of OI to find solicitation violations after the Cerritos plane crash.\footnote{The unethical encouragement of distraught persons to litigate claims which are of marginal merit or involve dubious injury, in order to use the cost of litigation to extort settlement from insurance companies or other defendants, is a cause for legitimate concern. A plane crash, however, with the resulting competition between attorneys to handle what appear to be legitimate and serious claims, arguably does not give rise to the fundamental wrong addressed by the solicitation offense. This single proactive area of Special Investigations effort is not deserving of the limited resources available. There are numerous other areas where attorneys may be involved in the generation of false damage claims, where such proactive efforts would be more fruitfully pursued.}

We have been approached by judges who have expressed a willingness to provide information to the Bar concerning incompetence and improper behavior by attorneys practicing in their courts. However, at present, these non-client complaints have been treated by the Bar as if they are merely one-on-one grudge contests between the complainant and the attorney involved. In one
of the files we reviewed, an individual who was a former member of the Board of Governors took it upon himself to monitor advance sheets for serious contempts of court and ethical breaches by attorneys. (Exhibit 21; letter dated February 6, 1986.) His submission to the Bar of a serious case deserving of disciplinary review resulted in the standard submittal of a complaint form to the complainant with the implied suggestion that the informant was expected to pursue the matter as a complaining witness with a personal grievance against an attorney.

It would appear that the routind monitoring of advance sheets and the establishment of a recognized system of complaint receipt from third parties (as opposed to clients or opposing attorneys of the respondent) should be arranged. This is especially so insofar as the Bar can make available to itself the resources of trained judges who are in a position to detect a substantial amount of attorney incompetence and dishonesty. A special and publicized channel of communication to the State Bar, perhaps including the confidentiality already available from Business and Professions Code Section 6094, should perhaps be staffed so that the Bar may initiate its own investigations on behalf of the public (see Special Operations comments, infra). Although the upper staff will occasionally open an investigation from such sources, and delineate the matter for State Bar (initiated) Investigation, these inquiries are generated more by magazine or newspaper stories or the vagaries of happenstance than by an institutional outreach-detection mechanism.

Under a new statute, the Bar now requires attorneys to disclose to the Bar certain indictments, convictions, the imposition of discipline by another jurisdiction, and/or the filing of three or more civil malpractice actions against the attorney within a one-year period. This self-reporting requirement may not be effective, and to the extent there is compliance, it excludes the automatic detection by the Bar of major malpractice judgments, major acts of unfair competition (including deceptive legal advertising), and many other civil actions brought and judgments rendered (the reporting requirement) is not triggered until three narrowly-defined civil actions are filed within a twelve-month period). The issue of malpractice judgments is even more egregious. Although it is now improper to prohibit a plaintiff from reporting a violation of Bar disciplinary standards to the Bar as a condition for settling a case, the parties in a major malpractice action can agree to seal the record. This might preclude detection and easy use by the Bar of evidence demonstrating gross
incompetence. At present, the Bar has not sponsored legislation to prohibit such sealing tactics, and does not itself systematically monitor malpractice filing in any sense.

This task could be accomplished through a statutory requirement that the department of Insurance gather all information concerning legal malpractice claims filed against attorneys and transmit that information to the State Bar for review. Only four legal malpractice carriers currently offer insurance in California. It would not be difficult to require the review by the Bar of all claims filed as a matter of course. The majority of the cases would thus be reported to the Bar; the remainder might be addressed through a requirement that the clerk of the court transmit any legal malpractice case filing against an individual attorney (not an insurance firm) to the State Bar for review.

5. Initial Delay

Although the important subject of investigatived delay is discussed infra, there are several initial issues of delay raised by the OI Intake process. As the backlog grew to 5,000 and then to 6,000 unprocessed complaints, those consumers filling out and returning complaint forms for the State Bar received a form letter included as Exhibit 13. This standard letter was mailed (usually within 30\(60\) days of the Bar\(\equiv\)receipt of the complaint) to literally thousands of persons submitting complaints into 1986. The letter basically explains that the Bar is deluged with a backlog of complaints and is without adequate resources to process them. The letter warns the complaining witness that there will be a six-month delay before the complaint can be addressed by Bar investigators.

In large numbers of now-closed investigatived files, the Bar\(\equiv\)next contact with the complaining witness then occurred from 12\(8\) months after the initial complaint was submitted to the Bar. This next contact from the Bar after the six-month delay letter@Exhibit 13) generally consists of a simple request for additional information, such as the written attorney fee agreement, if any, and other documents and information which might be expected to exist given the nature of the complaint. Many of the complaining witnesses, either because they had moved or because they were understandably not enormously impressed with the disciplinary system\(\equiv\)response, did not answer this belated letter. A subsequent follow-up letter is sometimes mailed from OI, repeating the
request. If these two letters are not answered, the complaint is then closed (NSF) with the notation that the complaining witness lacked sufficient interest to pursue the matter.

It is important to note that the files reveal a large percentage of the backlog reduction accomplished during 1986 has resulted from these kinds of closures. These cases have been closed not as a result of a proactive complaint investigation showing lack of actual merit, but at least partly as a vicious-circle byproduct of the delay which created the backlog.

We note that all of the requests for further documentation made to these complaining witnesses 12 to 18 months after the submission of the initial complaint could have been written immediately upon the receipt of the form or complaint in a matter of minutes. This immediate response and request for appropriate additional documentation is still not the practice at the State Bar, either in the OI Intake Unit or in the immediate review steps following OI Intake (although telephone contact is now more likely, and the current speed of initial response, particularly those cases which are designated Anquiry or closed NSF, as increased markedly).

6. Competence and Resources at Intake

The new procedure at the State Bar designed to facilitate an early elimination of marginal cases is based on an evaluation of material initially submitted by the complaining witness in light of the existing disciplinary standards and the relevant statutes, rules, and judgments of the Review Department of the State Bar Court and the California Supreme Court. Page 3 of Exhibit 19 presents the statistics on the current performance of the OI Intake Unit as it removes cases from the system at the earliest stage by designating them as Aearly resolution@ or AAnquiry@ cases (that is, not appropriate for discipline). As the statistics indicate, although the number of contacts from consumers to the State Bar has increased markedly over the past ten years in a steady progression, the new Intake procedure of delineating many contacts as Aresolved@ or AAnquiry@ cases reducing the flow of surviving matters for investigation and possible formal proceeding. A review of the Intake Flow detail Chart in Section IV above suggests the funnel effect. At first phone contact, one of these six persons can, without review, designate a matter as AAnquiry@ and decline to send the consumer the complaint form. An attorney ignoring his/her clients repeatedly may respond when prodded by the Bar and avoid any further inquiry. Even on a serious matter, an attorney response assuaging a CW will cause a Abottom drawer@ filing closure. If the OI Intake operator views the allegations as serious
and unresolvable quickly, a complaint form (see Exhibit 15) is sent. As noted above, only 20% are apparently returning the forms. If the CW does not write the matter rests inactive in three-ring binders until periodic destruction.

Another Intake investigator will likely review those which are returned during the morning readings. He/she can, once again, designate the matter as inquiry closed. These are placed in the top three drawers of the Intake Unit's fifth floor file in the Third Street Los Angeles office. A review of these forms suggests that at least a number of them could well warrant further inquiry. (Intake may also request additional information and place the written materials in a holding file pending an answer.) The Intake Unit places allegation codes and an initial priority on prioritization of the matter from A one to A four as described in Section IV above. For a possible complaint, OI Intake Unit also attaches a sheet allegedly listing prior discipline of the respondent (including cases currently pending), and transfers the matter to Step 5 on the Exhibit 7 flow chart.

The initial culling of cases as Inquiry to the consumer and the subsequent separate filtering of written complaints is made under the following working arrangement: under the present configuration, the six investigators assigned to the OI Intake Unit spend half of their time on the toll-free line answering continuous phone calls from the public. Hence, three of the six spend one day on the phone attempting to resolve matters upon first verbal contact. The following day, those three are free to perform investigative work while those who were doing investigative work the previous day take the phones. during this Investigative day, however, these investigators must spend some time on the phones in order to give those with phone duty lunch break opportunities. Also during this Investigative day, those three who are not on phone duty conduct a reading of the substantial amount of mail concerning possible discipline problems, all of which is channeled to them whether originating in northern or southern California. This initial reading consumes several hours each morning. At these readings, or on occasion at the point of phone contact, a matter may be designated an Inquiry. Where it is so designated, a separate form is completed and the matter is filed under the last name of the attorney complained about in a file cabinet located near the OI Intake Unit.

The importance of this particular point in the complaint flow process is underscored by the number/percentage of cases which are dismissed at this level. Exhibit 34 arrays the statistics of the
OI Intake Unit as gathered by staff. The exhibit consists of the weekly sheets of output divided into six categories, and it divides that output between Gita Saraydarian and the six individual investigators comprising Intake. The statistics suggest that from 100 to 250 complaints are closed by Intake which would previously have made it into investigations and been counted as an entering complaint. These are the matters listed in categories 1 and 2 of the Exhibit 34 sheets: written and telephonic inquiries closed. These matters are eliminated by Intake at Steps A and D in the Intake detail Flow Chart, respectively (category 2 at Step A, and category 1 at Step D). In addition, it is not entirely clear whether the large number of category 3 matters, simply designated inquiries, might be possible complaints. They are eliminated on their face as matters irrelevant to the disciplinary jurisdiction of the Bar, but their classification as such depends upon a correct understanding of that jurisdiction. It is not at all clear that such an understanding exists.

Categories 4 and 5 include the very large number of telephone inquiries which appear to involve complaints possibly warranting discipline and result in the mailing of complaint forms to the CW. As noted above, only about 20% are in fact returned. Category 6 does not include complaints issued, but the much smaller number of complaints created by the OI operator at the initial call; as the March figures suggest, this procedure is increasingly rare.  

The tables in Exhibit 34 do not include the approximately 150 to 200 complaints per week which are opened after Intake Unit reading of forms and letters received. However, it appears that between 20-30% of consumer complaints are being closed by Intake, a significant number and percentage. And it appears that the number designated complaints are likewise reduced.

3 Note that the Intake Unit terminology would be easier to understand if different terms were used: for example, for a non-complaint call received from the outside, a phone inquiry or phone inquiry/C fee dispute, if more detail is desired; a phone inquiry/C complaint where a complaint opened by phone; a phone inquiry/C complaint closed where closed; a phone inquiry/C complaint form sent coded/uncoded; a written inquiry, a written inquiry/C complaint, and/or a written inquiry/C complaint closed.

4 The Bar’s data will show less than the usual 10% of total membership in complaints received per year for 1987, but the actual number of persons calling with complaints against attorneys appears to be well above that usual 10% benchmark. Based on current 1987 statistics, telephone inquiries with complaints facially relevant to the disciplinary system project to from 15,000 to 20,000, excluding written complaints. We would roughly place the number of actual complaints entering the system without an outreach program, at close to three times the level normally cited by the Bar, or approaching three complaints for every ten attorneys for 1987.
These initial decisions to reject (and prioritize) are momentous. The people making these decisions are junior investigators. Four of the six members of the OI Intake Unit have less than one year of experience as Bar investigators. None have any significant legal training. The training materials they are given and the guidelines they are expected to know are included as Exhibit 15. Their decisions to reject are reviewed systematically, only by Gita Saraydarian, who, although obviously a bright investigator, has no legal training and has been with the Bar only since April 29, 1985. One of the senior attorneys within the Office of Trial Counsel remarked to us: A don’t understand how they can make an initial wholesale elimination of complaints without investigation, by people who are perhaps the least qualified in the entire Bar system to make that judgment. Nor will the imminent replacement of these investigators by young paralegals, perhaps with experience as phone complaint receivers, ameliorate this serious deficiency.

We are very surprised that there is no attorney present, such as an experienced Attorney III or IV, at these readings to establish consistency in inquiry designation; recognize possible important legal issues; direct an immediate request for specific and useful documents and route a case for special treatment where warranted (such as interim suspension, protection of client files in abandonment cases, referral to a prosecuting agency where criminal behavior is described, or special treatment by a special prosecution unit).

Our inquiries within the Bar staff suggest that it is believed the presence of an experienced attorney to direct and route these important decisions consistent with State Bar policy and Supreme Court and Review department standards would apparently violate the notion of an independent Office of Investigations. This territoriality which permeates the reforms resulting from the Kroeker Report is here as elsewhere misplaced, counterproductive, and based on a faulty analogy between street crime police practice and a very different procedure appropriate for an administrative law enforcement system.

Interviews indicate further exacerbating problems, including a lack of knowledge about current Bar standards justifying Notice to Show Cause issuance, a lack of any information about current Supreme Court or Review Department rulings, a lack of knowledge about the area of law which the consumer complaint concerns, and a lack of knowledge about legal procedures in general. In a particularly poignant area, investigators C from those newly hired to the Director C seem to
define the *willful* and *anomoral turpitude* jurisdiction of the Bar with a police *criminal* law interpretive flavor. This is consistent with the street crime background of a substantial portion of OI personnel, and it results in a natural focus on undisguised misappropriation cases. While perhaps deserving of very high priority, the jurisdiction of the Bar under current Supreme Court standards is far more expansive as to negligence and repeated incompetence than either the investigative emphasis of OI or the candid verbal comments of investigators reflect. (See *Chefsky v. State Bar of California*, 202 Cal. Rptr. 349 (1984).)

This general OI criteria concern is exacerbated by a failure to provide training or guidelines to investigators in general. The attorneys assigned to the OI Legal Unit (Virgo, Geminder and Fuchs) have attempted some minimal training sessions and there has been an OI *retreat*. None of the three OI team leaders (Sartuche, Brooks or Fried) attended the major OI attorney-directed workshop in 1987.

The investigators in the OI Intake Unit have an additional morale problem in that they were hired to be *investigators*, but must spend most of their time fielding a large number of complaints from dissatisfied consumers. Their only opportunity for investigation is on their alternating *investigation day*, after they have completed the reading of materials and complaints submitted to the Bar through the mail and after they have spelled those on phone duty during lunch hour. During this brief period, they are expected to attempt to resolve many of the *inquiries* they have received, particularly those received by telephone. They are not supposed to keep a matter before them more than one week. (To allow them more time would likely result in cumulative build-up, and a delay-causing *tank* could develop.) They accomplish this reduction by diverting many matters into the *attorney fee dispute* category (which removes it from the disciplinary system), categorizing the matter as beyond the jurisdiction of the Bar, or assuaging the CW by obtaining a phone call or other concession from the attorney via the Intake investigator’s informal request of that attorney.

The OI Intake Unit is not a popular position among investigators, and notwithstanding its importance, turnover has been very high. Although the Intake system has been in effect less than eight months, two-thirds of the original investigators (four of the original six) have left.

The Board of Governors has recently allocated $320,000 for the hiring of up to ten new investigators. The Bar’s actual plan, however, apparently involves the hiring of new paralegals to
replace the OI Intake Unit investigators. These new employees would be designated consumer complaint handlers. The six investigators presently assigned to OI Intake Unit would be dispersed to the various general investigative units to augment the investigative staff and help reduce the backlog. Present plans unwisely do not include the proper expansion of Intake personnel or incoming telephone lines. Although the use of paralegals does not seem objectionable, it does not address any of the issue raised by the above analysis: lack of training, lack of expertise, lack of attorney review, lack of consistent decisionmaking, and lack of adequate resources and incoming phone lines.

7. Patterns and Complex Cases

As mentioned above, the initial Intake process is not designed to foster the recognition of complex cases. It is unlikely that a sophisticated estate planning or real estate fraud would be recognized as such by the current Intake process unless directly identified by an articulate complaining witness who uses the proper terms of art. In addition, many of the egregiously incompetent attorneys manifest their harm through a large number or pattern of small acts. One failure to return phone calls for several weeks to a client may be a minor matter warranting at most a phone call reminder. But a complete failure to return all phone calls from thirty different clients, half of whom complain over a six-month period, warrants further investigation as a possible standard transgression, or even a possible abandonment which may lead to irreparable harm for the clients (note that an attorney’s failure to meet statutes of limitations and other deadlines precluding the redress of legitimate grievances may give rise to a civil malpractice action, but as explained below approximately half of California’s privately-practicing attorneys have no malpractice insurance coverage).

The Bar does not enter onto its computer any contact classified as an inquiry, although it has prospective plans to do so. These matters are filed, as noted above, in a file room according to the respondent’s name. Although the Director of Investigations has expressed interest in occasional random sampling of inquiry entries against particular respondents for evidence of repetition or pattern, the computer system does not now allow for retrieval, and the backlog does not generally afford investigators the time to conduct a manual search of the file. In reading investigative files, it was not unusual to find that a given respondent very often had numerous other complaints in his/her record. For example, the priors sheet appended to the investigative file would
often indicate 5B10 prior complaints closed as NSF. Under the new system, many of these kinds of cases may be expected to be dealt with by the Anquiry method, and as such will never even appear on the Priors sheet.

In other words, the Bar is not in a position to detect patterns of behavior. Its current procedure emphasizes the sustenance of a viable case in a single complaint. If that single complaint is unable to meet a threshold test appropriate for Notice To Show Cause treatment, it generally will not be saved by the existence of numerous other NSF or even open cases, and the investigator making the critical decisions generally will not check the Anquiry file to determine the incidence of complaints now rejected at the outset.

We do not understand why the IBM computer system cannot accommodate the entry of all contacts about attorneys, including those placed legitimately in Anquiry categories. It is important for a prosecuting attorney confronted with a hearing on a major matter to know about other complaints against that respondent. These other complaints may provide witnesses to rebut that respondent attorney’s defense presented at the hearing. These other matters may provide witnesses to establish state of mind or course of behavior, which may be critical in establishing a prerequisite for discipline. Of the hundreds of closed investigative case files we have reviewed, very few (if any) indicate any mention or analysis of the allegations of other open cases or recently-NSFed cases against that respondent. The investigators, whether in Intake or thereafter, generally do not check the entire contact history of that respondent vis-a-vis consumer complaints about him/her to the State Bar. Many files include a priors sheet identifying 10, 15, 20, 25, or even 30 recently-closed or still-open complaints against an attorney, but the sole discussion and analysis in the closed file concerns the specific allegations made by that particular complaining witness in that particular file.

8. Rejection Procedures

The designation of contacts as Anquiries will be the subject of a future survey by the Monitor in terms of consistency, both internal and with existing Bar guidelines. Where a matter is subject to Anquiry status or early NSF rejection by Intake or Investigations, the CW is sent a cursory letter. The CW’s right to request further proceedings is unmentioned in rejection letters sent by the State Bar through 1986. Attorney fee arbitration options are also unmentioned in many of these written communications, even where the basis for rejection of the complaint is that the matter is a
A fee dispute, and hence not within the jurisdiction of the Bar disciplinary system. The new rejection letters mention the request for further proceedings with the formulation of the Complainants Grievance Panel.

B. INVESTIGATIONS

1. Initial Review by Special Operations

The vast majority of incoming cases are assigned lower priorities by the OI Intake Unit. These cases are now routed to a special unit for an additional intake review. Al Fried Special Operations Division has foregone special operations activities (except for two investigators handling repeat offenders), and has allocated four investigators to perform an additional culling for possibly marginal complaints in order to stem further the flow and make backlog reduction more likely. These investigators make NSF determinations, subject to cursory review by Fried, and close out additional investigations with a terse rejection letter (see Step 5 in the Exhibit 7 flow chart). This group is now seeking broader authority to cull high priority cases as well.

This additional review suffers from the same defects as the OI Intake Unit review process described above. Although some of the investigators conducting this additional review have law enforcement experience, they are not familiar with Supreme Court or Review Department current standards and decisions, and they are not in the best position to make important decisions to eliminate cases from further proceedings. Their workload precludes extensive additional investigation into individual complaints, and the application of rejection standards by this newly-created ad hoc team are unlikely to be internally consistent. Once again, these are momentous decisions and although the new Complainants Grievance Panel (which has been created but is not yet operative) may receive requests for further proceedings, it will only examine cases if the complaining witness makes the effort to request those further proceedings (unless the Panel conducts its own proactive audit).

It would appear better to have the most qualified person make the hard decision with maximum information at an early stage, rather than subjecting the system to a culling by investigators without coordination, knowledge of current legal standards, or adequate expertise. This additional review by Special Operations would appear to be unnecessary, but there is inadequate culling taking place at the outset for all the reasons described in Section V(A).
Further, the Special Operations intake review suffers from the same critical problem as does the OI Intake Unit review—the absence of a trained and experienced attorney capable of recognizing more subtle legal issues and directing the acquisition of critical evidence. Since the reading takes but one to two hours each day, and since the prioritization, routing, and rejection decisions made at this stage are momentous, those decisions should be made by a single attorney with respected expertise and current knowledge who will make consistent decisions which will only have to be made once. If new information is obtained warranting later rejection of the case (by either inquiry or NSF file close-out), that information can be submitted to that same person under the work flow now extant. This position is one of the most important in the entire system and is nonexistent in the present configuration.

2. The Volunteer Investigative Attorneys Program (VIAP)

Many cases emerging as possible complaints from the new Special Operations intake unit (Step 5 in the Exhibit 7 flow chart) will be routed to a new Volunteer Investigative Attorney Program. That is, in order to reduce the backlog given a lack of professional investigative resources, the Bar has begun the reinstitution of its VIAP program, which calls for the use of volunteer attorney investigators in the field. At one time, most Bar investigations were conducted in the field by volunteer examiners who were practicing members of the Bar. Practicing attorneys also often held informal hearings to determine whether probable cause existed to file a Notice To Show Cause. These procedures are no longer routinely used.

However, in its continuing attempt to reduce the backlog and satisfy the legislative mandate in SB 1543 and SB 1569, the Bar proposes to ask for volunteers from local bar associations, subject these individuals to brief training, hand them from ten to fifteen files each, and allow them to complete the investigative work and recommend NSF close-out or possible issuance of a Notice To Show Cause based on their findings.

This program, now underway, is ill-advised. Although our findings and conclusions are tentative in many respects, we have no hesitation in categorically condemning the VIAP program either as it has historically functioned or as it is now being implemented. The system is structurally flawed at the outset. It appoints as investigator and quasi-prosecuting agent a currently practicing attorney, usually one who lives and works in the same community as the accused respondent.
Notwithstanding a general feeling in the legal community that such investigators will be objective and that conflict of interest problems are solvable, it is quite understandable that complaining witnesses whose complaints are rejected will not share that view.

Although the Bar intends to be more careful in its selection of field investigators (prior recruits have included accused respondents), the perception of conflict of interest by the complaining witness C whatever the good faith of the examiner in the field C undermines an effective system. Those who submit themselves to this system must have full confidence in its impartiality. The Bar clearly has the resources to conduct professional and independent investigations and it should do so. If its current budget does not allow for high-quality adequate investigative resources, an assessment of a very small amount per attorney would produce more than enough salary enhancement and additional positions to perform the job.

The VIAP program was attempted in 1985B86 (and previously) in several waves to attempt reduction of the investigative backlog. The experience of the Bar with the program at a practical level has been clearly negative. Attached as Exhibit 16 are several of the internal memos and notes from the VIAP experience in 1985. Apart from the theoretical and actual conflict of interest issues is the fact that most of the attorneys who volunteered for VIAP had no experience in investigations and little knowledge of Bar standards, the conduct of administrative proceedings, and/or the area of law at issue in the complaint. Many of them volunteered because they were concerned about discipline and cared about the competence and honesty of their colleagues. Many others participate to add an integrity-enhancing appellation to their resumes.

Whatever their motivation, the performance of the VIAP program has been extremely unsatisfactory. Our review of the files revealed, on rare occasion, attorney field investigative work of unusual thoroughness and professionalism. However, the work was inconsistent and a large number of the volunteers either did no work or such unsatisfactory work that it had to be completely redone by an OI line investigator. A rather bitter memo from the Acting Assistant Chief Trial Counsel dated June 24, 1986 notes the following: 38 volunteers allegedly signed up to be investigative examiners, 25 confirmed that they would attend the workshop, and 13 actually showed up for the workshop training. A large proportion of those assigned cases after the final cut failed to do anything at all by way of investigation. Although they were given a sixty-day deadline, a
substantial number of those did not complete their investigations of six, eight, or even all ten files assigned to them. Don Mike Anthony of the Discipline Committee of the Board of Governors was reduced to writing letters demanding the return of files from a substantial number of attorneys who, after volunteering and attending the workshop, failed to follow through. In many cases, all that was accomplished was a sixty-day delay and a series of letters and threatening phone calls from Anthony in an attempt to get the files back so that somebody could do something with them.

Even more disturbing than the lack of conscientious follow-through by VIAP volunteers is the quality of their work. In our interviews of OTC line attorneys who have had to handle VIAP-investigated cases in which Notices To Show Cause are recommended, OI line investigators who often must reinvestigate the matters assigned out, and OTC supervisory attorneys who train the VIAP attorneys in the workshops, the judgment was unanimous: the program does not work.

The structure of the program reminds one of the difficulty one may have in getting one’s son to take out the garbage. The constant reminding and nagging necessary to get the kid to take out the garbage often involves far more work than it would take to just take the garbage out yourself. This homespun analogy is most appropriate to the VIAP process.

3. Load, Delay and Passivity

Cases which have been classified as a priority Aone@ or Atwo@ may not be selected for VIAP treatment, and will go to the director of an investigative team if not eliminated by the preceding culling process. One of the three team leaders in Los Angeles or Bob Sandstrom in San Francisco then reviews the priority given to the matter and assigns it to a line investigator for further investigation. This line investigator may recommend the NSF closure of the case (as may a VIAP investigator), subject to review by the director of the team. Once again, although the Office of Investigations has its own legal staff, these NSF decisions by line investigators are curiously not subject to attorney review.

Numerous serious problems and concerns exist with the current operation of the Office of Investigations. The first difficulty is simply the workload. At one time, OI maintained a large Atank@ which contained up to 2,500 files warranting further investigation and assignment to specific investigators. The OI Atank@ no longer exists; the problem has been Aresolved@ by simply assigning out most of the cases to investigators and reducing the tank. Unfortunately, the assignment of these cases
results in a working caseload per investigator of 150-200 cases at a time. There is general agreement among investigators that a standard mix of Bar discipline cases, assuming that complex priority cases are not included, should be in the 50-60 case range.

Most investigators have three times the number of cases they are able to handle. This overload operates in the same way that the addition of too many cars to a freeway slows the thoroughfare to an extremely inefficient speed. OI investigators are constantly receiving phone calls about their excessive cases. They no sooner answer one phone call when another one arrives, and they must flip through yet another file to answer that question or to move it forward one small step. They are unable to concentrate on any matter for more than a few minutes before their caseload directs them to yet another file.

OI investigators must rely almost exclusively on telephone and written correspondence for their investigation. Virtually no field work is undertaken by the Office of Investigations. Many investigators have expressed a need for on-site field work for many reasons familiar to those who investigate white-collar crime. There is no substitute for going through the records directly yourself, seeing the witnesses face-to-face, and otherwise conducting an on-site inquiry in many cases. OI personnel, however, must obtain special permission through a time-consuming process in order to conduct such an investigation. The Bar effectively prohibits such inquiries by placing burdensome barriers before investigators who wish to conduct any inquiry beyond a very peremptory collection of admissions and documents by phone or letter. Hence, any case successfully directed into the system must be carried through the cooperative effort of the complaining witness. Whenever the complaining witness becomes satisfied with the respondent attorney, loses interest in the additional work required of him/her to pursue the matter, or otherwise does not cooperate, the matter is closed forthwith.

As noted earlier, there is no proactive investigation, and there is very little subject matter expertise within the Office of Investigations. Investigators within the Office tend to fall into two categories: retired former police officers most familiar with street crime; or former secretaries or process servers promoted from within the Bar.

Although the Special Operations Division was designed to handle complex and serious matters, only two investigators are so assigned at present given the Bar's current preoccupation with
reduction of the backlog. Presently, no resources are available to handle complex or serious investigations within the State Bar system, except for the token commitment noted above. Virtually every investigator and former and present OTC attorney with whom we spoke are adamant on the failure of the Bar structure as presently constituted to handle any sophisticated or complex and serious matter. The system is designed to cull out simple abandonment or clear misappropriation of funds cases amenable to two witness hearings and quick resolution.

It would appear that in addition to proactive inquiry, a proper discipline system would have a Special Operations Division consisting of attorneys and investigators. Given the resources available to the Bar, and the number and severity of the complaints received, such a unit could easily include expert investigators and attorneys in real estate, estate planning, family law and other substantive areas commonly the subject of attorney abuse and consumer complaint. We believe that these substantive areas can be identified through a survey of the incoming complaints, particularly in the priority Aone@ and Atwo@ categories.

The confidence of the Bar in the adequacy of the present limited phone and letter investigation leads it to transfer a large number of Los Angeles area complaints to the somewhat less-overloaded Bar investigators in San Francisco. In addition to the obvious difficulty of adequately investigating an incident which arose in southern California from a telephone in San Francisco, our investigation of this practice revealed a rather shocking historical phenomenon. Another notorious Atank@ this time at the OTC level C was created, consisting of southern California cases, some of which had been referred to and investigated by San Francisco investigators, and then shipped back to Los Angeles with recommendations for the issuance of NTSCs. Contributions to this Atank@ from San Francisco began in 1983, when the Bar San Francisco office recruited a team of 4 persons, including Bar attorneys working in divisions unconnected with discipline (e.g., the attorney advising the Public Law Section), and set before them the task of investigating Los Angeles cases to reduce the already growing backlog. A number of these cases were investigated, SOCs were prepared, the issuance of NTSCs were recommended, and the files were transferred back to Los Angeles for the filing of NTSCs and formal hearings. Most of these cases, and a larger number of Los Angeles generated cases, were assigned to Jerry Markle, who at the time was Assistant Chief Trial Counsel in Los Angeles. Many of them sat in what is known variously as the Ared room@ or the ATNT room@
(i.e., getting so full it may blow up) from 1983 to 1986. Some of these matters, now being prosecuted in Los Angeles, concern events which occurred more than a decade ago, and present OTC line attorneys responsible for their prosecution have expressed numerous complaints about the adequacy of these San Francisco investigations, as well as the obvious staleness problems.

The elimination of the OI tank and the current overload on investigators has resulted in the creation of some forty sub-tanks. How these sub-tanks are handled is of special importance. The cases are distributed in a mix so that each investigator may get a number of priority ones, twos, threes, and fours. OI's preoccupation with demonstrating to the Board of Governors and Legislature its backlog reduction and statistical improvement has reached such a level that a quota has now been imposed on OI investigators. They must close five cases per week or be subject to discipline. Further, one of these five cases must lead to an SOC (Statement of the Case) for recommended NTSC issuance. OI investigators agree that closing an average of five cases per week is not unreasonable in the long run, since that is the approximate historical performance level of the Office of Investigations under normal circumstances. However, the imposition of this mandatory quota week to week has a predictable result on these satellite tanks. Investigators move into the forefront cases which are easy to NSF, particularly in the priority three and four categories. They are delaying the high priority, complex, and serious matters requiring additional investigation. This observation does not derive from inference, but is openly admitted by those investigators subject to the current system who have spoken candidly with us. Complex cases are specifically avoided in favor of caseload reduction statistics. And, once again, there is a strong incentive to NSF cases without attorney review.

Exhibit 18 illustrates the concern. OI presented with pride 13 pages of statistical charts and graphs to the Board showing compliance with the statutory backlog reduction commands. The older cases are being resolved (although backlog levels of complaints over six months old number close to 3,000 similar to levels in 1982 B83). However, we added two pages to Exhibit 18 from other OI sources. In January 1987, OI regretfully did not meet its goal of 700 complaints disposed of, finishing at 580. It issued 106 SOCs for NTSC issuance and prosecution, which is close to a 20% meritorious complaint rate. That figure appears a bit high, except the new inquiry elimination at intake may reduce it to below 10% by traditional measures, a more typical figure. Then in February
OI approached its 700 goal with 677 complaints disposed of, and in March it powered through an extraordinary 1096. But it issued only 14 SOCs in February and 40 in March C from close to a 20% meritorious complaint rate to a rate in the 2B4% range. The inference is clear.

4. Fragmentation

The OI case overload and failure to detect patterns is further exacerbated by the historical failure of the Bar to assign cases against the same respondent to the same investigator. Although most within the Bar believe this problem has been somewhat ameliorated in recent months, we surveyed investigative files against the last 100 attorneys whose investigations were closed in Los Angeles. We chose the 19 attorneys with the highest number of A p r i o r s @ listed on their priors sheets and ran each of those names through the computer to ascertain which investigators had been and were being assigned the various cases against these respondents. Exhibit 17 presents the results. Note that some of these varying names occur because some of the cases have gone from OI up to OTC where a different person is assigned. In some other cases an investigator may leave the office and his/her cases may have to be reassigned to another investigator. The survey results indicate somewhat of a continuing problem in the fragmentation of investigative assignments, although the new policies do appear to be gradually addressing what has been the inefficient allocation of different cases against the same respondent to two, three, or four different investigators. We hope that this improvement continues since these survey results and other individual file studies indicate that the fragmentation problem has not been entirely solved.

The fragmentation problem may be exacerbated by the prospective move of a part of the Office of Investigations into the Security Pacific Bank Building in Los Angeles. OI will thus be located in the Security Pacific Building and on Third Street, while the Office of Trial Counsel will be located on Third Street and on Seventh Street. Carrying a file to a colleague’s office or to an attorney expert in a particular area relevant to an investigation for quick review and question is thus impeded.

Finally, note that even with proper initial assignments, the reassignment of investigators between sections handling different types of cases and high turnover results in numerous case transfers affecting both fragmentation and imposing displacement costs.

5. Policy Impediments to Aggressive Investigation
We have briefly described the requirement that investigators obtain special permission to engage in field work. Other impediments are also placed in the way of the investigator. Any investigative technique which involves the possible expenditure of funds, ranging from copying expenses to extraordinary travel, must be separately approved through a time-consuming process. A subpoena duces tecum cannot be issued for documents (even by the attorneys working with the Office of Investigations), without the inclusion of an affidavit in support of such a subpoena. The review of the affidavits filed in such cases gives the impression that search warrant affidavit criteria are being used for the simple administrative subpoena of a document, including documents held by current licensees of the Bar. No procedure has been established for obtaining an administrative search warrant for an attorney’s office. Although such a procedure would involve some special problems, it is one of the most useful mechanisms for administrative system enforcement since it does not depend upon the voluntary surrender of incriminating evidence by the respondent. Over the past decade, no administrative search warrant power has been requested by the State Bar.

Apart from failing to facilitate aggressive investigations, the Bar has imposed some extraordinary additional barriers. The first is its prohibition against the mention of the accused respondent’s name. During the entire course of the investigation, investigators are prohibited from mentioning the name of the attorney they are investigating. They are even prohibited from writing the respondent’s name in their correspondence back to the complaining witness who complained about him/her in the first place. Where a complaining witness has problems with two or three attorneys, the investigator’s attempt to write a response letter acknowledging the complaints without mentioning the name of any of them makes for some interesting problems in draftsmanship. Apparently, the theory behind this policy is that a third party might see the letter, which might cast some unwarranted aspersion on the subject of the investigation.

This same proprietary sensitivity to besmirching the name of an attorney is carried over into the basic mechanics of the investigators’ work as well. Under the Bar’s current procedure, the investigator is unable to even talk to another client of the respondent who is not the complaining witness without express permission and written justification. Investigators must complete a form entitled Request for Permission to Interview Non-Complaining Clients of Attorney. Permission to conduct such an investigation is not simply subject to approval by Director of Investigations
O'Brien. Copies of 1987 forms indicate that these requests, under an existing November 21, 1986 policy memo from Mary Yen, must then be specifically approved by three separate members of the Board of Governors Committee on Discipline. The fact that an investigator, under current workload restrictions, is compelled to make a separate written request with justification, in order to simply talk to a non-complaining witness, which must be approved by a superior and then by three currently practicing members of the Board of Governors\textsuperscript{5} Discipline Committee, is a sad commentary on the priorities and sensibilities of the Bar.\textsuperscript{5} OTC and OI requests for this elementary authority, including a request in April of 1986, were unfortunately rebuffed by the Board of Governors.

Perhaps the most poignant example of solicitude occurs when Los Angeles investigators have probable cause to believe there is serious misappropriation from an attorney's client trust fund. They need the bank name and account number to subpoena the records. This information is available in the Bar's own San Francisco Legal Services Trust Fund office. The investigators are not seeking the records, just the bank identification information so it can be subject to legal process. The Bar's own San Francisco office refuses to divulge this information to the Bar's own investigators in deference to the confidentiality interests of licensed attorneys.

These examples do not exhaust the subject. An investigator seeking a CII check on prior criminal arrests and convictions may need fingerprints. All attorneys have their prints taken when they take the Bar exam. OI requests for the prints from the Bar are denied as invading attorney privacy. When an examiner (OTC attorney Sherrie McCletchie) requested the Bar's own moral fitness hearing transcript on a particular respondent, the Bar's own Office of General Counsel opposed her attempt to obtain it. The respondent had criminal convictions he had concealed on his

\textsuperscript{5} Note that any competent investigator minimizes contaminating impact on his investigation by confining his interviews and inquiries to persons likely to yield meaningful information, and where appropriate, couches his/her inquiries with the appropriate disclaimers: \textit{We have some questions about some transactions relevant to attorney X; we have not made any findings at all; we are just trying to get some information about the subject,... and we would appreciate your help.} Of no other trade, including those with clients whose continued business is important, imposes such a restriction on an investigative entity. Indeed, a peace officer inquiring into a crime which may cast aspersions of rape, sodomy, and murder onto those persons being investigated, is not subject to these kinds of investigative limitations. Those investigators with substantial experience in the Bar find that secrecy and contact limitations preclude aggressive or meaningful investigation, are unnecessary with proper training, and are demeaning to them as investigators.
application. A hearing was held at which he testified, and he was denied Bar admission. The admission was improvidently reversed by the Bar and McCletchie had the later-admitted attorney as a respondent within several years on an original proceeding (and two subsequent conviction referrals). The Bar’s hearing transcript was relevant, but her efforts over the subsequent year to obtain it sound like an Homeric odyssey. She still does not have it.

Perhaps the most comical extension of territorial protectionism has occurred in May of 1987. The new statute discussed supra requires attorneys to notify the Bar of criminal convictions or if three civil malpractice filings are entered in any one year against them. As inadequate and limited a source of information for OI and OTC discipline use as this may be, it is something. Last month, however, an OTC attorney was told by the Membership Records Office now gathering this information that her inquiry about such reporting by a respondent she was prosecuting was confidential and could not be revealed.

6. Morale/Resources

Exhibit 20 attached hereto lists those currently employed by the Office of Investigations in Los Angeles and their respective tenure with the Bar. Note that three of the thirteen persons with more than five years’ experience are the attorneys in the Legal Unit of the Office of Investigations, and not the investigators. Of the other employees, seventeen have been with the Bar three years or more, thirteen for two years or more, and 31 have been employed by the Bar for one year or less. The Bar has serious difficulty in attracting and maintaining top-flight investigators for this important work. As noted above, they tend to consist of retired police officers or promotions from within, often former secretaries or process servers. Current investigators contend, with some apparent justification, that their starting pay is substantially below comparable pay for District Attorney’s Office and Attorney General’s Office investigators, and well below comparable pay for peace officer duty. Estimates of the deficiency range from 10-25%. Exhibit 27 includes the current salary levels for the positions of Investigator I, II and III.

Exacerbating the problem is an apparent ceiling on promotions at the Investigator III level at a salary which does not encourage long-term career path development. Also, during 1984, the Bar was able to obtain the abolition of the which normally augment pay within a class.
That is, in most public sector employment, including District Attorney Office and Attorney General Office investigators, the salary of an Investigator I will increase somewhat as he or she progresses from steps A through D in time of service. These periodic raises, at approximately 5%, occur once every year or two and provide additional incentive to remain with the position. The Bar has replaced this system with a merit system, but it has not yet been implemented.

Investigators generally have only rudimentary clerical help and at least in Los Angeles have been moved into a bullpen-type work space. Each investigator is given a very small area (perhaps six feet by six feet) in a large open room complete with noise and bustle. There are constant distractions, interruptions of social and related conversation within the room, and OI personnel have great difficulty in concentrating on the investigative work at hand. A brief walk through facilities for investigators at the Third Street offices of the Bar in Los Angeles illustrates the problems faced by investigators more eloquently than any written description could accomplish.

In general, the morale among investigators, including those of acknowledged competence and service, is low.

7. Investigator/Attorney Interaction

The creation of a separate Office of Investigations, as recommended in the 1985 Kroeker Report, has been completed with a vengeance by the Bar. Kroeker, a former police administrator, and the current Director of the Office of Investigations, Ken O'Brien (who has a long career as a police administrator in San Diego), contend that the format is comparable to a police/street crime, city attorney, or district attorney investigative model. There, the police are responsible for investigating the crime, compiling the police report, formulating a witness list, and otherwise gathering evidence and written reports so the case may be prosecuted. The police agency then carries the material to an issue deputy within the District Attorney or City Attorney Office, who reviews the material and makes a decision whether to proceed with the case. The attorney receives the evidence and may never speak with the officer who conducted the investigation until he/she testifies at trial, if that testimony is needed.

Although appropriate in other areas, this model simply does not work in the administrative process, or in any white-collar crime setting. It especially does not work where the defense or respondent is represented by a well-financed defense effort, where substantial discovery must take
place prior to trial, and where the issues involved go beyond proof of the identity of the defendant. For this reason, the Consumer Fraud Division of the District Attorney’s Office in San Diego employs approximately twice the number of investigators as it does line Deputy District Attorneys. These investigators work full-time with the attorneys on the cases from initial filing through trial.

The Bar’s Office of Investigations has adopted a policy which precludes a line investigator from even talking to an attorney, including the three attorneys directly assigned to the Legal Unit of the Office of Investigations, without first obtaining the permission of the senior investigator in the unit (e.g., Lloyd Bogstad), and then the permission of the unit director (e.g., Phil Sartuche). Neither the investigators nor attorneys involved agree with this impediment to their mutual communication.

8. Abatement

One way to remove a case from an overly burdensome workload is to abate it. Sometimes it is appropriate to delay an investigation or prosecution pending the arrival of similar charges imminently forthcoming, or for other reasons. However, a review of files reveals that the Bar routinely engages in an abatement of its disciplinary action where any civil or criminal case is pending or may prospectively raise similar issues. Furthermore, these decisions are made by investigators without any apparent attorney review.

To illustrate the inappropriateness of this policy, one need only review a 1985 Kern County case. The client entrusted her fortune, amounting to $2.5 million, to her counsel. He took the money and invested it in corporations he controlled or participated in and borrowed from the funds. He has not paid back the monies and the investments have been lost. Phone records in the Bar’s file detail over 300 attempts by the client to contact the attorney. Almost all of them are recorded as a one-minute sign-off, meaning counsel was unavailable. The file also includes an affidavit from the attorney’s own bookkeeper, attesting to sufficient dishonest behavior to warrant consideration of immediate disbarment. Although bereft of most of her funds, this complaining witness retained an attorney and sued the attorney for fraud in federal court. Upon learning that a civil case was pending, the Bar immediately without attorney review abated its disciplinary proceedings.

Further, this abatement procedure does not allow for any automatic recall of the matter should the civil case be resolved. Rather, the complaining witness must reapproach the Bar at a later and more opportune time (when the matter will undoubtedly still be on appeal) in order to reactivate
the case. The complaining witness in the above-mentioned case, having some difficulty in paying for counsel, has now had three different lawyers handling her case in federal court. Those counsel handling the case told us that they have gotten absolutely no help from the Bar and that the matter is tied up in interminable discovery disputes in federal court, and is likely to remain in that status for a long time to come. Meanwhile the attorney retains the client’s monies, is free to practice law, and is so practicing today.

Exhibit 21, page 3, includes a standard Bar letter to a CW whose attorney has committed acts (relevant to his complaint) which warrant criminal prosecution. The July 2, 1986 letter tells the CW the matter will be abated until the criminal matter is disposed of and the CW informs the Bar of that fact and his continued desire to pursue the matter.

Yet another abatement example is contained in an unintentionally ironic memo to Special Operations Director Fried dated March 23, 1987. An investigation into serious abuse by an attorney resulted in the final conclusory paragraph and disposition:

There appears to be potentially multiple violations on the part of the Respondent, including: representing conflicting interests and failure to adhere to the rules associated therewith, misrepresentations to the court, violation of a court order, moral turpitude and possible criminal activity. This case is currently before the Los Angeles County Superior Court (C 591975 and P 697467). The litigations appear to be complex, lengthy, and directly related to the issues in which the State Bar has an interest. Thus, a request pursuant to the Rules of Procedure, NSF without prejudice, this case pending the result of the underlying litigation, is requested.

Theoretically, abatement is governed by Rule 350 of the Bar’s Rules of Procedure. Under the rule, upon written motion...for good cause shown, a hearing panel or assistant presiding referee may abate an action pending related litigation (Rule 350(b)). The Bar has so abated approximately 10 cases in 1987 through the Office of Trial Counsel. But many cases are being abated in OI, without required compliance with Rule 350(b) standards or procedures, indeed, without attorney review! Investigators simply abate to avoid that terminology. There is no mechanism for re-triggering the case unless a CW refiles another complaint after the
cause for abatement is gone. Of course, NSFing a case without prejudice is misleading since prejudice does not attach in any event when an investigation is closed.

Lead counsel advising OI in Los Angeles, Paul Virgo, concedes that there are no procedures established for abating a case. He informed us that he recently discovered that investigators are abating cases without informing him. Our review of the files indicates that this is a longstanding and general practice.

Virgo contends that he should approve any abatement and that abated cases should be re-reviewed at thirty-day intervals. He also correctly enunciates a preferable policy: cases should rarely be abated and then only briefly.

In fact, the administrative process can take the lead. Unless there are Fifth Amendment barriers precluding fact presentation or imminent (30-60 days) discovery or hearing material relevant (e.g., a criminal preliminary hearing transcript), there is no reason to wait. (See also discussion re: conviction referrals, infra.)

9. Proper Criteria for NSF

Apart from the issue of lack of attorney review of case closures, and inconsistency in closing files based on non-sufficient facts (NSF), is the propriety of the actual decisions made. We reviewed hundreds of closed investigative files, most of which were NSFed at the investigative level. It is clear that the majority of complaints about attorneys communicated to the Bar are deserving of inquiry (that is, non-complaint-generating) status. A substantial number involve emotional reactions to volatile situations, complaints about rudeness, and misunderstandings about the law and court procedure. However, substantial inconsistency exists between cases closed and cases moved up the line for further proceedings. We noted numerous closed cases which would seem appropriate for further investigation while numerous cases investigated further could have been immediately closed.

Some specific practices warrant generalized comment. Whenever a complaint against a lawyer also involves a dispute over the attorney’s fee, there is a tendency for investigators to close the case forthwith as an attorney fee dispute matter. Complaints which contain as one minor aspect a concern about the size of the fee and/or whether the attorney did anything to earn the fee are summarily closed without reference to possible additional violations, and sometimes without
explanation (as noted above) of the attorney fee arbitration remedy. Where a complaining witness appears to have a number of legitimate and perhaps actionable bases for Bar discipline against an attorney, the supplemental existence of an attorney fee dispute should not eliminate the case from further proceedings. Yet, in many instances, this is the case.

A second oft-repeated practice is to simply claim a lack of jurisdiction whenever complaints are made about the unauthorized practice of law, including unauthorized practice by lawyers who have allegedly resigned or been disbarred by the discipline process. See the final page of Exhibit 21 for an example of a Bar standard letter of rejection on this basis.

Finally, as noted in the discussion of Intake supra, the Supreme Court’s interpretation of moral turpitude a legal term of art is quite different than that which appears to be the impression of most investigators. We have observed that a substantial percentage of the cases heard by the Review Department on appeal following NTSC and hearing are quite similar to scores of closed NSF files from OI. Although most cases closed by OI warrant closure, a large number are clearly improperly closed.

We have been informed that the Bar’s first, rather informal audit of investigator NSFed cases, by OI attorney Geminder, suggested that at least 11 of 80 reviewed were deserving of further investigation.

10. Referral To Other Authorities

Many of the complaints made to the Bar, including the unauthorized practice of law problem noted above, may not fall within the jurisdiction of a licensing revocation remedy; however, alternative or supplemental criminal prosecution may be warranted. Under current Bar procedures, however, a special authorization under Rule 227 of the Bar’s Rules of Procedure must be obtained in order to disclose information or to exchange information with other agencies. Once again, a separate form is required to be completed in order to obtain the necessary permission. Up until 1987, this permission could be obtained from the Chief Trial Counsel. Now, that individual may be able to delegate that authority to the Director of the Office of Investigations.

As with the forms required in order to interview a non-complaining client, these Rule 227 waiver forms impose both a practical and psychological barrier on the proper performance of investigative duties. The presumption and the procedure appear to be: let review the matter and
make sure we are not hurting this attorney unnecessarily before we act. In the area of disclosure to another government agency, particularly a prosecutorial agency, such a mindset is particularly inappropriate. If the Bar, or any person in the Bar, has information indicating a violation of any criminal statute of this state or nation, that person is duty-bound to report the matter to the public authorities so concerned. The reporting of this matter to those authorities should not require the completion of any form or the permission of any superior. The canons of ethics and the status of the persons involved as officers of the court and as a part of the judiciary require such a policy.

The Acting Chief Trial Counsel protests that the procedure is nothing more than a way to track such sharing for administrative purposes. If so, it should be a simple notice, not a waiver. Just what is being waived?

Further, we have reviewed all of the requests for authorization to disclose information to and exchange information with other agencies, as well as the requests for permission to interview other clients outside the complaining witness. The burdensome barriers imposed by the Bar in these areas are reflected by the extremely small number of such efforts undertaken by investigators or attorneys within the Bar system. We asked for copies of all form requests from January of 1985 to the present. We have not yet received a response from the San Francisco office. Approximately thirty requests to interview non-complaining clients of the respondent were processed in the Los Angeles office since January of 1986. Out of more than 12,000 complaints arriving at the Bar during this period (approximately 9,000 relevant to southern California attorneys), surely more than 30 instances arose where the conduct of these additional interviews would be appropriate. The letter on the final page of Exhibit 21, noted above, illustrates the common termination methodology for Bar receipt of often

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6 Note that Exhibit 22 lists the current alteration of that policy. The venue for approval to interview non-complaining witnesses by investigators now resides in the Office of Investigations. However, the Office of Investigations only has the authority to approve interviews and communications... when the underlying investigation or proceeding relates to the failure of a respondent to comply with Rule 955.... All other communications with non-complaining clients continue to require authorization by the Chairperson of the Committee on Discipline and the concurrence of two other members of the committee, upon a showing of good cause in writing. Note that 955 relates to the very limited obligation of an attorney who has been disbarred, suspended, or has resigned to notify clients, courts, and opposing counsel and to provide for the transfer of his/her clients’ cases to other counsel and to preserve the files for the benefit of those clients. In this situation, the Office of Investigations is going to have to talk to all of the clients of the attorney involved, whether complaining or not. It is perhaps particularly unfortunate that the Director of the Office of Investigations, with over thirty years of police experience, is told that he does not have the authority to authorize the simple interview of a witness relevant to a Bar disciplinary transgression without written permission from three currently practicing lawyers, none of whom have any experience whatsoever in law enforcement.
criminal acts C a simple jurisdictional disavowal without further comment to the CW or alternative authorities.

The Rule 227 request forms for authorization to disclose information and/or exchange information with other agencies also reveal the infrequency of this action by the Bar. Our analysis reveals only twelve such cases of cross-referral requested, approved, and made during the last year (June 1986 to the present) from the Los Angeles office, and five from San Francisco. Once again, of the 9,000 complaints received by the Bar during this period, more than seventeen surely included substantial evidence of criminal violations warranting disclosure to existing prosecutorial agencies. Interviews with the lead prosecutors in the two largest counties of California indicate a general lack of coordination and cooperation between the Bar and the white-collar crime units of those major offices. There is no close ongoing working relationship nor mutual sharing of information, which should certainly be the case given the common interests of both entities. The Acting Chief Trial Counsel properly points out that this failure is not entirely one-sided, and persuasively cites current DA antipathy for embezzlement cases in amounts under six figures.

C. OFFICE OF TRIAL COUNSEL

Referring once again to the Exhibit 7 flow chart, where the line investigator at Step 8 believes that a NTSC may be warranted, the investigative file is submitted to the OI Legal Unit C to Lynne Geminder in particular. She formulates and edits a statement of the case (SOC) to be transmitted to the Intake Legal Unit of the OTC for possible Notice To Show Cause formulation. The OI Legal Unit may also, as noted in Section IV above, NSF (close) a case or issue an admonition. Admonitions issued at this level (prior to the issuance of a Notice To Show Cause) are not subject to Review Department review, and are filed on a special shelf on the first floor of the Third Street State Bar building among the NSF closed investigative files.

The OI Legal Unit is under severe pressure to accept the degree of investigation accomplished and approve SOCs for transmittal to the OTC. NSF closing, admonition issuance, or SOC preparation removes the case from the total backlog attributable to the Office of Investigations, which has been the subject of recent legislation.

The Intake/Special Proceedings Unit of the Office of Trial Counsel includes four attorneys who handle the drafting of Notices To Show Cause. Unlike previous procedure, these attorneys did
not investigate the case, do not directly work with the investigator, and will not try the case after issuance of the order. They also may NSF the case, issue an admonition prior to Notice To Show Cause, stipulate to a private reproval or other discipline, or go forward with a formal Notice To Show Cause proceeding.

Exhibit 18 includes general statistics gathered by the Bar recently as to 1985, 1986 and some 1987 OI and OTC case-handling performance. As can be readily seen from Exhibit 18, of 8,574 complaints received in 1986, 7,715 were determined to have non-sufficient facts C an approximate 90% rejection rate. Further, the increasing number of Aquiries@eliminated as potential complaints during the current OI intake procedure would appear to make this rejection percentage much higher.

The OTC raw data Alose-out sheets@for 1987 indicate a large number of NSFs and admonitions entered after OTC acceptance and before NTSC filing. These close-out sheets indicate the disposition of cases which have survived the series of culling operation in Steps 1 B of the Exhibit 7 flow chart, and which have been recommended for formal disciplinary action by the Legal Unit of the Office of Investigations. As to this limited and Aelite@population, the OTC at a very early stage then on its own closed out 24 cases for Aon-sufficient facts@during January B March of 1987. Ten were eliminated with the token Amonition. During the same three-month period, 65 NTSCs were filed. Of these, some may be dismissed at hearing or settled by stipulation.

Exhibit 24 includes the monthly total output statistics for the Los Angeles OTC for September 1986 through March 1987. These summary statistics available for wider review do not include OTC NSF closings.

Exhibit 23 includes the most recent San Francisco and Los Angeles logs showing the status of current cases within OTC (with names redacted since some have not yet reached NTSC filing). The timing indicates a three- to five-month lag between OTC intake and NTSC filing. We explore the reasons for this delay, infra.

1. Investigative Coordination/Assistance

The lack of physical facilities in Los Angeles has resulted in the Office of Investigations = leasing of additional office space in the Security Pacific Bank building. As mentioned above, this means that the Office of Investigations will be located at Third Street and in the Security Pacific Bank building in Los Angeles. The Office of Trial Counsel will be located at the present Third
Street and Seventh Street offices of the State Bar. This fragmentation of location reflects the larger problem of the bifurcation of attorneys and investigators in the current evolving system. While it is possible that straight abandonment cases and certain other categories may be handled through an investigation by one individual and transfer of the case to a prosecutor for short-matter hearing and disposition, complex cases simply cannot be tried after a four-month investigation (or a one-year investigation), and a simple hand-off to a prosecuting attorney.

In the administrative process, where discovery is allowed, investigative help throughout the entire process is crucial in a complex case. Without such investigative resources readily at hand, the attorney finds himself/herself performing that investigative work, wasting his/her expertise, and foregoing hearing preparation. The current horizontalization of the process with its numerous review levels as a case proceeds step-by-step from different persons in distinct paper hand-offs destroys the vertical continuity necessary to prosecute any complex case. One investigator and one attorney must know the case and work it in a consistent and coordinated manner all the way through hearing. Interviews with both investigators and line attorneys indicate strong agreement that the current arrangement does not provide for the possibility of such complex case prosecution on a realistic basis.

A subsidiary issue arising from the current bifurcation of investigative and attorney services has been raised by recent motions brought by former OTC attorney Phil Martin, now representing respondents. The motions contend that since the Office of Investigations is now separate from the Office of Trial Counsel, no work product or other privilege attaches to the investigative work done by OI. Hence, it is argued, all investigative work is discoverable by the respondent. While respondents are entitled to reasonable discovery, and have generic affirmative discovery rights of their own in terms of interrogatories, depositions, etc., this argument, if sustained, may have a substantial impact on the efficacy of investigative work in complex serious cases against well-financed respondent opposition. The respondent may have well-coordinated attorney and investigative resources, and full use of the attorney work product privilege. If the Bar has no comparable working relationship among its personnel, it may find itself at yet another disadvantage.

7 Martin’s arguments in the Gadda, Garfield, Allison, and Guy-Smith cases have not been accepted. However, these cases were investigated before the bifurcation.
As mentioned in Section IV, the lack of investigative resources is very much exacerbated under existing time pressures as the complaint reaches Step 10 of the Exhibit 7 flow chart. The Los Angeles OTC Intake/Special Proceedings Unit under Rick Harker consists of OTC attorneys Bill Davis, Lazar, Gochis, Cobb, Cohen, Ohrle, Stroke, and Robbins. Of these eight attorneys, five work on short matters, including SOC intake, Section 6007(c) interim suspension matters, probation revocations, and Rule 955 actions. The other three work on conviction referrals and reinstatements only.

In San Francisco, a single OTC unit of ten attorneys under Trev Davis handles everything: intake, special proceedings, and general hearing work. Alan Cohen and Marilyn Winch are temporarily handling SOC receipt and NTSC assignments, but this function is normally handled by Trev Davis.

The typical original investigation proceeding through our flow chart is subject to the SOC intake process. The OTC Intake/Special Proceedings Unit attorneys listed above draft the NTSCs when the case is first received within OTC. They may negotiate the case at this early stage, file the NTSC with the State Bar Court, and then assign it to another attorney for trial. These cases are typically routed from Lynne Geminder (who approves the SOC in the Legal Unit of the Office of Investigations) to Rick Harker (the director of the Los Angeles OTC Intake/Special Proceedings Unit).\(^8\)

If the case is based in Los Angeles, the case is then routed to an attorney in OTC Intake, and then back through Harker to Fran Bassios for approval of the NTSC, and then to the Assistant Chief Trial Counsel in the unit to which it is assigned (short matter or long matter), and then to the particular attorney to whom the Assistant Chief Trial Counsel assigns it for hearing. San Francisco cases go through Trev Davis instead of Rick Harker, but in a similar pattern. Hence, under the new system, NTSC cases pass through the hands of six attorneys in the normal course.

Upon receipt of the SOC from Geminder, Harker assigns an OTC Intake/Special Proceedings Unit attorney to draft the NTSC. Two weeks are allowed to write a first draft of a proposed NTSC. It is then submitted to Harker (temporarily Davis), and then Bassios for review, and the attorney is

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\(^8\) Note that Trev Davis from San Francisco is temporarily directing OTC intake for Harker’s unit in Los Angeles.
given two more weeks to edit it into final form. Note that the NTSC, unlike a criminal complaint, includes detailed factual allegations. The Bar's NTSCs generally include factual allegations in greater detail than is customary for an accusation in standard administrative proceedings applicable to other professions under the APA. Such detail may be justified given the default reforms currently being considered and given liberal opportunity to amend at hearing.

Following the drafting of the NTSC and its approval, a notice of intent to file NTSC is sent to the prospective respondent. He/she is given ten days to respond, as noted in Section IV above. This intent to file conference is a very important part of the existing process. For once the filing is undertaken, the matter becomes public with potential attendant publicity, mandatory Review Department review, and no possible opportunity for a private reproval sanction.

At this point in the process, it becomes critical that anything the respondent says by way of explanation or defense be thoroughly tested. Hence, it is important that there be reinvestigation opportunities. To be sure, the investigator should have already obtained most of the respondent's defenses as part of his/her investigation. However, as a practical matter, this does not always occur (either because the investigation was inadequate or because the respondent failed to respond to Oi requests for explanation). Further, the NTSC may be slightly different than the original focus of the investigation.

Since the OTC Intake/Special Proceedings Unit may: (1) NSF cases; (2) issue admonitions with no direct disciplinary impact (aside from the psychological effect on the respondent, if any), and (3) stipulate to a disposition and detailed terms of probation (including private reprovals before NTSC filing), it is imperative that the investigator who has been in direct touch with the CW and who gathered the evidence remain available and in consultation with the OTC attorney as these critical steps proceed. Further, it is important to remember that the material produced at the intent...

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9 There is some confusion as to whether or not the respondent should be shown the actual draft of the NTSC which may be filed. Apparently, the Acting Chief Trial Counsel has expressed hesitation in sending the proposed NTSC as part of the Antent to file notice, and in showing it to the respondent at the resulting conference, if there is one. We believe that it is most appropriate to inform the respondent of the precise nature of the charges he/she may have to confront, and that inclusion of the proposed NTSC with the Antent to file notice is advisable. Presumably, the initial investigation has been completed at this point, and there is no disadvantage in hearing the response in specific terms prior to final filing. The Acting Chief Trial Counsel believes this disclosure will convey the impression that the charges are subject to negotiation and lead to Anischief. We do not agree.
to issue conference will in many cases require, at the very least, reinvestigation. It may be necessary to drop portions of the NTSC (which will limit the scope of the evidentiary hearing to come), or to alter it in other ways. Entirely new questions may arise which require additional investigation for possible additional charges. A review of 1986 and 1987 intent conference reporting sheets and commentaries further confirms this conclusion.

However, under the current system, the attorneys in the OTC Intake/Special Proceedings Unit have no reasonable access to investigative resources sufficient to conduct any such reinvestigation following the Antent to issue conference; in fact, they are under pressure not to do so, since the matter is now removed the statistical caseload of the Office of Investigations, and OTC has only twenty days in which to file the NTSC.

Again, as explained in Section IV(B) supra, SB 1569 (Presley) requires the Bar to attempt to process cases to either dismissal, admonition, or the filing of an NTSC within six months of receipt of the complaint. Four months are allocated for reinvestigation and preparation of the SOC (Steps 1B of Exhibit 7); thirty days are allotted for the drafting of the NTSC (Step 10 of Exhibit 7); ten more days are allowed for the scheduling and conduct of the Antent to issue conference. Thus, OTC attorneys have only twenty days in which to make critical decisions and take action regarding reinvestigation, negotiation, issuance of private sanctions, and amendment and filing of the NTSC.

Hence, the OTC Intake/Special Proceedings Unit attorney is now in a difficult position. He/she has an investigative report supporting a NTSC, and in many cases has participated in the Antent conference which has revealed some inaccuracies, possible explanations, and new documentation. He/she has twenty days to file the NTSC and no investigative help. Under the present circumstances, the OTC attorney’s only alternative is to attempt the reinvestigation himself/herself. They make this effort to the extent they are able, attempt to secure approval for delay (which may be granted, but in the context of clear time pressure), and then sometimes feel compelled to file NTSCs about which they have some doubt.

This lack of continuous investigative resources continues in its impact after the case is assigned to the trial team and to a counsel for hearing. The new OTC attorney has ninety days before the first settlement conference. A trial date is generally set for sixty days after the settlement conference where it fails to produce a stipulated result. During the initial ninety-day period, the new
attorney is generally without resources to conduct further investigation or to conduct discovery. This lack of resources seriously jeopardizes complex cases. In a simple case, the initial investigation may provide all the information necessary for hearing. Where this is the case, an abbreviated calendar is being considered by the Bar for a short-matter settlement conference (e.g., within thirty days of the NTSC filing), followed by a hearing date thirty or sixty days thereafter. For the longer matters, discovery by the respondent, including possible depositions, possible additional document production, etc., may open up entirely new areas of inquiry appropriate for additional investigation. At the hearing itself, it is not uncommon for respondents to provide surprise evidence. Where this is the case, the rebuttal case of the Bar will determine the outcome. Investigative resources are needed; the investigator who conducted the initial investigation should be available to the OTC attorney throughout reinvestigation, discovery, and the hearing process.

It is unlikely that proper treatment of a case within the statutory six-month period can be accomplished without a different structure. And it is not advisable that at least some cases should be shoe-horned into that time frame even with an expeditious and efficient process. The Bar should change its process so that most cases can realistically run through the system within six months; and the Legislature must understand that there may be legitimate justification if 10-20% of the Bar cases take somewhat longer.

After the case is ready for NTSC filing, it is assigned in Los Angeles to Helton or Gerner, and in San Francisco to Davis to designate the OTC attorney to handle the case through hearing and Review Department proceedings. This OTC counsel or State Bar Examiner must be on the NTSC at time of filing (see Steps 12 and 13 of Exhibit 7 flow chart).

2. Settlement Procedures

The timing and preparation problems of trial counsel are (at least partially) direct results of the lack of discretion given them in the settlement of cases. The current mechanism for stipulated discipline works approximately as follows: A two-part stipulation must be prepared, which includes a stipulated statement of facts and the recommended discipline. For many respondents, the stipulated statement of facts which becomes part of a public record is as important or more important than
the actual discipline. Where the NTSC has been issued and time is progressing toward the settlement conference and the hearing, negotiations are likely to begin for disposition.\textsuperscript{10}

In the settlement discussions, OTC counsel handling the case is not given bottom-line authority to negotiate discipline recommendations. This lack of authority is curious, given the fact that prosecutorial agencies involved in criminal matters routinely designate such authority to the deputies handling the cases, including deputies employed at the office less than one year. The bottom-line recommendations are actually made by experienced counsel within the office, based on a review of the file, discussion of it with the attorney handling the case, and guidelines for minimum penalty designations. However, once the settlement authority has been given to trial counsel, it is part of his/her job to negotiate it down to or close to that level, and standing authority to do so is necessary for an efficient resolution of any negotiated settlement. There is nothing more frustrating than attempting to negotiate an agreement with someone who has no authority to consummate that agreement.

In the case of the State Bar, the current practice is most puzzling. Counsel handling the case are not given a bottom-line discipline recommendation, nor any authority to negotiate to that level. Rather, settlements must be specifically authorized to the letter by Davis or Bassios. The tortured procedure is as follows. First, OTC counsel and respondent or respondent counsel arrive at what they believe to be an equitable and proper disposition. However, OTC counsel is unable to negotiate with any authority, since he/she has no permission to settle under any defined terms. Rather, another OTC form to settle the case must be completed (usually with OTC counsel Alyse Lazar help), which is submitted to the Assistant Chief Trial Counsel of the team concerned. It is then commented upon, changes are made, and it is sent to Trev Davis. Davis looks at the form, approves or rejects it, and sends it back. OTC counsel then drafts a final stipulation, including findings of fact and the agreed-upon discipline in a more extensive document.

This final draft generally goes to OTC attorney Marilyn Alper, who comments upon it and sends it back to the OTC attorney handling the case. It is revised by the line attorney and submitted

\textsuperscript{10} Note that the Board of Governors is presently considering what may be a fruitful early settlement conference date thirty days after the filing of the NTSC. Although such a proceeding would appear to be beneficial, it does not alter the problems described herein since the initial conference may prove unsuccessful and resolution may come later.
to the Assistant Chief Trial Counsel of the unit. Further revisions are made here and it is returned to the OTC attorney. The agreed-upon version of the final draft is finally sent to Davis, who then comments on the draft, makes changes, and sends it back to the OTC attorney again.

During these proceedings, very little verbal discussion occurs, particularly between Trev Davis and the OTC attorney. These matters are handled in writing. The changes made by Davis to the draft are not suggestive, but involve red pen revisions. After this process is complete, the entire document is sent back to the respondent for signature. In almost every case, the respondent does not agree to some of the changes made during this process. The respondent usually argues about some of the changes, and may accept or reject the agreement. If the respondent requests additional changes, and the OTC counsel agrees, he/she must then go through the same process described above in order to accomplish the alteration.

Finally, after the respondent and OTC trial counsel have obtained an agreed-upon version of a fairly lengthy document which has been approved in that form, it is submitted to a referee. If that referee (a volunteer practicing attorney whose name is chosen from a list of settlement referees kept at the State Bar Court) disapproves any part of the document, whether agreed to by the respondent or not, the entire document must go back through the whole OTC process de novo.

After this process is complete, the stipulated settlement goes to the Review Department, which will examine it ex parte. The Review Department rejects approximately 25-30% of the stipulations reached through this process.

Aside from issues of professional insult, inefficiency, and enormous frustration to respondent counsel (which may chill settlement possibilities in any event), the process also involves inordinate delay. As documents go from desk to desk, back and forth, time passes. Often settlement negotiations begin very shortly before the scheduled settlement conference and after some minimal discovery. The hearing date may be fast approaching as the documents are submitted, resubmitted, revised, altered, and debated. As this process continues, OTC counsel scheduled to handle the hearing is in the position of losing bargaining power as he/she has eschewed hearing preparation given the press of other matters and the likely disposition which may be forthcoming.

This Tinker-to-Evers-to-Chance phenomenon of handing files back and forth is not confined to the stipulation process. Other types of decisions are also characterized by the spirit of
the famous Abbott and Costello whom-on-first routine. Exhibit 25 includes (with names redacted) a 1986 recitation of the progress of a single file. The course of this file in the disciplinary process illustrates the problem which is growing in severity within the Bar. A description of the progress of the case is here quoted from a memo in the file of the Acting Chief Trial Counsel:

This case was twice denied by Paul Virgo [Chief Attorney of the Legal Unit of the Office of Investigations]. CW appealed to Judge Coyle [Board of Governors=Committee examining disciplinary system] and J. David Ellwanger [until very recently, the Chief Executive Officer of the Bar]. They referred the matter to Susan Mahony-St. Clair [until recently, the Chief Trial Counsel]. Susan advised CW the matter would be reviewed by a member of the A&D Committee [Committee on Discipline of the Board of Governors] after Bill Davis [senior OTC attorney] prepared a summary and contacted CW.

Judge Coyle also brought the case to the attention of Jerry Markle [until very recently, the Assistant Chief Trial Counsel in Los Angeles]. The case was then assigned to Andrea Wachter [OTC attorney] in San Francisco. She apparently appealed to Fran Bassios [then Assistant Chief Trial Counsel; now Acting Chief Trial Counsel] who referred the matter back to Virgo. It was then transferred from Virgo to Gerner to Dalton.

In addition to the ten people who apparently were reviewing this case, a handwritten note added by the Office of Trial Counsel asked Has it gone to A&D? If not, why not?

Currently, we now have the Complainants-Grievance Panel, which will provide yet another avenue for review. One can create a system, and find in it people whose judgment one does not trust. One may respond by importing additional people to review those judgments. Then, when you lose confidence in those people, you appoint yet other people to review that judgment. We respectfully suggest that a better alternative is to attract and keep people whose judgments can be relied upon for consistency and fairness, subject to limited review by perhaps one additional person with overall perspective.

It is unclear why the stipulated facts cannot be negotiated by OTC counsel at a level of Attorney II or III. These stipulated facts should be agreed to in consultation with the investigator
handling the case, as noted above. The CW or other direct parties familiar with the evidence should be consulted closely to ensure that the respondent’s naturally closer knowledge of the facts does not give him/her an unfair advantage in the shading of the factual stipulations to gratuitously soften what the attorney is able to prove at hearing.

Likewise, it is unclear why the Attorney II or III cannot be given settlement authority to negotiate a discipline level consistent with precedent and established guidelines. If there is to be review and/or amendment of these documents, it would appear that such review should be handled by the Assistant Chief Trial Counsel who is supposed to be directly supervising the OTC attorneys. It should be done on the basis of verbal conversations and discussions, where quick explanations can be made by the attorney close to the situation.11

The Acting Chief Trial Counsel argues that the current multi-layered settlement approval process is temporary and is only required until the new Assistant Chief Trial Counsels obtain more experience, after which approval will be delegated to them to operate more directly and efficiently. We hope this description proves prescient.

3. Resources/Discretion Regarding Discovery

In addition to the lack of investigative resources noted above, problems of multiple layers of review and delay in the face of mechanically-imposed deadlines, and the lack of cooperation from the rest of the Bar (e.g., obtaining attorney bank account numbers, fingerprint cards, prior discipline records, moral fitness hearing transcripts, and even civil malpractice filings in current Bar files, discussed supra), trial counsel face additional obstacles. The lack of discretion afforded counsel in disposition is mirrored in impediments to formal discovery discretion during the ninety-day period in which it is allowed. Just as Bar investigators must get specific permission to engage in proactive inquiry, attorneys must also obtain specific permission to engage in any act which involves the

11 An alternative recommendation has been made by Board of Governors Vice Chair Terry Anderlini. This would involve the handling of dispositions similar to changes of plea in criminal matters. That is, a referee would complete a form, and the proper admonitions would be made on the record. However, because many of these settlements are more akin to civil dispositions, including detailed factual recitations, such a procedure might only be feasible for short-cause matters with very simple stipulations of fact and penalties. Note that the suggestion made infra concerning the use of professional administrative law judges instead of volunteer referees would also minimize current problems which may arise from the part-time referee@interaction in the stipulation approval process. Approval-disapproval referee standards would be more uniform and predictable.
expenditure of monies. Specific permission must be obtained in order to take a deposition, or engage in any act which involves the expenditure of monies. This requirement involves the preparation of a separate authorization request and the issuance of a check from San Francisco. Some ten days to three weeks normally transpire for this process.

Further, where attorneys engage in discovery and investigative work involving even minor sums of money (e.g., the copying of court files, etc., outside the Bar office), a similar requisition format must be followed. Hence, the expenditure of $5.00 for copies must be separately approved as the time is clicking for settlement conference and hearing. At least one attorney in OTC informed us that he has simply taken to paying for these costs out of his own pocket in frustration.

In addition to the problem of delay such requests entail, some are not granted. We have been told of examples where requests for transcripts and copies would not be permitted until attempts to gather these materials elsewhere had been exhausted. In one case, the OTC attorney was told to contact the respondent, then in state prison, and ask him if he had a copy of the transcript to facilitate his discipline.

This penurious approach also affects the transportation costs for out-of-state witnesses. Many CWs move, sometimes to locations within the state and often out of state. They must be flownback to testify at the hearing. Although it is theoretically possible to use the deposition transcript in lieu of live testimony at the hearing, no prosecuting attorney likes to do so, since it is disadvantageous to his/her case if the trier of fact cannot see the live witnesses who have testimony against the respondent.

Nevertheless, the Bar policy in such cases is to obtain the reciprocal cooperation of the bar of the other state. That is, in order to save transport costs, the respondent’s attorney will travel to the state where the CW resides and conduct an examination with a volunteer attorney representing OTC counsel, courtesy of another state bar. The transcript is then used at the hearing.

It is true that the plane fare costs might be more expensive than deposition reporting costs, but the small amount saved would appear to be a false economy. It is frustrating for counsel not to be able to attend a deposition to protect his/her CW during cross-examination and to ensure that the correct questions are asked on direct examination for later use at hearing.
The Acting Chief Trial Counsel disputes that unreasonable barriers exist, contending that any needed expenditure will be and is approved and that the current review is preferable to an historical unbridled discretion to OTC counsel. We would note that regardless of supervisorial perception of reasonable approval, interviews with most of OTC counsel establish very clearly that this is not the perception of those doing the work. Rather, they admit to being deterred in the very request of procedures they believe important. This is not a chance sampling, but an overwhelmingly supported conclusion.

In addition to discovery resource problems is the lack of investigative help which can assist aggressive discovery. There is little evidence of aggressive discovery by the Bar, even in relatively complex cases. Few depositions are taken there is limited document discovery. These failures are not the result of a completed investigation at earlier stages. They are the result of a lack of resources, time, and perhaps experience, at the OTC level.

The resource problem which besets OTC attorneys in the conduct of discovery, reinvestigation, and hearings extends to the many little things upon which an attorney relies for his/her arms and legs. Any law office is, essentially, a paper factory. It must absorb, collate, and turn out documents. Exhibit 26 includes the support staff assignments listed on March 6, 1987 for the three Los Angeles OTC trial teams. The 8B12 attorneys projected for each unit, as the list indicates, have limited resources available. Secretaries serve two to three attorneys, in addition to serving one law clerk, paralegal, or process server.

More important, there is constant secretarial turnover. Only one of the secretaries in the entire Office of Trial Counsel serving the line attorneys (Exhibit 26) has been a permanent employee more than one year (Dina Ledow). The rest are temporaries or newly-hired. Because of substantially below-market wages, legally-trained secretaries are generally unobtainable. These secretaries must be trained by the attorneys in the OTC, after which they allegedly leave for higher-paying jobs elsewhere. Attorneys report extremely slow service from the clerical staff. This problem is exacerbated by the fact that each secretary is only allowed from one to one-and-one-half hours per day on the Wang word processor. Hence, any document going on the word processor (many documents in a legal office) must wait for that window of opportunity. Often, it takes three to four days to get a legal document out through the word processing system. Exhibit 31 includes a stark
internal memo conceding the severity of the problem. The recommendations listed therein have not been implemented.

In an amusing scenario, several attorneys reported that the office supplies problem is so great that they have retrieved paper from the wastebasket in order to have something to write on, and that they xerox pleading paper because it is sometimes not available in direct print form. Although obviously atypical and exaggerated, the recounting by staff of the niggling problems impeding their work seems to be symptomatic of a larger resource deprivation problem. Exhibit 32 includes an internal Office Management Report recently completed which we obtained after drawing very similar conclusions ourselves.

As is the case with investigators, the number of cases appropriate for OTC counsel is a question of debate. However, a caseload above 25 at any one time would normally inhibit major attention to a complex and vigorously contested matter. This is particularly so if the timing of cases is tightened so they go to hearing and the Review Department more quickly a clear trend. In fact, some major cases would appear to require a caseload of no more than 2 to 3 such matters at any one time, with no other time commitments, in order to handle properly the discovery and hearing (assuming no settlements). a large caseload inhibits aggressive attention to a high priority case. It is necessary to free a certain number of OTC counsel to handle these complex cases.

Prior caseload levels have created serious problems, especially in Los Angeles. Although the Acting Chief Trial Counsel properly notes that the Los Angeles tank of 500 NTSC-approved cases in 1986 awaiting (some, for many years) NTSC filing may be attributed to Los Angeles management deficiency, the reality is not so simple. For several years, the attorney in charge in Los Angeles was Jerry Markle. Exhibit 33 includes his memoranda imploring all who would listen to add OTC resources. Note that one of these memos has a notation from its recipient back to Markle suggesting that there would be less of a problem if he would devote some of his memo-writing energy to his job. The response of the Bar was not immediate or energetic, and was totally unsympathetic to Markle’s management position. The unusual candor in these memoranda suggests a high level of frustration. Markle resigned in 1986.

4. Delays
Four fundamental reforms could ameliorate delay problems post-NTSc filing. The first is a default system, which is discussed in the following section. This reform, currently under consideration by the Bar, would eliminate the 24 months now commonly required to discipline an attorney who does not appear to contest the charges. The second area of reform involves the early settlement conference discussed briefly above, and the delegation to OTC attorneys of adequate authority with direct conversational review under defined guidelines for stipulated settlement purposes. The third reform involves possible changes in Review Department procedures, discussed below. A fourth reform, and currently under consideration, lends finality to the decisions of the State Bar Court, and is also discussed below.

Another procedure which could marginally help the expedition of cases within the OTC could be the inclusion in the Wang computer system of standard forms commonly used by the office. Assuming secretaries are obtained who are able to call up these forms and that adequate word processing facilities are available, much of the repetitious work of counsel could be short-cutted and the cases moved along at a faster rate, or at least more work done during the time allotted. Marilyn Alper, among the most senior counsel within the OTC, has formulated model forms for a variety of the discovery and pleading documents used by trial counsel. Her forms have been entered into the Wang system and only await approval by upper staff. They have been awaiting that approval for more than six months.

If the reforms described above are adopted, particularly the default and finality rules, and the processing of matters arriving at OTC from places other than the Office of Investigations (discussed below) are also reformed, the total trial process within the State Bar Court system will be substantially faster than is the case under the Administrative Procedure Act applicable to all other licensing agencies within the state. In fact, the time span between the filing of an accusation in an APA proceeding is likely to be three or even four times the time span in this prospective State Bar Court system after the filing of the analogous NTSC. It appears that the expedition of these cases

12 The Bar has purchased expensive Anemery typewriters for each of the secretaries. It is unclear and baffling to the attorneys in the office why this expensive equipment was bought in lieu of a networked word processing system as is now common in even mid-sized legal offices throughout the state.
post-NTSC filing is best accomplished through the application of resources, and not simply the imposition of additional layers of bureaucratic review and artificial deadlines. The imposition of mechanical deadlines only accelerates the clear but less serious cases, and jeopardizes the proper handling of complex and more serious cases. There must be separate tracks and separate resources allocated to different kinds of cases requiring different kinds of prosecutorial attention.

5. Competence/Turnover/Morale

Exhibit 27 presents an important chart of the current vacant positions within the State Bar of California. Most of them are vacant positions within the disciplinary system. The chart indicates the offered salary, the position, the location, the date available, and the date the position was posted. As noted in the discussion above concerning secretaries, the $1500 per month for a Secretary II is not sufficient to attract an experienced legal secretary in the San Francisco or Los Angeles market. Some of these secretarial positions have been advertised and have gone unfilled for 6 months. As also noted above, the Investigator I position, offering a salary of $1,764 per month, particularly when several years of experience is required in the job description, is substantially below DA and AG investigative levels.

Although we are very aware that labor/management relations are subject to negotiation, and that there has been a recent strike by the attorneys within the Office of Trial Counsel and the supposed signing of a new agreement, it is also the obligation of the Bar Monitor to address those factors which impede an effective disciplinary system. The job market is an issue of fact. Attorney Is are offered positions at $2323 per month; Attorney IIs at $2786 per month; Attorney IIIs, requiring substantial litigation experience, receive $3112 per month. The Bar learned what litigation costs on the outside means when it was forced to pay $100 per hour and a total of several hundred thousand dollars in order to obtain the services of outside counsel while existing trial counsel were on strike. These expenditures, if applied to increases in existing trial counsel salaries, would be significant. By February of 1987, $272,000 had been paid out for commercial legal services. This amount alone, spent on outside legal help due to the strike, would have met the demands of OTC counsel then employed for well over one year. Inexplicably, some of these cases still remain with outside counsel at these very high rates.
It is apparent from Exhibit 27 and also from recent admissions of the Acting Chief Trial Counsel that these salaries are insufficient to attract competent professionals to perform the tasks required. Some ten positions in the Office of Trial Counsel remain vacant as the Acting Chief Trial Counsel attempts to find competent practitioners. One person recently hired was released during his probationary period because of performance deficiencies.

It is our strong feeling that attorneys who prosecute other attorneys should be among the best of the best. They should be among the most respected attorneys of the Bar. Not only should they be paid comparably to a Deputy District Attorney or Deputy Attorney General with like experience and responsibility, if anything, they should be given a five or ten percent premium because of the need for mature and effective representation of the public in proceedings against errant attorneys. Current pay levels, however, appear to be substantially below market levels.

Current staff believes that the Acting Chief Trial Counsel has taken to offering Attorney II or III positions to attorneys who would normally qualify at the Attorney I or II levels, respectively. This has created a morale problem within the office, because employees are being brought in at levels above the levels at which existing trial counsel are employed and at higher salaries. Even using this technique, however, as noted above, positions remain vacant, and the Acting Chief Trial Counsel is correct in not filling these positions with warm bodies. We believe it is far better to have twenty very competent attorneys than thirty marginal counsel, particularly when they represent the public in these important proceedings. The Acting Chief Trial Counsel responds that those who are being hired meet the job descriptions which specify minimum years of experience. And he believes most of the turnover has been beneficial, implying a dead wood problem. We do not agree. A number of those who have left, including Marilyn Alper who has resigned during the writing of this draft, are clearly competent. That competence does not appear to be obtainable from new hires at current salary levels.

The pay situation is reflected in turnover. Thirteen attorneys in the Office of Trial Counsel left during 1986. In Los Angeles, of the twelve attorneys with the OTC shortly before the strike, two left shortly before the strike, and four have left since the strike. Assistant Chief Trial Counsel Markle has also recently left. Currently, only five attorneys in the entire Los Angeles Office of Trial Counsel have more than two years of Bar experience. With the departure of Alper, only four will remain. One
attorney we interviewed noted with bemusement that he is now tenth on the list of twenty Los Angeles OTC attorneys in seniority, having been with the Bar only seven months.

Also disturbing is the fact that our interviews indicate that a substantial proportion of those with more than one year of experience are considering positions elsewhere. The professional attorney staff of the Office of Trial Counsel has been seriously depleted over the past year-and-one-half, and it faces possible evisceration unless meaningful actions are undertaken.

In addition to the pay issue mentioned above, the Office of Trial Counsel appears to have unclear career paths for trial counsel to provide them with the proper incentive to remain in their positions. It is unclear why the line attorney positions tend to stop at Attorney III, except for the recent push-back of three Attorney IVs through the hiring of Assistant Chief Trial Counsels.

Most important, as noted above in our discussion of investigator morale, in 1984 the Bar eliminated the step increases which are very important to retain employees in most agencies of government. If someone is appointed a Deputy Attorney General I or a Deputy District Attorney I, he/she receives step increases with seniority in those positions. Steps A, B, C, D, and E are passed after six month-, one year-, or two year-intervals, as the case may be. As each step is passed, a small increase in salary, often 5%, is forthcoming. This allows for compensation based on time in service and provides a continued incentive to remain, even if passed over for immediate promotion due to a lack of available positions at the Attorney III or other levels. The Bar abolished these step increases for a purported merit-based system. Such a system can theoretically work. We are informed that the system has not yet been implemented. Based on the number and quality of those who have departed, its prospective implementation has not worked at the Bar. Step increases provide both a financial and psychological incentive to remain in employment, subject to merit promotions to Attorney II, III and IV. A workable compromise might be to reinstitute slightly reduced step increases with a merit-based bonus add-on.

The cost of retraining a new Attorney I or II after investing a great deal of time and resources in developing their expertise is far greater than the 5% increase in salary one obtains as a result of increasing tenure. Of course, these tenure increases have limits, often at Step E. If an attorney reaches Step E without promotion to a higher level, notwithstanding limited opportunities for promotion to those levels, it is possible the system does not want to encourage that person to...
retention. However, at present, even the most competent attorneys are given insufficient incentive to remain where promotion opportunities are limited, as they are with the Bar. The Bar has lost a large number of experienced counsel. Some of these persons were reputed to be among its most competent. Although a number of competent attorneys remain, it appears that the Bar, under its current format, will not easily replace those who have left with persons of comparable skill and experience.

One of the consequences of the high turnover has been the additional fragmentation of cases. The departure of Tom Low left major cases for Jerry Fishkin to pick up; he, in turn, transferred fifteen of his cases to other counsel in order to make room for the complex cases left by the departing attorney Low. This same procedure is repeated throughout the Office of Trial Counsel whenever someone departs. Hence, the loss of experienced trial counsel over the past year-and-one-half, even if they should be replaceable, has dislocative effects of some consequence.

As to specific hiring/promotion decisions, it should be noted that many attorneys within the Office of Trial Counsel felt that the new Los Angeles Assistant Chief Trial Counsel positions should be filled from experienced Attorney IVs currently with the office. While the attorney staff appears willing to accept newcomer supervisors, it is unclear to most of them what this new layer of supervisors is supposed to do. Davis and Bassios appear to be very personally supervising counsel notwithstanding Harker and Helton in paper positions as supervisors in Los Angeles. It is unclear exactly what their duties are. The Acting Chief Trial Counsel believes this problem is temporary and natural given the transition now taking place.

Most critical to the morale problem of existing senior trial counsel is a widespread perception that their work and professionalism are not respected. That feeling derives from the nature of what they consider to be demeaning promotional interviews by their supervisors, the imposition of additional layers of review over them, and the impediments imposed on the conduct of their cases. And it appears to extend substantially beyond these matters. We have been told consistently that the Bar system, from the Board of Governors on down, views the senior trial attorneys within the OTC as people who couldn’t make it in private practice. Comments to this effect have been overheard from recent members of the Board of Governors in different contexts. Indeed, the labor policies of the Bar and the administrative system imposed around these attorneys seem to reflect such an
attitude. If that attitude is warranted based on demonstrated incompetence of the attorneys in that office, it would appear that the matter would be best resolved by the acquisition of allegedly more competent attorneys, rather than the continued denigration of those filling the positions.

It is more important that the perception of general contempt for their work exists than whether those who have created that impression meant to do so. Such an impression sometimes manifests itself in Review Department demeanor toward counsel and, interestingly, in the attitudes of many Bar members they prosecute. A reading of file after file leaves one with the impression that the Bar is not an organization much feared or respected by practicing attorneys in the field. Initial questions by OI and OTC are often ignored; documents sought from respondents, courts, and other agencies are not quickly forthcoming; requests for documents and explanations of serious accusations are ignored. These responses are not occasional, but shockingly routine.

The most important element in any disciplinary system is an effective deterrent impact which prevents people from engaging in marginal behavior leading to abuse. In short, the profession must fear the Bar. The evidence is overwhelming that it does not. In order to create the kind of respect necessary, the morale of those who perform the visible and critical legal work must be high. They must have pride in their work and they must be respected by the legal community.

6. OTC Filekeeping

We were unable to review a substantial quantity of OTC case files. We reviewed a number of such files in San Francisco and found that they strongly reflect the lack of resources both clerical and investigative available to OTC attorneys. The files have investigative materials scattered throughout them, are unorganized, and unprofessionally kept.

Where there is a recommended NTSC, the investigative materials and reports compiled by the Office of Investigations are transferred (without copies kept by the Office of Investigations) to the Office of Trial Counsel with the SOC. The OTC Intake/Special Proceedings Unit takes the investigative reports and materials and keeps them in the OTC case file thereafter. No other investigative file is kept, and these materials are not found in any other place. The OTC file goes to the OTC Intake/Special Proceedings Unit (Step 10 of Exhibit 7), and then to the OTC team leader (Steps 11 and 12) if the case is not settled immediately after the Intent to issue conference. After the NTSc is filed, the file is transferred to the line OTC attorney in Step 13 to prepare for hearing.
As noted, these files include all of the investigative material, to which are added all discovery material compiled and obtained by the trial counsel preparing for and conducting the hearing. After the OTC Intake/Special Proceedings Unit accepts the SOc and investigative file, and after the NTSc is filed, the entire file now becomes OTC property. After the hearing and Review Department approval, the file remains with the line attorney handling the hearing in OTC. Where there is a subsequent resignation with charges pending or disbarment, the file may be transmitted to Los Angeles for perpetuation. Many of these files are maintained for at least five years in case the respondent seeks reinstatement. It is unclear whether all of these files are so perpetuated. As noted below, they should be. Except for those few disbarment and resignation files mentioned above, we learned in February 1987 that all other OTC files in the Los Angeles office C representing two-thirds of OTC output C had been routinely shredded and that virtually no such pre-1987 files were available. We managed to save one box about to go to the shredder; Exhibit 28 is the notice taped to the box as it was on its way to destruction. Some of the attorneys in the OTC were under the impression that when they give up their files (after the case is over), these files are archived. The Bar’s initial justification for this procedure is to note that the State Bar Court file is still available. However, the State Bar Court file has only publicly-filed information. If there has been a stipulated settlement of the case, there might not even be a hearing transcript in the State Bar Court file; there will certainly not be any investigative material. This investigative material is extremely important and includes everything from the current names and addresses of witnesses to admissions of the respondent made to the investigator. It also includes the trial notes and discovery documents, and numerous other materials which would not be in the public State Bar Court file.

Further, these cases are shredded immediately after they are surrendered by the OTC attorney following the alleged conclusion of the case. We reviewed a typical file bound for the shredder which had been marked on the outside: Shred, Case Over. The case involved a respondent given probation for five years with a short period of actual suspension. This respondent will be on probation until 1991, but his OTC file has been shredded.

Numerous other illustrations of the danger of this file-shredding practice existed in the files we were able to save. In one case, the disciplinary action was going to be followed by an
entirely separate proceeding on a Client Security Trust Fund claim, and extensive CW records showing loss were in the OTC file. A case where a public reproof was issued might be destroyed. A case that was subsequently dismissed might be destroyed. Needless to say, a probation revocation action or a subsequent disciplinary matter would be greatly enhanced by the retention of these OTC files.

Not only should they be retained; they should be retained for at least seven years, as should the closed investigative files now kept in Los Angeles and San Francisco Bar offices. Storage costs are minimal and the volume of space necessary for this additional record maintenance would not be substantial. We have, for example, managed to obtain approximately one year’s worth of San Francisco OTC files (with approximately half the number of cases handled in Los Angeles) in a small office assigned to us by the Bar in San Francisco. A room smaller than most living rooms could accommodate two more years’ worth of closed OTC investigative files and at least several years’ worth of closed OTC files in both San Francisco and Los Angeles.

The Acting Chief Trial Counsel notes that part of the problem rests with an outstanding policy of destroying files not five years after final action, but five years after the complaint first arrives at the Bar. Given the common three- to five-year historical time in the Bar system, this timing standard is not appropriate.

7. Computer Records

We have mentioned briefly above some of the deficiencies in the Bar’s computer system at point of intake. The same deficiencies and additional problems affect OTC attorneys. First, we were informed that in April of 1987 the Bar deleted from the WANG system all of the OTC statistical information from April 1986 to the present. The reason for this deletion is unclear to us. This information included each OTC attorney’s caseload analysis, and general statistical information showing the output of the office at each stage of the proceedings. The Acting Chief Trial Counsel believes the information was both little used and of little use. We reserve judgment on internal administrative OTC computer tracking pending further inquiry.

However, the WANG computer records (or comparable records) appear useful in calculating the impact of the current expedited system on OTC. The OTC tank includes those cases
in which investigations have been completed and NTSCs recommended, but which have not yet been filed or assigned for disposition or hearing. This pre-filing apparently still exists, although it is not on the scale of the many hundreds of cases kept under Jerry Markle’s name during 1985 and 1986. The WANG data could help to identify whether or not a similar glut of cases is beginning to arise. The data that is available indicates that the problem is not entirely solved and, as noted above, the Bar is attempting a time-limit-imposed solution, rather than the application of proper resources.

As noted, OTC attorneys who evaluate the prior records or current status of existing respondents they are prosecuting are confronted with a fragmented, uncooperative computer system. At present, if a line attorney wishes to find out the details of a prior proceeding, he/she cannot call it up on the computer, but must telephone Membership Records in San Francisco as can any member of the public. Although some of this information is, we believe, available in the IBM system, only Grisinger, Bassios, Davis, and several others appear to have the code keys enabling access to the information. Hence, the line attorneys must attempt to get through the Membership Records phone number, obtain the Bar’s miscellaneous number, go over to the State Bar Court (in a different building for most of them), and look up the public record of the case. Very summary information is now being backloaded on the IBM regarding prior Supreme Court orders to suspend and dates of suspension, but the entries will be somewhat limited in detail and time period.

As noted above, line attorneys will not find any existing OTC files on previous cases. Further, if they note from the computer that a number of investigations on the same respondent have been NSFed, and they wish to search those for possible rebuttal, names of witnesses, or amplifying evidence, they are likely to find those records shredded. After four years, the NSF files are destroyed which may include information relating to events contemporaneous with the matter then being tried, given the historical delays of the discipline system. Finally, as discussed in Section V(B) supra, the computer will not tell the OTC attorney whether a private reproval has been issued, and perhaps it will not even provide information on admonitions. To get private reproval information, he/she must consult a separate list in the Third Street office in Los Angeles. Some counsel in OTC do not know this list exists.

D. STATE BAR COURT
After the NTSC is filed (Step 11 in the Exhibit 7 flow chart), it becomes a part of the State Bar Court system. In addition to the Office of Investigations and OTC, discussed above, a separate administration governs the procedures for hearings and review which take place after formal charges have been filed. This office consists of staff (termed the Office of the State Bar Court and, once again, groups of volunteer practicing attorneys and public members (termed the State Bar Court). As described in Section IV supra, this system organizes and arranges the public record of the filing, hearing, and review relevant to a case. It assigns the Board of Governors appointed referees who act similarly to administrative law judges. It arranges for the hearings, the transcripts, the scheduling and handling of motions, the approval of settlements, and the transmittal to its own Review Department of recommendations for review and appeal (discussed separately below). The policies of the State Bar Court are determined by an Executive Committee, also consisting of part-time attorney and public volunteers. The Review Department is presided over by a Presiding Referee currently Bill Mackey, a practicing attorney in San Francisco.

1. Referees

The State Bar Court includes hearing referees, who may be practicing attorneys or public members. These people volunteer to serve as administrative law judges in the cases brought by the OTC through the filing of a Notice to Show Cause. Most cases are heard in Los Angeles or San Francisco at the Bar offices, although occasional hearings are held in San Diego or elsewhere. The volunteer panels of referees extend throughout the state and include current practitioners from many counties, although most are concentrated in Los Angeles and the Bay Area. These persons are given some basic training materials and referee workshops to assist them in learning about Bar rules and the administrative process. Currently, over 500 volunteer referees preside over disciplinary hearings and fee arbitrations, and coordinate probation of those disciplined. They vary widely in interests, experience, and in their attention to the training materials and workshops provided by the Bar.

Types of panels include a newly-proposed short-matter panel of referees, regular hearing referees, settlement conference referees, and 6007(c) hearing referees, among others. Most hearings, as mentioned in Section IV above, are now conducted before a single, currently-practicing attorney referee. The public (non-attorney) referees become involved only when a three-referee panel is requested. In that case, one of the three must be a public member. However, the new short-matter
calendar will apparently consist of practicing attorneys who will hear, as a single referee, numerous short matters on scheduled dates.

Further, under recently-enacted SB 1543 and SB 1569, any matter anticipated to last more than one hearing day will be heard by a retired judge or single compensated referee. It was originally envisioned that these long-matter compensated referees would be former judges. However, as the Presiding Referee has pointed out to us, the competition for the time of retired judges is intense, given various local court mediation and alternative dispute resolution program demands. Further, Bar compensation is limited to $150 per day for these services. It is anticipated that many of the people receiving this long-matter compensation will be the more distinguished or qualified former or current practitioners serving as referees. Under current plans, the three-referee panel will be confined to cases which are not short matters but will take no more than one day; and, a party must affirmatively request the three-member panel.

The problems of the current format are considerable. What we have, essentially, is a system of several hundred judges from all parts of the state, each making findings of fact in important disciplinary adjudications. They are not up-to-date on the Supreme Court rulings in the field (unless so informed by the counsel appearing before them), are not aware of current Review Department standards, and have, at best, only rudimentary training through the workshop materials we have reviewed. Further, it appears that large numbers of current referees on the panels have not been to a recent workshop.

A large number of referees practice in a specialized area. Many of them are not litigators. Some of them are professional prosecutors or criminal defense counsel, most familiar with criminal procedure and rules of evidence. Very few will be expert in the particular area of law which is the subject of the complaint. More importantly, very few will be familiar with the differences between an administrative proceeding and a court proceeding. Those we interviewed, including those currently involved in the State Bar Court system, readily admit that a wide inconsistency exists among the rulings and standards applied by the many briefly-trained referees.

A final issue involves the understandable public perception of fairness. A serious complaint has been made about an attorney. The critical findings of fact, conclusions of law, and recommended discipline are rendered by another currently-practicing attorney. Since the attorney/referee may also
be from the same community as the respondent, he/she may be at least an indirect competitor of the respondent. The background of this judge may cut in favor of the respondent because of subtle occupational empathy, or may cut against the respondent because of professional pride or other factors. The person in this critical adjudicating position, however, should not be biased in either direction.

Although the instant report is a tentative one, in this one area we feel particularly strongly that the use of voluntary referees raises serious due process questions, is inefficient, and yields inconsistent and unpredictable results. Most important, it is unnecessary. The State Bar has sufficient resources and flow of cases to justify a group of professional, independent administrative law judges who: (a) are not practicing attorneys with any potential existing conflict of interest; (b) are thoroughly familiar with the administrative process and Bar procedures; and (c) will apply a level of consistency to decisionmaking for greater predictability for all concerned. Where there is predictability, settlements will be reached more easily because both sides know the likely outcome. Such predictability is a cornerstone of any efficient dispute resolution system.

Given several other recent changes in the Bar system, the need for this particular reform is now compelling. First, we are now required to pay referee compensation for any matter lasting more than one day. Although an administrative law judge system will be somewhat more costly than the $150-per-day payments to compensated referees, the added expense will not be prohibitive (certainly under ten dollars from each California lawyer). Second, the new system now imposes greater responsibility on the referees. Not only are there more cases, there are more proceedings, including the very important Section 6007(c) hearings on a possible interim suspension of the right to practice law pending further proceedings. This is a very momentous decision indeed. It is a decision which, in particular, must be entrusted to a group of professionals who will apply steady and predictable standards.14

13 The Director of the State Bar Court argues that the due process issue was resolved in Schullman v. State Bar, 10 C. 3d. 526 (1974); however, Gibson v. Berryhill, (cited infra) and the new finality rules, as well as a series of cases voiding the New Motor Vehicle Board, make this conclusion less certain.

14 The Director of the State Bar Court also argues that professional ALJs will be substantially more expensive even given the per diem fees now to be paid to many referees. And he believes that existing challenges to referees for bias, etc. ameliorate the danger of improper adjudication. We do not believe either of these arguments, which have some merit, justify the present system when a readily available and clearly preferable alternative exists. The
2. Default

The State Bar Court has long lacked an effective default system. A theoretical mechanism for default where an attorney is served with a request for admissions and refuses to respond does exist. However, there have been, in general, inconsistent rulings by referees where respondents have not appeared at all. The system as a whole requires that the OTC prove up its case, regardless of the appearance or non-appearance of the respondent. There is some dispute as to the standards to be applied in this prove up hearing. One of the reasons for the need to prove up a case rests with the Notice To Show Cause format of the Bar, which does not include a proposed remedy. In its present format, the matter cannot be treated as a traditional civil case default proceeding. Nor would such an analogy be appropriate in an administrative proceeding to potentially suspend or revoke a license to practice a profession.

However, it is important to note the members of the Bar are now obligated to have their current address on file, and to cooperate with the Bar. Failure to so cooperate now constitutes separate grounds for discipline.

One must also remember that unlike many proceedings, including APA accusatory proceedings against other professional state licensees, the attorney in the Bar process is given multiple warnings. First, the respondent is contacted by an investigator and his/her point of view or defense is solicited. Second, he/she is given an intent to issue Notice to Show Cause warning and opportunity to present his/her case at an informal conference within the Office of Trial Counsel. Third, he/she is given formal notice of the charges through the Notice to Show Cause. Failure to respond or appear under these circumstances must give rise to an abbreviated proceeding. At present, the natural review processes which occur at the prove up hearing and before Supreme Court final approval often last one year or more. (Note: This is in marked contrast to the Bar's approach when someone has failed to pay Bar dues. These persons are put on inactive status in a matter of weeks after neglecting warning notices.)

It must be understood that because a Bar proceeding is not a criminal proceeding, the OTC attorney has the right, consistent with Fifth Amendment protection, to call the respondent to the professional ALJ option is enthusiastically preferred by virtually every OTC attorney and most respondent counsel we interviewed, numbering approximately thirty different individuals.
stand for questioning. If the respondent fails to appear, this source of evidence is removed. And normal evidentiary objections, such as hearsay, must be stated to bar evidence. Often, however, the Bar evidentiary standard imposes upon OTC an obligation to meet evidentiary objections which have not been made because respondent has chosen not to attend. Referees and the Review Department will, in effect, make the objections for the respondent in absentia.

It is clear that default cases can and should be put on a fast track and that the default procedure proposals now before the Bar should be expeditiously considered. Two such versions, one from the State Bar Court and one from the Office of Trial Counsel, are currently being considered. Either would represent a substantial improvement over the present system. It appears that the Discipline Committee of the Board of Governors will approve a version somewhere between the two proposed.

3. Use of Civil Judgments

There is a tendency in the State Bar Court’s system to require OTC counsel to prove a case de novo, notwithstanding possible collateral estoppel application of existing civil judgments or criminal convictions. A rule should be considered to allow at least some collateral estoppel effect for civil judgments, particularly where relevant to the Bar disciplinary process: e.g., fraud, breach of fiduciary duty, or deceptive advertising under Business and Professions Code Section 17200. There are different standards of proof in a civil case (preponderance) versus a license revocation action. The stricter standard for the latter would preclude straight collateral estoppel effect. However, a shifting of the burden of proof or other use may be entertained.

4. Rules of Evidence

Traditionally, State Bar Court proceedings have been subject to standard California Rules of Evidence, with some adjustments. Even where those adjustments are appropriate, many of the referees in the field, familiar with criminal and civil trial practice, instinctively apply trial rules of evidence and proof burdens. Increasingly, different evidentiary standards as to hearsay, et al., are being applied in the State Bar Court system (e.g., the current debate over use of hearsay in default A prove up@proceedings). It is unclear why a doctor (or mortician or accountant) who is respondent in a disciplinary proceeding should be subject to a different standard of proof or rule of evidence than are attorneys. The APA standard for admissibility of evidence has been judicially upheld and has an
extensive record to commend it. It applies to the discipline (including license revocation) proceedings of over fifty professions and trades C all licensees except attorneys. We acknowledge that most attorneys within OTC support use of the California rules of evidence but it would appear that the burden is on the Board of Governors to demonstrate why and when attorneys need a different standard. One argument could be the more peremptory review by the courts of attorney discipline. We are not convinced that this distinction warrants different evidentiary standards. We have not yet surveyed sufficient hearing transcripts to gauge the practical impact of a different standard.

5. Review Department

The Review Department consists of eighteen persons C twelve are currently practicing attorneys and six are A public@members. This appellate body considers appeals and reviews all decisions within the State Bar Court system. The Department reviews not only matters appealed to it and matters where discipline is imposed C but dismissals and stipulated judgments as well. One rationale for such an active appellate body rests with the fragmented and inconsistent result of several hundred different referees making decisions with minimal guidance or continuity.

The Review Department operates by allocating the cases within the State Bar Court system among its members. Any particular matter goes to a single member of the Department for detailed review. Where a relatively new public member is assigned a case, an attorney member may shadow-review it as well.

The individual review involves a reading of the transcript and complete State Bar Court public record, including hearing transcripts and decision, filed Notice to Show Cause and response, filed discovery documents, if any, exhibits, the referee’s decision and recommended discipline, etc. Further, if either party has appealed the disposition, briefs may be filed by the OTC and the respondent. If the Review Department desires to hear oral argument, or the matter is on appeal from OTC or respondent, oral argument will be scheduled. Oral arguments are heard approximately ten times per year in Los Angeles and in San Francisco over a two-day period, respectively.

Those serving on the Review Department receive a thick preparatory compilation of materials. These materials normally consume two three-ring binders, each five to six inches thick. These materials are the basic documents (Notices to Show Cause, proposed findings of facts and discipline, etc.). These basic documents are expected to be read by all members as to all cases.
Although only one member reviews the transcript and detailed record of any particular case, the Department considers all cases en banc.

Each month, during a long *ex parte* calendar, the Review Department meets and considers those cases where there is no oral argument or written briefs. Here, the assigned member of the Department who has read the entire record on a particular case discusses and comments on any problems he/she has with it. Where there is a problem, the proposed disposition may be rejected for either correction or rehearing. Where matters are subject to oral argument, either because the Review Department wants to hear oral argument, or because the matter is the subject of appeal by either side, it will be heard in the morning portion of the proceedings. Once again, at least one member of the Department has read the entire record. The oral argument begins with a very limited (five-minute maximum) presentation by each side. This is generally followed by a series of questions from members of the Review Department. Respondents often appear pro per in these proceedings.

The reason for Review Department evaluation is purportedly to apply some consistency in terms of discipline which is otherwise unlikely given the fragmented decisionmaking process beyond the now-adopted Standards for Disciplinary Sanctions. It is also to ensure that the record is clean before it is transmitted to the Supreme Court. This means primarily guaranteeing that the transcript matches the findings of fact drafted by the referee. A small group of professional, independent administrative law judges, in communication with each other and coordinated, would tend to solve both problems. Stipulations would be approved in a consistent and professional manner, according to well-established guidelines; and the imposition of discipline would be relatively consistent and easily cross-communicated between the six to ten administrative law judges which would be necessary.

Several aspects of Review Department activity are troubling. First, a great deal of what the Review Department does, as noted above, would be automatically done in a properly-operating professional system without the additional layer of proceedings, the delay, and the expense that layer necessarily entails.

Second, although the Review Department attempts to provide consistency between the many decisions being made at a given point in time, it suffers from substantial turnover. Its voting membership changes markedly every two to three years. Hence, it does not provide consistency over
time. Indeed, the policies espoused by the Review Department four to five years ago appear to be somewhat different from the policies being announced today.

Third, the Review Department process does not operate by clearly defined standards. One observer remarked to us that it appears as if this is a chance for a lot of practicing attorneys to be king for a day. They have been hamstrung by procedure and subservient to judges during most of their careers. Here is a chance to make judgments in a setting with broad limits. Although not an entirely fair criticism, it is not unusual for oral argument to include examination of a respondent by Department members. Questions quite outside the existing record are often asked. Neither respondent nor his counsel are under oath and the testimony elicited is not subject to cross-examination by counsel for the Office of Trial Counsel. Nevertheless, there sometimes is fairly substantial discussion of mitigating factors, including representations such as I didn’t pay back the consumer because the investigator told me I didn’t have to.

Under the new procedures, where the investigator does not remain with the case after submitting it to the Office of Trial Counsel and the examiner trying the case is no longer the investigator (as was once the case), the opportunity for ex parte gratuitous interjection by respondents is manifest.

Of much greater concern than procedural infirmities is the entire additive impact of, again, a group of twelve practicing attorneys dominating an eighteen-member Review Department and making a final decision based on a record given to them by another practicing attorney about the discipline of a third practicing attorney.

15 Although the Director of the State Bar Court likens the Review Department to a traditional appellate body, limited by Supreme Court standards and adopting a reviewing member system as do most appellate courts, there are significant differences. First, Rule 452 establishes a role for the Review Department far beyond such parameters: the decision of the hearing panel shall serve as a recommendation to the review department. The review department shall independently review the record and may render findings of fact, draw conclusions and adopt recommendations... Further, a reviewing member system in a three- to nine-member court, with full-time judges who sit for life, who know each other quite well, and who will spend weeks exchanging opinion drafts is not closely analogous to an eighteen-member body of persons with existing and demanding occupations (twelve of them in public or private law practice), who sit for three-year terms and make decisions at a single ex parte en banc conference based on a record review by one of the members. We do not imply that delegation to one among the eighteen for review in detail is improper or that the Review Department should not have an aggressive role given the fragmented decisionmaking inevitable from several hundred referees who do not see each other’s prior decisions or those of the Review Department. But we do suggest that a professional ALJ system will lessen the need for review of decisions stipulated to by both sides and not appealed (the vast majority of the current caseload). And we suggest that a review system involving more consistent and professional attention to the important issues which are in dispute may be possible.
The concern we have about the continuing due process and conflict of interest implications of currently practicing attorneys making these decisions is accentuated by the current \textit{final judgment rule} being proposed by the Bar. The existing system of practicing attorney control has been justified by Bar officials for years because the Bar argues that disciplinary decisions are really nothing more than \textit{recommendations} for discipline to the Supreme Court. \footnote{At present, Business and Professions Code Section 6084 provides: \textit{When no petition to review...has been filed,...the Supreme Court shall make such order as it may deem proper in the circumstances.} \textit{This creates open-ended, continuing jurisdiction with the Supreme Court until it acts C upholding the \textit{recommendatory} structure and requiring Supreme Court affirmative act for finality.}} Although this is a disingenuous argument given the great weight State Bar Court determinations have with the Supreme Court (see, e.g., \textit{Smith v. State Bar}, 38 Cal.3d 525, 539 (1985); \textit{Davis v. State Bar}, 33 Cal.3d 231, 240 (1983)), it will no longer be as available to the Bar. That is, the final judgment rule will make the decision of the State Bar Court (i.e., the Review Department) \textit{final}, subject only to a thirty-day period in which to file objections or to petition the Supreme Court. Failure to file or refusal by the Court to review will result in finality.

This change may well be a justifiable one. \footnote{16} However, it mandates structural reform of the State Bar Court system. The State Bar Court system will no longer be able to make the \textit{advising, not adjudicating} argument. In fact, there will be less opportunity for judicial review of State Bar Court judgments than any other kind of adjudicatory ruling in the state. Administrative judgments made by any other California licensing agency are subject to Code of Civil Procedure section 1094.5 administrative mandamus. This review is not only significant, but is undertaken under the \textit{independent judgment test}, where the jeopardy to a \textit{vested right} is at issue (such as a license to practice). That petition for administrative mandate is itself subject to review by higher courts in the normal course.

Members of the Bar whose licenses are threatened by disciplinary proceedings uniquely do not have access to that writ of administrative mandate review by the appellate court system. It would appear that a system imposing such finality and consisting almost entirely of currently practicing attorneys faces serious due process issues of the kind raised in \textit{Gibson v. Berryhill}, 411 U.S. 564 (1973).
Is there an alternative which will provide adequate and constitutional review of Bar disciplinary proceedings without overburdening the Supreme Court? It is axiomatic that any such system must to some extent be sui generis because, unlike other administrative agencies subject to APA proceedings, this agency has a special relationship to the judiciary. Admission to the Bar falls under the jurisdiction of the Supreme Court and executive and legislative intrusions may have proper limits. It would also appear, however, that a minimally acceptable and constitutionally credible system cannot exist under the control of currently practicing attorneys serving in an adjudicatory fashion at each critical step of the proceeding and leading only to a single level of discretionary review. Yet the Supreme Court must have a body over which it has control, and in which it can place its confidence.

It would appear that the system would be served in only one general format: an esteemed board of a workable number of persons appointed by the Chief Justice of the Supreme Court to formal terms, and consisting of men and women knowledgeable in the law, but not current practitioners (e.g., retired judges, law faculty, and esteemed public members). A body of this kind could handle appeals with the confidence of the Supreme Court and the credibility of the public. Further, if such a board or court were to consider appeals from the decisions of a small group of independent, professional administrative law judges, the appellate body’s own review would likely cause it less travail. In the end, the Supreme Court could review petitions with confidence in an underlying system of consistency, competence, and independence.

The devolution of the current Review Department’s function into such an entity does not seem to us to be merely a question of efficiency, but a question of fundamental fairness and, as we have suggested, constitutional due process.

We hope to discuss this alternative, including critical details such as the role of the Board of Governors in the creation of such a board, the future control or independence of the State Bar Court system from Board of Governors’ jurisdiction vis a vis the board just described, issues of budget control, and other matters.

In addition, other alternatives have been suggested by those with whom we have spoken. These include turning over review functions to the existing courts of appeal, subjecting Bar decisions to section 1094.5 writ of administrative mandate review at the lower court level, creating a Review
Department of professional judges (or of retired judges not now currently practicing), increasing the number of public members in the existing Review Department, delegating review to special masters by the court, or creating a Review Department of non-practicing attorneys (e.g., former judges) appointed by the Governor, or by the Governor, Speaker, and Senate Rules Committee. We believe that there may be problems with each of these alternatives; however, each should be explored thoroughly.

6. Supreme Court Advocacy

All representation before the Supreme Court of California is handled by the State Bar Office of General Counsel. This is a separate office directed for many years by former General Counsel and newly-appointed Chief Executive Officer Herb Rosenthal. Attorneys in the Office of General Counsel are paid a 5% premium over other attorneys in the office and have the unique opportunity to practice before the Supreme Court.

Former OTC counsel Phil Martin and others have argued that the OTC attorney handling the case should write the briefs and conduct oral argument before the Supreme Court. Martin’s argument is that when the Review Department reduces the recommended discipline, the General Counsel is obliged to represent that final Bar judgment for reduced discipline, and the OTC position (perhaps referee-sustained) for greater discipline is not directly before the Supreme Court. Rather, the court has before it advocates for lesser punishment and no punishment, respectively. It must be noted that this criticism would apply to all administrative agencies. All boards and commissions have the authority to alter a hearing examiner’s decision and that final judgment is then represented by the Attorney General or other counsel. The underlying opinion and advocacy are in the record for the reviewing court to consider.

However, some arguments can be made in favor of OTC substitution for the General Counsel in factually complex cases. Numerous OTC counsel have complained that the Office of General Counsel advocacy of their cases has been incompetent. At least to some extent, this criticism derives from a lack of intimacy with the facts of the case. Unlike the typical appellate case, here we have unusual latitude in both the Review Department and the Supreme Court to deviate from what is normally a respected record. The Review Department can not only exercise the independent judgment test; it can hear new evidence. The Supreme Court, although repeatedly confirming the
A great weight to be afforded State Bar Court proceedings, is likewise free to reach its own judgment from the record. Hence, respondents' counsel are not above introducing material in briefs and oral argument which may not be in any adjudicated record. OTC counsel, if present, would be able to rebut these new materials and arguments (particularly if familiar with the investigation of the case as well as the hearing).

We have been given examples of respondents taking advantage of the ignorance of General Counsel attorneys by making claims which would be easily answerable by counsel familiar with the facts. Further, OTC counsel commonly complain that General Counsel attorneys never consult them about their work on the case. Briefs may be sent to the OTC attorney, but usually after final draft or even filing. Often, there is no contact at all.

Although this phenomenon is not unusual in other kinds of proceedings (for example, a Deputy Attorney General handling a criminal appeal may not spend much time with the deputy district attorney prosecuting the case), there are reasons why Bar proceedings require more OTC participation. Here, the Supreme Court sits as the court of first resort. It considers not merely questions of law for precedential impact; it reviews a complex record and makes, itself, a review of factors regarding the penalty chosen.

SB 1543 (Presley), enacted in 1986, provides: "On or after July 1, 1987, the chief trial counsel may, as prescribed by the Supreme Court, petition the court for a different disposition of a matter than the recommendations of the review department...." The change preserves the participation of the General Counsel and essentially allows intervenor status for OTC where it disagrees with the Review Department. This alteration would appear to address the Martin critique, but it does not cure the problem of the General Counsel's factual background disadvantage in a normal case not involving Review Department penalty revision. At the very least, OTC attorneys should sit at counsel table with the General Counsel during oral argument.

Over and above SB 1543, it might be appropriate to consider allowing OTC counsel to argue complex factual cases. An opportunity for OTC counsel to argue before the Supreme Court would add a prestige- and morale-enhancing feature to the position. This would particularly be the case if the Chief Trial Counsel adopts a policy that he personally will argue any OTC discipline variation argument before the Supreme Court.
7. State Bar Court Output

In recent months, the Bar has consistently cited several improvement statistics to bolster its opposition to various legislative measures and to demonstrate increasing and more stringent discipline. Exhibit 29 includes the State Bar Court’s statistical summary of total output from 1981, introduced by a cover memorandum listing statistical progress often used in recent Bar public relations. The cover memorandum and Bar external publicity have in particular repeatedly cited an increase in disbarments as a significant demonstration of system invigoration. The cover memorandum of the Bar in Exhibit 29 includes the most oft-repeated claim: Disbarments recommended by the Review Department and resignations with charges pending accepted by the Supreme Court totalled 107 for 1986, an 81% increase over the 1985 total of 59.

A review of the more complete statistics on the last two pages of Exhibit 29 indicates a different picture. First, the increase in 1986 was accomplished almost entirely from 69 resignations with charges pending. A number of these persons may be aged, infirm, ill or facing lengthy prison terms. The acquisition of resignation agreements from those who had no intention of continuing practice anyway may artificially inflate this figure as a reflection of State Bar Court output. We intend to survey this variable in future months.

To be sure, there may be some increase in the disbarment/resignation with charges pending category, but consider the following from the general statistics: Adjudicated disbarments were 22 in 1986. There were 20 in 1981. [There are states where the per capita disbarment rate is ten times these levels.]

Further, the total data on disciplinary actions actually shows very little increase from 1981. Suspensions without probation were 20 in 1981, 14 in 1986; suspensions with probation were 70 in 1981, 81 in 1986. Interim suspensions after conviction of a crime were 18 in 1981 and 25 in 1986 (they were 30 in 1983, 29 in 1984 and 36 in 1985). Interim suspensions after failure to pass the Professional Responsibility Examination were 21 in 1981 and 14 in 1986. (See page 4 of Exhibit 29 for table arraying numbers for all years.)

Disciplinary matters of all types decided by the State Bar Court were 229 in 1981 and 220 in 1986 (down from the 1985 high of 276). (See page 3 of Exhibit 29.)
These numbers are produced directly by the State Bar Court, and do not appear to justify self-congratulations from a single, and perhaps idiosyncratic, category increase.

What is troubling about the actual output figures is that they are actually declining, or are at best static, in the face of an enormous increase in the number of complaints, and in appropriations to the State Bar disciplinary system. While total matters decided declined from 1981, facially valid consumer complaints have increased by more than 20% in 1986 (6,946 to 8,574), and monies going to the OI and OTC disciplinary effort went from $2.8 million in 1981 to over $6 million in 1986.

E. SPECIAL PROCEEDINGS

In addition to the basic consumer-generated complaint and its consideration by the Office of Investigations, Office of Trial Counsel, and State Bar Court, there are numerous special proceedings which may follow a different track in the system. There are approximately twelve such special proceedings currently extant. They include:

1. illness or infirmity under Business and Professions Code Section 6007(b) (involuntary enrollment), giving the Bar authority to intervene to protect clients where an attorney is unable to function;

2. interim relief under Business and Professions Code Section 6007(c), a very important provision allowing the Bar to obtain interim relief and suspend an attorney from the practice of law pending the outcome of a disciplinary matter where there is a substantial threat of harm to the attorney’s clients;

3. incapacity under Business and Professions Code Section 6190, which allows the Bar to step in where an attorney is mentally or otherwise incapacitated in order to protect existing clients;

4. probation revocation under Rules 610-613, which allow the Bar to recommend that the Supreme Court revoke probation where the terms of an existing discipline suspension are breached;

5. reinstatement petitions under Rule 660-690, which involve attorneys who have been disbarred or who have resigned with charges pending attempting to obtain reinstatement to the practice of law;

6. Rule 955 violations, involving the obligations of an attorney to provide notice to opposing counsel, courts, file transfers, etc., for the transition of existing clients to other counsel where he/she is leaving the practice of law, whether by disbarment or resignation under charges;
(7) conviction referrals under Rule 955 et seq., which involve an automatic system for the review of criminal convictions of attorneys for possible immediate suspension and later discipline;
(8) lawyer referral service violations;
(9) legal service trust fund requirement violations;
(10) expedited discipline under Business and Professions Code Section 6049.1(b), where another jurisdiction has acted to discipline a California-licensed attorney;
(11) civil judgment referrals where attorneys have suffered more than three relevant adverse judgments and have so reported those judgments under recent legislation;
(12) mandatory fee arbitration under Business and Professions Code Section 6200; and
(13) the operation of the Client Security Trust Fund under Rule 670 et seq., which allows those who have suffered loss by the dishonest acts of attorneys to recover from that Fund.

Each of these special proceedings have their own problems. Our initial inquiry reveals that these problems are severe. The Client Security Trust Fund has its own separate staff and procedures. It has recently been chastised by the California Supreme Court in the Saleeby v. State Bar of California, 39 Cal.3d 547 (1985), for its failure to provide elementary due process for complaining witnesses who have claims before the Fund. The Fund would not permit adequate attorney representation of complaining witnesses (or any meaningful opportunity to be heard at all), did not hold hearings, and did not make findings upon which review could be taken. The system was considered by the Bar to be an act of grace with discretion vested in it to administratively say no. The amount of money available to the Client Security Trust Fund is limited (the new ceiling proposed is $75,000 per claimant) and is severely limited in its scope, excluding malpractice and including only dishonesty. We have serious questions about the adequacy of notice to consumers of the availability of this fund, which appears to be de minimis There are also serious questions about resources and procedural delay. We hope that procedural changes now being implemented will ameliorate these problems.

Most of the other special proceedings listed above tend to enter the system at present through the Office of Trial Counsel Intake/Special Proceedings Unit, avoiding the newly-separated investigations entity of the Bar. With these special proceedings, even more so than the regular proceedings, it is not appropriate to follow the street-crime model of separate investigation and hand-
off to attorney. Each of these proceedings absolutely requires a close and continuous working relationship between attorney and investigators. At present, for most of these proceedings, few investigative resources are available.

The extent of the problem is illustrated by perhaps the most important of these special proceedings, the interim relief opportunity afforded by Business and Professions Code Section 6007(c). A recent revision to the statute liberalizes the criteria for the granting of interim relief, which can now be obtained upon a showing of A substantial threat of harm @ to clients. Our survey of the Los Angeles office indicates some five such motions have been filed during 1987. The record of these initial cases is mixed. One of the initial problems evident is the lack of predictability from the A volunteer @ attorney practitioner referees in the field who are, under the present system, assigned to make these judgments.

Although several investigators within the Office of Investigations have assisted in interim relief petition preparation on what appears to be an ad hoc basis, a number of the current investigators C as recently as April 1987 C did not even know that an interim relief remedy exists( A number of them for the first time are now surveying their cases to see whether interim relief should be sought. However, the substantial work required for an interim relief petition does not constitute the close-out of a case in order to meet the quota of five cases per week now required of each investigator. Rather, an interim relief petition necessarily involves the commitment of substantial time C certainly weeks of investigative work C in order to build the record to meet the statutory standard, particularly before referees in the field who may be unfamiliar with the administrative process and who understandably are hesitant to grant this extraordinary summary remedy without overwhelming evidence.

The interim relief motion, and perhaps section 6007(b) and Business and Professions Code Section 6190 illness or infirmity capacity proceedings, might be generated from Investigations based on consumer complaints. In these cases, at least, an investigator is automatically involved in the case who can theoretically perform work. However, even before the quota system, investigators and OTC have been seriously deficient in recognizing and acting on incapacity and gross abandonment cases, for example. Los Angeles cases such as Miller or Montgomery involve 1981 wholesale and injurious abandonments of clients C now being addressed in 1986B87 proceedings.
Some of the special proceedings listed above may not enter the system from below, but flow directly into OTC. Reinstatements, conviction referrals, expedited discipline under Business and Professions Code Section 6049.1(b) (another jurisdiction disciplining a California attorney), civil judgment referrals, and in some cases, State Bar probation revocations and Rule 955 violations, may be routed directly into OTC intake. Again, the overwhelming problem in each of these categories is the lack of investigative assistance with which to pursue them. Conviction referrals often involve the requirement to at least partially relitigate the underlying crime. Probation revocations always involve detailed issues of fact. Reinstatement petitions contend that the respondent has engaged in exemplary behavior over the past five years, contentions which may be untrue, but which can only be rebutted through investigative work. In all of these cases, we have been informed that both attorney resources and investigative assistance are lacking.

For many of these procedures, additional remedies and procedural reforms may also be appropriate. For example, where an attorney resigns with charges pending, he/she is, under Rule 955, required to provide notice to current client(s) now dependent upon his/her legal representation. Deadlines must be calculated for imminent filings, there must be opportunity to obtain substitute counsel, and substitution forms must be signed so that opposing counsel and courts can communicate with new counsel. Original documents and files must be preserved and transferred to either the client or new counsel. However, the only remedy now imposed by the Bar for a Rule 955 violation by a disbarred attorney is a notation of failure to comply, should that attorney seek reinstatement later. Hence, attorneys who are leaving practice permanently may ignore Rule 955 obligations to the detriment of clients the Bar is supposed to protect. The Bar will do nothing else. It lacks jurisdiction, since the attorney is no longer a member of the Bar. It might be appropriate to create a court order format providing that failure to comply with Rule 955 obligations constitutes contempt of court. This would enable the summary or incarceration of former attorneys who fail to comply. Bar actions may only apply to licensees, but any citizen can be held in contempt of an applicable court order.

Likewise, the Bar will often receive reports that persons it has disbarred or who have resigned with charges pending are still practicing law. Upon receiving complaints of this kind, often because that unauthorized practice involves fraud or abuse, the Bar sends a standard letter
disavowing jurisdiction, since the offender is not a licensed California attorney. Likewise, a call to the toll-free number will result in an initial inquiry by the Bar complaint handler as to whether or not the person complained of is an existing attorney. If not, the conversation will be summarily ended.

The Bar claims it is discouraged from the referral of these cases to District Attorneys, given what it internally and privately contends is the short shrift given to these matters by public prosecutors. While unauthorized practice by, for example, a building contractor who performs a job admirably, may not have a high criminal prosecution priority, the position of the Bar is much stronger. Here, consumers are relying on the judgment of someone who has been specifically disapproved to practice law by the licensing entity. Here, the harm is not a poor drywall job, but can be much more momentous to the future of the consumer. Rather than simply disavowing jurisdiction, the Bar must make a formal and concerted effort to stimulate criminal prosecution for unauthorized practice of law where engaged in by any attorney who has resigned with charges pending or who has been disbarred. Our interviews and our review of files wherein this complaint is made suggest that such a concerted effort is not being made. The Bar does occasionally, as we discuss above, share its confidential material with other prosecuting agencies, but only very occasionally and rarely as our review of these Rule 227 waivers indicate for unauthorized practice by formerly disciplined attorneys.

We do not intend to imply that the concerns we have listed above are in any way exhaustive of the procedural or resource defects applicable to the thirteen special proceedings. Most of the concerns applicable to the system at large and as described above may apply to these special proceedings as well. We expect additional inquiry to reveal additional concerns, and hopefully, specific reform proposals to resolve them.

We have conducted some initial inquiry into the performance of perhaps the most important of these thirteen special proceeding areas: conviction referrals. Sections 6101 and 6102 of the Business and Professions Code and Rule 951 of the California Rules of Court govern the discipline of attorneys who are convicted of criminal acts. Certainly this is a critical area for expeditious discipline. Where such criminality affects professional competence, as it often does, the Bar should
move swiftly. Indeed, the system established by this statute and rule, and that described in Bar official literature, paints such a picture.

Business and Professions Code Section 6101 requires a district attorney or other prosecutor to notify the State Bar that an attorney has been charged with a crime (misdemeanor or felony), and to notify the court clerk that the defendant is an attorney. The Bar is informed of the charges and the alleged facts. After conviction, the clerk is then required to transmit a record of conviction to the State Bar, which the Bar then transmits to the Supreme Court within five days. The Supreme Court analyzes the conviction under Business and Professions Code section 6102, and if the crime is a felony or is deemed to involve moral turpitude, the attorney is suspended from the practice of law pending appeal of the conviction and final State Bar Court proceedings. The matter is then referred back to the State Bar Court for hearing after the judgment of conviction has become final, to determine whether or not moral turpitude is involved, and to consider an appropriate level of Bar discipline, which the Supreme Court will then review and possibly impose.

These are extremely important cases, involving the most dangerous kinds of consumer harm. But the system does not work as pictured.

The process used to be handled through OI. The most experienced Bar investigator working these case is Joe Roberts in San Francisco, who has handled them as his chief responsibility for over six years. At present, with the separation of OI and OTC, the process is being picked up by Ri Gomez in San Francisco and Barbara Field in Los Angeles, both paralegals attached to OTC.

The initial problem, of course, is the same difficulty described above: a lack of investigative resources for matters which go directly into OTC, which has only paralegal help. As with reinstatements, these conviction referral cases deserve substantial investigative help. As a practical matter, the questions of moral turpitude and degree of discipline have required substantial litigation of underlying facts, particularly where the conviction is the result of a plea bargain without trial.

But these particular cases raise serious additional procedural infirmities. First, the system is failing at its very first level: the detection of attorney criminal convictions. Prosecutors are clearly not complying with Section 6101. We suspect most of them do not even know of the existence of the statute. Since senior attorneys in major District Attorney Offices do not know of it, the Bar has apparently not educated them adequately. A review of pending conviction referral cases indicates
that about one-third of the entries are derived from prosecutorial reporting. Most actually derive from newspaper clippings, letters, phone calls, hearsay references, etc. Since only a small percentage of the required notices are going to the Bar, a similarly small percentage are going to court clerks. Hence, the records of conviction are also haphazardly collected. Exhibit 35 includes source identification of a sample of sixty cases by OI=Joe Roberts.

When the Bar does learn of a pending case, it writes for the charging documents and faithfully follows the progress of the case on a monthly status report, which we have reviewed. Files are not opened on these attorneys, however, unless a CW calls or writes to demand it independently. In this instance, a file will be opened but then immediately abated pending the result of the criminal case.

If the verdict is not guilty, or a search and seizure motion is granted which guts the prosecution= case and forces a dismissal, the Bar= disciplinary matter is closed automatically, whether a file has been opened or not. Further, if the prosecution ends in what is called Adiversion@ (i.e., the criminal case is suspended for a probationary period while the defendant is required to make restitution or attend drug rehabilitation programs, after which it may be dismissed), the matter is closed automatically.

If a previously-convicted attorney is on probation or parole and commits another unlawful act, the prosecutor is most likely to avail himself/herself of the easier standard of a probation revocation or parole revocation proceeding. These cases are not reported to the Bar criminal referral system at all.

The Bar= range of coverage appears to be too narrow. The Bar should automatically track all filings, including probation and parole revocation hearings. Some of these proceedings may warrant the straight imposition of Section 6102, and others should appropriately be the subject of original Bar disciplinary actions. These original actions should also include interim suspension motions under Business and Professions Code section 6007(c), or under unfit or abandonment theories, as appropriate.

Further, the Bar= standard for action appears to be overly solicitous to respondents. A failure to meet the prosecution= burden in a Aproof beyond a reasonable doubt@ proceeding is not the test for Bar disciplinary action. Most important, a very large number of cases are reduced or dismissed
because of a procedural police error in obtaining a confession or in seizing evidence. Penal Code section 1538.5 motions testing Fourth and Fifth Amendment compliance by police agencies form the single largest source of prosecutorial concern in compromising a case, and in dismissing it. But under Emslie v. State Bar, 11 Cal.3d 210 (1974), the exclusionary rule is not applicable to Bar disciplinary proceedings. Rules of criminal procedure do not govern State Bar disciplinary proceedings. See also Lewis v. State Bar, 9 Cal.3d 704 (1973); Werner v. State Bar, 24 Cal.2d 611 (1944).

The Bar procedures impliedly presume that its standards are as strict or stricter than criminal burdens and evidentiary rules. The Bar refuses to consider a criminal prosecution as a receipt of information which should be independently evaluated by it. Even in the extreme example of a felony act directly relevant to honesty, e.g., fraud or drug dealing, the Bar will simply drop the respondent and terminate the matter unless there is a conviction or unless a CW appears to champion the public cause. Then a case will be opened and the CW, considered a complaining witness, can pursue the matter and the Bar will at least potentially consider it.

Even if there is a conviction, the Bar will still abate the matter until it is final. It is final only after appeals have been exhausted that is, years later. At this point, a serious felon is in custody. If so, the Bar action is then abated because he/she is in custody and the matter appears to be moot. Then when he/she leaves prison, many years will have passed in the normal course. The Bar then has some difficulty in imposing what appear to be belated add-on sanctions many years after an event. And, because the matter is then treated almost as an original proceeding and is subject to investigation (if available) and hearing, a substantial period will pass before the sentencing decision is reviewed by the Review Department and then Supreme Court. In the meantime, not only has the crime occurred many years ago, and a long sentence has perhaps been suffered, but the attorney now has two to three years while the matter is in the State Bar Court system to compile evidence of beneficent rehabilitation and charity.

State Bar Court proceedings reveal many rather extraordinary personal conversions: from major drug dealer to pro bono counselor to other attorneys with drug abuse problems. Attorneys for respondents actually argue with a straight face before the Review Department: These acts occurred six or seven years ago and this man, who is now rehabilitating his colleagues of the Bar, has led an
exemplary life since these tragic events of long ago without mentioning that during five of those years he was in state prison and rather unable to suffer rearrest.

In a case with many of these problems coalescing, a San Diego prosecutor filed felony cocaine dealing charges against an attorney. The attorney was dealing from his office out of an engraved box entitled Attorney-at-Law. He boasted to his associates that he was safe in dealing from his law office since it was a sanctuary. A search and seizure problem which would not have impeded the Bar required the prosecutor to take a plea to simple cocaine possession. But then the attorney, learning that the State had an inside witness, solicited a person to kill that witness. He even showed up in a hospital where the witness was recovering from surgery. Here too there were evidentiary problems which should not have impeded the State Bar. The jury hung, heavily voting for conviction, and the defendant pled to attempting to do great bodily injury to a witness.

These crimes were not on the list for interim suspension, so the defendant remained a member of the Bar during State Bar proceedings. He has since served a one- to two-year sentence and is now out on parole. He is also practicing law. The Bar is currently processing his disciplinary action four to five years after the events.

The conviction referral area appears to be a prime candidate for reform. Exhibit 35 includes an indirect internal critique: advice from Joe Roberts of OI who had been directing the monitoring of conviction referrals for six years, to the OTC paralegals assuming his task. Further study of conviction referrals and the remaining twelve special proceeding areas is warranted.

VI. PREVENTION/DISINCENTIVES

It is inappropriate for one charged with a review of a disciplinary system to ignore the larger environment in which it operates. In the long run, an attempt to deal with the causes of attorney abuse may have the most telling palliative effect on the current overload. If there are access points at which major prospective abuse can be ameliorated before it becomes a discipline problem, these should be explored. We have not focused on these background factors pending completion of at least the initial review of the disciplinary system operation itself. However, there are three basic areas of prevention/disincentive impact beyond the need to create a deterrent-producing respect for the disciplinary system itself, as described above. These include alcohol/drug intervention, malpractice insurance requirements, and competence assurance through testing, education, specialization
licensing, re-licensure, or other regulatory measures. Although we shall address these important issues as our inquiry proceeds, we raise herewith our initial summary concerns.

A. ALCOHOL/DRUG ABUSE

As we read through hundreds of investigative files of the State Bar, it became apparent to those of us working on this project that alcohol and drug abuse appear to be a serious problem for those practicing attorneys who are the subject of complaints. Certainly the pressures of litigation have led many into the false solace of substance abuse. The State Bar has contracted with a substance abuse program, primarily for referral where ordered as a part of a condition of probation (or for voluntary referrals). However, a number of persons have expressed interest in intervening before client abuse occurs and before the disciplinary system must, years later, impose such terms and conditions.

The Bar often receives the first indications of substance abuse problems, although they are usually manifest in complaints designated as A inquiries @ under the system now in place. A long pattern of failing to return clients' phone calls, missing court dates and appointments, and losing files can be indicative of a substance abuse problem. If the Bar were in a position to detect the patterns of these A minor inquiry @ designated complaints, it might be in a position to help identify those in trouble.

Certainly those who are members of the Bar carry with them a very special responsibility the lives and financial future of clients are entrusted to them in the belief that the licensing system will provide some assurance of competence. Investigators should be trained in recognizing alcohol and substance abuse and be sensitive to the early symptoms. Certainly some programs should be instituted to allow for early intervention where there is substantial evidence of such abuse.

At the very least, the Bar should take the lead in informing the bench and attorneys in general that programs are available for treatment on a confidential basis. One such program allegedly includes over 2,000 attorneys currently participating. This is an extraordinary number, and does not include another 2,000 B 3,000 persons who have reportedly completed the program over the past decade.

Where the discipline investigation indicates that issuance of a Notice to Show Cause is appropriate, and alcohol/drug abuse appears to be a contributing cause, the offender should be
referred to an acceptable treatment program immediately. Failure to comply should properly give rise to a petition for interim relief to immediately terminate that attorney's practice where section 6007(c) standards are met, or even an incapacity petition should the attorney prove to be demonstrably dysfunctional. Certainly the attempt by the attorney to engage in bona fide rehabilitation, or his/her refusal to do so, should be important factors weighing on an interim suspension or incapacity seizure decision by OTC counsel.

Note, once again, that these kinds of considerations require the interplay between an investigator and an attorney. This is not the kind of judgment an investigator can make in the field without reference to the legal standards involved. Nor is it the kind of judgment which can be made by an attorney without substantial evidence of substance abuse. The current artificially bifurcated investigation/attorney system impedes any such coordinated effort.

To the extent the Supreme Court addresses alcohol or substance abuse in its probation orders, it should consider refraining from a prohibition on excessive consumption of alcohol. For those with a serious substance abuse problem, the terms of probation, should prohibit all ingestion of alcohol and illegal drugs. Probation including these terms should advisably include a method of verification, perhaps including periodic testing.

Our interviews with investigators who are sensitive to this problem indicate concern about it and some frustration about a lack of options. One attorney within the Office of Trial Counsel in Los Angeles has informally assisted attorneys in trouble on his own. Two investigators have arranged for an intervention, a system where friends and family of a serious substance abuser are brought together in one place for an often emotional confrontation. These interventions do raise some difficult questions, and the Bar has expressed reservations based on the privacy rights of attorneys. However, the subject is worthy of serious study, since the problem is catastrophic to the lives involved and provides a significant increment into the current disciplinary system. Moreover, this increment is particularly damaging to clients since it often involves wholesale and serious misappropriation of client trust fund monies. The Bar's policy on intervention should not rely upon the ad hoc efforts of several investigators or one attorney with a personal interest in the subject. The policy should be vigorously debated and an early detection/referral program considered.

B. MALPRACTICE INSURANCE
One of society’s theoretical self-regulating devices to assure competence is a malpractice insurance system. Such a system provides its own limited policing through economic forces. Presumably, a repeat offender compelling insurance payouts will be denied coverage, after which further transgressions will result in judgments personally attaching to his assets. And, the victims will be recompensed in the process.

However, the existing malpractice system has important flaws. First, it is unclear that incompetent attorneys are being denied insurance. Second, the Client Security Trust Fund recompense system is limited in amount and only applies to dishonest acts by attorneys, not to incompetence or even gross incompetence. Third, 30,000 attorneys almost half of the attorneys in private practice have no malpractice insurance. Further, many of these attorneys tend to be sole practitioners, and where the object of attorney discipline may have limited or sheltered personal assets.

Notwithstanding a potentially vigorous disciplinary system, clients have a right to redress in legal malpractice as well as other professional malpractice. It appears unfair to establish a system for the comprehensive licensing of this profession, set up a disciplinary system which is not operative in the incompetence area except in cases of extreme abandonment, and not require insurance coverage to provide recompense to victims of incompetence.

The Bar Commission on Professional Liability Insurance is currently considering a mandatory malpractice insurance plan. A similar plan passed the legislature in 1986, only to be vetoed by the Governor. The veto occurred allegedly because the wording of the statute might be interpreted by some to include publicly-employed attorneys (e.g., Deputy Attorneys General, etc.). That language could easily be clarified. We have not reviewed the specifics of the current program pending before the Bar for submission to the legislature. However, the concept of mandatory malpractice insurance, particularly where it involves surcharges for continued behavior generating payouts, has strong policy arguments to commend it.

Where attorneys, even with surcharges, are costing Bar members a great deal of additional money in required contributions to the system through repeated acts of malpractice, one might expect additional pressure to be placed on the disciplinary system to discipline such attorneys and to eliminate them from the profession. If not doing something about an attorney begins to cost all
attorneys money in a visible way, that may provide a useful incentive to the invigoration of the
disciplinary process.

C. EDUCATION/SPECIALIZATION/RE-EDUCATION

Certainly the Bar has made major progress over the past decade in the area of professional
responsibility training. Courses on the subject are now common in law school, and it is the subject
of required examination. This focus, however, is on ethics, not competence. In order to assure a
minimum level of competence, an attorney must work in the field in which he/she is familiar,
maintain updated information about current law and procedures (which are continuously changing),
and undertake a workload within the physical capabilities of counsel to perform. As presently
constituted, the Bar appears to have very little to do with these fundamental prerequisites to
competence.

Measures in the direction of assuring actual competence would also eliminate numerous
cases from the disciplinary system and provide a benefit to the public beyond the current reach of
that system. At present, the Bar grants a license to practice law without limitation. An attorney will
usually practice in one or two specific areas: patent law, estate planning, criminal defense, et al.
Although the raison d'être of attorney licensing is the assurance of competence because its absence
creates irreparable harm to consumers, the system as it actually operates does not reasonably attempt
to ensure competence in the areas where attorneys actually practice. Most any attorney who has been
practicing in the immigration area will not be competent to handle a major estate planning case. As
far as the Bar is concerned, however, he/she is perfectly free to do so.

Moreover, members of the Bar are never re-tested. Once they are given a license, it is a
license for life. The Bar has no continuing education requirements whatever. This is ironic for a
profession where information changes as radically and quickly as it does in law. Although nurses and
doctors are required to take some continuing education, the Bar has only voluntary ACEB® programs.
Litigators are never tested on civil or criminal procedure; real estate lawyers are never tested on
recent development in real estate law; tax and estate planners are never tested on their competence
in their subject areas. Although to some extent the marketplace rewards the competent in the long
run, the reason for the licensing of attorneys is because short-run incompetence produces irreparable
harm. Since this is a justification for licensing the profession, it would appear that the system ought
to make a bona fide attempt to assure competent attorneys. A reading of the hundreds of investigative
files of the Bar confirms the conclusion, apparent to most of us already, that such is not the case now.

The Bar is considering additional specialization certifications which would be entirely voluntary. However, it is extremely doubtful that the Bar will impose upon itself meaningful specialization, education, testing, and relicensure requirements from within. Recently-enacted section 6092 requires a study of Attorney Competency by the Bar and a report to the Legislature by January 1, 1989. The recommendations of the Bar will be very interesting.

The creation of such a system may be outside the jurisdiction of the Bar Discipline Monitor; however, its absence has a measurable impact on the existing disciplinary system. It is curious that the Bar, which is fully able to establish a system where thousands of students spend three years and a small fortune obtaining a legal education, only to see the general Bar exam keep 60% or more of them from the profession, then allows those who get through this general knowledge test to practice in any specialized field they choose, in which they are untested until they die or retire. This license is limited only by a disciplinary system which does not focus on competence, but rather dishonesty and abandonment. Indeed, one cannot depend upon a disciplinary system to assure competence given the difficulty of measurement. A vigorous specialization, continuing education, and retesting program, however, can provide such minimal assurance, and together with a discipline system addressing the serious criminal and abandonment abuses which can suddenly afflict a competent attorney can provide reasonable assurance of competent performance by those licensed to so perform.

VII. BAR PROGRESS

Notwithstanding the rather lengthy recitation of initial concerns of the Monitor, we would be extremely remiss not to acknowledge what has been a long series of often bona fide attempts at improvement. However, we are also duty-bound to report that many of these are undermined by the problems we have listed, and that a large number of them have originated and been imposed from outside the Bar. Even in concert they will not create a minimally acceptable system. However, most of them are worthy of completion and preservation.
The Monitor concedes that the list of reforms imposed by the Legislature and in some cases *sua sponte* addressed by the Bar, is impressive in its totality. A partial list follows, for purposes both of recognition and of encouragement to continue:

1. **Additional Investigative, et al. Resources.** The Bar has authorized a major increase in the number of positions in the Bar disciplinary system, a more than 50% increase above the intake increase over the past several years.

2. **Some Statistical Improvement Re: Backlog.** A reading of the files indicates that in 1987, a consumer complaint is likely to receive a response from an investigator within four months. Although this is certainly an unacceptable response time, it is a substantial improvement from the twelve- to eighteen-month initial delay period occurring in 1984 to 1986. (Note 1986 legislative amendments which require response to CW and establish a six-month investigation period goal (Business and Professions Code Sections 6093.5, 6140.2).) Some progress has been made in reducing the backlog (although not as much of an improvement as some of the numbers from the Bar would indicate).

3. **Professionalization of Investigations.** Although we have been critical of the overly territorial bifurcation of attorneys and investigators, the creation of an identity for investigators could be a source of professional pride. Further, the pride of the Director of the Office of Investigations in investigative professionalism is clear.

4. **Interim Suspension Attempts.** Although with only mixed results, recent amendments to Business and Professions Code section 6007(c) make possible the amelioration of delays where egregious and demonstrable attorney abuse continues pending final resolution. Although this remedy suffers from a number of defects which we have discussed above, its potential and continued attempts are important.

5. **Enhanced Criminal/Civil Filing Detection.** New legislation requires attorneys to report criminal charges and civil judgments under certain limited circumstances. It is unclear how the Bar will use this information on the civil side, where the reporting requirements themselves are clearly inadequate and the means of detection questionable. Nevertheless, for the first time, an attempt to
gather at least some information concerning adverse civil judgments against attorneys in areas relevant to honest practice may occur.

6. Requirement to Cooperate With the Bar. Of great import is this particular reform, which we hope will be aggressively used by the Bar. Attorneys who do not respond to questions (separate and apart from Fifth Amendment rights), who do not show up for disciplinary proceedings, et al., should be subject to supplemental charges consistent with this requirement. Although this reform is too new to gauge its impact on the system, its potential is clearly beneficial.

7. New Client Trust Fund Procedures. The Bar has increased the trust fund limit to $75,000 per claimant, and is implementing procedural changes to provide due process for claimants consistent with the requirements of the recent Saleeby case directive from the Supreme Court.

8. Finality. The Bar is now proposing a finality rule which will reduce the effectuation time in the imposition of disbarment or suspension terms which do not require review by the Supreme Court.

9. Default System. Perhaps the most important single reform now being considered are the two versions of a default system which would allow summary adjudication in cases where the respondent does not respond to the Notice to Show Cause and attempts to ignore Bar jurisdiction generally.

10. Office of Trial Counsel Appearance in Supreme Court. Although it is unclear exactly the steps which must be undertaken for OTC representation before the Supreme Court, this area of Bar procedure has been subject to much criticism. The reform may allow the Supreme Court to hear directly a point of view only otherwise available from the record.

11. Complainants’ Grievance Panel. Although awaiting implementation, the Complainants’ Grievance Panel allows those requesting further proceedings a formal review of their request. (These proceedings were handled by the Committee on Discipline of the Board of Governors.) The current backlog reduction drive raises serious questions of excessive rejection of possibly meritorious cases, and makes such a Panel particularly appropriate under the present setting.

12. Malpractice Insurance. As mentioned above, the Bar is considering a system of mandatory malpractice insurance.
13. **Competency Study.** As also mentioned above, and as required by Business and Professions Code section 6092, the Bar is conducting a study of methods to better assure attorney competence.

14. **Master Calender System.** An improved State Bar Court calendaring system appears to be in place.

15. **State Bar Court Reporter.** Ron Stovitz and Stuart Forsyth are about to publish the first issue of a State Bar Court Reporter, an excellent idea.

16. **Computer On-Coding.** The Bar is in the process of coding attorney prior discipline onto the IBM system/38 Membership Records program.

**VIII. CONCLUSION**

Our concerns about Bar procedures are extensive, notwithstanding the brevity of our tenure as Monitor. In sum, the ten areas where initial inquiry indicate serious difficulties warranting further investigation and reform efforts include the following:

(1) The Bar engages in virtually no outreach to the public. Although the Bar has a toll-free complaint number in Los Angeles, it has been kept out of public circulation deliberately and is not even available from directory assistance in Los Angeles, or the Bay Area. There is a 60-75% busy rate on this number, despite its limited availability. It is not published in any telephone directory, including the State of California Telephone Directory. Further, the Bar allows local bar associations without disciplinary authority free reign to handle and delay cases through their own Client Relations Committee programs and without Bar notice.

(2) There is no proactive detection of violations, except for an ill-advised attempt to find solicitation at the site of the Cerritos plane crash. The identification, investigation, and prosecution of cases depend very heavily on the complaining witness (citizen) pursuit of a case.

(3) There is little focus on prevention, whether in the drug abuse area or as to incompetence (except for the development over the past decade of professional responsibility testing).

(4) There is a serious structural defect in the separate creation of many horizontal layers of review. The recent reforms which resulted in the creation of a separate Office of Investigations are having some serious and unnecessary impacts. Bar trial counsel are deprived of investigative help even in complex cases where such assistance is very much needed after formal charges are
recommended. Investigators are deprived of legal advice, training, and guidance in the making of
critical complaint routing and other decisions. Too many people are reviewing the cases sequentially,
and there are too many stop points along the complaint routing process at which dismissal or delay
may occur. The Bar is not equipped to handle serious, complex cases on any appreciable scale perhaps not at all.

(5) The Bar’s current emphasis is on finding ways to close cases. The current policies inhibit
reinvestigation where it is clearly needed, and the imposition of case closure quotas on investigators
who are already overloaded with 150-200 cases each leads to the misclassification of easy-to-close
cases as the top priority, while complex and serious cases needing substantial work are delayed.

(6) Serious problems in employee turnover, morale, recruiting, and resources still exist. Secretarial help is inadequate. Only one secretary in Los Angeles OTC has been employed at the Bar for more than one year. Clerical salaries are inadequate and turnover is high; also, the secretaries are not legal secretaries. Two to three attorneys share one secretary, who is allowed only 1-1/2 hours per day on the Wang word processor. Investigators and attorneys are also paid 10% or more under market. Salary step increase have been eliminated. Career paths end at Administrative Secretary, Investigator III, and Attorney III or IV. Turnover of attorneys is also very high; those senior personnel who remain are generally looking for other jobs. Only five attorneys in Los Angeles now have over two years with the Bar.

(7) There are serious problems with Bar administration in its refusal to rely on professional
line personnel for normally routine decisions. Settlement procedures are extremely inefficient.
Attorneys must obtain separate and time-consuming approval to spend any money even a senior
Attorney III must get advance approval to spend $5.00 on copies outside the office. Plane tickets
enabling complaining witnesses to come to hearings are discouraged in favor of ineffective
depositions by out-of-state bar association personnel. Discovery depositions by OTC are
discouraged, and subpoenae duces tecum require difficult affidavits. Special approval must be
obtained to contact an outside agency, including the Attorney General’s Office. Investigators are
unable to mention the name of an attorney under investigation even in letters sent to the
complaining witness. Special and time-consuming permission must be obtained in order to talk to
a non-complaining client of the respondent, including a sign-off by three currently practicing attorneys on the Board of Governors=Discipline Committee.

(8) We also see serious problems involving the participation of currently practicing attorneys in the disciplinary process. The Bar is about to reactivate its VIAP program, under which volunteer attorneys from local bar associations perform the investigative work. In the past, this program has been extremely unsuccessful, and is derided by all familiar with it C including those who have trained and managed the program participants in prior years. Nevertheless, the program will be reinstated in another of the Bar= attempts to reduce the backlog.

Further, another 448 attorneys and 80 non-attorneys in the field serve as referees, or hearing examiners who actually decide the cases (subject to some review). The training of these people is minimal, and their decisions are inconsistent. This process then requires an interventionist eighteen-member Review Department which reviews all cases, including those subject to stipulation. Twelve of these people are currently practicing attorneys; six are public members. Only one of the eighteen members reviews the entire record in any particular case. One obvious reform must be the addition of six to nine professional administrative law judges to perform the hearing function in an independent, professional, and consistent manner.

(9) There is also a serious need for a default system. An extraordinary amount of delay and expense are caused by respondent attorneys who simply ignore the system. The files indicate a shocking level of contempt for the authority of the Bar.

(10) There is a long list of miscellaneous reforms needed: document retention policy is indefensible; abatement practices are reprehensible; the computer system has serious holes; training is inadequate for new investigators and attorneys; standards for case rejection are unclear and inconsistent; and the conviction referral system is not operating in many cases.

It is the hope of the Bar Monitor that specific recommendations for improvement can be made in each of these ten areas, and others identified in this report, for the creation of a meaningfully effective system in which we can all take pride. I would be shirking my duties as assigned by law to contend that the system now in place, or as it is evolving, approaches a minimum level of acceptability. Under standards requiring expeditious, independent, fair and thorough disciplinary proceedings, it is my duty to report that we are a long way from meeting those standards. However,
we have had no certain indication from anyone connected with the Bar that they will not entertain suggestions for reform. We hope to make those suggestions, both to them and then to you. We intend to report on the progress of the Bar in its own reform measures, in its substantive discipline work, and on its response to the recommendations made hereafter. I shall be available to report orally to you (that is, to the Judiciary Committees and to the Chief Justice) upon your request, and I shall endeavor to keep you informed as appropriate on the further progress of this inquiry.

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**LIST OF EXHIBITS**

1. 1984 Office of Trial Counsel Organizational Chart (including OI function)
2. Current Overall Organizational Chart
3. Current Office of Investigations Organizational Chart
4. Current Office of Trial Counsel/State Bar Court Organizational Charts
5. Current State Bar Court Flow Chart
6. Current Office Of Investigations Flow Chart
7. Actual Current Flow Chart By Bar Monitor
8. Roster of Key Players
9. California County Bar Association Survey
10. Phone Survey Log
11. Sample Letters to Complaining Witnesses Where Admonition Issued
12. Survey of Prior or Current Disciplinary Disclosure by Bar
13. Copy of Standard Six-Month Letter
14. Letter to Monitor From Los Angeles County Bar Association Regarding Caseload Handling
15. Intake Unit Guidance Manual
16. 1985 VIAP Memo and Letter to Volunteer Attorney
17. Fragmentation Survey
18. 1986 Statistical Summary of the State Bar System Intake/Actions

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17 To request copies of exhibits, contact the Center for Public Interest Law at (619) 260-4806.
19 Investigation Backlog and Statistical Report
20 Office of Investigations Time in Service
21 Bar Letters to Complaining Witnesses
22 Non-CW Client Interview Policy
23 San Francisco and Los Angeles OTC Open and Closed Case Logs
24 Los Angeles OTC 1986/87 Monthly Total Output Reports
25 Sensitive Matter Description
26 Support Staff in Los Angeles OTC
27 Vacant Positions/Salaries
28 ✱For Shredding✱
29 State Bar Court Statistics
30 List of Matters Adjudicated by the State Bar Court
31 Secretarial Turnover Memo
32 1986 OTC Office Management Report
33 1986 Markle Resource Deficiency Memos
34 Intake Inquiry Breakdown
35 Conviction Referral Source Identification and Procedural Description