



State Bar of California:

It Can Do More to Manage Its Disciplinary System and Probation Processes Effectively and to Control Costs

July 2009 Report 2009-030



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July 21, 2009

2009-030

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As required by Chapter 342, Statutes of 1999, the California State Auditor presents this audit report concerning the State Bar of California's (State Bar) disciplinary system, discipline costs, cost recovery efforts, probation office, and responses to internal and external reviews. This report concludes that the State Bar's costs for its attorney disciplinary system, which account for nearly 80 percent of the State Bar's general fund expenditures, escalated from \$40 million to \$52 million from 2004 through 2008. Despite the rising costs, the number of disciplinary inquiries that the State Bar opened declined. Because of the way the State Bar tracks its discipline costs, it cannot fully measure the efficiency of its disciplinary system. Specifically, it does not account for its expenses by key disciplinary function, such as investigations and trials. Additionally, because of the way the State Bar tracks the time it spends to close investigations, it was unaware that, instead of the decreasing trend it had been reporting in this area, its investigative case processing time has actually increased over the past five years. Moreover, the State Bar has not reported its backlog consistently and has not included all pertinent information, and is therefore limiting stakeholders' and the Legislature's ability to measure the effectiveness of its disciplinary system. We also observed that by making some relatively simple changes to its billing procedures and conducting a cost-benefit analysis of collection efforts, the State Bar could offset some of its discipline costs. Further, the State Bar's probation office could increase its ability to effectively monitor the growing number of probation cases by ensuring that its staff have reasonable workloads.

The State Bar has received many recommendations as a result of internal and external reviews of its operations but has not fully attended to some of these recommendations. For example, even though a consultant's 2007 review identified weaknesses in the State Bar's cost recovery process, the State Bar has not yet fully implemented some of the review's recommendations. The importance of fully correcting internal control weaknesses was highlighted subsequent to the consultant's review when the State Bar discovered an alleged embezzlement of almost \$676,000 by a former employee. Further, even though the State Bar formed an audit and review unit in 2004 to periodically audit discipline cases, the State Bar does not have a formal process in place to ensure recommendations resulting from these reviews are implemented. Additionally, as part of our current audit, we reviewed the State Bar's response to the 10 recommendations made in our April 2007 report titled *State Bar of California: With Strategic Planning Not Yet Completed, It Projects General Fund Deficits and Needs Continued Improvement in Program Administration* (2007-030). We determined that the State Bar fully implemented seven and partially implemented three of these recommendations. While the State Bar improved its strategic planning efforts as we recommended, work remains in reducing its discipline case backlog, improving cost recovery efforts, and adhering to internal policies related to discipline case processing.

Respectfully submitted,



ELAINE M. HOWLE, CPA
State Auditor

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Summary

Results in Brief

As a public corporation established by the California Constitution, the State Bar of California (State Bar) administers a system for disciplining attorneys who have failed to adhere to their professional responsibilities. The costs for the disciplinary system, which account for nearly 80 percent of the State Bar's general fund expenditures, escalated from \$40 million to \$52 million from 2004 through 2008, while the number of disciplinary inquiries that the State Bar opened declined. During the same five years, the State Bar experienced noticeable increases in salaries, in the number of cases sent to trial, and in the time necessary for staff to process cases. However, because of the way that the State Bar tracks its discipline costs, it is difficult to determine the efficiency of its disciplinary system.

For example, the State Bar cannot easily measure its efficiency or identify where it might be able to reduce its discipline costs because it does not track its expenses by key disciplinary function, such as investigations and trials. Further, although the State Bar believes that salaries are a primary driver of the overall increase in discipline costs, it is not able to break down the salaries by each of its disciplinary functions. As a result, neither we nor the State Bar is able to evaluate whether the salaries are the cause of increased discipline costs of a particular function or whether it may indicate inefficiency. Further, because the State Bar does not track its discipline costs by function, it cannot determine whether a policy change has a positive or negative effect on its expenses. For example, while the number of overall cases declined, the number of discipline cases proceeding to trial in the State Bar Court rose from 65 in 2004 to 127 in 2008, nearly a 95 percent increase. This trend is consistent with the change in policy in response to a 2005 California Supreme Court case that criticized the State Bar for failing to follow all of its own standards for disciplining attorneys who have repeatedly violated professional and legal standards. Nonetheless, administrators at the State Bar cannot demonstrate that part of the surge in discipline costs relates to changes in policy because its accounting methods do not correlate costs with particular functions within the disciplinary system. Contributing further to this problem is the fact that the State Bar's offices in San Francisco and Los Angeles calculate discipline costs differently.

Moreover, the increases in case processing times may prevent the State Bar from fulfilling its mission to protect the public because some attorneys who are targets of complaints and whose cases are moving through the disciplinary system will continue practicing law

Audit Highlights . . .

Our audit of the State Bar of California revealed the following:

- » *The costs of its disciplinary system have escalated by \$12 million from 2004 to 2008, while the number of disciplinary inquiries opened has declined.*
- » *It cannot measure its efficiency or identify where to reduce costs because it does not track expenses by key disciplinary function.*
- » *Its offices in San Francisco and Los Angeles calculate discipline costs differently.*
- » *Because of the methodology it uses to calculate the average time it spends to close investigations, it reported a decrease of 11 days from 2004 to 2007 when the average investigation time has actually increased by 34 days.*
- » *Relatively simple changes to its billing procedures would probably yield additional revenue that could offset some of its increased discipline costs.*
- » *Its probation office's workload has increased from 791 cases in 2004 to 867 cases in 2008, yet the number of probation deputies was only recently increased by one.*
- » *It discovered an alleged embezzlement of nearly \$676,000 by a former employee and is taking measures to strengthen its internal controls.*
- » *It still needs to fully implement recommendations made in a consultant's report, in the periodic audits conducted by its internal audit and review unit, and in our prior audit.*

longer than necessary. However, because the State Bar tracks the time that it spends to close investigations by averaging the number of days it took to close every investigation from 1999 through the most recent year, it was unaware that the decrease in the average time that it took to investigate a case from 197 days in 2004 to 186 days in 2007 that it reported in its annual discipline report was not entirely accurate. Rather, our review indicated that investigation time has actually increased from an average of 168 days per case in 2004 to 202 days in 2007.

Further, the State Bar does not include complete backlog information in a consistent manner to allow for year-to-year comparisons when it reports to the Legislature. Specifically, although the State Bar excludes several different types of disciplinary cases in its calculation of backlog, it does not always identify these omissions in its annual discipline report. For example, the State Bar does not identify how many cases that it designates as complex. This information would be helpful because, even though state law requires reporting all complaints over six months old, the State Bar does not consider complex cases backlogged until 12 months after receipt of the complaint and considers noncomplex cases backlogged after six months. Further, it has periodically changed the types of cases that it includes, which makes year-to-year comparisons difficult. By not reporting consistently and not including all pertinent information, the State Bar is limiting its stakeholders' and the Legislature's ability to measure the effectiveness of its disciplinary system.

The State Bar also needs to make changes to its billing procedures and its tracking of cost recovery. State law authorizes the State Bar to recover only certain costs associated with disciplining California attorneys found culpable during the disciplinary process. However, although the State Bar billed about \$1 million in discipline charges in both 2007 and 2008, it only collected \$550,000 and \$766,000 in those respective years and the vast majority of these amounts represent collections from various earlier billing years. The State Bar is unable to evaluate the effectiveness of its cost recovery efforts because it does not track how much it expects to receive annually.

Further, relatively simple changes to the State Bar's billing procedures would likely yield additional revenue that it could use to offset some of the recent increase in discipline costs. The State Bar's weak cost recovery efforts occurred partly because it has not adjusted since 2003 the formula it uses in billing attorneys to defray their discipline costs and partly because it does not consistently include due dates on discipline bills. In addition, the State Bar is hiring out part of its collection efforts, but paid more in fees and reimbursements to an outside collections attorney in one recent

year than it received in collections. Conducting a cost-benefit analysis of its current efforts to collect on discipline bills could help the State Bar to identify more cost-effective alternatives for its cost recovery efforts.

The State Bar also needs to analyze the staff workload in its probation office, which has seen the number of cases rise from 791 in 2004 to 867 in 2008, or nearly 10 percent, a situation that created a workload that is difficult for its staff to successfully manage. Specifically, at the end of 2008, the caseload for each of the four probation deputies averaged 217. The attorneys subject to probation are most of those who receive a type of discipline that does not entail disbarment, and they must comply with specified probation conditions that probation staff monitor. In most circumstances, attorneys are still able to practice law during their probationary period, which typically ranges from one to five years. If an attorney fails to meet the terms of probation, the probation office can either revoke the attorney's probation or report the violation to the Office of the Chief Trial Counsel for disciplinary prosecution. Under the State Bar's 2008 Long-Range Strategy, the probation office now attempts to protect the public by making referrals within 30 days of a violation. However, inadequate staffing levels may be hindering the probation office's ability to meet this goal.

The probation office believes that it is understaffed, but it has not determined the appropriate caseload for each probation deputy to monitor probationers effectively, nor is it sure whether a recently approved probation deputy position will fulfill its needs. In our review of 18 initial letters from probation case files, we identified several case processing delays that could have occurred because of inadequate staffing. Specifically, in eight cases, the probation office did not send initial letters reminding disciplined attorneys about the terms of their probation within the required seven days. Further, in four of these cases, the probation office did not inform attorneys of their probationary conditions until some of the conditions were already past due. Additionally, for five of 11 cases we reviewed that were referred to the Office of the Chief Trial Counsel for a probation violation, probation deputies took between 96 and 555 days to make these referrals. In 2008, in an effort to increase the timeliness of referrals, the probation office set a goal of making referrals within 30 days of the violation. However, the probation office later reported that it met this goal only 15 percent of the time. Because attorneys are often still able to practice law during their probationary period, unnecessary delays in referrals for violations may allow errant attorneys to continue to practice law and represent clients despite being in violation of the terms of their probation.

The State Bar has missed opportunities to increase its effectiveness because it has received many recommendations in internal and external reviews of its operations, but has not fully attended to some of them. For example, the State Bar received a consultant's report in October 2007 on its cost recovery processes. This review identified several areas of high risk related to internal control weaknesses in the oversight of cash receipts, some risks of data discrepancies, and insufficient reconciliation processes. The State Bar expected that its implementation of a new cost recovery system would address these weaknesses. However, it is still in the process of implementing the new system. The importance of fully correcting internal control weaknesses was highlighted subsequent to the consultant's review when the State Bar discovered an alleged embezzlement of nearly \$676,000 by a former employee. The State Bar's chief financial officer told us that an employee was able to reorganize and consolidate the process of invoicing building tenants and receiving payments, which enabled the employee to intercept rent checks and divert them to a personal account. In response to this event, the State Bar contracted with an outside auditor to evaluate the internal controls over the specific area in which the alleged embezzlement occurred and other processes throughout the State Bar. According to the chief financial officer, the State Bar has already implemented some changes to its procedures and plans to implement other recommendations once the auditor's work is complete.

In addition to addressing the recommendations from external reviews, the State Bar needs to use the results from internal reviews more effectively. Although it formed an audit and review unit in 2004, the State Bar does not have a formal process to ensure that recommendations identified by its periodic audits of disciplinary case files are implemented in response to the unit's concerns. The audit and review manager stated that unit managers address concerns less formally, such as discussing issues with their employees. However, our review of the unit's summaries of audit results noted recurring deficiencies, suggesting the need for a more formal process of ensuring corrective action. For example, we found that because of repeated errors in following certain case processing procedures, the unit recommended the same training for investigators in the two most recent summaries.

Our April 2007 report, titled *State Bar of California: With Strategic Planning Not Yet Completed, It Projects General Fund Deficits and Needs Continued Improvement in Program Administration* (2007-030), included 10 recommendations to the State Bar. In response to that audit, the State Bar has fully implemented seven recommendations related to improvement of its strategic plans and tracking and monitoring grant recipients under its Legal Services Trust Fund program. However, the State Bar has

only partially implemented the remaining three recommendations related to improving its disciplinary system, including improving its cost recovery efforts by entering Client Security Fund and debtor information into its new disciplinary debtor database, reducing its backlog of outstanding discipline cases at year-end, and only intermittently adhering to internal policies such as using checklists and performing random audits. Finally, we recognize that the State Bar updated its strategic planning efforts to comply with our recommendations; however, we also note that the Information Technology Strategic Plan (IT plan) cannot be fully implemented without additional resources.

Recommendations

To explain and justify cost increases, and to measure the efficiency of its disciplinary system as well as the impact of policy changes, the State Bar should account separately for the expenses associated with the various functions of the disciplinary system, including its personnel costs. This can be accomplished through a study of staff time and resources devoted to a specific function. The State Bar should also ensure that its various offices track expenses consistently.

To make certain that the State Bar provides accurate and complete descriptions to its various stakeholders so they can evaluate the effectiveness of its disciplinary system over time, the State Bar should do the following:

- Adjust its methodology going forward for calculating case processing times for investigations so that the calculations include time spent to process closed and forwarded cases for the relevant year only. For example, for its 2009 annual discipline report, the State Bar should report the average processing time for only cases it closed or forwarded to the State Bar Court in 2009.
- Include additional information regarding backlog in its annual discipline report to the Legislature. Specifically, the State Bar should identify the number of complex cases over 12 months old in its backlog.
- Identify in its annual discipline report the types of cases that it does not include in its calculation of backlog and explain why it chooses to exclude these cases. Specifically, the State Bar should identify that it presents its backlog by case rather than by member, and that it does not include intake, non-attorney, abated, and outside examiner cases.

- Identify the composition of each year's backlog to allow for year-to-year comparisons, as the law requires.

To ensure that it maximizes the amounts that it may recover to defray the expense of disciplining attorneys, the State Bar should update annually its formula for billing discipline costs and include due dates on all bills. Additionally, to report accurately its collection amounts and to analyze the effectiveness of its collection efforts, the State Bar should compare what it expects to collect against how much it actually collects in payments for discipline costs each year.

To make sure that it is using the most cost-effective methods to recover discipline costs, the State Bar should complete a cost-benefit analysis to determine whether the benefits associated with using collection agencies outweigh the costs. If it determines that the collection agencies are, in fact, cost-effective, the State Bar should redirect in-house staff to other disciplinary activities. Finally, the State Bar should also research the various collection options available to it, such as the Franchise Tax Board's Interagency Intercept Collections Program.

To fulfill its responsibility to protect the public and its mission to assist attorneys to successfully complete the terms of their probation, the State Bar should ensure that it effectively communicates with and monitors attorneys on probation by doing the following:

- Continue its efforts to determine the appropriate caseload level for its staff to effectively monitor probationers and adjust staffing as appropriate.
- Ensure that staff comply with procedures for promptly sending initial letters reminding disciplined attorneys of the terms of their probation.

To make certain that it does not create a perception of favoritism or leniency, the State Bar should increase compliance with its goal to improve timeliness and consistency of probation violation referrals to the Office of the Chief Trial Counsel. If the State Bar believes instances occur when probation staff appropriately deviate from the 30-day goal, it should establish parameters specifying time frames and conditions acceptable for a delay in the referral of probation violations and clearly document that such conditions were met.

To ensure that it has adequate internal controls in place, the State Bar should fully implement recommendations from audits and reviews of the State Bar and its functions. Further, the State Bar

should ensure that its new cost recovery system and related processes fully address the issues identified in the consultant's 2007 report on its cost recovery process.

To improve its effectiveness, the State Bar's audit and review unit should establish a formal process to follow up on and ensure implementation of recommendations from its twice-yearly audits.

The State Bar should continue acting on recommendations from our 2007 report related to the following:

- Continue its efforts to enter all of the Client Security Fund and disciplinary debtor information into its database.
- Take steps to reduce its inventory of backlogged cases.
- Improve its processing of disciplinary cases by more consistently using checklists and performing random audits.

To ensure that it can justify requests to fund the remaining information technology upgrades, the State Bar should follow its IT plan.

Agency Comments

The State Bar generally agrees with most of our recommendations and states that it will take corrective action to address them. However, the State Bar did not specifically agree or disagree with two of the recommendations related to establishing parameters for referring probation violations and for consistently using checklists for discipline case processing.

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Introduction

Background

The State Bar of California (State Bar), established by the California Constitution, is a public corporation within the judicial branch of government for the State of California (State). The law requires that every person admitted and licensed to practice law in California belong to the State Bar unless the individual serves as a judge in a court of record. According to its Web site, with a membership of more than 217,000 attorneys, the State Bar is the country's largest. Commonly referred to as the *State Bar Act*, Division 3, Chapter 4, of the California Business and Professions Code specifies the State Bar's responsibilities.

According to the State Bar's 2008 Long-Range Strategy (long-range strategy), its 23-member board of governors (board) has the fundamental fiduciary responsibility for the State Bar's health and success. The board's responsibilities include setting a strategic direction for the State Bar that reflects the needs of its core stakeholders, who are the public, the state judiciary, and the State Bar's lawyer-members. The long-range strategy adopted by the board identifies the State Bar's mission, vision, and values. Of particular interest is the first value listed in the long-range strategy, which recognizes the State Bar's obligation to handle the resources entrusted to it with care and professionalism through prudent stewardship, economical use of resources, efficient organization of activities, and effectiveness of undertakings. Finally, the long-range strategy identifies four goals that the board considers necessary and appropriate to carrying out its mission: public protection, administration of justice, member services, and administration. The first and third goals, public protection and member services, encompass the various functions of the attorney disciplinary system.

Located in San Francisco, Los Angeles, and Sacramento, the State Bar's various departments carry out its responsibilities, including admitting new members, investigating and resolving complaints against members, disciplining attorneys who violate laws or rules, and performing various administrative and support duties. The State Bar collects an annual membership fee from each of its members to pay for most of its operations. In addition to charging the annual membership fee, state law authorizes the State Bar to charge each member additional fees that fund specific programs, which the text box describes.

Composition of the State Bar of California's Membership Fees

Building Fund: Pays the costs of financing, constructing, purchasing, or leasing facilities to house the State Bar of California (State Bar) staff and any major capital improvement projects related to facilities owned by the State Bar.

Information Technology Special Assessment Fund: Finances the costs of upgrading the State Bar's information technology systems, a process that includes purchasing and maintenance costs and for hardware and software.

Lawyers Assistance Program Fund: Finances costs associated with identifying and rehabilitating attorneys with impairments due to abuse of drugs, alcohol, or mental illness.

Discipline: Finances a portion of the costs of the attorney disciplinary system.

Client Security Fund: Satisfies claims from injuries caused by dishonest conduct by members of the State Bar.

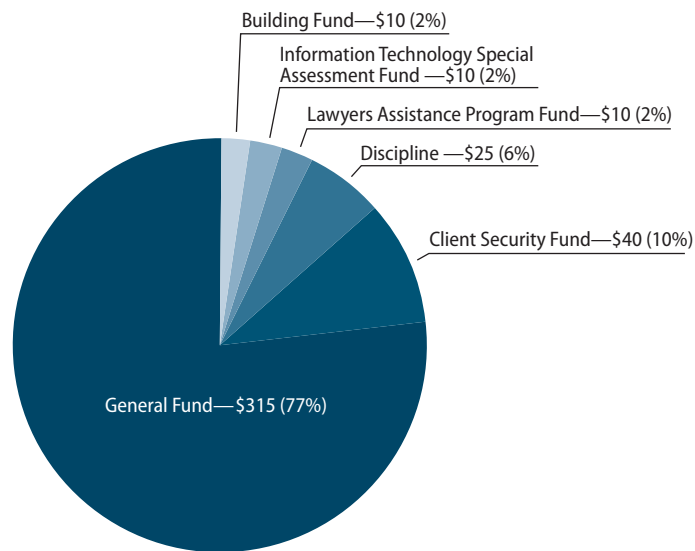
General Fund: Finances all remaining expenses, such as administrative costs, and other disciplinary system costs.

Source: California Business and Professions Code.

Historically, to ensure effective legislative oversight of its functions, annual legislation has given the State Bar the authority to assess an annual fee, which it deposits into its general fund. For 2009, the State Bar assessed an annual membership fee of \$315 for active members and \$75 for inactive members. Under current legislation, the State Bar's authority to assess the annual membership fee will expire on January 1, 2010, and will be subject to legislative reauthorization for subsequent years.

The components of the State Bar's active membership fees appear in Figure 1. State law does not require inactive members to pay the information technology special assessment of \$10; however, inactive members must pay the same amounts as active members for the discipline and building funds. In addition, inactive members pay only \$5 to the Lawyers Assistance Program Fund and \$10 to the Client Security Fund.

Figure 1
The 2009 Components of Each Active Member's \$410 in Required Fees

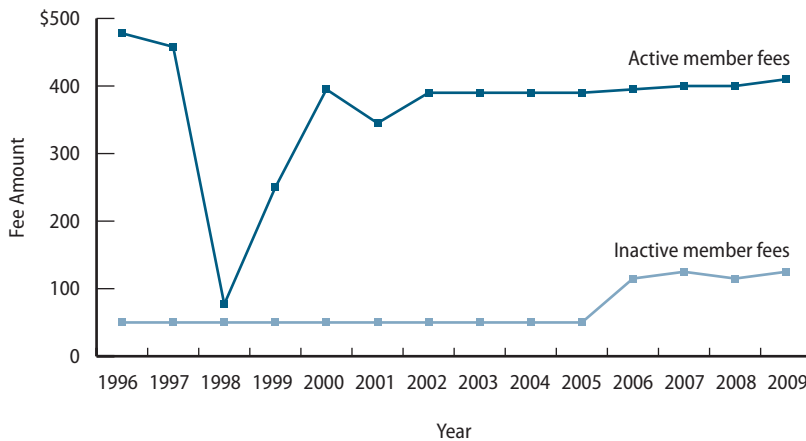


Source: The State Bar of California's 2009 Annual Fee Statement.
Note: Percentages do not add up to 100 percent due to rounding.

Contributions in addition to the annual membership fee are optional: A voluntary \$5 payment funds some of the State Bar's legislative efforts and another voluntary \$5 contribution is used to address concerns of access and bias in the profession. Members can also voluntarily pay specified amounts to join one or more of the State Bar's 16 sections—voluntary organizations of attorneys who share an area of interest such as the Family Law Section or Workers' Compensation Section.

In 2008, the State Bar began assessing a \$10 information technology special assessment fee (IT fee) from each active member to upgrade existing technology systems. However, the total annual membership fees did not increase until 2009 because the State Bar's fee increase in 2008 was offset by its loss of authority to assess a \$10 fee for its Building Fund. For 2009, with legislative authority, the State Bar assessed both the IT fee and the building fee, thus raising the required membership fees for its active members from \$400 to \$410. In Figure 2 we show the fluctuations in mandatory membership fees for each active and inactive member from 1996 through 2009.

Figure 2
The State Bar of California's Required Annual Fees for Each of Its Members 1996 Through 2009



Sources: The State Bar of California's chief financial officer and its audited financial statements.

As Figure 2 shows, over the past 14 years, the mandatory membership fees for active members have decreased by \$68 while the fees for inactive members have increased by \$75. Membership fees for active members dropped sharply in 1998 because the governor vetoed a bill in 1997 that would have authorized the State Bar to continue to assess the annual membership fee. Consequently, it could charge and collect only certain fees that statutes separately authorized and that were not part of the annual membership fee. Legislation in 1999 reauthorized the State Bar to assess the annual membership fee for 2000.

The State Bar's Disciplinary System

According to its *2008 Report on the State Bar of California Discipline System* (annual discipline report) to the Legislature, one of the most important functions of the State Bar is to protect

the public, the courts, and the legal profession from attorneys who fail to fulfill their professional responsibilities. To carry out this function, the State Bar established a disciplinary system that includes receiving, investigating, and prosecuting complaints against attorneys.

Definitions of the Types of Discipline That California Attorneys May Receive

Admonition: A written nondisciplinary sanction issued in cases that do not involve a serious offense and in which the State Bar Court concludes that no significant harm resulted. Either the Office of the Chief Trial Counsel or the State Bar Court may impose an admonition.

Disbarment: A disciplinary action whereby the California Supreme Court expels an attorney from membership in the State Bar of California (State Bar). The attorney's name is stricken from the roll of California attorney, and the attorney becomes ineligible to practice law.

Probation: A status in which a State Bar member retains the legal ability to practice law subject to his or her compliance with terms, conditions, and duties for a specified period of time.

Probation Revocation: Probation that was imposed in a prior disciplinary case can be revoked when a member violates one or more terms of that probation.

Reproval: The lowest level of discipline imposed by the California Supreme Court or State Bar Court. An attorney may receive a reproval that includes duties or conditions; however, reprovals do not involve suspension. Reprovals can be either public or private.

Summary disbarment: A disciplinary action in which the California Supreme Court disbars a member—expels him or her from the State Bar—without that attorney undergoing a formal State Bar Court proceeding.

Suspension: A disciplinary action that prohibits a member from practicing law or from presenting himself or herself as a lawyer for a period of time set by the California Supreme Court.

Termination: A proceeding closed due to an external cause, such as the death of the member, his or her disbarment in a separate matter, or the member's resignation with charges pending.

Source: *The State Bar of California's 2008 Report on the State Bar of California Discipline System.*

In 2008 approximately 40 percent of the State Bar's total annual revenue—which constitutes 80 percent of its general fund—goes toward financing the costs of the attorney disciplinary system. According to the annual discipline report, one division within the State Bar—the Office of the Chief Trial Counsel—receives complaints against attorneys, investigates those complaints, and prepares cases for prosecution against attorneys for whom allegations of unethical conduct appear to be justified. A second division—the State Bar Court—serves as the administrative arm of the California Supreme Court in the adjudication of disciplinary and regulatory matters involving attorneys in the State.

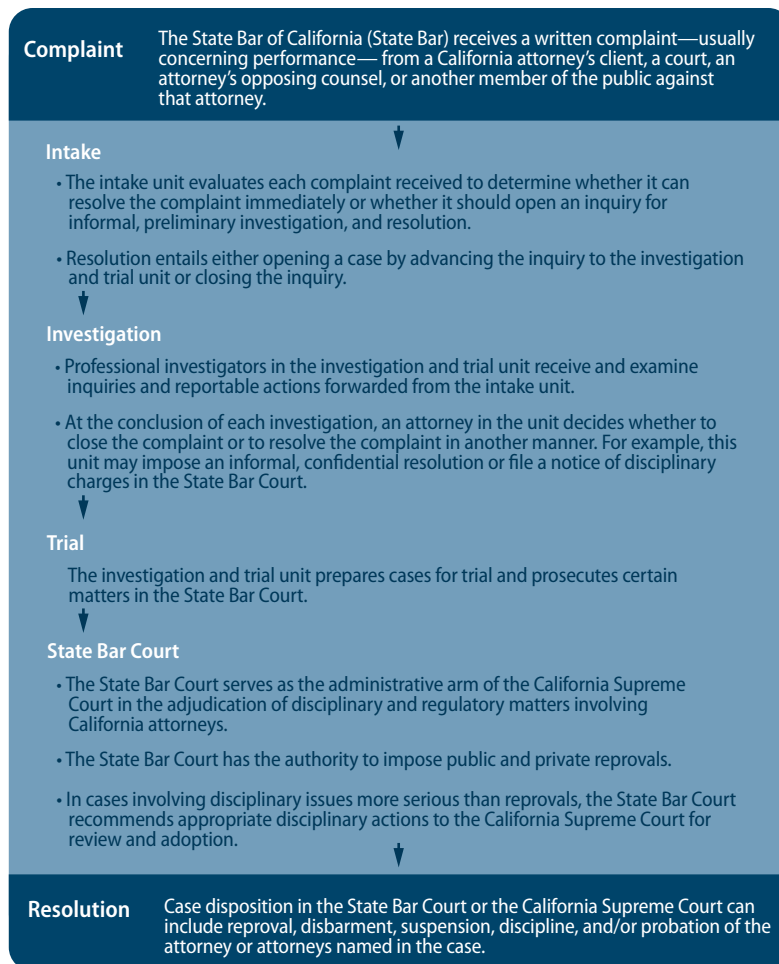
As Figure 3 outlines, the disciplinary system consists of four functions: intake (receipt of complaint), investigation (investigation of case), trial (prosecution of case), and the State Bar Court (venue in which the case is tried).

Attorneys whom the State Bar Court finds culpable of violating its Rules of Professional Conduct or the State Bar Act, or attorneys who settle a disciplinary complaint, may be subject to several different types and levels of discipline. The California Supreme Court must review and may adopt more severe levels of discipline recommended by the State Bar Court, but the State Bar Court has the authority to impose reprovals—the lowest levels of discipline. The text box describes some of the various disciplinary measures that California attorneys may experience.

The State Bar's Office of Probation (probation office), located in Los Angeles, monitors attorneys ordered on probation. According to the annual discipline report, the probation office opens approximately 500 case files each year, and the terms of probation typically range from one to five years. As the text box explains, an attorney

can retain the legal ability to practice law subject to his or her compliance with probationary terms. To comply with the terms of probation, attorneys often have to maintain regular contact with the probation office by submitting quarterly reports, making required restitution payments, and completing ethics courses. Since April 2005 the probation office has reported directly to the chief trial counsel, but prior to that it reported to the State Bar Court's administrative officer.

Figure 3
The State Bar of California's Attorney Disciplinary System



Sources: The State Bar's 2008 Report on the State Bar of California Discipline System and the State Bar of California Overview.

Types of Case Files Monitored by the State Bar of California's Office of Probation

Probation files: Established for attorneys placed on probation with certain terms and conditions and on whom the California Supreme Court may have imposed actual suspension.

Reproval files: Created for disciplined attorneys who are reprovled—the least serious level of discipline—by the State Bar Court with certain terms and conditions attached to the reproval.

Agreements in lieu of discipline files: Established for confidential agreements between respondents and the Office of the Chief Trial Counsel where certain required terms and conditions exist.

Rule 9.20 files*: Opened for attorneys for whom Rule 9.20 is the only condition that the State Bar of California (State Bar) is monitoring. Rule 9.20 requires a disbarred, resigned, or suspended attorney to notify clients and other affected parties about the attorney's disqualification to act as an attorney. The attorney must also file an affidavit of compliance with all Rule 9.20 court orders.

Alternative Discipline Program files: Opened when the State Bar Court orders an attorney to comply with certain terms and conditions during participation in the Alternative Discipline Program, which addresses the substance abuse and mental health problems of attorneys facing formal disciplinary proceedings.

Source: *The State Bar's Probation Deputy Manual.*

* Pursuant to a reorganization of court rules effective January 1, 2007, Rule 955 was renamed Rule 9.20.

The State Bar's Strategic Planning Budget describes the probation office's function as monitoring probationer compliance with court orders, providing timely information for the courts regarding noncompliance, and assisting probationers to successfully complete their terms of probation. These functions are implemented through the work of the probation office's probation deputies. According to the probation office supervisor, as of May 31, 2009, a staff of five probation deputies monitor 815 open case files. According to the probation office's procedure manual, probation deputies are responsible for opening, maintaining, and closing complete and accurate case files. As described in the text box, probation deputies monitor several different types of cases.

The State Bar has statutory authority to collect some costs from attorneys who are disciplined. The law further allows the State Bar to recover from members any payments that it makes from its Client Security Fund, which the State Bar uses to satisfy claims from injuries caused by the dishonest conduct of its members. For those costs it is allowed to recover from disciplined attorneys, the State Bar uses a formula—a fixed amount primarily based on how far the case proceeds through the disciplinary system before resolution—to bill attorneys who are publicly disciplined. The formula is based on a disciplinary fee model developed from a time study completed in 1997. The time study provided the State Bar with estimates of costs for State Bar staff to

investigate and prosecute cases based on the amount of time spent on case-related tasks, excluding attorney and expert witness services. In 2002 the State Bar hired a consultant to update the fee model to reflect increases in salaries and overhead expenses in the relevant cost centers to account for changes in the disciplinary system since 1997. The formula reflecting the 2002 costs became effective in January 2003. Typically, the State Bar adds these costs to the disciplined members' next membership fee statements.

According to the annual discipline report, the State Bar's audit and review unit, which was created in 2004, gives complainants a medium through which they can appeal decisions in cases that the State Bar closed without disciplinary action. The annual discipline

report indicated that for 2008, the audit and review unit resolved 1,307 requests for review during that year. This unit also conducts random checks on approximately 500 closed cases per year to ensure actions taken by the Office of the Chief Trial Counsel are appropriate. These random checks may result in cases being reopened or in recommendations for staff training. According to the annual discipline report, the audit and review unit reopened 59 cases in 2008.

Scope and Methodology

The California Business and Professions Code requires the State Bar to contract with the Bureau of State Audits to audit the State Bar's operations every two years, but it does not specify topics that the audit should address. For this audit, we focused on and reviewed the State Bar's disciplinary system. To determine the efficiency and effectiveness of this system, we examined the State Bar's discipline costs, the method by which the State Bar accounts for its discipline expenses, the outcomes of cases, the length of time that the State Bar takes to process cases, and the recovery of discipline expenses. We also evaluated the State Bar's attorney probation system and its audit and review unit. Further, we reviewed the State Bar's responses to prior reviews of its operations and the circumstances surrounding an alleged embezzlement by a former State Bar employee. Finally we reviewed the status of the State Bar's implementation of recommendations made in our 2007 audit titled *State Bar of California: With Strategic Planning Not Yet Completed, It Projects General Fund Deficits and Needs Continued Improvement in Program Administration*. This report summarizes our 2007 assessment of the State Bar's strategic planning efforts, projected general fund deficit, legal services trust fund, and certain aspects of the attorney disciplinary system.

To determine the State Bar's total discipline expenses, the causes for increases in expenses, and the number of cases that proceeded through the disciplinary system, we reviewed the State Bar's budgets, financial statements, internal financial reports, case-tracking data, and its *2008 Report on the State Bar of California Discipline System*. Additionally, we interviewed various State Bar staff members, including the chief financial officer, deputy chief trial counsel, assistant chief trial counsel, State Bar Court administrative specialist, and the former and interim chief trial counsels. Throughout our fieldwork, we obtained various assertions from the chief trial counsel whose term with the State Bar expired in June 2009. Because the State Bar no longer employs him, we refer to him in this report as the former chief trial counsel and refer to his successor as the interim chief trial counsel. To review case processing times and disciplinary case backlog, we used the

data tracked in the State Bar's disciplinary tracking system. The case processing time analysis that we present is based on data from the year that the intake unit received a complaint. For example, if the intake unit received a complaint in 2004 but the case did not close until one year later, we included that particular case's processing time in our analysis for 2004. The backlog analysis is based on cases that were open at each calendar year-end from 2005 through 2008.

Government auditing standards issued by the U.S. Government Accountability Office require us to assess the reliability of computer-processed data. We assessed the reliability of the State Bar's disciplinary tracking system by performing electronic testing of key data elements and by testing the accuracy and completeness of the data. To test the completeness of the data, we judgmentally sampled 40 files for disciplinary cases opened in 2004 through 2008, and we ensured that those cases existed in the State Bar's database. To check the accuracy of the discipline data, we selected a random sample of 29 intake cases, 10 investigation cases, and 10 State Bar Court cases, and we traced key data elements to source documentation. Using the results of that testing, we concluded that the data were sufficiently reliable for the purposes of this audit.

To gain an understanding of the State Bar's cost recovery of discipline expenses, we reviewed billing procedures and obtained printouts for all billed amounts to determine the total discipline charges billed for 2006 and 2007. We then judgmentally sampled 28 billing files to examine more closely due dates and payment receipts. We also obtained reports of discipline amounts received, and we reviewed the State Bar's disciplinary debtor pursuit policy and its contracts with a collection agency and a collection attorney. Lastly, we interviewed key State Bar staff, including the billing manager and the acting general counsel.

To determine whether the State Bar's probation office properly documents its probation monitoring and complies with its own procedures and strategic goals, we reviewed the *Probation Deputy Manual* and strategic planning documents and judgmentally sampled 20 case files for probationary cases closed in 2008. According to the supervisor of the probation office, 29 probation case files were lost during a move from one floor to another in 2008. Of the 20 probation case files that we reviewed, two of the original files had been lost, so we were only able to review 18 original initial probation letters. We obtained additional assurance for our sample of the time it took the probation office to refer matters to the Office of the Chief Trial Counsel through confirmations from the supervisor of the probation office.

To assess the State Bar's responses to external and internal reviews of its disciplinary processes, we obtained a prior consultant's review and reports issued by the State Bar's audit and review unit. We also interviewed the chief financial officer about an alleged embezzlement by a former State Bar employee and reviewed information related to the State Bar's update to its internal controls in response to this event.

To determine the State Bar's status on implementing the recommendations from our 2007 report, we interviewed key State Bar staff, including the senior executive for member services and the manager of planning and administration. We analyzed the State Bar's strategic planning efforts by examining 14 departmental plans and assessing whether the plans aligned with the State Bar's overall strategic plan and its budget. We also reviewed in detail a sample of performance measures from the 14 departmental plans to evaluate whether they were meaningful. To examine the State Bar's current cost collection efforts, we reviewed its recently implemented pursuit policy and its new disciplinary debtors database. To determine whether the State Bar is receiving all of the income possible from lawyers' trust accounts, we reviewed its efforts to contact nonreporting members and its plans for seeking the authority to enforce compliance reporting. Further, to make certain that the State Bar is properly monitoring recipients of grants under its Legal Services Trust Fund program, we judgmentally chose a sample of 10 monitoring reports from the program's 2007 and 2008 monitoring schedules. Additionally, we assessed the State Bar's efforts to comply with its policies of conducting periodic audits of open disciplinary case files and of using checklists for key tasks. Finally, we reviewed the State Bar's efforts to reduce its inventory of backlogged disciplinary cases.

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Chapter 1

THE STATE BAR OF CALIFORNIA SHOULD BETTER MANAGE ITS DISCIPLINE COSTS

Chapter Summary

The State Bar of California's (State Bar) total costs for its attorney disciplinary system have risen from \$40 million in 2004 to \$52 million in 2008, or 30 percent over five years. This upsurge in expenses has outpaced both inflation and the growth in the State Bar's active membership, and it does not match the changes in caseload size in most stages of the system for disciplining attorneys who violate professional standards. For example, our analysis found that the number of disciplinary cases that the State Bar investigated decreased from 3,770 to 2,802 over the same five years. Additionally, the manner in which the State Bar accounts for discipline expenses does not correspond to the expenses incurred by each function involved in the disciplinary system, and the State Bar does not ensure that two of its offices record discipline expenses consistently. Further, even though salaries for State Bar staff have risen significantly over the past five years, because the State Bar does not track its expenses by function of the disciplinary system, it cannot determine how the salary increases affected the expenses of each function. The State Bar thus has difficulty identifying the specific causes of disciplinary system cost increases and monitoring how efficiently it operates within its monetary resources.

Moreover, because it does not separately track expenses for each of its key disciplinary functions, the State Bar cannot measure the effects of any policy changes on the cost of the attorney disciplinary system. For example, in 2005 the California Supreme Court criticized the State Bar for failing to bring all possible charges against an attorney who was ultimately disbarred, and for failing to follow its own sanction standards—internal guidelines that delineate the appropriate actions that the State Bar should take against attorneys who have repeatedly violated professional or legal standards. In response, the State Bar's former chief trial counsel issued a memo directing staff to apply sanction standards consistently and to be willing to take more disciplinary cases to trial if warranted. The trend in the number of cases that ultimately went to trial in the State Bar Court each year has increased from 65 in 2004 to 127 in 2008, a 95 percent increase and is consistent with the change in policy. However, because the State Bar does not track the costs incurred for each function that plays a role in the disciplinary process, it cannot assess the financial impact of the new policy.

We calculated that investigation time has increased from an average of 168 days in 2004 to 202 days in 2007, while the State Bar's method of calculating the average time it took to investigate closed cases showed a decrease during the same time period.

One way the State Bar could gauge its effectiveness is by measuring the outcomes of its efforts, such as the penalties imposed at trial and the time that it takes to process cases. In the five-year period from 2004 through 2008, two of the most severe actions that the State Bar can take—disbarments and suspensions—increased from 35 in 2004 to 60 in 2008. In addition, possibly because the former chief trial counsel insisted that staff thoroughly investigate more cases, the case processing times have increased. Specifically, in 2004 there were 378 cases that took more than 360 days to investigate; in 2007 the number of cases received that took longer than 360 days to investigate had grown to 402. However, the State Bar was unaware of this increase in long-outstanding investigations because of the way it calculates the average time to investigate complaints. In computing the average time it takes to close investigation cases, the State Bar includes as part of its average the number of days it took to close every case from 1999 through the most recent year. This makes it difficult to identify current trends. Our review indicated that investigation time has increased from an average of 168 days in 2004 to 202 days in 2007. Whereas using the State Bar's method, the average time it took to investigate closed cases decreased from 197 in 2004 to 186 in 2007. Although the State Bar's efforts to more strictly follow disciplinary standards may prove beneficial, increases in case processing time may contribute to increasing costs and may also allow attorneys whose cases are currently moving through the disciplinary system to continue practicing law longer than necessary.

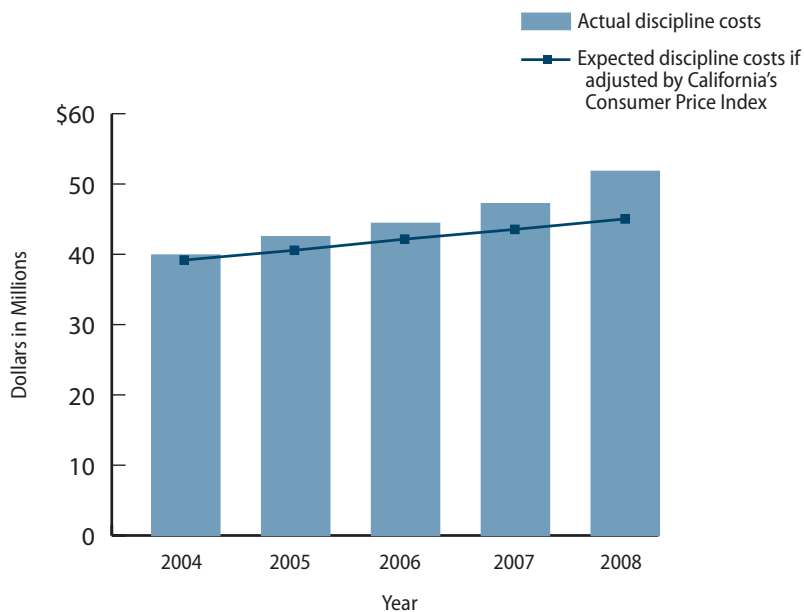
Further, the backlog of disciplinary cases that the State Bar has reported in its *Report on the State Bar of California Disciplinary System* (annual discipline report) to the Legislature omits key information. California Business and Professions Code requires the State Bar to submit an annual discipline report to the Legislature that includes accurate and complete backlog information in a consistent manner to allow for year-to-year comparisons. However, the State Bar has not identified the types of cases that it chooses to exclude from its backlog, which are significant in number, nor has it consistently identified when it began to exclude certain types of cases. By not reporting complete and consistent information, the State Bar is limiting its stakeholders' and the Legislature's ability to measure the effectiveness of the State Bar's disciplinary system.

Discipline Costs Have Increased Consistently Over the Past Five Years

The State Bar's costs to discipline attorneys have risen over the past five years; however, the increases in these expenses have outpaced inflation, the growth in active membership, and the decreasing caseload for most stages of the disciplinary system. In particular, the State Bar's total discipline costs have increased 30 percent from \$40 million in 2004 to \$52 million in 2008. However, as

Figure 4 shows, the growth of the State Bar's disciplinary expenses exceeded California's consumer price index (index), a measure of inflation calculated by the State's Division of Labor Statistics and Research, during each year from 2004 through 2008. For 2008, the most recent year, the index rose 3 percent, while the State Bar's total discipline costs rose 10 percent. Further, total disciplinary expenses have increased an average of 6 percent per year over the last five years, while the index's average increase per year was only 3 percent.

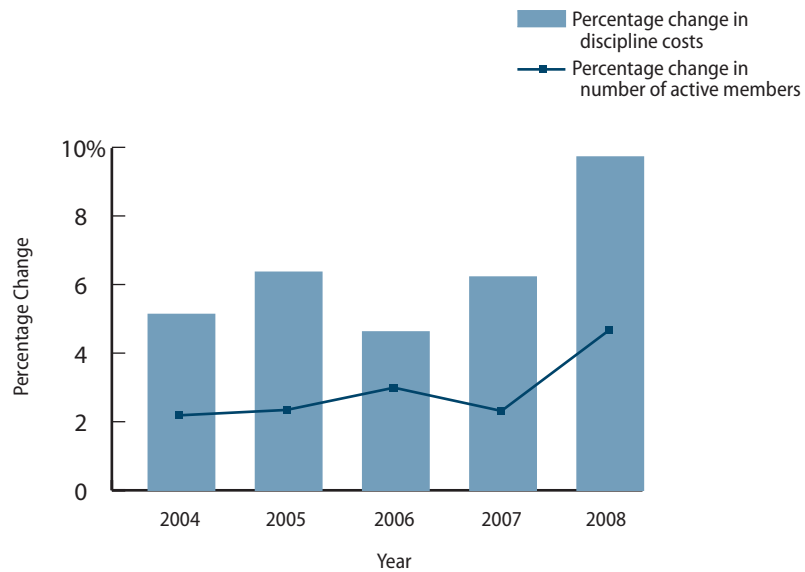
Figure 4
The State Bar of California's Discipline Costs Compared to the State's Consumer Price Index
2004 Through 2008



Sources: The State Bar of California's 2004 through 2008 audited financial statements and the *Consumer Price Index for All Urban Consumers* published by the State's Division of Labor Statistics and Research.

Further, increases in active membership do not appear to be causing the rise in total discipline expenses. As Figure 5 on the following page depicts, the percentage increase in discipline costs exceeded the percentage increase in the number of active State Bar members in each year from 2004 through 2008. According to the membership numbers reported in its 2008 annual report, the State Bar's active membership increased by an average of 2.4 percent per year while total discipline costs increased by an average of 6.4 percent per year.

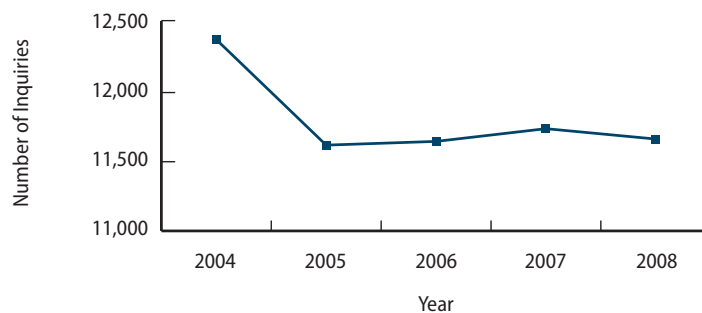
Figure 5
Percentage Changes in the State Bar of California's Discipline Costs Compared to Changes in Its Active Membership
2004 Through 2008



Sources: The State Bar of California's 2004 through 2008 audited financial statements and 2008 Annual Report.

We also found that discipline costs were increasing even though caseloads in most stages of the disciplinary system decreased. For example, as Figure 6 indicates, the overall number of inquiries opened in the intake unit has decreased from 12,400 in 2004 to 11,700 in 2008.

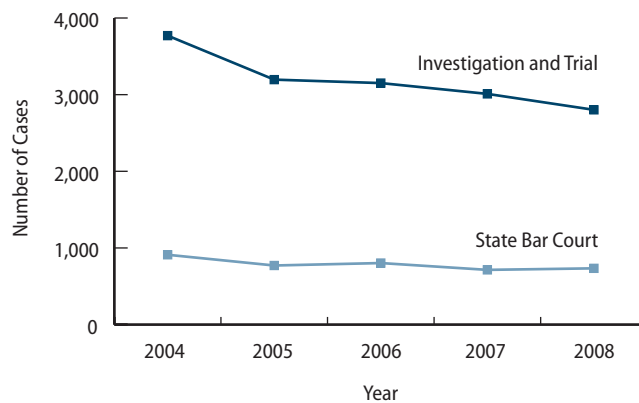
Figure 6
Number of Inquiries Opened by the State Bar of California's Intake Unit
2004 Through 2008



Source: The State Bar of California's 2008 Report on the State Bar of California Discipline System.

Additionally, as discussed in the Introduction, when the intake unit concludes that an inquiry warrants further action, it will open a case and forward it to the investigation and trial unit. However, as Figure 7 depicts, the number of cases received in the investigation and trial unit declined from 3,770 in 2004 to 2,802 in 2008. Further, the number of cases filed in the next stage of the disciplinary system, the State Bar Court, also decreased from 2004 to 2008, dropping from 911 to 734 cases.

Figure 7
Number of Disciplinary Cases Opened in the State Bar of California's Investigation and Trial Unit and Filed in the State Bar Court 2004 Through 2008



Source: The State Bar of California's 2008 Report on the State Bar of California Discipline System.

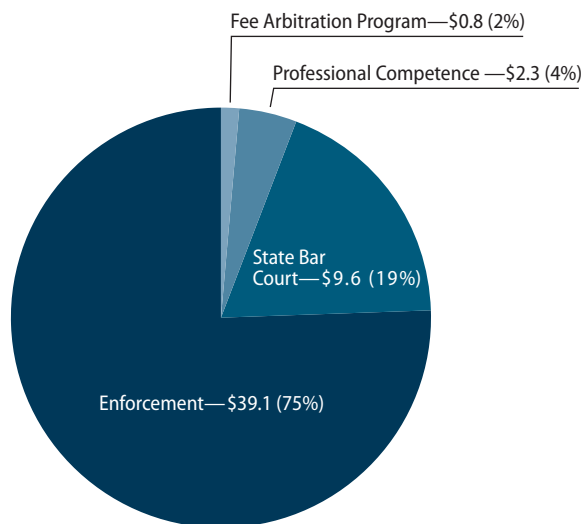
After asking the State Bar why discipline costs had increased despite these factors, the chief financial officer and former chief trial counsel noted that salaries are likely a primary contributor. However, as we discuss later, the method the State Bar uses to track its expenses precludes it from isolating which disciplinary function was most affected by the salary increases. The only increase we were able to identify in the State Bar's disciplinary caseload from 2004 through 2008 was in the number of cases that actually proceeded to trial. As this chapter later explains, a 2006 policy change shifted the State Bar's focus to more consistently adhere to its sanction standards, and it believes this shift has contributed to a 95 percent increase in the number of trials that began in the State Bar Court from 2004 through 2008.

The State Bar Does Not Account for Discipline Costs so That It Can Measure Efficiency

The State Bar asserts in its 2008 Long-Range Strategy that it is obligated to handle the resources entrusted to it with care and professionalism through prudent stewardship, economical use of resources, efficient organization of activities, and effectiveness of its undertakings. However, because it does not track the costs of the disciplinary system according to its various functions, the State Bar cannot be certain that it is using its resources as efficiently as possible.

According to the State Bar's financial statements, its disciplinary system expenses arise from four program areas: enforcement, the State Bar Court, fee arbitration, and professional competence. As Figure 8 shows, in 2008 the enforcement program area accounted for \$39 million, or 75 percent of total discipline costs. Enforcement accounts for most of the discipline expenses because it encompasses most major functions of the disciplinary system, including intake, investigations, trials, and audit and review.

Figure 8
The State Bar of California's 2008 Discipline Costs by Program Area
(Dollars in Millions)



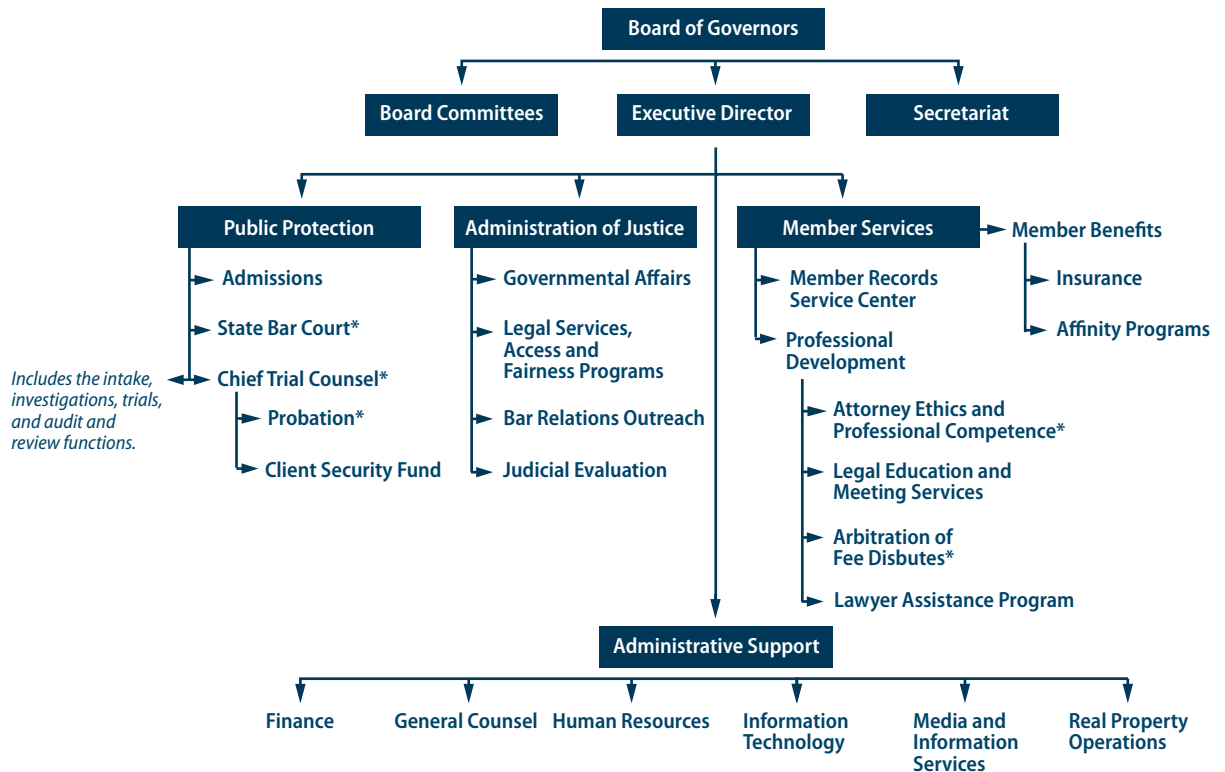
Source: The State Bar of California's 2008 audited financial statements.

Note: Program area expenses are based on estimates from the chief financial officer. However, the sum of the program areas materially agrees to total audited amounts.

Although the State Bar is able to account for its discipline costs within various program areas as shown in Figure 8, because the discipline functions are accounted for in various organizational

areas, the State Bar’s ability to identify and track trends to measure the efficiency of its disciplinary system is limited. Specifically, as shown in Figure 9, according to the State Bar’s organizational structure, the functions of the disciplinary system are included in two distinct areas: public protection and member services. However, these areas also include functions not related to the disciplinary system.

Figure 9
 Structure of the State Bar of California



Source: The State Bar of California's 2008 Annual Report.

* These areas represent the disciplinary functions accounted for in total discipline costs.

Expenses for the enforcement program area include both the functions of the Office of the Chief Trial Counsel and those of probation, and they also include the expenses associated with cost recovery. The responsibilities of the Office of the Chief Trial Counsel are discharged by the two State Bar offices located in Los Angeles and San Francisco. The disparity between how the State Bar accounts for its expenses and how it organizes its functions makes it difficult to determine what drives costs and to measure the efficiency of the disciplinary system.

The State Bar does not separately track expenses by function such as investigations, trials, and audit and review, and thus it could not readily differentiate the cost of its various functions.

In an effort to evaluate the efficiency of the disciplinary functions and to understand the reasons for the increases in discipline costs, we asked the State Bar to provide us with expenses for intake, investigations, trials, audit and review, and the State Bar Court. However, the chief financial officer explained that the State Bar does not separately track expenses by all of these functions. Although the State Bar accounts for the expenses for the intake and the State Bar Court functions separately, it combines expenses of other functions such as investigations, trials, and audit and review. Consequently, the State Bar could not readily differentiate the cost of its investigation and trial functions.

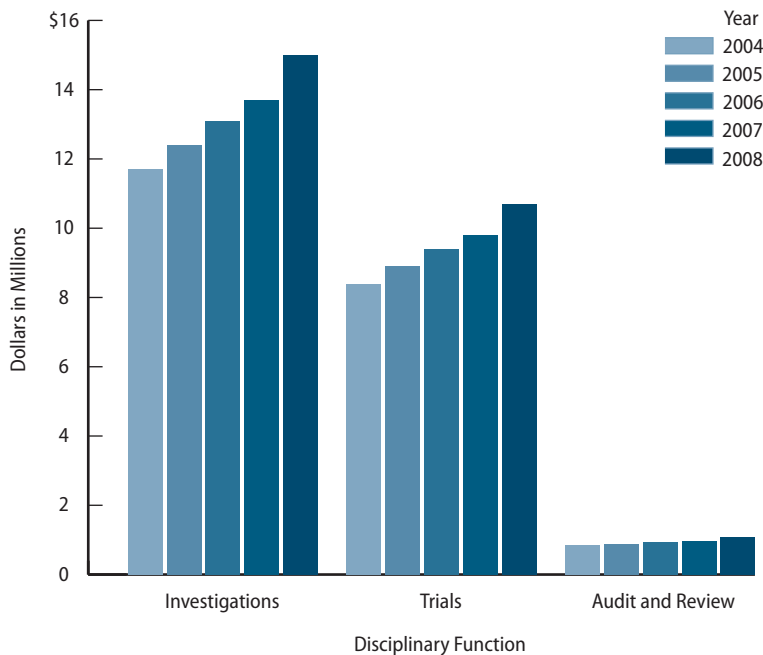
Additionally, we found that the State Bar's San Francisco and Los Angeles offices do not track their enforcement expenses in the same manner, which further contributes to the difficulty of identifying actual expenses by function. Specifically, in its tracking of discipline costs, including those for the investigation, trial, and audit and review functions, the Los Angeles office combines all such expenses together as one amount. This office further groups all its administration expenses—those that support the disciplinary system as well as those that support all the other functions of the office—together as a second amount. In contrast, the San Francisco office combines all its discipline costs as well as all its administrative expenses to support the office as a single amount. Therefore, not only is the State Bar unable to separately track and monitor what it spends on key aspects of its disciplinary system, such as investigations and trials, it cannot even make meaningful comparisons between the two offices because it has no consistent method of accounting for its operations. This fact inhibits the State Bar's ability to identify specific reasons for cost increases, and if warranted, to take appropriate actions to contain them.

Even though the State Bar does not separately track its discipline costs by function within the Office of the Chief Trial Counsel, at our request, the chief financial officer was able to provide approximations of these costs based on an estimate of the time State Bar staff spent on each function within the disciplinary system during a year. The intake and State Bar Court functions are separately accounted for and therefore did not need to be estimated. Once having arrived at these estimates for the functions, the chief financial officer then applied the same percentage estimates for each of the functions to the total discipline costs for each of the preceding five years; therefore, this is not a precise estimate because this is not a process that the State Bar normally uses in its management of the disciplinary system. Although we were not able to verify management's estimates, we were able to match the sum of the estimates for the investigation, trial, and audit and review functions to the total discipline costs appearing in the State Bar's audited financial statements for 2004 through 2007. Based

on the estimates, we determined that these three functions of the Office of the Chief Trial Counsel—investigations, trials, and audit and review—account for 48 percent of the enforcement program area’s expenses.

As Figure 10 shows, the estimated costs for these three functions of the Office of the Chief Trial Counsel show larger increases in some functions than in others. For example, according to the estimates provided by the chief financial officer, investigation costs have increased nearly 30 percent from under \$12 million in 2004 to \$15 million in 2008.

Figure 10
 The State Bar of California’s Estimated Discipline Costs by Function
 2004 Through 2008



Source: Estimates provided by the State Bar of California’s chief financial officer.

Had the State Bar previously tracked and reviewed this type of information, it may have noticed that, for example, costs are increasing for the investigation function despite the fact that caseload is not. This type of analysis in the future could assist the State Bar in determining the drivers of increased cost and aid in measuring the efficiency of various components of its disciplinary system. For example, increases in investigation costs could be the result of increases in personnel costs in that functional area, or if that was not the reason, it could be an indication of inefficiency.

The increase in overall discipline costs appears to be partly due to personnel costs—total personnel costs for discipline increased from \$27.6 million in 2004 to \$35.7 million in 2008.

In an effort to determine the reasons for the increase in overall discipline costs, we asked the former chief trial counsel and the chief financial officer why discipline costs are increasing. The former chief trial counsel stated that many of the employees in his office are long-term employees and are at the high end of their salary ranges. He stated that negotiated salary increases and cost-of-living increases account for a significant portion of the increase in discipline costs. However, when we asked for a breakdown of personnel costs by function, for example, investigations, trials, and audit and review, the chief financial officer was only able to provide us with a summary by cost center, year, and category. According to the summary, total personnel costs for discipline increased from \$27.6 million in 2004 to \$35.7 million in 2008. This \$8 million increase represents a 29 percent increase in personnel costs and accounts for 68 percent of the overall increase in discipline costs.

We also requested the State Bar to provide us with staffing levels in the function areas of discipline to evaluate whether higher personnel costs were a result of an increase in positions. Based on staffing information—the number of authorized positions and vacancies—provided by the chief financial officer at the end of each year from 2004 through 2008, we determined that although total authorized positions for the Office of the Chief Trial Counsel slightly decreased, the number of those positions that were filled increased by 10 from 221 to 231. However, similar to its salary costs, the State Bar does not separately track positions by the investigation, trial, or audit and review functions, and as a result, exactly where the increases occurred is unclear.

According to the chief financial officer, growth in indirect costs during the past few years also accounted for part of the increase in discipline costs. Specifically, indirect cost allocations to discipline increased from \$8.6 million in 2004 to \$12 million in 2008. This \$3.4 million growth represents a 40 percent increase in indirect costs and accounts for 29 percent of overall discipline costs. Some indirect cost increases in 2008 were related to increased information technology and space-related costs, as well as an increase in the use of the Office of the General Counsel's time.

Further, the former chief trial counsel told us that the number of trials contested in the State Bar Court has increased significantly in the last two years as a result of greater adherence to the sanction standards adopted by the board of governors. Further, he stated that this has increased costs related to witness fees and travel, expert witness fees, and production of extensive exhibits for use at trial. Because the State Bar does not track expenses, including

personnel costs—the largest component of its expenses—by all of its various functions, it cannot measure the cost impact of an increased number of cases going to trial.

The State Bar Cannot Determine Whether Policy Changes Affect the Costs for Its Disciplinary Functions

Because the State Bar does not track costs separately for each of its key functions within the disciplinary system, it cannot measure the cost impact of policy changes. In 2005 the California Supreme Court criticized the State Bar for failing to bring all possible charges against an attorney who was ultimately disbarred and for failing to follow its internal guidelines that delineate the appropriate actions that the State Bar must take against attorneys who have repeatedly violated professional or legal standards. The former chief trial counsel issued a policy memo in June 2006 in response to this criticism. The memo directed staff to keep in mind a number of considerations when negotiating a settlement or when arguing the degree of discipline that should be imposed or recommended in a contested proceeding. This memo provided guidance to staff to ensure consistency in applying sanction standards and to take cases to trial if they warrant more severe discipline than the respondent is willing to accept in a stipulation. His memo further stated that the Office of the Chief Trial Counsel must demonstrate a willingness to take the more egregious matters to trial and, as necessary, to appeal those decisions to the State Bar's Court Review Department and to the California Supreme Court.

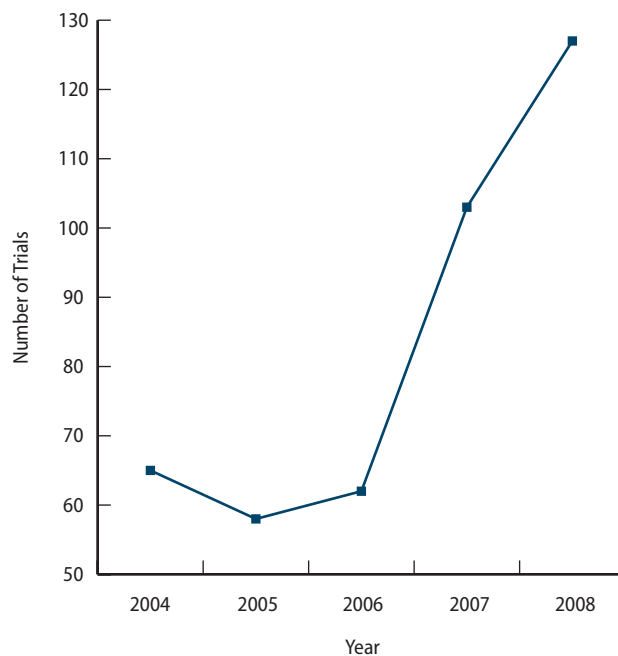
Additionally, the former chief trial counsel provided staff further clarification in August 2007 with the *State Bar's Statement of Policies, Objectives, Procedures and Practices Governing the Determination of Level of Discipline*. Before this policy shift, according to the former chief trial counsel, the State Bar settled before trial about 90 percent of cases in which the accused attorney participated. However, he recently estimated that this percentage has decreased to about 75 percent. He also stated that in the past, the State Bar was more willing to offer settlements at lesser discipline levels to resolve cases, and he attributes the recent decline in settlements to the State Bar's unwillingness to agree to dispositions that are not consistent with the sanction standards.

The recent trend in the number of cases going to trial is consistent with these policy changes. The former chief trial counsel said that he does not track the average costs of a case that proceeds to trial, and explained that the decisions to prosecute are based on the merits of the cases and not the costs. Although decisions may not be based primarily on financial considerations, we believe the State Bar would benefit from at least understanding roughly how much

The recent trend in the number of cases going to trial is consistent with policy changes that the former chief trial counsel made in June 2006.

it spends on trials—especially since the number of trials has nearly doubled in the past few years. As shown in Figure 11, the number of trials commenced in the State Bar Court each year has increased from 65 in 2004 to 127 in 2008.

Figure 11
Disciplinary Trials Begun in the State Bar Court
2004 Through 2008



Source: Trial dispositions summary prepared by staff at the State Bar Court, State Bar of California.

The chief financial officer noted that the State Bar does not account for costs by the specific function of the disciplinary system, nor does it ensure that both the San Francisco and Los Angeles offices track expenses in the same manner. When we asked whether the State Bar currently uses other methods to track the efficiency of its disciplinary system, the chief financial officer noted that as part of its strategic planning process, in 2009 the State Bar began to estimate the percentage of staff time spent on processing cases in the various functions of the disciplinary system. Although a step in the right direction, this is only an estimate, not an actual percentage of staff time spent on processing cases.

Key members of the State Bar's management team have varying views about the value of tracking expenses related to each function of the disciplinary system. The chief financial officer agreed that tracking expenses by function would be beneficial from a budgeting

perspective and may help the State Bar to increase efficiency. The former chief trial counsel said that from a functional perspective, it would not be helpful in managing costs. He explained that the office does not conduct a formal cost-benefit analysis when deciding if it should take disciplinary cases to trial, but it does consider whether it can prove its case at trial and whether the case can be settled with an acceptable level of discipline. He explained that the Office of the Chief Trial Counsel bases its decision to take a particular case to trial on the State Bar's mission to protect the public as well as on the merits of the case, and that his division operated within its allocated budget. However, we believe that by knowing the cost of each of its various functions, the State Bar will not only be able to operate in a fiscally responsible manner but will also be more accountable to the members who fund its operations.

The State Bar's 2009 Strategic Planning Budget—assuming no dues increase—projects a deficit of \$4.7 million in 2010 and \$5.4 million by 2011, and it is currently considering options to cut costs. If the State Bar plans on requesting an increase in its annual membership dues in the future to address its deficit, it would be in a much better position to justify such a fee increase to the Legislature and to its members if it could demonstrate that it had measured the efficiency of its systems by function and had already made efforts to address any areas of identified deficiency. Additionally, by aligning its functions with its expenses, the State Bar will be able to gauge the impact of its policy decisions on costs, and will be able to assure members that it is being efficient with its resources.

The Number of Trials Resulting in Severe Penalties Has Risen, but the State Bar Was Unaware That Its Investigation Case Processing Time Has Also Increased

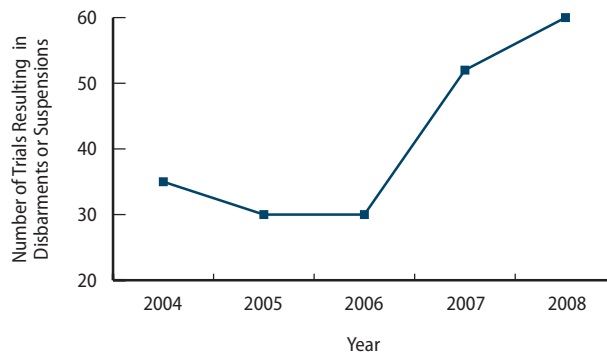
Although the State Bar does not track costs separately for each of its key functions within the disciplinary system to measure efficiency, the effectiveness and efficiency of the disciplinary system can be measured by the outcomes of its efforts—specifically, the penalties imposed at trial and the time involved in processing cases. According to a summary of trial dispositions provided by a State Bar Court administrative specialist, the number of trials that resulted in severe penalties—disbarments and suspensions—has increased over the past five years. However, case processing times have also increased. According to the former chief trial counsel, factors contributing to increases in case processing times include the State Bar's handling of more complex¹ cases and his insistence

The State Bar is projecting a deficit of \$4.7 million in 2010 and \$5.4 million by 2011 if dues are not increased.

¹ The State Bar designates a case as complex if the case meets certain criteria, such as difficulty in communicating with witnesses or if the case involves extremely unusual or complicated legal matters.

that more cases be thoroughly investigated. Figure 12 shows that the number of disbarments or suspensions resulting from cases that went to trial increased from 35 in 2004 to 60 in 2008.

Figure 12
Disciplinary Trials That Have Resulted in Disbarments or Suspensions
2004 Through 2008



Source: Bureau of State Audits' compilation from a summary of trial dispositions prepared by staff at the State Bar Court, State Bar of California.

However, even though the number of severe penalties increased, the State Bar is also taking longer to process its cases because of its policy to more stringently adhere to disciplinary standards that require more staff time to prepare cases for trial. According to the former chief trial counsel, preparing and taking a case to trial entails more work than settling earlier in the disciplinary process. Our review of the State Bar's processing times for complaints received and completed in 2004 through 2007² is summarized in Table 1.

As the table indicates, the State Bar processes most cases from the intake stage through the investigation stage within six months. Additionally, the number of inquiries opened at the intake stage has declined slightly from 2004 to 2007, and the average intake case processing time has decreased in recent years. Specifically, the average number of days in which the intake unit either closed an inquiry or opened a case and passed it on to the investigation and trial unit for further processing decreased from 48 days in 2004 to 43 days in 2007, or 10 percent. However, our analysis demonstrates that the length of time to process cases proceeding beyond intake is generally increasing. Specifically, in 2004 State Bar staff took more than

² We did not include the processing times for 2008 because many of these cases are still pending in the various stages of the disciplinary system.

Table 1
Case Processing Times Listed According to the Year That the State Bar of California's Intake Unit Received the Complaint
2004 Through 2007

	2004			2005			2006			2007		
	NUMBER OF CASES	PERCENTAGE OF TOTAL CASES	AVERAGE NUMBER OF DAYS TO PROCESS A CASE	NUMBER OF CASES	PERCENTAGE OF TOTAL CASES	AVERAGE NUMBER OF DAYS TO PROCESS A CASE	NUMBER OF CASES	PERCENTAGE OF TOTAL CASES	AVERAGE NUMBER OF DAYS TO PROCESS A CASE	NUMBER OF CASES	PERCENTAGE OF TOTAL CASES	AVERAGE NUMBER OF DAYS TO PROCESS A CASE
Intake Unit												
0-60 days	10,779	76%		9,629	72%		9,371	70%		11,114	80%	
61+ days	3,420	24		3,695	28		4,041	30		2,784	20	
Pending	0	0		0			2	<1		7	<1	
Case closed or sent to investigations			48			51			50			43
Totals	14,199			13,324			13,414			13,905		
Investigation and Trial Unit												
0-180 days	2,621	68%		2,015	62%		1,756	56%		1,526	49%	
181-360 days	845	22		838	26		852	27		943	30	
361+ days	378	10		390	12		446	14		402	13	
Pending	9	<1		6	<1		85	3		271	9	
Case closed or sent to State Bar Court			168			185			205			202*
Totals	3,853			3,249			3,139			3,142		
State Bar Court												
0-180 days	189	25%		163	22%		†	†		†	†	
181-360 days	202	27		163	22		†	†		†	†	
361+ days	172	23		131	18		†	†		†	†	
Pending	181†	24		271†	37		†	†		†	†	
Case closed by the State Bar Court			†			†			†			†
Totals	744			728			†	†		†	†	

Source: Bureau of State Audits' analysis of data from the State Bar of California's disciplinary tracking database.

Note: Some percentages do not add to 100 percent due to rounding.

* All of these cases are currently pending beyond 361 days, therefore the average processing time for cases received in the investigation and trial unit for 2007 will increase from what we have reported.
† Because the majority of these complaints are still pending resolution, we did not include State Bar Court processing times and the number of cases for 2006 and 2007, nor did we include average processing times for all years.

‡ Of the pending cases received in 2004, 160 were beyond 361 days and of cases received in 2005, 209 were beyond 361 days, an increase of 31 percent.

360 days to process 378 of 3,853 cases received in the investigation and trial unit, or 10 percent. In 2007 the proportion of cases taking longer than 360 days had increased to 13 percent. Additionally, from 2004 to 2005, although Table 1 shows that the number of cases taking more than 360 days to resolve in the State Bar Court decreased from 172 to 131, or 5 percent, the number of cases already pending for more than 360 days increased from 160 to 209 cases, or 31 percent. Based on this analysis, a complaint received in 2004 could take more than two years to close or otherwise resolve.

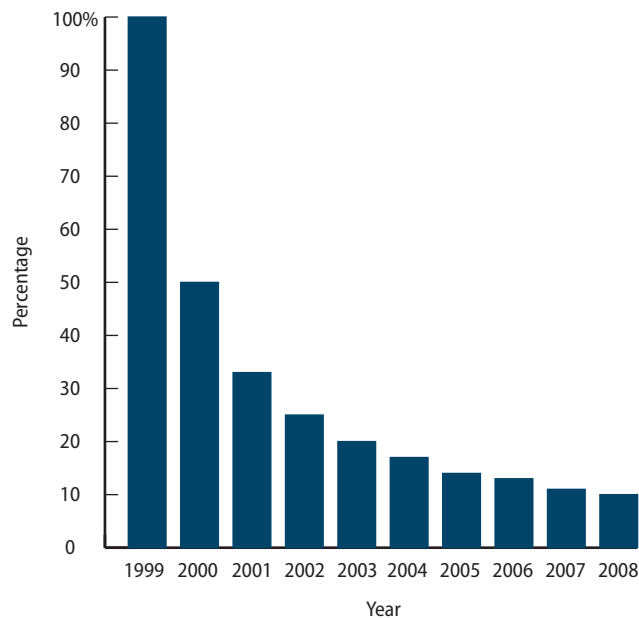
When we asked the State Bar why it is taking longer to process cases beyond the intake stage, the chief administrative officer of the State Bar Court noted that one of the explanations could be due to judicial turnover. Further, the former chief trial counsel indicated that his insistence that cases be more thoroughly investigated might be a contributing factor. However, in the same response the former chief trial counsel noted that according to the State Bar's analysis of investigation processing time, the trend has decreased over the past five years except for a slight increase in 2008.

After discussing with the State Bar its methodology for calculating its average investigation processing time, we determined that it is not calculating this average in a way that fully represents yearly trends. In its annual discipline report, the State Bar reports the average number of days that closed cases spent in investigations at year-end. According to the program/court systems analyst (systems analyst), the State Bar combines average processing time to compute a single average for all cases closed since 1999 as opposed to calculating a separate average based on cases closed for a particular year. According to the systems analyst, the State Bar chose the 1999 date so that it would be able to reflect productivity after the State Bar regained its authority to charge an annual membership fee that year. However, this is not a meaningful measure of current yearly investigative case processing times because the number of cases from which the State Bar generates the averages continues to grow and includes data from years that do not apply to the relevant reporting year. As Figure 13 depicts, when the State Bar reports the average processing time of closed investigations at the end of 2008, only 10 percent of the total population from which it calculates this average applies to 2008.

Further, because the population from which it calculates this average consists of many years of data, a significant change in processing time during more recent years would not notably change the average. Thus, the State Bar is unable to detect notable annual increases or decreases in case processing times using this method.

The State Bar's methodology for calculating its average investigation processing time does not represent yearly trends. For example, when it reports the average for 2008, only 10 percent of the total population from which it calculates the average applies to that year.

Figure 13
Proportion of Cases Relevant to Yearly Case Processing Time as Reported by
the State Bar of California
1999 Through 2008



Source: Analysis by the Bureau of State Audits.

Note: These figures represent the proportion of cases closed each year compared to the total cases closed since 1999. Because the State Bar of California includes the average processing time for all cases closed since 1999, the proportion of cases that apply to the relevant reporting year continues to decline.

Finally, according to the systems analyst, when the State Bar reports its case processing times, it does not include the time it took to process a case that eventually gets forwarded to the next stage of the disciplinary system. Rather, the State Bar only includes closed investigations. Even though the State Bar refers to processing times for closed cases in its annual discipline report, including only closed cases may be misleading and is an understatement of case processing times for all investigations because forwarded cases often take longer to process than the ones that are closed.

Using the State Bar's method to calculate the average processing times for closed investigations resulted in average processing times that ranged from a high of 197 days in 2004 to a low of 186 in 2007. In contrast, when we used what we believe to be a more representative method that only considers the time investigations remained open during a given year, whether eventually closed or forwarded to the next stage, average processing times were generally longer. Using this method, the average processing times for the State Bar's investigations ranged from a low of 168 days in 2004 to a high of 205 days in 2006 before declining to 202 days in 2007, as depicted in Table 1 on page 33.

We are not making a determination as to the appropriateness of the former chief trial counsel's efforts to more strictly adhere to the sanction standards. Although these efforts may prove to be beneficial in imposing stricter penalties, increases in case processing time may contribute to increased costs and may allow attorneys whose cases are currently in the disciplinary system to continue practicing law longer than necessary. Further, because the State Bar does not track or report its case processing time in a way that is completely representative of its efforts, its stakeholders, including the Legislature, cannot fully measure the effectiveness of its disciplinary system.

The State Bar Could Better Inform the Legislature by Including All Relevant Information When It Reports Its Backlog

Another possible means to measure the effectiveness of the State Bar's disciplinary system is through tracking its backlog of disciplinary cases. The Business and Professions Code requires the State Bar in its annual discipline report to describe the performance and condition of its disciplinary system by reporting on the existing backlog of cases, including, but not limited to, the number of complaints as of December 31 of the preceding year that were pending beyond six months after receipt without dismissal, admonition,³ or the filing of charges. The law further specifies that the State Bar should provide accurate and complete descriptions of the backlog, and that the discipline reports should include information in a consistent manner to allow for year-to-year comparisons. However, the State Bar has interpreted this law in such a way that it reports less than what the law permits and does not report consistently to allow for year-to-year comparisons. The State Bar was able to provide us with the types of cases that it does not include when it reports its backlog as well as its rationale for not including them. We believe that the State Bar's stakeholders, including the Legislature, would benefit from having this same information, as it would provide more complete and clear measures of the number of complaints and cases that were pending over six months during the preceding year.

The State Bar has interpreted the law relating to reporting the backlog of disciplinary cases in such a way that it reports less than what the law permits and does not report consistently from year to year.

In its annual discipline report, the State Bar reports a case as part of its backlog when its staff has not resolved the case within six months of its receipt or when the State Bar designates the case as complex and has not resolved it within 12 months of receiving the complaint. However, as shown in Table 2, the State Bar does not include or explain many other types of cases when it reports its backlog.

³ A written nondisciplinary sanction issued in cases that do not involve a serious offense and in which the court concludes that no significant harm resulted.

Table 2
Types of Disciplinary Cases That the State Bar of California Does Not Include or Identify as Part of Its Backlog in Its Annual Discipline Report

TYPES OF DISCIPLINARY CASES	DEFINITIONS OF THESE CASE TYPES	THE STATE BAR'S REASONS FOR NOT INCLUDING THE CASES AS PART OF ITS CASE BACKLOG
Complex	The State Bar of California (State Bar) designates a case as complex if the case meets certain criteria, such as the staff's difficulty in communicating with witnesses or if the case involves extremely unusual or complicated legal matters.	The State Bar does not include a case designated as complex in its calculation of backlog until the case is more than 12 months old. In its annual discipline report, the State Bar does not identify the number of cases that are complex.
Intake	The intake unit receives each new complaint and does not forward the complaint unless it determines that the complaint should be a case that warrants further investigation.	The State Bar has interpreted the law to mean that it only needs to report complaints and not inquiries in its backlog, and does not consider an inquiry that has never left intake to be a complaint.
Non-attorney	In accordance with a 2006 law concerning non-attorney cases, the State Bar is allowed to apply to the court to intervene and to assume jurisdiction over the practice of any individual who is not an attorney but who engages in the unauthorized practice of law in California.	The State Bar noted that although the California Business and Professions Code mandates a report on the existing backlog of cases within the State Bar's disciplinary system, individuals who are not attorneys are not subject to discipline by the State Bar Court and thus their cases do not fall within the State Bar's disciplinary system.
Abated	In an abated case, the State Bar delays prosecuting that case if another similar case is pending against the same attorney.	The State Bar does not include abated cases when reporting case backlogs because it takes no actions on the cases until it has resolved prior matters.
Reopened	A reopened case is one in which the State Bar's audit and review unit has revisited a case because a complainant has requested a review of a decision to close his or her complaint without disciplinary action.	Before 2006 the State Bar did include reopened cases in its backlog calculation. However, it stopped doing so because, according to the assistant chief trial counsel, the State Bar felt that counting such cases created an inaccurate impression that the State Bar had not resolved the matters expeditiously.
Outside examiner	Outside examiners are volunteers and handle cases as special deputy trial counsel when the State Bar has a conflict and cannot investigate or prosecute the matter.	Cases with outside examiners always take longer to process than the backlog goal of 6 months or 12 months for complex cases. Outside examiners do not have dedicated staff or the time to complete the cases within 6 or 12 months.
Member	In some circumstances, multiple attorneys can be named on the same inquiry.	It has been the State Bar's practice to count its backlog by case, rather than by member. As a result, if four members were originally included on one complaint, and three out of four members' cases were resolved in the investigations and trial unit after six months, the State Bar would only count this as one case in its backlog.

Sources: The State Bar of California's 2008 Report on the State Bar of California Discipline System, the State Bar's interim chief trial counsel, and assistant chief trial counsel.

We wanted to gain a better understanding of the total number of cases, regardless of type, that were pending beyond six months. To do this, we used data from the State Bar's disciplinary tracking database and calculated the total number of cases that were not resolved within six months of receipt of the complaint and remained open at year-end for 2005 through 2008. These results are shown in Table 3.

Table 3
Total Cases by Member Not Resolved Within Six Months at Year End
2005 Through 2008

	2005	2006	2007	2008	TOTALS
Complaint remains in intake	74	57	43	32	206
Complex 6-12 months	226	239	309	226	1,000
Complex over 12 months	74	80	106	95	355
Noncomplex	253	253	316	241	1,063
Non-attorney	0	53	143	200	396
Reopened cases*	21	30	15	2	68
Abated cases*	23	45	38	16	122
Outside examiner*	NA	NA	NA	21	21
Totals	627	682	917	794	3,020
Backlog as defined and reported by the State Bar in its annual discipline report (by case)	315	246	327	290	1,178

Sources: The State Bar of California's (State Bar) 2008 audited financial statements, the State Bar's disciplinary tracking database, and its 2008 *Report of the State Bar of California's Discipline System*.

* These are already included in the totals for either complex over 12 months or noncomplex cases. Because we did not separately identify these in our analysis, the State Bar provided us with these numbers.

NA = Not applicable.

As shown in Table 3, the number of cases over six months old that the State Bar excludes from the backlog it reports to the Legislature is significant. Specifically, the State Bar only reported 1,178 of the 3,020 total cases, or 39 percent, that were not resolved within six months from 2005 through 2008. Table 3 also shows that the number of complex cases over 12 months old has increased from 2005 through 2008 from 74 to 95, or 28 percent. According to the interim chief trial counsel, cases have become more complex over the past several years for reasons including accessibility to the Internet, which allows California attorneys to provide services in jurisdictions where they are not licensed. Because the State Bar designates cases as complex and does not include them in the backlog until they are over 12 months old, separately identifying them from noncomplex cases would allow stakeholders to better

understand reasons for fluctuations. Further, the State Bar does not count inquiries in the intake unit that do not move on to the investigations unit—even though these issues could remain in intake for more than six months. Because the annual discipline report notes that the investigation and trial unit strives to complete investigations within six months after receipt of the complaint (or 12 months if they are designated as complex), the State Bar is not providing complete and clear information regarding its backlog when it does not identify or explain its reason for not including inquiries.

The State Bar has also changed the types of cases that it does include in its annual discipline report over the past five years, which makes year-to-year comparisons difficult. For example, the State Bar changed its reporting beginning in 2006 to remove cases that were reopened at year-end from the backlog count. No explanation was included in the 2006 report or in subsequent reports about this shift. Additionally, beginning in 2008, the State Bar excluded cases in its backlog that were being handled by special deputy trial counsels, who are outside examiners. Although the State Bar noted this change in its 2008 discipline report, it did not explain the reason for the revision. Even though it explained to us the reasons for excluding cases or changing the cases that it does include, the State Bar has not explicitly clarified its rationale in its annual discipline reports. Including such information would give the Legislature more complete and accurate information regarding the State Bar's backlog and would allow the Legislature to better measure the performance of the State Bar's disciplinary system from year to year.

Additionally, the State Bar reports its backlog by case and not by member, which further decreases the number of cases that could be included in the backlog count. In some circumstances, multiple attorneys can be named on the same complaint, but the State Bar only includes one in its backlog calculation, even if separate cases are opened that would otherwise be included. The interim chief trial counsel believes that it is appropriate to report backlog by case and not by member because the complaint, whether it alleges misconduct by one or more attorneys, is generated from a single complaint made by one complaining witness, and for the most part the issues and evidence are the same. However, the backlog table in the State Bar's annual discipline report does not indicate that the backlog is reported by case rather than by member. Although we understand the State Bar's reasoning for excluding certain cases from backlog counts, by not delineating what it does and does not include, the State Bar is not providing a clear representation of its backlog in its annual discipline reports.

The State Bar is not providing a clear representation of its backlog in its annual discipline reports because it does not delineate what it does and does not include.

Recommendations

To explain and justify cost increases, and to measure the efficiency of its disciplinary system as well as the impact of policy changes, the State Bar should account separately for the expenses associated with the various functions of the disciplinary system, including its personnel costs. This can be accomplished through a study of staff time and resources devoted to a specific function. The State Bar should also ensure that all its offices track expenses consistently.

To make certain that the State Bar provides accurate and complete descriptions to its various stakeholders so they can evaluate the effectiveness of its disciplinary system over time, the State Bar should do the following:

- Adjust its methodology going forward for calculating case processing times for investigations so that the calculations include time spent to process closed and forwarded cases for the relevant year only. For example, for its 2009 annual discipline report, the State Bar should report the average processing time for only cases it closed or forwarded to the State Bar Court in 2009.
- Include additional information regarding backlog in its annual discipline report to the Legislature. Specifically, the State Bar should identify the number of complex cases over 12 months old in its backlog.
- Identify in its annual discipline report the types of cases that it does not include in its calculation of backlog and explain why it chooses to exclude these cases. Specifically, the State Bar should identify that it presents its backlog by case rather than by member, and that it does not include intake, non-attorney, abated, and outside examiner cases.
- Identify the composition of each year's backlog to allow for year-to-year comparisons, as the law requires.

Chapter 2

THE STATE BAR OF CALIFORNIA COULD IMPROVE ITS COST RECOVERY EFFORTS

Chapter Summary

By making relatively simple changes to its billing procedures and its tracking of cost recovery, the State Bar of California (State Bar) could improve its efficiency by making better use of its resources, improve its collection efforts, and potentially offset some of the recent increases in its overall discipline costs. State law authorizes the State Bar to recover certain costs related to disciplining its members, but the law prohibits collection of costs for attorneys' or experts' services. Because of this statutory limitation and other factors, the State Bar's recovery of its discipline costs remains relatively low. The State Bar has only been able to recover \$550,000 in 2007 and \$766,000 in 2008, with the vast majority of these amounts representing collections from various earlier billing years, but it has billed about \$1 million in each of these years.

For those costs it is allowed to recover from disciplined attorneys, the State Bar uses a formula to bill attorneys, but this formula has not been updated since 2003. Consequently, the State Bar has missed an opportunity to bill more than it did over the past six years. Further, because the State Bar does not generate reports from its billing system that compare amounts received with amounts billed, and because it does not consistently include on its bills the due dates for disciplined attorneys' payments, the State Bar cannot reasonably predict the amount of recoverable costs that it should receive from disciplined attorneys in a given year. By tracking the amounts that it receives by the year that it billed for those amounts, the State Bar may be able to identify trends related to its billing procedures and identify ways to improve its collection efforts. Finally, the State Bar has not conducted a cost-benefit analysis of its current cost recovery processes, which would allow it to consider more cost-effective alternatives to its current processes and thus potentially increase the amount that it recovers.

State Law Prohibits the State Bar's Recovery of Certain Expenses From Disciplined Attorneys

The State Bar can recover from individual attorneys only some of its costs for disciplinary activities. According to the State Bar's audited financial statements for 2008, \$52 million, or 84 percent, of its \$62 million in general fund expenses was associated with its disciplinary system. State law requires the State Bar to charge

attorneys it has disciplined for certain costs related to their disciplinary proceedings. Although the State Bar does bill the attorneys it has disciplined, the amounts it can bill and ultimately collect are substantially lower than the amounts it spends on processing disciplinary cases. One reason is that state law limits the amount of recovery by excluding costs for the services of attorneys or experts, which, according to the acting general counsel, make up a substantial portion of the disciplinary costs incurred by the State Bar.

Changes to the State Bar's Processes for the Billing and Tracking of Discipline Costs Could Improve Collection Efforts

Some of the increases in discipline costs could be offset if the State Bar made changes to the processes it uses for billing and tracking of these costs. As mentioned in the Introduction, for those costs it is allowed to recover from disciplined attorneys, the State Bar uses a formula—a fixed amount primarily based on how far the case proceeds through the disciplinary system before resolution—to bill attorneys who are publicly disciplined. The formula is based on a disciplinary fee model developed from a time study completed in 1997. The time study provided the State Bar with estimates of costs for State Bar staff to investigate and prosecute cases based on the amount of time spent on case-related tasks, excluding attorney and expert witness services. In 2002, the State Bar hired a consultant to update the fee model to reflect increases in salaries and overhead expenses in the relevant cost centers to account for changes in the disciplinary system since 1997. Although discipline costs have increased 30 percent during the last five years, the State Bar has not updated this formula since it became effective beginning in 2003.

Although discipline costs have increased 30 percent during the last five years, the State Bar has not updated the formula it uses to bill for discipline costs since it became effective in 2003.

When we asked the State Bar why it had not updated its billing formula, the former chief trial counsel told us that the State Bar updates this formula approximately every five years, and that it did not do so in 2008 because of his office's focus on other projects. However, he also told us that the State Bar is planning to update the formula later this year or early next year. Because it is likely not cost effective to hire a vendor to perform a full study to update the formula each year, the State Bar should establish a method for calculating recovery costs in the interim years that would at least include adjusting billing rates for any cost increases. For example, the State Bar could increase recovery costs annually based on the percentage increase of its total discipline expenses. Table 4 shows how the recovery costs would have been adjusted annually had this approach been used. While we acknowledge that this method does not take all conditions into account since these averages include attorney and expert expenses, which are not recoverable,

we present this table as a concept for the State Bar to consider. We presented this method to the former chief trial counsel, assistant former chief trial counsel, and acting general counsel, and they generally agreed with the concept of adjusting discipline charges in years between formal studies.

Table 4
Possible Model for Adjusting Fees Charged to Disciplined Attorneys That Accounts for the Increases in Disciplinary Costs 2003 Through 2008

STAGE AT WHICH THE STATE BAR RESOLVES THE CASE	2003	2004	2005	2006	2007	2008	TOTAL INCREASE IN COSTS BETWEEN 2003 AND 2008
Before discipline charges are filed	\$1,983	\$2,084	\$2,218	\$2,320	\$2,463	\$2,702	\$719
During the first 120 days of proceeding	2,296	2,413	2,568	2,686	2,852	3,129	833
Before pretrial statements* are filed	3,654	3,840	4,086	4,274	4,539	4,979	1,325
Before trial, after pretrial statements are filed, or during a one-day trial	4,920	5,171	5,502	5,755	6,112	6,705	1,785
During a multiday trial	11,107	11,673	12,421	12,992	13,797	15,136	4,029
After case proceeds to review department	13,463	14,150	15,055	15,748	16,724	18,346	4,883

Sources: Bureau of State Audits' analysis based on the State Bar of California's discipline costs and audited financial statements.

* Pretrial statements detail key information such as a brief description of charges, undisputed facts, and disputed issues.

According to the amounts billed on the State Bar's discipline payments summary, from 2006 through 2008, the State Bar billed \$3.3 million in disciplinary charges. Had the State Bar added the percent increase in total discipline costs from the preceding year to the amount billed in the manner shown in Table 4, it would have billed almost \$850,000 more from 2006 through 2008.

Further, according to the assistant supervisor of membership billing, the State Bar cannot reasonably predict the amount of recovery costs it expects to receive from disciplined attorneys in a given year because in many cases the bills do not include any set due date for when payments must be made. Consequently, the State Bar cannot adequately evaluate its discipline cost recovery collection efforts or fully budget for such collections. To evaluate the effectiveness of the State Bar's collection efforts in recent years, we requested a summary report of the amounts billed and received.

As shown in Table 5, according to the State Bar's discipline payment summary report, in 2007 and 2008, the State Bar collected an average of 63 percent of the amount it billed. Although these percentages provide some context about collections, they are somewhat misleading and not necessarily a useful measure of the effectiveness of the State Bar's efforts. This is because the State Bar does not match the percent collected with the corresponding amount billed. In fact, payments often are received years after they are billed. Using detailed payment information provided by the State Bar, we determined that of the \$1.1 million billed for recovery costs in 2008, only \$229,000 was collected in that year, or about 21 percent, as shown in Table 5. The State Bar does not currently run reports from its billing system to analyze this data, but the finance manager noted that the State Bar's current billing system has the capability to run reports based on the year billed. Additionally, he confirmed that the State Bar's new system will be able to run automated billing reports that include the percentage collected and other billing measures such as tracking how late payments are. The chief financial officer told us that the State Bar plans to use automated billing reports in the future as part of its analysis. According to the acting general counsel, this system will be fully implemented in July 2009. By tracking the amount that it receives by the year the amounts are billed, the State Bar may be able to identify the effectiveness of its billing procedures.

Table 5
The State Bar of California's Costs for the Attorney Disciplinary System That the State Bar Has Billed and Recovered

YEAR	COSTS BILLED	COSTS RECOVERED	PERCENTAGE RECEIVED REGARDLESS OF BILLING YEAR	PERCENTAGE RECEIVED BASED ON YEAR BILLED
2007	\$1,000,000	\$550,000	55%	13%*
2008	1,100,000	766,000	70	21*
Totals	\$2,100,000	\$1,316,000	63%	17%

Source: The discipline payment summary report generated from the State Bar of California's billing system.

* It is likely that some of the payments for amounts billed in these years will be received in subsequent years.

Undermining any attempt to track the billing and payment of attorneys' disciplinary expenses is the fact that the State Bar does not consistently include due dates for when payments must be made when billing disciplined attorneys. Specifically, when billing disciplined attorneys with no designated payment plan or for some types of discipline orders, the bill states that the attorney may voluntarily pay the disciplinary expenses immediately or at

any time in the future. Our review of 28 bills sent to attorneys in 2006 and 2007 found that attorneys promptly paid their discipline bills at a much greater rate if the due date was explicitly stated on the bill. For the 15 bills with specific due dates, 14 attorneys, or 93 percent, paid their bills in full by the due date. For the 13 bills we reviewed with no specific due date, only one attorney paid by the end of the next fiscal year. By not including specific due dates on its bills to disciplined attorneys, the State Bar is much less likely to recover costs as promptly as it could.

We discussed our results with the State Bar's acting general counsel. He stated that he is unsure why the letters to disciplined attorneys did not include due dates and that during the next few months he will work with staff to implement a policy to include due dates. He also stated that specifying due dates may result in increased payments of disciplinary expenses by disciplined attorneys with suspensions who, as a group, are more likely to pay than those who resigned with charges pending or who were disbarred. By implementing a policy to include due dates on all letters requiring payment, the State Bar will most likely see an increase in disciplinary payments.

The billing issues described in this section are not meant to imply that the shortcomings in the State Bar's billing procedure would allow attorneys who owe discipline costs to renew membership or be readmitted to the State Bar. To the contrary, we found that according to the State Bar's internet-based attorney search, the 13 attorneys we reviewed who had outstanding discipline recovery costs were listed as ineligible to practice law. This policy complies with the Business and Professions Code, which states that disciplined attorneys must pay disciplinary expenses before they can return to the practice of law.

The State Bar Does Not Track How Much It Spends on Cost Recovery Efforts

The State Bar should ensure that it spends members' annual dues in a fiscally responsible manner by demonstrating that it has evaluated the costs and benefits of its undertakings. Specifically, the State Bar may be able to increase its ability to more efficiently operate within its resources by conducting a cost-benefit analysis and evaluating its current processes associated with its disciplinary cost recovery efforts. Before April 2007, the State Bar's efforts to recover costs associated with disciplined attorneys typically included billing the disciplined attorneys through annual membership bills and contracting with a collection attorney. Effective April 1, 2007, the State Bar received California Supreme Court approval of a rule to enforce as a money judgment, disciplinary orders directing

By implementing a policy to include due dates on all letters requiring payment, the State Bar will most likely see an increase in disciplinary payments.

Despite its new cost recovery authority for court-ordered discipline costs and Client Security Fund obligations, the State Bar does not expect an immediate material increase in collections.

payments of costs. A money judgment is an order entered by a court that requires the payment of money. In July 2007 the State Bar's board of governors adopted a pursuit policy to implement its new cost recovery authority for court-ordered discipline costs and Client Security Fund obligations.⁴ The policy outlines when the State Bar will pursue debt and in what circumstances it will not.

Despite its new authority, according to the acting general counsel, the State Bar does not expect an immediate material increase in its collections. Specifically, in its 2009 budget, the State Bar projects only a \$12,000 increase over the amount it collected in 2008. The acting general counsel noted that the vast majority of Client Security Fund cases involve payments to clients whose funds have been misappropriated by their attorneys and that this type of misconduct generally results in disbarment or resignation with charges pending. These attorneys tend to be under financial stress when they misappropriate client funds and have a greater likelihood of not paying these amounts back after losing their license to practice law. He also noted that the State Bar expects to collect only modest amounts from disbarred members and those who resigned with charges pending until five to 10 years after money judgments have been filed. As a result, the State Bar has not established goals related to its collection efforts of money judgments.

Before implementing its new pursuit policy, the State Bar contracted with a collection attorney to pursue collections from disciplined attorneys owing the largest unpaid amounts to the Client Security Fund. The State Bar agreed to pay the collection attorney 25 percent of the net funds recovered. Also, if no recovery was obtained, the State Bar agreed to pay for the expenses the collection attorney incurred. According to its discipline payments summary report, the collection attorney collected \$11,600 for the State Bar in 2007, but he was paid \$19,400 in recovery fees and expenses. For 2006 through 2008, the collection attorney collected \$156,600, and the State Bar received \$63,900, or 41 percent, of the total amount recovered.

Subsequent to the adoption of its pursuit policy, the State Bar contracted with a collection agency in March 2008 to pursue collections of money judgments from disciplinary and Client Security Fund cases. The State Bar agreed to pay this collection agency 15 percent of amounts collected on money judgments. Additionally, if the collection agency both obtained the money judgment and collected on that judgment, the State Bar would pay 25 percent of the amounts collected.

⁴ As noted in the Introduction, the Client Security Fund satisfies claims from injuries caused by dishonest conduct by active members or legal consultants registered with the State Bar.

According to the State Bar's acting general counsel, the legal work required to prepare a money judgment is labor-intensive, and in an effort to avoid having the collection agency conduct this legal work, the State Bar is currently using its own in-house staff. However, when we asked about the cost of its in-house efforts, the general counsel told us that the State Bar does not specifically track all of these costs. After our request, the State Bar identified some estimates of in-house costs to prepare the money judgments, and the general counsel acknowledged that paying the higher 25 percent of recovered costs might be more cost beneficial than having State Bar staff conduct this work. He further stated that the results of the preliminary analysis indicate further research is worthwhile. Because the State Bar is not tracking all of the costs of its in-house efforts and comparing these costs to the additional 10 percent it would pay the collection agency to perform these services, it has not determined whether it is using the most cost-effective alternative for its cost recovery efforts.

Finally, the State Bar's discipline payments summary shows that for 2006 through 2008, it collected \$3 million in discipline costs and Client Security Fund recoveries from its in-house billing efforts, but it does not track its costs associated with making these recoveries. We acknowledge that because of the statutory restrictions on the amount of discipline costs that can be recovered, the State Bar is limited to recovering substantially less than its costs. However, conducting a cost-benefit analysis of its collection efforts would allow the State Bar to evaluate and determine whether more cost-effective alternatives exist that could potentially increase the net amount that it recovers.

In an effort to provide the State Bar with some alternative best practices regarding cost recovery efforts, we asked two state agencies about methods they use for collecting money owed to them. A business tax compliance supervisor at the Board of Equalization (Equalization) noted that Equalization does not currently contract with any outside collection agencies. Although it has contracted with collection agencies in the past, these efforts were only marginally successful. He also stated that for debtors located in California, Equalization obtains information to track debtors from other governmental agencies, such as the Franchise Tax Board (Tax Board) and the Employment Development Department. He stated that these tracking activities are generally not expensive.

We also contacted a representative at the Tax Board about various programs available to state entities to recover costs, especially those that are available for a nominal fee. The representative told us about the Tax Board's Interagency Intercept Collections Program (intercept program) that offsets a debtor's state tax refund

Because the State Bar is not tracking all of the costs of its in-house cost recovery efforts and comparing these costs to what it would pay to a collection agency to perform such services, it cannot determine whether it is using the most cost-effective alternative.

by the amount owed to a state entity. According to the intercept program participation booklet for 2009, the cost for the program is approximately 25 cents per account. According to the State Bar's acting general counsel, in 2001 the State Bar attempted to obtain legislative approval to use the Tax Board's intercept program but was unsuccessful. If the State Bar does conduct a cost-benefit analysis of its current collection methods and finds that they are not cost beneficial, the State Bar may profit from attempting again to seek legislative approval to use the Tax Board's intercept program. The Legislature may be more inclined to support passage of such a proposal if the State Bar can show the results of a cost-benefit analysis. Because the State Bar has not evaluated the various collection options available, it may have chosen collection methods that are not the most cost effective.

Recommendations

To ensure that it maximizes the amounts that it may recover to defray the expense of disciplining attorneys, the State Bar should update annually its formula for billing discipline costs and include due dates on all bills. Additionally, to report accurately its collection amounts and to analyze the effectiveness of its collection efforts, the State Bar should track how much it anticipates receiving against how much it actually receives in payments for discipline costs each year.

To make sure that it is using the most cost-effective methods to recover discipline costs, the State Bar should complete a cost-benefit analysis to determine whether the benefits associated with using collection agencies outweigh the costs. If it determines that the collection agencies are, in fact, cost effective, the State Bar should redirect in-house staff to other disciplinary activities. Finally, the State Bar should also research the various collection options available to it, such as the Tax Board's intercept program.

Chapter 3

AN INCREASING WORKLOAD AND INADEQUATE STAFF LEVELS MAY UNDERMINE THE STATE BAR OF CALIFORNIA'S MONITORING OF ATTORNEYS ON PROBATION

Chapter Summary

As described in the Introduction, the Office of Probation (probation office) for the State Bar of California (State Bar) monitors disciplined attorneys who have been ordered to comply with probation or other conditions imposed by court orders issued by the California Supreme Court or the State Bar Court. The number of attorney disciplinary cases the probation office monitors has risen from 791 at the end of 2004 to 867 at the end of 2008, or nearly 10 percent in five years, resulting in a workload that is difficult for staff to manage effectively. This increase resulted in an average workload, at the end of 2008, of 217 case files for each probation deputy. The probation office believes it is understaffed, and in February 2009 requested an additional probation deputy position. However, it has not determined what a reasonable caseload would be for each probation deputy to effectively monitor disciplined attorneys and is therefore unsure whether its recent request for an additional probation deputy position will fulfill its needs. Until the State Bar determines that its probation deputies have reasonable caseloads, it cannot be sure that they are devoting the amount of attention necessary to effectively monitor probationers.

In addition, although ultimately the probationer is responsible for meeting the terms of probation, delays in the probation office's initial communications with probationers may prevent the State Bar from fully meeting its goal of assisting disciplined attorneys in fulfilling the terms of their probation. Our review of 18 initial letters from probation case files closed in 2008 revealed that eight were sent out late and four of the eight were not sent out until days or weeks after the recipients' respective probationary periods had begun.

Further, according to the *2008 Report on the State Bar of California Discipline System* (annual discipline report), if a disciplined attorney violates his or her probation, the probation office can either bring a motion to revoke the attorney's probation or report the violation to the Office of the Chief Trial Counsel for disciplinary prosecution. However, the probation office has not always made referrals promptly or consistently. In particular, the probation office made 11 referrals to the Office of the Chief Trial Counsel for violations related to eight of the 20 probation case files we reviewed that closed in 2008. However, the probation office referred five of these

cases between 96 and 555 days after the related violations occurred. Further, the probation office was not always consistent or prompt in referring the same types of violations. For example, the probation office took three days to refer one attorney to the Office of the Chief Trial Counsel, and it took 96 days to refer another attorney who committed the same type of probation violation.

Until recently, probation office staff have had little guidance related to timely referral of probation violations. However, under the State Bar's 2008 Long-Range Strategy (long-range strategy), the probation office now attempts to protect the public by making referrals within 30 days of a violation. Because disciplined attorneys are often allowed to practice law during their probationary periods, unnecessary delays in making referrals for violations may allow errant attorneys to continue to practice law and to represent clients, and as a result prevent the probation office from meeting its goal of protecting the public. In addition, such delays may generate the appearance of favoritism.

The Number of Cases the Probation Office Monitors Has Risen in Recent Years

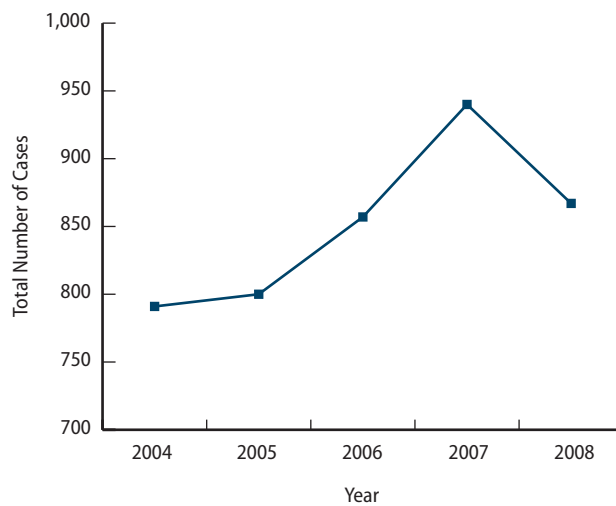
As described in the Introduction, the probation office monitors disciplined attorneys who have been ordered to comply with probation or other conditions imposed by court orders issued by the California Supreme Court or the State Bar Court. According to the 2008 annual discipline report, most attorneys who are subject to discipline other than disbarment are placed on probation that typically lasts one to five years. Over the past five years, the probation office's caseload has increased nearly 10 percent, making it more difficult for its staff to manage disciplined attorneys effectively. Specifically, as shown in Figure 14, the number of cases probation staff monitor has grown from 791 at the end of 2004 to 867 at the end of 2008.

This increase resulted in an average workload, at the end of 2008, of 217 cases for each of the probation office's four probation deputy positions. Although the State Bar generally had four probation deputies working over this period, it experienced some turnover during 2006 and 2007, with one or two positions remaining vacant for a time. This likely contributed to the relatively higher number of cases outstanding at the end of those years. In February 2009 the former chief trial counsel requested an additional probation deputy position because four probation deputies could not keep up with the increasing workload. He indicated that he had authorized overtime for much of 2008 and for January 2009 so that probation

The number of cases probation staff monitor has grown from 791 at the end of 2004 to 867 at the end of 2008.

deputies could work on their caseloads. This may explain the drop in the number of cases from 940 at the end of 2007 to 867 at the end of 2008.

Figure 14
The Number of Open Cases Monitored by Probation Staff at Year-End
2004 Through 2008



Source: The State Bar of California's disciplinary tracking system.

Table 6 on the following page provides a breakdown of the types of cases the probation office monitored from 2004 through 2008. The most notable increase in the probation office's workload relates to the number of Alternative Discipline Program cases (alternative discipline cases). As the table shows, the probation office had only five alternative discipline cases open at the end of 2004, but it had 94 open at the end of 2008.

The State Bar's Alternative Discipline Program addresses the substance abuse and mental health problems of attorneys against whom formal disciplinary proceedings were initiated in the State Bar Court. Starting in 2002 the State Bar Court implemented a system for handling cases associated with the Alternative Discipline Program, and attorney participation has increased steadily since its inception. According to the probation office's supervisor, probation deputies' responsibilities for monitoring alternative discipline cases include additional work that is not typical of other monitoring cases. Specifically, when the State Bar Court schedules a status conference, probation deputies prepare a written report for the court, and sometimes the reports can be time-consuming

due to the staff's need to gather information and documentation from various parties. The supervisor told us that sometimes the probation deputies also attend the status conferences.

Table 6

Type and Number of the State Bar of California's Probation Cases at Year End 2004 Through 2008

	2004	2005	2006	2007	2008
Probation	495	486	508	516	496
Reproval	210	200	174	204	176
Agreements in lieu of discipline	47	49	64	74	76
Rule 9.20*	34	37	52	65	25
Alternative Discipline Program	5	28	59	81	94
Totals	791	800	857	940	867

Source: The State Bar of California's disciplinary tracking system.

Note: See the Introduction for a description of these case types.

* Pursuant to a reorganization of court rules effective January 1, 2007, Rule 955 was renamed Rule 9.20, which includes a requirement for disciplined attorneys to notify their clients of their ineligibility to practice law.

The Office of Probation Has Not Determined Appropriate Workload Levels for Staff to Monitor Probationers Effectively

The probation office believes that it is understaffed, but it is unsure whether its recent request for an additional probation deputy position will fulfill its needs. In a memo to the deputy executive director requesting an additional probation deputy position, the former chief trial counsel noted that with existing caseloads, it has become increasingly difficult, if not impossible, for probation deputies to oversee probation in a timely, effective manner. The memo further notes that an additional probation deputy will reduce the current caseload and increase the probation office's ability to effectively fulfill its function. However, the additional probation deputy will only decrease the overall caseload to around 175 cases per deputy.

Despite these workload challenges, the probation office has not determined what a reasonable caseload would be for each probation deputy to effectively monitor disciplined attorneys. According to the supervisor of the probation office, because of increases in alternative discipline cases and other changes to the probation office's responsibilities, she is still in the process of monitoring staff workloads and determining the appropriate caseload. The supervisor stated that she uses the results of the State Bar's

internal reviews of open case files to assist her in determining how effectively the probation deputies are monitoring probationers. These reviews have highlighted several processing errors, which could be an indicator that the deputies have too many cases. The supervisor also stated that she plans to wait until the two newly hired probation deputies—one hired to fill a vacancy and one to fill the newly authorized probation deputy position—are trained to complete her determination of whether five probation deputies will be adequate to effectively monitor probationers. Until the State Bar determines that its probation deputies have reasonable workloads, it cannot be sure that they are devoting the amount of attention necessary to effectively monitor probationers.

The Office of Probation Is Not Fully Meeting Its Strategic Goals to Help Attorneys Successfully Complete Probation and to Protect the Public

The probation office has not fully met its mission of assisting attorneys to successfully complete probation and of protecting the public because it did not always promptly communicate attorneys' probation terms and did not refer probation violations to the Office of the Chief Trial Counsel consistently or promptly. Specifically, for eight of the 18 initial probation letters that we reviewed from cases closed in 2008, the probation office sent the initial letters communicating the terms of probation to disciplined attorneys between eight and 72 days after it received the related court orders. However, the State Bar's probation deputy manual requires its probation deputies to send a letter to the affected attorney within seven days of receiving the court order. These initial letters remind probationers of their probation terms, deadlines for compliance with probation conditions, and relevant contact information.

Further, four of the eight letters sent after the required date were sent out days or weeks after the respective probationary terms began. For example, one probationer was sent a letter dated 60 days after the date the State Bar received the court order, and by that time deadlines for two of the probation conditions were already past due. This attorney was eventually disbarred for not complying with one of those terms, Rule 9.20, which includes a requirement for disciplined attorneys to notify their clients of their ineligibility to practice law. According to its *Probation Deputy Manual*, the probation office's mission includes helping attorneys comply with the terms and conditions required of them in order to complete probation successfully. Although the probationer is ultimately responsible for meeting the terms of probation, when the probation office sends initial letters later than required by its own procedures, it is not fully meeting its goal to assist attorneys in successfully completing the terms of their probation.

For eight of the 18 initial probation letters that we reviewed, the probation office sent these initial letters communicating the terms of probation to disciplined attorneys between eight and 72 days after it received the related court orders.

For five of the 11 referrals of probation violations that the probation office deputies prepared and sent to the Office of the Chief Trial Counsel, probation deputies took well over a month after the violation occurred to refer the violation.

The supervisor of the probation office attributed the delays in sending out the initial letters to inadequate staffing. As we discussed in the earlier section, determining the appropriate caseloads for staff to effectively perform their jobs is important.

The probation office has also not promptly referred attorneys who have violated their probationary terms to the Office of the Chief Trial Counsel, and in some cases, referred the same type of violation inconsistently. According to the annual discipline report, if a disciplined attorney violates his or her probation conditions, the probation office is authorized to bring a motion in the State Bar Court to revoke the attorney's probation or refer the violation to the Office of the Chief Trial Counsel for disciplinary prosecution. Related to eight of the 20 probation case files we reviewed that the State Bar closed in 2008, probation office deputies had prepared 11 referrals of probation violations to the Office of the Chief Trial Counsel. Probation deputies made one of these referrals in 2004, four in 2006, four in 2007, and two in 2008. For five of the 11 referrals, probation deputies took well over a month after the violation occurred to refer the violation. In fact, the timing of these five referrals ranged from 96 days to 555 days after the violation occurred, with probation deputies taking more than 500 days for two of the referrals. Additionally, the probation office was not always consistent in referring the same types of violations. For example, we reviewed two cases in which attorneys were referred to the Office of the Chief Trial Counsel for violations of Rule 9.20, which includes requirements for notifying clients and other affected parties that they are no longer eligible to practice law. In one case the referral was made after only three days; however, the other was made 96 days after the violation occurred.

Until recently, probation office staff received little guidance related to timely referral of probation violations. In particular, the *Probation Deputy Manual* notes the probation office's responsibility to address noncompliance issues in an expedited manner that is consistent with the fundamental values of fairness, effectiveness, and public protection. The manual also provides general guidance for staff about the circumstances that would warrant referral of probation violations, such as when a probationer fails to submit two or more quarterly or monthly reports. However, the probation deputy manual generally does not clearly define acceptable time frames related to referrals of various probation violations, nor does it delineate when it might be appropriate to delay a referral of a violation for a specified period of time.

The probation office supervisor told us that before 2008, the State Bar did not track the number of days it took for staff to make referrals and had not considered it as a performance indicator. However, under the long-range strategy, the probation office

identified a goal to refer probation violations promptly—within 30 days—to the Office of the Chief Trial Counsel. In the State Bar’s 2009 Strategic Planning Budget, the probation office estimated meeting this goal only 15 percent of the time for 2008. The probation office indicates that one of its initiatives for 2009 is to significantly increase this percentage.

The probation office’s supervisor told us that inadequate staffing was the main reason that the probation office has not made referrals more promptly. She also told us that delays occur as a result of the amount of time that it takes for probation deputies to prepare referrals and because of the time probation deputies spend getting the probationers to complete court-ordered conditions, even if the conditions are past due.

Because attorneys are still often able to practice law during their probationary period, unnecessary delays in making referrals for violations may allow an errant attorney to continue to practice law and represent clients. Further, when the probation office does not make referrals promptly, it is not meeting its goal of protecting the public. Finally, when staff are not consistent or prompt in referring violations, it may create a perception of favoritism or leniency, and could undermine the efforts of the Office of the Chief Trial Counsel to enforce disciplinary standards.

Recommendations

To fulfill its responsibility to protect the public and its mission to assist attorneys to successfully complete the terms of their probation, the State Bar should ensure that it effectively communicates with and monitors attorneys on probation by doing the following:

- Continue its efforts to determine the appropriate caseload level for its staff to effectively monitor probationers and adjust staffing as appropriate.
- Ensure that staff comply with procedures for promptly sending initial letters reminding disciplined attorneys of the terms of their probation.

To make certain that it does not create a perception of favoritism or leniency, the State Bar should increase compliance with its goal to improve timeliness and consistency of probation violation referrals to the Office of the Chief Trial Counsel. If the State Bar believes instances occur when probation staff appropriately deviate from the 30-day goal, it should establish parameters specifying time frames and conditions acceptable for a delay in the referral of probation violations and clearly document that such conditions were met.

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Chapter 4

THE STATE BAR OF CALIFORNIA COULD INCREASE ITS EFFECTIVENESS BY FULLY ADDRESSING INTERNAL AND EXTERNAL REVIEW RECOMMENDATIONS

Chapter Summary

The State Bar of California (State Bar) has received many recommendations for improvement in internal and external reviews of its operations. However, the State Bar has not fully addressed some of these recommendations. For example, in 2007, the State Bar hired a consultant to review its cost recovery processes. The consultant notified the State Bar in October 2007 about several areas of high risk related to its cost recovery processes, such as internal control weaknesses in the oversight of cash receipts, some risks of data discrepancies, and insufficient reconciliation processes. The State Bar expected that its implementation of a new cost recovery system would address these weaknesses. However, it did not obtain the system immediately and is still in the process of implementing it. The importance of fully correcting internal control weaknesses was highlighted subsequent to the consultant's review when the State Bar discovered an alleged embezzlement of almost \$676,000 by a former employee. In response to this event, the State Bar took steps to improve its internal controls by contracting with an independent auditor to review its processes throughout the organization.

Additionally, the State Bar's audit and review unit could do more to ensure that staff receive appropriate training in areas that need improvement. The audit and review unit conducts audits twice a year, reviewing 250 recently closed discipline cases and subsequently preparing a summary of the results and related recommendations. Our review of its most recent five audit summaries found some recurring deficiencies and related recommendations for training. However, according to the audit and review unit manager, no documentation demonstrates the implementation of recommendations. She further stated that managers generally address concerns in other ways, such as discussing specific issues with individuals. Without a formal process to ensure that the recommendations from its summaries are implemented, the audit and review unit is not maximizing the value of its efforts to improve the quality of investigations and prosecutions.

Finally, of the 10 recommendations in our 2007 audit report focused on the State Bar's strategic planning, general fund, and program operations, the State Bar has fully implemented

seven recommendations, but it has implemented only partially the three remaining recommendations. The recommendations that the State Bar has partially implemented relate to improving its collection efforts for discipline-related costs, reducing its disciplinary case backlog, and developing consistency in the State Bar's processing of disciplinary cases through the use of checklists and random audits of discipline files. Consequently, the State Bar has not fully benefited from the recommendations, which were intended to increase the effectiveness of its processes.

The State Bar Has Not Fully Addressed Concerns Identified in a Review of Its Cost Recovery Process

Although the State Bar contracted with a consultant in September 2007 to review interdepartmental processes surrounding its cost recovery processes, including its planned cost recovery system, the State Bar did not fully address recommendations for improving internal control weaknesses that the consultant identified. The consultant's review included an assessment of the State Bar's procedures and processes, relevant risks, and adequacy of internal controls associated with its cost recovery process. In the October 2007 review, the consultant identified several areas of high risk that affected various State Bar units. Specifically, the consultant noted a weakness in the oversight of cash receipts, some risks of data discrepancies due to several manual data entry points, and insufficient reconciliation processes. In one of the specific observations, the consultant noted the lack of strong controls to prevent or detect errors in recording and monitoring payments. Additionally, the consultant noted certain risks associated with this weakness, such as payments not being properly recorded, monitored, or received in a central location. In response to these risks, the consultant recommended that management consider centralizing all collections through member billing.

Although the State Bar had anticipated that the new cost recovery system would resolve deficiencies noted by a consultant it hired in September 2007, the State Bar is still in the process of fully implementing the system.

In response to some of the concerns raised in the consultant's review, the State Bar indicated that it would achieve corrective action through various functions and processes associated with the new cost recovery system it was developing. Although it anticipated that the new cost recovery system would resolve the deficiencies, the State Bar did not obtain the new system immediately and is still in the process of fully implementing it.

The importance of fully correcting internal control weaknesses was highlighted subsequent to the consultant's review when the State Bar discovered an alleged embezzlement by a former employee. In October 2008 the State Bar publicly reported that one of its long-term employees had allegedly embezzled almost

\$676,000 in rents received from tenants of its San Francisco headquarters building. The State Bar's chief financial officer told us that the employee was able to reorganize and consolidate under her sole control, the process of invoicing building tenants and receiving payments—initially two separate duties involving two staff—without the knowledge of the finance office. The chief financial officer also told us that the employee verbally directed several building tenants to make rents payable to an account under the employee's control. Because the employee had taken over the responsibility for collecting the checks and submitting them to the finance office for deposit, the employee was able to intercept the checks and divert them to a personal account.

According to the chief financial officer, after the State Bar discovered the possible embezzlement, it placed the employee on administrative leave and subsequently terminated her. The State Bar also requested a criminal investigation and filed an independent civil action against the former employee. In response to this event, the State Bar took steps to improve its internal controls by contracting with an outside auditor to evaluate the internal controls over the specific area in which the alleged embezzlement occurred. According to the chief financial officer, the State Bar has already implemented some changes to its procedures and plans to implement other recommendations in the near future once the auditor's work is complete. For example, different staff within the State Bar's Office of Finance now send invoices to building tenants and receive payments. In addition, the State Bar's Department of Operations now prepares a tenant ledger summarizing the future expected rental incomes for each tenant. We reviewed a sample of the changes the State Bar said it made after discovering the alleged embezzlement and found it has implemented them.

According to the chief financial officer, the auditor is currently in the process of evaluating internal controls throughout the organization, specifically those controls over cash receipts, procurements and disbursements, payroll, budgeting, grants, treasury functions, and financial reporting. After completion of the first phase of the project, which focused on the risks and controls related to the State Bar's cash receipts process, the auditor began providing training concerning those controls. The chief financial officer stated that the State Bar expects the training sessions to educate key personnel in how to identify risks to the organization, communicate the importance of internal controls, and identify and implement a process for State Bar personnel to assess and monitor risks.

When the State Bar discovered a possible embezzlement, it placed the employee on administrative leave and subsequently terminated her employment, and took steps to improve its internal controls.

The State Bar's Audit and Review Unit Could Be More Effective by Ensuring Its Recommendations Are Implemented

In keeping with one of its goals to enhance the quality of the Office of the Chief Trial Counsel's investigations and prosecutions, the State Bar's audit and review unit has identified some recurring deficiencies and related recommendations for training during its periodic audits of case files. However, it could do more to ensure that staff receive appropriate training in areas that need improvement. In August 2004 the State Bar created an internal audit and review unit to handle complainant requests for review of a decision by the Office of the Chief Trial Counsel to close his or her complaint without disciplinary action. In addition to its review function, through which staff receive and review requests to reopen cases from complainants, the unit serves an audit function.

According to State Bar policy, for the audit function, twice each year staff in the unit review at least 250 recently closed disciplinary cases and complete a checklist to determine whether staff followed specific requirements and whether the files include appropriate documentation. After each audit, the audit and review unit prepares a summary report of the deficiencies found and submits it to the Office of the Chief Trial Counsel for consideration. The summary also identifies training opportunities. According to the audit and review manager, she makes such recommendations in areas where errors could be avoided by training staff to properly follow policies and procedures.

Although the State Bar's internal audit and review unit identified recurring deficiencies and related recommendations for training from September 2005 through February 2008, the unit did not have any documentation that the recommendations were implemented.

We reviewed five audit summaries covering September 2005 through February 2008 and noted several recurring deficiencies and related recommendations for training. For example, the audit and review unit recommended training for staff in the proper procedures for filling out a document specific to cases that proceed to trial in each of the five summaries. In the most recent of these summaries covering September 2007 through February 2008, the audit and review unit noted 31 instances when this document was not signed and 26 cases in which this document was not prepared at all. The summary also identified 36 instances in which staff did not send appropriate letters to complainants, respondents, or witnesses and the audit and review unit recommended that training be conducted on the proper procedures for sending the appropriate letters. Unit staff also noted this condition in the previous summary covering March 2007 through August 2007.

When we asked the State Bar for documentation that it had followed up on these and other recommendations from its audits, the audit and review manager told us no documentation of the implementation of recommendations exists. She further stated that the managers within the units generally address concerns

through a combination of discussing specific issues with State Bar staff, discussing general issues at their unit meetings, informally reminding unit staff, or raising the issues with supervisors.

When we asked about the possibility of conducting training to address the issues identified in the audits, the audit and review manager stated it is possible but unnecessary and potentially inefficient. She stated that the major issues identified in the audits have improved over time. However, based on our review, the number of recurring deficiencies present in the summaries suggests the need for a more formal process of ensuring corrective action. The audit and review manager expressed concerns about the cost of creating and implementing a formal process of following up on the implementation of its recommendations. Nonetheless, the audit and review unit itself made these recommendations for added training. Moreover, without a formal process to ensure that its recommendations from the audit summaries are implemented, the audit and review unit is not maximizing the value it can add to improve the quality of investigations and prosecutions.

The State Bar Has Partially Implemented Three and Fully Implemented Seven of Our 2007 Audit Recommendations

Our April 2007 report titled *State Bar of California: With Strategic Planning Not Yet Completed, It Projects General Fund Deficits and Needs Continued Improvement in Program Administration* (2007-030), included 10 recommendations to the State Bar. Table 7 on the following page summarizes the status of the State Bar's efforts to implement these recommendations. The State Bar has fully implemented seven of the recommendations related to improvement of its strategic plans and tracking and monitoring grant recipients under its legal services trust fund program. However, it has only partially implemented the three other recommendations related to improving the State Bar's disciplinary system, which is also the subject of the current report.

In the following subsections we update the status of the three recommendations from our April 2007 report that the State Bar has not fully implemented. In addition, although we believe the State Bar has successfully implemented our prior recommendations related to its strategic planning efforts, we highlight a continuing challenge related to the implementation of the information technology portion of the strategic plan.

Table 7
Implementation Status of the Recommendations From the State Auditor's 2007 Report

RECOMMENDATIONS	IMPLEMENTATION STATUS
To ensure that the strategic plan is fully implemented in an effective and timely manner, the State Bar of California (State Bar) should do the following:	
1. Complete revisions of the departmental plans that will serve to implement the board of governors' strategic goals and ensure that each departmental plan contains meaningful performance indicators that will measure how successfully goals are being met.	✓
2. Limit performance measurement to indicators that can be accurately tracked on an ongoing basis and measure desired outcomes.	✓
3. Ensure that departments, during their departmental plan revision process, identify the objectives and performance measures that can be attained, considering existing resource levels and information technology capabilities. In addition, on an ongoing basis the departments should revise their annual action plans to update this information given additional information technology upgrades.	✓
4. Take the steps necessary to ensure information technology systems can capture the required performance measurement data to support the projects needed to accomplish strategic-planning objectives, or devise alternative means of capturing this data such as using a Microsoft Excel spreadsheet.	✓
5. To ensure that it maximizes collection efforts and its ability to implement the Rules of Court as soon as the California Supreme Court approves procedures allowing their use, the State Bar should complete its database and input all available information on the Client Security Fund and disciplinary debtors, implement its proposed policy for pursuing debtors, and complete its assessment of the costs and benefits of reporting judgments to credit-reporting agencies.	■
6. To effectively allocate its resources and justify its membership fees, the State Bar should align its budgets with the results of its strategic planning process.	✓
7. To ensure that it receives all of the trust account interest income available for its legal services program, the State Bar should consider conducting activities, such as interviewing or surveying a sample of members who do not report whether they have established trust accounts. This would allow the State Bar to determine whether some members are holding clients' funds without establishing trust accounts and remitting the interest to the State Bar. If the State Bar finds that nonreporting members do, in fact, hold client funds that are nominal in amount or are held for a short period of time, it should seek the authority to enforce compliance reporting.	✓
8. To properly monitor recipients of grants under its legal services program, the State Bar should ensure that it performs and documents all required monitoring reviews and should develop a plan to perform the fiscal on-site monitoring visits that were not performed while staying current with its ongoing monitoring requirements.	✓
9. The State Bar should continue its efforts to reduce the backlog of disciplinary cases to reach its goal of having no more than 200 cases.*	■
10. The State Bar should ensure that staff use checklists of significant tasks when processing case files and fully implement its 2005 policy directive for random audits of case files by the supervising trial counsel.	■

Sources: Bureau of State Audits' (bureau) report, titled *State Bar of California: With Strategic Planning Not Yet Completed, It Projects General Fund Deficits and Needs Continued Improvement in Program Administration* (2007-030), issued in April 2007, and bureau analysis during the current audit.

* Since the 2007 report, the State Bar has changed its backlog goal to having no more than 250 cases in backlog at year-end.

✓ = Implemented.

■ = Partially Implemented.

The State Bar Needs to Continue Improving Its Cost Recovery Efforts

In addition to the new concerns we have raised in Chapter 2 of this current report, the State Bar has also not fully implemented our 2007 recommendation regarding its recovery of discipline-related costs. Effective April 2007, the California Supreme Court approved a rule that authorized the State Bar to enforce as a money judgment, disciplinary orders directing payments of costs. As previously discussed in Chapter 2, a money judgment is an order entered by a court that requires payment of money. Previous to this new authority, the State Bar relied on billing attorneys through their annual membership bills and contracting with a collection attorney to recover discipline-related costs. In 2007 we recommended that, after the Supreme Court's approval, the State Bar should complete its cost recovery database and input all available information on the Client Security Fund and on disciplinary debtors, implement its proposed policy for pursuing debtors, and complete its assessment of the costs and benefits of reporting judgments to credit-reporting agencies. According to the chief financial officer, the completion of the database would allow the State Bar to track all discipline costs and reimbursements, as well as the expenses associated with billing and collecting these amounts, in a single program, enabling all departments to be more efficient when performing their specific job functions related to billing and collecting discipline costs.

Although the State Bar has implemented its pursuit policy and obtained its new database that will capture amounts owed and payments received from individual debtors, it has not yet entered all of the Client Security Fund and disciplinary debtors' information. In May 2009 the State Bar's acting general counsel stated that he expects the new database to be fully online within 60 days.

The State Bar Is Continuing Its Efforts to Reduce the Backlog of Disciplinary Cases, but It Has Not Yet Reached Its Goal

The State Bar has only partially implemented our 2007 recommendation related to its reduction of backlogged cases. Although the State Bar reported in its *2008 Report on the State Bar of California Discipline System* that it has decreased its disciplinary case backlog from 327 cases in 2007 to 311⁵ cases in 2008, it has still not reached its most recent goal of having no more than 250 backlogged cases. As discussed in Chapter 1, the State Bar

Although the State Bar reported that it has decreased its disciplinary case backlog from 327 cases in 2007 to 311 in 2008, it has not reached its goal of having no more than 250 cases backlogged.

⁵ In 2008, the State Bar discontinued including cases in its backlog where a special deputy trial counsel was appointed to act in the chief trial counsel's place, even though these types of cases were included in previous years. For consistency, we include these 21 cases as part of the State Bar's 2008 backlog.

considers a case part of its backlog when its staff has not resolved the case within six months of its receipt or when the State Bar designates the case as complex and has not resolved it within 12 months of receiving the complaint.

As reported in our 2007 audit, the State Bar told us that its backlog goal of 200 cases was an aggressive goal and that it would take additional effort to lower the number of backlogged cases. Specifically, in our 2007 report, the State Bar asserted that the goal was based on historical data about backlogged cases, 2006 staffing issues, and the former chief trial counsel's experience with handling disciplinary cases. In response to our audit finding, the former chief trial counsel noted that it revised its goal to 250 cases. Despite the increase in its target, the State Bar has still not reached the new goal. The former chief trial counsel told us that the office is taking steps to reduce the backlog, such as establishing incremental goals to reach its target and creating regular backlog reports to update the appropriate staff.

The State Bar Should Use Checklists for Processing Discipline Cases and Perform Random Audits More Consistently

The State Bar has not fully implemented the recommendations from our 2007 audit related to its processing of disciplinary case files.

The State Bar has not fully implemented the recommendations from our 2007 audit related to its disciplinary case files. In this recommendation, we identified two State Bar policies established in 2005 to improve its processing of disciplinary cases. The first policy directs staff to use checklists to record significant tasks completed during processing. In our current review of 10 case files sent to investigation in 2007 or 2008, although checklists were present, we found that eight were incomplete and supervisors had not signed off on three. The second policy directs supervising trial counsels to randomly audit one open investigation file each month for each investigator under their supervision. The policy also requires supervising trial counsels to report on May 1 and November 1 of each year a summary of the results of these audits to their deputy chief trial counsel. In our current review, we found inconsistent compliance with the random audit policy. Specifically, two of four units could not demonstrate that they had completed all of the random audits. A deputy chief trial counsel acknowledged that not all required audits had been performed in 2008 for one of the four units. For another unit, an assistant chief trial counsel stated that the State Bar did not have documentation for some of the audits. Regarding the preparation of summaries related to the results of the random audits, only one of the four units completed the summaries on time. For another of the four units, the State Bar could not provide any evidence that the summaries were ever prepared. Although the remaining two units prepared summaries, they did not do so in a timely manner. In one case, although the

unit's summaries were due May 1 and November 1, 2008, the supervising trial counsel submitted both of them in February 2009. For the other unit, the summary due on November 1, 2008, was completed in March 2009.

The State Bar Has Improved Its Strategic Plan but Cannot Implement the Information Technology Portion of the Plan Without Additional Resources

Although the State Bar implemented the four recommendations from our 2007 audit related to updating its strategic plan, as shown in Table 7, it has only secured funding for a portion of its planned technology initiatives. Of particular note, the fourth recommendation on Table 7 reflects our recommendation that the State Bar should either take the steps necessary to ensure that its information technology systems can capture the required performance measurement data to support the projects needed to accomplish strategic planning objectives or devise alternative means of capturing this data, such as using a Microsoft Excel spreadsheet. During our current review we found that departments currently use Microsoft Excel spreadsheets or other methods to capture this information. The manager of planning and administration indicated that the State Bar plans to implement a new information technology system that will capture this strategic planning data and allow centralized access to the departments' performance indicators. For purposes of the summary presented in Table 7, we noted that the State Bar has fully implemented the recommendation because it is using methods, including Microsoft Excel spreadsheets, to capture performance measurement information. However, since it has yet to implement the new information technology system, we examined the status of its efforts in more detail as part of our current audit.

Overall, we found that the State Bar has developed detailed plans related to its information technology needs. However, it does not yet have funding to accomplish all of its planned information technology goals and objectives. Specifically, we reviewed the State Bar's Information Technology Strategic Plan (IT plan). In March 2009 a consultant hired by the State Bar finalized the IT plan, which outlined the State Bar's strategic goals and objectives for information technology. It included an implementation plan that identified steps the State Bar determined were necessary to attain its vision for information technology. We reviewed the IT plan's strategic goals and objectives as well as the implementation plan and verified that they are in alignment. In addition, we determined that the IT plan's goals and objectives are in alignment with the State Bar's 2008 Long-Range Strategy. Further, between November 2006 and April 2009, contractors hired by the State Bar finalized business cases related to acquiring new

Although the State Bar has developed detailed plans related to its information technology needs, it does not yet have funding to accomplish them.

admission, association management, case management, and court case management systems. Planning for these new systems was also included in the IT plan.

Although the planning efforts related to its information technology needs are detailed, the State Bar has yet to secure funding for all of its plans. According to its chief information officer, the State Bar proposed a fee increase for the 2007 fee authorization bill to pay for upgrades outlined in the IT plan. The chief information officer estimated that these upgrades would cost \$22 million. He told us that the State Bar originally proposed an increase in member fees of \$25 per year over five years to fully fund these costs. However, the Legislature approved only a \$10 fee increase, which the State Bar began assessing on each active member beginning in 2008. The State Bar has determined that this amount would only cover upgrades that addressed the most minimal needs, such as replacing computers and printers. The chief information officer estimates that the State Bar will receive a total of approximately \$5.1 million over three years from the \$10 fee increase.

The chief information officer estimates that funding the remaining phases of the IT plan upgrades will cost an additional \$17 million. He also stated that a request to extend the initial information technology special fee assessment would be part of the State Bar's overall funding strategy based on needs and resources available next year when the sunset of the current fee legislation will come before the Legislature. If followed, the State Bar's implementation plan, which aligns with its IT plan, will prove useful in justifying additional funding for the State Bar's upgrade of information systems.

Recommendations

To ensure that it has adequate internal controls in place, the State Bar should fully implement recommendations from audits and reviews of the State Bar and its functions. Further, the State Bar should ensure that its new cost recovery system and related processes address the issues identified in the consultant's 2007 report on its cost recovery process.

To improve its effectiveness, the State Bar's audit and review unit should establish a formal process to follow up on and ensure implementation of recommendations from its twice-yearly audits.

The State Bar should continue acting on recommendations from our 2007 report related to the following:

- Continue its efforts to enter all of the Client Security Fund and disciplinary debtor information into its database.
- Take steps to reduce its inventory of backlogged cases.
- Improve its processing of disciplinary cases by more consistently using checklists and performing random audits.

To ensure that it can justify requests to fund the remaining information technology upgrades, the State Bar should follow its IT plan.

We conducted this review under the authority vested in the California State Auditor by Section 8543 et seq. of the California Government Code and according to generally accepted government auditing standards. We limited our review to those areas specified in the audit scope section of the report.

Respectfully submitted,



ELAINE M. HOWLE, CPA
State Auditor

Date: July 21, 2009

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For questions regarding the contents of this report, please contact Margarita Fernández, Chief of Public Affairs, at 916.445.0255.

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(Agency response provided as text only.)

July 6, 2009

The State Bar of California
180 Howard Street
San Francisco, California 94105-1639

Elaine M. Howle, State Auditor*
Bureau of State Audits
555 Capitol Mall, Suite 300
Sacramento, CA 95814

Re: State Bar of California Response to State Audit Report of July, 2009

Dear Ms. Howle:

Please find enclosed the response of the State Bar of California to State Audit Report 2009-030 (July 2009).

Consistent with your request, we have submitted this written response in the envelope provided and the entire response, including this cover letter, has been reproduced on the enclosed diskette, using a Microsoft Word file.

I wish to extend my thanks to the audit team and appreciate their hard work in preparing the report. We look forward to working with you and your staff as this process continues.

Sincerely yours,

(Signed by: Judy Johnson)

Judy Johnson
Executive Director

Enclosure

* California State Auditor's comments begin on page 79.

Chapter 1

Recommendation No. 1

To explain and justify cost increases, and to measure the efficiency of its disciplinary system as well as the impact of policy changes, the State Bar should account separately for the expenses associated with the various functions of the disciplinary system, including its personnel costs. This can be accomplished through a time study of staff time and resources devoted to a specific function. The State Bar should also ensure that all of its offices track expenses consistently.

• Response

- ① The State Bar agrees. Beginning with its 2010 budget, the State Bar will explore ways to separately budget and account for the various discrete functions of the disciplinary system.

• Comments

The State Bar can only estimate the costs of each of its discrete disciplinary functions because from time to time Office of the Chief Trial Counsel staff must be reassigned from one functional unit to another to meet changing demands in public protection over which the State Bar has little control. Readjusting cost centers at different times during the year to track actual costs of the functional divisions may be problematic.

Recommendation No. 2

The State Bar should adjust its methodology going forward for calculating case processing times for investigations so that the calculations include time spent to process closed and forwarded cases for the relevant year only. For example, for its 2009 annual discipline report, the State Bar should report the average processing time for only cases closed or forwarded in 2009.

• Response

The State Bar agrees. Beginning with its annual discipline report in 2010, the State Bar will include the average case processing time for cases closed or forwarded by relevant year.

• Comments

- ② Additionally, to comply with the requirements of Business and Professions Code section 6086.15, subdivision (b), the State Bar will continue to use its current methodology for three additional years. The State Bar agrees that it should use the most accurate method for computing the average time for resolved investigations. Using the suggested methodology may improve tracking of year-to-year trends and provide a more accurate method for computing the average time for resolved investigations. While the methodology recommended by the state auditors differs from the one the State Bar has historically used, the data yielded from these calculations varies only slightly. For example, using its methodology, the State Bar calculated average time in days for resolved investigations in 2007 at 186. The state auditors' suggested methodology calculated the 2007 average case processing time at 202, a difference of 16 days. The State Bar believes
- ③

**Response to DRAFT Report of the State Auditor
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that the primary reasons for the relatively slight increases in case processing times over the four-year period reviewed by the state auditors is due to the more sophisticated and complex nature of attorney misconduct cases.

Recommendation No. 3

The State Bar should include additional information regarding backlog in its annual discipline report to the Legislature. Specifically, the State Bar should identify the number of complex cases over 12 months old in its backlog.

• Response

The State Bar agrees. Beginning with its annual discipline report in 2010, the State Bar will specifically identify the number of complex cases over 12 months of age within its backlog.

• Comments

Historically, the State Bar's annual discipline report has contained information about the age of complaints at year's end as well as the number of complaints between 13 and 21 months of age, and the number of complaints that are more than 21 months of age. Moreover, all cases over 12 months of age are—by statute—backlogged cases. (See Bus. & Prof. Code, section 6094.5.) The State Bar will clarify and identify complex investigations over 12 months of age, stating that number in the aggregate and indicating that such matters are backlogged.

Recommendation No. 4

The State Bar should identify in its annual discipline report the types of cases that it does not include in its calculations of backlog and explain why it chooses to exclude those cases. Specifically, the State Bar should identify that it presents its backlog by case, rather than by member, and that it does not include intake, non-attorney, abated and outside examiner cases.

The State Bar should identify the composition of each year's backlog to allow for year-to-year comparisons, as the law requires.

• Response

The State Bar agrees. Beginning with its annual discipline report in 2010, the State Bar will identify in each annual discipline report the types of cases that are not included in the backlog and an explanation of the legal, practical, and policy rationales for excluding certain types of matters from backlog calculation. (See comment below.) The State Bar will also indicate that it presents its backlog by case and *not* by the number of attorneys involved in the case.

Response to DRAFT Report of the State Auditor

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• Comments

The State Bar has not included the following types of matters in its backlog calculation:

- **Non-attorney matters:** While statutes provide for civil remedies that may be exercised against unlicensed persons who are illegally engaged in the unauthorized practice of law, these remedies are enforced in the state courts—outside of the State Bar’s disciplinary system—and generally in conjunction with state or local law enforcement officials in related criminal prosecutions. By definition, disciplinary proceedings apply only to attorneys who are members of the State Bar, and the statutory term “backlog” is applicable only to those matters.
- **Abated Matters:** Cases are abated when it is unlikely they will be investigated or prosecuted due to other circumstances. These circumstances include a lawyer’s serious mental or physical infirmity or the lawyer’s disbarment or disciplinary resignation. A small number of cases are abated due to a related pending proceeding in another court system. Once resolved, the State Bar can investigate quickly, relying on the facts and evidence developed in the other proceeding.
- **Cases Handled by Outside Examiners:** Occasionally, the State Bar should not review or prosecute some matters because of a conflict of interest, for example, complaints of attorney misconduct involving a member of the Board of Governors or a staff attorney. Such matters are referred to outside examiners and are pursued independently of the State Bar. The Office of the Chief Trial Counsel has no control over these matters and is careful to avoid any perception of involvement.
- **Re-Opened Cases:** In calculating its case backlog since 2006, the State Bar considers only the number of days or months a matter is actually under investigation. Often a case is closed after several weeks or months. If new information is received later or a “second look” is indicated, the same matter may be reopened. The six-month clock begins to run again from the time the matter is reopened. The intervening days or months during which the case was closed should not be considered as part of the backlog calculation.

We do not object to identifying the above-referenced matters in our annual discipline report. The State Bar agrees that providing additional information about other types of cases it handles may be helpful to stakeholders in evaluating the overall workload and performance of the State Bar.

Because a “complaint” arises out of a discrete set of facts and issues, varying little with the number of respondent attorneys involved, the State Bar believes that counting and reporting its inventory by the number of “complaints” on file and in backlog status—regardless of the number of attorneys listed in the complaint—is the most accurate method of depicting workload.

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Chapter Two

Recommendation No. 5

To ensure that it maximizes the amounts that it may recover to defray the expense of disciplining attorneys, the State Bar should update annually its formula for billing discipline costs and include due dates on all bills.

Additionally, to report accurately its collection amounts and to analyze the effectiveness of its collection efforts, the State Bar should track how much it anticipates receiving against how much it actually receives in payments for discipline costs each year.

• **Response**

The State Bar agrees.

Recommendation No. 6

To make sure that it is using the most cost-effective methods to recover disciplinary expenses, the State Bar should complete a cost-benefit analysis to determine whether the benefits associated with using collection agencies outweigh the costs. If it determines that the collection agencies are, in fact, cost effective, the State Bar should redirect in-house staff to other disciplinary activities. Finally, the State Bar should also research the various collection options available, such as the Franchise Tax Board's Interagency Intercept Collections Program.

• **Response**

The State Bar agrees. The State Bar, however, notes a prior recommendation that it pursue participation in the Franchise Tax Board's Interagency Intercept Collections Program was unsuccessful for other public policy reasons. (See comment below.)

⑤

• **Comments**

In 2001, the State Auditor recommended that "the State Bar should pursue additional collection efforts, such as participation in the State's Offset Program." (California State Auditor, Report No. 99030, p. 21.) The State Bar's proposed legislation for that purpose was rejected. After observing the public interest advanced through the intercept program, the legislative analysis of the State Bar's proposal stated: "It does not seem that ensuring that Bar members repay their disciplinary and Client Security Fund costs, so that the annual bar dues could be reduced, rises to the same public purpose, enough to use the Franchise Tax Board as a collection agency." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 352 (2001-2002 Reg. Sess.) as amended April 30, 2001, p. 7.) Since then, the State Bar has successfully pursued other collection methods, including the use of collection agencies and the change in law to allow for automatic judgments on discipline orders imposing costs and CSF restitution.

⑥

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Chapter Three**Recommendation No. 7**

The State Bar should continue its efforts to determine the appropriate caseload for its staff to effectively monitor probationers and adjust staffing as appropriate.

• Response

The State Bar will continue its ongoing efforts to determine the appropriate caseload for its staff to effectively monitor probationers and adjust staffing as appropriate.

• Comments

- ⑦ In 2009, the Office of the Chief Trial Counsel sought authorization for and hired, an additional probation deputy. The Office of Probation now has 5 full-time deputies.

Recommendation No. 8

The State Bar should ensure that staff complies with procedures for promptly sending initial letters reminding disciplined attorneys of the terms of their probation.

• Response

- ⑧ In 2008, the State Bar revised its timeline for sending initial letters to a more realistic 14 days. The State Bar has set policy and procedural guidelines for its staff and will continue to strive to ensure compliance.

• Comments

It should be noted, however, that probationers are already fully aware of the obligations and conditions of probation, having received either a written stipulation or a State Bar Court decision and, in all cases except those imposing a reproof, a California Supreme Court order imposing discipline and probationary terms.

- ⑨ Lawyers are expected to obey court orders without reminders from the Office of Probation.

Recommendation No. 9

The State Bar should increase compliance with its goal to improve timeliness and consistency of probation violation referrals to the Office of the Chief Trial Counsel. If the State Bar believes there are instances when it is appropriate for probation staff to deviate from its 30-day goal, it should establish parameters specifying timeframes and conditions acceptable for a delay of probation violations.

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• Response

Timeliness and consistency in referring probation violations to the Chief Trial Counsel are important goals, both in terms of public protection and rehabilitation. The probation staff bases a referral for probation violations on the facts and circumstances as well as the exercise of appropriate discretion and judgment in consultation with their attorney supervisors. An inflexible set of guidelines, parameters or timeframes is neither reasonable nor practical. To impose rigid referral standards may also result in the expenditures of resources when there is no reasonable expectation that the State Bar Court will revoke probation.

⑩

• Comments

The State Bar has no additional comments regarding this recommendation.

Chapter Four

Recommendation No. 10

The State Bar should implement promptly recommendations from audits and reviews of the State Bar and its functions. Further, the State Bar should ensure that its new cost recovery system and related processes address the issues identified in the 2007 report on its cost recovery process.

⑪

• Response

The State Bar agrees. The State Bar has implemented changes in its manual and automated processes and controls to address issues raised in the 2007 report on its cost recovery process. These processes and controls apply to the new cost recovery system.

⑫

• Comments

The State Bar expects to complete uploading of data from its AS400 system to its new cost recovery system before mid-July.

Recommendation No. 11

The State Bar's audit and review unit should establish a formal process to follow up on and ensure implementation of recommendations from its twice-yearly audits.

• Response

The State Bar agrees. We will establish a process by which the audit and review unit conducts twice-yearly training sessions to review audit findings and advise staff regarding the unit's recommendations.

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• Comments

The audit and review unit has found that the overwhelming majority of cases are handled appropriately in all meaningful respects, even given the sheer volume of cases processed by the Office of the Chief Trial Counsel. The practice of allowing individual unit managers to informally review problems has, to date, paid off. As the most recent audit and review report concluded, many of the issues or problems that had appeared previously "have been significantly improved and/or been corrected."

The State Bar concurs that there is value in formalizing the process by which staff is informed of the findings and recommendations of each audit. The State Bar believes this can be best accomplished by having the audit and review unit conduct training sessions for the attorneys and investigators, rather than individual unit managers, following the release of each audit report.

Recommendation No. 12

The State Bar should continue taking steps to reduce its inventory of backlogged cases.

• Response

Although the current backlog level is certainly reasonable, the State Bar generally agrees that it is important to continue to take steps to reduce its inventory of backlogged cases.

• Comments

- ⑬ The discipline unit's primary goal is public protection. We therefore give higher priority to serious attorney misconduct than less serious complaints that may be older. The case backlog is simply a measure of the timeliness of the investigation process and should not be the only tool used to assess the State Bar's public protection efforts. At the end of 2008, the backlog number was 290, the second lowest in the last ten years. Furthermore, in most years, despite increasing case complexity, approximately 80 percent of all investigations are completed within the normative guidelines of the backlog statute.

Recommendation No. 13

The State Bar should continue improving its processing of disciplinary cases by more consistently using checklists and performing random audits. The State Bar should also continue its efforts to enter all of the Client Security Fund and disciplinary debtor information into its database.

• Response

- ⑭ The State Bar believes that there is some merit in the use of checklists, but that their importance has been overstated. The State Bar believes that the audits conducted by Audit and Review— its so-called "second look" procedure and monthly random audit of open investigations – are a better check to ensure quality and proper case handling. Audit and Review should consider and review "checklist compliance" as well as other quality assurance measures.

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Recommendation No. 14

To ensure that it can justify requests to fund the remaining information technology upgrades, the State Bar should follow its information technology strategic plan.

• **Response**

While allowing for modification of the plan to reflect continuing technological advancements and changes in the Bar's staffing levels and mission, the State Bar generally agrees that it should continue to follow its technology strategic plan.

• **Comments**

The State Bar's ability to implement its technology strategic plan is obviously dependent on its ability to obtain adequate additional sources of revenue to fund its IT efforts. Legislative authorization for such additional resources can lead to long-term cost savings, especially if a member and stakeholder interface can be made interactive and online.

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Comments

CALIFORNIA STATE AUDITOR'S COMMENTS ON THE RESPONSE FROM THE STATE BAR OF CALIFORNIA

To provide clarity and perspective, we are commenting on the response to our audit report from the State Bar of California (State Bar). The numbers below correspond to the numbers we placed in the margins of the State Bar's response.

Although the State Bar states that it agrees with our recommendation, from its response it is unclear how it specifically intends to address the recommendation. We look forward to the State Bar's six-month response for specific proposals on how it will separately budget and account for the functions of the disciplinary system. As stated in our recommendation, the State Bar could conduct a time study of staff time and resources devoted to a specific function. For example, the State Bar could track the staff time and resources spent on a sample of cases. This would not only allow the State Bar to more effectively measure its costs based on empirical data, but would also help it to identify any delays that may occur in its processing of cases.

①

By stating that it will continue to use its current methodology for three additional years, we take this to mean that the State Bar will be reporting two separate case processing times in its 2009, 2010, and 2011 annual discipline reports—one based on our suggested methodology and another based on its current methodology which, as we state on page 34, is not a meaningful measure of yearly case processing time.

②

Although the State Bar is correct in noting the 16-day variance between its calculation and our calculation of its 2007 average case processing time, we would not characterize the State Bar's understatement of average case processing time as slight given the impact of the variances over multiple years. In particular, because the State Bar averages the case processing time for every case closed since 1999, it has reported a four-year decreasing trend to the Legislature, even though the trend has actually increased as described on page 35 of our report. If the State Bar does not change its methodology, it will continue to misrepresent its true case processing time.

③

- ④ We believe the information the State Bar intends to provide in its annual discipline reports to the Legislature will be helpful in evaluating the State Bar's performance. However, we note that the State Bar omitted in its response any discussion of the cases that remain in the intake unit beyond six months. As shown in Table 3 on page 38, there were 32 cases that remained in the intake unit for more than six months in 2008, and the State Bar reported a total backlog of 290 for that year. We believe it is important for the State Bar to inform its stakeholders, including the Legislature, that it does not include these types of cases in its backlog calculations.
- ⑤ We acknowledge on page 48 of our report that the State Bar was not successful in gaining legislative approval to use the Franchise Tax Board's Interagency Intercept Collections Program in 2001. However, we also note on that same page that if the State Bar does conduct a cost benefit analysis of its current collection methods and finds that they are not beneficial, it may be worthwhile to again seek legislative approval.
- ⑥ We are puzzled that the State Bar characterizes its current collection methods as successful when it has not conducted any cost benefit analyses, and when the costs of some of its collection efforts outweighed the benefits. For example, on page 46, we describe how the State Bar paid its collection attorney \$19,400 in 2007, even though the attorney collected only \$11,600 in discipline payments.
- ⑦ Although we acknowledge the State Bar recently hired a fifth probation deputy, as we state on page 53, the supervisor of the probation office stated she has not yet determined whether five deputies will be adequate to effectively monitor probationers.
- ⑧ Although the State Bar asserts in its response that in 2008 it revised its timeline for sending initial letters to a more realistic 14 days, we note that its *Probation Deputy Manual* dated March 2009 does not reflect this revision.
- ⑨ The State Bar's comment that lawyers are expected to obey court orders without reminders from the Office of Probation (probation office) is puzzling in light of the office's mission and existing policy. In particular, as we state on page 53, part of the probation office's mission is to assist attorneys to successfully complete the terms of their probation. We understood that the State Bar viewed its practice of sending initial letters to probationers as an important step in accomplishing the office's mission because it established a policy for its probation deputies to send the initial letters within a certain number of days. In contrast to this policy, the State Bar's comment here suggests that sending these letters is not important.

We are not suggesting that the State Bar impose inflexible guidelines or set rigid referral standards. Instead, we believe that the State Bar would benefit from establishing a thoughtful referral policy that allows for discretion while also maintaining reasonable and consistent standards. As we describe beginning on page 54, our concerns are based on the fact that probation violations were referred a significant number of days after the related violations occurred or the same types of violations were referred inconsistently. For example, for five of 11 referrals we reviewed, the probation office took from 96 days to 555 days after the violations occurred to make the referrals. In addition, we noted that the probation office took three days to refer one attorney to the Office of the Chief Trial Counsel but took 96 days to refer another attorney for the exact same violation. Discrepancies such as these, if not properly justified or documented, can lead to the appearance of favoritism or leniency.

⑩

Further, it is unclear why the probation office would have established a goal of making referrals within 30 days if the State Bar did not believe staff could meet this goal for a majority of its cases. We appreciate that certain circumstances may prevent the probation office from meeting its 30-day goal. However, we believe it is reasonable for the State Bar to establish a set of circumstances where it is appropriate for staff to make a judgment to deviate from the 30-day goal, and to establish a reasonable time frame for a delay in the referral. Equipped with such guidelines, probation office staff would be able to document their rationale for deviating from the policy.

Based on a concern raised by the chief financial officer while the State Bar was reviewing our draft report, we changed the wording in the recommendation from “promptly” to “fully.” We believe that this change properly highlights the need for the State Bar to fully address recommendations made in reviews.

⑪

We were not able to verify whether the changes the State Bar refers to in its response adequately address the issues because it did not inform us of these changes until after it had received a draft copy of our report. Further, because the new cost recovery system is not yet fully functional, we could not determine whether the system will correct the identified issues, nor were we able to assess the reliability of the data.

⑫

We do not suggest that measuring backlog is the only tool that can be used to assess the State Bar’s public protection efforts. We also disagree with the State Bar’s characterization of the backlog’s importance. Promptly processing discipline cases is not only fundamental to the State Bar’s mission of protecting the public,

⑬

but also provides a key performance measure that informs the Legislature of the effectiveness of the disciplinary system and allows for year-to-year comparisons.

Moreover, because the State Bar has changed its methodology for calculating its backlog twice in the past five years, it is not accurate to state that 290 is the second lowest backlog in the past 10 years. Specifically, as we mention on page 39, the State Bar began to exclude reopened cases in 2006, and outside examiner cases in 2008. Because the types of cases that the State Bar has included in its backlog calculations has varied over the years, it is difficult to make a meaningful assessment of the progress the State Bar has made in reducing its backlog during this period.

- ⑭ We have not attempted to rank the significance of policies designed to improve the processing of disciplinary case files, as the State Bar's comments seem to imply. Instead, as described beginning on page 64, we evaluated two of these policies and found that neither was fully effective. In particular, we found that eight of 10 checklists in our sample were not complete, and supervisors had not signed off on three. Additionally, we found that two of the State Bar's four units could not demonstrate that they had completed all of the random audits.

cc: Members of the Legislature
Office of the Lieutenant Governor
Milton Marks Commission on California State
Government Organization and Economy
Department of Finance
Attorney General
State Controller
State Treasurer
Legislative Analyst
Senate Office of Research
California Research Bureau
Capitol Press