



# The State Bar of California

845 S. FIGUEROA STREET, LOS ANGELES, CALIFORNIA 90017  
180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105

## OFFICE OF THE CHIEF TRIAL COUNSEL

Jayne Kim, *Chief Trial Counsel*

TELEPHONE: (213) 765-1468  
(415) 538-2063

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TO: Members, Committee on Regulation and Discipline Oversight

FROM: Jayne Kim, Chief Trial Counsel

SUBJECT: Status Report From the Office of Chief Trial Counsel

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Each year the State Bar publishes an Annual Discipline Report (annual report) addressed to the Chief Justice of California, the Governor, the Speaker of the Assembly, the President pro Tempore of the Senate and the Assembly and Senate Judiciary Committees in accordance with Business and Professions Code, section 6086.15. That public report describes the performance and condition of the State Bar's attorney discipline system in the previous calendar year.

Commencing with the April 2011 annual report, which reported discipline data for 2010, the executive director's office of the State Bar assumed oversight and control of the report, establishing an independent reporting structure from the Office of Chief Trial Counsel (OCTC) and State Bar Court. More specifically, since 2011, the Office of General Counsel prepares the annual report relying upon the Office of Budget and Performance Analysis to compile and validate OCTC's and State Bar Court's discipline data. Pursuant to statute, the annual report provides a snapshot of the status of matters on December 31 of each year. OCTC's monthly reports are based on information as produced during each month of the calendar year. Due to differences in how the data is compiled by the Office of Budget and Performance Analysis, small variances generally exist between figures in the annual report and corresponding figures in OCTC's monthly reports. State Bar staff from the Office of General Counsel, Office of Budget and Performance Analysis, Office of Information Technology and OCTC are currently working to develop a unified reporting process for monthly and annual reporting purposes to eliminate such differences, as discussed further in Section II below.

Since October 2011, OCTC has reported metrics to this committee on a regular basis, working closely with the Office of Budget and Performance Analysis to ensure consistency with its methodology for data reporting in the annual report. OCTC provides monthly reports reflecting key inventories and work flows as discussed further in the following section.

### **I. June 2015 Month-End Metrics**

The scope and general format of OCTC's current monthly report were previously approved by this committee and includes: (1) a single page "simplified metrics" report reflecting key metrics of OCTC and the Client Security Fund, (2) graphic charts reflecting OCTC's backlog and "second look"

inventories, and (3) detailed data tables reporting inventories, workflows, processing times and outcomes.

Commencing with the May 2015 monthly report, OCTC added an additional graphic chart reflecting OCTC's combined active and suspended backlog inventories – inventories which have always been reported in the monthly data tables. Commencing July 1<sup>st</sup> of every year, OCTC is able to calculate its potential year-end backlog (i.e. cases that would be more than six months old on December 31<sup>st</sup> if not closed, filed or otherwise resolved). Accordingly, OCTC is now able to report that inventory and has added an additional graphic chart titled “Potential Year End Backlog” to the monthly reports. A summary of key metrics as calculated on June 30, 2015 and previously provided to the board is as follows:

#### New Complaints

<u>Case Initiation Type:</u>	Jan	Feb	Mar	Apr	May	June
Complainants	930	1,016	1,068	1,178	942	985
State Bar Initiated	24	47	107	121	34	29
Reportable Actions	274	239	254	281	236	255
<b>TOTAL</b>	<b>1,228</b>	<b>1,302</b>	<b>1,429</b>	<b>1,580</b>	<b>1,212</b>	<b>1,269</b>

As a reminder, case initiation type reflects the source which initiated the case. For example, complainant cases are those complaints initiated by a member of the public. State Bar initiated cases are those opened by OCTC without a complainant, such as where OCTC learns of possible attorney misconduct through media coverage or during the course of a separate disciplinary investigation. Reportable action cases are those matters where an individual or entity has reported certain activity to OCTC, pursuant to statutory obligations, such as where a financial institution reports insufficient funds in an attorney client trust account or a superior court reports imposition of certain sanctions against an attorney.

#### Call Center Volume

Intake staff responded to 3,907 telephone calls to the State Bar's complaint hotlines last month, 30 of which came through the Immigration Hotline.

	Jan	Feb	Mar	Apr	May	June
Complaint Hotline	3,706	3,414	3,973	3,895	3,509	3,877
Immigration Hotline	23	18	29	20	12	30
<b>TOTAL</b>	<b>3,729</b>	<b>3,432</b>	<b>4,002</b>	<b>3,915</b>	<b>3,521</b>	<b>3,907</b>

#### Active Inventories

Consistent with the current methodology used for the State Bar's annual report, OCTC's active inventories in the Intake and Investigation stages include complainant, State Bar initiated and reportable action cases. OCTC's standing inventory in the Pre-Filing stage include complainant, State

Bar initiated and reportable action cases, as well as referrals from other jurisdictions and the State Bar's Office of Probation (which are cases that do not have an investigation stage).<sup>1</sup>

OCTC's month-end inventory of active complaints which have yet to be filed, closed or otherwise resolved was as follows:

	Jan	Feb	Mar	Apr	May	June
Intake	1,676	1,857	2,124	2,054	1,848	1,857
Investigation	1,197	1,181	1,200	1,356	1,403	1,396
Pre-Filing	145	143	156	200	181	173
<b>TOTAL</b>	<b>3,018</b>	<b>3,181</b>	<b>3,480</b>	<b>3,610</b>	<b>3,432</b>	<b>3,426</b>

#### Backlog Inventories (Active & Suspended Complaints)

	Jan	Feb	Mar	Apr	May	June
Active	283	296	301	343	355	361
Suspended	1,648	1,670	892	896	906	951
<b>TOTAL</b>	<b>1,931</b>	<b>1,966</b>	<b>1,193</b>	<b>1,239</b>	<b>1,261</b>	<b>1,312</b>

As of July 1, 2015, OCTC's potential year-end backlog inventory (i.e. cases currently in the system which will be more than six months old on December 31, 2015 and considered backlog if not filed, closed or otherwise resolved) stood at 3,426. This same time last year, OCTC's potential year-end backlog inventory stood at 3,577.

#### Suspended Inventory Details

The majority of suspended cases are suspended due to the likely disbarment of the attorneys involved as a result of other disciplinary cases already filed and pending before the State Bar Court or Supreme Court.

As of June 30, 2015, there were 1,151 cases in suspended status, 951 of which were in backlog status. The 1,151 suspended cases involved 207 attorneys, 158 of whom are on inactive status or otherwise not-entitled to practice law.

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<sup>1</sup> The state auditor correctly found that the annual report's backlog count, published April 2013, began including cases that had been lodged with State Bar Court but not yet filed (i.e. stipulations executed by the parties and submitted to the State Bar Court for acceptance). The auditor also found that the annual report never mentioned this change or otherwise explained this addition of cases to the backlog count. OCTC's monthly report has never included these cases as backlog and it appears that variance due to the change has been relatively small -- likely because stipulated cases do not generally linger in a lodged status long but, rather, move quickly out of that status. Regardless and as indicated previously, the State Bar is developing a unified reporting process for monthly and annual reporting purposes to eliminate such differences.

The reasons for suspension of work in the 1,151 cases were as follows:

<b>Suspension Reason</b>	
Default in other matter	349
Expected Disbarment	267
Disbarment Recommendation Filed by SBC	141
Overlapping Litigation	276
Inactive Enrollment Order	118
<b>TOTAL</b>	<b>1,151</b>

#### Audit & Review: Second Look Requests

There were 152 pending “second look” requests at the end of the month. The median time it took OCTC to process a second look request was 36 days. The mean (average) time it took OCTC to process a second look request was 80 days.

#### **Second Look Inventory**

Jan	Feb	Mar	Apr	May	June
283	257	210	192	160	152

#### **Processing Time in Days**

	Jan	Feb	Mar	Apr	May	June
Median	98	105	81	61	31	36
Mean	104	113	97	71	52	80

#### Walker Petitions

There were seven (7) Walker petitions filed last month, bringing a year-to-date total of 50. There were no Walker petitions granted last month, bringing the year-to-date total to one (1).

	Jan	Feb	Mar	Apr	May	June
Filed	7	8	10	9	9	7
Granted	0	0	0	0	1	0

#### Trials and Discipline Decisions

OCTC received discipline recommendations from the Hearing Department last month involving 58 cases, as follows:

<b>Decision Type</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>
By Trial	5	12	9	9	6	11
By Default Decision	8	10	18	31	26	10
By Stipulation	44	43	51	38	20	36
By ADP Decision	0	1	0	1	6	0
Dismissal Decision	0	0	0	1	0	1

As a reminder, due to limitations of the State Bar Court's available data, this count is based upon OCTC's internal hand-count of the decisions and orders received each month.

## **II.**

### **State Audit Report June 2015**

On June 18, 2015, the California State Auditor published its report on the State Bar of California concluding that the State Bar had not consistently protected the public through its attorney discipline system and lacks accountability. The state auditor made several recommendations, including recommendations directly related to the discipline system as stated below and reflected on pp. 40-42 of the audit report. While many of the recommendations relate to processing and reporting of the State Bar's annual report, which is prepared and validated independently from OCTC, OCTC is working closely with the Office of General Counsel, Office of Budget Performance Analysis and Office of Information Technology to ensure that recommendations are followed.

#### **Recommendation No. 1**

To ensure that its backlog does not adversely impact the quality of the discipline it imposes on attorneys who fail to fulfill their professional responsibilities, the State Bar should adhere to its quality control processes. Further, it should take steps to prevent its management or staff from circumventing those processes, such as requiring the presentation to the board of any proposed changes to quality control.

The State Bar agrees with this recommendation and is pursuing board action to adopt appropriate oversight policies to implement this recommendation and to prevent a repetition of the situation identified in the report when prior OCTC management eliminated OCTC's Audit and Review Unit in 2010 and its quality control processes were circumvented without the knowledge of the board or this committee.

#### **Recommendation No. 2**

To ensure it consistently counts and reports its backlog of disciplinary cases, the State Bar and the Legislature should work together to determine what cases the State Bar should include in its backlog. For example, one method of calculating the backlog would be to include every case that affects public protection that the State Bar does not resolve within six months from the time it receives a complaint. The Legislature should then amend the state law that currently defines how the State Bar should present the backlog in its annual discipline report. In the interim, the State Bar should comply with our 2009 recommendation to fully disclose the types of cases it includes and excludes from its backlog calculation, as well as any methodology changes from the prior year.

The State Bar agrees with this recommendation and is pursuing discussion with the Legislature as recommended. The State Bar is also re-examining its annual report to ensure consistency with the 2009 recommendations and the 2015 recommendations. Commencing with the April 2011 annual report, which reported discipline data for the 2010 calendar year, the executive director's office of the State Bar assumed oversight and control of the ADR, which established an independent reporting structure from the Office of Chief Trial Counsel (OCTC) and State Bar Court and significantly changed

the format and methodology for reporting annual backlog numbers for the preceding calendar year. The most significant changes occurred with the ADR reports for the 2010 and 2013 calendar years, when other types of cases not previously counted were added. While these were intended improvements to the annual reporting process, the State Bar agrees with the state auditor that we can and should do better.

OCTC will refine its monthly reports accordingly with approved revisions to the annual discipline report and is currently working with the Office of General Counsel, Office of Budget and Performance and Office of Information Technology to propose a unified monthly and annual reporting process for review and approval.

### Recommendation No. 3

To provide clear and reliable information to the Legislature, the governor, and the public, the State Bar should define how it calculates case-processing speeds in its annual discipline report and report this metric using the same method each year. If the State Bar elects to continue presenting the median case-processing time, it should also present the average case-processing time. Finally, it should disclose any methodology changes from the methodology used in the prior year.

The State Bar agrees with this recommendation. Related to Recommendation No. 2, this is a good improvement to the State Bar's annual report. The State Bar had previously reported median and 90<sup>th</sup> percentile of case processing times because (1) outliers can dramatically affect average calculations and (2) the time taken to conclude disciplinary cases is often characterized by a "long tail." That is, a relatively small number of cases take a very long time to complete, while most cases are concluded more rapidly. For such distributions, averages can be misleading because the average will be well *above* the "typical" value and well *below* the "long tail." Therefore, the State Bar had reported both the median (a standard and widely used statistic for long-tailed distributions) and the 90<sup>th</sup> percentile (an indicator of the "long tail"). While the median will be lower than the average for such a distribution, the 90<sup>th</sup> percentile will be substantially higher. Supplementing the annual report to also include average processing time will provide even greater information to our stakeholders.

### Recommendation No. 4

To assure the Legislature and the public that the data in the State Bar's annual discipline reports are accurate, the board should implement controls over the accuracy, consistency, and sufficiency of the data gathered and methods used to compute the information included in the annual discipline report. For example, the board could expand the role of an existing board committee—such as the regulation and discipline committee—to include a review of the annual discipline report and the underlying discipline statistics.

The State Bar agrees with this recommendation to implement further controls over the data and methodology for the annual report. Related to both Recommendations Nos. 2 and 3, the State Bar is working to address the identified deficiencies in its existing annual reporting process and will document and report to this committee and the board of the controls, data collection methods and data validation methods in producing the annual discipline report. In addition, the State Bar will expressly add to the charge of this committee the role of reviewing the annual report process and underlying discipline statistics.

### Recommendation No. 5

To align its staffing with its mission, the State Bar should engage in workforce planning for its discipline system. The workforce planning should include the development and formal adoption of an appropriate backlog goal, an assessment of the staffing needed to achieve that goal while ensuring that the discipline process is not compromised, and the creation of policies and procedures sufficient to provide adequate guidance to the staff of each unit within the discipline system.

The State Bar agrees with this recommendation and is pursuing bar-wide workforce planning. Formal workforce planning is also consistent with the board's current strategic planning process.

### Recommendation No. 6

To ensure that the Audit and Review Unit's random audits of closed case files provide an effective oversight mechanism, the State Bar should follow its policy to conduct and record meetings and trainings related to the audit report's recommendations. Additionally, the Audit and Review Unit should oversee the retrieval of case files for audit to ensure that it maintains control over its random selection of cases.

The State Bar agrees with this recommendation. Self-initiated and since 2014, OCTC has been utilizing independent auditors to conduct its bi-annual audits and further refinement to OCTC's random audit process is appropriate and needed – including improving the recording of meetings and training in response to audit findings.

### Recommendation No. 7

To ensure that the review function within the Audit and Review Unit continues to provide a means for complainants to appeal the State Bar's decisions on closed cases, the State Bar should implement a policy that prohibits the chief trial counsel from dissolving the review function of the Audit and Review Unit. Alternatively, at a minimum, it should require board approval of such action.

The State Bar agrees with this recommendation. In 2010, under the direction of former management and without notice to this committee or the board, OCTC eliminated its "second look" review process wherein a complainant could request OCTC to take a second look or reconsider its decision to close the complainant's complaint. Without this internal review function, the complainant's only remedy was to seek Supreme Court review. Recommendation No. 7 overlaps with Recommendation No. 1, which had recommended that the State Bar take steps to prevent its management or staff from circumventing quality control processes, such as requiring the presentation to the board of any proposed changes to quality control. The elimination of OCTC's review function circumvents quality control processes and should require board approval before such action. As stated above, the State Bar is pursuing board action to adopt appropriate oversight policies and prevent a repetition of what occurred in 2010 when OCTC eliminated quality control processes without the knowledge of the board.

### Recommendation No. 8

To provide independent oversight of the Office of Chief Trial Counsel and assurance that it properly closes its case files, the Audit and Review Unit should report to an individual or body that is separate from the chief trial counsel, such as the executive director or the board.

The State Bar agrees generally with this recommendation to ensure that OCTC is complying with established policies and procedures in its review and closing of complaints.

*Audit Function:* As referenced above, in 2014, OCTC self-initiated the use of independent auditors (non-OCTC staff) to conduct the audit function of the Audit and Review Unit. OCTC believes that there is value in making the audit function more independent and is exploring options with the executive director's office and the Office of General Counsel.

*Review Function:* As stated above, we agree with Recommendation No. 7 that the State Bar should implement a policy that prohibits the chief trial counsel from dissolving the review function of the Audit and Review Unit. OCTC is working with the Office of General Counsel to explore ways to refine the review function consistent with this recommendation but that also fits within the statutory and operational structure of the State Bar. Under existing law, the chief trial counsel serves under the regulation and discipline oversight committee of the board and not under the direction of the chief executive officer. The State Bar's former complainants grievance panel had the authority to review and recommend the reopening of cases, but this process created delays and frustrations for complainants. In 1995, the Legislature repealed the panel and permitted the State Bar to adopt Rule 2601 of the Rules of Procedure delegating the discretion to reopen cases back to OCTC.