

December 19, 1991

# A Review of the State Bar Court

## Executive Summary

In accordance with Ch 1159/88 (SB 1498, Presley), we have reviewed the workload of the State Bar Court, the entity within the State Bar that adjudicates complaints against attorneys in California. Among other things, Chapter 1159 revised the system of attorney discipline, substituting full-time judges for volunteer hearing referees.

Our findings regarding the overall workload of the State Bar Court are:

- The number of cases filed in the court rose dramatically in 1991, due primarily to increased complaints and a working down of a large backlog of complaints in the investigation stage.
- Disposition of cases, however, also have increased, as both suspensions and removals from the system (disbarments and resignations) rose significantly in 1989 and 1990.
- As a result of these two factors, the number of cases pending before the court did not change much between 1987 and 1990. The court has made some progress, however, in reducing the age of outstanding cases.

With regard to specific staff categories within the State Bar Court, we examined the workload of the hearing department (which includes judges who initially adjudicate cases and their supporting legal staff), the review department (which consists of a three-member judge panel and supporting legal staff) and deputy court clerks (who provide support to the entire court). Our key findings are:



- The hearing department has not been able to keep up with new workload (apparently due to a bottleneck at the judge level), resulting in a growing cumulative backlog.
- Full-time hearing judges appear to be more cost-effective than pro tem judges.
- Review department staffing may be in excess of what is needed to meet future needs.

Our main conclusion is that the State Bar Court has generally done an effective job of managing and processing its workload following the transition to the new attorney discipline system. Based on a growing backlog in the hearing department, however, we believe the court will need a new judge position. This position could be funded in part by eliminating an existing attorney position in the hearing department or in the review department.

## Introduction

The State Bar, directed by a 23-member board of governors, was established by the California Constitution as a public corporation in the judicial branch of government. Membership in the bar is required in order to practice law in California. The bar's principal functions are admitting persons to practice law in California and disciplining its members.

Chapter 1159, Statutes of 1988 (SB 1498, Presley), made various changes in law relating to the State Bar, including revising the attorney discipline system. Among other provisions, this measure replaced an earlier State Bar Court system, which used volunteer hearing referees to adjudicate disciplinary matters with a new system based on full-time judges.

Chapter 1159 also required the Legislative Analyst to evaluate the workload of the revised State Bar Court, based on data submitted by the State Bar. The measure required these data to be submitted quarterly, beginning October 1, 1989, and specified that they include, but not necessarily be limited to:

"... statistics on the productivity of judges and clerks of the State Bar Court, including the numbers of rulings, orders, dispositions, and advisory memos produced; the number and type of hearings and appeals; and the complexity of cases. The State Bar shall also submit ... data regarding the use of pro tem judges and the productivity of the State Bar Court Clerk's Office."

This report is submitted in compliance with the requirements of Chapter 1159.

This report was prepared by Ray Reinhard. The author wishes to acknowledge the assistance of the staff of the State Bar Court, who responded to his many requests for information in a cooperative and timely manner.

## Description of State Bar Discipline System

In order to understand the sources of workload pressures on the State Bar Court, it is helpful to understand the role the court plays within the overall system of attorney discipline administered by the State Bar. Accordingly, this section provides a brief description of the four major components of this system: (1) complaint intake/legal advice, (2) investigation, (3) prosecution, and (4) adjudication (the State Bar Court is part of this latter component).<sup>1</sup>

### Complaint Intake/Legal Advice

Under the direction of the State Bar's Chief Trial Counsel, the Office of Intake/Legal Advice receives, reviews, and categorizes incoming communications regarding disciplinary matters. The office identifies potential complaints and assigns a priority ranking to each, based on the seriousness of the allegations. The office also monitors cases involving lawyers charged with committing a felony or misdemeanor and forwards records of convictions in such cases to the State Bar Court. (In cases of felony convictions or the commissions of crimes involving "moral turpitude," the State Bar Court places the lawyers involved on interim suspension, pending resolution of misconduct charges.)

### Investigation

The Office of Investigation (also under the direction of the Chief Trial Counsel) receives cases from the Office of Intake/Legal Advice. This office notifies the respondent attorney (that is, the one being charged) that it has received the specified charges, and conducts a complete investigation of the case. In 1990, the Office of Investigation received a total of 13,986 complaint *allegations* against attorneys. (Because many complaints contain more than one allegation against an

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<sup>1</sup> The following section draws heavily on the description of the attorney discipline system contained in the State Bar's report, *Lawyer Discipline in California: A Progress Report for 1988 and 1989*, pages 12-14.

attorney, total allegations exceed the number of complaints involved.) A majority (53 percent) of allegations related to lawyers' performance or their duties to clients. Within this category, the most common types of complaints included failure to perform duties, failure to communicate, withdrawal from employment, and failure to turn over files to clients.

### **Prosecution**

The Office of Trials is the prosecutorial arm of the State Bar discipline system. If the attorneys assigned to the Office of Intake/Legal Advice determine that there is sufficient evidence, the Office of Trials prosecutes the case before the State Bar Court. In addition to having the authority to file formal charges against an attorney, the prosecutor may take various unofficial disciplinary actions, enter into an agreement in lieu of discipline, or — in rare instances — dismiss the complaint. (If formal charges are not filed, a complainant may appeal the decision not to prosecute to an independent Complainants' Grievance Panel.)

### **Adjudication**

This is where the work of the State Bar Court begins. Cases prosecuted by the Office of Trials are heard in the State Bar Court, which consists of six full-time hearing judges (supplemented by pro tem hearing judges) in the hearing department and a three-judge review department, plus associated legal and clerical support. Based on the evidence and testimony presented by the Office of Trials and the respondent attorney, the hearing judge determines whether to recommend suspension or disbarment to the state Supreme Court, take other disciplinary action, or dismiss the case. If either the respondent or the prosecutor so requests, the decision of the hearing judge is reviewed by the review department, which may accept or change the decision of the hearing judge.

All recommendations for suspension or disbarment are submitted to the state Supreme Court which, until recently, routinely accepted most petitions for review of the State Bar Court's decisions in such

cases. In December 1990 and February 1991, however, the Supreme Court adopted new rules regarding the finality of the decisions issued by the State Bar Court. The overall effect of these so-called "finality rules" was to transfer from the Supreme Court to the State Bar Court much of the responsibility for imposing disciplinary action on attorneys. Although the Supreme Court retains authority to review appeals from the State Bar Court's decisions, it typically will not do so unless a case involves a significant issue of law or an alleged deprivation of due process.

## Description of Study Methodology

In conducting this study, our primary source of information was the quarterly workload reports submitted by the State Bar Court, as directed by Chapter 1159. In addition, we reviewed several reports and transcripts of legislative hearings related to the overall issue of "reforms" to the attorney discipline system. Finally, we met with staff of the State Bar Court in San Francisco and identified additional workload-related information that we needed in order to complete our understanding of this issue.

Based on our preliminary review and discussions with staff of the State Bar Court, we decided to focus our analysis on three major areas:

- **Workload.** As used in this report, "workload" refers to the work-related demands imposed on State Bar Court staff from sources primarily outside of their control. For example, the number of new cases forwarded to the State Bar Court by the Office of Trials constitutes a significant indicator of the workload of both hearing judges and the State Bar Court attorneys who serve them.
- **Productivity.** "Productivity," in contrast, refers to the amount of work processed by staff during a specific time period, controlling for the number of staff assigned to the task measured. (That is, it is a measure of how well staff use resources

— including their own labor — that are within their control.) Using the example of hearing judges again, the number of "dispositions" (or cases closed out) per judge per year is a primary indicator of productivity. (We use the more general term "output" to describe the total amount of work processed in a given time period *without* controlling for the number of staff available to accomplish the task.)

- **Cost-effectiveness.** "Cost-effectiveness" combines information on productivity with data on costs, in order to make comparisons among alternative means of achieving the same goals. For instance, in the case of the State Bar Court, we compared the relative cost-effectiveness of pro tem judges (hired on a part-time basis) with that of full-time hearing judges.

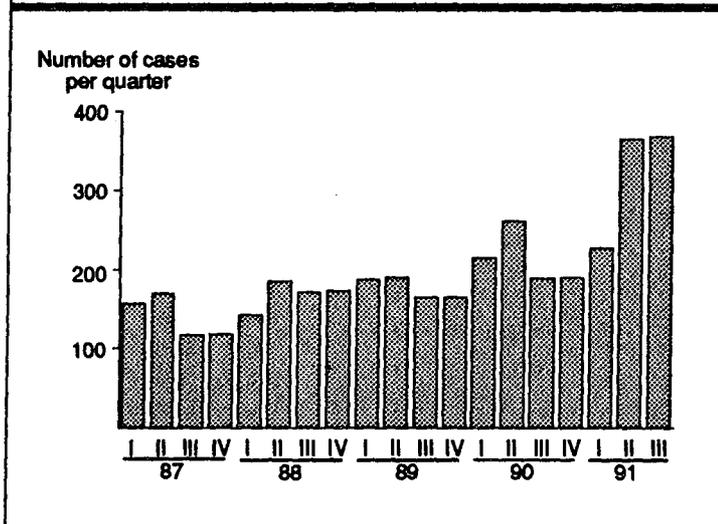
It is important to note that it was not possible — given limitations of time and available resources — to measure with precise accuracy either workload or productivity. The functions performed by staff of the State Bar Court, like those of most complex, professional organizations, are not easily reduced to a few simple numbers. While acknowledging this limitation, we have nevertheless attempted to identify a limited number of *key* indicators that measure functions accounting for the bulk of workload and productivity within three major categories: (1) judges, (2) attorneys, and (3) clerks. Before analyzing these specific workloads, however, we review the overall workload situation of the State Bar Court.

## Overall Workload and Output of State Bar Court

The primary measure of workload affecting the State Bar Court is the number of cases filed with the court by the Office of Trials. Figure 1 shows the trend in this key indicator over the period 1987 through the third quarter of 1991. As the figure shows, the number of cases filed during each quarter was generally rising during the first

three years of this period. During the second quarter of 1991, the number of cases filed increased substantially over previous levels, and reached an all-time high of 368 in the third quarter of this year.

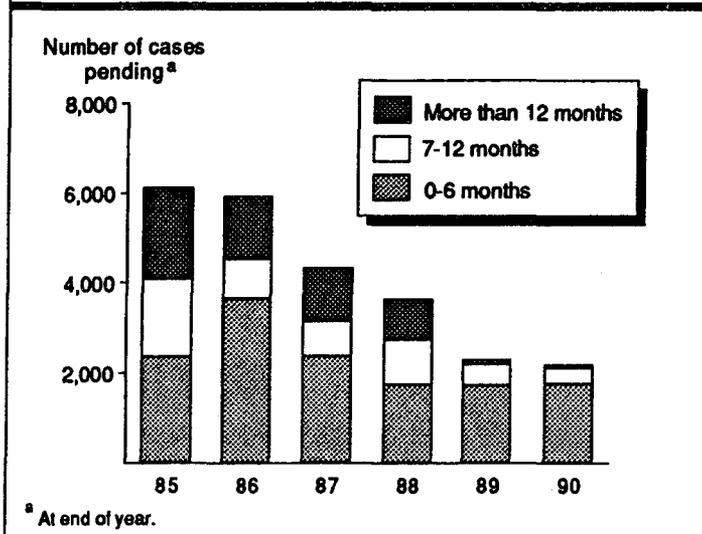
**Figure 1**  
**Cases Filed in State Bar Court**  
**1987 through 1991 (3rd quarter)**



This dramatic increase in the number of cases filed is primarily due to the efforts of both the Office of Investigation and the Office of Trials to eliminate what had been a long-standing backlog of open complaints. A secondary factor is a longer-term trend of increases in the number of disciplinary complaints. As Figure 2 shows, the Office of Investigation made significant progress over the past several years in reducing the number of backlogged complaints. At the end of 1985, the office had over 6,000 open complaints on file; of these, nearly one-third were more than a year old. By the end of 1989, the number of open complaints had been reduced to just under 2,300, with less than 5 percent pending for more than a year. This record was further improved upon in 1990: at the end of the year, there were about 2,200 open complaints, with less than 4 percent over a year old.

Figure 2

**Office of Investigations Has Reduced  
Number of Backlogged Complaints  
1985 through 1990**

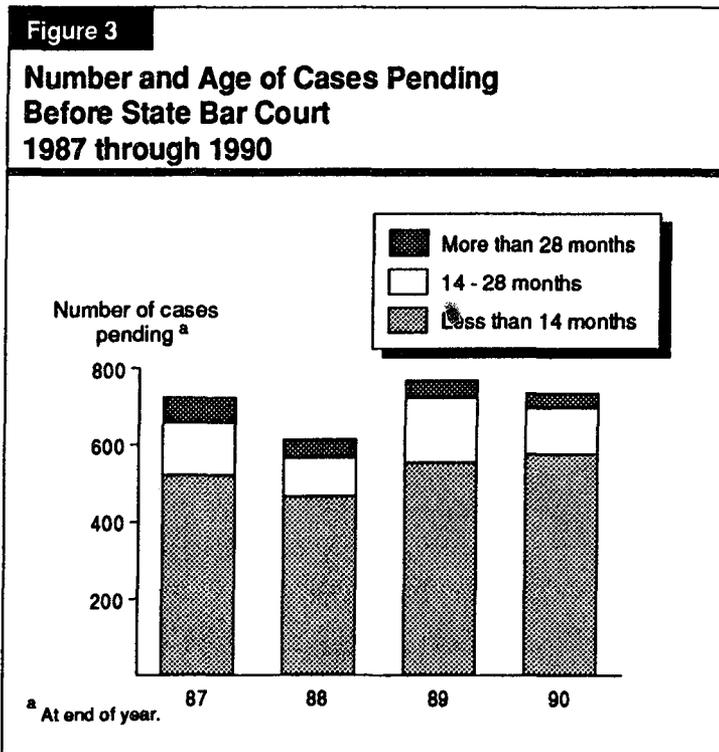


As the investigations backlog was cleared, however, a related "bulge" developed in subsequent years in (1) the number of complaints forwarded to the Office of Trials and (2) subsequently, the number of cases filed with the State Bar Court. The existence of this "one-time" workload complicates the task of assessing the court's longer-term, "normal" workload demands, and should be borne in mind in the more detailed workload analysis that follows.

Staff of the State Bar Court project that the court will receive 319 cases during the fourth quarter of 1991, and an average of 361 cases per quarter during 1992 and 1993. Our review of statistics on the number of "statements of the case" forwarded from the Office of Investigation suggests that, once the Office of Trials brings its workload backlog under control, the court's workload may drop somewhat below these projected levels. It is not clear, however, exactly when — or if — this will occur.

## Pending Cases

Figure 3 presents information on the number of cases pending before the State Bar Court at the end of each year, from 1987 through 1990. As the figure shows, the number of pending cases increased substantially between the end of 1988 and the end of 1989, from 614 cases to 768 cases (a 25 percent increase). In addition, the *proportion* of pending cases that were more than 14 months old also increased — from 24 percent at the end of 1988 to 28 percent at the end of 1989. This increase in the number and age of backlogged cases coincided with a 24 percent *decrease* in the number of cases closed out by the court during 1989 (dropping from 731 to 553).



The reasons for this reduction in output during 1989 are not clear. It may be due, in part, to the reorganization of the State Bar Court that occurred during this year, including the winding down and phase-out of the volunteer system, the start-up of the new full-time judge system,

and the "learning curve" associated with new personnel and changes in operating procedures. (The new, full-time court began its work in September 1989.) It may also be that the cases that were filed with the court became more complex — although the State Bar Court has no empirical evidence regarding this possibility.

In any event, the drop in output during 1989 was largely reversed during 1990. During this year, the number of cases closed out rose to 893, while the total number of cases pending at the end of the year was reduced somewhat to 734. Finally, the proportion of cases that were more than 14 months old dropped to 22 percent, with only 39 cases (5.3 percent of all cases pending) being more than 28 months old.

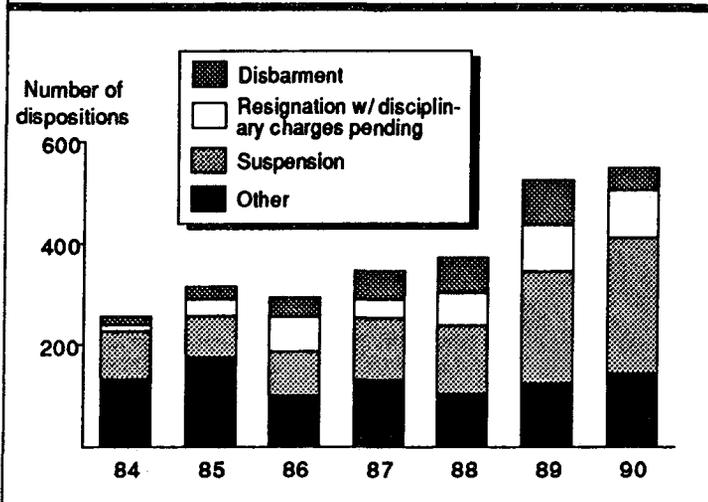
### **State Bar Court Actions and Recommendations**

Figure 4 summarizes the outcomes of the cases before the State Bar Court, from 1984 through 1990. (The figure includes both final actions of the court as well as the court's recommendations to the California Supreme Court regarding disbarment, suspension, and reinstatement.)

As the figure shows, the total number of dispositions in discipline and related matters increased significantly with the advent of the revised State Bar Court system in 1989. The bulk of this increase occurred in the number of recommended suspensions, which rose over 1988 levels by 66 percent in 1989 and 101 percent in 1990. Although the number of recommended disbarments, which reached an all-time high of 89 in 1989, dropped in 1990 to a level more in line with prior historical experience, the total number of attorneys removed from the system (either through disbarment or through resignation with disciplinary charges pending) in these two years was substantially higher than in prior years.

Figure 4

### State Bar Court Actions and Recommendations On Discipline and Related Matters 1984 through 1990



## Workload and Productivity of Specific Staff Categories

The following sections examine in more detail the workload and productivity of the State Bar Court's judges, attorneys, and clerks.

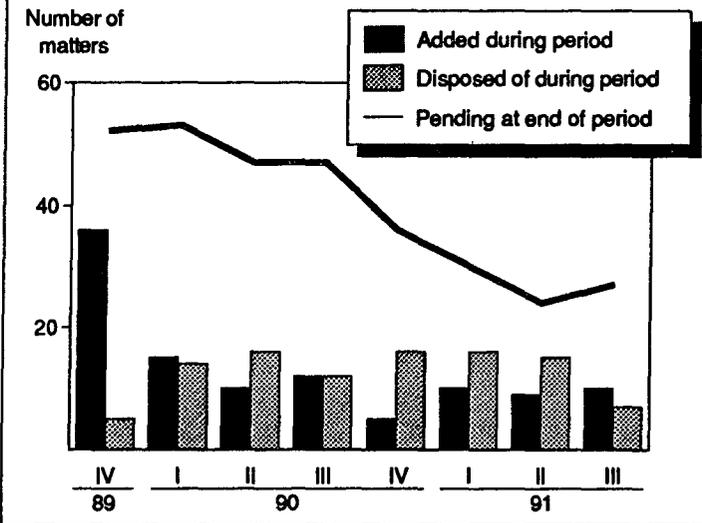
### Review Department

As noted, cases heard by the State Bar Court's hearing judges may be appealed to a three-member review department. Figure 5 shows the number of matters (1) newly added during each quarter, (2) disposed of during each quarter, and (3) pending at the end of each quarter before this department, since the inception of the new court system. (This figure excludes workload associated with the Supreme Court's finality rules, which were adopted in the fall of 1990.)

The figure shows that, from the second quarter of 1990 through the second quarter of 1991, the department was able to dispose of at least

Figure 5

**Review Department Judges  
Workload and Productivity of Three-Member Panel  
1989 (4th quarter) through 1990 (3rd quarter)**



as many matters as were newly added each quarter. As a result, the number of matters pending before the review department dropped significantly — from 50 to 55 in the early quarters of the revised court's existence to just 24 at the end of the second quarter of 1991.

The figure also shows, however, that in the most recent quarter, the review department's productivity in nonfinality matters dropped significantly. Specifically, while the department was able to dispose of an average of nearly 16 such matters per period during the prior three quarters, it disposed of only 7 matters during the third quarter of 1991. This change appears to be due, at least in part, to an increase in the amount of workload related to the Supreme Court's finality rules. The number of conviction referrals disposed of (a primary indicator of productivity associated with such workload) increased from 55 in the first quarter of 1991 to 94 in the third quarter of this year. At this point, it is not clear whether the decrease in the number of nonfinality matters disposed of is merely a temporary aberration in the prior trend

of productivity outpacing newly added workload, or whether it signals the reversal of this trend.

These statistics indicate that there does not currently appear to be a significant problem of workload backlogs in the review department. In fact, they suggest that if the *general* trend (of decreasing numbers of matters pending) were to continue, there could soon be insufficient workload to fully occupy three full-time judges. In response to this possibility, staff of the State Bar Court cite the additional finality-related workload noted above; they estimate that this workload now accounts for one-fourth to one-third of the review department's total workload. In addition, they note that as long as the review function is handled by a panel (as opposed to individual judges) and the judges are precluded from outside employment (in order to ensure impartiality), it is not possible to reduce the number of full-time judge positions assigned to this purpose.

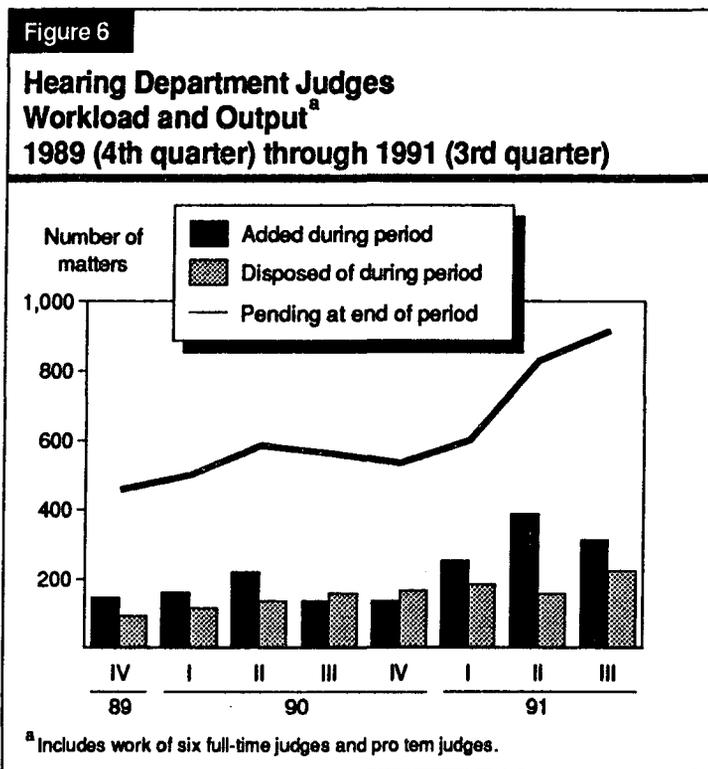
We note, however, that it *may* be possible to reduce the number of *attorneys* assigned to the review department. Specifically, since the fourth quarter of 1990, the department has been staffed with four attorneys — one assigned to each review judge and one devoted exclusively to finality-related workload. If productivity in nonfinality matters continues to outpace workload, the total workload associated with the review department could potentially be handled by just three attorneys. The court could then redirect resources to the hearing department (where, as indicated below, there appears to be a significant and growing problem of workload backlogs).

### Hearing Department

As noted earlier, the primary work of hearing cases in the State Bar Court is done by six full-time hearing judges. In addition, since the second quarter of 1990, the court has relied on 12 or 13 additional "pro tem" judges, compensated on a per diem basis, to help process this workload.

Figure 6 presents the information on workload and output similar to that which was provided above for the review department judges.

(Because the figure reflects workload processed by the six full-time hearing judges plus *significantly varying* amounts of pro tem judges' and attorneys' time, we use the more general term "output" — rather than "productivity" — to describe the number of matters disposed of per period by the judges.)



The figure shows that the output of the hearing department judges has generally been increasing. (Part of this increase is undoubtedly due to an increase in the number of attorneys assigned to the hearing department — growing from just one attorney in the fourth quarter of 1989 to eight attorneys in the second and third quarters of 1991.) The figure also shows, however, that the number of matters newly added to the department's workload has outpaced this output in six of the eight quarters since the inception of the revised court system. As a result, there has been a growing backlog in the number of matters pending before the hearing department — from 458 matters at the end

of the fourth quarter 1989 to over 900 matters at the end of the third quarter 1991.

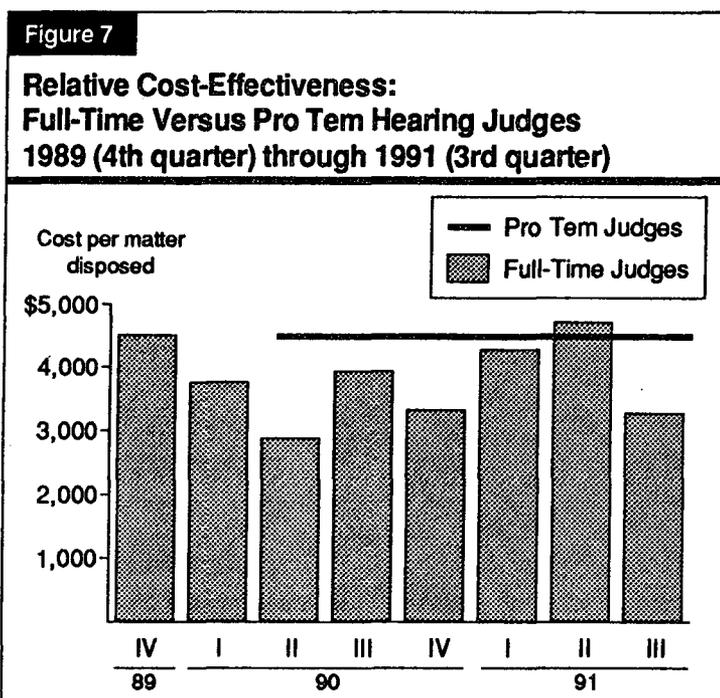
Based on the State Bar Court's projection of workload noted earlier, we estimate that the number of cases assigned to hearing judges will average around 350 per quarter from October 1991 through December 1992. If this projection is accurate, then it appears that — absent some corrective action — the backlog will grow by some 125 to 200 cases per quarter, as workload continues to outpace the number of matters disposed of.

*Relative Cost-Effectiveness of Pro Tem Judges.* As noted, the State Bar Court uses six full-time hearing judges, as well as temporary pro tem judges to hear cases. Hearing judges receive a full-time salary (\$90,680 in 1991) plus benefits; pro tem judges, in contrast, receive an amount of \$350 per diem and are not eligible for fringe benefits. Because both types of judges hear similar cases, we explored whether there is any evidence to indicate that one approach is more cost-effective than the other.

Figure 7 compares the relative cost-effectiveness of full-time hearing judges to that of pro tem judges. In this figure, cost-effectiveness is measured in terms of total cost per matter disposed of. Before discussing the figure, however, we note three important points:

- *First*, we have attributed to the full-time judges *all* costs associated with staff support (attorneys, legal secretaries, and deputy court clerks) for the hearing department. Because pro tem judges may make some use of this support, this assumption tends to overstate the costs (and understate the relative cost-effectiveness) of full-time judges.
- *Second*, because a larger proportion of cases handled by pro tem judges actually progress to the hearing stage (rather than being terminated for other reasons, such as the attorney's resignation, death, or disbarment in a separate matter), we have *excluded* matters disposed of through such terminations.

- *Third*, because of significant variation in the quarterly average cost per disposition among pro tem judges (due primarily to the relatively small number of cases handled), the figure shows the *average* cost per matter disposed of over all six quarters (April 1990 through September 1991) that pro tem judges have been used. (That is, the pro tem judge line in Figure 7 is a constant — or flat — cost.)



The figure shows that, after adjusting for the factors noted above, the use of pro tem judges *appears* to be somewhat less cost-effective than using full-time hearing judges. Specifically, since the second quarter of 1990, the cost per matter disposed of by pro tem judges has averaged about \$4,500. During this same period, the comparable figure for full-time judges has ranged between \$2,900 and \$4,700, and recently fell to a relative low of about \$3,300.

We note that these findings do not conclusively *prove* that the use of pro tem judges is less cost-effective than using full-time judges. Cases assigned pro tem judges could be more protracted or complex,

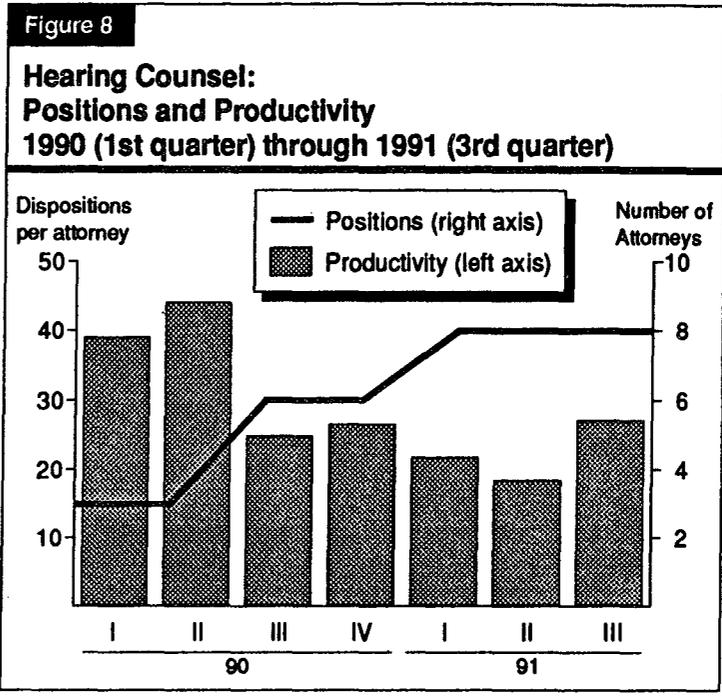
on average, than those assigned regular hearing judges — thereby requiring more of a judge's time to complete. (According to staff of the State Bar Court, this is, in fact, the case.) Unfortunately, we had no way to adjust for these factors.

Moreover, even if pro tem judges *are* relatively more expensive — on a per unit of productivity basis — than full-time judges, it still may be more cost-effective *overall* to use some pro tem judges to handle *temporary* workload peaks. (This is because the alternative might involve not fully using the full-time judges' time.)

While acknowledging these caveats, these data nevertheless suggest that if sufficient resources are available, the State Bar should probably give first priority to adding another full-time hearing judge — rather than additional pro tem judges — as a means of addressing any long-term imbalance between workload and productivity in the hearing department. They also suggest that it may be cost-effective to use some existing resources spent on pro tem judge services to instead fund part or all of a new full-time judge position.

*Productivity of Hearing Counsel.* In contrast to the trend of increasing output of the six judges, noted above, Figure 8 shows that since the first quarter of 1990, the average productivity of the hearing counsel who support these judges has *decreased slightly* as the number of attorneys has grown. We have identified at least three possible explanations for this phenomenon:

- *First*, the average complexity of cases may have increased with the number of attorneys. This could occur, for example, if the easier cases had been disposed of first, when fewer attorneys were employed.
- *Second*, the more recently hired attorneys simply may not be as productive as the ones hired earlier. This could reflect either a temporary "learning curve" phenomenon or a more fundamental disparity in productivity.
- *Third*, the number of dispositions per attorney may be artificially constrained by the productivity of the six hearing judges.



Given limited time and resources, we were unable to determine the extent to which each of these potential explanations accounts for the trend shown in Figure 8. Staff of the court concede, however, that limitations on the amount of time available on the six hearing judges' calendars is beginning to create a "bottleneck."

*Conclusion.* We believe that the State Bar Court should consider whether the problem of large and growing workload backlogs in the hearing department could best be addressed through converting one attorney position in the department (currently costing \$77,000 annually for salaries and benefits) plus \$40,000 in existing pro tem judge services to a new full-time judge position (\$117,000 annually). Alternatively, the court could eliminate one attorney from the review department (see discussion above) and use the proceeds to fund the new judge position.

## Deputy Court Clerks

The Deputy Court Clerks' Office within the State Bar Court performs various functions that support the activities of the court, including calendaring, case processing, setting of pretrial conferences, operating tape recording equipment in the courtrooms, and monitoring dispositions.

The office is divided into four units, according to the primary State Bar Court functions for which support is provided:

- *Hearing.* This unit supports the functions of the hearing department.
- *Review.* This unit supports the functions of the review department.
- *Effectuation.* This unit ensures that the disciplinary and related actions ordered by the State Bar Court are carried out, and (where appropriate) prepares cases for transmittal to the California Supreme Court. The unit also processes finality-related workload, previously handled by the Supreme Court.
- *Probation.* This unit supports the functions of a group of volunteer probation monitors.

*Primary Workload Measures.* The workload of the deputy court clerks is measured primarily in terms of caseload — that is, the total number of cases assigned to the clerks at any given time. In contrast to judges, there is no readily available measure of court clerks' productivity. (Cases are closed out primarily for reasons unrelated to clerk productivity.)

Figure 9 provides information on the total workload of deputy court clerks from the advent of the revised State Bar Court through the third quarter of 1991. The figure shows that total workload has increased significantly in the probation unit (a 94 percent increase over the period shown) and the hearing unit (a 68 percent increase), while it has declined in the review and effectuation units (down 67 percent and 53 percent, respectively).

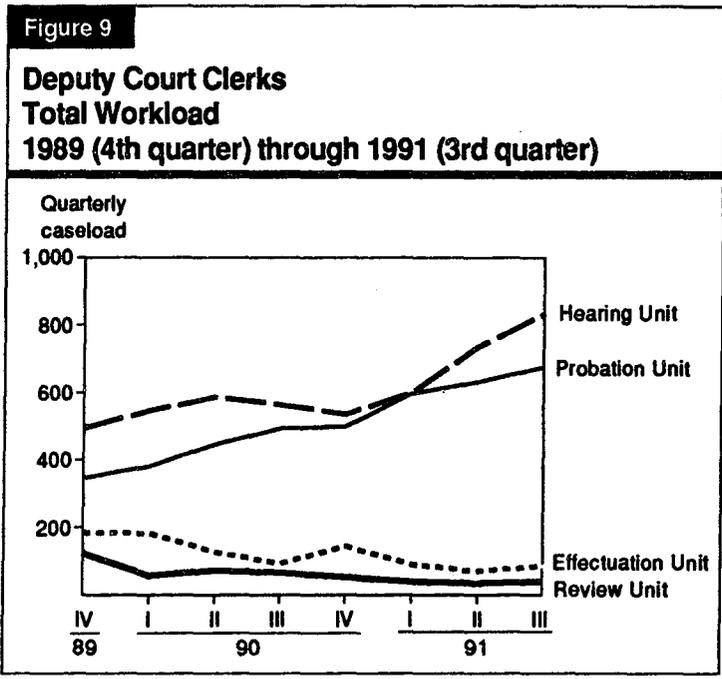
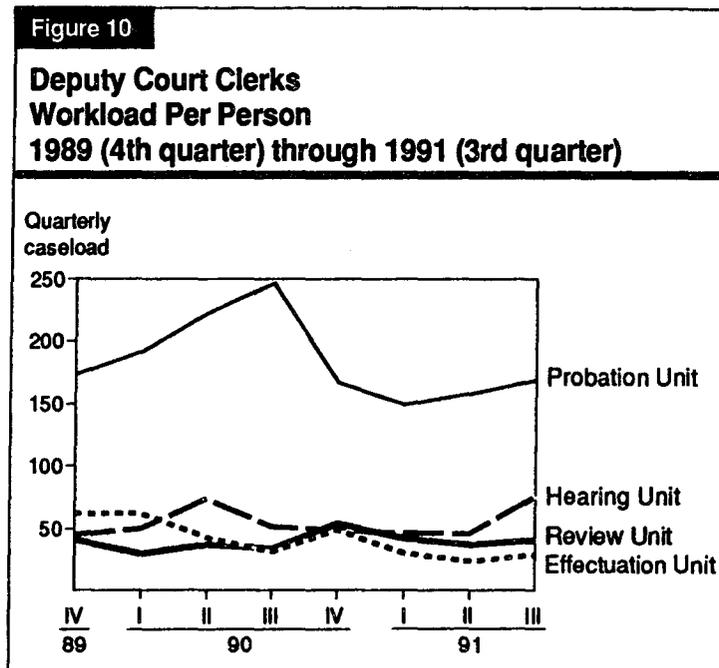


Figure 10 presents workload information on a *per-person* basis. The State Bar Court has adjusted the number of clerks assigned to each unit, in order to maintain a more even distribution of workload. In the hearing and review units in particular, this strategy has resulted in a relatively flat distribution of per-person workload over the period shown. (The recent upturn in the per-person workload in the hearing unit was due to the loss of three staff. The court intends to leave these positions vacant for the remainder of the calendar year.) In the case of the probation unit, per-person workload had been increasing through the third quarter of 1990, but was brought back down to earlier levels by increasing to four the number of staff assigned to this unit.

Finally, Figure 10 shows that per-person workload within the effectuation unit has generally declined over the period shown, from an initial high caseload of 62, to a most-recent level of 29. Staffing has remained constant over the entire period at 3 clerks, as much of the reduction in caseload has been offset by increased workload (not

reflected in the figure) associated with the Supreme Court's finality rules.



## Conclusion

Our review indicates that — through the third quarter of 1991 — the State Bar Court has generally done an effective job of managing and processing its workload following the transition to the new attorney discipline system created by Chapter 1159. Although the number of cases (734) pending before the court at the end of 1990 was about the same as the number pending at the end of 1987, the proportion of cases that were more than 14 months old had decreased, from 28 percent to 22 percent. Furthermore, the number of cases that were more than 28 months old had been reduced from 66 to just 39.

Our review, however, raises concerns regarding whether the State Bar Court will be able to maintain this standard in the future. Despite a general trend of increasing output since the inception of the revised

court system, the court's hearing department has recently been unable to keep pace with the number of new cases assigned it. As a result, the number of matters pending in the department has grown by over 70 percent during the first three quarters of 1991. Furthermore, the court's own workload projections indicate that, absent any corrective action, this growing backlog is likely to continue at least through 1992.

It is not clear whether the primary constraint in the hearing department is the number of judges or the number of attorneys. Available workload and productivity data, however, suggest that the "bottleneck" may lie in the number of hearing judges. Accordingly, we believe that the court should consider seeking legislation to authorize a new, full-time hearing judge position. This position could be funded, in part, through the elimination of one of the eight existing attorney positions serving the hearing judges. Alternatively, the court could eliminate one attorney position from the review department to support the new judge position.

Should these actions fail to stem the growing workload backlog in the hearing department, the State Bar may need to consider increasing the total amount of resources devoted to the State Bar Court — either through a reallocation of its total budget, or through further increases in attorneys' dues.