



THE STATE BAR OF CALIFORNIA

180 Howard Street
San Francisco, Ca 94105
(415) 538-2000

TO: Board of Governors
FROM: CTC Metrics Committee
DATE: July 21, 2010
RE: **Final Report of the CTC Metrics Committee**

I. Introduction and Committee Membership

This memorandum is the final report of the CTC Metrics Committee (the "Committee") to the State Bar Board of Governors. The Committee was appointed by the President of the State Bar on October 24, 2009. Its task was to review current reporting of statistics by the Office of the Chief Trial Counsel ("OCTC") to the Board and to review and evaluate the value of the OCTC's current performance measurement standards.

The Committee was chaired by William Hebert. The members of the Committee were Angela Davis, Cheryl Hicks, Michael Marcus, Howard Miller (ex-officio), Michael Tenenbaum, and Jon Streeter. The Committee held telephone meetings on November 6, 2009, April 26, 2010, May 25, 2010 and July 2, 2010. The Committee received detailed memoranda dated January 11, 2010 and March 22, 2010 from the OCTC and the Chief Administrative Officer of the State Bar Court in response to inquiries posed by the Committee. In addition, the OCTC and the State Bar Court provided additional information in response to follow up requests from the Committee and posed by the Chair.

This Report does not include a description of the discipline system or its various stages. This Report assumes that the members of the Board have a working knowledge of the system.

The Committee wishes to express its thanks to the OCTC, and in particular Interim Chief Trial Counsel Russell Weiner, and his staff; the Chief Administrative Officer of the Courts, Colin Wong; Interim General Counsel Larry Yee, and Executive Director Judy Johnson.

II. Procedures Followed by the Committee

At the first meeting of the Committee, it defined the purpose of the discipline system as public protection, with the fair administration of justice being achieved with reasonable expenditure of resources. This statement of the purpose of the discipline system served as the touchstone for the performance measurement and statistical reporting the Committee viewed as necessary for the Board to adequately assess and evaluate whether the discipline system, and the OCTC in particular, is meeting that goal.

The following sections set forth the reports that the Committee recommends the OCTC submit to the Board on a regular basis in order for the Board to effectively fulfill its duties of evaluating the performance of the Chief Trial Counsel and the discipline system as a whole.

III. Recommendations of the Committee

A. Planning Process Specific to the OCTC.

The Committee discussed planning by and evaluation of the CTC. The Committee agreed that the CTC needs to generate a long-term plan and provide it to the Board no later than the Board's first planning session after the Annual Meeting in September. This plan should set the prosecutorial priorities for the office. The Board should sit in review annually regarding this plan and whether the CTC has achieved the plan and has met his or her goals.

B. Intake

The Committee discussed moving toward a Web-based complaint system and whether consumers should be given the choice of making their complaints over the phone, and then getting sent a complaint form, or simply completing a complaint template on-line. We would like the Bar to explore moving to a Web-based system, since it might eliminate the need for so many complaint analysts answering telephones, and as time passes, more and more people will be comfortable with making complaints on-line.

The Committee discussed requiring all intake callers to categorize each call by call type. Based upon discussions with the Interim CTC, it was determined that the top ten types of calls are already catalogued and that this information is provided to the legislature in the State Bar's Annual Report on the Discipline System. The Committee suggests that this information should be provided to the Board at each Board meeting.

C. Categorizing and Reporting for High Priority Cases.

The Committee discussed whether the Bar should categorize Priority I and Priority II cases (as defined by the OCTC's policies) and report on the incidence of these cases and the time to resolve them. The Committee recognized that this might be an issue to be addressed by the new Chief Trial Counsel after he or she is hired. The Committee strongly recommends that the CTC categorize Priority I

and Priority II cases and report on the incidence of each of these types of cases and the time to resolve them.

D. Reporting on Notice Opens.

Since before the shut down of the Bar in 1996, there has existed a backlog of cases in which the investigation has been completed, and the recommendation made that disciplinary charges be filed, but there is a delay in the drafting of the Notice of Disciplinary Charges (the "NDC") due to lack of personnel or other reasons (here called "open NDCs", a/ka/ "notice opens"). The Committee recommends that the OCTC regularly and permanently report to the Board on the time period that completed investigations are open before the OCTC files the NDC, and to keep track of this backlog.

The Committee questioned whether the OCTC should appoint its deputies to work on a rotating basis, e.g., every six months, as a filing deputy whose only responsibility is to draft the NDCs, and was informed that the OCTC does employ deputies as filing deputies. The Committee strongly encourages the new CTC to take aggressive measures to decrease and drastically reduce the number of open NDCs pending more than 14 days.

E. Regular Recording and Reporting of Charges Filed versus Discipline Imposed.

The Committee recommends that the CTC present at regular intervals a comparison of the charges filed versus the discipline imposed. While the March 22, 2010 report of the Interim-CTC was helpful, the Committee feels it could be presented in a better format, which would be more easily understood. One or more members of the Committee will suggest ways to present the same information in a more easily understandable format.

The Committee is sensitive to the confidentiality issues raised by the inclusion of settlement offers and demands, and suggests that this information should be held in confidence by the Board. The Committee generally believes that the results of this comparison of charges filed versus discipline imposed will give greater transparency to the system and facilitate settlement of claims. For example, if the OCTC is asking for a certain level of discipline in a particular case, it could argue that in 85% of all cases in which it seeks that level of discipline, the State Bar Court imposes it. Likewise, for example, the respondent could argue that there is only a 35% or less chance of being suspended for a year on those charges. A State Bar Court judge, acting as an early neutral evaluator or settlement judge, could use this data to assist in the early settlement of disciplinary cases.

This comparative information, and information about settlement demands and offers by the OCTC and the Respondents, would also help the Board determine whether the discipline system is efficiently moving cases toward completion, or whether there exist obstacles that are outside the control of the OCTC to the swift completion of pending matters.

F. Probationary Reporting.

The Committee suggests that the frequency of reporting should be at the discretion of the State Bar Court judge. Serious offenses, or offenses involving drugs, should require more frequent reporting; less serious offenses could require less frequent reporting. The Committee requests that the Chief Administrative Officer of the State Bar Court make a recommendation to the Committee and the Board regarding changes in frequency of reporting that would decrease the burden caused by probationers in the discipline system.

G. Time Study.

The results of the time study of the OCTC were not available before the Committee completed its tasks. The Committee recommends that Board require the CTC to review, evaluate and analyze the results of the recently completed time study and report to the Board on any possible changes to the discipline system that are suggested by the study. If no changes are recommended as a result of the CTC's evaluation of the time study, the CTC should explain why.

H. Benchmarking.

The Committee recommends that the Board institute a study to benchmark performance and cost of the California disciplinary system against the disciplinary systems of other large state bars, such as New York, Texas or Florida.

I. Recidivism Study.

The Committee asked for and received limited data on the number of disciplined attorneys who receive the imposition of discipline on successive occasions. The Committee understood that this data did not represent a true study of recidivism, which would be defined as imposition of discipline on an attorney for misconduct occurring after the imposition of the first instance of discipline. The Committee understood that the data it received was not truly data representing recidivism, because it included instances where the timing of misconduct that resulted in a complaint and the subsequent imposition of discipline might have occurred before the first discipline was imposed.

The Committee recommends that the Board instruct the OCTC to conduct a true recidivism study in order to determine what, if any, steps might be taken to reduce recidivism and the additional costs imposed on the system by revolving-door attorneys.

J. Review of Statute of Limitations

Before 1995, there were no statutes of limitations in California for filing disciplinary charges. Contrast this situation with criminal prosecutions in California in which all crimes, except murder and perhaps kidnapping with great bodily injury, are subject to limitations periods, with certain limited tolling

exceptions, such as the time the defendant was outside the state and the period in which the crime had not been discovered.

In 1995, the Rules of Procedure of the State Bar of California were amended to add Rule 51, which attempted to address the absence of a limitations rule for discipline prosecutions. As a general proposition, the period became "five years from the date of the alleged violation." (Rule 51 (a).) Paragraph (c) of that rule identifies 11 tolling exceptions to the five years, including that the member continues to represent the complainant; the complainant is physically or mentally incapacitated; a parallel civil or criminal investigation is pending; the attorney has concealed facts constituting the violation; the attorney has not cooperated in the investigation; the attorney has made misleading statements to the bar concerning the violation; the investigation has been abated; the attorney is participating in an authorized diversion program; the investigation has been terminated by an admonition; the investigation is currently pending before CTC's audit or review unit and the attorney is currently suspended from the practice of law, subject to a hearing regarding his/her reinstatement.

The practical effect of the above, very broad tolling exceptions is that few, if any cases, are dismissed in the state Bar Court for violation of the five year rule. As an example, and from my experience, the bar can always argue that a subject attorney failed to cooperate with an investigation or mislead the bar as to the investigation. Besides, in criminal and civil matters, it is of no consequence on the applicable statute of limitations that a defendant was uncooperative; a victim was incapacitated; a parallel investigation was being conducted; the investigation was abated or the subject defendant is incarcerated. We believe that an amended limitations rule will have a salutary effect on the discipline system by reducing the backlog and causing better cases to be filed in a more diligent fashion.

For the above reasons, the Committee proposes that Rule 51 be amended to make it more workable and realistic. During this review process, we suggest that different tolling periods be considered for different violations, with five years being applied to the most serious violations such as misappropriations, criminal convictions and misrepresentations to clients and the courts and that a lesser period be instituted for the less egregious acts, such as a single failure to communicate with a client.

IV. Conclusion

The Committee summarizes its ten recommendations as follows:

1. That the CTC should generate a long-term plan and provide it to the Board no later than the Board's first planning session after the Annual Meeting in September.
2. That the CTC should study the feasibility of on-line complaints being taken over the Internet on a Web-based system.

3. That the CTC report to the Board at each Board meeting the categorization of complaints received by the Bar during the preceding period.
4. That the CTC should categorize Priority I and Priority II cases and report to the Board on a quarterly basis on the number of Priority I and Priority II cases received, the number of Priority I and Priority II cases, and the shortest period, longest period, average time period and median time period to resolve them.
5. That the CTC should report to the Board at each Board meeting on the number of open NDCs and that the CTC take aggressive measures to reduce and eventually eliminate the pendency of open NDCs.
6. The CTC should report to the Board at each Board meeting its comparison of the parties' pre-filing settlement positions, their post-filing positions and the level of actual discipline imposed. This information should be provided in a readily understandable format.
7. The Chief Administrative Officer of the State Bar Court should evaluate the frequency of probationary reporting and institute guidelines for less frequent reporting by probationers in appropriate cases.
8. The CTC should review, evaluate and analyze the results of the recently completed time study and report to the Board on any possible changes to the discipline system that are suggested by the study. If no changes are recommended as a result of the CTC's evaluation of the time study, the CTC should explain why.
9. The Board should institute a study to benchmark performance and cost of the California disciplinary system against the disciplinary systems of other large state bars.
10. The Board should instruct the CTC to conduct a recidivism study in order to determine what, if any, steps might be taken to reduce recidivism and the additional costs imposed on the system by revolving-door attorneys.
11. To further reduce the backlog and to make the system fairer, the Committee proposes to amend Rule 51 to make it more workable and realistic. During this review process, we suggest that different tolling periods be considered for different violations, with five years being applied to the most serious violations such as misappropriations, criminal convictions and misrepresentations to clients and the courts and that a lesser period be instituted for the less egregious acts, such as a single failure to communicate with a client.