Clearing backlog will be tough slog
Agency’s mandate is to eliminate more than 1,500 discipline cases.

By Don J. DeBenedictis

Three weeks ago, the State Bar’s executive director demanded that the agency’s persistent backlog of discipline cases be eliminated - by year’s end. That’s 1,500-plus cases reduced to zero in less than six months.

To fulfill that daunting mandate, each of the state’s 55 bar investigators will have to boost by 50 percent the number of cases he or she closes or moves on to prosecutors - from about seven cases a month to 10.

In addition, each of the bar’s 60 lawyers, including supervisors, will have an average of two weeks to settle or prepare detailed formal charges per backlog case. That’s on top of the 200 to 500 new cases the team gets every month.

Bar executive director Joseph L. Dunn has tasked the six top managers in the discipline prosecution unit to figure out the details of this backlog Blitzkrieg. He wants concrete plans within two weeks.

Various ideas are floating around inside and outside the agency - from changing the way cases are assigned and processed to improving the office’s work ethic.

And at least one area is already showing signs of change.

Lawyers who defend other lawyers in discipline matters have long complained about the agency’s plea bargaining protocols, which require adherence to a disposition schedule and supervisor approval in all cases.

Arthur Margolis, a longtime Los Angeles defense attorney, said one prosecutor told him that they only offer sentences they expect they could score at trial, rather than something less to induce settlement, because of the stringent rules.

"That kind of negotiation misses the whole point of negotiation," Margolis said.

Lately, several lawyer said they’ve noticed a thaw.

"Suddenly, things seem to be moving forward," said Beverly Hills attorney Diane Karpman.

"I’ve seen what I believe to be a slight increase [in settlements]," agreed Jerome Fishkin of Fishkin & Slatter LLP in Walnut Creek. "In the last two weeks, several cases that I believe should have been closed months ago finally got closed."

Although the backlog, which is defined by statute, includes only cases that have not yet been filed, defense lawyers argue that settling early would clear cases before they become backlogged.
State Bar President William N. Hebert said settling out cases just to keep the numbers down isn't the solution. "We're not going to let disciplinable cases go without some sort of discipline," he said.

Some longtime observers of the discipline system remain skeptical that Dunn's mandate will be fulfilled.

"They're never going to reduce the backlog to zero," said defense attorney Paul G. Virgo, himself a former top bar prosecutor. After all, Virgo and others pointed out, the bar has had a discipline backlog for 30 years or more.

A few defenders said that some people in the prosecution office have not always worked diligently, even knocking off early on Friday afternoons.

"I think there's some truth to that," said Ellen A. Pansky, a well-known defense attorney with Pansky Markle Ham LLP in Pasadena.

Others in the defense bar and within the prosecution office deny the accusation vehemently.

For the moment, those concerns are gone.

At the same time he issued his mandate, Dunn cleaned house, firing four top managers. The top prosecutor, James Towery, resigned. Since the mass of dismissals, prosecutors' "morale is down, but they've got their noses to the grindstone," said Edward O. Lear of the Century Law Group LLP in Los Angeles.

"The lights are on, the desks are manned and everybody's eyes are wide open," agreed Karpman.

The bar has already tightened management by cancelling alternative work schedules for trial counsel employees who had them, so that everyone starts the day at the same time.

Hebert, the State Bar president, said supervisors in the Office of Chief Trial Counsel will provide "careful management of each person's workload" to help move cases along.

And already, there are glimmers of hope.

The number of fully investigated cases awaiting filing or settling - the "notice open inventory" in bar terminology - has been sliding down for 18 months. The total was 1,446 in January 2010, while it was only 674 at the end of June.

The other portion of the total backlog, uncompleted investigations, dips dramatically each year in the weeks before the bar's annual discipline report to the Legislature comes due. Bar officials believe that fact shows that, with effort, the investigative backlog can be slashed to zero and kept there.

But Robert C. Fellmeth, a professor at University of San Diego School of Law who served as State Bar discipline monitor from 1987 to 1992, said the only way for the bar to cope with the crush of cases would be to hire more investigators and prosecutors.

Others have made more technical suggestions.

John K. Van de Kamp, who has in the past served as state attorney general and bar president, as well as Los Angeles County district attorney, advocates swapping lengthy, detailed charging complaints with shorter "notice pleading" style complaints, like those used by district attorneys' offices.

Other suggestions include reducing the staff at depositions, typically now two lawyers or an investigator and lawyer, according to Pansky.

Margolis said the bar should adopt a vertical-prosecution approach, in which cases are assigned lawyers for their duration.

Dunn said he would be open to considering plans encompassing any or all of those

Martens Olson & Bear LLP won a verdict for their client, Schindler Elevator Corp.

California Courts of Appeal
Toyota executives won't be deposed in U.S.
A 2nd District Court of Appeal panel on Wednesday reversed a superior court judge who ordered Toyota Motor Corp. to compel five of its Japanese-based executives to appear in the U.S. for a deposition in a wrongful death and personal injury case.

Law Practice
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Bingham McCutchen LLP, an international firm focused on financial services and technology, is expanding its tax practice to California with the addition of three tax specialists as partners in its Silicon Valley office.

Tax
New tax form for retailers receiving credit card payments
Beginning in 2012, retailers will be required to report their credit card receivables for the calendar year and on a monthly basis. By William A. Kastin and Mark A. Ziemba of Snell & Wilmer LLP

Environmental
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The complicated case of developing regulations for California's Green Chemistry Law. By Gene Livingston of Greenberg Traurig LLP

Intellectual Property
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Lessons to be learned from disputes over intellectual property rights in body art. By Spencer C. Martinez of Ropers Majeski Kohn & Bentley

Government
Getting away with torture: the ill-treatment of detainees
A Human Rights Watch report on torture calls for criminal investigations of several members of the Bush administration. By Stephen F. Rohde of the ACLU Foundation of Southern California.

Law Practice
Fight job dissatisfaction with a dose of positivity
Feeling an increase in job dissatisfaction? Here's a new way to escape the gloom. By Timothy Tosta of Luce, Forward, Hamilton & Scripps LLP

California Supreme Court
Liu's confirmation hearing set
State Supreme Court nominee Goodwin Liu's confirmation hearing has been set for 3 p.m. on
approaches. He's even considering lobbying for a change in the statutory definition of the backlog to separate complex and other special cases from routine matters.

Currently, the statutory definition is "the number of complaints ... pending beyond six months after receipt without dismissal, admonition, or the filing of a notice to show cause."

Still, many people experienced with the discipline system remain dubious.

Fishkin said that when he went to work as a State Bar prosecutor himself, back in 1983, he was part of a new, 10-person task force set up to eliminate a backlog so large it soon led to a multipart exposé in the San Francisco Examiner.

The task force was given one year to get the job done.

"I got a nine-year career out of it," Fishkin said.

Aug. 31, the court announced Wednesday.

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Judicial Profile
Kirtland L. Mahlum
Superior Court Commissioner San Bernardino County (Barstow)

Discipline
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Each of the state's 55 bar investigators will have to boost by 50 percent the number of cases closed or moved on to prosecutors - from about seven a month to 10, to clear a backlog of lawyer complaints by the end of the year.