4A

Information/Action

Professional Practices Committee

Division of Professional Practices Workload Report

Executive Summary: This agenda item provides a report on the Division of Professional Practices' current workload and options for the Commission to consider concerning the caseload at the Office of the Attorney General.

Recommended Action: Support redirecting or adding resources at the Office of the Attorney General and seek resources to pay for the legal services.

Presenter: Nanette F. Rufo, Director, Division of Professional Practices

Strategic Plan Goal

I. Educator Quality

- Effectively, efficiently, and fairly monitor the fitness of all applicants and credential holders to work with California students.

June 2014

Division of Professional Practices Workload Report

Introduction
To increase its oversight over the work of Division of Professional Practices (DPP), in 2011 the Commission on Teacher Credentialing (Commission) directed staff to present information about DPP's workload as a standing part of the Commission's agenda.

The DPP is responsible for managing the disciplinary caseload and providing legal advice to the statutorily created disciplinary review committee, the Committee of Credentials (Committee). The Committee is an investigatory body comprised of seven members appointed by the Commission for two-year terms. Members include an elementary teacher, a secondary teacher, one school board member, a school administrator, and three public representatives. The Committee is responsible for reviewing allegations of misconduct against a credential holder or applicant and making a recommendation to the Commission as to whether probable cause exists for adverse action against a credential or application. Once the Committee makes a recommendation for an adverse action, the credential applicant or holder may accept the recommendation and the matter is placed on the Commission's Consent Calendar. The applicant or holder also has the option to appeal the Committee's recommendation and ask for an administrative hearing. An administrative hearing is a full evidentiary hearing, held before an administrative law judge, where witnesses testify and evidence is presented.

Highlights for the April 2014 Statistics
The Commission's dashboard (see Attachment A) reports on six key measurements in line graph form, showing both current year numbers as well as the prior year numbers for comparison purposes.

The "Total Cases" are the number of open cases within DPP, including cases in the Intake Unit, before the Committee of Credentials (Committee), pending before the Commission and pending an administrative hearing. At the end of April the caseload was 2,392, about the same number as presented at the last Commission meeting, although down about 200 cases from a year earlier.

"Cases Opened" are new cases received during the month, from all sources, including criminal arrest notices, district reports and educators who self-report misconduct. In April, staff opened 428 cases, which is within the normal range of 400-500 cases a month.

As can be seen in the "Initial Review Cases" and the "Formal Review Cases," the Committee continues to effectively handle the large number of cases under consideration by the Committee. The numbers in these two charts reflect the number of cases reviewed by the Committee at its monthly three-day meeting. The two-step process (initial review and formal review) is required by statute.

"Cases Closed" is the number of matters closed during April by Commission action, Committee action or closed by staff where the Commission has given formal delegation of authority (e.g. single alcohol offenses that do not involve schools or minors). In April, 388 cases were closed.

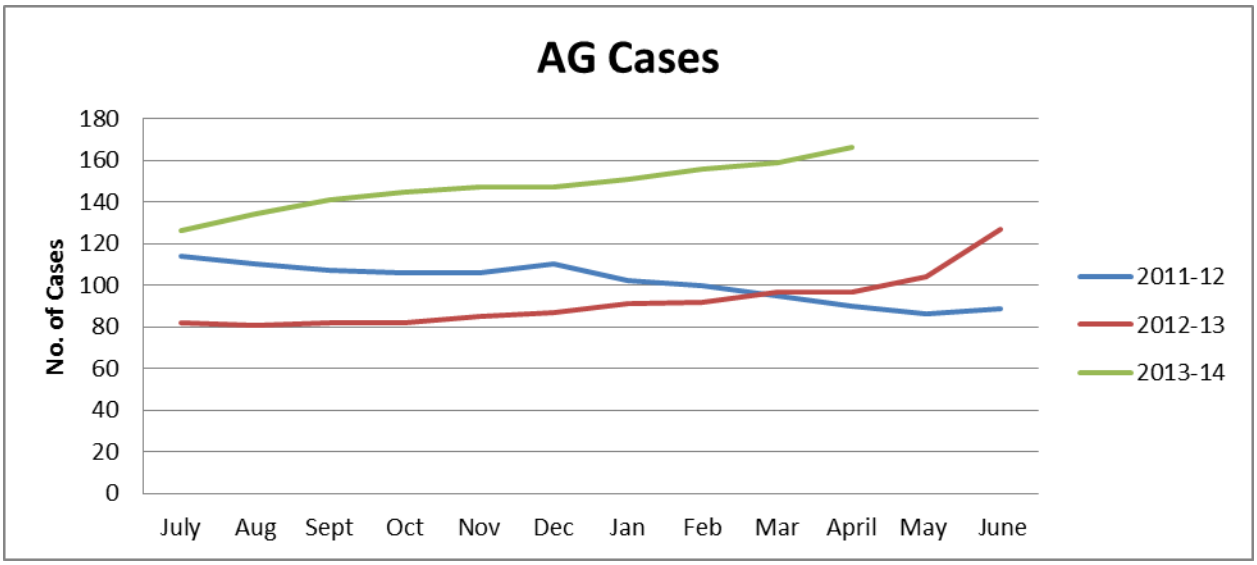
"AG Cases" is the number of cases in which the Office of the Attorney General (AG) represents the Commission in an administrative hearing as a result of an individual appealing the recommendation of the Committee.

Growing Caseload at the AG

When a person appeals the recommendation of the Committee, the Commission's case file is transferred to the AG's office with a request that the AG represent the Commission in the administrative hearing.

As reported at the last Commission meeting, the number of cases pending at the AG's office has risen significantly, from 89 as of June 2011 to 166 as of May 1, 2014. This growth is illustrated in Chart 1:

Chart 1



There are two major reasons for the increase. First, more cases are being reviewed by the Committee of Credentials each month. In FY 2010-11, approximately 40-50 cases were set for initial review at each meeting. Since May 2012, that number is approximately 90 each month. More cases being reviewed results in more recommendations for adverse action and thus, more requests for an administrative hearing. Despite the increase in the number of cases transferred to the AG's office, the number of cases completed by AG staff has remained fairly constant over the last three years. Attachment B compares the total cases referred to the AG with the total completed.

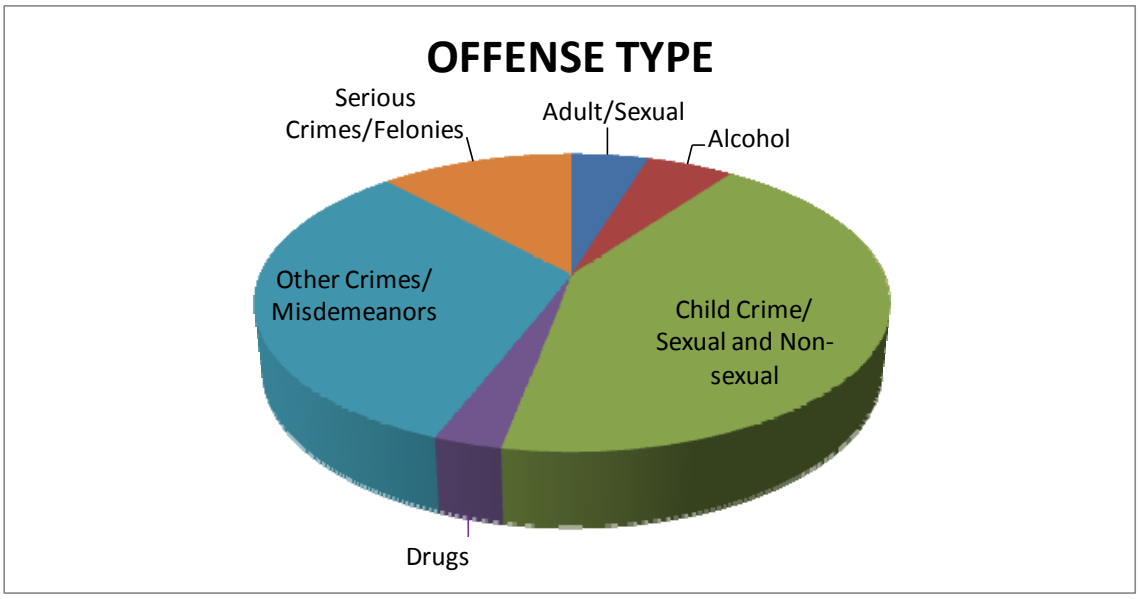
As indicated in Attachment B, the difference between cases referred and cases completed began steady upward growth in October 2012. While staff monitored the numbers and reported them to the Commission at each meeting, it was unclear whether this increase was a result of the Commission's work on clearing out the backlog of DPP cases, which would create a

temporary "bubble" or a true increase in workload. However, with several months of data, it appears clear that there is, and will continue to be, more referrals to the AG than in prior years. The number of cases being opened each month and the number of cases presented to the Committee each month are fairly stable over the last year. Thus, no decline in referrals to the AG is anticipated.

To reduce the expense of AG representation and to allow credential applicants and holders to resolve cases more expeditiously, once an individual requests an administrative hearing, a Commission attorney reviews the case file to determine if it might be appropriate for settlement. Cases involving early settlement typically involve substance abuse offenses or lesser forms of misconduct where the Committee recommended a suspension. These early settlement cases are resolved without being sent to the AG for representation, and therefore without additional costs to the Commission. During FY 2012-13, Commission staff prepared, and the Committee approved 57 settlements. However, as a result, the cases sent to the AG tend to be for the most serious forms of misconduct.

The increased number of cases sent to the AG for representation may lead to a serious delay in cases that pose a risk to children or the educational system. While applicants do not hold a credential while waiting for an administrative hearing, a credential holder continues to hold a valid credential while waiting for the administrative hearing. The largest number of cases pending administrative hearing directly involve children, as shown in Chart 2. So a credential holder charged with a serious offense involving a child may continue to serve under his or her credential, posing a risk to public safety. This risk may be seen by the type of misconduct alleged in cases currently pending at the AG's office:

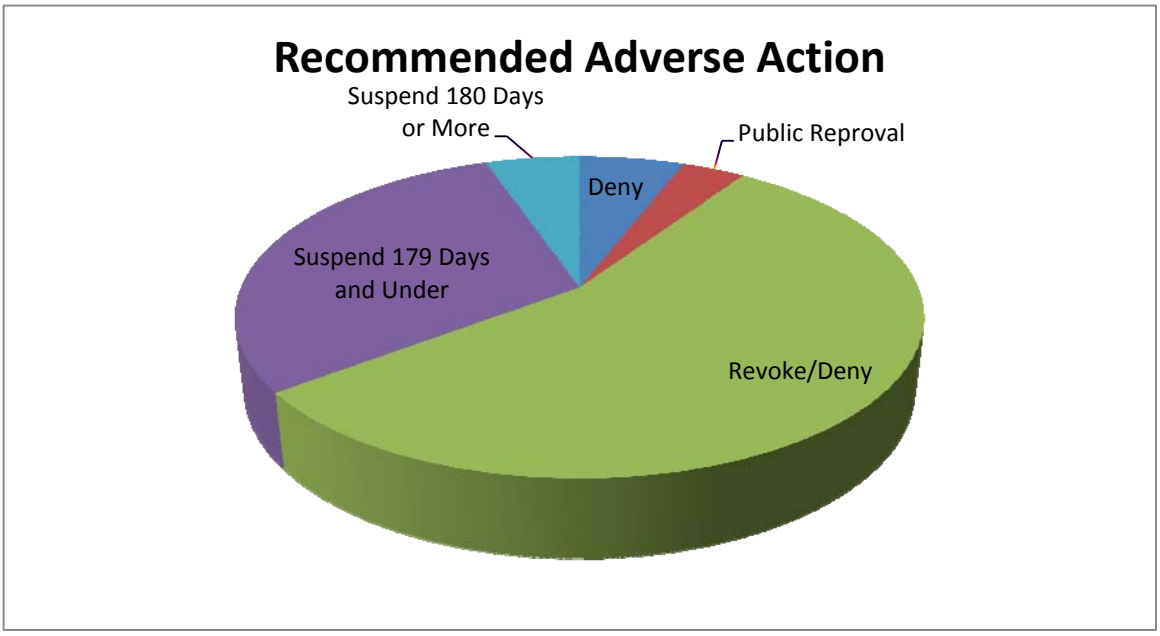
Chart 2



The serious nature of the cases is also reflected in the type of recommendation made by the Committee of Credentials in these AG cases. Ninety-four of the cases involve a recommendation to revoke all credentials. In another 10 cases the Committee recommended denial of all applications. These are the most serious actions the Committee may recommend,

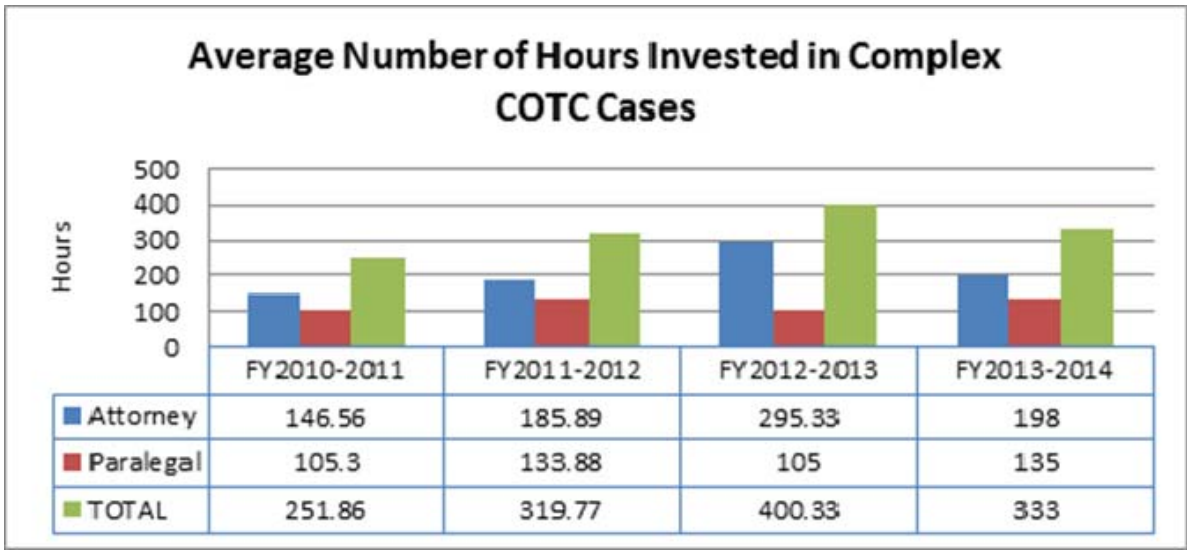
and represents the Committee's judgment about the level of misconduct reviewed by the Committee. For comparison, only six cases at the AG's office involve a recommendation for a public reproval. The type of recommendation is shown in Chart 3, below.

Chart 3



The AG bills the Commission for the costs of the legal services it provides to the Commission. The current rate for attorney billing is $170 per hour for attorney time and $120 an hour for paralegal time. The estimated cost for AG representation through the end of the current fiscal year is consistent with the Commission's budget of $1.25 million.

The chart below reflects the AG's estimate of average number of hours the AG spends on more complex Commission matters:



	FY2010-2011	FY2011-2012	FY2012-2013	FY2013-2014
Attorney	146.56	185.89	295.33	198
Paralegal	105.3	133.88	105	135
TOTAL	251.86	319.77	400.33	333

To handle the increase in Commission cases, the AG has informally estimated it would need to assign three attorney positions and two paralegal positions. Should these additional resources be allocated to handling the Commission's cases, this would increase the Commission's cost for AG services.

One of the Commission's priorities over the past several years was an insistence that discipline cases are not unduly delayed due to activities within the Commission's control and oversight. Staff is raising the issue of the increasing caseload at the AG's office so that the Commission may consider what, if any, action it may wish to take to stop the AG caseload from continuing to increase and age. The Commission has some options to consider about cases referred to the AG's office.

Options

Option 1-Maintain Current Workload at the AG's Office

One option would be for the AG to continue to complete one or two cases each month while 8 to 10 new cases are referred for representation. While the Commission and the AG could set priorities for case management, this option will result in long delays in getting cases heard before an administrative law judge, posing an unacceptable risk to school children. It also allows the cloud of an accusation against an educator where the evidence of alleged misconduct may not be provable in a contested hearing. Option 1 does not meet with the Commission's mission of protecting students in California, it also denies prompt due process to credential holders and applicants.

Option 2-Request the AG to allocate More Resources to Commission Cases

Should the AG redirect or add staff to handle the higher number of cases referred by the Commission, it would result in increased costs to the Commission. Commission staff contacted the AG's office to request an estimate of the additional resources it would need to handle the new volume of Commission cases. This informal estimate of time indicated a need to add three Deputy AG positions and two paralegal positions. If the Commission believes adding resources at the AG's office is appropriate given the increased workload, the Commission might ask the AG's office to redirect or add the needed resources.

Since the AG bills the Commission by the hour for its services, the Commission would need to identify resources to pay for an increase in the hours of legal services provided by the AG. The budgeted and estimated cost of AG legal services for FY 2013-14 is $1.25 million. The approximate cost of adding three Deputy AG positions and two paralegal positions is $1,350,000.[1] This would result in a total budget for AG services of approximately $2.6 million.

The Commission would also need to pay for the increase in bills from the Office of Administrative Hearings (OAH). OAH provides administrative law judges to hear cases throughout the state and runs the administrative hearing process. In fiscal year 2013-14, the Commission cost for OAH services is estimated to be $120,000. If the number of hearings doubles, then that bill is likely to increase at the same rate, to $240,000.

[1] Calculated at the AG's billing rates of $170 an hour for an attorney and $150 for a paralegal, times 1800 hours per year. (So $170 x 1800 hours x 3 attorney positions = $918,000; and $120 x 1800 x 2 paralegals=$432,000)

Given the demands on the Commission's resources, the Commission would not be able to redirect funds to cover these increased costs for the AG and OAH of approximately $1.5 million without reducing its ability to meet other statutory responsibilities. Absent a significant increase in credential applications, the Commission would likely need additional resources to handle these increased costs. Of course, any change in the Commission's expenditure authority would require approval by the Department of Finance, the Governor and the Legislature.

This option would increase the number of cases being actively worked and increase speed of resolution, providing better public safety protection and faster due process for credential holders and applicants.

Option 3-Add staff to the Commission

The Commission could also seek authority to increase the number of authorized positions in DPP so that the entire hearing process would be handled by Commission staff. Handling these cases would require, in addition to more staff, a sizeable travel budget. The majority of cases arise in Southern California, and administrative hearings are held where the witnesses are located. The AG provides representation to the Commission from its offices located around the state, a cost savings not available to the Commission with a single office in Sacramento.

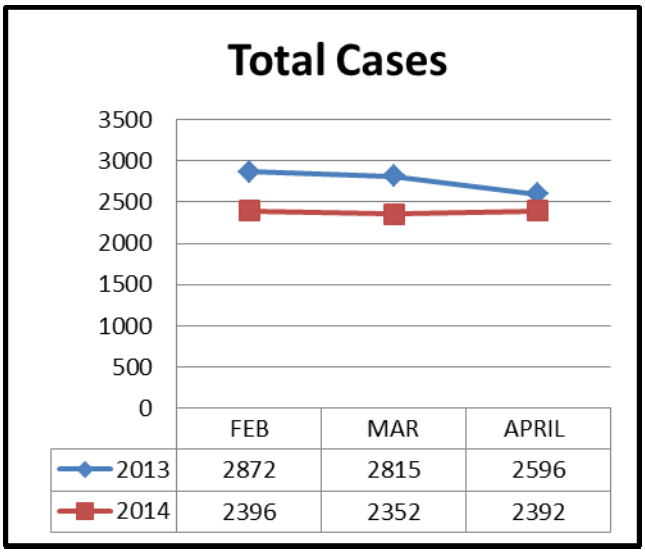
This approach would also, in the short run, increase costs to the Commission. As the Commission hired staff to perform this function, the Commission would also be paying the AG to complete the existing cases where it represents the Commission.

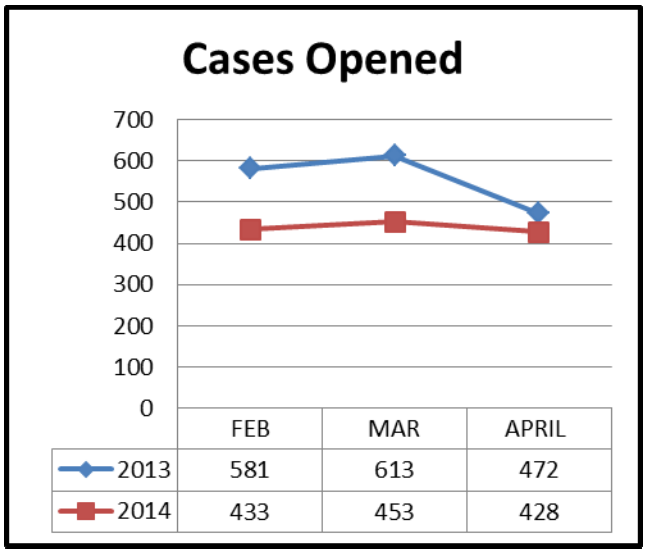
It is not clear that this option would garner the support of the AG. In 2005, the Commission explored the idea of adding positions so that administrative hearings were handled by Commission staff. In a letter dated October 25, 2005, Attachment C, the AG explained the process for obtaining their consent to the proposal. The letter notes that requests for the AG's consent to representation by in-house counsel are "not routinely granted." Option 3 would result in additional increased costs to the Commission during the transition phase where both in-house counsel and the AG would be conducting administrative hearings. In addition, this option would require an additional layer of approval, consent from the AG.

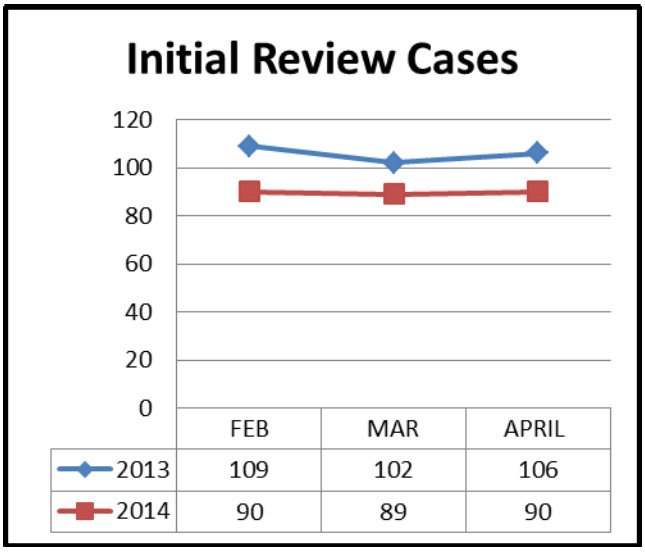
Staff Recommendation

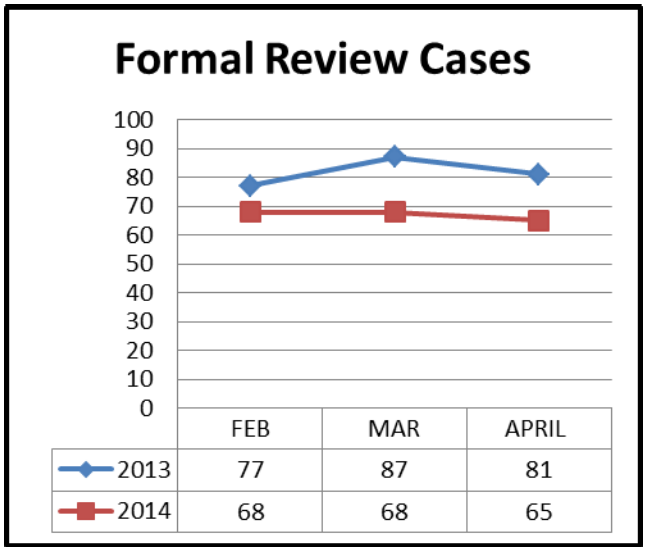
The Commission is continuing to work with the AG to identify options for completing more administrative hearings. At this time, staff believes that Option 2, requesting the AG to redirect or add more resources for Commission cases, is the strongest option for ensuring that cases are handled expeditiously. While this approach would strengthen public safety and provide timely due process, it would likely result in increased costs to the Commission and would potentially require additional staffing resources for the AG's office. The Commission may wish to direct the Executive Director to work with the Administration to explore options for addressing this important public safety issue.

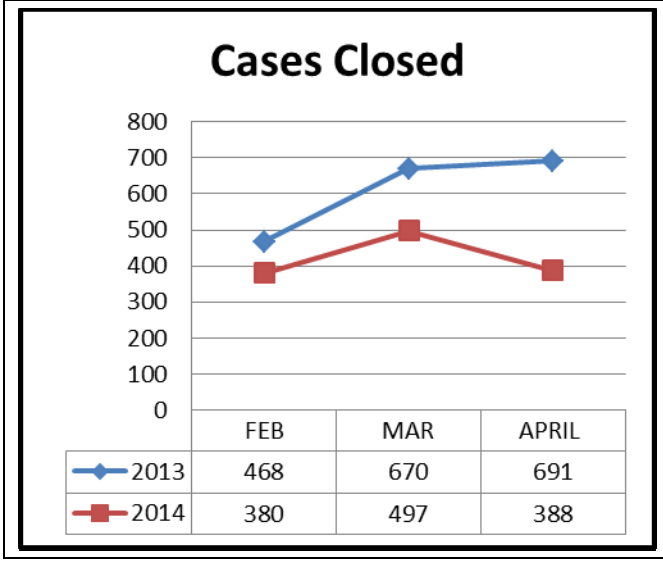
Attachment A

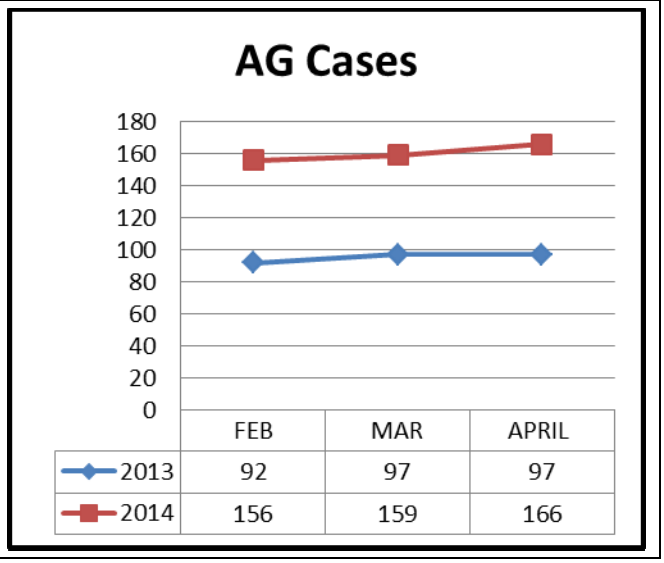




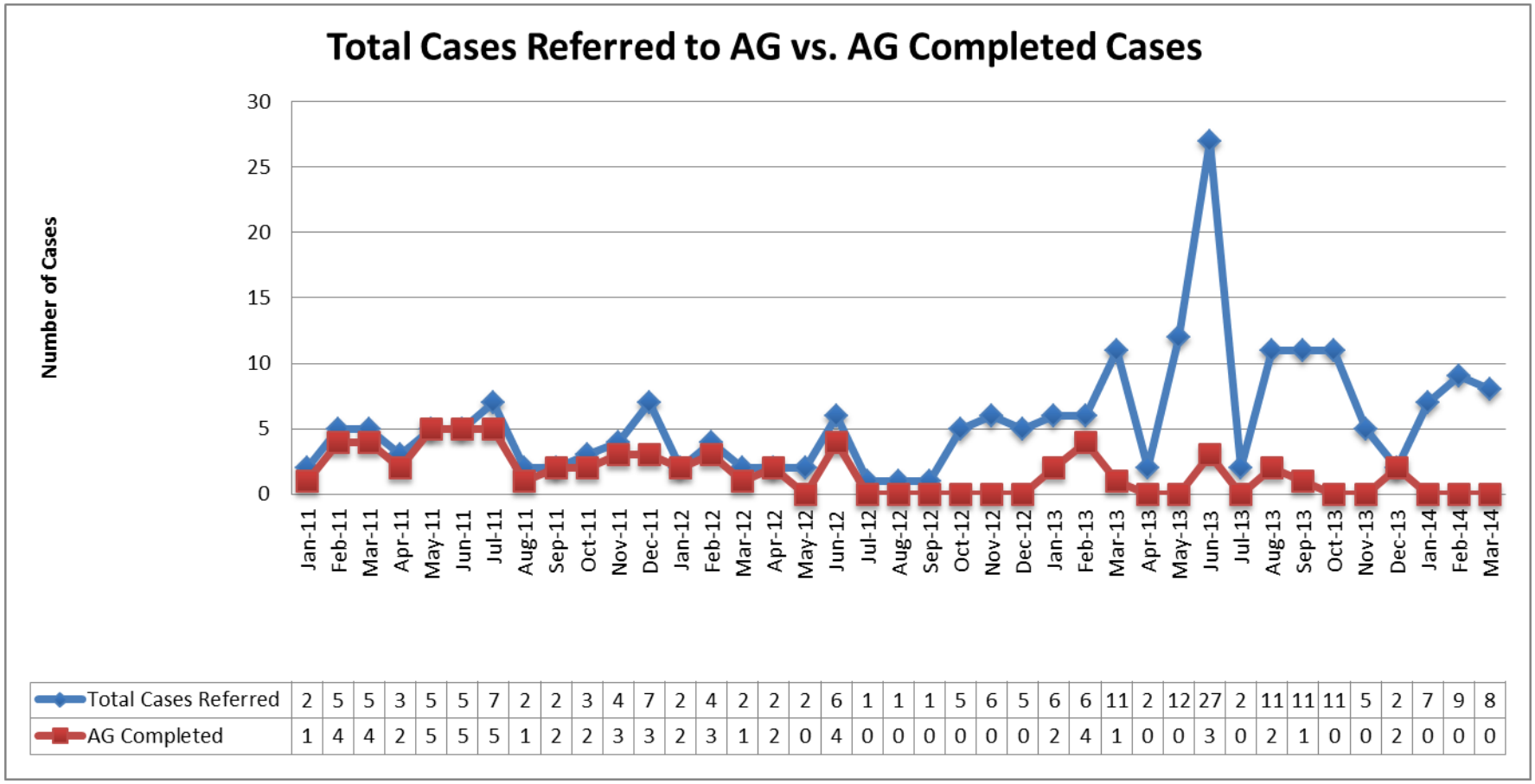








Attachment B



	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12	Oct-12	Nov-12	Dec-12	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13	Jan-14	Feb-14	Mar-14
Total Cases Referred	2	5	5	3	5	5	7	2	2	3	4	7	2	4	2	2	2	6	1	1	1	5	6	5	6	6	11	2	12	27	2	11	11	11	5	2	7	9	8
AG Completed	1	4	4	2	5	5	5	1	2	2	3	3	2	3	1	2	0	4	0	0	0	0	0	0	2	4	1	0	0	3	0	2	1	0	0	2	0	0	0

BILL LOCKYER
Attorney General

Attachment C

10/13/05

State of California
DEPARTMENT OF JUSTICE

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October 11, 2005

Mary C. Armstrong
Director, Division of Professional Standards
Commission on Teacher Credentialing
1900 Capitol Avenue
Sacramento, CA 95814

Dear Ms. Armstrong:

I write in reply to your letter of October 4, 2005, in which you relate that the Commission will submit a proposal to the Department of Finance and to the Legislature regarding the feasibility of relying upon internal legal counsel rather than the Attorney General at administrative hearings in order to achieve savings initially calculated at $927,000 per year.[1] While I am skeptical of the assumptions underlying the proposal, you have not solicited my opinion on that score, so I will turn immediately to your questions.

You first ask whether the requirement that the Attorney General represent state agencies in judicial proceedings extends to administrative hearings. The answer to that question is yes. Government Code section 11042 states unequivocally that no state entity may employ counsel other than the Attorney General "in *any* matter in which the [entity] is interested, or is a party as a result of office or official duties." (Emphasis added.) The administrative hearings in issue are matters in which the Commission is a party as the result of its official duties, and thus the law requires that the Attorney General represent the Commission in those proceedings.

You next ask whether the Attorney General has any written guidance on state agencies providing in-house legal representation. It does. That guidance consists of a letter sent to the Commission and all other clients of the Attorney General on October 6, 2000, a copy of which I enclose for your convenience.

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[1]The total cost to the Commission for all of the Attorney General's services in fiscal year 2004-05, including court hearings as well as administrative hearings, was $1,136,173. The proposal therefore assumes that in-house counsel will be able to do the work now being done by the Attorney General for about $200,000.

Of particular relevance to the Commission's proposal is the discussion on page 3 of the letter, which addresses the import of the several references in Government Code section 11040 to the requirement that state entities obtain the written consent of the Attorney General prior to employment of other counsel "in any judicial proceeding." In that regard, the letter first sets out the entire text of section 11040, which reads as follows:

> (a) This article does not affect the right of any state agency or employee to employ counsel in any matter of the state, after first having obtained the written consent of the Attorney General.
>
> (b) It is the intent of the Legislature that overall efficiency and economy in state government be enhanced by employment of the Attorney General as counsel for the representation of state agencies and employees in *judicial and other proceedings*.
>
> The Legislature finds that it is in the best interests of the people of the State of California that the Attorney General be provided with the resources needed to develop and maintain the Attorney General's capability to provide competent legal representation of state agencies and employees in *any judicial proceeding*.
>
> (c) Except with respect to employment by the state officers and agencies specified by title or name in Section 11041 or when specifically waived by statute other than Section 11041, the written consent of the Attorney General is required prior to employment of counsel for representation of any state agency or employee in *any judicial proceeding*.

(Emphasis added.) The letter then addresses the statute's focus on judicial proceedings, declaring:

> [T]he exception in subdivision (c) of section 11040 [for judicial proceedings] must be read in light of the general rule [in] subdivision (a) that requires . . . agencies not otherwise exempt by statute to obtain the consent of this office to employ counsel other than the Attorney General. Subdivision (c) *is not a grant of authority* for state agencies to employ house counsel for non-litigation matters [i.e., matters other than judicial matters] absent statutory exemption from the provisions of Government Code sections 11042 and 11043.

(Emphasis in original.)

You next ask, assuming the Government Code requires that the Attorney General represent state agencies at administrative hearings, whether it also requires that paralegal or legal analyst work, such as the drafting of accusations, be performed by the Attorney General. Whether work must be done by the Attorney General turns on whether the work constitutes the practice of law. (12 Ops. Atty. Gen. 176 (1948); *U'ren v. State Board of Control* (1916) 31 Cal.App. 6, 8.) Because paralegal work does not constitute the practice of law, the Government Code does not require that this work be done by the Attorney General. I will reiterate, though, that making an appearance for a party in an administrative hearing constitutes the practice of law.

Next, you ask whether the Attorney General maintains a list of state agencies that it does not represent, or that have received a section 11040 consent, or both. We do not maintain such lists, although section 11041 itself lists agencies that are not required to employ the Attorney General's office for their legal services. In addition, we maintain copies of letters in which we authorize agencies to retain outside counsel, or in which we identify these authorizations, but we do not disclose these letters without client permission because of concerns about attorney-client confidentiality.

Next, you ask the procedure for requesting consent pursuant to section 11040. The request should be made in a letter to James M. Humes, the Chief Assistant Attorney General for the Civil Law Division. The details of what the request should address are set out on pages 5 and 6 of the enclosed October 6, 2000 letter. I will note here that such requests are not routinely granted. The Attorney General takes very seriously his charge from the Legislature to enhance overall efficiency and economy in state government by providing efficient, economical legal representation, and believes, with considerable justification, that representing state entities in judicial and other proceedings accomplishes precisely that. Furthermore, the trend has been for this office to increase rather than to decrease its role in handling disciplinary matters because the practice helps to alleviate conflicts problems that arise when agency counsel perform both prosecutorial and advisory functions.

Finally, you ask whether I have an opinion concerning the length of time needed to transition the Attorney General's current Commission caseload back to the Commission and whether I have any examples of this process having occurred. In my opinion, the length of time needed would depend entirely upon the time it would take the Commission's attorneys to review and understand the history of each case. The case files are typically of modest size, so I think that an attorney should be able to become familiar with one in no more than eight hours. The Attorney General's Office currently has 75 open Commission cases, so depending upon how many attorneys you devote to that effort, the transition could take from one week to three months. I have no examples of the process having occurred.

If you wish additional information or further elaboration upon the answers given above, you have only to let me know, and I will provide it.

Sincerely,

THOMAS R. YANGER
Senior Assistant Attorney General

For BILL LOCKYER
Attorney General

TRY/mca
Enc.

cc: Sam W. Swofford, Ed.D. (w/enc.)
James M. Humes (w/enc.)