

The City of New York

Commission to Combat Police Corruption

**THE NEW YORK CITY POLICE DEPARTMENT'S
PROSECUTION OF DISCIPLINARY CASES**

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PART I

INTRODUCTION

I. INTRODUCTION

A police department disciplinary system that fairly and expeditiously adjudicates cases of corruption and misconduct is an important element in instilling public confidence in the overall performance of the department. Confidence in a department's disciplinary system is necessary if the public is to believe that a police department is willing and capable of effectively disciplining its own members and unwilling to accept wrongful behavior by its officers. From the perspective of police officers, a fair and efficient system is also important. If members of a department do not have respect for its disciplinary system, cynicism and disrespect grow while morale falls, and the system's potential for deterring future misconduct is diminished.

The 1995 Mayoral Executive Order establishing the New York City Commission to Combat Police Corruption ("Commission") recognized the need for a monitor independent of the New York City Police Department ("Department," "NYPD") that would evaluate, on a permanent basis, the effectiveness of Department policies and procedures to combat any conditions and attitudes that may "tolerate, nurture or perpetuate corruption."¹ In prior studies the Commission has examined penalty aspects of the Department's disciplinary system in specific misconduct settings.² While the

¹ Executive Order No. 18, February 27, 1995, "Establishment of Commission To Combat Police Corruption," at p. 4.

² See, e.g., Commission Reports, *The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members Who Make False Statements* ("1996 False Statement Report") (December 1996); *The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members*

Commission's First Annual Report also raised issues about the quality of the Department's prosecution of disciplinary cases, the Commission has not previously undertaken a comprehensive study of the Department's prosecution function.

The Commission, therefore, initiated a broad study of the Department's prosecution of disciplinary cases. Rather than focusing on charges, penalties, and other issues that have been addressed by the Commission in prior reports, the focus of the present study is on the prosecution function as a whole, its structure and mechanics, and those core areas related to the Department's ability to effectively and expeditiously prosecute and adjudicate disciplinary cases. In furtherance of this review, the study addresses a broad range of issues involving the Department Advocate's Office and the Office of the Special Prosecutor ("DAO," "SPO," respectively), the two parts of the Department's disciplinary system responsible for prosecuting internal disciplinary cases. While DAO prosecutes the majority of disciplinary cases, SPO handles the most serious cases of misconduct.

Specifically, the Commission examined the qualifications, training, and supervision of Department advocates³ and evaluated how cases are handled, including the preparation and presentation of cases in the Department's "Trial Rooms" and "OATH" hearing rooms.⁴ The report

Who Engage in Serious Off-Duty Misconduct ("Off-Duty Misconduct Report") (August 1998).

³ "Advocates" prosecute cases for DAO while "Assistant Special Prosecutors" prosecute cases for SPO. Unless otherwise specified as "Advocate" or "Assistant Special Prosecutor," lower case "advocate" will be used in discussions that apply to both Advocates and Assistant Special Prosecutors. In the report, all advocates will be referred to using the male pronoun.

⁴ At the Department's Office of the Deputy Commissioner - Trials ("DCT"), disciplinary cases are adjudicated in the "Trial Rooms." The Office of the DCT is comprised of the Deputy Commissioner and three Assistant Deputy Commissioners. The four sit as judges in Department disciplinary cases, presiding over negotiations, hearings and trials, and rendering decisions and making penalty recommendations to the Police

also addresses the issue of adjudicatory delay in order to determine its nature and extent. Necessarily, this aspect of the report requires some discussion of the work of the administrative law judges, both inside and outside the Department, who hear these cases.

In conducting its study the Commission obviously examined the Department's conviction rate, including the percentage of trials that resulted in convictions. As calculated by the Commission,⁵ for the 12-month period from November 1998 through October 1999, approximately 55.8% of all cases resulted in guilty pleas or convictions after trial. In 46% of the dismissed cases, however, there was either a command discipline or instructions given to the officer.⁶ If these cases are included, 73% of all cases resulted in guilty pleas, trial convictions, command discipline or instructions. If one focused just on trials, 71.8% of all trials resulted in convictions.⁷ These

Commissioner. Also, the Deputy Commissioner reviews and edits all written decisions of the Assistant Deputy Commissioners and handles the daily scheduling and assignment of cases. For purposes of this report and unless otherwise noted, the four judges will be referred to as "Trial Commissioners." Trial Commissioners will be referred to using the female pronoun.

The Office of Administrative Trials and Hearings ("OATH"), a City Charter agency authorized to conduct adjudicatory hearings for all City agencies, also adjudicates NYPD disciplinary cases. OATH and DCT are the two venues in which Department disciplinary cases are heard.

⁵ These figures apply to 746 disciplinary cases in the Commission's study sample that were prosecuted by DAO and SPO and that were adjudicated in the Department's Trial Rooms or OATH hearing rooms. Cases where disciplinary charges were "filed" (*see* footnote 16 and accompanying text) and cases brought against civilian employees of the Department that were adjudicated informally (*see* further discussion at pp. 15-16) were therefore excluded.

⁶ Over 90% of these penalties included command disciplines, with the balance of cases involving training instructions to an officer. A command discipline is "non-judicial punishment available to a commanding/executive officer to correct deficiencies and maintain discipline within the command." NYPD Patrol Guide ("Patrol Guide") § 206-02. The maximum penalty that may be imposed for a command discipline is the forfeiture of up to ten vacation days. Command disciplines remain part of an officer's disciplinary record for up to three years.

⁷ According to the Department, the conviction rates for disciplinary cases after trial, was 86% in 1996, 83% in 1997, 85% in 1998, and 77% in 1999 (from January 1999 through October 1999). These figures apply to cases adjudicated in the Trial Rooms only and exclude all cases adjudicated at OATH, which are exclusively CCRB cases, as well as all dismissed cases. The Department did not provide data for an overall conviction rate that includes OATH cases and dismissals because it does not maintain a database that collates this information.

conviction rates include Civilian Complaint Review Board ("CCRB") cases, where the decision to substantiate the allegations was made by another agency, and which resulted in a disproportionate number of dismissals and acquittals lowering the overall percentage.⁸

Although conviction rates do not address the problems of delay within the disciplinary system, it can be argued that if conviction rates are high then, from a quality perspective, the system must be working. While one can debate whether these conviction rates are sufficient -- they could be higher -- the Commission does not believe that conviction rates alone are a sufficient measure of the disciplinary system's effectiveness. Even acceptable rates do not obviate the need for exploring whether major changes in how cases are prosecuted are necessary.

Although securing more convictions of the guilty is always better, as discussed above, whatever the conviction rate, it is also particularly important where a police department is concerned, that officers and the public alike have confidence in the system. If, for example, officers going through the system see convictions even where the quality of presentations in the courtroom by advocates is ineffective and unpersuasive, they -- and their colleagues -- will question the fairness of the process, and feel vindicated in the view often heard from those going through any agency's discipline system that the system is biased against them. Similarly, if civilians dealing with the system experience it as being insufficiently competent, they will question the commitment of the Department to prosecuting wrongdoers. Neither result should be acceptable.

Thus, it plainly is important for the Department that its system both be, and appear to be, of sufficient quality that officers and the public alike believe that the Department cares about its

⁸ For an analysis of conviction and dismissal data *see Appendix C*. Until the fall of 1999, however, the Department did more screening before proceeding with CCRB cases.

effectiveness and fairness. While, as discussed below, significant improvement continues to be required, it is clear that the Department recognizes the importance of the disciplinary system. Thus, the Department has over the years made serious efforts to increase the effectiveness of the system in general, and the prosecution function in particular.⁹ For example, since 1997, there has been a significant increase in the Department Advocate's staff, including hiring a number of former prosecutors. Further, the Department hired an additional Assistant Trial Commissioner, programs have been implemented to reduce the number of open cases, and a "fast-track" system was developed to accelerate the disposition of less significant CCRB cases. The Department has also adopted policies to deal more effectively with disciplinary cases involving false statements and off-duty misconduct.¹⁰ In addition, as discussed below, improvements have recently been made by the Department during the course of this study and the Department has indicated a willingness to consider additional changes.

The remainder of the report includes an overall summary of the Commission's findings and recommendations, including a section on delay within the disciplinary system and a section evaluating the effectiveness of the prosecution function within the system.

⁹ The Department summarized various of these initiatives in a response to a draft of this report and in discussions with the Commission. Some of these efforts were described in earlier reports of the Commission. *See* 1996 False Statement Report and Off-Duty Misconduct Report; *see also* Commission Reports, *The New York City Police Department's Disciplinary System: How the Department Disciplines Probationary Police Officers Who Engage in Misconduct* (August 1998); *The New York City Police Department's Disciplinary System: A Review of the Department's December 1996 False Statement Policy* (August 1999).

¹⁰ As discussed above, a topic not covered by this study is the appropriateness of the penalty imposed once an officer is convicted.

II. SUMMARY OF FINDINGS AND RECOMMENDATIONS

Based on this study of the Department's prosecution function, the Commission found that:

1. Compared to other Departments, the NYPD has a more formal disciplinary system with greater due process rights within the Department being provided to officers.
2. Significant delay exists in the adjudication of Department disciplinary cases. This delay occurs at various points in the progress of a case, and affects all types of cases prosecuted by the Department. The areas of delay have included: delays in the service of charges; failures to make plea offers to respondents at the earliest possible time; delays in the time between the filing of charges and the start of trial; lengthy adjournments to receive a trial date; and delays between the end of a trial and the issuance of a decision by a Trial Commissioner. Some of these delays arise when defense counsel first meets a client on an initial negotiation date or seeks adjournments later in the process. This overall delay has serious negative consequences for the Department's disciplinary system, including impact on the viability of prosecutions, deterrence, fairness to members of the service who are ultimately exonerated, and the public's perception that the Department is willing, and capable, of effectively disciplining its own members.
3. The Department appears to treat the prosecution of cases as a police function when, in reality, it should be treated more as a legal function. DAO and SPO are structured, staffed and managed like police bureaus. This includes how supervisors are selected, the periodic rotation of advocate members of the service into policing assignments, and the requirement that members of the service who are promoted while in DAO or SPO return to patrol for a period of time. While this organization is appropriate in other areas of the Department, a legal bureau charged with prosecuting

cases has different structural and managerial needs. The current structure, management and staffing of the offices leads to a number of the problems identified in the study.

4. While some advocates possess appropriate legal knowledge and trial skills, the overall quality of Department prosecutions is diminished by the significant number of advocates who are under-qualified or inexperienced. Almost 40% of the advocates are members of the service who are currently in law school or recent graduates. Although DAO has developed opportunities to provide on-the-job training, there is insufficient formal training regarding fundamental skills and inadequate supervision to compensate for the lack of experience.

5. The Department Advocate and the Special Prosecutor have appropriate experience. This is not true, however, of some senior-level supervisors. These individuals, while undoubtedly skilled as police officers, do not as a whole possess the appropriate legal and advocacy training to effectively supervise and train advocates. Consequently, the overall management and presentation of disciplinary cases suffers.

6. Too often, cases are not adequately prepared for trial. Witnesses are not contacted in a timely fashion and are not properly prepared. As a result, too many cases are dismissed after prolonged periods of time, scheduled trial dates are delayed, and the effectiveness of prosecutions is hurt.

7. Although some of the trial presentations by advocates were competently conducted, most presentations observed by the Commission's staff were of marginal quality.

8. Problems with trial preparation and presentation as well as delay appear to be systemic problems and are not focused on particular types of cases.

9. It is common in the Trial Rooms to observe visible frustration of the Trial Commissioners with the performance of the advocates as well as the responding, sometimes defiant, attitude of advocates towards the Trial Commissioners. The open nature of the apparent lack of mutual respect between Trial Commissioners and advocates risks damaging the perception of the system by all those who deal with it, including civilians and officers.

10. The Commission noted a number of cases that were substantiated by CCRB,¹¹ but lacked the necessary legal proof needed in the Trial Room and OATH hearing rooms.¹² Delays in dealing with many of these cases resulted in them lingering in the Trial Room for significant periods of time before being dismissed due to evidentiary problems, which often would have been identified had substantive witness contact been earlier.

11. The Department does not sufficiently capture and utilize data to track disciplinary cases in order to identify areas of delay.

Consistent with these key findings, the following are recommendations that address the quality of prosecutions and delay in the Department's adjudication of disciplinary cases.

1. While it remains important to the effective management of the Department that ultimate responsibility for disciplinary decisions remain with the Police Commissioner, including the right

¹¹ Through a revision in the City Charter in 1993, the handling of civilian complaints against police officers was restructured and the CCRB was created. CCRB has jurisdiction to conduct primary investigations of complaints against police officers that allege the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language. The CCRB-team of DAO refers to the group of advocates who are responsible for prosecuting cases that have been referred to the Department from CCRB.

¹² CCRB has stated that the investigative quality of its more recent cases has improved and the Police Commissioner has stated that he concurs in this assessment.

to accept or reject all plea agreements, the prosecution of CCRB cases should be handled by CCRB. Such a system would provide an incentive to CCRB to substantiate only cases that can be successfully prosecuted, and prevents the Department and CCRB from being able to blame each other for the failure of CCRB prosecutions. Such a structure also should enable CCRB cases to be completed more expeditiously. This enhanced accountability for the success of CCRB cases also should promote public confidence in the overall process. The Commission recognizes that transferring the prosecution of these cases to CCRB would require a revision to CCRB's current enabling legislation and/or the City Charter. Such a change would also require the development of appropriate procedures for such things as information access by CCRB to the extent necessary to facilitate CCRB prosecutions and to promote plea bargains that the Police Commissioner is likely to approve.

2. Again, while maintaining the Commissioner's ultimate responsibility for disciplinary decisions, the City should consider whether there are ways, even if legislation or a Charter revision is required, to merge the prosecutorial function for all City agencies' disciplinary matters into a single agency with separate divisions headed by experienced prosecutors responsible for the prosecution of cases in particular agencies. A unified agency whose sole function is the prosecution of disciplinary cases should be better able to train, supervise, and recruit the best available attorneys. Such a decision would, of course, require considering the effects of such a consolidation on agencies other than the Police Department.

3. The Department Advocate's Office and the Office of the Special Prosecutor should be joined into a single office so that resources and caseloads may be more effectively utilized and shared.

During the pendency of this study, the Department moved to consolidate the two offices. In order to reflect this change as well as others recommended in this report, and to increase the stature of the office and attract highly qualified leadership, this combined office could be headed by a Deputy Commissioner for Prosecutions.

4. The Advocate's Office should be organized more like a legal office rather than a police bureau. For example, members of the service would remain eligible to join the office, but only if they were believed to be the best available candidates. Further, those joining the office should, at least for a reasonable period of time, be choosing prosecuting rather than policing as a career path. They should be committed and available to prepare their cases as necessary. In this regard, advocates should work flexible hours, as opposed to fixed police tours, in order to facilitate witness interviews. In addition, there should not be an assumption that these members of the service will rotate out of the office and promotions should not require a return to patrol. Assignment to supervisory positions should be based on legal and management skills, not other police experiences.

5. The Department should hire a greater number of qualified attorneys with at least some trial experience.

6. The Department should place the supervision and training of advocates in the hands of qualified managers with trial experience. These supervisors should, to the extent possible, have experience supervising trial attorneys and managing an office with a large caseload. Managers should more aggressively monitor advocates' caseloads and provide increased supervision in the Trial Room and OATH hearing rooms.

7. Advocates should receive more ongoing formal training both inside and outside the Department on legal issues and trial skills that would supplement the Department's current on-the-job training methods. Although advocates attend outside training programs, such as District Attorneys' Offices trial advocacy programs and Continuing Legal Education ("CLE") classes, more training programs should be developed within the Department and advocates who are admitted attorneys should be strongly encouraged, if not required, to fulfill CLE requirements in areas of trial advocacy and evidence.

8. The Department should explore whether the addition of personnel and other resources, including an additional Trial Commissioner and clerks for the Trial Commissioners, advocates, paralegal staff, and other resources, would decrease delay in the adjudication of cases and increase the overall effectiveness of the prosecution function. In this regard we have been advised that the Department recently has decided to provide additional law clerks to the Trial Commissioners.

9. Advocates should better document significant work completed on cases, including contact made with witnesses and case enhancement.

10. There should be a requirement that key witnesses be contacted by advocates early on in the process so that the viability of cases can be evaluated in a more timely manner.

11. The Department should develop a system by which disciplinary cases are closely tracked in order to identify areas of delay and, where possible, resolve cases more speedily.

12. As part of such a system, the Department Advocate should regularly submit to the First Deputy Commissioner a list of cases which have been pending for six months or longer from the filing of charges along with an explanation of why they are still open. Advocates should

aggressively monitor cases where there is a corresponding criminal case or where an officer is suspended pending an investigation so that these cases are immediately calendared in the Trial Room as soon as the criminal matter or investigation is completed.

13. The Department should explore ways in which cases can be more speedily reviewed by the First Deputy's Office so that the Department is able, where appropriate, to offer plea agreements more efficiently. Whenever possible, plea offers also should be conveyed to counsel for the officers prior to the court date at which offers are to be accepted or rejected.

14. The Department should review older cases to determine their viability and take action to appropriately resolve them on an expedited basis in order to clear up the backlog of cases and make way for new procedures and policies.

15. Trial Commissioners should take a stronger hand in case management. This could include better managing the trial docket, prioritizing older cases and scheduling a larger number of cases each week for trial.

16. The Department should explore ways in which a Trial Commissioner may more aggressively assist in the settlement of cases, as is done at OATH,¹³ while maintaining the independence of the different judge who ultimately tries the case.

17. The Department should explore alternative methods for the service of charges and specifications on respondents.

¹³ For a discussion of the role of OATH judges in the settlement of cases, *see* pp. 44-45.

18. The Department should explore the establishment of a system by which Trial Commissioners would report any inappropriate behavior by an advocate to the First Deputy Commissioner for his review.

19. The Department Advocate and senior staff should meet on a regular basis with the Trial Commissioners to discuss issues of general interest including docket management, trial presentation skills, and other issues of mutual concern.

PART II

BACKGROUND

I. METHODOLOGY

A. Overview

In preparing this study, the Commission developed information from a variety of sources. The Commission reviewed closed cases that had been prosecuted by DAO and SPO, and met with numerous Department officials regarding the organization and structure of the disciplinary system. Also, over an eight-month period the Commission's staff observed numerous Department trials and negotiations conducted by both the DCT in the Trial Rooms and the OATH Administrative Law Judges. In addition to these qualitative evaluations, the Commission developed an extensive database of statistical information on case dispositions. Finally, the Commission conducted a survey of a number of law enforcement agencies across the country to examine alternative prosecution models and to place the Department's disciplinary system in a broader perspective. Each area of review is summarized below.

B. Case Review

In order to evaluate the quality of prosecutions brought by DAO and SPO, the Commission reviewed 49 closed DAO and SPO case files. The manner in which these cases were selected is described below.

At the outset of the Commission's study, in September 1999, the Commission obtained a list of all 299 cases closed between May 1, 1999 and July 31, 1999. These cases included disciplinary actions against a range of NYPD employees including uniformed members of the service, probationary police officers ("PPO"), Traffic Enforcement Agents ("TEA"), School Safety Agents and civilian employees.

Pursuant to the Commission's mandate as a monitor of police corruption, the Commission sought to evaluate the prosecution of disciplinary cases involving uniformed members of the service. Additionally, the Commission noted that PPOs do not have the same adjudicatory rights that full police officers do,¹⁴ and that civilian employees and School Safety and Traffic Enforcement agents may avail themselves of an informal disciplinary process that bypasses DAO and SPO.¹⁵ The Commission therefore did not evaluate disciplinary cases involving probationary or civilian NYPD employees because it would not necessarily meet the broader goal of the study to examine the overall effectiveness and efficiency of the Department's disciplinary system. Finally, the Commission noted that disciplinary cases where charges are "filed"¹⁶ but no substantive disposition is reached do not

¹⁴ The Department may summarily dismiss an officer during his or her two-year probationary period commencing on the date of the officer's appointment. Under statutory and decisional law, summary dismissal of a probationary officer may be effected for any reason, as long as termination is not based on bad faith or based on a constitutionally impermissible reason. For a full discussion of how the Department disciplines PPOs, see Commission Report, *The New York City Police Department's Disciplinary System: How the Department Disciplines Probationary Police Officers Who Engage in Misconduct* (August 1998).

¹⁵ Disciplinary cases against civilian members of the Department are generally adjudicated through the so-called "Step" process that allows for an informal disposition of the charges and, where that does not take place, adjudication through the City's Office of a Labor Relations ("OLR"). DAO does not prosecute these cases, but is occasionally consulted regarding the imposition of penalties.

¹⁶ In various instances, including where an officer facing disciplinary charges resigns or retires, the Department files the charges and specifications against the officer both to ensure that, should the officer return to the force, the statute of limitations for these charges would not have elapsed, and to preserve the Department's ability to discipline the officer. These are referred to as filed cases.

reflect the full disciplinary process and would not afford an overall view of the Department's prosecution function.¹⁷

After this initial selection process,¹⁸ the Commission determined that all of the cases included in the study were prosecuted by DAO. Inasmuch as one of the goals of the study was to examine and evaluate the performance of SPO, the Commission expanded its sample by selecting five SPO cases. The selection was done by the same method described above.¹⁹

As a result, the Commission chose 35 cases representing DAO and SPO prosecutions for the specific sample. Because a number of these cases actually involved multiple disciplinary cases against the same officer, or related cases against more than one officer, the total sample ultimately consisted of 49 cases.

After selecting the cases for inclusion in the study, the Commission reviewed all documents related to the prosecution of each case. These documents included, but were not limited to, the entire file of the advocate, the investigative file, jacket notes and transcripts of interviews. In addition, where applicable, the Commission obtained transcripts of Departmental trials. Then, the

¹⁷ The Commission applied these same criteria in analyzing disciplinary cases closed by the Department from November 1998 through October 1999. For an analysis of delay regarding these cases, *see* pp. 33-47. The Commission also analyzed delay for all disciplinary cases, including those involving PPOs, agents, non-uniformed employees, and filed cases. *See Appendix F.*

¹⁸ With these criteria in mind, the Commission eliminated 116 cases from the list leaving 183 cases deemed suitable for the Commission's sample. Of these cases, the Commission sought to evaluate ten cases from each of the three months in the time period. Thirty cases were thereafter selected randomly by picking every sixth eligible case from the May list, every eighth eligible case from the June list, and every fourth eligible case from the July list.

¹⁹ After eliminating the SPO cases which fell outside of the criteria used in selecting the initial sample, only three cases remained, all of which were closed in June 1999. Although these three cases were included in the evaluation of SPO in this study, the Commission reviewed also a list of cases closed in August 1999 in order to meet its sample goal. There were two cases prosecuted by SPO that were closed in August 1999 and fit the criteria of the study. Both of these cases are included in the evaluation of SPO.

Commission discussed with DAO and SPO supervisors issues that were raised by some of these cases.

C. Meetings with Department and OATH Officials

Commission staff met on several occasions with Department officials representing DAO, SPO, the Disciplinary Assessment Unit,²⁰ as well as with the Deputy Commissioner - Trials and OATH's Chief Administrative Law Judge and Deputy Administrative Law Judge. These meetings focused on a range of issues including the backgrounds of advocates, case management, training, trial preparation and presentation, issues related to writing decisions and docket management. Also, the Commission met with the First Deputy Police Commissioner and the Police Commissioner to discuss its overall findings.

D. Trial Room and OATH Observations

Between November 1, 1999, and June 15, 2000, the Commission staff attended proceedings held in the Department's Trial Rooms and OATH hearing rooms. These proceedings included negotiations, trials, and motions to dismiss charges and specifications. In total, the Commission staff spent 40 days or partial days observing the day-to-day operations of the Department's Trial Rooms and OATH hearing rooms and on a number of these days different staff members observed different proceedings. Some trials were observed in whole while others were observed in part. The

²⁰ The Department's Disciplinary Assessment Unit ("DAU") oversees all disciplinary matters. Its responsibilities involve gathering and reporting data on disciplinary cases, including maintaining CATS sheets. Organizationally, DAU is under the office of the First Deputy Commissioner.

staff observed witnesses testify in 24 separate trials, and in virtually all the cases spoke either to witnesses after the completion of their testimony, to the respondent, or to the respondent's counsel regarding the case and/or trial process.

E. Adjudicatory Time Frames for Prosecutions

The Commission evaluated the time in which cases proceeded through the disciplinary system. In doing so, the Commission reviewed summaries of all closed disciplinary cases for a twelve-month period -- from November 1998 through October 1999.²¹ These summaries are generated on a monthly basis and were provided to the Commission from the Department's database entitled the Case Analysis and Tracking System ("CATS"). The summaries contain information on all Department disciplinary cases.²² When a case is closed, the Department generates a document ("CATS sheet") containing a chronological history of the closed case. The CATS sheet includes the date of the incident, the consultation date, the date charges are approved by DAO or SPO (i.e., the filing date), the date of service of those charges on the respondent, where applicable, the date of negotiation of a plea, the date a trial began, the date a trial ended, the date a decision was rendered by the Trial Commissioner, and the date the disposition was approved by the Police Commissioner (i.e., the date the case was closed). In total, the Commission reviewed and collated this information

²¹ As discussed above, the Commission reviewed statistical data involving all disciplinary cases closed during this time period. These data are reported in *Appendix F* below. Data regarding subsets mirroring the criteria used in the Commission's specific case sample are reported in the main text of the report.

²² According to Department officials, the Department is in the process of updating the CATS system. The new system, while not yet complete, will continue to summarize the same information that is currently contained in CATS sheets.

for over 1,200 Department disciplinary cases, thereby providing an extensive one-year long database to assess the issue of delay in the Department's disciplinary system.

II. ANATOMY OF A CASE

Before discussing the Commission's findings, it is important to understand how a disciplinary case moves procedurally through the Department.

A. Intake

Disciplinary cases arrive at DAO and SPO from several investigative sources. More serious cases generally originate with the Internal Affairs Bureau ("IAB") or, in some instances, with CCRB. In addition, a case may be initiated by the summary arrest of a member of the service. The Borough and Bureau Investigations units also generate cases, usually of a more minor character. An officer's patrol unit may also investigate charges, again of a less serious kind, against an officer.

In all CCRB cases, and in most disciplinary cases in general, advocates are not consulted prior to the completion of an investigation.²³ On occasion, however, in non-CCRB cases, an advocate may be asked to assist in the interrogation of a subject officer or witness officer and the advocate may advise the investigator regarding the legal ramifications of evidence gathered by the investigator.

In most cases, the consultation phase of a case is the first contact an advocate has with an investigation. In DAO, individual Advocates are scheduled for specific days on which they are

²³ By statute, CCRB investigations must be independent of the Department. New York City Charter, Chapter 18-A ("Civilian Complaint Review Board"), § 440.

responsible for all consultations. In preparation for meeting with an Advocate, the investigator prepares a consultation sheet which contains a synopsis of the facts of the case. Based on the consultation, the Advocate completes the recommendation portion of the form, indicating whether or not charges should be approved. The Advocate may also include instructions that the investigator obtain additional information or evidence before charges may be approved. The Advocate who conducts the consultation is assigned that case, whether or not charges are approved at the time of the consultation.²⁴ According to officials within DAO, it conducts approximately 2,000 consultations per year.

In SPO, the Special Prosecutor himself conducts all consultations.²⁵ During this consultation, the Special Prosecutor meets with the investigator, discusses the facts of the case, and then determines whether or not to approve the filing of charges against the subject officer. If approved, the Special Prosecutor will then assign the case to one of the Assistant Special Prosecutors or he may transfer the case to DAO. Similar to DAO, the Special Prosecutor may disapprove charges and/or instruct the investigator to conduct further investigation. The SPO conducts approximately 100 consultations per year.²⁶

²⁴ If an Advocate conducts a consultation that does not result in charges, known as an "open consult," the case is still assigned to that Advocate and the Department includes the case in calculating an Advocate's caseload. During the period of an open consult, further investigation will be conducted by an investigator before additional review by an Advocate.

²⁵ Only cases within SPO's mandate will be brought to the Special Prosecutor for consultation. *See* discussion below at p. 26.

²⁶ This figure includes open consults. According to SPO, it does not keep records distinguishing between consults and open consults.

When a CCRB investigation is completed, the CCRB Board²⁷ determines which allegations, if any, to substantiate. The case and the charges that have been substantiated are then forwarded to DAO for prosecution. There is no prior consultation in CCRB cases.

B. Charges and Specifications

Once a case has been approved for charges and specifications,²⁸ the advocate must review the case with his team leader. During this review, the advocate recommends charges that he deems appropriate and if the team leader approves such charges, the case is then brought to the Managing Attorney or Assistant Managing Attorney for final DAO approval.

Upon the initial receipt of a recommendation that charges be filed in CCRB cases, the underlying case file is always provided to the advocate. Although the advocate should always have the investigative file when conferring with the team leader, in non-CCRB cases the investigative file is not always received prior to the filing or service of charges.

The CCRB Team of DAO utilizes a more streamlined approval process for less significant cases. CCRB cases that allege relatively minor offensive language, discourteousness or abuse of authority are eligible for "fast-tracking."²⁹ In the event that DAO determines that both the allegations and the subject officer's record suggest that a command discipline rather than charges and

²⁷ The CCRB board is comprised of thirteen civilian members of the community appointed by the Mayor. The appointees include five members designated by the Mayor, five by the City Council, and three by the Police Commissioner.

²⁸ The "charge" designates the name of the offense and the "specification" describes the specific misconduct charged.

²⁹ CCRB allegations of force or offensive language involving ethnic or racial slurs are not fast-tracked.

specifications are appropriate, the case is fast-tracked.³⁰ When a case is fast-tracked, there are no charges and specifications filed and the subject officer is given the opportunity to accept the command discipline rather than face Department prosecution. Approximately one-third of the subject officers offered command disciplines accept and approximately 25% of all CCRB cases are disposed of in this manner. The First Deputy Commissioner makes the final determination as to whether a case is fast-tracked. If an officer refuses the command discipline the case returns to DAO for charges and specifications and is prosecuted through the formal disciplinary system.³¹

Command disciplines also are utilized in certain non-CCRB cases as well. In 1995, the Department instituted several changes to the disciplinary system in an effort to reduce the number of less serious violations processed and to expedite the prosecution of cases. These included expanding the number of violations that could be adjudicated by command discipline and providing DAO with the discretion to direct the issuance of a command discipline in lieu of charges and specifications.

C. Service of Charges

Once charges have been approved they are served on the officer. This is done by having the

³⁰ See Patrol Guide §§ 206-03, 04, and footnote 6 at p. 3. See also Commission's 1996 False Statement Report, at p. 7.

³¹ At the time of this writing CCRB fast-tracked cases are handled by two Advocates who are currently in law school. Both of these Advocates are members of the service. DAO assigns fast-tracked cases to these Advocates as a method for training less experienced Advocates.

officer, while on duty, come to DAO or SPO where he is handed the charges and signs a written acknowledgment.³²

D. Negotiation/Trial

Negotiations are conferences between the advocate and the respondent's attorney where the advocate conveys a penalty offer. Before a negotiation, the advocate evaluates the case and determines what plea offer, if any, is appropriate. Accordingly, the advocate considers, among other factors, the nature of the offense and the subject officer's background and Department record. The advocate then drafts a plea memorandum which contains an outline of the pertinent facts of the case, a summary of the subject officer's background, and a plea recommendation. The advocate conferences the case and plea offer with a supervisor, and if approved, the case is "steered" by a group led by the Department's First Deputy Commissioner.³³ If the First Deputy approves the offer, the case is then scheduled for negotiation. The advocates do not have unilateral discretion to change approved offers.

In cases where the Department is recommending termination, no plea offer is given. If the officer does not resign, the case is scheduled for trial.

³² Patrol Guide § 206-06 states that charges and specifications must be served on a subject officer within six weeks after receipt by the Department, absent exigent circumstances. As noted, the Commission believes that the Department should shorten the length of time it takes for the service of charges.

³³ The "steering" process takes place periodically. The Department Advocate and Special Prosecutor, as well as the Commanding Officer of each of the prosecution offices, participate in steering cases with the First Deputy Commissioner.

The first appearance before the Trial Commissioner is a negotiation date.³⁴ Ideally, on this first negotiation date the advocate conveys a plea offer to the respondent.³⁵ The respondent may accept the plea offer on that date. If he does, and if the Trial Commissioner approves the recommendation, a plea is entered and the Trial Commissioner forwards the recommendation to the Police Commissioner for final approval. Where the Trial Commissioner does not approve the offer and seeks a new negotiation, her disapproval is forwarded to the Police Commissioner. If the Police Commissioner disagrees with the Trial Commissioner's rejection of the offer, then the plea may proceed. If the Police Commissioner agrees with the Trial Commissioner then the case may be scheduled for trial or a new negotiation. Similarly, where the respondent does not accept the offer, he may request an adjournment of the case for a second negotiation date or request a trial. If the case is adjourned for further negotiation and on the adjourned date the respondent does not accept the plea offer, then the case is generally scheduled for trial.

After the second negotiation date, the plea offer is usually withdrawn. If the respondent subsequently chooses to plead guilty, he does so without any recommendation by the advocate. In that instance, the respondent admits his guilt to the charges and a "mitigation hearing" is held before the Trial Commissioner. In a mitigation hearing the respondent will bring to the attention of the Commissioner any information that he deems relevant to mitigation of penalty.

³⁴ Similarly, at OATH, the first negotiation date is the first appearance before the ALJ. For a further discussion of how a case proceeds at OATH, *see* pp. 44-45.

³⁵ As discussed more fully below at pp. 61-63, at times the Department is not prepared to make an offer at the negotiation date.

After the hearing, the Trial Commissioner sends her written discussion of the facts of the case, findings and, where applicable, penalty recommendation and recitation of the subject's disciplinary record to the Police Commissioner for final approval.³⁶ The Commissioner reviews the case and renders a final determination, closing the case.³⁷

In instances where a respondent rejects a plea offer, or in termination cases where an officer refuses to resign or is not allowed to retire with benefits, a case will be scheduled for trial. At trial, the advocate must prove the Department's case by a preponderance of the evidence. Upon completion of the trial, a Trial Commissioner will render a written decision and penalty recommendation, if any. A copy of the draft decision is provided to the advocate and respondent's attorney for comment. After this period, a final decision is submitted to the Police Commissioner for review. The Police Commissioner may accept, reject or modify the decision of the Trial Commissioner.

E. Caseloads

Most Department disciplinary cases are prosecuted by DAO. According to the Department, on average each Advocate in DAO carries a caseload of approximately 50 cases. This caseload includes cases in every phase of prosecution from pre-charges and specifications to those awaiting

³⁶ Prior to submitting a final decision to the Police Commissioner, the Trial Commissioner provides a draft decision to the subject officer and advocate for comments. Each side is given ten business days to respond to the draft decision. Only after this period has lapsed does the Commissioner render her final decision. *See Fogel v. Board of Education*, 48 A.D.2d 925 (2d Dept. 1975) (subject of disciplinary action must be given a reasonable opportunity to controvert findings of disciplinary board before imposition of penalty).

³⁷ A respondent may appeal a final penalty determination through an Article 78 proceeding in State Supreme Court.

decision and final closing by the Police Commissioner. According to the Department, on average, each Advocate conducts approximately one trial per month. As further discussed below, most trials take one day or a portion of a day to complete.

On average, according to the Department, SPO conducts approximately 20 trials per year and each Assistant Special Prosecutor carries a caseload of approximately twenty cases. This caseload is significantly lower than the caseload carried by DAO because SPO tends to handle more complex cases which take longer to prepare for trial and SPO selectively chooses which cases it handles. Similar to DAO, the Department counts cases in every stage of prosecution, including inactive cases awaiting resolution of criminal charges and cases tried but awaiting decision and closing by the Police Commissioner, in calculating an Assistant Special Prosecutor's caseload.

F. OATH Cases

In addition to handling administrative disciplinary matters for all City agencies, OATH hears certain designated CCRB-generated NYPD disciplinary cases. As such, it offers a second venue, in addition to the Department's Trial Room, for the adjudication of disciplinary cases against members of the service.

Created by Executive Order in the late 1970's, OATH became a City Charter agency in 1988. OATH was created to remove internal disciplinary hearings from most individual agencies and in the late 1980's the Police Commissioner began utilizing OATH as an alternative forum to adjudicate cases. By agreement between the Department and the various police unions, only drug-test-failure

cases³⁸ and CCRB cases involving members of the service with the rank of patrol officer became eligible for OATH adjudication.

Initially, the Department forwarded a small number of cases to OATH. However, beginning in 1996, the Department received a large influx of cases from CCRB. This influx resulted in a large backlog of CCRB-generated cases at DAO. Partly in response to this influx, the Department has referred an increasingly larger number of cases to OATH, and presently a majority of CCRB-generated Department prosecutions are settled or tried at OATH.

In 1999, OATH adjudicated 2,383 cases originating from various City agencies. Other than the Department of Corrections, NYPD referred more cases to OATH than any other agency.³⁹ In 1998 the Department filed 145 cases with OATH and in 1999 the number of filed cases increased to 244.

OATH is staffed by ten ALJs who conduct settlement conferences and try cases. All OATH ALJ decisions and penalty recommendations are submitted to the Police Commissioner for final review. Similar to Trial Commissioners' decisions, the Police Commissioner has the discretion to reject an ALJ's decision and to modify, either by decreasing or increasing, any penalty recommendation.

³⁸ OATH does not currently hear cases involving members of the service who have failed drug tests. These cases are adjudicated in the Trial Room.

³⁹ In 1999, the Department of Corrections referred 1023 cases to OATH.

PART III

DELAY IN THE DEPARTMENT'S DISCIPLINARY SYSTEM

To maintain a competent and effective system for the prosecution and adjudication of disciplinary cases it is essential, from the perspective of the Department, officers and the public, that there be an efficient system by which cases are handled from intake to final disposition. This system must be tailored to accommodate a large number of cases while at the same time remaining sensitive to the importance that the disciplinary system has to the overall integrity of the Department and its effects on members of the service and the public.

During the study, the Commission found significant delays within the disciplinary system. Presented below (beginning on p. 37 and in *Appendices D, E and F*) are statistical tables detailing the Commission's analysis of data indicating the time it takes for disciplinary cases to advance through the system.

I. IMPORTANCE OF SPEEDY RESOLUTIONS TO CASES

A. Prevent Staleness of Evidence and Maintain Interest of Civilian and Department Witnesses

In the time between the occurrence of the alleged misconduct and the prosecution of charges against an officer, the quality of the Department's evidence may deteriorate. The memories of witnesses and investigators may fade, or complainants may grow reluctant to testify -- sometimes out of frustration with the delays they have experienced in pursuit of their complaints. Some

witnesses may simply lose contact with advocates, rendering themselves difficult to find when needed for trial, while others may move out of the area and become unavailable for that reason alone.

In general, witnesses are also more inclined to cooperate soon after the incident about which they are needed to testify. Without necessary witnesses, the best evidence in an administrative case may be lost, leading to a dismissal of the most serious charges (if not the entire case) and inadequate punishment as a result.

Even where all parties involved are still available for a Department trial, and even where witnesses believe that their memories remain strong, testimony relating to events that occurred at a time far removed from the trial may be viewed by Trial Commissioners with heightened caution. In addition, in fashioning a penalty recommendation Trial Commissioners often explicitly consider how much time has passed since an incident. For these reasons, the Department's prosecution of disciplinary cases is best served when a substantiated case is adjudicated as quickly as feasible.

B. Impact on the Public, the Department and Members of the Service

Perhaps as important as ensuring the quality and viability of a case, a speedy resolution of a disciplinary case against a police officer bolsters the public's confidence in the Department's ability to prosecute and punish its own. To the extent that cases lag, and the public observes that justice is delayed, it may undermine that confidence. This, in turn, may have the effect of weakening faith in the Department's commitment to its disciplinary system, even when it ultimately produces an objectively fair and appropriate outcome.

Another effect of delay is the impact on a subject officer's career. While an officer is facing administrative charges his career will be placed on hold and advancement within the Department generally will be barred. While a barrier to such advancement may be appropriate for officers found guilty of misconduct, those ultimately exonerated also suffer adverse consequences from the delay. Therefore, another crucial reason for administrative charges to be prosecuted with all possible speed is to ensure that officers' careers are not unfairly damaged. Even the morale of officers who are not themselves subjects of an administrative prosecution may be adversely affected by delays. If, for example, colleagues of subject officers perceive that the slow adjudication of cases is unfairly prejudicing the careers of other officers, their confidence in the disciplinary process may also be undermined.

From the Department's perspective, it often places officers facing disciplinary charges on limited or modified duty. As a result, the Department's overall policing effort is hurt until the case is resolved and the officer can be placed on full duty.

There are also financial considerations for the Department to take into account. By law, the Department may suspend an officer without pay for no more than 30 days per incident.⁴⁰ Thus, regardless of how heinous the alleged misconduct, an officer may continue to draw a paycheck from the Department for the entire length of time the case against him proceeds, subtracting, at most, 30 days for each incident. In addition, such an officer typically continues to work during this time, creating potential liability for the Department should the officer continue to engage in misconduct for which the Department could ultimately be held legally responsible.

⁴⁰ See Administrative Code of the City of New York Section 14-115 (a).

C. The Need for Swift Punishment of Guilty Officers

Deterrence of wrongdoing is enhanced when punishment is not unnecessarily delayed. This is true on an individual level to the extent that an officer understands that his misconduct will have immediate consequences. Also, it is true for the notion of general deterrence because the Department sends a message to all of its employees when it punishes misconduct, and that message is all the more strong and convincing when appropriate discipline is meted out swiftly.

Finally, when the misconduct involved is so egregious that termination is the appropriate penalty, it is important that the case is adjudicated as quickly as feasible so that the officer is removed from the Department.

D. Sources of Delay Beyond the Department's Control⁴¹

1. Underlying criminal case

The Commission recognizes the difficulty the Department faces in pursuing an administrative case where the subject officer also faces criminal charges for the same conduct. In such cases, the criminal prosecutor typically requests that the Department place its prosecution on hold during the pendency of the criminal case. Prosecutors typically make this request to ensure that potential targets of the criminal case are not granted immunity through operation of law,⁴² to prevent defense attorneys from examining trial witnesses and obtaining any otherwise unavailable discovery in the

⁴¹ Because of the difficulty in identifying which cases were delayed for reasons outside the Department's control, the Commission did not exclude such cases from its calculations of adjudicatory delay.

⁴² Because a subject officer may be terminated from the Department should he refuse to answer questions under PG § 206-13 (formerly PG § 118-9), his answers are considered to be compelled and under constitutional law may not be used in a criminal prosecution. *See Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967).

disciplinary case, and to protect the overall viability of the criminal case. For these and other reasons, including that a criminal conviction may obviate the need for a Department prosecution, the Department most often agrees.⁴³ While ongoing criminal cases delay some Department prosecutions, in the overwhelming majority of the Department's disciplinary cases there is no corresponding pending criminal case by the time charges and specifications are filed.⁴⁴ Also, as recommended below, in cases where there is a pending criminal case, the progress of that case should be more aggressively monitored to enable prompt administrative prosecution after completion of the criminal case.

2. Suspension cases

In instances where an officer is arrested or otherwise involved in serious misconduct, the Department generally suspends the officer without pay. In such cases, DAO or SPO generally files charges against the officer within weeks from the date of the incident while the investigating unit (e.g., Bureau or Borough Investigations, or IAB) continues to investigate the case.⁴⁵ Although formal charges are filed, DAO or SPO will not prosecute the case until the investigation is completed. Any delay caused by this investigation should not be attributed to DAO or SPO. Delay

⁴³ There have been instances where the Department has proceeded with its administrative prosecution despite the existence of an ongoing criminal case. This has happened in cases where criminal prosecutors have encouraged the Department to proceed in order to assist in a concerted effort to punish the officer and, more rarely, where the Department has gone forward with its case over the objections of a criminal prosecutor in order to prevent a subject officer from retiring with pension rights. An example of the latter case is the Department's prosecution of Police Officer Francis Livoti.

⁴⁴ According to Department statistics, in 1998, 127 uniform members of the service and 50 civilian members of the service were arrested.

⁴⁵ According to Department statistics, in 1998, 213 uniform members of the service and 32 civilian members of the service were suspended. A number of the suspensions, however, took place after the completion of an investigation and therefore were not cases where DAO or SPO had to delay prosecution of the case. Also, a number of suspensions do not result in the filing of charges and specifications against a subject officer.

which occurs after the investigation is completed, however, may be minimized by regular monitoring of the case as the recommendations below indicate.

3. Other sources

The Department may have, in certain instances, tactical or administrative reasons for holding up the progress of a disciplinary case. For example, the Department may wish to complete another ongoing investigation of the same officer in order to consolidate any resulting charges with the case that is already pending in the disciplinary system. This is especially true where the first case is weaker and the Department is seeking termination of the officer. In addition to the above, delays at negotiation and trial stage can also be caused by adjournments sought by a subject officer's defense counsel. This may include an adjournment on a negotiation date when a subject officer is for the first time meeting his attorney and receiving a plea offer. Similarly, an adjournment may be sought by defense counsel on a scheduled trial date.

Any of these considerations may delay the progress of an administrative case, and the Commission recognizes that such factors are beyond the control of advocates.

II. THE COMMISSION'S FINDINGS REGARDING ADJUDICATORY DELAY

The Commission requested that the Department provide the Commission with information about how long it took a disciplinary case to move through various steps in a prosecution. In response, the Department informed the Commission that it does not routinely gather data regarding how long disciplinary cases take. In order to capture this data, the Commission thus relied on its

own calculations of raw data provided by the Department in its CATS sheets.⁴⁶ Through this information the Commission developed data and statistical analyses on delays occurring at key points in the progression of Departmental disciplinary cases. This section analyzes the statistics first for all cases,⁴⁷ then for only cases which go to trial, then for only cases which are dismissed, and then for cases resulting in pleas of guilt. Significant delays were found in each of these categories.

A. Overall Statistics

To summarize the findings for all cases closed during this period, the Commission noted significant delays in each of the following intervals.

⁴⁶ A sample CATS sheet with identifying information redacted is reproduced as *Appendix A*.

For every disciplinary case in the Commission's 12-month time frame, Commission staff entered data from 17 different fields in the CATS sheet onto a spreadsheet. These data included 11 dates covering every step from incident date to initial consultation with DAO or SPO, to trial date, where applicable, through closing date.

In all, the Commission reviewed the CATS sheets of 1214 disciplinary cases closed by the Department from November 1998 through October 1999. As discussed more fully below, the Commission assessed the data in a way that presents its findings in the fairest and most accurate light -- for example, by eschewing averages, which are much more susceptible to distortion resulting from either error or anomalous extreme cases. For further discussion of the Commission's statistical analysis, see *Appendix B*.

⁴⁷ All of the data cited in the points below apply to the 746 cases that mirror the Commission's study sample. For reasons discussed in the Methodology section above, the Commission's criteria in selecting its study sample for in-depth case review involved excluding those disciplinary cases that were filed, and those that involved civilian employees, Traffic and School Safety agents, and PPOs. This left only those cases against non-probationary uniformed members of the service whose cases were actually adjudicated. These cases most fully reflect the disciplinary process and provide the best overall view of the Department's prosecution function. This particular subset is more useful than the comprehensive sample at isolating individual delays, because it focuses on those cases which bring into play a greater number of elements in the Department's prosecution of cases. The Commission's findings regarding the comprehensive sample show a slightly shorter time frame for the adjudication of cases. As discussed in *Appendix F*, this finding is consistent with the fact that filed cases and cases involving PPOs are included in the comprehensive sample. For a statistical analysis of the full 12-month sample, see *Appendix F*.

- *from filing of charges against the subject officer to closing of the case*⁴⁸

- 50% of the cases took approximately one year or more from the filing of charges to the closing of the case,
- 25% took approximately 17 months or more, and
- 10% of the cases took almost two years or more to adjudicate.

- *from the filing of charges to the start of an administrative trial*⁴⁹

- 50% of the cases took eight months or more to come to trial,
- 25% took over 14 months, and
- 10% of the cases took nearly two years or more to the start of the trial.

- *from the end of the trial to the issuance of the Trial Commissioner's findings and recommendation*⁵⁰

Most disciplinary cases that reach this stage go through very short trials (with barely one out of six lasting more than two days and most completed in one day). In this area, the Commission found that:

- 50% of the cases took three months or more for the judge to issue a decision,
- 25% took five and one-half months or more, and

⁴⁸ Data for this subset included 746 cases.

⁴⁹ Only a portion of the Department's disciplinary cases reach the trial stage, with most being either filed, dismissed, or negotiated in advance of a trial. Data for this subset included 258 cases.

⁵⁰ Data for this subset included 241 cases.

- 10% of the cases took over seven months until the judge's decision.

- *from the Trial Commissioner's report to the closing date*⁵¹

This was not a major source of delay. In 75% of the cases this process was completed within approximately 45 days.

The Commission's statistical findings are presented in the tables immediately below⁵² as well as in *Appendices* to the report.

⁵¹ Data for this subset included 344 cases. This number is greater than the number of trial cases because Trial Commissioners issue reports for cases where the Department has moved to dismiss the charges and specifications.

⁵² An explanation of the Commission's statistical tables is provided after Table 1.

Table 1: Delays in the Commission's eight key measures of case progress, broken down by percentiles (this table covers 746 cases)⁵³

<i>relevant time frame</i> <i>(total of applicable cases)</i>	0%	10%	25%	50% <i>(median)</i>	75%	90%	100%
consultation date ⁵⁴ to filing of charges (402)	0 days	4 days	10 days	41 days	96 days	215 days	1044 days
consultation to closing date of case (402)	27	177	247	367 ½	530	772	1914
filing of charges to service of charges (720)	0	1	5	13	35	61	775
filing of charges to closing date (746)	1	138	203	342 ½	515	713	2107
filing of charges to start of trial (258)	22	94	144	250	440	703	1634

⁵³ As discussed above, to arrive at this subset, the Commission eliminated all 320 civilians, TEAs, and PPOs. Next, the Commission eliminated the filed (138), "INF" (informally adjudicated) (9), and OLR (1) cases from the remaining 894 cases involving only non-probationary uniform members of service, leaving 746 cases in this subset.

⁵⁴ Although the period from initial consultation date to closing date represents the full length of the Department's prosecution of a disciplinary case, using the consultation date as the starting point in calculating delay is problematic when looking at CCRB-referred cases, and a small number of non-CCRB cases, that typically do not have consultation dates. Approximately 45% of the cases analyzed in this section are CCRB cases. Additionally, as discussed above, a percentage of cases carried by DAO are "open consult" cases. In these cases, delay should not be charged to the advocate because the case is still under investigation.

start of trial to end of trial (217) ⁵⁵	1	1	1	1	2	8	197
end of trial to judge's decision (241)	1	22	41	90	165	231	441
trial judge's decision to closing date (344)	0	14	22	34	46	76	553

• *explanation of the Commission's statistical tables*

The table above (and those in Appendices D, E, and F) illustrates the findings of the Commission's statistical review of the data provided by the Department's CATS sheets.

The Commission sought a simple method to illustrate the distribution of cases within each of the eight time frames (such as consultation date to closing date, or start of trial to end of trial) that were measured. Thus, the Commission devised a table to show the extreme high and low figures for each measure, as well as the median -- which is the figure that would fall in the absolute midpoint of a top-to-bottom list of all cases.

To convey more fully the overall distribution, the Commission chose to cite in its table four more points in the range of figures in the sample for each time frame, two above and two below the median. The points selected were the 10th, 25th, 75th and 90th percentiles. Percentiles indicate what percentage of the other cases in the sample had a figure smaller than (representing a shorter delay) or equal to the data point in question. So if a delay of 75 days between two events in a given case is shown to be on the 90th percentile, it merely indicates that 90% of the other cases in the sample had a delay of 75 days or less.

The median, which is in the middle of the sample, is always equal to the 50th percentile, so that 50% of the remaining cases have a delay smaller than or equal to the median, and the other 50% have a delay larger than or equal to the median. In the same way, the largest figure in the entire range is on the 100th percentile, and the smallest is on the 0th percentile.

Thus, looking at the first row of data in Table 1 directly above, it shows that, of the 402 cases in the Commission's "mirror sample" for which the Commission was able to measure the delay from consultation date to filing of charges, at least one case took 1044 days (under "100%") between the two events, while in at least one case the two events occurred the same day (hence the "0" for delay

⁵⁵ For clarity purposes, a "1" here represents a trial that is started and concluded in the same day. In all other measures shown on the chart, a "1" represents a one-day lag from one event to the next.

under "0%"). At least half the time, it took no more than 41 days (the median value)⁵⁶ for charges to be filed after the consultation date. But in at least 10% of the cases, there was a delay of 215 days or more.

One other potential way to assess the data is to look at the middle 50% of cases in the distribution -- that is, the range from the 25th percentile to the 75th percentile. For any measure, at least half of the cases will fall into this range, while about a quarter of the cases will have a longer delay, and about a quarter will have a shorter delay. Referring back to the first line in Table 1, at least half the cases saw filing of charges between 10 (the 25th percentile) and 96 (the 75th percentile) days after the consultation date.

B. Delays in Cases Which Go to Trial

As the table below indicates, significant delays exist in the time it takes to close cases that ultimately go to trial.

- 50% took at least 242 days from the filing of charges until the start of trial and 25% of the cases took at least 425 days until the start of the trial.
- 50% took at least 444 days from the filing of charges to the closing of the case and 25% of the cases took at least 600 days from the filing of charges until the case was closed.
- 50% of the cases took more than three months from the end of the trial to the judge's decision and 25% of the cases took nearly six months or more from the end of trial to the trial judge's decision.

⁵⁶ Some median values will inevitably end in "½" because the median values shown in the tables represent mid-points in the ranges of applicable cases. Wherever the number of applicable cases for measuring any given delay in a particular subset of cases is even (divisible by two), there is no true mid-point and the median is considered the average of these two values. As such, this median may be a value ending in ½, even though there is no such value in the actual range of cases.

Table 2: Delays in the Commission's eight key measures of case progress, broken down by percentiles
(this table covers trial cases only: 220 cases)⁵⁷

<i>relevant time frame</i> <i>(total of applicable cases)</i>	0%	10%	25%	50% <i>(median)</i>	75%	90%	100%
consultation date to filing of charges (152)	0 days	5 days	9 days	49 days	112 days	226 days	1044 days
consultation to closing date of case (152)	106	316	378	504	693	915	1679
filing of charges to service of charges (216)	0	2	5	13	35	57	526
filing of charges to closing date (220)	106	241	316	444	600	815	1673
filing of charges to start of trial (211)	22	97	139	242	425	685	1322
start of trial to end of trial (177)	1	1	1	1	2	21	197
end of trial to judge's decision (207)	17	24	49	111	168	231	312

⁵⁷ In determining which cases to include in this subset, the Commission considered all cases the Department labeled as trials, except those that were dismissed on motion of the advocate, with no formal evidence presented. (See further discussion of this issue in *Appendix C*.) For purposes of calculating this figure, each case adjudicated, whether it involved multiple respondents or multiple cases against a single respondent, was treated as a separate trial. In fact, there were fewer than 220 discrete trials held in this period.

trial judge's decision to closing date (212)	0	17	25	35	54	85	553
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C. Delays in Cases Which Are Dismissed

Significant delays also exist in cases that are ultimately dismissed. This area of delay is particularly troublesome in that it highlights that even those cases that have serious proof problems, and should not be pursued, including a number substantiated by CCRB, are not being disposed of in a timely manner. In assessing the delay involved in these cases it also must be remembered that significant time also will be spent on these cases during the investigative phase and before charges are filed. As the statistical table below shows,

- 50% of cases which result in dismissals took at least 402 days from the time charges were filed⁵⁸ to the time the case was closed.
- More than 25% of cases which resulted in dismissals took over 18 months to close.

Cases may result in dismissal for a variety of reasons.⁵⁹ The prosecution may determine that it would be unable to prove a *prima facie* case because of, for example, a lack of evidence, failure

⁵⁸ As discussed above at footnote 54, the Commission's measure for the overall length of a case was from filing date to closing date. As noted above, the use of the filing date as the starting point for measuring the history of a case results in a more inclusive (and therefore more meaningful) sample, but also creates an impression that cases are being processed more quickly.

⁵⁹ As discussed above, in 46% of these cases, the dismissal produces informal discipline through either a command discipline or the giving of instructions. As with cases dismissed with no action, where this type of informal discipline is imposed it should be done very early in the disciplinary process and not after significant delays.

to preserve evidence, or the unavailability of a witness. Although the advocate cannot create evidence that does not exist or maintain control over all its witnesses in perpetuity, contacting witnesses in a timely fashion results in greater control over the witness, increased chances of availability, and a potentially stronger, more viable case. The lack of early witness contact in DAO and SPO, as discussed below, contributes to the number of cases which ultimately must be dismissed. Also, deferring witness contact results in delay in identifying untriable cases.

Table 3: Delay from filing of charges to closing date for dismissed cases handled by DAO and SPO
(this table covers 284 cases)

<i>relevant time frame</i> <i>(total of applicable cases)</i>	0%	10%	25%	50% <i>(median)</i>	75%	90%	100%
filing of charges to closing date (284)	1 day	160 days	256 days	402 days	566 days	721 days	2107 days

D. Delays in Cases Which Result in Guilty Pleas Only

The following table includes only those cases resulting in a negotiated settlement where a respondent pleaded guilty, and excludes those cases involving dismissals in favor of other informal

disciplinary action.⁶⁰ Here,

- 50% of the cases took 228 days or more from the filing of charges to the closing date.
- 25% of the cases took at least 398 days to complete after the filing of charges.

Table 4: Delays in the Commission's eight key measures of case progress, broken down by percentiles
(this table covers negotiated guilty pleas only: 259 cases)⁶¹

<i>relevant time frame</i> <i>(total of applicable cases)</i>	0%	10%	25%	50% <i>(median)</i>	75%	90%	100%
consultation date to filing of charges (191)	0 days	5 days	12 days	44 days	86 days	192 days	586 days
consultation to closing date of case (191)	78	160	200	285	396	629	1914
filing of charges to service of charges (254)	0	2	6	21	47	64	228
filing of charges to closing date (259)	34	117	145	228	398	620	1912

⁶⁰ For a computation of delay regarding cases which resulted in plea agreements, including cases which involved *nolo contendere* pleas, filed cases, and cases dismissed in light of the officer accepting informal discipline, such as a command discipline or instructions, see *Appendix D*, Tables 8 to 8b.

⁶¹ This subset includes the 259 negotiated cases that also had a disposition of "guilty" (as opposed to "dismissed," "nolo," or "filed").

filing of charges <i>to</i> start of trial (0) ⁶²	n/a	n/a	n/a	n/a	n/a	n/a	n/a
start of trial <i>to</i> end of trial (0)	n/a	n/a	n/a	n/a	n/a	n/a	n/a
end of trial <i>to</i> judge's decision (0)	n/a	n/a	n/a	n/a	n/a	n/a	n/a
trial judge's decision <i>to</i> closing date (0)	n/a	n/a	n/a	n/a	n/a	n/a	n/a

E. Adjudicatory Time in OATH Cases

1. Overview of OATH cases

The above tables include all cases, whether ultimately heard in the Trial Room or at OATH. As discussed above, a number of CCRB cases are tried at OATH. In handling these cases -- which on an overall basis tend to be somewhat simpler than those being tried by Trial Commissioners -- OATH has generally proven to be effective in minimizing undue delay. One of the reasons is that a main objective of the agency is to facilitate settlements between parties. In 1999, 80% of the Department's cases at OATH were settled prior to trial.⁶³ In addition, when cases need to be tried, trials are generally conducted expeditiously and decisions are rendered in a relatively short period of time. According to OATH, during fiscal year 1999 (July 1, 1998, through June 30, 1999) it

⁶² There is one applicable case for this range.

⁶³ In 1998, according to OATH, it settled 72% of its NYPD-referred cases.

adjudicated an NYPD case in an average of 67 calendar days from the time the Department referred the case to OATH until the ALJ's report and recommendation or until the date the case was settled. This figure included cases dismissed, tried, and those resulting in negotiated settlements.

2. Pre-trial conference

OATH receives approximately 15-20 new cases every month from the Department. Once a case has been received by OATH, it is calendared for a "police initiative day" which functions as a pre-trial settlement conference. The settlement conference involves the advocate, the respondent's representative and an ALJ. During this conference, all parties are encouraged to candidly discuss their cases in an attempt to reach a settlement. To foster this open atmosphere, all conversations are considered off-the-record and cannot be used against the respondent or the Department in subsequent proceedings. Additionally, in the event no settlement is reached, the ALJ conducting the conference will not be the trial judge. Although the ALJ attempts to facilitate settlements, any settlement agreement which is reached is strictly between the parties. OATH does not endorse or make recommendations regarding the settlement to the Police Commissioner, who ultimately must approve any resolution.

If a case is not settled, it will be adjourned for two to three weeks for another settlement conference. If the parties are unable to reach an agreement at this juncture, the case will be given a short adjournment for trial.

F. Overall Conclusions Based on Commission's Statistical Review

Based on its review of the data provided by the Department on disciplinary cases concluded

from November 1998 through October 1999, the Commission found that the length of time it takes for the Department to complete the prosecution of cases is too long. In particular, the Commission isolated several sources for delay in the adjudication process. These include:

- Delays in the service of charges. The Department should consider alternative methods of service, as further discussed in the recommendations section below. At present, all charges prepared by DAO and SPO must be forwarded to the respondent's commanding officer for signature, and then forwarded to the appropriate Bureau or Borough commander for review and signature before being returned to DAO or SPO for filing. After this process, the respondent must be scheduled to come to the Department for service of the charges while he is on duty.⁶⁴
- A failure to make offers to respondents at the earliest possible time (i.e., before the negotiation date), and, in some cases, the failure to make offers on the first negotiation date. As discussed above, each case must be steered before an offer is conveyed. As recommended, the process for developing plea offers should be expedited.
- Time taken between the filing of charges and the start of trial.⁶⁵ With the goal of expediting the swifter resolution of trial cases, the Commission has made a series of

⁶⁴ The Commission found that in 25% of the cases in its comprehensive sample, it took 30 days or more from the time of filing of charges to their service on the respondent. As a result, the Department is, in most cases, in compliance with Patrol Guide § 206-06 which requires that absent exigent circumstances charges and specifications be served on a subject officer within six weeks after receipt by the Department. The Commission believes, however, that this period should be shortened.

⁶⁵ Officials within the Department attribute most of this delay to a congested trial calendar. Other factors also contribute to this delay, including delays by the advocates in getting their cases ready for trial.

recommendations to enable delays in this period to be minimized and monitored.

- An allegedly congested court calendar that requires three-to-four-month adjournments before a Trial Room date is available.
- Delays in issuing opinions after trial.

Pursuant to these findings, the Commission is making a series of recommendations to address these issues. These recommendations are discussed above and at the end of the report.

PART IV

THE PROSECUTION FUNCTION: AN EVALUATION

In Part III of this report we reviewed the issue of delay within the Department's disciplinary system. In this part the Commission reports on its review of how, from a substantive perspective, the Department prosecutes cases. This evaluation entailed a review of closed cases, extensive observations over an eight-month period ending in June 2000 of the process as it took place before Trial Commissioners and at OATH, and interviews with many of those involved in the system in order to better understand the structure of DAO and the SPO.

I. REVIEW OF CASES IN THE COMMISSION'S SAMPLE

A. Overview

As part of its evaluation of Department prosecutions, the Commission reviewed 49 closed cases prosecuted by DAO and SPO. The Commission's evaluation of these cases involved a number of issues, including whether the advocate had adequately, and in a timely manner, evaluated and prepared the case by contacting investigators and witnesses and obtaining key evidence. In order to make these evaluations, the Commission examined the entire case file, including handwritten notes, and in some instances discussed specific cases with DAO and SPO representatives.

B. Case Management/Documentation

To evaluate how the advocates managed and prepared their cases, the Commission reviewed the documents in the case folder for the chronological history of the advocate's actions. Most cases contained little documentation. There were often no worksheets indicating contact with witnesses, no prepared questions or lists of facts to be adduced from witnesses at trial, or any documentation of additional steps taken by advocates to enhance the case. The Department informed the Commission that it does not utilize any standardized forms to document the history of a case and advocates are not required to memorialize actions taken on the case. Since approximately January 2000, the CCRB-team supervisor, however, requires the advocates on that team to fill out a "trial preparation checklist." These forms are utilized for case conferrals with the supervisor.⁶⁶

Documenting the steps which have been taken on a case is important and would be helpful for several reasons. First, although the staffing level of DAO remains fairly constant, turnover occurs, especially among advocates who are uniformed members of the service.⁶⁷ In addition, as discussed below, if promoted, advocates may be absent from their position for up to six months⁶⁸ while others in DAO or SPO handle their cases. Thus, proper documentation of case preparation is necessary to enable a subsequent advocate, either temporarily or permanently handling the case, to familiarize himself with the history of the case and the previously completed preparation.

Additionally, documentation is necessary for caseload reviews. In DAO, team leaders meet

⁶⁶ This checklist, however, does not track key actions taken on the cases.

⁶⁷ Turnover in staff exists partly because the assignment is viewed as a "stepping stone" to other legal bureaus within the Department, according to some advocates and officials within the Department.

⁶⁸ In some instances advocates return to DAO or SPO from patrol in shorter periods of time.

with each advocate on a monthly basis to discuss the status of the cases. In SPO, the Special Prosecutor conducts similar case reviews on a quarterly basis. Each advocate handles approximately fifty cases and each Assistant Special Prosecutor handles approximately twenty. In either case -- whether in DAO or SPO -- if an advocate does not document what he has been instructed to do or what he has done, it is difficult to recall the details of the steps that he has taken. Important information or instructions may have been forgotten. Similarly, it is difficult for the supervisor to adequately review and evaluate the advocate's work. According to some supervisors in DAO, however, although documentation is preferable, it is not necessary and team leaders can rely on discussions with the advocate during monthly case reviews to determine the status of the case preparation.

Also, after a case is prosecuted, there may be additional proceedings regarding the case. Department disciplinary cases sometimes result in civil lawsuits against the Department and the City. Moreover, a Department disciplinary case may be the subject of an Article 78 proceeding in State Supreme Court in which a respondent appeals the Department's decision. A complete, timely, and accurate record of the case history would assist in defending against such challenges.

In addition to accurate documentation of actions taken on a case, case preparation includes keeping abreast of significant developments on a case. For example, if an administrative case is delayed because of a pending criminal case, an advocate should monitor the status and developments of the criminal case. First, the outcome of that case may have a direct bearing on the administrative case. Second, if the administrative case is delayed because of the criminal matter, the advocate's failure to aggressively pursue the Department's case as soon as possible may result in further undue

delay and detrimental effects on the viability of the case.

For example, in one case reviewed, the advocate's failure to actively prosecute the Department's case resulted in it languishing in the Department for approximately one year after the criminal case was resolved. In that case, in February 1995, the subject officer failed to arrest a confidential informant who allegedly had been selling drugs and carrying a gun. Also, the officer allegedly disclosed to an informant that someone had notified the Police Department of the informant's criminal activity. In September 1997, the subject officer was tried in criminal court for hindering prosecution, and he allegedly perjured himself at that trial.⁶⁹ The officer was charged administratively for failing to arrest the informant, warning him of possible arrest, and lying under oath at the criminal trial. Given the seriousness and age of the case, the advocate should have aggressively pursued the administrative charges as soon as the criminal case was completed in September 1997. Instead, the Departmental trial did not occur until September 1998, approximately one year later.⁷⁰

The failure to properly manage a case may not only result in excessive delay, but as discussed above, may have more direct consequences for the viability of the case as well as for the disciplinary system in general.

⁶⁹ Respondent was acquitted at his criminal trial.

⁷⁰ At his administrative trial, respondent was found guilty of most charges and was terminated from the Department.

C. Witness Contact

The Commission reviewed the efforts advocates made to contact witnesses during the pendency of a case. Determining the credibility of a witness and evaluating her testimony is a critical step in any prosecution because it is one of the principal means of determining the viability of a case. The advocate should be able to evaluate the strength of a case prior to making a plea recommendation to the First Deputy Commissioner. Often this cannot be reliably accomplished without speaking with witnesses. Thus, it is important to most prosecutions that key witnesses be contacted as early as possible.

Each advocate prepares a plea memorandum on his case which is used to review the case with the First Deputy Commissioner and to determine plea offers. The plea memorandum includes a summary of the facts of the case, generally mirroring the language of the underlying investigator's request for charges and specifications. The memorandum also includes the advocate's recommendation and a brief explanation of the rationale for the plea offer. According to the Department, plea memoranda are normally prepared within eight weeks from the time an advocate receives a case. Although advocates are generally expected to speak with complainants before plea memoranda are prepared, this does not appear to be the routine practice. The Commission believes that such witness contact is generally necessary for an appropriate plea recommendation to be made. In reviewing the case files, however, the Commission found no indication that advocates had taken any steps to verify the facts of the case through their own contact with the investigator or witnesses prior to writing a plea memorandum and making a plea recommendation. Furthermore, none of the plea memoranda reviewed by the Commission included an analysis of the strength of the evidence

or cited evaluations of, or conversations with, witnesses as a reason for making an offer.

In general, the section in the plea memorandum pertaining to the rationale for an offer consisted of a short description of the subject officer's background and how similar cases had been resolved. Also, in cases where the respondent had previously faced disciplinary charges, there was no indication that the advocate had reviewed any of these prior case files.

Although the Commission believes that early contact with witnesses is often crucial to the successful prosecution of a case, those at the Department interviewed in connection with this study maintain that such contact is not necessary. According to supervisors within DAO and SPO, advocates may rely on investigators' worksheets because they detail any interviews conducted of witnesses. Supervisors also point out that civilian witnesses may be unwilling to come to the offices for personal interviews.⁷¹ One problem is that advocates generally work day-shift hours with limited overtime and many witnesses who are employed are available only outside regular working hours or on the weekends. If advocates were available after the typical work day ends, witnesses might be more accessible.

While early witness contact is not essential in some cases (e.g., cases involving drug-test failures), the Commission believes that in most cases relying on an investigator's worksheets as the sole means of evaluating the strength of a case and the credibility of a witness is not sufficient. Although the Bureau and Borough investigators' worksheets are generally adequately detailed, it is impossible to ascertain from worksheets what, if any, facts have been omitted from the report or assess the credibility of the witnesses. In addition, an advocate who must evaluate how well a case

⁷¹ See *infra* pp. 57-60 for a discussion of witness preparation.

actually can be presented in a court often may view witnesses and evidence in a different light than an investigator. Witnesses memories may have changed or their manner of presenting the facts altered.

Further, an investigator's interest in interviewing a witness is to gather information and determine whether charges can be brought against an individual. An advocate needs to construct a legally sufficient case and prove the charges by a preponderance of the evidence in front of a Trial Commissioner or ALJ. Because of these different goals, and because of the different backgrounds and experience of investigators, an interview conducted by an investigator should not, and cannot, replace an interview conducted by an advocate.

Moreover, at times, an advocate may discover through witness interviews that the current charges are incorrect or not legally sustainable. As noted, investigations may take months or even years to complete and an investigator may not have been in recent contact with a witness. Witnesses may have lost interest or relocated during the pendency of an investigation and may not be available to testify. Memories may have changed. Although the Department can present a hearsay case based on a witness's prior statement, it is much less persuasive. It is often more difficult to prove a case when there is no actual witness testifying about the events in question, and this failure may be fatal to a case. Early contact with witnesses and the investigator will allow the advocate to determine the viability of a case and the availability of a witness. The advocate will therefore be able to quickly dismiss unviable cases, enhance prosecutable ones, or suggest appropriate plea bargains.

Indeed, when a witness is finally contacted it often directly, and appropriately, leads to the dismissal of unviable cases. In one case the Commission reviewed, DAO received the case which

had been substantiated by CCRB in September 1997. The allegation involved an incident in late February 1997, when an officer stopped the complainant and a few of his friends because they matched the description of youths who had just been involved in a dispute. The officer's partner, who arrived shortly after the stop, was charged with using excessive force against the complainant. The Department served charges on the subject officer in late July 1998, ten months after it received the case.

A review of CCRB's paperwork indicated the reliability of the complainant and his friends was a key issue, since their statements at CCRB were inconsistent both with one another and with independent witnesses. These differences needed to be examined in order to determine whether the case was viable. However, according to the assigned advocate's notes in the file, no one at DAO spoke with the complainant until late August 1998, when the advocate spoke to him by telephone. Based on this conversation, the advocate determined that the physical contact between the subject officer and the complainant was incidental and unintentional and therefore did not rise to the level of misconduct. It then took until the end of December 1998 for a memorandum recommending dismissal of the charge against the subject officer to be completed, and it was not until early April 1999 that the motion to dismiss was presented to a Trial Commissioner. The Police Commissioner gave final approval for dismissal in late June 1999. The failure of DAO to speak with the complainant in a timely fashion, followed by delay in processing the dismissal, resulted in this case remaining open for 21 months after it was received by the Department, only to ultimately be dismissed for lack of evidence. Throughout this time, the charged officer suffered the consequences of these delays in resolving the open charge.

Another example in the Commission's sample of a case that lingered for years prior to being dismissed involved a complainant who alleged that in early August 1996 he informed two officers in a patrol car that he was being harassed by an intoxicated man whom he pointed out to the officers. The officers were allegedly discourteous to the complainant and threatened to arrest him. In January 1998, CCRB substantiated charges against the two officers and forwarded the case to DAO.

If DAO had done a thorough review of CCRB's investigation when it received the case, it would have realized that the complainant's ability to accurately identify the officers was doubtful. The witness needed to be spoken with to determine whether DAO had a legally sufficient case. In November 1998, ten months after receiving the case, without speaking to the witness, the assigned advocate drafted a memorandum to the Department requesting that the case be dismissed based on the CCRB paperwork in the file. This request was denied. Even though the assigned advocate was aware that there were substantial evidentiary problems with his case, as evidenced by his file notes, he did not speak to the complainant by telephone about the incident until the beginning of June 1999. During this conversation the advocate discovered additional reliability problems with the witness which were fatal to the case. In early July 1999, the advocate appeared before the Trial Commissioner and made a motion to dismiss the case which was approved by the Police Commissioner at the end of the month. Again, the advocate's failure to speak with the complainant in detail about the incident until one and one-half years after receipt of the case resulted in this case lingering for this extended period with consequences to the officers charged. There were considerable evidentiary problems because the complainant failed to identify the officers involved. While the case was apparently properly dismissed because of these problems, a timely conversation

with the complainant would have prevented this case from languishing unnecessarily.⁷² The fact, as discussed above, that it often takes so long to dismiss unprosecutable cases also suggests that significant delays in contacting key witnesses is not unusual.⁷³

D. Witness Preparation

Within the sample of cases the Commission reviewed, 20 cases proceeded to trial. The Commission reviewed these files to determine how advocates prepared witnesses for trial. As noted above, Department officials indicated that the advocates may rely on the investigator's write-up of the witness interview and no further contact with witnesses is necessary until the advocate prepares for trial. Given the lack of documentation in most files, it was difficult to ascertain when witnesses were first contacted and whether they were spoken to, or brought in for trial preparation, in advance of the actual trial date.

Although the Department agrees that speaking with witnesses prior to the day that they testify is preferable, it indicated that this is not always possible. Although the advocates use subpoena-like notices to contact reluctant witnesses for trial, these notices do not carry the same authority as a

⁷² Also, there was a letter to CCRB from the complainant vehemently expressing his displeasure about how the Department handled his case. Specifically, he complained about being contacted by the Department years after the incident, and being pressured by the advocate for immediate cooperation on a day he was unavailable because he was leaving town on a business trip. Although this was never a good case and the complainant's inability to accurately identify the officers involved was apparent at the outset, earlier contact with the witness should have made this evidentiary problem more evident and resulted in a more expeditious resolution of the case.

⁷³ In the sample of cases reviewed by the Commission, 14 of 49 cases were dismissed by the Department, some of which had been pending for months and even years prior to their dismissal. Further, from November 1998 through October 1999, the Department dismissed 306 cases, often, as discussed above, after the case was pending for a significant period of time. While the delay in the resolution of all of these dismissed cases may not always be the result of untimely contact with witnesses, specific examples of such cases are discussed above.

criminal or civil court subpoena. Moreover, no subpoena can require a pre-appearance interview. The Department stated also that civilian witnesses at times are reluctant to interrupt their personal schedules to come and speak with the advocates. Given this reluctance, the Department feels that it is prudent to minimize in-person contact until these witnesses are actually needed for testimony. Department officials, therefore, indicated that interviews conducted on the telephone are an acceptable alternative to in-person interviews. As a result of this practice, an advocate may be first meeting a civilian witness on the day the witness is testifying.

The Commission believes that except where *pro forma* uncontroverted testimony is involved, in-person interviews with key witnesses are essential. Reliance on telephone interviews of these witnesses does not afford an advocate an opportunity to observe the mannerisms and body language of a witness. Furthermore, only a face-to-face encounter with a witness will enable an advocate to truly determine how a witness will handle himself on the witness stand. Also, witnesses often have difficulty testifying and will need in-person preparation. Meeting with the advocate and discussing the testimony may put the witness at ease and enable him to recount the details of the incident. Such evaluations and preparation often cannot be sufficiently done during a telephone interview. While the Commission recognizes that civilian witnesses cannot be "forced" to be prepared, as discussed above, a greater availability of the advocates to meet witnesses during other than normal working hours may make witnesses more willing to devote the time to being prepared for trial.

In fact, most witnesses in Department disciplinary cases are members of the service. These witnesses are readily available to advocates, but representatives of the advocates' offices stated that these witnesses do not need to be spoken with in advance of trial because an advocate can rely on

the written paperwork to determine what the witness's testimony will be at trial. Indeed, one high-ranking advocate represented to the Commission that he often puts police witnesses on the witness stand without speaking to them about their testimony. As further discussed in the trial observation section below, this lack of witness preparation in the Trial Room was evident even with police witnesses. Some police witnesses interviewed by Commission staff indicated they were uncomfortable with the minimal preparation that had preceded their testimony.

This lack of preparation may result in the failure of the prosecution to elicit key evidence. By going over questions with the witness, the advocate will see how each element of a charge is to be proven by currently available evidence. If certain information is beyond the knowledge or current recollection of a witness, the advocate will, in advance of trial, be able to see whether another witness, or other evidence is available to prove the charge. For example, in one case reviewed, the Department failed to elicit essential information to prove that the subject officer failed to respond to a notification to appear at the Department on a certain date. The advocate submitted into evidence paperwork which did not conform to the date on which respondent was allegedly required to appear at the Department as specified in the charges and specifications. Had the advocate properly prepared the witness, this discrepancy would have been evident. Also, the advocate should have noticed this evidentiary problem if he had reviewed the file and documentation within the file more thoroughly. While it is difficult to ascertain whether further witness or case preparation by the advocate would have changed the result in this particular case, this lack of case preparation and consequent failure to elicit key evidence was obvious during trial observations as well.

Although the Commission recognizes that there are many ways that an attorney can prepare

and present a case, most of the cases reviewed by the Commission contain no evidence of pretrial preparation, such as worksheets referencing facts to be adduced or witness questions. This raised concerns, especially in light of the limited legal experience of most of the advocates and the last-minute contact and trial preparation, if any, of many witnesses. The process of preparing questions or worksheets detailing facts to be elicited from a witness can help an advocate learn his case and ensure that testimony is presented in a coherent, chronological fashion with all key points being brought out. Indeed, during observations of trials, Commission staff noted several instances where the advocate failed to elicit a key fact from the witness and might not have been able to prove the charges if the Trial Commissioner had not been willing to admit the evidence during redirect examination.

II. COURTROOM OBSERVATIONS

The conclusions reached in this report regarding issues of delay, inexperience among advocates, and insufficient supervision and case preparation were corroborated by evidence gathered by Commission staff during its extensive observations of negotiations, motions, and trials in the Trial Rooms and OATH hearing rooms.

A. Overview

Commission staff attended proceedings in the Trial Rooms on 40 days during an eight-month period, beginning November 1999, and through June 15, 2000. These proceedings included negotiations, trials and motions to dismiss charges and specifications. Often more than one staff

member was present on these days observing different proceedings which involved prosecutions by SPO and DAO, including the CCRB Team of DAO. The proceedings involved numerous advocates, all four Trial Commissioners, and five Administrative Law Judges at OATH. The 24 trials observed were prosecuted by 18 different advocates. All trials were completed within three days; most were completed in one day.

B. Negotiations - Scheduling

Most cases were not disposed of on the first negotiation date. This appeared to be the result of several factors. First, in some instances, the advocate was not prepared to make a plea offer. As a result, the case was adjourned for weeks so there could be another negotiation date.

Moreover, even where an offer was conveyed on the first negotiation date the respondent generally did not accept the offer. Although the respondent may have eventually accepted the offer, he was given little time to consider the offer and its consequences on the first day in court. Not surprisingly, given the consequences for their careers, respondents often were reluctant to accept offers on the first negotiation date.

Another routine source of delay involved the scheduling of trials. The current system requires that the trial date be set after both parties have announced their readiness for trial. Although, as discussed below, at the outset of the courtroom observations, often both Trial Rooms generally were not utilized, the average length of time to secure a trial date was approximately three to four months. During the course of the study, however, Commission staff noticed that the Trial Commissioners sought to shorten the length of adjournments before trial.

Scheduling delays sometimes occurred because advocates had cases scheduled in both the Trial Room and at OATH. If, for example, on the first available court date, one of the parties is already scheduled to be at OATH, then the case pending in the Trial Room must be adjourned further into the future. If DCT and OATH worked in conjunction to determine the most efficient way to handle the advocates' trial schedules, it would alleviate some of the pressure on the advocate and enable the overall speedier resolution of DAO's and SPO's cases.

Though over the course of the Commission's study the Trial Rooms were being used more fully, during the first three or four months of the Commission's observations, rarely were both Trial Rooms in use for a full day. On the days when negotiations were held, the calendar was often completed before noon. Also, most of the trials were completed in one day.⁷⁴ Only when a trial took place did a courtroom remain open in the afternoon. During this earlier period, while there were four Trial Commissioners and two courtrooms, there were days when no Trial Rooms were in use at all and other days when only one or two negotiations were held and the courtroom was closed by 10:30 a.m.

Indeed, the Department's statistics show that the Trial Rooms were often available to conduct trials and were not used. On average, for the calendar years of 1997, 1998, and 1999 (through October), the Department asserted that slightly more than three proceedings took place per week, including trials, mitigation hearings, and motions to dismiss.⁷⁵ There are four Trial Commissioners

⁷⁴ This conclusion is based on CATS sheets, trial observations, and statements made by advocates in court when scheduling trials.

⁷⁵ According to the Department, on average, 2.98 trials took place per week in 1997, 3.3 in 1998, and 3.42 in 1999 (through October 1999). These figures also include mitigation hearings, which generally involve the respondent's testimony solely, and motions to dismiss charges and specifications.

(three until January 1999), two Trial Rooms and as discussed above, most trials take only one day or less to complete while mitigation hearings and motions to dismiss take significantly less time. While the initial observations of Commission staff were consistent with these statistics, the utilization of the courtrooms increased significantly towards the end of this study.

C. Case Preparation

The advocates at trial appeared to be knowledgeable about the basic facts of cases contained in the original case folders. It appeared through the observations of many trials that a number of advocates, however, were doing little, if anything, to develop facts necessary to support their cases. This lack of factual development often resulted in gaps in the presentation of the case and undermined the advocate's position.

For example, in a case involving three officers, it was alleged that the police acted discourteously and without probable cause. Based upon the interviews that it conducted, CCRB substantiated the charges and questioned the failure of the police to fill out a required report. Strangely, during the CCRB interviews the officers were never asked directly whether they had filled out the report and the officers, therefore, did not definitively state that they had not.

The issue of whether or not the report had been filled out was important because if it was not filled out, the advocate could use this omission to support his position that the officers' behavior was improper. Also, the officers could have been charged with an additional specification for their failure to complete required paperwork. Conversely, if the report was filled out, information contained in that report could bear directly on the issue of whether the officers had probable cause

to act and thus help vindicate the officers.

During the respondent's case, therefore, the advocate sought to support the Department's contention that the search was improper through establishing that the testifying officer's testimony was incredible. Based upon the CCRB findings, the advocate cross-examined the officer about his failure to fill out the report. This officer surprised the advocate by testifying that the report had been filled out, and was currently on file at the precinct where the incident occurred. Evidently, the advocate, who had received a transcript of the CCRB interviews and investigative paperwork, had not determined whether the report had, in fact, been completed. Obviously, there was a fundamental flaw in the CCRB investigation since there was no definitive statement that a search for the form had been done. Significantly, the existence of the report could have been confirmed if the advocate had contacted the precinct where the incident occurred and asked whether the report was on file. The Trial Commissioner, therefore, precluded the advocate from making additional reference to this issue. The immediate consequence of the advocate's failure to investigate this issue was that his credibility and the validity of his case were undermined.

This lack of case preparation was apparent with more seasoned advocates as well as the more inexperienced ones. In one case observed, the respondent had previously been tried criminally involving charges of sexual abuse against a young girl and was being tried administratively regarding the same conduct. Respondent testified at the criminal trial and upon completion of that case, the record was sealed by operation of law. Although the advocate was legally entitled to make an application to the criminal court and obtain an unsealing order, he failed to do so. He, therefore, never obtained a copy of the transcript of the criminal proceedings and did not have it at the time of

the administrative trial.⁷⁶

This evidence was extremely significant. First, in preparation of the Department's case, the respondent's prior testimony would have alerted the advocate to the details of respondent's theory and provided the advocate with an opportunity to refute respondent's contentions at the trial. Second, the transcript was essential in order to conduct an effective cross examination of respondent at the administrative trial. Indeed, here, when respondent testified, the advocate sought to use respondent counsel's copy of the transcript to cross-examine and impeach the respondent. Defense counsel, who properly obtained the transcript, objected to the advocate's use of it. Because respondent's counsel had paid for the transcript and the advocate had failed to obtain it, the Trial Commissioner ruled that respondent's counsel was not required to provide it to the advocate to use.⁷⁷ As a result of the failure to properly prepare his case, the advocate's ability to impeach the respondent, discredit his story, and effectively disprove the respondent's case was undermined. Also, at the completion of testimony in the case, when the Trial Commissioner asked the advocate to respond to various legal arguments, he stated that he was not as prepared as he would normally be because he had been out on patrol. In fact, at the time of trial this advocate was still on a patrol rotation from the advocate's office and returned solely to try this case. The lack of case preparation here may, in part, be attributable to the fact that the advocate had been out on patrol performing

⁷⁶ Notably, the advocate represented to the court that he had researched the law regarding his right to obtain an unsealing order and concluded that he had no legal right to do so. While this was a clear misreading of the law, the ultimate consequence was that the advocate failed to obtain a copy of the transcript, to which he was legally entitled.

⁷⁷ For a further discussion of this case, *see infra* at p. 76.

police duties instead of performing a full-time advocacy role.⁷⁸ This example, thus also reflects the problem of attorneys in the legal bureaus being required to rotate out on patrol upon promotion.

Routine case preparation is necessary also to determine whether further development of the facts or additional investigation is necessary. Detectives may investigate and complete a case based on evidence which appears sufficient, but an appropriately skilled attorney who needs to present a legally sufficient case will, when preparing a case for trial, often identify additional evidence necessary to support his position. Given that DAO and SPO are part of the Police Department, they have the means available to investigate and enhance the cases they receive. When required, it is essential that these resources be utilized so that the Department can successfully prosecute its cases.

Indeed, at times, even where the material evidence was in the possession of the advocate, he failed to sufficiently examine it. In one case the respondent was charged with the failure to appear at a Departmental interview when so directed on a particular date. The advocate attempted to introduce into evidence a receipt from a certified letter that had been sent to and signed by respondent, directing her to appear. The date on the letter, however, was different from that charged in the charges and specifications. The witness, who was in charge of sending such notifications, testified as to the signed receipt pertaining to the irrelevant date. Respondent's counsel noticed the discrepancy, which surprised the advocate. After taking a moment to confer with a supervisor and ask the witness about the pertinent notification, the advocate discovered that the notification sent to respondent for the date applicable to the charge had been returned to the Department, "unclaimed."

⁷⁸ A similar issue was present in the case discussed *infra* at pp. 73-74, where respondent was charged with stealing a fellow officer's paycheck. In that case, the advocate had been transferred out of the office and was brought back solely to try the case.

Consequently, the advocate moved to dismiss that charge and specification. Simply looking at the prosecution's evidence and documentation within the file in any meaningful way before trial would have prevented this surprise and the undermining of the prosecution's case during trial.

This lack of case preparation was again apparent during observations of negotiations. In one case, for example, originating from an incident in March 1998, the subject officer had been charged criminally and administratively. In October 1999, the criminal charges were dismissed by the District Attorney's Office due to the complainant's lack of credibility. In March 2000, the advocate appeared in the Trial Room to set a date for the administrative trial, which was then set for July 2000. On the negotiation date, it was disclosed that the advocate had not spoken with the District Attorney's Office regarding the reason for the dismissal of the criminal case until the day before he appeared in court, five months after the dismissal.

Here, the advocate let the case languish instead of monitoring the criminal case and proceeding administratively at the earliest possible date. The advocate should have been in regular contact with the Assistant District Attorney and calendared the case administratively as soon as feasible once the criminal case was completed. As discussed above, the Department appropriately points out that a pending criminal case against a member of the service will cause delay in the prosecution of the Department's case that is, to a large extent, beyond the control of the Department. Yet, where as here, the Department failed to contact the District Attorney's Office until five months after the completion of the criminal case, the case was not set for trial until several months later and the Department's inaction added to the delay.

D. Witness Preparation

Another general problem evident in the Trial Room was the lack of witness preparation. A well-prepared witness should be familiar with all the facts and paperwork of the case, including any prior testimony she has given. She should be able to speak thoroughly about all key issues with minimal leading questions and should be prepared for the questions she will be asked by the advocate and the respondent's attorney. Properly preparing a witness enhances a witness's ability to testify clearly and accurately. Also, it gives the attorney an opportunity to become familiar with the testimony and the witness's ability to respond to questions on the witness stand. As further discussed below, it was clear that the advocates did not spend a sufficient amount of time preparing their witnesses prior to trial. This lack of witness preparation appeared to be the underlying cause of most of the problems the advocates experienced during their direct examinations.

Commission staff spoke also with some police officer witnesses specifically about the preparation they received from the advocate before testifying. They described minimal preparation by the advocate prior to testifying. One witness, the highest-ranking officer involved in a particular case, reported that the advocate had spoken with him for ten minutes a few days before the trial, and then ten more minutes on the day of trial regarding his testimony. All these witnesses stated that they were not comfortable with the preparation they did receive. It did not compare with the trial preparation they routinely received by Assistant District Attorneys in criminal cases. Furthermore, none of the advocates reviewed with the witnesses the questions that the witness would be asked on the witness stand.

Although advocates may be encouraged to speak with civilian witnesses prior to the date of

trial, DAO and SPO representatives stated that advocates often have difficulty persuading civilians to come in for trial preparation and witnesses are therefore briefly prepared just prior to testifying. In addition, many of the cases tried by DAO and SPO have been investigated by IAB or another investigative bureau of the NYPD. As part of their duties, the investigators fill out worksheets which detail the facts of the investigation. As discussed above, it is the Department's view that the investigators require little, if any, trial preparation since the advocate is able to read their paperwork. Consequently, some Department witnesses are put on the witness stand without ever having spoken to the advocate regarding their trial testimony.

In one case, the lead IAB investigator had an exceedingly difficult time during cross examination. His response to almost every question was that he did not recall and needed his recollection refreshed by looking at his paperwork. Significantly, neither the investigator nor the advocate had any of the investigator's paperwork with him, and the investigator needed the respondent's attorney to provide it. The cross examination took approximately one and one-half hours due to the investigator's inability to answer the respondent's attorney's questions. After testifying, the investigator told Commission staff that he believed he had been insufficiently prepared to testify.

Similarly, in another case, the advocate failed to adequately prepare and speak with the principal witness. As a result, crucial testimony against the respondent was not admitted into evidence during the advocate's direct examination. Absent the Trial Commissioner's questions to the witness, such evidence would not have been elicited. This was a termination case involving respondent's participation in a narcotics sale. The Department's evidence against the respondent

consisted primarily of his presence in an apartment where a narcotics dealer discussed the particulars of a drug sale with the witness, an undercover officer.⁷⁹ The narcotics transaction occurred outside the apartment and the witness was unsure whether the respondent had been able to hear the conversation regarding the drug sale, or whether he had been in the apartment at the time the dealer and undercover returned to the apartment and the narcotics were packaged.

After completion of direct examination, the respondent's counsel asked about the witness's proximity to the dealer and undercover officer when the drug-sale conversation took place. As elicited on direct examination, the witness testified that respondent had been seated at the living room table. On cross examination, slightly more detail was elicited as to where respondent was situated in relation to where the conversation took place and the table in the apartment. After both examinations were completed, the Trial Commissioner asked the witness for a description of the apartment since none had been elicited from the advocate and what, if anything, was on the table where respondent was seated. The witness replied that drug paraphernalia, such as glassine envelopes, a scale, a strainer, and cardboard boxes were on the table where respondent was seated.

This evidence was critical to establishing respondent's knowledge about, and involvement in, the sale of narcotics at the location. It became evident later during the trial that the drug paraphernalia observed on the table was not listed on the paperwork in the advocate's file. Consequently, the advocate had to speak with the witness before trial to become aware of this information. Thus, had the advocate adequately prepared the witness, the advocate would have

⁷⁹ Also, at the time of his arrest, the respondent had in his possession an amount of prerecorded "buy money" which he said he had received from the dealer in order to buy various items at a nearby grocery store.

elicited the relevant testimony from the witness, instead of discovering such crucial evidence when the Trial Commissioner intervened.

E. Trial Skills

Deficiencies in case preparation and trial skills can be significantly improved with appropriate training and supervision. During its observations, the Commission observed that many advocates lacked the knowledge of basic rules of evidence, such as how to lay the proper foundation for the admission of documents, photographs or business records into evidence, or the proper way to impeach a witness. Knowledge and utilization of these basic foundational evidentiary issues is essential in order to be able to admit evidence at trial and prove a case. Handbooks providing foundation questions for different types of routine evidence such as documents and photographs would assist the advocates in these situations. During many of the trials observed, the advocates had difficulty asking the questions which were necessary to have proof admitted into evidence. Sometimes evidence was admitted without foundation questions in the absence of objection or as the result of stipulation. On other occasions the Trial Commissioner had to provide the advocate with routine foundation questions. Other times, however, the inability to elicit certain information simply precluded the admissibility of the evidence.

Similarly, many advocates did not know how to use prior testimony of a witness to impeach the witness with a prior inconsistent statement. In numerous cases, the Trial Commissioners needed to instruct the advocates what questions to ask in order to lay the foundation to ask about the prior statement. In one case in particular, the Trial Commissioner repeatedly told the advocate what a

prior inconsistent statement was and how the testimony to which the advocate referred was not inconsistent. Notably, the advocate continued raising the same issue and trying to impeach in the same incorrect fashion. Impeaching a witness with prior inconsistent statements is an important and basic method used to undermine the credibility of a witness. Again, increased training, supervision and "canned" training material should reduce this type of problem.

Another important basic trial skill for a prosecuting attorney is the ability to conduct a clear and comprehensive direct examination. Testimony should be presented in a lucid, logical progression to facilitate the listener's ability to follow the evidence being offered. Many of the advocates observed had difficulty conducting effective direct examinations. They appeared uncomfortable formulating non-leading questions, thereby preventing the witnesses from testifying in a rational chronological fashion. Instead, the advocates relied on leading questions to develop the witnesses' testimony. Further, many witnesses seemed unsure about what the advocate was seeking to elicit, which sometimes resulted in fragmented, unclear testimony and resulted in undermining the witness' credibility.

Problems also appeared on cross examinations. The purpose of an effective cross examination is to elicit specific information from a witness which either supports the case or undermines the adversary's case. Cross examinations were not focused on eliciting supportive testimony or impeaching the witness' credibility. The examinations were usually too long, repetitive and meandering.

For example, in one case an off-duty officer was charged with assaulting a civilian after a traffic accident and then leaving the scene of the accident without reporting it. Respondent testified

that he drove his passenger home instead of immediately reporting the accident. The passenger was respondent's brother, who had a prior criminal record. Arguably, the respondent did not want his brother involved in the incident because of his criminal history and possible repercussions to him. Respondent was not asked about that possible motivation. Instead, the advocate cross-examined the respondent for over one hour regarding details of the brother's criminal history. This extensive questioning, particularly since these details were of, at most, marginal relevance, accomplished relatively little. Training and supervision would have probably prevented this. The incident caused the advocate to lose credibility with the Trial Commissioner, who expressed her frustration with this line of questioning.

While at times the Trial Commissioners merely expressed dissatisfaction or frustration, as discussed above and below, the Trial Commissioners (as well as the ALJs at OATH) often found it necessary to help develop a full factual record. As a fact-finder, the Trial Commissioner must understand and digest all of the evidence presented in a case. Although it is not improper for the Trial Commissioner to elicit testimony and obtain clarification of issues, this should be unnecessary if the advocate is doing his job properly. In one trial observed, for example, the respondent was charged with stealing a fellow officer's check from the precinct and having a relative cash the check. The Department's main evidence consisted of bank photographs which depicted the relative cashing the check. After both parties had rested, the Trial Commissioner notified the advocate that he had failed to show that the respondent was in the precinct on the day the check was stolen or that he had access to it. The advocate conceded that he would have to reopen his case in order to establish this

fact. Although, here, the Trial Commissioner notified the advocate that he had not presented a legally sufficient case, this should not have been necessary.

This type of intervention by the Trial Commissioners also results in certain perceptions by the members of the service and witnesses involved in the system. The respondent, for example, would be justified in questioning the fairness of a process that required the intervention of the judge for the advocate to establish his case. Alternatively, intervention by a Trial Commissioner may lead observers to conclude that advocates are not themselves being sufficiently forceful in effectively advocating on behalf of the Department and its disciplinary rules.

F. The Dynamic Between the Advocates and Trial Commissioners

Admonishments to advocates from the Trial Commissioners were constant in many trials observed. The advocates and judges do not always display respect for each other. This conclusion is based on the observations in the courtrooms and conversations with parties inside and outside the Department.

The apparent lack of both preparation and skills of many of the advocates often resulted in the Trial Commissioners publicly expressing frustration. This frustration was demonstrated by actions ranging from statements in varying tones of voice suggesting possible legal arguments or approaches to testimony, to body language, to harsh admonitions to advocates for the failure to abide by Trial Commissioners' directives. Conversely, it was evident that the advocates believed that the

judges were at times inappropriately impatient or hostile and, as a result, often were visibly disrespectful towards the Trial Commissioners.⁸⁰

For example, mutual discourtesy was particularly present during one trial observed where the advocate failed to abide by the Trial Commissioner's repeated instructions. The problem began when the advocate failed to elicit a comprehensive narrative from the Department's witnesses. The Trial Commissioner informed the advocate that a non-interrupted narrative would be helpful to her. Despite this request from the Trial Commissioner, the advocate defiantly continued to interrupt the witnesses and prevented them from testifying in the format in which the trier of fact requested. Moreover, the advocate continued to defy the Trial Commissioner throughout the trial, including among other things, not standing when addressing the court after being repeatedly asked to do so by the Trial Commissioner. In addition, after completion of testimony and a day before closing arguments, the Trial Commissioner asked the advocate to address during summation specifically how the Patrol Guide related to the charges in the case and the testimony presented at trial. Despite this instruction, the advocate presented his summation and failed to address any arguments which the Trial Commissioner requested.⁸¹

In another trial observed, the Trial Commissioner admonished the advocate not to mention a specific document. The advocate continued to do so, despite repeated admonishments. This

⁸⁰ While criticisms of advocates were sometimes also observed at OATH, for reasons that are not entirely clear, the atmosphere between advocates and judges was noticeably less hostile in OATH than in the Trial Room.

⁸¹ The Department maintains that the advocate was not discourteous during these proceedings. The Commission's conclusions were based on actual observations during the trial.

inexcusable non-compliance resulted in severe reprimands to the advocate from the Trial Commissioner.

During several trials when it became apparent that the advocate was not conducting an effective cross examination, the Trial Commissioner would try to suggest approaches to the advocate. The Trial Commissioner also sometimes suggested relevant information that she wanted to hear or inquired of the advocate if there was a purpose to the lines of questioning. Most of the advocates tended to ignore these suggestions from the Trial Commissioners.

Even the more seasoned advocates within the Department displayed improper respect for the courtroom and the proceedings. Although professionalism in the courtroom is always important, a lack of it is even more damaging when exhibited by more experienced advocates because they may be viewed by other advocates as examples to emulate.

In the case discussed above, where the advocate failed to obtain a copy of the transcript of the prior criminal court proceedings, at the outset of the trial the Trial Commissioner ruled that respondent's counsel did not have to provide a copy to the advocate. When the advocate sought to use the transcript during the trial, the Trial Commissioner reminded the advocate of her previous ruling and ordered the transcript returned. First, the advocate took out his wallet and threw money on the courtroom table, claiming he would use the transcript for as long as the money would allow. Then, upon being directed to return the transcript, the advocate slammed it down on the defense table, causing an expected admonition from the Trial Commissioner. While this blatant disrespect for the proceedings in the courtroom obviously was not present in every case, whenever it appears it has a severely damaging effect on the perception of the professionalism in the disciplinary system.

In part, the staffing and structure of the prosecution function contributes to the hostile atmosphere between Trial Commissioners and advocates. First, as discussed below, the lack of experience and training of the advocates means that many of them do not possess sufficient trial skills that judges want to see. Second, there appear to be no consequences to an advocate for lack of preparation, continued poor performance or displays of disrespect, including open defiance of directives, toward the Trial Commissioners. An advocate's ability to earn the respect of the fact finder, however, is an essential part of his job. Failure to do so undermines his effectiveness and ultimately is harmful to his client, the Department.

In any event, the discord between the advocates and the judges results in an inappropriate courtroom atmosphere. This atmosphere undermines the confidence in the system of all present, officers and the public alike. While the Commission does not condone any overly harsh comments by the Trial Commissioners in the courtroom -- and some were observed -- based on our observations, it is clear that the Trial Commissioners are justified in expecting better trial preparation, presentations, and legal arguments.

III. STRUCTURE AND OPERATIONS OF SPO AND DAO

A. Overview

The Commission's review of the structure and operations of DAO and SPO identified a number of significant issues which help, in part, to explain what the Commission observed in its file review and courtroom observations. The Commission found that too many inexperienced lawyers, accompanied by insufficient training programs and inadequate supervision, are assigned to DAO and

SPO. The issues identified in this section of the report are not theoretical. As demonstrated by the Commission's review of closed cases and its courtroom observations, the result is that the quality of the presentation of many cases suffers and there appears to be both inadequate case management and, in too many cases, inadequate trial preparation and presentations. In addition, while the SPO was created to centralize the Department's most serious cases, especially those involving accompanying criminal liability, the separation between the offices appears to weaken the overall quality of prosecutions by preventing the sharing of caseloads and resources.

B. Staffing

The nature of the staffing at DAO, and to a lesser extent, at SPO raises serious issues. While certain prosecutors are capable trial attorneys, these offices are to a greater extent than is desirable largely staffed by a combination of law students and lawyers who often have insufficient trial experience.

Although DAO has the stated goal of hiring experienced civilian trial attorneys, including former prosecutors, this goal is inconsistent with DAO's practice of aggressively recruiting and hiring as advocates uniformed members of the service who are attending law school. While this practice is undoubtedly well-intentioned -- it provides the prospect of varied career alternatives within the Police Department -- the result is that the majority (seventeen of twenty-eight) of the advocates are members of the service who are inexperienced law students and attorneys with no prior outside legal or trial backgrounds. At the time of this writing, eight of the uniformed officer advocates are currently in law school, five are attorneys, and four are law school graduates who have

not yet been admitted to the bar. Moreover, all seventeen of the advocates assigned to DAO who are uniformed members of the service gained their entire trial experience through their assignment to DAO.

The level of prior trial experience among the eleven civilian advocates in DAO varies. According to the Department, as of October 1996, it is DAO's policy that all new civilian attorneys hired by DAO must have extensive trial experience. At the time of this writing, however, while all eleven are attorneys, the level of trial experience they possess ranges from a few years as former criminal prosecutors, to minimal, if any, trial experience as a former attorney in private practice.⁸² Also, most of the former Assistant District Attorneys in DAO had relatively short careers as criminal prosecutors and may, therefore, have somewhat limited trial experience.

Although the Special Prosecutor is a civilian, all of the Assistant Special Prosecutors are uniformed members of the service. These members of the service gained varying amounts of legal experience through prior assignments in District Attorney offices and in non-criminal law-office settings.⁸³

Advocates typically make a commitment to stay in DAO for two years and then some transfer to another legal position within the Department. Additionally, if a member of the service -- whether it be Advocate or Assistant Special Prosecutor -- is promoted during his tenure at DAO or SPO, he

⁸² Seven of the civilian advocates are former Assistant District Attorneys with relatively short criminal prosecution careers, one is a former Legal Aid attorney, one is a former Fire Department Hearing Officer, one worked previously for the Department of Social Services, and another advocate was in private practice.

⁸³ At the time of the Commission's study, three of the current Assistant Special Prosecutors were former Assistant District Attorneys for approximately four years and the other two attorneys worked in DAO prior to their assignment to SPO.

will be transferred out of DAO or SPO and put into a patrol unit for a period of up to six months. During this period, the advocate is not replaced and other members of the team handle his caseload.

There are two problems which arise from this mode of staffing the Department's prosecution offices. First, it appears that because, in practice, the Department is treating the prosecution function more as a police rather than a legal function, these offices are largely staffed by uniformed members of the service, many of whom often lack the requisite prior trial experience to prosecute cases effectively. To operate as a successful prosecution function, personnel must demonstrate a commitment to the advocates' offices and its unique role in the Department. Advocate positions should not be transitional positions, or positions fungible with others in the Department.

Although a uniformed member of the service has experience in the field that can be valuable in many aspects of a Departmental prosecution, including first-hand knowledge of police procedures and familiarity with the Patrol Guide, other skills are necessary to be an effective trial attorney. Advocacy skills and legal knowledge are of paramount importance. These problems are compounded by the fact, as discussed above, that some members of the service in DAO and SPO, upon promotion, rotate out of these positions. As a result, the Department loses the benefit of the experience these officers get while serving as advocates. Also, where an officer has demonstrated a commitment to the legal position, such a rotation is unnecessary. Finally, the skills that make a good advocate, or a supervisor of advocates, are different from those which may make someone a good police officer or police supervisor. Advocates thus should be promoted, and given responsibility, with the advocates' offices based on these skills and not premised on the rank or experience they obtained as police officers.

In addition, the use of uniformed members of the service to prosecute other officers, at a minimum, raises an issue because advocates are best when they have a level of detachment which enables them to objectively review cases and effectively prosecute them. Such an attitude may be hard to maintain when advocates know that they either will return to line police functions permanently or, if promoted, be sent back to patrol for a rotation.⁸⁴ Anecdotally, the Commission has also heard that members of the service often do not want to be assigned to DAO or SPO. Such an assignment, therefore, may result in low morale within the offices, which can reduce the effectiveness of the officer.

If the Department determines that a member of the service is the best available candidate for a position within the advocates' offices, that person should be eligible for the position, but this assignment should be viewed as an appointment to a different type of job and not just as another transfer within the Department.

C. Supervision and Training

The Commission found that the advocates are not adequately supervised. It is vital to the success of a prosecution office that new attorneys are closely supervised and trained. As discussed above, a large number of Advocates are inexperienced and many are still in law school. The level of supervision is inconsistent and the training program currently in place is inadequate given the lack of experience.

⁸⁴ Commission staff even observed a trial during which an advocate, who was a uniformed member of the service, was heckled by other members of the service who were sitting in the audience and was taunted for not being "a real cop."

The Department Advocate is responsible for the general oversight and management of DAO. Although he is an attorney with extensive prior legal and trial experience, the responsibility for the day-to-day management and supervision of the attorneys rests with the Commanding Officer ("CO") of DAO, and the head of the CCRB Team. Both are attorneys, but neither has any prior trial or legal experience before being assigned to DAO. Also, two Deputy Managing Attorneys, only one of whom has outside trial experience, supervise the Advocates and assist them with case management and trial strategy. The Commission believes that there is an insufficient amount of experience at the top level of management which limits the amount of guidance the supervisors can offer to Advocates.

Advocates are assigned to one of six "teams" within DAO, handling cases within one of four geographical areas, allegations against members of the Traffic Enforcement Agency, or CCRB-generated cases. Each of the six teams has an Advocate who is the designated "team leader," responsible for reviewing all of his team's cases, supervising trials, and because of the structure of DAO, essentially training new Advocates. In addition to supervising the Advocates on his team, the team leader also prosecutes his own caseload, which consists mostly of cases likely to go to trial and therefore requiring fact development and trial preparation. The team leaders, as a result, are limited in the amount of time they have available to supervise the Advocates.

The Special Prosecutor serves as the SPO's only supervisor and has his own caseload to prosecute. He observes trials conducted by the Assistant Special Prosecutors infrequently.⁸⁵

⁸⁵ During the course of this study, however, the Commission observed an increase in DAO and SPO supervisors observing trials. While it is unclear whether these observations were followed up with appropriate training, the Commission endorses this enhanced supervisory review.

Finally, the Department does not have an adequate internal formal training program to teach trial skills. To be an effective advocate an attorney must learn and practice the fundamental skills needed to present a case. Such skills include adequately preparing a case, formulating a trial strategy, presenting thorough and clear direct examinations of witnesses, and conducting effective cross examinations. The Commission recognizes that, because of the number of trials that an advocate may have the opportunity to prosecute, DAO is an ideal venue by which to learn trial skills by on-the-job training. Although a great deal of trial advocacy involves learning by doing, the development of a strong foundation through some form of training in basic skills is important. Without such a foundation, methods of enhancing trial skills such as "second seating" or courtroom critiques are of less value.

In order to form and strengthen advocacy skills, the Department enrolls advocates in local prosecutor offices' trial advocacy programs and approximately ten advocates may attend each year.⁸⁶ While CLE classes are available to all Department attorneys, attendance by advocates in CLE trial advocacy and evidence courses is not mandatory. Law students in the Advocate's Office are, however, encouraged to complete courses in trial advocacy and evidence in law school. Advocates are expected to learn how to prosecute a case mostly through on-the-job experience. To achieve this goal, an Advocate with little or no prior legal and/or trial experience will be assigned cases involving minor charges that usually result in a negotiated plea or a simple trial. Less experienced Advocates are paired with more experienced Advocates and "second-seat" or assist in trials prior to trying a case on their own. Advocates who are first-year law students do not prosecute cases and are assigned to

⁸⁶ Advocates who are former criminal prosecutors presumably have attended trial advocacy programs.

the charging unit. In addition, DAO has a weekly meeting of the Advocates where team leaders discuss noteworthy issues and decisions which arose in the past week. On occasion, a guest lecturer is invited to these meetings to speak with the advocates on topics such as ballistics expert testimony and rules of evidence.

These efforts are positive, particularly "second-seating," which is similar to what, along with formal training, is used in criminal prosecutors' offices. They have not, however, been sufficient to overcome the lack of experience of many of the advocates and the absence of real training.

Apart from the above efforts, the advocates also receive a handbook which includes sections of the Department's Patrol Guide that most commonly form the basis for charges and a set of "predicate questions" for conducting a direct examination of certain specialized witnesses. This booklet, however, does not contain information regarding how to prepare a case for trial, or manage a caseload. It does not give guidance on how to prepare effective direct and cross examinations. Because the Department views the Assistant Special Prosecutors as "seasoned" advocates, little if any additional training is provided to them by the Department.

Notably, the Deputy Commissioner - Trials is in the process of working in conjunction with DAO to develop videotapes which consist of various courtroom scenarios in an attempt to demonstrate common evidentiary issues and trial techniques. While the Commission has not viewed these videotapes, this should be important supplemental training for new advocates. They need qualified instructors to put trial advocacy in a context they can understand. Such programs should assist in developing the skills essential to effectively try cases.

As discussed in the report, the Department possesses an extensive and formal disciplinary system. Having adopted this complex structure, the Department is responsible for developing resources to enable advocates to acquire and enhance the skills necessary to perform their jobs competently and professionally. This includes regular in-house training as necessary. This may require classes teaching, for example, the foundation questions necessary to admit documents into evidence, how to impeach a witness with a prior inconsistent statement, and how to argue credibility issues on summation. These training programs should be routine and be accompanied by comprehensive supervision and outside training.

IV. SURVEY OF OTHER POLICE DEPARTMENTS & AGENCIES

To place the Department's prosecution function in a broader perspective, the Commission conducted a survey of a number of police departments of large cities around the country. The Commission spoke also with representatives of several large county police departments and the Department of Justice. Through interviews with officials of these agencies, the Commission solicited general information about each agency's disciplinary system. The Commission was especially interested in determining whether each department's prosecution function existed within or without the agency and the typical length of the adjudicatory process.

The Commission sought to interview officials who oversee disciplinary matters. Owing to variations in how agencies handle internal disciplinary matters, however, Commission staff interviewed officials from various areas of the departments surveyed, including internal affairs officials and others. Ultimately, Commission staff spoke with representatives from the Baltimore,

Boston, Chicago, Dallas, San Diego, and New Orleans Police Departments. Also, the Commission interviewed officials of the Los Angeles, Metro Dade and Nassau County Police Departments, and the Department of Justice.

While comparing the disciplinary systems of other agencies may be helpful in placing the NYPD's prosecution function in a broader perspective, a survey of these agencies confirmed that the Department is unique in a number of ways. First, because there are over 40,000 uniformed members of the NYPD, the number of disciplinary matters to be processed is substantially larger than in any other police department or law enforcement agency in the country. While the Federal Bureau of Investigation, under the auspices of the Department of Justice, has almost 30,000 FBI agents and civilian employees, all police departments surveyed employ significantly fewer members of the service. Most have under 5,000 employees, with the largest police department surveyed, the Chicago Police Department, employing approximately 14,000 members of the service. The considerable size of the NYPD inevitably makes its job more difficult, while at the same time providing an organization of sufficient means to allow the creation of a more substantial infrastructure to deal with disciplinary matters.

Similarly unique about the NYPD is the formality of its disciplinary system. Unlike many of the agencies contacted, the Department's prosecution function and disciplinary system involve a much more formal adjudicatory model with a relatively large staff of advocates trying cases before administrative law judges in an adversarial setting. Indeed, various agencies surveyed make disciplinary recommendations without formal adjudication within the department. For example, the Metro Dade County Police Department does not conduct hearings at all. A high-ranking officer of

the department makes a finding regarding guilt and a penalty determination after reviewing the results of the internal affairs investigation. In agencies without formal, internal adjudicatory processes, appeals of a department's findings and penalties provide the necessary due process and are handled by agencies outside of the department. Typically, this process consists of a hearing conducted outside the department by an independent hearing examiner and the department is represented by attorneys from other city or county agencies.⁸⁷

An example of a somewhat more formal process, and the process most closely resembling New York's, is that of the Los Angeles County Police Department. There, department advocates, who are not attorneys but rather members of the service assigned to prosecutorial positions, present substantiated charges to a panel called the Board of Rights. The Board is composed of two high-ranking members of the department, selected randomly, and one outside civilian, selected from a previously approved list of representatives of the community. Unlike the Department's Trial Room and OATH hearing rooms, the advocates present cases in what was described to Commission staff as a non-adversarial manner. Testimony and evidence is supposedly presented objectively and evidentiary rules are not followed. Upon completion of the presentation of evidence, the Board convenes and renders a decision, usually within a few hours and no longer than in a few days. The decision, which includes a finding regarding guilt and a penalty recommendation, is forwarded to the Chief of Police for final approval. Pursuant to the City Charter, the Chief of Police can either accept the Board's recommendation or decrease the penalty to be imposed. He is not empowered

⁸⁷ In New York, despite its more formal system, officers can also appeal penalties imposed by the Commissioner through Article 78 proceedings in the State Supreme Court.

to increase the penalty. Department officials stated that the Chief of Police rarely lessens the penalty recommended by the Board.

Another somewhat more formal disciplinary process is that of the Chicago Police Department. The prosecution, however, is handled primarily by civilians, not uniform members of the service. Investigations of misconduct are handled by Internal Affairs or, in firearm-discharge and force cases, by the Office of Professional Standards ("OPS"). Although OPS is a component of the Superintendent's Office⁸⁸ and the head of the agency is a member of the police department who reports directly to the Superintendent, the agency is comprised solely of civilian investigators. After an investigation is completed, OPS makes a penalty recommendation. There is no further evaluation of the substantiation of the charges, and the written penalty recommendation goes through the chain of command for review, ultimately reviewed by the First Deputy Superintendent and then returned to OPS. Any objections by any of these reviewers to the penalty recommendation are made in writing, attached to the original penalty recommendation, and the file is forwarded to the next party for review. Then OPS makes a final penalty recommendation. Where the subject officer rejects the proposed penalty, depending on the severity of the penalty recommendation, the respondent may either orally present his case to a three-member panel of uniform members of the service or obtain a review of the paperwork by a nine-member board of civilians. Only where the recommended penalty is 30 days' suspension or more does a formal hearing take place. In that event, the case is presented, similarly to trials in the Trial Room, but by civilian attorneys from the Corporation Counsel's Office. Attorneys present the case to a Hearing Officer, a civilian member

⁸⁸ The Superintendent in the Chicago Police Department is the equivalent of the Police Commissioner in the NYPD.

of the community, who hears the case and presents a written report and recommendation to the nine-member board of civilians. The hearing addresses solely why the penalty is appropriate and does not litigate the finding of guilt. The board's decision is final and may be appealed only in Circuit Court.

Because of differences in the methods by which various departments prosecute cases, it is somewhat difficult to compare the time it takes to adjudicate cases in other agencies with the Department's record in this area. The formality of the Department's system necessarily contributes to some delay in the adjudication of cases. Other agencies, for example, that have informal systems may report fairly short periods of time for the completion of cases. However, in these departments, further time taken for outside review of the department's findings must be taken into account. In addition, as discussed above, the times for completion of cases are simply what the relevant departments report.

The Federal Bureau of Investigation, for instance, has various means by which to appeal a case. After an allegation has been sustained and a penalty recommendation has been approved by the Office of Professional Responsibility ("OPR"), a small percentage of employees, who are veterans of certain wars, may appeal to the Merits Systems Board. The remainder of employees may appeal decisions outside OPR to the Appellate Unit in the Inspections Division. Either entity has the authority to review the paperwork and render a final decision which, in minor cases, is binding. Where the employee has appealed to the Inspections Division and is facing a penalty of more than 14 days' suspension, he may obtain a redacted copy of the file, send a written response to OPR, and present his case orally to a deciding officer. The deciding officer generally issues an opinion within

60 days. Once a decision is rendered, the employee may further appeal the case to a Disciplinary Review Board which consists of three executive staff members. This board reviews the paperwork and renders a final decision in approximately 60 to 90 days from the time of review.

Understanding the less formal nature of many of these disciplinary systems, as well as keeping in mind that information received from the various agencies surveyed was self-reported and the Commission did not have the opportunity to review primary data as it did in its study of the Department, a number of departments report time frames for the completion of disciplinary cases which are substantially shorter than what the Commission found it takes the Department. These differences were most noteworthy in comparing the handling of less serious charges, with several agencies reporting that such cases are completed within two months from the time of complaint, which includes the time taken for investigation. For example, the Dallas, Los Angeles County, and New Orleans police departments each reported that disciplinary cases involving minor charges are typically completed in under two months. The FBI noted that 70% of its disciplinary cases of all types are completed in under six months from the time of complaint, and over 91% within one year. Also, Los Angeles County reports that approximately 65% of all its disciplinary cases are completed within three months from receipt at the Advocate's section.

Whereas New York does not have a specified time period within which a case must be adjudicated,⁸⁹ other agencies set certain time frames for which a case should be adjudicated. For example, the Department of Justice has a goal of adjudicating cases in 180 days or less. If a case takes longer than 180 days, the approval of the Assistant Director of the Office of Professional

⁸⁹ Although the statute of limitations requires that charges and specifications must be filed within one and one-half years from the date of incident, there is no statute which applies to the adjudication of the case.

Responsibility must be obtained, and the case status and necessity of continuance will then be evaluated every thirty days by the Assistant Director. Los Angeles representatives report that it seeks to adjudicate cases, where no corresponding criminal matter is pending, within three months of receipt in the Advocate Section.

As noted above, the size of the Department and the formality of its prosecution function create distinct issues and challenges. While a defining aspect of the Department's disciplinary system is the large number of cases it handles, as discussed above, this reality has enabled the Department to create an extensive formal disciplinary structure. This structure further creates potential opportunities that may not exist in other departments, such as the ability to create a prosecution function staffed by more experienced lawyers.

PART V

CONCLUSION AND RECOMMENDATIONS

I. CONCLUSION

As discussed above, despite the Department's ongoing efforts to improve the disciplinary system, the prosecution function currently suffers from a number of problems. First, there is significant unnecessary delay in the adjudication of disciplinary cases. Such delay harms the Department in numerous ways including in its ability to prosecute cases against guilty officers, exonerating innocent officers in a timely fashion, and by discouraging confidence in the Department's fairness in, and commitment to, disciplining its own members. There are also significant problems in the staffing and training of the Department's advocates. As discussed above, these problems produce the less-than-desirable quality of trial preparation and presentation.

II. RECOMMENDATIONS

Based on the findings related to the Department's prosecution function, the Commission is making a series of recommendations. While these recommendations address many of the areas of concern identified in the study, they are intended to serve, in some instances, as a starting point for identifying solutions to the key problems of delay and quality of advocacy. These recommendations include the following:

1. While ultimate responsibility for disciplinary decisions needs to remain with the Police Commissioner, including the right to accept or reject plea agreements, the prosecution of CCRB cases should be handled in-house by CCRB. Such a system would provide an incentive to CCRB to substantiate only cases that can be successfully prosecuted and prevents the Department and CCRB from being able to blame each other for the failure of CCRB prosecutions. Increasing accountability for these cases and eliminating the reciprocal finger-pointing which often takes place currently should also enhance public confidence in how these complaints are being addressed. Additionally, having one agency both investigate and prosecute these cases should produce some corresponding reduction in the time it takes for these cases to be completed. Pursuant to this proposal, the Commissioner would retain the existing statutory power to approve or disapprove all pleas and trial results. The Commission is aware that transferring the prosecution of these cases to CCRB would require a revision to CCRB's enabling legislation and/or the City Charter. Such a change would also require the development of appropriate procedures for such things as information access by CCRB to the extent necessary to facilitate CCRB prosecutions and to promote plea bargains that the Police Commissioner is likely to approve.

2. The City should consider whether there are ways to merge the prosecutorial function for all City agencies' disciplinary matters into a single agency with separate divisions headed by experienced prosecutors responsible for the prosecution of particular agencies. As with the prior recommendation, the Police Commissioner would continue to have the ultimate authority over disciplinary cases. A unified agency whose sole function is the prosecution of disciplinary cases should be better able to train, supervise, and recruit the best available attorneys. Such a decision

would require considering the effects of such a consolidation on agencies other than the Police Department.

3. Prior to the release of this study, Department officials reported that the Department Advocate's Office and the Office of the Special Prosecutor had been merged into a single office which will allow them to more effectively utilize personnel and resources. To reflect the status of this newly combined office and the substantive changes recommended by the Commission, the Department should consider having the office headed by a Deputy Commissioner for Prosecutions. This new position may attract more qualified attorneys to the Department since it would increase the stature of the Department Advocate's Office by allowing it to be run by an individual nearly at the same level as the Deputy Commissioner - Trials.

4. The Advocate's Office should be organized more like a legal office rather than a police bureau. For example, members of the service would remain eligible to join the office if they were believed to be the best available candidate. Further, those joining the office should, at least for a reasonable period of time, be choosing this rather than policing as a career path. They should be committed to the bureau and to working as necessary in order to prepare and develop their cases. This would require a flexible work schedule in order to facilitate meeting with witnesses, perhaps at times other than typical work day hours. The advocates therefore should not be expected to work a predetermined schedule of a police tour-of-duty. In addition, there should not be an assumption that these members of the service will rotate out of the office and promotions should not require a return to patrol. Moreover, assignment to supervisory positions should be based on legal and management skills, not other police experiences.

5. The Department should hire a greater number of appropriately qualified civilian attorneys with experience in case management, trial preparation and trying cases. As discussed above, the staffing of DAO by a large percentage of uniform members of the service creates problems, including regular rotation out of the bureau upon promotion, possible morale issues among advocates who must prosecute fellow officers, and lack of appropriate outside legal experience.

6. The Department should place the supervision and training of advocates in the hands of qualified managers with trial experience and, to the extent possible, supervisory and management experience. Supervision in the Trial Room and OATH hearing rooms and training on fundamental skills should be an ongoing process in the office.

7. The advocates should receive more ongoing formal training regarding legal issues and trial skills. This should supplement the Department's on-the-job training methods already in place and more in-house training programs should be developed. These programs should focus on teaching basic skills as well as on problem areas of case preparation and advocacy skills as they are identified. These programs should be routine and necessary. In addition to more comprehensive training within the Department, the Department should more extensively utilize outside training opportunities such as CLE classes. While CLE courses are available to all attorneys within the Department, advocates should be encouraged, if not required, to fulfill CLE requirements through attendance in trial advocacy and evidence courses.

8. The Department should explore whether the addition of personnel and other resources, including an additional Trial Commissioner for the Trial Commissioners, advocates, paralegal staff, and other resources would decrease delay in the adjudication of cases. Additional law clerks should

be hired by DCT to facilitate the timely issuance of opinions by Trial Commissioners. Such clerks would be able to assist in the drafting of decisions, particularly in summarizing the factual record. At present, there is only one law clerk assigned to DCT. The Commission has been informed by the Department that additional law clerks will be hired.

9. Advocates should better document significant work completed on cases, including contact made with witnesses and case enhancement. Department supervisors should emphasize how such documentation is critical in a Department where turnover occurs and where Department prosecutions are often subject to the scrutiny of outside agencies and courts. Moreover, enhanced documentation should be stressed to allow supervisors better access to the work done on particular cases and identify areas for improvement.

10. There should be a requirement that key witnesses be contacted by advocates early on in the process so that the viability of cases can be evaluated in a more timely manner.

11. The Department should develop a system which would allow it to comprehensively track cases as they proceed through the system so that cases that are lagging can be identified and, where possible, accelerated.

12. As part of such a system, the Department Advocate should regularly submit to the First Deputy Commissioner a list of cases which have been pending for six months or longer from the filing of charges along with an explanation of why they are still open. Also, advocates should aggressively monitor cases where there is a corresponding criminal case or where an officer is suspended pending an investigation so that these cases are immediately calendared as soon as the criminal matter or investigation is completed.

13. The Department should explore ways in which cases can be more speedily reviewed so that the Department is able, where appropriate, to offer plea agreements earlier. It would be more efficient if prior to the negotiation date the prosecutor would communicate with respondent's attorney and discuss any plea offer. This would give the respondent's attorney time to discuss the case with his client prior to the negotiation date and determine the next step they wish to take. Then on the court date, the case can be disposed of by plea or scheduled for trial. Given the fact that most of the Department's cases are handled by relatively few attorneys, following this approach should not be difficult. At negotiations, generally one of two attorneys represents the Patrolmen's Benevolent Association, and one attorney represents the Detectives' Endowment Association and the Sergeants' and Lieutenants' Benevolent Associations. The advocate, therefore, should be able to ascertain which attorney will be handling a particular case prior to the negotiation date and convey the offer before that date.

14. The Department should review older cases to determine their viability and take action to appropriately resolve them in order to clear up the backlog of cases and make way for new procedures and policies.

15. The Trial Commissioners should take a stronger hand in case management. This could include better managing the trial docket, prioritizing older cases and scheduling a larger number of cases each week.

16. The Department should explore ways in which a Trial Commissioner may more aggressively assist in the settlement of cases, as is done at OATH, while maintaining the independence of the judge who ultimately tries the case.

17. The Department should explore alternative methods for the service of charges and specifications on respondents such as service at a respondent's command.

18. The Department should explore the establishment of a system where Trial Commissioners could report any inappropriate behavior to the First Deputy Commissioner for his review.

19. The Department Advocate and senior staff should meet on a regular basis with the Trial Commissioners to discuss issues of general interest including docket management, trial presentation skills, and other issues of mutual concern. Such meetings may help resolve certain misunderstandings that appear to exist between the advocates and the Trial Commissioners.

* * *

APPENDIX A

[Redacted CATS Sheet]

PEDIGREE INFORMATION

AGE [REDACTED] SEX [REDACTED] RACE [REDACTED] U/C U SHIELD [REDACTED] CMD [REDACTED] TAX [REDACTED] RANK [REDACTED] PCT DATE APP [REDACTED] CS STAT PERM [REDACTED]

INCID 10/24/96	CONS DATE 06/11/97	Case at a Glance		NEGOT 05/14/98	CRIM CASE N
CONTROL 05/14/98	INTSTAT	PINK APP 01/12/98	SERV 03/10/98	DISPO GUILTY	CLOSED TYPE TRIAL
EST CONTROL 05/11/98	PENSION	NEGOT ACP N	TRIAL 08/12/98	VESTED CLOSED Y 07/16/99	
		ART 2 APPL			

C.A.T.S. PAGE 1 - PgDn for more info
INCIDENT INFORMATION

SOL 04/24/98 INC DUTY STAT FULL INC STAT DATE
ON DUTY Y ARRES N ARRES DATE ARR49 CMD
PREF BY [REDACTED] PREF CMD [REDACTED] CMD SOURCE BUREAUS
LOC INCID BX LOC PREF CMD BNK
CONS2 DATE 06/26/97 CONS ATTY [REDACTED] WORD SUB 01/05/98 WORD SENT 01/06/98
DOLE N CCIB N DAO CCIB# [REDACTED] CCIB# REC V AT CCIB
CCIB REC V INVES RECOM FADEO

CHARGES AND SPECS #CS 3
CS1# 1609 CS1 NARR FAILURE TO TAKE POLICE ACTION
CS2# 601 CS2 NARR FALSE STATEMENT / PG 118-9
CS3# 601 CS3 NARR FALSE STATEMENT / PG 118-9
CS4# CS4 NARR
CS5# CS5 NARR
PINK PREP 01/05/98 PINK SENT 01/06/98
PINK REC V 01/09/98 PINK IN 01/12/98

DRS#1 27
DRS#2 30
DRS#3 30
DRS#4
DRS#5

AMENDED CHG

C.A.T.S. PAGE 2 - PgUp & PgDn for more info
TRIAL CALENDAR SECTION
CASE INPUT

EXPD SEC 75 W N SUSP W TR 49 ICO
ATTY ASSN [REDACTED] F TO ATTY 01/13/98 TEAM CONF
ORIG NEGOT 02/10/98 ORIG CONTROL 02/10/98 ADJ ADJ2
OFF CONTROL CAL: OFF1 OFF2 OFF3 OFF4 OFF5
SCHED TRIAL 08/13/98 #RES
INF CONF I C TO CMD I C FROM CMD
I C RESULT TO OLR FROM OLR
CPI 01/12/98 MEDICAL 01/12/98 DEPT RECON EVAL 01/13/98
TO DB FROM DB PROSC SHIELD TENURED
COMP CASE# VENU DCT AWOD

EXPUNGEMENTS, C.D.'S AND FINALS
CPI INPUT PO#
CPI TO CMD CD FROM CMD
CD TYPE CRG CMD/SER# CMD SER # : ACCPT DATE
EMD EMD EXPUN DAO EXPUN :

C.A.T.S. PAGE 3 - PgUp & PgDn for more info
ADC STAFF SECTION

RENEGOT
STATUS 1

RENEG OFFER
STAT DATE1

RENEG OFFER

R+R 06/11/99 PC APP 07/16/99

CS1 DISPO GUILTY
CS2 DISPO NOT GLT
CS3 DISPO NOT GLT
CS4 DISPO
CS5 DISPO

P
E PEN 1 VAC DAYS PEN 1 AMT 20
N
A PEN 2 PEN 2 AMT
L
T PEN 3 PEN 3 AMT
Y ADC NOTE FOGEL HERE 05/26/99

PS1	If PEN is a
PS2	SUSP, type:
	D= Dismissal
	R= Disciplin
PS3	...

IF FILED
IF DISMISSED
IF NDA

STATUS 2

STAT DATE2

CCIB SENT

C.A.T.S. PAGE 4 - PgUp & PgDn for more info

APPENDIX B

EXPLANATION OF COMMISSION'S STATISTICAL ANALYSIS

The following discusses certain aspects of the Commission's statistical analysis of the data provided by the Department.

- *non-use of averages*

The Commission decided to present its data in terms of percentiles and distributions within various ranges, rather than simply using averages for each relevant measure. Given that there are 1214 cases in the full sample, there are wide variations across these cases in every measure with which the Commission was concerned. For example, Table 11 in *Appendix F* indicates that while at least one case took only six days from consultation date to closing, at least one other case took 2201 days.

An average of these figures and all those in between would be susceptible to errors that could skew the numbers significantly in one direction. As a result, the Commission concluded that the charts shown are a fairer and more accurate presentation of the data.

In reviewing CATS sheets, the Commission noted certain qualifications on its ability to assess the data, though the Commission concluded that these factors did not affect its capacity to render valid statistical analysis of the data:

- *blank fields in the CATS sheets*

In many instances, fields on the CATS sheets were blank because they were simply inapplicable to the case at hand. For example, a CATS sheet for a case that never went to trial (perhaps because the officer resigned, or perhaps because a settlement agreement was reached between the officer and the Department) will not show a date for the start or end of the trial, nor for the trial judge's recommendation. If the field for the initial consultation date with DAO was blank, there was no need for the Commission to measure the time from initial consultation to filing of charges, or from consultation to closing date, to take only two examples.

The result is that, in the various tables in the report, the figures shown for each delay do not necessarily encompass every case in the subset in question. And from one field to the next, the

figures shown do not derive from exactly the same cases.⁹⁰ The Commission concluded that this issue did not affect the validity of its findings in any way.

- *errors in the CATS sheets*

In entering data from the CATS sheets onto a spreadsheet, Commission staff noticed that a small number of dates (a total of 31, in 31 separate cases) appeared to be in error. Where the date for one event fell after another event that could not logically have occurred first, the Commission questioned the validity of both dates. For example, in one instance the date for trial was later than the date for the trial judge's recommendation. The Commission attributed this to a probable data-entry error. Where the Department was unable to correct such apparent errors, the Commission simply did not use the tainted data in its statistical analysis.

The number of such errors was quite small, given the 1214 cases in the full sample (as well as the 17 different fields the Commission observed in each case), and because (as with the problem of blank fields discussed above) these problems could not be expected to definitively skew the results either upward or downward, the Commission concluded that its results stood on their own, despite these limited errors in the Department's data.

⁹⁰ In Table 11 in *Appendix F*, for example, the data on time from initial consultation date to filing of charges are derived from 851 of the 1214 cases in the comprehensive 12-month sample (in large part because cases referred from CCRB usually do not have a consultation date, since DAO is required to accept such cases), while the data on time from filing of charges to service of charges are derived from 1049 cases. Owing largely to the limited number of cases that go to trial, the data for time from filing of charges to start of trial are derived from only 311 cases. (In fact, the Department's CATS sheets indicate only 298 cases in the full sample that went to trial. However, because a number of other cases also have a trial date shown on the CATS sheets, the Commission was able to measure the time from filing of charges to start of trial for more than just the 298 "trial" cases.)

APPENDIX C

CONVICTION AND DISMISSAL RATES

The following charts compare conviction and dismissals rates at OATH and the Trial Room, and dismissal rates of CCRB-generated cases versus non-CCRB cases.

CONVICTIONS

(Cases reflecting the full adjudicatory process - the Commission's "Mirror Sample"):

- 417 cases (55.8%) resulted in convictions out of 746 cases (includes convictions by plea and after trial)
- 158 trial cases (71.8%) resulted in convictions out of 220 trials⁹¹

In comparing the results of trial cases only, at OATH versus DCT, the Commission found the following distribution of dispositions:

	Guilty	Not Guilty	Dismissals During Trial
OATH	54%	6%	40%
DCT	77%	19%	3% ⁹²

DISMISSALS BEFORE TRIAL

Mirror Sample	260 of 746 (35%)
CCRB-generated cases	240 of 342 (70%)
Non - CCRB cases	20 of 404 (5%)

⁹¹ The Department's CATS sheets indicate 267 trials in the mirror sample. However, this figure includes 71 cases dismissed at trial. The Commission reviewed these 71 dismissals to determine whether they were dismissed on motion of the advocate before presentation of testimony (47 cases) or whether the dismissal came only after the presentation of evidence by the advocate (24). The Commission then excluded the former 47 cases from its calculation of the conviction rate after trial, leaving only 220 trial cases in the mirror sample.

⁹² Because three DCT cases had a disposition of "filed," the DCT figures shown do not add up to 100%.

APPENDIX D

STATISTICAL TABLES OF COMMISSION'S "MIRROR SAMPLE"
ANALYSIS BY TIME RANGES

The tables below offer a different perspective on the data the Commission collected. Whereas the tables in the body of the report indicate the distribution of figures for each of the Commission's measures of case progress with the use of percentiles, most of the tables below split this distribution into eight equal ranges and indicate, for each measure, how many cases in any given subset took a given amount of time or less. For each measure within each subset, the cases being looked at are exactly the same; only the method of presenting the data is different.

Thus, Table 5a shows that, of the 402 cases in the Commission's "mirror sample" for which data were available on this measure, 257 cases (64%) took 450 days or less from consultation date to closing date (while, by extension, 36% took longer than 450 days). The table also reveals that 53 of the cases (13%) took 721 days or more.

Tables 5a to 5e: Delays in the Commission's key measures of case progress, broken down by time ranges
 (these tables cover only those cases that mirror the Commission's study sample officers: 746 cases)

5a. consultation date to closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	3 (1%)
up to 180 (<i>6 months</i>):	47 (12%)
up to 270 (<i>9 months</i>):	117 (29%)
up to 360 (<i>12 months</i>):	199 (50%)
up to 450 (<i>15 months</i>):	257 (64%)
up to 540 (<i>18 months</i>):	302 (75%)
up to 630 (<i>21 months</i>):	336 (84%)
up to 720 (<i>24 months</i>):	349 (87%)

721 or more:	53 (13%)
<i>total cases applicable:</i>	402

5b. filing of charges *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	14 (2%)
up to 180 (<i>6 months</i>):	152 (20%)
up to 270 (<i>9 months</i>):	295 (39%)
up to 360 (<i>12 months</i>):	405 (54%)
up to 450 (<i>15 months</i>):	489 (65%)
up to 540 (<i>18 months</i>):	572 (77%)
up to 630 (<i>21 months</i>):	638 (85%)
up to 720 (<i>24 months</i>):	673 (90%)
721 or more:	73 (10%)
<i>total cases applicable:</i>	746

5c. filing of charges *to* start of trial

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	20 (8%)
up to 180 (<i>6 months</i>):	88 (34%)

up to 270 (<i>9 months</i>):	140 (54%)
up to 360 (<i>12 months</i>):	171 (66%)
up to 450 (<i>15 months</i>):	196 (76%)
up to 540 (<i>18 months</i>):	213 (83%)
up to 630 (<i>21 months</i>):	225 (87%)
up to 720 (<i>24 months</i>):	235 (91%)
721 or more:	23 (9%)
<i>total cases applicable:</i>	258

5d. trial end to trial judge's decision

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 30 days (<i>about 1 month</i>):	51 (21%)
up to 60 (<i>2 months</i>):	90 (37%)
up to 90 (<i>3 months</i>):	122 (51%)
up to 120 (<i>4 months</i>):	138 (57%)
up to 150 (<i>5 months</i>):	160 (66%)
up to 180 (<i>6 months</i>):	188 (78%)
up to 210 (<i>7 months</i>):	198 (82%)
up to 240 (<i>8 months</i>):	220 (91%)
240 or more:	21 (9%)
<i>total cases applicable:</i>	241

5e. trial judge's decision to closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 10 days:	26 (8%)
up to 20:	75 (22%)
up to 30:	150 (44%)
up to 40:	220 (64%)
up to 50:	269 (78%)
up to 60:	289 (84%)
up to 70:	298 (87%)
up to 80:	309 (90%)
81 or more:	35 (10%)
<i>total cases applicable:</i>	<i>344</i>

Tables 6a to 6e: Delays in the Commission's key measures of case progress, broken down by time ranges
(these charts cover trial cases only: 220 cases)

6a. consultation date to closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	0 (-)
up to 180 (<i>6 months</i>):	3 (2%)
up to 270 (<i>9 months</i>):	8 (5%)

up to 360 (<i>12 months</i>):	31 (20%)
up to 450 (<i>15 months</i>):	62 (41%)
up to 540 (<i>18 months</i>):	86 (57%)
up to 630 (<i>21 months</i>):	109 (72%)
up to 720 (<i>24 months</i>):	115 (76%)
721 or more:	37 (24%)
<i>total cases applicable:</i>	152

6b. filing of charges *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	0 (-)
up to 180 (<i>6 months</i>):	6 (3%)
up to 270 (<i>9 months</i>):	35 (16%)
up to 360 (<i>12 months</i>):	77 (35%)
up to 450 (<i>15 months</i>):	110 (50%)
up to 540 (<i>18 months</i>):	146 (66%)
up to 630 (<i>21 months</i>):	170 (77%)
up to 720 (<i>24 months</i>):	181 (82%)
721 or more:	39 (18%)
<i>total cases applicable:</i>	220

6c. filing of charges *to* start of trial

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	13 (6%)
up to 180 (<i>6 months</i>):	75 (36%)
up to 270 (<i>9 months</i>):	122 (58%)
up to 360 (<i>12 months</i>):	144 (68%)
up to 450 (<i>15 months</i>):	167 (79%)
up to 540 (<i>18 months</i>):	179 (85%)
up to 630 (<i>21 months</i>):	187 (89%)
up to 720 (<i>24 months</i>):	194 (92%)
721 or more:	17 (8%)
<i>total cases applicable:</i>	211

6d. trial end to trial judge's decision

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 30 days (<i>about 1 month</i>):	35 (17%)
up to 60 (<i>2 months</i>):	69 (33%)
up to 90 (<i>3 months</i>):	93 (45%)
up to 120 (<i>4 months</i>):	108 (52%)
up to 150 (<i>5 months</i>):	130 (63%)

up to 180 (<i>6 months</i>):	158 (76%)
up to 210 (<i>7 months</i>):	168 (81%)
up to 240 (<i>8 months</i>):	190 (92%)
240 or more:	17 (8%)
<i>total cases applicable:</i>	207

6e. trial judge's decision *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 10 days:	10 (5%)
up to 20:	35 (17%)
up to 30:	80 (38%)
up to 40:	123 (58%)
up to 50:	153 (72%)
up to 60:	167 (79%)
up to 70:	176 (83%)
up to 80:	186 (88%)
81 or more:	26 (12%)
<i>total cases applicable:</i>	212

Tables 7a to 7e: Delays in the Commission's key measures of case progress, broken down by time ranges
 (these charts cover "dismissed" cases only: 284 cases)

7a. consultation date *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	0 (-)
up to 180 (<i>6 months</i>):	1 (4%)
up to 270 (<i>9 months</i>):	4 (17%)
up to 360 (<i>12 months</i>):	11 (46%)
up to 450 (<i>15 months</i>):	14 (58%)
up to 540 (<i>18 months</i>):	16 (67%)
up to 630 (<i>21 months</i>):	17 (71%)
up to 720 (<i>24 months</i>):	19 (79%)
721 or more:	5 (21%)
<i>total cases applicable:</i>	<i>24</i>

7b. filing of charges *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	4 (1%)
up to 180 (<i>6 months</i>):	38 (13%)
up to 270 (<i>9 months</i>):	88 (31%)

up to 360 (<i>12 months</i>):	127 (45%)
up to 450 (<i>15 months</i>):	163 (57%)
up to 540 (<i>18 months</i>):	200 (70%)
up to 630 (<i>21 months</i>):	233 (82%)
up to 720 (<i>24 months</i>):	254 (89%)
721 or more:	30 (11%)
<i>total cases applicable:</i>	284

7c. filing of charges *to* start of trial

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	5 (8%)
up to 180 (<i>6 months</i>):	13 (20%)
up to 270 (<i>9 months</i>):	20 (30%)
up to 360 (<i>12 months</i>):	34 (52%)
up to 450 (<i>15 months</i>):	41 (62%)
up to 540 (<i>18 months</i>):	47 (71%)
up to 630 (<i>21 months</i>):	51 (77%)
up to 720 (<i>24 months</i>):	55 (83%)
721 or more:	11 (17%)
<i>total cases applicable:</i>	66

7d. trial end to trial judge's decision

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 30 days (<i>about 1 month</i>):	17 (31%)
up to 60 (<i>2 months</i>):	29 (54%)
up to 90 (<i>3 months</i>):	42 (78%)
up to 120 (<i>4 months</i>):	49 (91%)
up to 150 (<i>5 months</i>):	49 (91%)
up to 180 (<i>6 months</i>):	49 (91%)
up to 210 (<i>7 months</i>):	49 (91%)
up to 240 (<i>8 months</i>):	49 (91%)
240 or more:	5 (9%)
<i>total cases applicable:</i>	54

7e. trial judge's decision to closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 10 days:	16 (10%)
up to 20:	40 (26%)
up to 30:	75 (48%)
up to 40:	103 (66%)
up to 50:	126 (81%)

up to 60:	134 (86%)
up to 70:	138 (89%)
up to 80:	142 (92%)
81 or more:	13 (8%)
<i>total cases applicable:</i>	155

Tables 8 to 8b: Delays in Cases Which Result in Plea Agreements

This category includes cases resulting in plea agreements, including both cases in which a respondent pleaded guilty and cases in which charges were dismissed pursuant to an agreement by the respondent to accept other disciplinary action, including a command discipline or instructions.⁹³ Here,

- 50% of the cases took 233 days or more from the filing of charges until the closing date.
- 25% of the cases took 400 days or more to be completed.

Table 8: Delays in the Commission's eight key measures of case progress, broken down by percentiles
(this table covers "negotiated" cases only - 319 cases)⁹⁴

<i>relevant time frame (total of applicable cases)</i>	0%	10%	25%	50% (median)	75%	90%	100%
consultation date to filing of charges (233)	0 days	4 days	10 days	33 days	81 days	174 days	586 days

⁹³ It also includes a small number of "nolo" (*nolo contendere*) pleas and filed cases which, in the latter instance, occurred late in the process when an officer resigns as part of an agreement.

⁹⁴ This group includes the 259 negotiated cases where a respondent pleaded guilty, as well an additional 60 cases where the CATS sheet designates the case as having a negotiated outcome although the case may have been dismissed, filed, or resulted in a plea of *nolo contendere*. A separate series of tables covering these 259 cases immediately follows this series of tables.

consultation <i>to</i> closing date of case (233)	27	160	199	285	401	582	1914
filing of charges <i>to</i> service of charges (314)	0	2	6	20	47	64	775
filing of charges <i>to</i> closing date (319)	25	120	155	233	400	590	1912
filing of charges <i>to</i> start of trial (--) ⁹⁵	n/a	n/a	n/a	n/a	n/a	n/a	n/a
start of trial <i>to</i> end of trial (0)	n/a	n/a	n/a	n/a	n/a	n/a	n/a
end of trial <i>to</i> judge's decision (0)	n/a	n/a	n/a	n/a	n/a	n/a	n/a
trial judge's decision <i>to</i> closing date (--) ⁹⁶	n/a	n/a	n/a	n/a	n/a	n/a	n/a

Tables 8a and 8b: Delays in the Commission's key measures of case progress,
broken down by time ranges
(these charts cover "negotiated" cases only: 319 cases)

8a. consultation date *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	3 (1%)
up to 180 (<i>6 months</i>):	43 (18%)

⁹⁵ There are actually three applicable cases for this range, but the Commission concluded this was not enough a large enough set from which to draw any valid statistical conclusions.

⁹⁶ There is actually one applicable case for this range, but the Commission concluded this was not enough a large enough set from which to draw any valid statistical conclusions.

up to 270 (<i>9 months</i>):	105 (45%)
up to 360 (<i>12 months</i>):	159 (68%)
up to 450 (<i>15 months</i>):	184 (79%)
up to 540 (<i>18 months</i>):	203 (87%)
up to 630 (<i>21 months</i>):	214 (92%)
up to 720 (<i>24 months</i>):	219 (94%)
721 or more:	14 (6%)
<i>total cases applicable:</i>	233

8b. filing of charges *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	10 (3%)
up to 180 (<i>6 months</i>):	118 (37%)
up to 270 (<i>9 months</i>):	191 (60%)
up to 360 (<i>12 months</i>):	226 (71%)
up to 450 (<i>15 months</i>):	253 (79%)
up to 540 (<i>18 months</i>):	274 (86%)
up to 630 (<i>21 months</i>):	293 (92%)
up to 720 (<i>24 months</i>):	306 (96%)
721 or more:	13 (4%)
<i>total cases applicable:</i>	319

Tables 9a and 9b: Delays in the Commission's key measures of case progress,
 broken down by time ranges
 (these charts cover negotiated guilty pleas only: 259 cases⁹⁷)

9a. consultation date to closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	2 (1%)
up to 180 (<i>6 months</i>):	33 (17%)
up to 270 (<i>9 months</i>):	85 (45%)
up to 360 (<i>12 months</i>):	132 (69%)
up to 450 (<i>15 months</i>):	152 (80%)
up to 540 (<i>18 months</i>):	168 (88%)
up to 630 (<i>21 months</i>):	172 (90%)
up to 720 (<i>24 months</i>):	177 (93%)
721 or more:	14 (7%)
<i>total cases applicable:</i>	191

⁹⁷ This group includes only those cases where the CATS sheet indicates that the case was negotiated with a guilty plea. See tables above for an analysis of these cases plus an additional 60 designated as negotiated which resulted in filed, dismissed, and *nolo contendere* outcomes.

9b. filing of charges to closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	9 (3%)
up to 180 (<i>6 months</i>):	101 (39%)
up to 270 (<i>9 months</i>):	156 (60%)
up to 360 (<i>12 months</i>):	184 (71%)
up to 450 (<i>15 months</i>):	205 (79%)
up to 540 (<i>18 months</i>):	222 (86%)
up to 630 (<i>21 months</i>):	238 (92%)
up to 720 (<i>24 months</i>):	247 (95%)
721 or more:	12 (5%)
<i>total cases applicable:</i>	259

APPENDIX E

DELAY IN THE COMMISSION'S STUDY SAMPLE OF 49 CASES

The statistical analyses presented below relate to the 49 cases in the Commission's study sample.

Table 10: Delays in the Commission's eight key measures of case progress, broken down by percentiles
(this table covers the Commission's study sample of 49 cases)

<i>relevant time frame (total of applicable cases)</i>	0%	10%	25%	50% (median)	75%	90%	100%
consultation date to filing of charges (32)	0 days	5 days	6 days	35 days	76 days	116 days	423 days
consultation to closing date of case (32)	64	190	225	349 ½	439	692	1679
filing of charges to service of charges (49)	0	1	5	15	44	64	775
filing of charges to closing date (49)	64	152	210	342	447	715	1673
filing of charges to start of trial (22)	19	122	215	262	278	284	1322
start of trial to end of trial (23)	1	1	1	1	3	3	3
end of trial to judge's decision (21)	46	47	57	84	157	255	302
trial judge's decision to closing date (26)	0	19	21	35	43	65	130

Tables 10a to 10e: Delays in the Commission's key measures of case progress,
 broken down by time ranges
 (these tables cover the Commission's study sample of 49 cases)

10a. consultation date to closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	1 (3%)
up to 180 (<i>6 months</i>):	4 (13%)
up to 270 (<i>9 months</i>):	12 (38%)
up to 360 (<i>12 months</i>):	16 (50%)
up to 450 (<i>15 months</i>):	24 (75%)
up to 540 (<i>18 months</i>):	25 (78%)
up to 630 (<i>21 months</i>):	25 (78%)
up to 720 (<i>24 months</i>):	28 (88%)
721 or more:	4 (13%) ⁹⁸
<i>total cases applicable:</i>	32

⁹⁸ Due to rounding, the final two percentages in this chart do not add up to 100%.

10b. filing of charges *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	1 (2%)
up to 180 (<i>6 months</i>):	8 (16%)
up to 270 (<i>9 months</i>):	14 (29%)
up to 360 (<i>12 months</i>):	29 (59%)
up to 450 (<i>15 months</i>):	36 (73%)
up to 540 (<i>18 months</i>):	39 (80%)
up to 630 (<i>21 months</i>):	42 (86%)
up to 720 (<i>24 months</i>):	45 (92%)
721 or more:	4 (8%)
<i>total cases applicable:</i>	49

10c. filing of charges *to* start of trial

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	2 (9%)
up to 180 (<i>6 months</i>):	4 (18%)
up to 270 (<i>9 months</i>):	12 (55%)
up to 360 (<i>12 months</i>):	19 (86%)
up to 450 (<i>15 months</i>):	20 (91%)

up to 540 (<i>18 months</i>):	20 (91%)
up to 630 (<i>21 months</i>):	20 (91%)
up to 720 (<i>24 months</i>):	20 (91%)
721 or more:	2 (9%)
<i>total cases applicable:</i>	22

10d. trial end to trial judge's decision

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 30 days (<i>about 1 month</i>):	0 (-)
up to 60 (<i>2 months</i>):	9 (43%)
up to 90 (<i>3 months</i>):	13 (62%)
up to 120 (<i>4 months</i>):	13 (62%)
up to 150 (<i>5 months</i>):	15 (71%)
up to 180 (<i>6 months</i>):	17 (81%)
up to 210 (<i>7 months</i>):	17 (81%)
up to 240 (<i>8 months</i>):	18 (86%)
240 or more:	3 (14%)
<i>total cases applicable:</i>	21

10e. trial judge's decision to closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 10 days:	2 (8%)
up to 20:	5 (19%)
up to 30:	10 (38%)
up to 40:	16 (62%)
up to 50:	22 (85%)
up to 60:	22 (85%)
up to 70:	24 (92%)
up to 80:	24 (92%)
81 or more:	2 (8%)
<i>total cases applicable:</i>	26

APPENDIX F

DELAY IN THE COMMISSION'S COMPREHENSIVE SAMPLE OF 1214 CASES

The tables below illustrate the findings of the Commission's statistical review of the data provided by the Department's CATS sheets for all 1214 cases closed from November 1998 through October 1999.⁹⁹ This includes cases that were tried, plead, dismissed, or filed with no further action. The set includes cases involving civilian employees, school safety agents, traffic enforcement agents, and probationary officers,¹⁰⁰ filed cases with no substantive disposition, as well as cases against uniform members of the service. Approximately 30 % of the 1214 cases involved plea agreements,¹⁰¹ 25 % trials, 25 % dismissals, and 25 % cases with other outcomes.¹⁰²

As the tables below indicate, these cases generally took less time than cases against non-probationary uniformed members of the service to go through the Department's disciplinary system at each step along the way. Since filed cases and those cases involving civilians¹⁰³ (who have access to a more streamlined adjudicatory process) can be expected to move more quickly, this difference is to be anticipated.

Based on a statistical analysis of this data, the Commission noted the following delays in the Commission's comprehensive sample of 1214 disciplinary cases closed by the Department between November 1998 and October 1999:

- ***from filing of charges against the subject officer to closing of the cases***

- nearly half of the cases (587 of 1210¹⁰⁴) took more than 270 days (about nine months),
- more than a third (450) took more than 360 days, and

⁹⁹ This full sample includes the 49 cases in the Commission's study sample. See Appendix E above for a statistical analysis of the Commission's specific study sample. The Department recently provided information to the Commission on seven additional cases closed during the time frame of the Commission's sample. These seven cases were not included in the Commission's statistical analysis.

¹⁰⁰ The 1214 cases include 320 civilians and probationary police officers, plus 777 uniform members of service and 117 cases where certain identifying information was redacted (see footnote below).

¹⁰¹ This figure includes agreements reached after a trial.

¹⁰² This includes cases that were filed after the subject officer's separation from the Department, cases in which charges were ultimately dismissed, and cases disposed of through means outside of the formal disciplinary system (designated as "INF," "OLR," and one "FOD" -- final order of dismissal: where after a criminal conviction, the respondent was terminated by operation of the Public Officers' Law.)

¹⁰³ For several reasons the Department redacted the names and ranks of respondents in 117 cases in the Commission's comprehensive 12-month sample of 1214 cases. Where a respondent receives psychological counseling, for example, identifying information is redacted. Though the Commission could not identify which of these officers were civilians or probationary officers, all 117 cases were included in this subset.

¹⁰⁴ Four cases in the 1214-case sample appeared to have a data-entry error that prevented them from being incorporated into this calculation.

- in almost one in five instances (227), the case lasted over 540 days (about 18 months).
- *from the filing of charges to the start of an administrative trial*¹⁰⁵
 - more than 90% of cases which went to trial (284 of 311) saw a delay of over 90 days at this stage.
 - half the cases were not tried within eight months (244 days).
 - over a third of the cases (106) were not tried within 360 days.
- *from the end of the trial to the issuance of the Trial Commissioner's findings and recommendation*

Most Department trials are very short, with barely one out of six lasting more than two days and most completed in one day. The Commission found that:

- in nearly two-thirds (174 of 271¹⁰⁶) of the cases, it took longer than 60 days before the trial judge issued her recommendation.
- more than half of the recommendations (136) took over 90 days.
- 44% (119) of the recommendations took over 120 days.
- nearly one-quarter (66) took more than 180 days.

- *from the Trial Commissioner's report to the closing date*

This was not a significant source of delay. In 75% of the cases this process was completed within 45 days.

¹⁰⁵ Only a fraction of the Department's disciplinary cases reach the trial stage, with most being either filed, dismissed, or negotiated in advance of a trial.

¹⁰⁶ Even among those cases that go to trial, some are negotiated during the course of the trial, and in these cases the Trial Commissioner does not issue findings and recommendations.

Table 11: Delays in the Commission's eight key measures of case progress, broken down by percentiles
(this table covers the full 12-month sample of 1214 cases)

<i>relevant time frame (total of applicable cases)</i>	0%	10%	25%	50% (median)	75%	90%	100%
consultation date to filing of charges (851)	0 days	3 days	7 days	20 days	65 days	178 days	1044 days
consultation to closing date of case (851)	6	50	152	287	487	743	2201
filing of charges to service of charges (1055)	0	1	4	11	30	57	775
filing of charges to closing date (1210)	1	48	139	265	476	686	2107
filing of charges to start of trial (311)	19	93	144	244	442	691	1634
start of trial to end of trial (321)	1	1	1	1	2	4	197
end of trial to judge's decision (271)	1	23	42	91	171	232	441
trial judge's decision to closing date (374)	0	11	22	33	45	73	553

**Tables 11a to 11e: Delays in the Commission's key measures of case progress,
broken down by time ranges**
(these charts cover the full 12-month sample of 1214 cases)

11a. consultation date *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	140 (16%)
up to 180 (<i>6 months</i>):	269 (32%)
up to 270 (<i>9 months</i>):	396 (47%)
up to 360 (<i>12 months</i>):	523 (61%)
up to 450 (<i>15 months</i>):	611 (72%)
up to 540 (<i>18 months</i>):	683 (80%)
up to 630 (<i>21 months</i>):	730 (86%)
up to 720 (<i>24 months</i>):	760 (89%)
721 or more:	91 (11%)
<i>total cases applicable:</i>	851

11b. filing of charges *to* closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	193 (16%)
up to 180 (<i>6 months</i>):	414 (34%)
up to 270 (<i>9 months</i>):	623 (51%)

up to 360 (<i>12 months</i>):	760 (63%)
up to 450 (<i>15 months</i>):	877 (72%)
up to 540 (<i>18 months</i>):	983 (81%)
up to 630 (<i>21 months</i>):	1060 (88%)
up to 720 (<i>24 months</i>):	1105 (91%)
721 or more:	105 (9%)
<i>total cases applicable:</i>	1210

11c. filing of charges *to* start of trial

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 90 days (<i>about 3 months</i>):	27 (9%)
up to 180 (<i>6 months</i>):	107 (34%)
up to 270 (<i>9 months</i>):	173 (56%)
up to 360 (<i>12 months</i>):	205 (66%)
up to 450 (<i>15 months</i>):	234 (75%)
up to 540 (<i>18 months</i>):	256 (82%)
up to 630 (<i>21 months</i>):	273 (88%)
up to 720 (<i>24 months</i>):	285 (92%)
721 or more:	26 (8%)
<i>total cases applicable:</i>	311

11d. trial end to trial judge's decision

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 30 days (<i>about 1 month</i>):	56 (21%)
up to 60 (<i>2 months</i>):	97 (36%)
up to 90 (<i>3 months</i>):	135 (50%)
up to 120 (<i>4 months</i>):	152 (56%)
up to 150 (<i>5 months</i>):	176 (65%)
up to 180 (<i>6 months</i>):	205 (76%)
up to 210 (<i>7 months</i>):	222 (82%)
up to 240 (<i>8 months</i>):	247 (91%)
240 or more:	24 (9%)
<i>total cases applicable:</i>	271

11e. trial judge's decision to closing date

<i>time range</i>	<i># of cases in this range (cumulative percentage)</i>
up to 10 days:	31 (8%)
up to 20:	87 (23%)
up to 30:	170 (45%)
up to 40:	244 (65%)
up to 50:	298 (80%)

up to 60:	318 (85%)
up to 70:	328 (88%)
up to 80:	339 (91%)
81 or more:	35 (9%)
<i>total cases applicable:</i>	374

* * *

COMMISSION TO COMBAT POLICE CORRUPTION

The Commission to Combat Police Corruption was created pursuant to Executive Order No. 18 of 1995. The Commission is mandated to monitor the New York City Police Department's anti-corruption systems. To accomplish this, the Commission conducts audits, studies, and analyses regarding the Department's anti-corruption policies and procedures. This includes studies to determine the effectiveness of the Department's systems and methods for: investigating allegations of corruption; gathering intelligence; implementing a system for command accountability, supervision, and training for corruption matters; and such other policies and procedures relating to corruption controls as the Commission deems appropriate.

COMMISSIONERS

Richard J. Davis, Chair

Currently, Mr. Davis is a partner with the law firm of Weil, Gotshal and Manges. He was Assistant Secretary of the Treasury (Enforcement and Operations) between 1977 and 1981, where he supervised the activities of the Secret Service, the Customs Service, the Bureau of Alcohol, Tobacco and Firearms and the Federal Law Enforcement Training Center. He had previously served as an Assistant United States Attorney in the Southern District of New York from 1970-73 and as an Assistant Special Prosecutor for the Watergate Special Prosecution Force. In 1987 he was appointed to a Commission to review the operations of the Philadelphia Police Department. In 1993 he served on a panel of experts appointed by the Justice and Treasury Departments to provide advice in addressing situations which may occur in the future similar to those which took place in Waco, Texas.

Charles M. Carberry

Mr. Carberry is currently a partner with the law firm of Jones, Day, Reavis & Pogue. He is a former federal prosecutor, having served from 1979 through 1987 as an Assistant United States Attorney in the Southern District of New York (including service as Chief of the Securities and Commodities Fraud Unit and Deputy Chief of the Criminal Division). Pursuant to his appointment by the federal district court, from 1989 to the present, Mr. Carberry oversees investigations and administrative prosecutions of allegations of corruption and dishonesty involving the Teamsters Union. Mr. Carberry is on the boards of editors of the White Collar Crime Reporter, Business Crimes Bulletin, and the Money Laundering Law Report. He has written numerous articles and has spoken frequently at seminars on white collar crime, securities fraud, and money laundering.

Rhea Kemble Dignam

Ms. Dignam currently is a Vice President and Deputy General Counsel at New York Life Insurance Company. She is a former federal and state prosecutor, having served from 1976 through 1988 as an Assistant United States Attorney in the Southern District of New York (including service as Chief, Narcotics Unit; Chief, Public Corruption Unit; and Executive Assistant United States Attorney). From 1988-1989 Ms. Dignam was the Chief Assistant District Attorney in Kings County and served as the Executive Deputy Comptroller, City of New York from 1990-1993 in which position she gained extensive experience monitoring the work of City agencies.

Ann Hayes

Ann Hayes is the Chief Executive Officer of Strang Hayes Consulting, Inc., a leading New York City investigative management firm. She is a former Special Agent with the Federal Drug Enforcement Administration, having served from 1984 through 1988. As an undercover agent, Ms. Hayes was directly involved in infiltrating and combating organized crime, and later supervised numerous high-level, international investigations. Ms. Hayes was the first woman to graduate first in her class from the DEA Agent Basic Training Academy. Her law enforcement career began as a police officer following graduation from college. In 1987, Ms. Hayes served on the President's Organized Crime Drug Task Force. Ms. Hayes was recently appointed by Mayor Giuliani to the Mayoral Task Force on Police/Community Relations, which was established to improve the relationship between the police and community in New York City. She was also appointed to the Board of Directors of the National Center for Victims of Crime, an organization devoted exclusively to the needs of crime victims.

COMMISSION STAFF

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PUBLISHED REPORTS OF THE COMMISSION

<u>First Report of the Commission</u>	April 1996
<u>The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members Who Make False Statements</u>	December 1996
<u>The New York City Police Department: The Role and Utilization of The Integrity Control Officer</u>	December 1996
<u>The New York City Police Department Random Integrity Testing Program</u>	December 1996
<u>Second Annual Report of the Commission</u>	October 1997
<u>Performance Study: The Internal Affairs Bureau Command Center</u>	October 1997
<u>Monitoring Study: A Review of Investigations Conducted by the Internal Affairs Bureau</u>	October 1997
<u>Third Annual Report of the Commission</u>	August 1998
<u>The New York City Police Department's Disciplinary System: How the Department Disciplines Probationary Police Officers Who Engage in Misconduct</u>	August 1998
<u>The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members Who Engage in Serious Off-Duty Misconduct</u>	August 1998
<u>Performance Study: A Review of the New York City Police Department's Background Investigation Process for the Hiring of Police Officers</u>	January 1999

<u>A Review of the New York City Police Department's Methods for Gathering Corruption-Related Intelligence</u>	August 1999
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<u>The New York City Police Department's Disciplinary System: A Review of the Department's December 1996 False Statement Policy</u>	August 1999
<u>Fourth Annual Report of the Commission</u>	November 1999
<u>Performance Study: A Review of the Internal Affairs Bureau Interrogations of Members of the Service</u>	March 2000
<u>The New York City Police Department's Internal Affairs Bureau: A Survey of Former IAB Members</u>	March 2000
<u>Performance Study: The Internal Affairs Bureau's Investigative Review Unit</u>	March 2000
<u>Performance Study: The Internal Affairs Bureau's Integrity Testing Program</u>	March 2000
<u>The New York City Police Department's Prosecution of Disciplinary Cases</u>	July 2000