



SPECIAL REVIEW

CALIFORNIA DEPARTMENT OF CORRECTIONS
AND REHABILITATION'S LEGAL COSTS ASSOCIATED
WITH 12 SIGNIFICANT CLASS ACTION LAWSUITS

**OFFICE OF THE
INSPECTOR GENERAL**

DAVID R. SHAW
INSPECTOR GENERAL

STATE OF CALIFORNIA

NOVEMBER 2010



November 9, 2010

Matthew L. Cate, Secretary
California Department of Corrections and Rehabilitation
1515 S Street, Room 502 South
Sacramento, California 95814

Dear Mr. Cate:

Enclosed is the Office of the Inspector General's revised Special Review of the California Department of Corrections and Rehabilitation's Legal Costs Associated with 12 Significant Class Action Lawsuits.

The report identifies more than \$139 million in payments by the department to plaintiffs' and defense attorneys for legal fees and costs, as well as payments to special masters and experts on these major lawsuits. This amount does not include the unspecified costs to address the problems that prompted these lawsuits.

The duration of the federal courts' involvement in these class-action settlements, as well as the escalating legal expenses, indicate that efforts taken by the department to remedy the underlying deficiencies have been ineffective. Furthermore, it does not appear that the department has submitted quantifiable plans to the courts for the purpose of determining when the department has complied with the settlements reached in a number of these cases. Without specific plans in place identifying the steps required to comply with the courts' orders, it will be much more difficult for the department to ensure that inmates' constitutional rights are protected, and for the department to extract itself from the ongoing substantial litigation costs associated with these class action suits. Therefore, the Department should develop such plans. To the extent that the Department is working toward developing metrics for each class action lawsuit, we encourage you to continue those efforts and act as quickly as possible.

If you have questions concerning this report, please contact Jerry Twomey, Chief Assistant Inspector General, Bureau of Audits and Investigations, at (916) 830-3600.

Sincerely,

A handwritten signature in black ink that reads "David R. Shaw".

David R. Shaw
Inspector General

cc: Brett Morgan, Chief of Staff, CDCR
Benjamin Rice, Assistant Secretary – General Counsel, CDCR
Kim Holt, External Audits Manager, CDCR

Enclosure


Arnold Schwarzenegger, Governor

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Executive Summary

This revised report presents the results of a special review that the Office of the Inspector General (OIG) conducted into the legal costs associated with 12 class action lawsuits filed against the California Department of Corrections and Rehabilitation (department). After the initial report was issued, the OIG received comments and concerns regarding the report from various stakeholders. As a result of those comments, the OIG determined that it would be appropriate to revise its initial report to include additional information and analysis regarding the legal costs associated with the 12 class action lawsuits.

The lawsuits in question concerned the treatment and care of inmates and wards within the department's institutions. Although the department incurs substantial legal costs in a number of other forums (*e.g.*, individual inmate lawsuits, discrimination and retaliation complaints filed by department employees and disciplinary actions taken against department employees), this report focuses on 12 specific class action lawsuits. We chose these lawsuits for review because of the significant issues involved in those cases and because of the protracted nature and substantial ongoing legal costs associated with them. Our purpose is to provide the department and its stakeholders with a snapshot of the substantial legal costs associated with its ongoing litigation in federal and state courts.

As a result of the 12 lawsuits in question, the courts determined or the department conceded that significant defects existed within the department's operations with respect to a variety of issues. These issues include inmate access to medical, dental, and mental health care, the constitutionality of existing parole revocation procedures, the violation of inmates' rights under the Americans with Disabilities Act, excessive use of force being employed against inmates and wards, and wards being denied adequate access to education and treatment programs. Indeed, in a number of the cases, the courts determined that the department's treatment and care of inmates fell below constitutionally-required minimum standards.

We found that as a result of the 12 lawsuits, the department paid court-appointed special masters, experts, plaintiff and defense attorneys \$139 million since 1997 to cover costs associated with those lawsuits. The duration of the federal courts' involvement in these class-action settlements, as well as the escalating legal expenses, suggest that efforts taken by the department to remedy the underlying deficiencies, thereby enabling the department to extricate itself from the courts' oversight, have been ineffective. Furthermore, it does not appear that the department has submitted quantifiable plans to the courts for the purpose of ascertaining when the department will be deemed to have complied with the settlements reached in a number of these cases. Without specific plans in place identifying the steps required to comply with the courts' orders, it will be much more difficult for the department to ensure that inmates' constitutional rights are protected, and for the department to extract itself from the ongoing substantial litigation costs associated with these class action suits.

Through our review, the OIG also determined the following:

- **The annual payment amounts associated with these cases have steadily increased over the past 12 years.** The department paid just over \$3.4 million for court-ordered plaintiff legal fees and monitoring costs, as well as Attorney General's Office legal costs, in fiscal year 1997–98, (no fees were paid to private law firms retained to assist the department in its defense during this time period). However, by fiscal year 2007–08, the department paid \$20.4 million, and during fiscal year 2008–09, legal fees and court-ordered monitoring costs exceeded \$21.6 million. This dramatic increase is due primarily to new settlements and judgments, the continued implementation of various court orders, and ongoing court-mandated monitoring by plaintiffs attorneys, special masters, and experts.¹
- **Department attorneys conduct a limited review of invoices submitted by the plaintiffs' attorneys to identify disputed costs.** These reviews result in cost savings averaging about four percent. If this rate applies proportionally to all \$66 million of plaintiffs' attorney payments since July 1997, disputed costs would be approximately \$2.6 million. However, some of these cost savings are only temporary because the plaintiffs' attorneys also bill the state for the hours spent negotiating revisions to each invoice.² Therefore, some portion of the cost reduction eventually results in an overall increase in hours billed on future invoices. Department attorneys do not review special masters or court experts' invoices prior to those invoices being submitted to the court. The department ordinarily does not dispute costs submitted by special masters or court experts, as the department does not believe a practical means exists for it to dispute such bills; however, the OIG was unable to locate any statute, regulation, court rule, or policy that precludes the department from challenging the accuracy of any costs submitted by special masters or court experts.
- **Department attorneys conduct a limited review of invoices submitted by private law firms hired to assist in the department's defense.** It is the department's contention that its limited reviews of the defense attorney billings have resulted in no disputed work being billed to the department, though the department disallowed several travel-related bills submitted by the private firm.³

¹ It is further noted that, given the long period of time this report covers, inflationary forces will also have an impact on the amount of legal costs associated with the litigation.

² We note that it is a commonly accepted practice in the legal profession for a party to review legal bills submitted by their own legal counsel, and to thereafter discuss disputed costs before settling upon a negotiated final amount owed for legal services rendered.

³ Although the department is ordinarily required to retain the services of the Attorney General's Office for legal representation purposes (Government Code section 11040 *et seq.*), in certain situations, such as where the Attorney General's Office has a conflict of interest in the litigation, or where it does not have sufficient resources on hand, the Attorney General's Office may give its consent for the department to employ private legal counsel.

- **The department's efforts to detect billing errors or disputed costs are hampered because plaintiffs' attorneys and private defense firms do not provide invoices in a usable electronic format.** The department reviews legal invoices to identify billing errors or disputed costs. However, this review is limited because the invoices submitted by plaintiffs' attorneys and private defense firms are not typically submitted in an electronic format that would allow a more extensive, in-depth review. Consequently, the department has difficulty identifying duplicate billings and other disputed costs. The department filed a motion in October 2008 in the *Armstrong* case requesting electronic billings from the plaintiffs' attorneys but, according to the department, it has not yet received any documents in a usable format. As to the Attorney General's Office bills, they are submitted directly to the State Controller's Office as direct transfers and are not reviewed by department attorneys.⁴
- **Hourly rates for the attorneys varied significantly depending on whether federal legal fee limits applied.** The federal Prison Litigation Reform Act (PLRA) places a cap on the fees that plaintiffs' attorneys can charge the state. During the relevant time period, plaintiffs' attorneys were allowed to bill an hourly rate of \$169.50 for cases governed by the PLRA.⁵ However, the plaintiffs' attorneys can bill at the court-approved market rate for cases not governed by the PLRA.⁶ For instance, in *Farrell* the court approved a market rate for plaintiffs' attorneys' fees up to \$615 an hour, with an average of \$418 an hour, while in *Armstrong*, the court approved a market rate for plaintiffs' attorneys' fees up to \$640 an hour, with an average of \$420 an hour.⁷ In comparison, the Attorney General's Office, which represents the state in these lawsuits, billed the department at a rate of \$158 an hour,⁸ while the private law firm retained to assist the department in its defense of the *Plata* lawsuit billed the department at a rate up to \$395 per hour, with an average of \$326 per hour, as PLRA cap

⁴ The Attorney General's Office typically bills all of its state clients in a similar manner, pursuant to Government Code section 11044.

⁵ Effective January 2009, the PLRA hourly billing rate for attorneys increased to \$177.00.

⁶ When plaintiffs are successful in litigating their cases, their attorneys are ordinarily legally entitled to be compensated at a "market rate," approved by the court, that takes into consideration such factors as the complexity of the litigation and the hourly billing rate charged by other attorneys in the applicable geographic region who regularly engage in such litigation as part of their practice. Obviously, if the plaintiffs' attorneys are not successful in their litigation, defendants are not liable for any such fees. Moreover, plaintiffs' counsel point out that they are not reimbursed for other expenses, such as expert witness fees, they incur in the litigation.

⁷ The significant disparity that exists between the PLRA rate of attorney reimbursement and court-approved market rates for similar litigation in California calls into question the efficacy of an attorneys' fee rate cap of \$177.00 per hour in a state like California, which traditionally has a high cost of living.

⁸ According to the Attorney General's Office, pursuant to Government Code section 11044, subdivision (b), the \$158 (currently \$170) per hour rate captures the total cost to the Attorney General's Office for providing legal representation to the department, including the assigned attorney's salary and benefits, as well as all overhead costs, including the salary and benefits paid to supporting staff.

rates do not apply to defense counsel fees. It is further noted that, although a private law firm was retained to assist in the department's defense in the *L.H., Perez, Plata* and *Valdivia* cases, the majority of the private law firm's billings were incurred in *Plata*.

In some cases, the plaintiffs' attorneys are monitoring the progress of the department's corrective action. In several cases, the courts have directed plaintiffs' attorneys to monitor the department's compliance with the settlement/stipulation or other court orders, and to bill the department for such monitoring costs. The plaintiffs' attorneys view this monitoring as a legal and professional obligation on their part for purposes of enforcing any judgment rendered against the department. Although this is a somewhat unusual situation that does not appear to be consistent with post-judgment enforcement practices in most other non-prison federal litigation, this process has been ordered by the courts and there is no indication that the department objected to any such orders when they were issued. In addition, this court-ordered monitoring process appears to be consistent with the monitoring process ordered by the United States District Court in *Ruiz v. Estelle* (2001) 154 F. Supp.2d 975, 1000 concerning similar inmate lawsuits filed against the Texas Department of Corrections.

Some of the cases reviewed here have been subject to the jurisdiction of the courts for as long as twenty years. Therefore, it would be prudent for the parties to work together, and with the legislature as necessary, to implement necessary plans to bring about the correction of the identified violations and end the ongoing costs associated with these cases. Implementation of such plans would ultimately not only result in significant cost savings to the taxpayers by bringing an end to the litigation at issue here, but would also help guard against and prevent future violations of inmates' fundamental constitutional rights, and any litigation that might follow such violations.⁹

Recommendations

As a result of this special review, the Inspector General made three recommendations to the Secretary of the California Department of Corrections and Rehabilitation. First and foremost, the department should immediately develop viable plans for each of the cases in question that will resolve the constitutional deficiencies and end the ongoing costs associated with these cases. In order to do this, the department will need to work with stakeholders and the courts' to establish quantifiable metrics that realistically assess the department's progress in determining its legal compliance with the courts' orders. For example, after approximately 30 years of litigation, the Texas Department of Corrections successfully extricated itself from federal monitoring in the matter of *Ruiz v Estelle* in July 2002 after implementing such a strategy. Second, the department should support state legislation similar to the PLRA to standardize the reimbursement rate for attorneys for inmate litigation cases filed in state court (while recognizing that the existing PLRA attorneys fees rate cap of \$177.00 per hour probably is insufficient for a high cost of living state such as California). Finally, the department should continue its efforts to

⁹ One possible model for such plans based upon quantifiable metrics may be found within the medical inspections currently being conducted at all CDCR adult institutions.

obtain invoices from plaintiffs' attorneys, as well as their own defense counsel, in a format that can be analyzed electronically by the department in order to more readily identify ambiguous billings.

Department's Response

In its October 26 response, the department agreed with the OIG's recommendations and reported that it is developing metrics for each class-action lawsuit, as well as developing audit instruments and compliance measurements.

The department further reported that the *Lancaster v. Tilton* and *Gilmore v. California* cases have recently been terminated, that “tremendous efforts” have been made in the *Madrid* case, and that the department has appealed a decision in the *Perez* case regarding the legal expenses that can be claimed by the plaintiff for its non-attorney staff.

The department’s response appears in its entirety at the end of this report.

Introduction

This report presents the results of a special review that the Office of the Inspector General (OIG) conducted into the legal costs associated with 12 class action lawsuits filed against the California Department of Corrections and Rehabilitation (department) concerning the treatment and care of inmates and wards within the department's institutions. We conducted this review under the authority of California Penal Code section 6126, which assigns the OIG responsibility for oversight of the California Department of Corrections and Rehabilitation.

Background

As of June 30, 2009, the department had spent in excess of \$139 million on attorney, special master and expert fees related to 12 class action lawsuits filed on behalf of inmates or wards. A class action lawsuit is a suit filed by one or more people on behalf of themselves and a larger group of people who are similarly situated. The term "class action" is being used generically to refer to cases in which the court has granted broad and ongoing remedial relief to an identifiable group of inmates or wards.

Although the department incurs substantial legal costs in a number of other forums including individual inmate and ward lawsuits, discrimination and retaliation complaints filed by department employees, and disciplinary actions taken against department employees, this report focuses on 12 specific class action lawsuits due to significant issues and the protracted nature of those cases.

As a result of the 12 lawsuits in question, the courts decided or the department conceded that significant defects existed within the department's operations with respect to a variety of issues. These issues include inmate access to medical, dental and mental health care, the constitutionality of existing parole revocation procedures, the violation of inmates' rights under the Americans with Disabilities Act, excessive use of force being employed against inmates and wards, and wards being denied adequate access to education and treatment programs. Indeed, in a number of the cases, the courts determined that the department's treatment and care of inmates fell below constitutionally-required minimum standards.

In general, when the department loses or settles a lawsuit, the court may require the department to pay an assortment of legal fees to the plaintiffs' attorneys, in addition to the department paying for its own legal defense costs. Further, the settlement conditions or court orders in many of these cases result in ongoing monitoring costs by plaintiffs' attorneys as well as court-appointed special masters and experts, in addition to the actual implementation costs to remedy the underlying problem. According to the department's Legal Affairs Division, the department actively monitors the legal costs for its major cases.

Objectives, Scope, and Methodology

This review explores the amount of state funds the department has expended for costs on 12 lawsuits and describes, in general, the nature of these lawsuits. The information is intended to provide insight into the significant ongoing legal costs associated with these cases separate from the costs to implement the provisions of the decisions and settlements. Financial information is as of June 30, 2009.

In conducting this review, we performed the following procedures:

- To gain an understanding of the department's operations and the nature and scope of lawsuits to which it is a party, we reviewed documents related to the lawsuits and interviewed legal staff. We compiled expenditures beginning on July 1, 1997 for fees and costs paid to the attorneys and special masters and experts, since data before this date was not readily available from the department's accounting records. Accounting data was provided by the Attorney General's Office from the date the lawsuits were filed.
- To verify the amount of state funds that the department paid to the plaintiffs' attorneys and the court for special masters and experts, we reviewed payment documents and interviewed the department's legal and accounting staff.
- To verify the amount of state funds that the department paid to the Attorney General's Office and private law firms retained to assist in the department's defense of the lawsuits, we reviewed payment documents and interviewed the department's legal and accounting staff.
- To determine the department's process for reviewing invoices submitted by the plaintiffs' attorneys and the court, as well as by the Attorney General's Office and a private law firm retained to assist in the department's defense, we reviewed legal billing documents received from attorneys and interviewed the departments legal staff members.
- To develop the information for this report, we analyzed the data gathered in the above procedures.

Our review focused on 12 major class action lawsuits shown within Table 1 on the following pages due to their significant issues, as well as their protracted nature and ongoing legal costs. It excluded non-class action lawsuits, such as legal cases brought by individual inmates, inmate families, or employees. In addition, our review did not focus on the department's in-house legal costs for representation in these cases because, although the OIG attempted to quantify the department's in-house legal costs, we discovered that during the relevant time period the department did not require its staff attorneys to maintain timesheets delineating how much time each staff attorney devoted

to each of his or her assigned tasks. As a result, an accurate assessment could not be made concerning what percentage, if any, of each staff attorney's monthly salary went toward litigation monitoring duties; however, according to the department, it is now keeping track of the amount of time its staff attorneys devote to their assigned tasks.

Table 1**California Department of Corrections and Rehabilitation Monitored Cases**

Case	Date Filed	Settlement/ Stipulation Date	Case Synopsis	Legal Fees/Special Master Costs¹⁰
Armstrong v. Davis	June 1994	Sept. 1996	This lawsuit was brought under the Americans with Disabilities Act (ADA) and alleged that the department failed to provide reasonable accommodations to inmates and parolees with vision, hearing, mobility, kidney, and learning disabilities. Under the terms of the <i>Armstrong</i> stipulation, the plaintiffs can monitor each prison once every quarter. There are 33 prisons located throughout the state.	\$25,490,787
Clark v. State of California	April 1996	July 1998	The complaint alleged that the department denied developmentally disabled inmates access to programs, services, and activities. The complaint further contended that the department failed to protect these individuals from exploitation and abuse by other inmates. The stipulation agreement allows for yearly monitoring of all 33 institutions by plaintiff representatives.	\$7,738,748
Coleman v. Schwarzenegger	June 1991	Sept. 1995	This lawsuit alleged, and the federal court found, that the department was deliberately indifferent to the mental health needs of inmates, in violation of the Eighth Amendment, and appointed a special master to oversee mental health care at the prisons. In 1998, the court approved a plan designed to address constitutional inadequacies by establishing mental health services with varying levels of care.	\$47,118,564
Farrell v. Cate	Jan. 2003	Nov. 2004	This lawsuit alleged excessive use of force, failure to protect juvenile wards from physical attack by other wards, substandard housing conditions, inadequate medical and mental health treatment, insufficient due process hearings, faulty grievance procedures, inadequate access to education and treatment programs, disability discrimination, and other unconstitutional conditions of confinement. The consent decree requires monitoring of all DJJ facilities and reporting on the progress of the remedial plans.	\$6,046,493

¹⁰ These costs include fees paid to private defense attorneys, as well as DOJ staff. Legal costs for plaintiffs' attorneys and special masters/experts are from July 1, 1997 through June 30, 2009. Costs associated with DOJ legal representation are from the lawsuit filing date.

Case	Date Filed	Settlement/ Stipulation Date	Case Synopsis	Legal Fees/Special Master Costs¹⁰
Gilmore v. State of California	Oct. 1966	Oct. 1972	Since 1970, the department has been required by federal court order to maintain in each prison a law library with one complete and current set of annotated California and United States codes, updated California and federal cases since 1950, updated California and federal digests, and basic reference works on California and federal law.	\$228,583
Lancaster v. Tilton	July 1979	Oct. 1980	This lawsuit alleged inadequate inmate living conditions and classification procedures for death row inmates at San Quentin State Prison. The consent decree required the department to implement various changes in classification procedures and living conditions for death row inmates.	\$2,031,549
L.H. v. Schwarzenegger	Sept. 2006	June 2008	Plaintiffs are a class of over 4,000 juvenile parolees who claimed that in the granting, extending, and/or revoking of parole, they were being denied their Fourteenth Amendment rights of due process, counsel, and equal protection. They further claimed that correctional officials are violating the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The settlement incorporated numerous changes to the DJJ parole process.	\$7,232,615
Madrid v. Woodford	Oct. 1990	Jan. 1995	This lawsuit alleged that the department inadequately managed the use of force at Pelican Bay State Prison. In 1995, the court determined that supervision of the use of force and investigations of alleged use of excessive force were inadequate and that the delivery of medical and mental health services was deficient. The parties were ordered to develop remedial plans and a special master was appointed to monitor the progress.	\$9,725,353
Perez v. Cate	Dec. 2005	Aug. 2006	This lawsuit alleged that the department's dental care system violated the Eighth Amendment prohibition against cruel and unusual punishment. The court approved a settlement and the implementation of a stipulated agreement. The terms of the agreement are monitored by the plaintiffs' attorneys and court-appointed experts.	\$2,891,474

Case	Date Filed	Settlement/ Stipulation Date	Case Synopsis	Legal Fees/Special Master Costs¹⁰
<i>Plata v. Schwarzenegger</i>	April 2001	June 2002	California inmates challenged the constitutional adequacy of the department's medical care system under the Fourteenth and Eighth Amendments. Specific allegations included: insufficient numbers of medical staff, insufficient training and supervision of medical staff, disorganized and incomplete medical records, and other medical deficiencies. The settlement agreement required the department to develop and implement policies and procedures designed to provide a minimum level of medical care to inmates. On February 14, 2006, the court appointed a receiver to take control of the prison medical care system and allowed the plaintiff's attorneys to continue to monitor medical care as they have done since 2002.	\$15,590,342
<i>In re Rutherford/In re Lugo</i>	May 2004	March 2006	The lawsuit alleged that the Board of Parole Hearings violated petitioners' due process rights by failing to hold timely life sentence parole hearings. The stipulation agreement set a goal of reducing the backlog of hearings to no more than 5% of the monthly hearings. If the department meets this goal for 12 consecutive months, they will be considered to be in compliance with the remedial plan.	\$1,280,293
<i>Valdivia v. Schwarzenegger</i>	May 1994	Nov. 2003	This lawsuit challenged the constitutionality of California's parole revocation process. In 2003, the court issued an injunction requiring compliance with a number of provisions, including development and implementation of policies and procedures regarding the appointment of counsel for parolees, completing probable cause hearings within 10 days of parole hold, requiring a three-day notice of charges and rights, and having a final revocation hearing within 35 days of the hold. The remedial plan requires the state to pay for any fees to the plaintiff's attorney necessary to monitor and enforce the plan.	\$14,014,180
Total Legal Costs				\$139,388,981

Review Results

The review results are presented in four sections. The first section summarizes the payments made to the court-appointed special masters and the plaintiffs' attorneys, as well as to the Attorney General's Office and private law firms retained to assist in the Department's defense. The second section describes the department's review process for attorney invoices. The third section details attorney fees and federal fee limits. The last section provides guidance on how California may end these expensive and lengthy lawsuits.

Payments to Special Masters, Experts, and Attorneys

The state paid over \$139 million in fees to special masters, experts, and both plaintiffs' and defense attorneys.

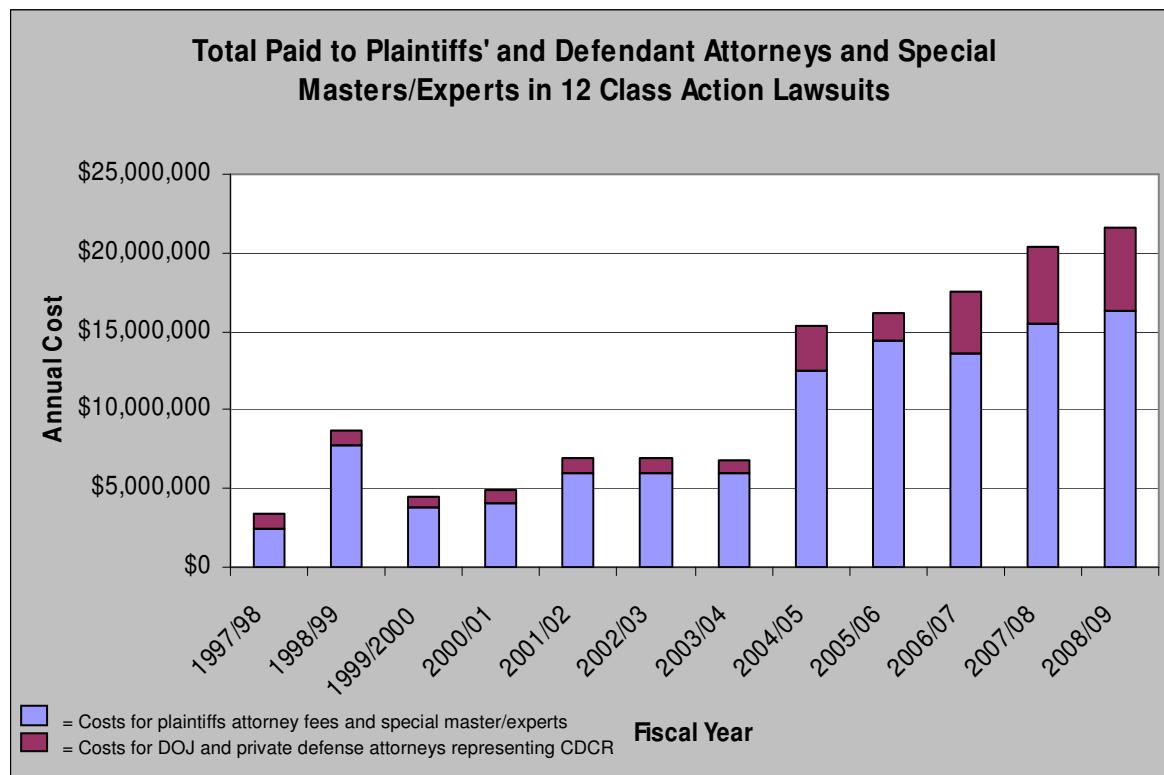
Over the last 12 years, the department paid \$139 million for court ordered fees and plaintiffs' and defense legal costs associated with 12 lawsuits brought against it. This \$139 million, however, does not include the department's legal staff because the department did not maintain records of the amount of time its staff counsel spent on litigation monitoring duties. Although the department assigns a staff attorney to monitor the progress of each case and to serve as a liaison between the department and the assigned defense counsel, those duties are ordinarily included within the staff attorney's existing job duties. As salaried employees, the department's staff attorneys are not paid by the hour and, as such, they receive no extra compensation when they are assigned additional duties.

The state has also incurred additional, unidentified costs to implement the court-ordered changes. In all 12 cases, the courts determined that the plaintiffs had prevailed on the merits of their cases and ordered the department to pay the plaintiffs' attorneys legal costs and fees. In several cases, the courts also ordered the department to pay the costs of the plaintiffs' attorneys monitoring the department's compliance with the courts' orders. In addition, in other cases the courts appointed their own special masters or court experts, at state expense, to evaluate the department's implementation of the corrective action ordered by the courts or stipulated to by the department.

Although the payments made by the department varied over the past 12 years, the payment amounts are trending upward. As shown in Figure 1 on the next page, the department paid \$3.4 million in fiscal year 1997–98, but by fiscal year 2008–09, the annual total had climbed to more than \$21.6 million. Some of this increase is due to new cases being settled and efforts to coordinate certain activities in the *Plata*, *Coleman*, *Perez*, and *Armstrong* cases. Some of this increase is also due to inflation that occurred during the 12 year review period. Nevertheless, the total represents an \$18.2 million annual increase since fiscal year 1997–98. Further, many of the settlements have been in place for numerous years, yet significant legal and monitoring costs continue to be incurred because, in part, the department has not presented plans with quantifiable

metrics to the courts that would assess the department's progress in achieving legal compliance with the courts' orders.

Figure 1



Source: California Department of Corrections and Rehabilitation and Department of Justice accounting records. Outside defense attorney fees began in 2004/05 and are included with the DOJ costs. The defense costs are shown above the costs for plaintiff attorneys and special masters/experts.

As shown in Figure 1, beginning in fiscal year 2004–05, there has been a dramatic increase in the amount of state funds paid for legal and special master fees.¹¹ For the first seven years in the period we reviewed, the average annual payment was just under \$6 million. In contrast, the average annual amount paid to plaintiffs' and defense attorneys and special masters and experts jumped to \$18.2 million for the final five years of our review period. Part of the increase results from settlements in the *Farrell* and *Perez* cases, which were settled in 2004 and 2006, respectively. In addition, a legal action concerning prison overcrowding went to trial in November 2008 before a three-judge panel. On August 4, 2009, the three-judge panel ruled against the state, and it is likely that the department will incur both one-time and ongoing legal costs unless this decision is overturned on appeal. As of June 30, 2009, the Attorney General has incurred costs of \$3.2 million for representing the department in the three-judge panel case. The plaintiffs' attorneys have submitted claims for attorney fees, as well as costs and expenses, of approximately \$5.46 million for the three-judge panel case.

¹¹ In addition, the department did not begin incurring costs for private defense representation until the 2004/05 period.

Further, in our review of the various lawsuits, we found that most of these lawsuits have on-going activities and hearings, with associated costs; therefore, these annual costs will likely continue until the department presents and effectively executes viable metric-based plans, approved by the courts, which will ultimately resolve the constitutional deficiencies and enable the department to extricate itself from on-going monitoring by the courts.

The \$139 million paid by the department over the last 12 years toward these lawsuits was paid to both the plaintiffs' attorneys, who brought the actions against the department, and special masters and experts appointed by the court, as well as to the Attorney General's Office and a private law firm retained to defend the department in the litigation.

Payments to the plaintiffs' attorneys usually represent money owed for litigation costs awarded to the plaintiffs by the courts as part of the settlement agreement or court order, or for costs associated with monitoring the departments' compliance in several of the cases. Payments to the special masters and court-appointed experts are for court-monitoring of the state's ongoing compliance with the court's orders. In the *Coleman* lawsuit alone, the state has paid \$31 million to the special master over the last 12 years for monitoring activities.

Our review of the payments showed that \$97 million was paid to plaintiffs' and defense attorneys for fees and costs as well as the plaintiffs' attorneys monitoring costs, while \$42 million was paid for court-appointed special masters and experts. As shown in Table 2 on the next page, the amounts paid by the department vary dramatically depending on the case. For example, the *Gilmore* settlement, which required the department to maintain a prison law library with a complete set of current California Codes and did not require subsequent monitoring, has required the department to pay over \$228,000, while the *Coleman* settlement has required the department to pay over \$47 million for attorney fees and special master expenses – and the costs in the *Coleman* settlement are anticipated to continue.

Table 2
Total Amount Paid to Special Masters/Experts and Plaintiffs' and Defense Attorneys by Case

Case Name	Plaintiffs Attorney Fees	DOJ and Outside Defense	Special Master/Expert Fees Paid	Total Fees Paid Per Case
Armstrong	\$22,501,160	\$2,789,627	\$200,000	\$25,490,787
Clark	\$6,788,282	\$745,242	\$205,224	\$7,738,748
Coleman	\$11,113,800	\$5,004,764	\$31,000,000	\$47,118,564
Farrell	\$3,041,226	\$2,248,299	\$756,968	\$6,046,493
Gilmore	\$52,413	\$176,170	\$ --	\$228,583
Lancaster	\$757,703	\$1,273,846	\$ --	\$2,031,549
L.H	\$5,085,399	\$1,887,326	\$259,890	\$7,232,615
Madrid	\$1,348,790	\$4,026,563	\$4,350,000	\$9,725,353
Perez	\$118,875	\$1,022,599	\$1,750,000	\$2,891,474
Plata	\$5,121,179	\$8,269,163	\$2,200,000	\$15,590,342
Rutherford	\$510,394	\$769,899	\$ ---	\$1,280,293
Valdivia	\$9,596,026	\$2,918,154	\$1,500,000	\$14,014,180
TOTALS	\$66,035,247	\$31,131,652	\$42,222,082	\$139,388,981

Source: California Department of Corrections and Rehabilitation and DOJ accounting records.

Plaintiffs' attorney's fees and special master/ expert costs are from July 1, 1997.

Besides the plaintiffs' attorneys, special master and court-expert fees that the department pays as a result of these 12 settlements and judgments, we also identified the state's costs to defend the department in each of these lawsuits. When the department must defend itself in court, attorneys from the Office of the Attorney General ordinarily represent the state. As part of our review, we identified that the state paid over \$23.8 million to the Attorney General's Office to defend the department in these 12 lawsuits since the inception of the cases. In addition, the department retained the services of a private law firm to assist in its defense of the *L.H.*, *Perez*, *Plata* and *Valdivia* cases and, accordingly, has paid \$7.3 million to that firm. These legal representation costs often continue even after the settlement date because the Attorney General's Office and the private law firm represent the department at future court proceedings connected to these cases. As previously discussed, the \$31.1 million paid for the departments legal representation does not include the cost of the department's in-house attorneys.

In several cases, the courts have directed the plaintiffs' attorneys to also act as monitors.

In several of the cases including, *Valdivia*, *Clark*, *Armstrong*, *Farrell*, *L.H.*, *Madrid*, *Plata*, *Perez* and *Coleman* the courts have ordered that plaintiffs' attorneys monitor the progress of the department's corrective action and charge the department at court-approved hourly rates – sometimes as high as \$640 per hour – for performing such services. For example, under the terms of the September 1996 *Armstrong* stipulation, the plaintiffs' attorneys monitor each prison once every quarter. This is a somewhat unusual

situation, given that such a monitoring process is very different from the type of post-judgment enforcement that occurs in most federal litigation, and given that in certain other of the 12 cases the courts have designated uninvolved special masters or court-designated experts to perform such monitoring functions. Nevertheless, the department did not object to the courts' orders at the time they were issued. Moreover, the practice of plaintiffs' attorneys conducting post-judgment monitoring appears to be consistent with the court-ordered monitoring activities that occurred in *Ruiz v. Estelle* ((2001) 154 F. Supp. 2d 975), concerning similar inmate lawsuits filed against the Texas Department of Corrections. In addition, plaintiffs' attorneys assert they have a legal and professional obligation to enforce the courts' orders on behalf of their clients. Finally, the department may challenge any monitoring bill submitted by plaintiffs' attorneys that the department believes to be improper, though we are unaware of the department having made such a challenge to date.

Review of Attorney Invoices

The department reviews invoices from the plaintiffs' and private defense attorneys which results in a small cost savings, but it does not review invoices submitted by the special masters.

We reviewed the process used by the department to review invoices from the plaintiffs' attorneys. We found that the department sometimes disputes certain items and on average obtains a four percent reduction in costs. In each of the cases we reviewed, the department was required to pay the legal costs of the plaintiffs' attorneys and the costs associated with the ongoing monitoring of the judgment or settlement. Based on our interviews with department and plaintiffs' attorneys, and a review of invoices submitted by the plaintiffs' counsel, we learned that typically the plaintiffs' attorneys submit an invoice for expenses each quarter. These invoices include expenses for the primary law firm representing the plaintiffs, as well as any other firms that are involved in the litigation. When the state receives an invoice, the department's attorney assigned to that particular case reviews the entire invoice and identifies disputed costs. For example, the attorney might object to an item because it is:

- Billing for staff meetings to discuss workload or office backlog
- Billing for multiple attorneys and other staff members participating in the same event
- Billing for staff training
- Billing for clerical tasks
- Billing for travel expenses
- Billing related to a different case than the one being invoiced

After reviewing an invoice, the department's attorney sends the plaintiffs' attorneys a copy of the invoice with the disputed items indicated. The department's attorney conducts a conference call with the plaintiffs' attorneys to discuss any concerns. Usually, the attorneys come to a resolution on a final amount, and the court issues an order to the

department instructing it to pay the negotiated amount.¹² However, if a resolution for payment is not accomplished, the plaintiffs' attorney may file a motion with the court to compel payment of fees.

By comparing a sample of the invoices submitted by the plaintiffs' attorneys and the final amount paid by the department, we found that the final amount paid by the department is generally lower than the initial invoice. On average, we identified a four percent reduction between the initial invoice and the final amount paid by the department. In total, for the sample of payments we reviewed, the department was billed \$5,575,707 by plaintiff's attorneys, but only paid \$5,351,772, a difference of \$223,935. When considering total plaintiff attorney fees of approximately \$66 million, if the four percent negotiated rate is consistent, disputed billings would be approximately \$2.6 million.

The department's Office of Legal Affairs also reviews billing invoices from its outside counsel; however, no billing disputes have been noted during those reviews, except for several minor travel claims that the department disallowed. The department's Office of Legal Affairs does not, however, review invoices from the Attorney General's Office, as those bills are submitted by the Attorney General's Office to the State Controller's Office for direct payment.

While the department's attorneys review the invoices submitted by the plaintiffs' and private defense attorneys, the department does not complete a similar review of the special masters' invoices. According to department attorneys, this review does not take place because the special masters send their invoices directly to the courts. Because the OIG has no authority over the courts, its invoice review process was not included in the scope of our review; therefore, we were unable to assess the effectiveness of the courts' review process. While the department obtains a copy of the special masters' invoices, according to department attorneys, the department is not given an opportunity to review the invoices prior to payment of the amount approved by the courts, nor does the department believe that a practical mechanism exists for it to challenge any such billings.

Although it appears that there is no agreed upon process for the department to challenge invoices submitted by special masters and experts to the courts, it nonetheless appears that if the department believes a particular billing was not appropriate, it could petition the court to have any such monies either not paid or appropriately adjusted. That is particularly so as the OIG was unable to locate any statute, regulation, court rule, or policy that precludes the department from challenging the accuracy of any costs submitted by special masters or court experts.

Cost savings are temporary or partially offset by increases in later billings.

Although the department gained some cost savings by negotiating with the plaintiffs' attorneys and objecting to various charges, some of the savings may only be temporary.

¹² As previously noted, negotiating legal costs payments is a commonly-accepted practice in the legal community.

The plaintiffs' attorneys bill the state for the hours spent negotiating the final resolution of each invoice. As a result, some portion of the cost reduction negotiated by the department attorney ultimately results in an overall increase in hours billed in the following invoice.

The department's efforts to detect disputed costs or billing errors in attorney invoices are limited because the department does not receive invoices in a usable electronic format.

The department reviews plaintiffs' and private defense counsel invoices and identifies any billing errors or disputable costs. However, the department has difficulty reviewing the attorneys' invoices due to the lack of electronically submitted documents. As a result, the department filed a motion on October 14, 2008 in the *Armstrong* case requesting that plaintiffs' attorneys submit billings in an electronic format. The court granted this motion but also ordered the department to pay the plaintiffs' attorneys costs to standardize their accounting system in order to submit the electronic billings. Electronic invoices would allow department staff to sort the data and compare billing documents on various cases and determine if duplicate or disputed billings are being submitted for payment by the plaintiff's attorneys. In the 12 cases reviewed, in the department's opinion, no plaintiff attorney billings were submitted in a format that would enable the department to readily analyze the data. Private defense attorneys also do not submit their bills electronically; however, their work involves mainly one case, *Plata*. Consequently, the need to sort the data for analysis may not be as great as that for plaintiffs' attorneys who may bill for several cases during a billing cycle. As previously noted, the department does not review invoices from the Attorney General's Office, as those bills are submitted by the Attorney General's Office to the State Controller's Office for direct payment.

Plaintiffs' Attorney Fees and Federal Fee Limits

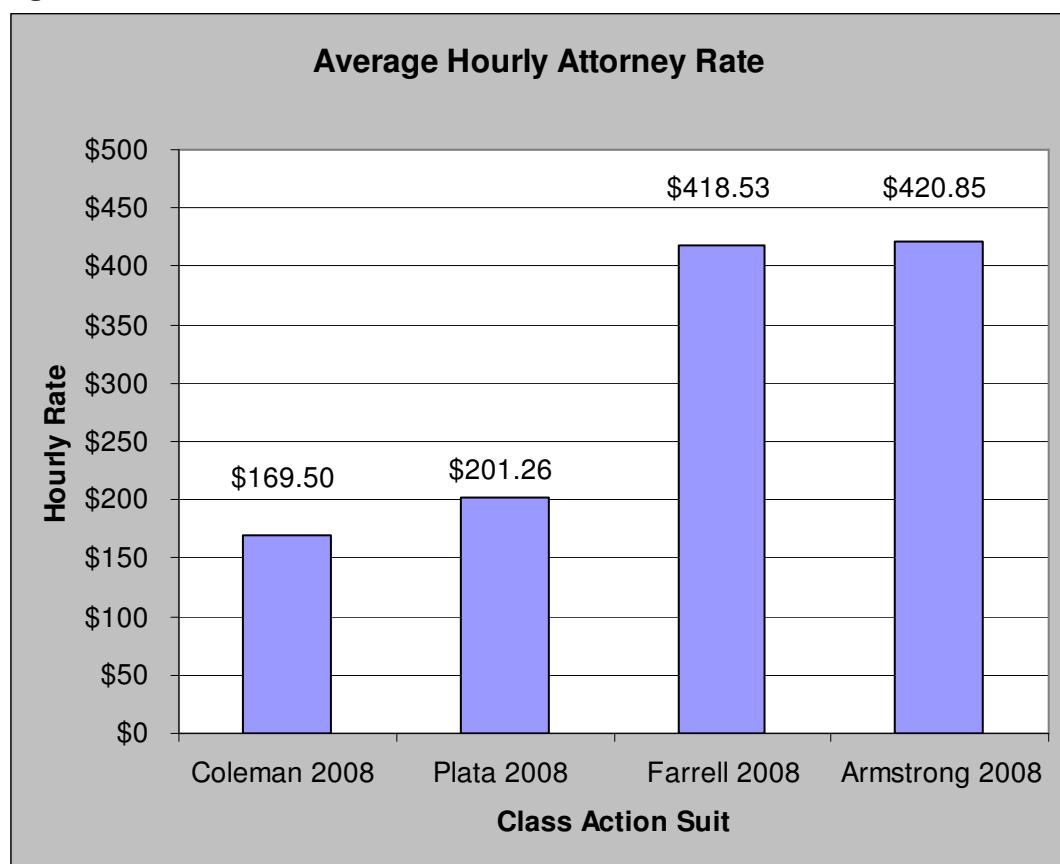
Hourly rates for the plaintiffs' attorney fees varied significantly depending on whether federal legal fee limits applied.

In 1996, Congress passed the Prison Litigation Reform Act (PLRA), which placed a cap on the rate plaintiffs' attorneys can charge for their work. According to department attorneys and our review of invoices on PLRA governed cases *Coleman* and *Plata*, attorneys were limited to an hourly rate of \$169.50 (currently \$177.00). In contrast, for cases not governed by the PLRA, the plaintiffs' attorneys bill at the court-approved market rate for their services, which has been as high as \$640 per hour. It is also important to note that, while successful plaintiffs' attorneys in PLRA cases are currently limited to payment of \$177.00 per hour, attorneys hired to defend against such cases are under no such limitation, and the department has paid private attorneys in *Plata* up to \$395 per hour to represent the department in PLRA cases.

We examined four cases where the department paid attorneys fees: *Coleman*, *Plata*, *Farrell*, and *Armstrong*. Two of the cases were affected by the PLRA and two of the

cases were not. We reviewed invoices for each of these cases to determine the billing rate of the plaintiffs' attorneys. As shown in Figure 2, the rates vary significantly.

Figure 2



Source: Invoices from the plaintiffs' attorneys.

As illustrated in Figure 2, because the PLRA is applicable to the *Coleman* case, the plaintiffs' attorneys were reimbursed \$169.50 an hour for services provided, while the Attorney General's Office was reimbursed \$158 per hour (no private law firm assisted in the department's defense in *Coleman*). The other three cases we reviewed are not governed fully by the PLRA. In *Plata*, 90 percent of the attorney fees are reimbursed at the PLRA rate, while the remaining 10 percent are billed at the market rate.¹³ According to the department's attorneys, a portion of the *Plata* case involves a lack of compliance with the Americans with Disabilities Act (ADA), and costs associated with ADA compliance are not covered under the PLRA. Thus, the court decided to allow 10 percent of the fees to be billed at the market rate. Because of this split billing in *Plata*, the average hourly plaintiffs' attorney rate was \$201, while the Attorney General's Office was reimbursed \$158.00 an hour for services rendered, and the private law firm retained

¹³ As previously noted the “market rate” is approved by the court and takes into consideration such factors as the complexity of the litigation and the hourly billing rate charged by other attorneys in the applicable geographic region who regularly engage in such litigation as part of their practice.

to assist in the department's defense was reimbursed in 2009 at rates up to \$395 an hour for services rendered, with an average of \$326 per hour for legal representation.¹⁴

One of the two cases we reviewed not governed by the PLRA is the *Armstrong* case. The PLRA does not apply because *Armstrong* deals with issues of compliance surrounding the ADA. Thus, the plaintiffs' attorneys bill the state at court-approved market rates, which range from \$295 to \$640 an hour, with an average attorney billing rate of \$420 an hour, while the Attorney General's Office was reimbursed \$158 an hour for services rendered (no private law firm assisted in the department's defense in *Armstrong*).

The other case not governed by the PLRA in our sample was *Farrell*. *Farrell* was brought in state court, as opposed to federal court where the other three cases were brought. California law does not have a PLRA-like provision that limits plaintiffs' attorney fees in state court. Therefore, the plaintiffs' attorneys in *Farrell* bill the state at the court-approved market rate for their legal services. The rates billed by plaintiffs' attorneys in *Farrell* range from \$270 to \$615 an hour. The average plaintiffs' attorney billing rate in *Farrell* was \$418 an hour. The rates billed by the Attorney General's Office in *Farrell* were \$158 an hour (no private law firm assisted in the department's defense in *Farrell*).¹⁵

The significant disparity that exists between the existing PLRA rate of attorney reimbursement and court-approved market rates for similar litigation in California does, however, call into question the efficacy of the current attorneys' fee rate cap of \$177.00 per hour in a state like California, which traditionally has a high cost of living. Consequently, should the State decide to implement a PLRA-like provision limiting the rate of hourly attorney fees, it would be prudent for the state to take into consideration existing market rates for similar litigation when establishing such a cap.

Future Considerations

For inmate class action cases such as *Coleman* and *Armstrong*, whose settlement dates were in September 1995 and 1996 respectively, the department has undergone years of monitoring by outside entities without an end in sight to these ongoing legal costs. The duration of the federal courts involvement in these class-action settlements, as well as the escalating legal expenses, suggest that efforts taken by the department to achieve final resolution in those cases have been ineffective.

A 1972 class action suit involving the Texas Department of Corrections may provide the appropriate framework for the California Department of Corrections and Rehabilitation to follow. In the case of *Ruiz v. Estella*, inmates alleged that overcrowding, lack of access to

¹⁴ Whether the billing rate for each attorney is as low as \$158.00 per hour, or as high as \$640.00 per hour, it is important to recognize that multiple attorneys for each side may participate in several hearings conducted in the separate cases. This, in turn, leads to increased litigation costs that must be borne by the taxpayer.

¹⁵ On July 1, 2009, the Attorney General's Office increased its rate for attorneys to \$170 per hour.

health care, inadequate access to the courts, as well as abusive security practices violated their constitutional rights. After 29 years of litigation, the federal court stated,

The parties are encouraged to work together to craft remedial measures that will respond effectively to the identified constitutional violations. All attempts should be made to provide the court with a joint proposed remedial order that corrects the continuing injustices and establishes a time frame for final termination of the court's jurisdiction over the Texas prison system. (*Ruiz v. Estelle* (2001) 154 F. Supp.2d 975, 1000.)

Thus, the federal court in *Ruiz* encouraged the parties to develop an overall plan with quantifiable metrics that assessed the department's progress achieving legal compliance with the court's orders. According to CDCR, no quantifiable plans have yet been presented to the federal courts by CDCR's legal team in the *Armstrong*, *Coleman*, *Plata*, *Perez* or *Valdivia* cases, that would allow the courts to rule on whether the department has complied with the courts orders, even though monitoring has continued on some of these cases for periods approaching fifteen years.

The department is aware that plans with quantifiable metrics and specific timelines for completion of tasks are necessary, as it demonstrated when it presented the courts with such plans and successfully extricated itself from monitoring in *Gilmore*. Without specific plans in place identifying the steps required to comply with the courts' orders, it is doubtful that the department will ever be able to remedy the constitutional deficiencies identified by the courts and successfully extricate itself from the ongoing substantial litigation costs associated with its remaining and future class action suits.

Toward that end, the department appears to be actively developing metric-driven plans for *Armstrong*, *Coleman*, *Plata*, *Perez* and *Valdivia* that will ultimately enable the department to remove itself from the on-going litigation. The department has also acknowledged, however, that it may still take several years for complete plans to be developed, and several years thereafter for those plans to be fully implemented.

Recommendations

- To the extent it has not already done so, the department should follow the example embodied in the recommendations of the federal court in *Ruiz v. Estelle* and work with all stakeholders to develop overall plans with quantifiable metrics assessing the departments' progress in achieving legal compliance with the courts' orders, as well as deadlines for completion of critical tasks.
- To limit tax-payer exposure for litigation costs in future lawsuits brought in state court, the department Secretary should support state legislation similar to the federal Prison Litigation Reform Act (PLRA) to cap the reimbursement rate for the attorneys, with the understanding that any such cap will likely need to be

higher than the rate set forth in the PLRA in order to provide a realistic incentive for attorneys to provide representation in such cases.

- To ensure that the state is billed appropriately, the department should continue its efforts to obtain invoices from all attorneys in a format that can be analyzed electronically by the department in order to more readily identify questioned transactions, and if necessary, dispute these items.

California Department of Corrections and Rehabilitation's Response

OFFICE OF THE SECRETARY

P.O. Box 942883
Sacramento, CA 94283-0001



October 26, 2010

Mr. David R. Shaw
Inspector General
Office of the Inspector General
P.O. Box 348780
Sacramento, CA 95834-8780

Dear Mr. Shaw:

This letter is being submitted in response to the Office of the Inspector General's (OIG) report titled *Special Review: California Department of Corrections and Rehabilitation's Legal Costs Associated With 12 Significant Class Action Lawsuits*, dated October 2010. We agree with the recommendations made by the OIG and are working toward developing metrics for each class action lawsuit in conjunction with the 2010/2011 Strategic Plan. In an effort to identify and develop compliance measures for the major non-medical lawsuits, the California Department of Corrections and Rehabilitation (CDCR) is developing audit instruments and compliance measurements for *Farrell*, *Valdivia*, *Clark*, and *Armstrong* by utilizing the Department's Performance Management Unit (COMPSTAT) process. Audit instruments and compliance measurements are also being created in the other cases, including medical cases.

We recognize litigation costs are a significant concern and are pleased to report that the *Lancaster v. Tilton* and *Gilmore v. California* cases have recently been terminated and tremendous efforts have been made in the *Madrid* case. In an effort to restrain the costs of litigation whenever possible, CDCR appealed a decision made in the *Perez* case which will decide what expenses and costs can be claimed for non-lawyer plaintiff staff in that case, as well as in *Plata*, *Coleman*, and other Prison Litigation Reform Act cases in the Ninth Circuit. The appeal will soon be heard at the Ninth Circuit Court of Appeals. In addition, more focused and targeted monitoring by all parties and stakeholders are being conducted to limit excessive plaintiff monitoring costs.

We would like to thank the OIG for allowing us the opportunity to comment on the special review and value your continued professionalism and guidance in our efforts to improve our operations. CDCR continues to be committed to responsible expenditure of

Mr. David R. Shaw

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the State's limited resources. CDCR's Office of Audits and Court Compliance will monitor and document the Department's progress in addressing the report's recommendations. If you should have any questions or concerns, please call my office at (916) 323-6001.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett H. Morgan".

BRETT H. MORGAN
Chief of Staff