

# AGENDA ITEM

**123 NOVEMBER 2015**

**DATE:** November 16, 2015

**TO:** Members, Regulation and Discipline Committee  
Members, Board of Trustees

**FROM:** Vanessa Holton, General Counsel  
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**SUBJECT:** Independent Oversight of Audit and Review Function and Approval  
Process for Amendments to Quality Control Measures: Status Updates on  
Implementation of State Auditor Recommendation

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## EXECUTIVE SUMMARY

As required by Business and Professions Code section 6145(b), the California State Auditor conducted a performance audit of the State Bar of California and released its report in June. The report contains various recommendations regarding the audit and review process currently run by the Office of Chief Trial Counsel. In general, the report recommends that (1) the audit and review process have greater independence from OCTC, and (2) any material changes to the process and other quality-control measures require approval of the Regulation and Discipline Committee. This item presents a summary of action taken to date regarding these recommendations, as well as policy recommendations for adoption by the Board.

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## BACKGROUND

The Audit and Review function housed within the Office of Chief Trial Counsel (“OCTC”) has two distinct functions: 1) to perform random audits of closed cases; and 2) to perform reviews when complainants request that the State Bar reexamine closed cases.

The audit function, which is currently handled by an outside consultant, involves a semiannual random audit of at least 250 recently closed cases to determine whether staff handling these cases followed State Bar policies and procedures and if their actions were consistent with case law. After each review, the auditor prepares a report summarizing any deficiencies found, along with recommendations for improvement, which is then forwarded to OCTC for implementation. These reports typically include a recommendation that OCTC managers meet to discuss how to prevent future deficiencies and train staff on problem areas identified.

The review function, which is currently housed within OCTC, reviews complainant requests to reopen closed cases, known as “second-look” reviews, and grants those requests when appropriate. Re-opening is recommended when the reviewer finds that OCTC abused its discretion in closing a case or where the complainant provides new material evidence and serves as a check and balance on the investigatory process. The State Auditor’s report notes

that, in 2014, the review unit received 1,029 requests for second-look reviews, resulting in the reopening of 97 cases. The other option available to complainants is to submit a petition for review to the Supreme Court, called a Walker Petition. This process is lengthier and more complicated than the second-look review.

The State Auditor's report notes that, in 2010, the former Chief Trial Counsel disbanded the unit that performed second-look reviews and redirected staff time to help reduce the discipline backlog. As a result, complainants wanting review of case closures had only Supreme Court review available. Consequently, Walker Petitions increased by 114 percent from 2009 – 2010, from 203 - 435. The report further notes that after the unit was reinstated in 2011, the number of Walker Petitions declined drastically, to 193 in 2011 and concludes that the second-look unit provides important benefits to complainants.

The report also states that the Audit and Review Unit is unable to ensure that it operates effectively because it is part of OCTC and the unit's supervisor reports to the Chief Trial Counsel. "When an auditor reports directly to the auditee—in this case, the Chief Trial Counsel—it creates a risk that the auditee will be able to minimize or fail to act upon findings resulting from an audit or review." Notably, while the audit report makes this statement regarding independence, the report does not find that any second-look recommendations were not followed by OCTC and OCTC reports that all recommendations from the second-look unit to reopen cases have been followed.

#### *State Auditor Recommendations*

The State Auditor made the following recommendations regarding the Audit and Review functions.

##### **Recommendation No. 1**

To ensure that its backlog does not adversely impact the quality of the discipline it imposes on attorneys who fail to fulfill their professional responsibilities, the State Bar should adhere to its quality control processes. Further, it should take steps to prevent its management or staff from circumventing those processes, such as requiring the presentation to the board of any proposed changes to quality control.

##### **Recommendation No. 6 (Renumbered as 7 & 8 in 60-day Report)**

To ensure that the audit and review unit's random audits of closed case files provide an effective oversight mechanism, the State Bar should follow its policy to conduct and record meetings and trainings related to the audit report's recommendations. Additionally, the audit and review unit should oversee the retrieval of cases files for audit to ensure that it maintains control over its random selection of cases.

##### **Recommendation No. 7 (Renumbered as No. 9 in 60-day Report)**

To ensure that the review function within the audit and review unit continues to provide a means for complainants to appeal the State Bar's decisions on closed cases, the State Bar should implement a policy that prohibits the chief trial counsel from dissolving the review function of the audit and review unit. Alternatively, at minimum it should require the board to approve such an action.

**Recommendation No. 8 (Renumbered as No. 10 in 60-day Report)**

To provide independent oversight of the Office of Chief Trial Counsel and assurance that it properly closes its case files, the audit and review unit should report to the executive director rather than to the chief trial counsel.

**DISCUSSION*****MEASURES TAKEN TO IMPLEMENT RECOMMENDATIONS REGARDING THE AUDIT FUNCTION OF THE AUDIT & REVIEW UNIT***

To address the State Auditor's recommendations, OCTC has already adopted the following policies to implement some of the report's recommendations:

1. OCTC retains an outside auditor to conduct each semi-annual audit of closed files. The closed files to be audited are randomly selected. If a selected file is unavailable for audit, a replacement file is randomly selected. To assure that no file is "hidden" from an audit, any selected file that is unavailable for a particular semi-annual audit is automatically included in the next semi-annual file audit.
2. OCTC managers will meet and discuss any recommendations made in an audit of closed files. OCTC will memorialize in writing that such discussions took place. OCTC will also conduct any training for OCTC staff recommended in an audit of closes files. OCTC will also memorialize in writing that such training took place.

***RECOMMENDED POLICY FOR ADOPTION BY THE BOARD***

It is recommended that the Board adopt the following policies in order to implement the Audit Report's recommendations:

1. OCTC will develop and implement a process to assure independent random audit of closed files. All of the files for such independent audits shall be randomly selected. OCTC will also develop and implement a policy to ensure that OCTC managers will discuss, and OCTC staff will be trained on, the recommendations made by the independent auditor. The occurrence of such discussions and training will be memorialized in writing.
2. The Charter of the Regulation and Discipline Committee ("RAD") should be amended to specify that approval of RAD is required in order to implement any material changes to policy-level quality-control measures that apply to the Office of Chief Trial Counsel, the Client Security Fund, or the Office of Probation. For example, RAD approval is required before the CTC (or anyone else) can dissolve or disband the Audit and Review Unit. The Charter already specifies that RAD should "review internal and external audit reports as they relate to the Regulation and Discipline functions of the Bar and overseeing corrective actions."

## ***FURTHER STUDY BY STAFF TO IMPLEMENT RECOMMENDATION THAT THE SECOND-LOOK FUNCTION OF THE AUDIT AND REVIEW UNIT MOVE OUT OF OCTC***

Regarding the State Auditor's recommendation on independence of the second-look function of the Audit and Review Unit, staff have developed two possible solutions and plan to have further discussions with the State Auditor regarding this issue to ensure that the plan adopted is acceptable. The State Auditor has previously indicated an openness to a suitable option other than removing the second-look function from OCTC.

As explained above, the random audit function of the unit is already outsourced to an independent auditor. That leaves the second-look function, which is currently housed within OCTC.

One option for giving the unit more independence, should the State Auditor accept it, is to codify OCTC's existing practice of accepting all recommendations to re-open cases without veto. This could be accomplished by amending the Rules of Procedure to specify that the recommendations generated by the second-look team to re-open cases will be accepted and cannot be vetoed by the Chief Trial Counsel. Such a rule amendment would preserve the existing practice regarding second-look recommendations, which currently functions as a check and balance within OCTC.<sup>1</sup> This may be the easiest way to address the recommendation since the audit report does not criticize the actual functioning of the second-look unit.

The second option is to move the audit and review unit out of OCTC, possibly under the supervision of the Office of General Counsel ("OGC"). This approach would create more disruption, including the need to hire and train necessary personnel and to assure that re-opened matters moved appropriately between OGC and OCTC. This approach would also require the creation of appropriate lines of supervision in OGC given the fact that OGC currently handles Walker Petitions and Petitions to Review disciplinary decisions in the California Supreme Court. One benefit of moving the audit and review unit out of OCTC may be to free up OCTC personnel for investigations and trials. For example, a move of the current unit would allow the re-assignment of 4 FTE attorneys and .5 FTE staff to investigations and trials. The realization of this benefit is dependent on the identification of vacant funded positions in OCTC that could be transferred to OGC. Ultimately, a cost benefit analysis should be done to determine whether moving the unit is recommended given the fact that there was no criticism of the actual functioning of the existing second-look unit in the Auditor's report. In the event that the State Auditor or the Board rejects maintaining the second-look function in OCTC, OGC can absorb the function and make it work as desired.

## **FISCAL/PERSONNEL IMPACT**

Scope of impact depends on whether unit is moved out of OCTC and if so, whether vacant positions can be transferred to staff the new unit. Regardless of the financial impact, creation of a new unit would require hiring and training of necessary employees.

## **RULE AMENDMENTS**

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<sup>1</sup> While this approach does not interfere with the Chief Trial Counsel's prosecutorial discretion, it is a small incursion into her authority which, in the scheme of things, might be tolerable as compared to a reorganization.

N/A

## **BOARD BOOK IMPACT**

Tab 9, Article 4.

## **BOARD COMMITTEE RECOMMENDATIONS**

The Regulation and Discipline Committee recommends that the Board of Trustees approve the following resolution:

**RESOLVED**, that the Board of Trustees adopts the following policy to assure independent random audits of closed OCTC investigations:

The Office of the Chief Trial Counsel will develop and implement a process to assure independent random audit of closed files. All of the files for such independent audits shall be randomly selected. OCTC will also develop and implement a policy to ensure that OCTC managers will discuss, and OCTC staff will be trained on, the recommendations made by the independent auditor. The occurrence of such discussions and training will be memorialized in writing.; and it is

**FURTHER RESOLVED**, that the Board of Trustees adopts the following amendment to the Charter of the Regulation and Discipline Committee and directs staff to update the Board Book accordingly:

### **CHARTER FOR REGULATION AND DISCIPLINE COMMITTEE**

The Regulation and Discipline Committee is a performance-monitoring committee without planning responsibilities. It is accountable for monitoring the operational and financial performance of the State Bar's Regulation and Discipline functions such as monitoring the work of the Client Security Fund Administration, the State Bar Court, Discipline Enforcement, and Mandatory Fee Arbitration. The Regulation and Discipline Committee is accountable for the following functions in the area of Regulation and Discipline:

- Establish the key elements of a programmatic and financial reporting process, including the content, format, and frequency of performance reports to the Board, and overseeing implementation of the process.
- Oversee (as provided by statute: Bus. & Prof. Section 6079.5), the work of the Chief Trial Counsel, who reports to and serves under this Board committee.
- **Approve any material changes to policy-level quality-control measures that apply to the Office of Chief Trial Counsel, the Client Security Fund, or the Office of Probation.**
- Review performance reports in committee meetings and report program and financial performance to the full Board.
- Identify needed corrective actions in ongoing programs and functions that do not require revision in approved program and functional goals or changes in the approved budget, and overseeing the implementation of such actions.

- Oversee the development and implementation of State Bar operational policies as needed to guide programs and functions dealing with Regulation and Discipline, so long as these policies do not alter approved goals or result in changes in the adopted budget.
- Oversee the preparation of in-depth assessments of program/function effectiveness for presentation at the annual strategic work session.
- Present an overall assessment of the past year's fiscal and program performance at the annual strategic work session.
- Review internal and external audit reports as they relate to the Regulation and Discipline functions of the Bar and overseeing corrective actions.