

AGENDA ITEM

JULY 2017

DATE: July 7, 2017

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

FROM: Steven Moawad, Chief Trial Counsel

SUBJECT: Status Report from the Office of Chief Trial Counsel (OCTC)

BACKGROUND

By the date of the Regulation and Discipline Committee's (hereafter "RAD" or "the committee") July meeting, I will have completed just over 6 weeks in the position of Chief Trial Counsel. My primary goal during this early part of my tenure at the State Bar is to gain a better understanding of the operations required for the members of the Office of Chief Trial Counsel to carry out their necessary and important work. I have spent much of the last six weeks observing, listening, and asking questions. In order to ensure that I have as complete an understanding of operational issues as possible, I have begun interviewing a proportional cross-section of OCTC staff across both locations and all job classifications. My goal is to interview between 20 – 25% of OCTC personnel. As of today's date, I will have interviewed 21 attorneys, investigators, paralegals, clerical, and administrative staff.

I am relatively early on in my examination of both OCTC operations and associated performance data. At this point, it is fair to say I have more questions than answers. Nonetheless, my hope is that this report will identify data that show interesting trends or anomalies and suggest avenues I plan to explore to help us all more fully understand what the data might be telling us. At each meeting I hope to answer the questions raised in prior reports, and identify more issues for exploration and resolution. This report will look different than past reports submitted to this committee and will likely continue to change as we move forward together to determine the most important information I can provide to assist the committee in its oversight function.

DISCUSSION

I. IMPLEMENTATION OF WORKFORCE PLANNING TEAM STRUCTURE

As noted in the OCTC status report for the committee's May meeting, effective April 24, 2017, OCTC implemented the team structure recommended by the Workforce Planning analysis. There are eleven non-specialized Enforcement/Trial teams, a Non-Attorney Unlicensed Practice of Law team, an Appellate team, two Intake teams, and a Calibration/Training team. Each trial team is headed by a supervising attorney and includes attorneys, investigators, a paralegal, and support staff. The specialized teams have different compositions based on operational need. According to the Workforce Planning report developed by the National Center for State Courts, the new team structure, among other things, will "support the more efficient use of staffing

resources; foster staff development and broadened skill sets; reduce process hand-off delays; and accommodate the filing of various allegations within one case.”¹ In addition, the expanded role of the supervising attorney is intended to further improve the efficient handling of the cases by providing each supervising attorney with “authority to determine case and trial preparation priorities and how the team addresses those priorities” and eliminating previously required multiple levels of approval, thus increasing operational efficiency.²

Again, as noted in OCTC’s May status report to RAD, in considering the most effective way to implement the new team structure, we opted not to immediately transfer cases from one investigator to another or from one attorney to another to ensure that all cases currently in our inventory are handled within a single team. We were concerned that the transfer of cases from attorneys and investigators who already had invested a significant amount of time and effort in the case would create duplicative work and greater inefficiencies than those eliminated by handling pre-existing cases within a single team. While pre-existing cases generally remain assigned across teams, new cases are being assigned to a single team for investigation and prosecution. As a result, eventually this recommendation will be fully implemented.

We are in the very early stages of this new structure, which, coupled with the fact that most cases are still being handled across teams, makes it impossible to draw any conclusions about the extent to which these structural changes will result in an ability to expedite case filing in State Bar Court and increase the number of cases that can be handled by OCTC staff. Further, while I understand that additional funding and positions were included in the approved 2017 2017 budget for OCTC, we have not yet realized the positive impact of that augmentation due to a number of staff leaving during the Reduction In Force. This factor also complicates assessment of the impact of the new Workforce Planning team structure. As these complexities are reduced over time, I anticipate we will be able to evaluate the impact of the new team structure on OCTC output and efficiency.

In addition to a reduction in the amount of time required to investigate and file a disciplinary case, part of the ongoing assessment of these structural changes should consider the alignment of the team structure with:

- The effective prioritization of disciplinary cases that have the greatest impact on public protection.
- Ensuring sufficient staffing to allow for proper functioning of individual teams even when there are occasional departures from the Bar and rotations are required for backfilling.
- An opportunity for staff to rotate to different positions within the office to keep roles fresh, to ensure professional development, to provide an opportunity to work with different team members and supervisors, and to aid in succession planning.

II. PRELIMINARY OBSERVATIONS

As mentioned above, I have been meeting with OCTC staff in all classifications. I have been seeking their input on what OCTC is doing right, and what we can be doing better to meet our mission of public protection.

¹ Workforce Planning Report, National Center for State Courts, p. 20

² Id. at p.19.

In the coming months, some of the areas on which I would like to focus include:

A. Process improvements.

This includes efforts to further streamline our processes and eliminate redundant or unnecessary oversight and progress reporting. However, these process improvements must avoid negative downstream impacts, including failure to encourage active communication with complaining witnesses or permitting investigation or oversight that is insufficient to effectively determine the extent of attorney misconduct or to protect the public.

One area I have recently begun exploring involves reducing the time and effort involved in manually creating spreadsheets by rekeying data contained in hard copies of bank statements that are provided by banks in response to subpoenas for bank records. Spending a significant amount of staff hours on this task may be avoided by requesting Microsoft Excel or .csv files containing the monthly statement records. Further, if some institutions do not provide those records in electronic format, we can use software to read the documents through optical character recognition. We can then use specialized software to convert these “OCR’d” bank records into Microsoft Excel data.

Of course, any process changes must also prioritize consistency of application of discipline. To ensure consistency in how we pursue licensees, we have recently restarted our efforts to hire a manager for our Training and Calibration Unit. I hope to be able to report to you soon that we have filled that important position.

I am also aware that the Board has identified developing an effective approach to prioritizing cases as an early goal for the Chief Trial Counsel. I have begun to delve into the current approach for case prioritization, and will be forming a working group of talented OCTC staff to analyze the necessary questions to help develop a coherent new approach that leads to appropriate results.

B. Proactive efforts.

The public protection mission of the State Bar includes an obligation to prevent misconduct before it occurs where possible. In the process of familiarizing myself with some proactive programs utilized by other Bars and bar disciplinary offices around the country, I am developing ideas that I hope to explore with others here at the Bar. One example would be to proactively reach out to attorneys when they change their State Bar contact information from a large firm or government agency to a small or solo practice. The purpose of the communication would be to congratulate them on their new role, to alert them to common ethical issues faced by attorneys in small or solo practices, and to provide them with resources so they can prepare to meet these new challenges – such as encouraging them to review the Bar’s Client Trust Accounting handbook or to attend Client Trust Account School or Ethics School.

C. Additional Metrics.

The ability to monitor and adjust the operation of the attorney discipline system in general, and OCTC specifically, to maximize public protection requires the development of new metrics to better evaluate how we are doing our job. One data point that may be instructive will come from a new Access and Fairness survey that will be provided to

complaining witnesses. The surveys are developed by the State Bar Office of Research & Institutional Accountability, in consultation with the Office of Chief Trial Counsel.

III. MAY 2017 MONTH-END METRICS AND YEAR-TO-DATE COMPARISONS BETWEEN 2016 AND 2017

As noted in the background section, above, for this status report I have identified a few of the data points from the Discipline System Statistical Report (DSSR) dated June 2017 prepared by the Office of Research and Institutional Accountability (containing data through the end of May 2017) which seemed to point to either a trend or a possible anomaly, or some other factor that seems to warrant further exploration or explanation.

A) Caseload

The total number of closed cases (CASELOAD - Chart on upper left of page one) almost exceeded the total number of cases received during May 2017. In more potentially good news, as shown in the DISPOSITIONS charts on page one, the growth in closed cases appears to be coming from increased closures at all three stages of the lifecycle of a case.

B) Investigations Inventory

A quick glance at the Investigations Inventory graph (DSSR, page one) shows an upward trend in the total number of cases in investigation since the beginning of January. However, an examination of the same five month period in 2016 shows that this trend is consistent with last year. Interestingly, at the start of 2017, the investigations inventory exceeded the 2016 investigations inventory by more than 800 cases. By the end of May, that difference dropped to just over 400 cases. In 2016, the inventory of cases in investigation began to decline after August, and continued on that trajectory through the end of the 2016 calendar year. Whether we can anticipate similar results in 2017 is unknown, but may be affected by several factors.

- In 2016, OCTC offered overtime to much of its investigative staff beginning in August and continuing through the end of the year. That coincides with the downward trend in the investigations inventory in 2016. A similar offering in 2017 might yield the same results. It should be noted, however, that the use of overtime is a short-term solution. If additional staff hours have an impact on the investigations inventory, then, once process improvements have been wrung out of the system, it may be appropriate to consider increasing staffing levels.
- Until recently, OCTC was recruiting for 12 investigators to fill previously filled positions. Four investigators began on July 3; nine positions are still vacant and being recruited. It may be that OCTC has fewer investigator resources at its disposal in 2017 than in 2016. Thus even if overtime opportunities are provided to the same extent they were in 2016, the inventory may continue to exceed that of 2016. I will be conducting an assessment of OCTC resources over the last few years and hope to be able to provide more information on this issue at an upcoming meeting.
- The decreasing size of the gap between the 2017 and 2016 inventories, despite the number of vacant positions, could be attributable to a number of factors, including the following:

- In 2016, additional investigator resources were hired for the San Francisco office. Those investigators carried reduced caseloads for a time while they developed the knowledge of the discipline system and the OCTC investigative processes. Those investigators now appear to carry a full caseload.
- In 2017, OCTC has offered 3 short periods of overtime for investigators. Those periods of overtime may have allowed investigators to resolve cases at a more rapid rate than during the same period in 2016.

C) Length of Investigations.

The line graph in the middle of the top of page two of the DSSR shows the number of days a case is in the investigation phase. This graph seems to show a sharp increase in both the median and average length of investigations in the last couple of months: the average number of days starts at 159 in January 2017, and jumps considerably each month thereafter, to an average of 318 days in May 2017. The median number of days also increases from January (146 days) to May (273 days), but its climb is less steady, showing the majority of its increase from April to May.

It should be noted however, that this statistic may be somewhat misleading. This statistic actually shows the average or median length of time a case was in the investigation phase, but only includes cases that were forwarded to the pre-filing phase or closed during that month. This means that if OCTC staff focuses on closing the oldest cases first, the average and median Days from Investigation to Pre-filing will increase. For example, an investigator has a significant number of old cases that have been abated for a year because disbarment of the licensee was anticipated in another case. If, instead of disbarment, the licensee receives a two-year actual suspension in the pending case, the abated cases will be unabated, those investigations will be completed, and the cases will then be forwarded to pre-filing. In that case, the average number of days from investigation to pre-filing would increase due to the age of the cases forwarded. I am in ongoing discussions with Dag MacLeod and other ORIA members to determine whether a better metric would be average case age and whether the existing data would allow calculation of that metric.

D) Length of the Pre-Filing Phase.

A similar analysis can be done about the Days from Pre-filing to SBC phase (see line graph on the right at the top of page two). Again, the pre-filing inventory in 2017 is higher than the inventory in 2016 (299 as of May 2017 compared to 233 as of May 2016). In 2016, the average number of days a case is in the pre-filing phase before it is filed in State Bar Court decreases from January (99 days) through March (77 days), with the median increasing first then decreasing. The average increases in April (126 days) and then decreases to 119 days in May. In 2017, the average number of days increases from 95 in January to 142 in May, with a slight dip in April. By the end of May, the median has doubled from January. The same questions about the efficacy of this data point exist as about the length of the investigation process, discussed above.

E) Inflow, Outflow and Backlog

The number of complaints received by OCTC remained relatively steady, with 6,198 complaints received as of the end of May 2017, compared to 6,293 complaints for the same period in 2016 (a 1.5% decline.) The backlog at the end of January 2017 (1562) was slightly higher than the

backlog at the same time in 2016 (1494). In addition, the rate of backlog growth is higher so far in 2017, with a total backlog of 1808 as of the end of May (compared with a total backlog of 1659 as of the end of May 2016). In 2016, OCTC's backlog at the end of the year ended roughly where it started.

Over the next several months, as part of our continuing efforts to make process improvements and take proactive steps, I plan to explore the trends and anomalies discussed above, and will provide updates as part of my regular status reports to RAD. I also believe the workload assessment that ORIA will conduct will ultimately provide us with useful, empirical data about the numbers of staff required to effectively manage OCTC's caseload.

ATTACHMENT LIST

- A. OCTC sections of The State Bar of California Discipline System Statistical Report, June 2017. Produced for the Committee on Regulation and Discipline by the Office of Research & Institutional Accountability.
- B. Draft Access & Fairness Surveys. Produced by the Office of Research & Institutional Accountability.