

OPEN SESSION AGENDA ITEM

54-121 MARCH 2018

REGULATION AND DISCIPLINE COMMITTEE III.B.

DATE: March 9, 2018

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

FROM: Steven Moawad, Chief Trial Counsel, Office of Chief Trial Counsel

SUBJECT: Office Of Chief Trial Counsel Case Prioritization [MAR 54-121]

EXECUTIVE SUMMARY

The Office of Chief Trial Counsel seeks the approval of the Regulation and Discipline Committee and the Board of Trustees to implement a case prioritization system that applies different processes to different categories of cases so that resources can be devoted to those cases that present the greatest risk to the public.

This item requests that the Regulation and Discipline Committee and the Board of Trustees approve the implementation of a case prioritization system for use in the Office of Chief Trial Counsel.

BACKGROUND

Public protection is the highest priority of the Office of Chief Trial Counsel (OCTC) (Bus. & Prof. Code, § 6001.1). OCTC also acknowledges the statutorily-defined aspirational goal of completing matters within six-months of receiving a complaint. (Bus. & Prof. Code, §§ 6094.5, 6140.2).

The number of cases in statutorily-defined backlog can be an important indication of case processing effectiveness, and if OCTC does not efficiently process the large number of grievances received, that may be an indication that we are not achieving the mission of protecting the public. However, placing undue emphasis on the backlog figure, or any other single statistic, as a measure of success can lead to focus on that measure to the exclusion of all other things. For example, if the emphasis is placed exclusively on the number of matters in backlog, then the cases in backlog, or those in danger of falling into the backlog, are always worked first, regardless of whether or not those respondents represent the most significant threat to the public.

By statute, whenever the protection of the public is inconsistent with other goals, the protection of the public shall be paramount. (Bus. & Prof. Code, § 6001.1). Therefore, OCTC has developed a prioritization system to: (1) prioritize those matters that put clients and the public at

the most significant risk, and (2) endeavor to address as many allegations of misconduct as quickly, completely, and competently as possible.

Before March 2016, OCTC utilized three different treatments of grievances. Once an Intake deputy reviewed an inquiry or reportable action, it was classified as one of the following: 1) a matter to be forwarded to Enforcement, 2) a "closer," or 3) a "worker." Grievances were sent to Enforcement when they appeared to merit further investigation or prosecution and appeared likely to result in the imposition of discipline by the State Bar Court. Closers were cases in which the grievances did not raise viable allegations of misconduct. "Worker" files included: 1) allegations of misconduct that contained insufficient information to ascertain whether a colorable violation existed and therefore required further information, 2) matters which would likely result in non-disciplinary actions, such as the issuance of a warning letter or a resource letter, and 3) matters which the Intake attorneys, based on their experience, determined would likely close after receiving a response from the respondent attorney.

Before March 2016, the limited investigation work required on a "worker" file was performed by the Intake attorney or by Complaint Analyst IIs assigned to the Worker Team in the Intake Unit. These "workers" were only forwarded to Enforcement if the Worker Team determined that the inquiry should not be closed based on the response of the respondent, the additional information received demonstrated that a colorable violation existed, or if non-disciplinary actions were not appropriate to resolve the case. The worker team model was not ideal because in many inquiries, pursuing additional investigation took a significant amount of time and a therefore a number of cases were already in backlog by the time the inquiries were transferred to Enforcement.

For this reason, in March 2016, the Worker Team was transferred from Intake to Enforcement. Thereafter, matters that were previously deemed to be "worker" files were required to comply with the requirements of an Enforcement investigation, including the development of an investigation plan, etc. The application of the investigation standards reserved for the Enforcement Unit to "worker" matters significantly slowed the determination of whether these matters should be closed or investigated further. The increased processing time to complete what used to be "worker" cases increased the Enforcement Unit caseload. The high caseload limits the investigators' ability to communicate effectively with the large number of complaining witnesses to which they are assigned. The large caseload is also one factor that prevents the investigators from conducting more thorough investigations of their cases.

DISCUSSION

Current Case Prioritization System

The current system identifies three priority levels based largely on the potential length of discipline that could result from the allegation of misconduct. Matters designated E1, or high priority, are where: 1) the attorney will potentially receive an actual suspension of at least two years, 2) the attorney's conduct in question potentially subjects the public, the courts, the administration of justice, or the legal profession to substantial harm, or 3) the attorney's conduct in question may significantly undermine the confidence of the public in the legal profession. Matters categorized as E2 or middle priority, are where a stayed suspension, or an actual suspension of fewer than two years, is the likely result. Matters where the likely result is a public or private reproof or may warrant an alternative to discipline, are designated E3.

The current case prioritization system is ineffective and operates as no more than a case labeling system. Despite the use of “priority codes,” the only real difference in the way that cases are handled is that a Deputy Trial Counsel is not normally assigned an E1 case without a Senior Trial Counsel as co-counsel. The lack of difference between the way that cases of different priorities are handled means that the same process is applied to matters in different priority codes and that the system does not prioritize the investigation of one matters over another. The lack of clear processing rules to prioritize higher level matters, combined with the heightened focus on the number of matters in backlog means that inquiries and complaints in backlog, or those in danger of falling into the backlog, are worked first, regardless of priority.

New Case Prioritization System

To focus on the highest priority of the State Bar, protection of the public, we set out to create a case prioritization system centered on public protection. Unlike the current system, we opted to define the criteria for the priority levels based largely on the underlying conduct rather than the potential length of discipline. We did this for several reasons. First, there are some allegations of misconduct that can cause significant harm to the client, but the presumed length of discipline provided in the Standards for Attorney Sanctions for Professional Misconduct does not include an actual suspension of at least two years. For instance, failure to return a file could significantly harm a client’s case even though the resulting length of discipline is less than two years. Second, there are some allegations of misconduct that, while the presumed length of discipline does not include an actual suspension of at least two years, the misconduct will cause future harm that could be avoided or mitigated by State Bar action. Finally, while this may also be true of some conduct-based criteria, the length of discipline may be difficult to predict at Intake, before any real investigation occurs.

A few touchstones instruct our proposal of the case prioritization system:

- 1) We must acknowledge that by placing priority on one thing, we necessarily reduce the priority of another. For example, if a priority system is not based entirely on the age of a inquiry or complaint, the emphasis on minimizing the number of matters in backlog is necessarily reduced.
- 2) We cannot effectively prioritize 75% of our matters. As a result, we have attempted to select attorney misconduct that would classify five to ten percent of our caseload for priority (P1) treatment. Of course, the criteria used to identify the different priorities levels will have to be reevaluated on a regular basis to ensure the system continues to operate efficiently.
- 3) The case prioritization system must be flexible enough to address trends in attorney misconduct and be susceptible to quick revision as operational needs require.
- 4) In general, a high priority matter should be investigated to a greater extent than a lower priority matter. Conversely, we should not expend the same resources on a low priority matter that we do on a high priority matter. Therefore, the case prioritization system eliminates unnecessary work requirements for lower priority matters with an eye towards a reduction in caseload. We seek to eliminate all tasks that are not necessary to investigate and prosecute lower priority matters while still protecting the public.

Expedited Category Explained

The Expedited category (“P2”) consists of matters that previously fell into the “worker” file category, matters that are potentially subject to a rapid determination of whether they can be filed or closed, and matters that require immediate attention but do not rise to the same level of risk to public protection as complaints in the Priority One category. The intent of the expedited priority code and the case prioritization system overall is to eliminate unnecessary process, not

to reduce the quality of work. As a result, a key focus of the case prioritization system is to ensure the active involvement of trial counsel in the investigations as early as possible.

Some experienced trial counsel will be assigned to act as expeditors. They will be dedicated to the identification of both new matters and matters in an investigator's existing caseload that can be resolved easily either by filing or closing. Expeditors will work with the investigator to resolve those matters quickly. Expeditors will proactively communicate with investigators on their team and review assigned matters to identify those that fit the criteria for expedited processing. Once identified, the expeditor will work with the investigators on their team to identify specific tasks that are necessary to determine if the matters can be resolved. The expeditor will also be empowered, and encouraged, to waive unnecessary processes when appropriate. For example, in many lower priority investigations, an Investigative Plan is unnecessary because the investigation is standard or straight-forward.

Of course, the selection of the expeditor is important. Expeditors must have a significant amount of trial experience and solid judgment so the expeditor can quickly and correctly identify both the issues that would prevent a case from being filed and those gaps in evidence that must be resolved so the matter can be filed. Expeditors should be proactive, decisive, familiar with our internal processes, and comfortable waiving unnecessary aspects of an investigation. Expeditors and investigators must frequently communicate regarding reevaluation of the viability of the case, modification of necessary tasks, and determining whether the matter continues to fit the expedited criteria. The expeditor and investigator must work together to ensure that the only tasks performed during an investigation are those necessary for deciding whether the case can be filed and if the case is to be filed, to get it ready for filing.

The benefit of expedited processing for these matters is that it allows us to dedicate resources to complaints that involve the greatest threat to the public and work to remove any and all unnecessary tasks on those matters that do not represent a significant threat to the public. The change in process under the priority code system will allow us to reallocate resources to their highest and best use. For example, investigators currently spend a significant amount of time drafting closing letters. While having investigators draft closing letters may be appropriate for expedited matters, it may be more appropriate to have trial counsel draft the closing letter if a higher priority case is closed. Reassigning this task from the investigator to the attorney will allow the investigator to devote that time to the investigation of other matters.

Potential Changes

OCTC has sought and will continue to seek input from various stakeholders. The system must be regularly reevaluated to accommodate changing trends in attorney misconduct and operational efficiency. Further, we will need to perform ongoing evaluation of the impact of the system. We will utilize the new case management system to "tag" cases with priority codes and monitor case processing times for each priority category.

The Office of Chief Trial Counsel receives a large number of pro forma grievances alleging ineffective assistance of counsel. These grievances are frequently filed as a procedural requirement for, or in support of, a petition for relief in another forum. We will need to monitor the number of these grievances that qualify for Priority One treatment. If these grievances increase the number of Priority One cases beyond what the office can effectively accommodate, we will have to include additional requirements to qualify for Priority One treatment, such as, requiring that the grievance include, at a minimum, a credible allegation that the attorney abandoned the client, failed to communicate, failed to appear, etc.

We will likely continue to wordsmith the “All matters wherein the respondent has three or more open grievances or a current grievance and a history that includes five or more closed grievances within the past two years involving similar allegations, but those grievances do not rise to the level of the Priority One category” criterion. This criterion is meant to address a situation where despite the fact that there are multiple grievances that do not fit into the Priority One category, the sheer number of grievances, including reports of performance issues (e.g., communication, failure to appear in court, failure to file documents) and Reportable Actions (e.g., bounced checks in a Client Trust Account, etc.) lead us to believe that the licensee’s conduct needs to be looked into quickly either because there may be something more serious going on or because an investigation may prevent future harm from occurring. The intent here is to expedite the investigation to determine whether the matter belongs in Priority One.

We may also specifically list, in either the Priority One or Expedited category, that the attorney has failed to make multiple court appearances in the same case. While this may be a sign of a serious issue, it was not included as a Priority One matter because we are concerned that this will increase the number of Priority One cases beyond what we can effectively prioritize. Further, like the multiple grievances involving similar allegations discussed above, this type of conduct may be more appropriate for Expedited treatment. The goal would be to investigate quickly to determine if there is something more serious going on. We will then be better prepared to evaluate whether the matter belongs in Priority One or should remain in the Expedited category.

Special Considerations

The case prioritization criteria must be sufficiently flexible to address trends in attorney misconduct and be susceptible to quick revision as operational needs require. As such, OCTC is seeking approval of the concept of a case prioritization system that applies different processes to different case priorities. OCTC is not requesting the Board adopt specific case prioritization criteria.

OCTC is bringing this item to you because the 2015 State Audit Report determined that the State Bar “should take steps to prevent its management or staff from circumventing [quality control] processes, such as requiring the presentation to the board of any proposed changes in quality control.” Cal. State Auditor, Rep. 2015-030, June 2015, p. 40. As part of case prioritization, we intend to make procedural changes to the way we handle cases that will allow us to focus our time, energy, and resources on those cases that have the greatest impact on public protection. We intend to reduce the resources required to process lower priority cases. However, the case prioritization system is not intended to reduce the quality of investigations or prosecutions. Instead, this change will allow us to refocus our resources on cases that present the greatest risk to the public.

Planned Implementation

If approved by the Board, OCTC will issue a policy directive detailing and implementing the prioritization system shortly thereafter. At this point, OCTC plans a staged implementation, including devoting the six newly budgeted positions (three attorneys and three investigators) to the Expeditor program. Additional staff will be utilized when possible. Full benefits of the case prioritization system might not be realized until OCTC can staff Expeditor and expediting investigator positions in addition to the six newly funded positions.

System Evaluation

As mentioned above, the case prioritization system will be subjected to regular reevaluation. We will need to ensure that the case prioritization criteria are tailored to protect the public. We will also need to ensure that criteria divide the cases into categories that are not so large as to be operationally unsustainable. Further, two measures of success will be: 1) a reduction in caseloads, and 2) comparatively fewer high priority cases in backlog. To determine the potential impact of prioritization system based on public safety, we will need to analyze the nature of the case in backlog as of December 2017. Given the previous focus on backlog, OCTC culture has been focused largely on resolving cases as quickly as possible and not focused on investigating high priority cases even when several lower priority cases may be in danger of falling into the statutorily defined backlog. We will need to compare whether there is a decrease in high priority cases in backlog year-over-year as a result of additional focus on cases impacting the protection of the public and a reallocation of resources to high priority cases.

FISCAL/PERSONNEL IMPACT

OCTC was given six additional positions in the current budget. These positions were for general purposes and to deal with issues from re-fingerprinting active attorneys. Until additional staff is required to deal with unreported convictions learned about through fingerprinting, OCTC will devote all of these newly budgeted positions to the Expeditor program. In the future, we may require additional personnel to expand the Expeditor program.

RULE AMENDMENTS

Rule amendments are not required to implement the prioritization system, but current and future proposed rule amendments, like the proposed amendments to Rule of Procedure 2409(a) and Rule of Procedure 5.104 will impact the ability to streamline process.

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: Develop and implement transparent and accurate reporting and tracking of the health and efficacy of the discipline system, to include: a) completion of a workload study for the Office of Chief Trial Counsel, and the State Bar Court; b) identification of staffing and resource needs based on the results of that study; and c) development of new metrics for measuring the effectiveness of the discipline system including any needed revisions to the statutory backlog metric.

RECOMMENDATION

It is recommended that the Regulation and Discipline Committee and Board of Trustees approve the following resolution:

RESOLVED, that the Office of Chief Trial Counsel is authorized to implement a case prioritization system that applies different processes to different categories of cases so

that resources can be devoted to those cases that present the greatest risk to the public; and it is

FURTHER RESOLVED, the Office of Chief Trial Counsel will provide regular reports to the Board Regulation and Discipline Committee on the progress and performance of the case prioritization system

ATTACHMENT(S) LIST

A. Example of Case Prioritization Criteria

Attachment A

Priority	Criteria
Priority One P1	<p><u>Significant, Ongoing, or Serious Potential Harm to the Public</u></p> <ol style="list-style-type: none"> Respondent has prior discipline that includes an actual suspension and the current alleged misconduct has caused either significant or continuing harm, or the misconduct will cause future harm. Respondent has been disbarred, has been reinstated, and has committed new disciplinable misconduct (i.e., the current alleged misconduct is more than a low level ethical violation that is not likely to recur or is unlikely to result in discipline). Respondent, whether from a Client Trust Account or any other source, has: a) intentionally misappropriated funds, regardless of the amount, b) misappropriated \$25,000 or more, or c) misappropriated funds and has not paid restitution. This criterion does not include mishandling through mere inadvertence (i.e., conduct that does not demonstrate intentional or grossly negligent appropriation). Respondent has committed misconduct against a vulnerable victim, including but not limited to aged, incapacitated, infirm, disabled, incarcerated, immigrant persons, or minors, and the misconduct has adversely affected the victim or the outcome of the matter (e.g., loss of rights or remedies), resulted in serious harm, or the misconduct was committed against three or more vulnerable victims. Respondent has entered into a business transaction with a client or acquired a pecuniary interest that is adverse to the client, and the client was significantly harmed (e.g., money, equity, or rights belonging to the client improperly came under, and remains under, the control of the respondent, the conflict has led to the abandonment of the client or a failure to abide by the client's lawful direction, etc.). <p><u>Abandonment</u></p> <ol style="list-style-type: none"> Respondent has abandoned three or more unrelated clients and either: a) is not cooperating with State Bar investigations, b) has not refunded unearned fees, or c) has not returned a client file. Respondent has failed to return a client file following a request from the State Bar to return the file and the matter is one where time is of the essence, for example, claims may become time-barred by a statute of limitations, the case is currently pending, or there are pending appeal rights. Respondent has abandoned his or her law practice. <p><u>Abusive and/or Frivolous Litigants</u></p> <ol style="list-style-type: none"> Respondent has been judicially sanctioned for engaging in abusive or frivolous litigation and either: (a) respondent has engaged in a pattern of misconduct or (b) respondent is continuing to engage in abusive or frivolous litigation. <p><u>Unauthorized Practice of Law</u></p> <ol style="list-style-type: none"> Respondent has engaged in the unauthorized practice of law and either: (a) has caused harm to two or more unrelated victims, (b) has not returned illegal or unearned fees to two or more unrelated victims, or (c) has caused harm to a vulnerable victim, including but not limited to aged, incapacitated, infirm, disabled, incarcerated, immigrant persons, or minors. Respondent has aided and abetted the unauthorized practice of law by abdicating control of his law practice to non-lawyers, resulting in client harm. <p><u>Management Discretion</u></p> <ol style="list-style-type: none"> Other cases wherein management and/or a Supervising Attorney, in his or her discretion, concludes that respondent has caused serious harm; concludes that respondent has engaged in intentional ethical violations; or otherwise concludes the matter is appropriate for Priority One treatment. <p>Except for criterion 10, regarding the unauthorized practice of law, above, we will not designate a case Priority One unless the respondent is on active status or will be able to return to active status within one year.</p>

Attachment A

Expedited P2	<p>Matters included:</p> <ol style="list-style-type: none">1. All matters wherein an Expeditor or Intake Unit attorney, based on his or her experience, determines will likely close with a response from the respondent attorney.2. All files that an Expeditor or Intake Unit attorney, based on his or her experience, believes contain insufficient information to determine whether a colorable charge exists and therefore requires further work, such as calling a complaining witness to obtain certain documents, before a trial counsel can make an informed decision about the need for further investigation.3. All matters wherein a colorable charge exists but an Expeditor or Intake Unit attorney, based on his or her experience, determines that the matter will likely result in non-disciplinary actions, such as the issuance of warning letters or resource letters.4. All non-Priority One matters wherein an Expeditor or Intake Unit attorney, based on his or her experience, determines that the matter can be resolved within 60 days of assignment.5. All matters wherein the respondent has three or more open grievances or a current grievance and a history that includes five or more closed grievances within the past two years involving similar allegations, but those grievances do not rise to the level of the Priority One category.6. Other matters wherein management and/or a Supervising Attorney, in his or her discretion, concludes the matter is appropriate for expedited treatment.
Standard P3	<p>All matters that do not fall into a different priority code.</p>