



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM NOVEMBER 2021 REGULATION AND DISCIPLINE COMMITTEE III.F**

**DATE:** November 18, 2021

**TO:** Members, Regulation and Discipline Committee

**FROM:** George Cardona, Chief Trial Counsel

**SUBJECT:** Overview of Twice-Yearly Random Audit of Office of Chief Trial Counsel Closed Cases and Office of Chief Trial Counsel Response

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### **EXECUTIVE SUMMARY**

This informational item relates to the twice-yearly random audit of cases closed by the Office of Chief Trial Counsel (OCTC), and OCTC's response to the random audit of files closed during the period of September 1, 2019, through February 29, 2020.

OCTC policy directives require an audit twice each year of randomly selected closed files from a six-month audit period, either March 1 through August 31 or September 1 through the end of the following February. The purpose of the audit is to ensure that actions taken by OCTC are appropriate and consistent with the office's standing procedures and policies, and that the substantive decisions of the office are within the acceptable range of prosecutorial discretion and comply with statutory provisions and case law precedent.

On June 7, 2021, OCTC received the report of the audit for files from the period of September 1, 2019, through February 29, 2020, which includes recommendations for training to improve OCTC's effectiveness.<sup>1</sup> OCTC agrees with many of the recommendations and issues noted by the auditor about the handling of certain files and will take corrective action. In particular,

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<sup>1</sup> Attachment A is an executive summary of the audit report prepared by the auditor, without its referenced appendices. The audit report itself is confidential because, as the auditor notes, "it includes information pertaining to employee performance issues as well as information identifying the names of California attorneys who, in most instances, have not been the subject of public disciplinary proceedings on the matters referenced" in the audit report.

OCTC has reopened the eight cases recommended for reopening by the audit. And, based on audit recommendations, OCTC is revising its policy directives relating to the random audit. There are, however, certain areas where OCTC disagrees with the audit's findings. As explained in more detail below, in some cases, the audit makes conclusory findings about OCTC's motives in handling certain cases that we believe are without factual support. Further, with respect to some of the more serious allegations involving duplicative charging and inappropriate evaluations of cases, we disagree with the findings, which we believe are inconsistent with caselaw.

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## **BACKGROUND**

Effective October 2000, OCTC established procedures for systematic random review of closed cases. Originally, the random review was conducted by team leaders and Assistant Chief Trial Counsel, with the results compiled into a summary report by a Deputy Chief Trial Counsel. In 2006, following the re-establishment of OCTC's Audit and Review Unit, that unit assumed responsibility for the review, with its results compiled into a summary report by the OCTC Special Assistant. In 2012, to ensure the independence of the audit process, a non-employee outside counsel was retained to conduct the audit and prepare the summary audit report. Since 2006, the procedures have required that the summary report be provided to the OCTC management team for review and identification of training issues, policy issues, and corrective action, if any. In 2010, in response to 2009 recommendations by the State Auditor, OCTC established a formal process for management to follow up on and ensure implementation of recommendations from the semi-annual audits. This year, for the first time, to increase transparency and enable additional oversight by RAD, summaries of the most recent audit report and OCTC's response to that audit report are being provided to RAD.

A minimum of 250 files are chosen for each audit consisting of approximately 100 files closed at the intake level, approximately 100 files closed or otherwise resolved at the investigation stage, and approximately 50 files completed at the prefiling or trial level by closure or other non-disciplinary resolution before filing the case with the State Bar Court or disposition before or after trial before the court.

Each file is evaluated on numerous criteria including: whether file closing procedures were followed; documentation was completed accurately and appropriately for the particular file; and actions taken were consistent with applicable case law, charging standards, and office policies and procedures. Based on evaluation of the audited files, the auditor identifies training issues, policy issues, and corrective action, if any. In assessing whether corrective action is required, the auditor determines whether or not to recommend the reopening of any files that were closed without the imposition of any discipline due to an identified deficiency in the work performed bearing on the final case disposition.

The policy directives relating to procedures for the random audit were last updated in 2006. The auditor made recommendations related to updating the directives. OCTC agrees with this recommendation and is revising its policy directives as explained below.

## DISCUSSION

The auditor's primary recommendations from the audit of files closed during the period of September 1, 2019, through February 29, 2020, and OCTC's responses, are as follows:

### RECOMMENDATIONS TO REOPEN EIGHT FILES

One of the benchmarks for OCTC's performance is the number of files that the auditor recommends be reopened. The auditor determines whether to recommend the reopening of any files due to an identified deficiency in the work performed that bears on the outcome of the case disposition. The auditor's recommendation to reopen eight files (3.1 percent of total files audited) is similar to the last four audits, in which nine, eight, 12, and 10 (3.6 percent of total) files were recommended for reopening. That the auditor recommended reopening only eight out of 251 files suggests that overall OCTC staff are appropriately resolving cases. As in prior audits, the auditor commended OCTC and stated that these "numbers indicate that while numerous errors are identified in each audit, a very small percentage have consistently required reopening. This reflects positively on the overall professionalism and quality of the work performed by OCTC."

OCTC reviews the auditor's recommendations for reopening and makes final determinations whether the cases will be reopened. OCTC will reopen a case based on the auditor's recommendation unless it is determined that the recommendation is clearly erroneous as to whether there is new material evidence or good cause to reopen the matter. For these purposes, good cause to reopen includes but is not limited to: (1) a substantial departure from the Standards Governing Attorney Sanctions for Professional Misconduct, statutory provisions, OCTC practices or policies, or case law precedent; or (2) a clear error of judgment outside the acceptable range of prosecutorial discretion.<sup>2</sup> OCTC has reviewed the eight files recommended for reopening by the auditor using this standard and reopened those files for additional investigation or action.

One of the eight cases identified for possible reopening (file 85) was closed due to the complainant's failure to cooperate with OCTC. As noted by the auditor for other files (files 8, 14, 15, 21, 22, 24, 26, 33, 39–41, 43, 58, 65, 69, 75, 82, 84, 154), it is within OCTC's discretion to close a file when the complaining witness does not respond to a request for additional needed information within a reasonable amount of time. For this file, however, the auditor notes that it involved "a Spanish speaking CW who stated on the complaint form that he needed communications translated into Spanish. While the acknowledgement of receipt of complaint letter was translated into Spanish, neither the request for additional information nor the closing letter were in Spanish. Therefore, it is unclear whether or not CW did knowingly fail to cooperate with the State Bar due to this error." OCTC will take steps, including additional

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<sup>2</sup> This is a standard that has been used in practice for several years but is not codified in OCTC's policy directives. Thus, along with other revisions to the directives, OCTC is incorporating a standard for review of recommendations to reopen.

training, to ensure that Spanish-speaking complainants (CWs) are provided with all necessary communications in Spanish.<sup>3</sup>

Another case (file 23) was also closed due to CW's failure to cooperate and provide additional information. The case involved serious alleged misconduct (failure to serve the CW, obtaining a default judgment on a time-barred matter, and then executing the judgment by levying on CW's bank account). The auditor recommends that this case be reopened both to consider late information provided by CW after the date requested and "because staff failed to realize that there was sufficient information already provided to warrant investigation." OCTC reviewed the file, including the additional information provided by CW, and reopened for additional investigation or action.

Another example of a recommendation to reopen (file 111) involved the auditor's determination that the file "was closed without interviewing CW's current attorney who could have resolved certain factual discrepancies," "failing to obtain any documentation from Respondent to substantiate his claims that he had performed legal services for the client and earned the attorney fees," and "without sufficient efforts made to contact a witness who would have either confirmed or contradicted Respondent's version of the facts." OCTC reviewed the file and reopened for additional investigation or action.

The auditor recommends reopening the other five files based in part on alleged failures to recognize or follow up on additional bases for culpability, including "allegations raised by a fee arbitration panel regarding excessive billings" (file 112), a potentially improper threat to file administrative actions absent settlement of a potential civil lawsuit (file 132), billing on an hourly basis but using fee agreement language "claiming it is a nonrefundable true retainer" despite not meeting the criteria (file 151), respondent's possible "abandonment of the client" (file 177), and "a possible trust account violation" (file 194). OCTC reviewed these files and reopened them for further investigation of the additional bases for liability.

## **DUPLICATIVE OVERCHARGING/IMPROPER EVALUATION OF CASES**

In files 221, 228, 232, 243, and 252, the auditor concludes that OCTC did not properly evaluate the cases and overcharged respondents, including bringing duplicative charges, to seek excessive discipline. OCTC strongly disagrees with the auditor's conclusions.

On occasion, the Hearing Department of the State Bar Court may dismiss some charges as duplicative. The Review Department, however, has found that charges that are duplicative or overlap are appropriate, with the understanding that no additional weight is given to those charges for purposes of discipline. For example, in *In the Matter of Hubbard*, case number 16-O-10871 and 16-O-14863 (May 13, 2020), the hearing judge recommended a one-year actual suspension finding respondent culpable of three counts of moral turpitude; six other counts were dismissed as duplicative, and one other count was dismissed on the merits. On appeal,

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<sup>3</sup> The auditor also recommends file 85 be reopened because "the CW complained that Respondent had failed to provide him with copies of papers from the file and this allegation was missed by staff." OCTC reviewed file 85 for reopening on this basis as well. As noted above, OCTC reopened file 85 in accordance with the auditor's recommendation.

the Review Department found respondent culpable of all 10 counts and affirmed the disciplinary recommendation. In resurrecting the six dismissed duplicative counts, the Review Department held that where the same facts prove more than one act of professional misconduct, it is proper to find culpability on all counts but give no additional disciplinary weight to the duplicative findings. The court made clear: “[A]n attorney should be found culpable for all misconduct committed, in order to maintain both the highest professional standards and the public’s confidence in the legal profession.” See also *In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520 [dismissal of duplicative charge not appropriate, but no additional weight assigned for disciplinary analysis].

Recent State Bar Court Review Department caselaw, therefore, establishes that OCTC may properly charge duplicative or overlapping counts and not only may, but has an obligation to, pursue alternate theories of culpability to ensure that there is a determination regarding the full scope of misconduct committed, with the understanding that the State Bar Court will not give additional disciplinary weight to duplicative findings. Under this caselaw, for the reasons discussed below, OCTC believes its charging decisions in these four cases were proper.

In file 221, the auditor writes, “the court noted that ‘three of the four counts are duplicative’ by alleging the same facts resulting in violations of Rule of Professional Conduct 4-100(A) and B&P §§6106 and 6068(a). In the court’s determination, they were considered a single count for purposes of assessing the appropriate level of discipline. Staff should avoid such overcharging.” This is not OCTC “overcharging.” Rather, this is an example of both alternative-theory and lesser-included charging—analogueous to such charging in criminal cases. That is, a respondent can be culpable of failing to maintain funds (4-100(A)) but not misappropriation (6106) depending on the proven facts and the *mens rea*. But, if a respondent is found culpable of misappropriation, the respondent will always be culpable of the lesser-included failure to maintain funds. Regardless, the level of discipline will only be determined by the most serious offense for which the respondent is culpable, and no additional discipline will be imposed if culpability is found on both of the two counts.

In file 228, the auditor asserts that the initial charges filed against respondent were “double charging.” OCTC disagrees. Two separate complaining witnesses complained against respondent, and while their complaints related to the same civil action, respondent owed separate duties to both. Thus, two charges were appropriate. Ultimately, after further consultation with the State Bar Court and additional inquiry, OCTC moved to dismiss the notice of disciplinary charges (NDC) and instead, issued a resource letter that the auditor appears to agree was an appropriate result. The audit identifies other issues with this file, and OCTC agrees that the matter could have been handled more expeditiously. With the assistance of the court, however, the parties reached an appropriate conclusion to the matter.

In file 232, the auditor criticizes a draft NDC in which OCTC included violations of both rule 3-110(A), Failure to Perform, and rule 3-700, Improper Withdrawal, concluding this was an example of “overcharging.” For the reasons stated above, the Review Department has affirmed OCTC’s charging of duplicative or alternative counts as appropriate and necessary for purposes of attorney discipline. The elements of each rule violation are different and after trial, depending on the proven facts, a respondent could be found culpable of one or both of the

violations, again, with the understanding that if found culpable of both, the State Bar Court could determine that no additional discipline was warranted on one or the other. Thus, OCTC disagrees with the auditor's conclusions.<sup>4</sup>

In file 243, the auditor criticizes OCTC's handling of a case (duplicative charges, improper evaluation of case), noting that at trial the Hearing Department "dismissed seven of the nine counts due to the fact that three counts were duplicative of Count 1 and OCTC did not meet its burden of proof in four counts." For the reasons stated above in *Moriarty* and *Hubbard*, OCTC disagrees with the auditor's conclusion that OCTC erred by charging duplicative counts. Further, the auditor's assertion that OCTC did not properly evaluate the case because it asked for disbarment is objectively incorrect. As the Hearing Department decision in file 243 noted, the applicable standard for imposing discipline was 1.8(b), under which disbarment is the presumed and appropriate discipline. That is because this matter was respondent's third discipline. His first discipline involved misconduct in four client matters including failing to perform and trust accounting violations. His second discipline involved both misconduct in a client matter and a criminal conviction matter and resulted in a six-month actual suspension. Ultimately, after trial, the Hearing Department found respondent culpable of failing to obey an order issued by the California Supreme Court and making a grossly negligent misrepresentation, but it elected to deviate from the standard and recommended a one-year actual suspension. This outcome does not mean OCTC's evaluation of the case was inappropriate, especially given the applicable standard and significant disciplinary history. The Hearing Department, after evaluating the evidence and all the factors, has discretion to deviate from the standards if it determines it appropriate to do so. The Hearing Department's exercise of this discretion does not render inappropriate OCTC's prior decision to seek discipline in accordance with the applicable standard.

Similarly, with file 252, the auditor concludes that OCTC filed duplicative charges based on slightly different facts and labels it "overcharging." Again, OCTC has discretion to allege different theories of culpability. Pursuant to caselaw, where the court finds duplication, the appropriate resolution is not to dismiss a count but rather to not give any additional weight to it when considering the level of discipline. Regardless, that the court ultimately did not find culpability on each count does not mean OCTC "overcharged."

#### **DEFAULT DISBARMENTS/IMPROPER EVALUATION OF CASES**

The auditor concludes that OCTC engaged in the erroneous prosecution of two cases through default disbarments. OCTC does not agree that either of the prosecutions was overzealous or erroneous.

Attorneys are obligated to respond to OCTC's investigations and court proceedings. See Business and Professions Code section 6068(i), (It is the duty of an attorney "[T]o cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself...") and Rules of Procedure, rule 5.80 (Default Procedure for

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<sup>4</sup> Following an early neutral evaluation conference (ENEC), the prefiling stipulation included only one of these two violations.

Failure to File Timely Response). Where an attorney fails to participate in disciplinary proceedings in State Bar Court, the Board has adopted rules that require OCTC to file a petition requesting the court to recommend the attorney's disbarment (rule 5.85).

Whether or not respondent is represented is not a factor in mitigation for attorney discipline. Whether or not represented, respondents have an obligation to respond and participate in OCTC's investigations and State Bar Court proceedings. Where a respondent does not respond in an investigation or to disciplinary charges, the options are limited. Motions for entry of default are accompanied by a declaration by the handling attorney demonstrating "reasonable diligence" in notifying the respondent of the proceedings. In addition, since at least 2006, OCTC policy directives have outlined additional steps attorneys should take to locate a respondent if there is evidence the respondent has not received notice of the disciplinary charges. OCTC endeavors to treat all respondents fairly and equally regardless of representation.

In file 227, the auditor asserts that "OCTC failed to obtain any documentary or testamentary evidence to establish most of the charges alleged in the Notice of Disciplinary Charges," "did not contact any of the witnesses with significant information about this matter which would have dispelled the belief that Respondent had engaged in the multiple acts of misconduct alleged in the Notice of Disciplinary Charges," and "lacked evidence/witnesses to establish anything other than de minimis misconduct, but filed a Notice containing serious allegations and refused to settle for any discipline less than disbarment." As a result, the auditor contends that file 227 did not warrant "significant discipline and should have been resolved by stipulation with a cooperative pro per Respondent rather than insisting on disbarment and pushing the matter through the State Bar Court to achieve this result by default." The auditor concludes that file 227 "resulted in a default disbarment due to OCTC's unwillingness to fairly resolve this matter with the respondent for appropriate discipline, including considering dismissal of the matter due to laches and lack of evidence."

OCTC has reviewed file 227 and determined that during the prosecution of the same respondent in an unrelated criminal conviction matter in which the respondent was represented, the respondent provided information for purposes of establishing mitigation, some of which included the respondent's employment history. That information revealed that the respondent had practiced law over a long period of time, during times when the respondent was voluntarily inactive and thus not entitled to practice law. The conviction matter concluded with a six-month actual suspension. Thereafter, the unauthorized practice of law misconduct alleged in file 227 was investigated, evidence including witness interviews and employment records were collected and turned over to the respondent in discovery, and charges filed. The OCTC prosecutor had numerous conversations with respondent before and after the filing of charges, but ultimately, the respondent ceased communications and defaulted.

The unauthorized practice of law is a serious breach of an attorney's ethical obligations and can warrant disbarment. The file reflects that there was more than sufficient evidence to prove the alleged charges, which were based on this unauthorized practice of law. There does not appear to be support for the auditor's assertions that the "only misconduct that OCTC could prove was that Respondent's resume contained misleading content" or that OCTC's resort to default

proceedings after the respondent ceased communications constituted “abusive tactics” in dealing with a pro per respondent.

In file 214, OCTC successfully petitioned the court for a default disbarment of a respondent who was not represented. The auditor contends that the “equitable principle of laches should have been applied in file 214 to alleged misconduct that occurred in 2007 for which the Respondent no longer had any records and OCTC lacked evidence to prove the case. Instead of closing the file, OCTC pursued the matter and, because Respondent did not participate after the case was filed, [Respondent] was disbarred through a default judgment even though the case would have been dismissed based on laches as well as OCTC having insufficient evidence to prove up the case.” As a result, the auditor concludes that the case should not have been filed with State Bar Court and that a warning letter should have been issued, as recommended by the deputy trial counsel.

File 214 involved a failure to pay court reporter fees and a failure to disclose a malpractice judgment. The auditor determined that the OCTC investigator failed to analyze a potential rule of limitations issue concerning the failure to report the malpractice judgment. While OCTC agrees that the investigation report should analyze all potential issues, the charging memorandum prepared by the deputy trial counsel did properly analyze the rule of limitations issue and concluded that it did not apply to this case because, as the auditor correctly noted, a self-reporting violation would not be covered by the rule of limitations. The auditor’s assertion that the court would have accepted respondent’s testimony that respondent reported the malpractice judgment several years earlier but no longer had evidence of that reporting and would have dismissed the count based on a laches argument is speculation and does not absolve respondent of the obligation to participate in the disciplinary proceeding.

While it is true that OCTC considered issuing a warning letter, the decision to proceed in State Bar Court was ultimately based on the presence of significant aggravation (three prior records of discipline including a 30-day actual suspension) and respondent’s continued failure to pay the court reporter fees. While the auditor’s preferred resolution of a warning letter is certainly an alternative course of action, the facts here do not appear to support the auditor’s conclusion that OCTC’s course of action was inappropriate.

## **DOCUMENT SCANNING/ODYSSEY**

This is the first audit since the implementation of Odyssey in which the auditor was asked to document specific deficiencies related to the use of the case management system. The auditor noted a number of deficiencies and suggested that OCTC should make a greater effort to scan all documents received after a file is closed into Odyssey. OCTC both acknowledges deficiencies in staff’s use of the case management system and agrees with the auditor’s recommendation. While OCTC has placed an emphasis on staff’s following Odyssey procedures including scanning procedures, document scanning into Odyssey continues to be an issue. OCTC has increased its training in 2021, including but not limited to several Adobe software and mandatory Odyssey refresher trainings for all staff. These trainings review procedures and substantive skills for working with OCTC’s Odyssey case management system.



## **INVESTIGATION PLANS, CHARGING MEMOS, CLOSING MEMOS, AND CLOSING LETTERS**

OCTC acknowledges that some files reflect deficiencies including insufficient detail in work product such as investigation plans, charging memos, closing memos, and closing letters sent to complaining witnesses and respondents. OCTC is addressing these issues by way of training where the issues reflect broadly upon the office and where appropriate, specific to the staff who handled the complaints. The OCTC training team develops various programs throughout the year to increase awareness and substantive knowledge of certain important issues, and new staff participate in a robust training program over their first several weeks of employment. This year, training sessions on client trust account violations are a critical component of OCTC's continuing education for its staff. Also, a new investigation manual was created and launched in spring 2021 for the investigators that provides both substantive and procedural guidance for OCTC staff.

## **OTHER TRAINING RECOMMENDATIONS**

The auditor recommends training on a number of issues, including: (1) preparation and handling of requests to CWs for information; (2) rule of limitation and laches; (3) handling of post-closure correspondence; (4) circumstantial evidence that can be relied upon for State Bar matters; (5) collateral estoppel and the effect on this doctrine of differences in the burden of proof; (6) limitations on request for summary review by the Review Department of State Bar Court; (7) use of motions to seal as the only appropriate method for protecting confidential information filed with the court from public disclosure; and (8) investigator training regarding which documents are discoverable. OCTC will ensure that appropriate staff are advised of the results of the audit in these areas with reminders regarding office practices and policies intended to address them. OCTC will also review existing OCTC training in these areas and determine whether additional or modified training is necessary.

## **SPECIAL DEPUTY TRIAL COUNSEL FILES (RULE 2201)**

In this audit, no special deputy files were included. The Office of General Counsel oversees the Special Deputy Trial Counsel administrator and the special deputies. OCTC however, provides general substantive training to the special deputies. Therefore, in the future, to ensure adequate training and calibration of special deputies, a small percentage of special deputy files will be included in the random audits to identify areas of need for training purposes.<sup>5</sup>

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<sup>5</sup> This requirement is incorporated in OCTC's revisions to its policy directives.

## **OCTC'S COUNTING OF CONSOLIDATED TRIAL FILES**

The auditor states, "In selecting files for this audit staff has inappropriately counted as more than one OCTC file a single trial level file containing two or more consolidated matters for hearing which logically must be considered by the auditor as one case. This issue was raised in the past two audits as a matter to be rectified." OCTC is puzzled by the conclusion. OCTC has been working with the auditor on this issue and was operating with the understanding that the auditor would request additional files from OCTC if the auditor felt that she did not have enough files to perform the audit, something that she has done in the past. OCTC interprets trial files the same as investigation files in that all cases should be counted separately. The consolidation of files for trial is an artificial tool used by the court for judicial economy. The difference in interpretation between the auditor's method for counting files and OCTC's method will be resolved prior to the next audit and is addressed in OCTC's revisions to its policy directives.

## **UPDATED POLICY DIRECTIVES**

The auditor notes that certain provisions of OCTC policy directives pertaining to these random audits have not been updated to conform with changes in OCTC operations including the use of Odyssey. OCTC agrees with this recommendation and is revising its policy directives. The most significant changes are:

- Clarifying that OCTC works in collaboration with Office for Regulatory Innovation and Assistance to randomly select files for auditing.
- Designating each case consolidated by the State Bar Court for trial to be treated as separate files just as in the intake and investigation phases. If, due to the consolidation, there are fewer than 45 independent trial files, the auditor will request replacement files so that a minimum of 45 separate trials are audited.
- Clarifying that the auditor should raise issues related to the exercise of prosecutorial discretion only when they reflect a clear error in judgment that contravenes California law, OCTC practices and procedures, or ethical rules.
- Requiring the auditor to prepare, in addition to a more detailed report, a high-level executive summary that does not include any confidential information and identifies important trends and any significant concerns raised by the audit.
- Providing a mechanism for OCTC to respond in writing to the auditor's findings and conclusions.
- Articulating the process by which OCTC will review files the auditor recommends for reopening and defining the standard that will be used to determine whether such files will actually be reopened.

## **FISCAL/PERSONNEL IMPACT**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal 1: Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective b: Develop and implement transparent and accurate reporting and tracking of the health and efficacy of the discipline system, and measures to improve the fairness and efficacy of the discipline system.

## **ATTACHMENT LIST**

- A. Random Audit of the Office of the Chief Trial Counsel Files Closed Between September 1, 2019, and February 29, 2020 – Executive Summary (without referenced appendices)

## **Random Audit of the Office of the Chief Trial Counsel Files Closed Between September 1, 2019 and February 29, 2020**

### **EXECUTIVE SUMMARY**

The Office of the Chief Trial Counsel (“OCTC”) Policy Directives 2006-02 and 2010-01<sup>1</sup> require audits to be conducted of a random selection of closed files on an ongoing basis for the periods from March 1 through August 31 and September 1 through February 28/29 of each year. A minimum of 250 files are chosen for each audit consisting of approximately 100 files closed at the intake level, approximately 100 cases closed or otherwise resolved at the investigation stage, and approximately 50 files completed at the trial level by closure or other non-disciplinary resolution prior to filing the case with the State Bar Court or disposition before or after trial before the Court.

The purpose of the audit is “to ensure that actions taken by OCTC are appropriate and consistent with the office’s standing procedures and policies and that the substantive decisions of the office are within the acceptable range of prosecutorial discretion and comply with statutory provision and case law precedent” (Policy Directive 2006-02). To insure there is no bias in the results of the audits, they are conducted by outside independent counsel. All but one of the audits completed between 2012 to the present have been performed by Alyse M. Lazar<sup>2</sup>.

Each file is to be evaluated on numerous criteria including “whether file closure procedures were followed; documentation was completed accurately and appropriately for the particular file; and actions taken were consistent with applicable case law, charging standards and office policies and procedures” (Policy Directive 2006-02). The auditor is also to determine whether or not to recommend the reopening of any files which were closed without the imposition of any discipline due to an identified deficiency in the work performed bearing on the final case disposition.

Information about each file is reviewed on OCTC’s on-line file information system known as Odyssey. For those files for which some of the documentation has not been scanned into Odyssey, the physical/paper files are provided to the auditor for review. Fifty-four boxes of files were provided to the auditor for the current audit. A checklist<sup>3</sup> containing 32 questions is completed for each file audited and, where deficiencies are observed and/or training issues identified, comments explaining the concerns are included. An appendix to the audit report includes a copy of these comments and a description of all errors with references to the checklist questions listing each file with the actual case numbers and Respondents’ names. This appendix is utilized to prepare the audit report which analyzes the results of the audit in a more cohesive fashion without disclosing any identifying information regarding the Respondents and the cases to protect the confidentiality of the matters which, for the most part, are non-public.

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<sup>1</sup> See Appendix 1.

<sup>2</sup> Ms. Lazar worked in the Office of the Chief Trial Counsel as a trial attorney and manager from 1980 to 1998. She represented the office in all types of disciplinary cases at the trial and appellate levels, oversaw the work of attorneys and investigative staff, had responsibilities for drafting and interpreting regulatory rules and statutes, and served as a liaison to various government agencies. Since that time, she has worked in private practice in Ventura County and has served on numerous boards, committees and commissions for various government and non-profit entities.

<sup>3</sup> See Appendix 2.

OCTC Policy Directive 2010-01 specifies that the Random Audit Findings contained in the audit report are to be reviewed and discussed by the OCTC management team within thirty days of receipt. Thereafter, staff training on issues identified in the report and by the management team in reviewing the report are to occur within the following sixty days.

This audit covers 251 files which were closed or otherwise resolved during the six-month period commencing September 1, 2019 through February 29, 2020. There is generally a six to twelve month lag time between an audit period and the completion of a report due to the length of time involved in identifying the files, providing them to the auditor, reviewing the files, and preparing the checklists and report. With restrictions imposed regarding access to OCTC offices during 2020 due to covid and other unexpected work of OCTC and the auditor, there were unanticipated delays involved in the completion of the present audit. In coordination with the Offices of the Chief Trial Counsel, the Mission Advancement and Accountability Division and the auditor, efforts will be made to catch up on these audits to provide more timely feedback to OCTC.

The findings of this audit are typical in comparison to prior audits with the number of errors identified in various categories falling within the range of past audits for the vast majority of items reviewed. The checklist questions were changed substantially in the Spring of 2018 including a reduction from 63 questions, many of which were more technical rather than substantive, to the 32 questions used today. Therefore, comparing current results to audits occurring before the change would not be appropriate.

Out of 251 files, this audit identifies 26 files containing only technical errors regarding failing to post information on Odyssey and 94 files with one or more substantive errors and/or training issues. Allowing time for staff training in transitioning to Odyssey, prior audits did not identify most of the omissions of information on Odyssey as “errors”. Therefore, the results of the prior two audits with comments on 95 issues and 81 issues respectively are comparable to this audit.

The auditor recommends the reopening of eight files which were deemed to be prematurely closed at the intake or investigation levels primarily due to missed issues of possible misconduct. OCTC will exercise its discretion on such follow through taking into consideration the rule of limitations and any other pending complaints or status changes regarding the named Respondent. Feedback will be provided to the auditor regarding these cases and any changes made to OCTC practices and procedures independently since February 2020 and/or as a result of the audit.

Fifteen sections of the report focus on specific areas where errors were identified pertaining to one or more questions in the checklist. The last approximately eight pages of the report contain recommendations regarding areas for training and possible modifications of OCTC practices and procedures. Highlights of these findings and recommendations are summarized as follows:

Question one of the checklist asks if all appropriate culpability issues were considered including those raised by the complainants (“CWs”) and those apparent from information gathered during the investigation. In thirteen files, errors were made in identifying and investigating such issues. This resulted in the premature closing of eight files at the intake and investigation levels which have been recommended for reopening. The remaining files were appropriately completed even though there were mischaracterizations of possible misconduct during the work up of the file.

It is important at the initial evaluation of a file to determine if a case is beyond the jurisdiction of the State Bar due to the status of the named Respondent (a judge or a deceased or disbarred attorney) or the running of the rule of limitations. In one matter, all OCTC staff who handled the case at the intake, investigation and trial levels missed the fact that the rule of limitations had run prior to receipt of the complaint. This should have resulted in its immediate closure rather than working the case up through the drafting of a Notice of Disciplinary Charges (“NDC”) and attendance at an Early Neutral Evaluation Conference (“ENEC”) before it was closed.

Questions 11, 12, and 13 of the checklist focus on investigation plans which are prepared for many files, but may be waived in order to expedite an investigation when the issues to be investigated, the witnesses to be contacted and evidence to be obtained is clear. A separate question evaluates whether or not necessary evidence was obtained before resolving the case. The investigation plans were deemed deficient in six cases; in three cases, the investigation plans were not followed; and insufficient documentary evidence was obtained in eight files. As a result of these errors, the investigations conducted were incomplete resulting in the erroneous closure of several files and, of far greater significance, the erroneous prosecution of two cases through default disbarments.

In other words, two attorneys were disbarred by the State Bar Court relying on allegations in NDCs for which none of the investigators or deputy trial counsel who worked on the cases obtained sufficient evidence (either documents and/or witness statements) to substantiate the allegations. Consequently, if the Respondents had participated in the State Bar Court proceedings, the cases presumably would have been dismissed for lack of evidence. This was an improper use of the default procedures as the court utilized the representations of the deputy trial counsel that the allegations in the NDCs were valid in order to issue the disbarment decisions when OCTC lacked sufficient evidence to make these representations.

The audit report contains two sections focused on interactions with Respondents, CWs and other witnesses. Errors were identified regarding these issues in forty-seven files, some of which were technical in nature. These sections focus on conversations, emails and letters seeking information regarding the complaint as well as the closing letters to CWs advising them of OCTC’s determination. Related to the closing letters sent to CWs are referral to the client security fund (CSF) which are required when a Respondent is found culpable of misappropriating the client’s funds. A separate section of the report addresses the propriety of such referrals. In this audit, it was determined that one such referral should not have been made as the client would not be entitled to any funds from CSF based on the outcome of the case. A separate section of the audit that is also interrelated is the handling of CWs’ requests for review/reconsideration of OCTC’s decision to close a file wherein ten errors were noted.

The content of the closing letters sent to CWs in seventeen of the files was troublesome. Most of which either did not address all the issues raised in the complaint or incorrectly assessed the legal and factual issues. One letter was misleading in suggesting that a warning letter was issued to Respondent for significant misconduct when it was issued due to Respondent’s initial failure to cooperate with OCTC in the investigation. In another file, a CW who notified OCTC that he required communications in Spanish received both the letter requesting additional information and the closing letter based on CW’s failure to provide the additional information in English. It is

OCTC policy to have supervisors review closing letters before they are sent. More attention to their accuracy and completeness appears necessary based on the number of errors presented.

OCTC also erred in not engaging in any follow up with five CWs in reply to letters submitted by these individuals in response to the closing letters. Even in those files which have not been recommended for reopening, a reply should have been provided in order to acknowledge that the information was considered by OCTC.

Several other cases may have had similar post-closure correspondence ignored however the documents were not scanned into Odyssey and therefore no determination could be made on whether or not the files should have remained closed and/or additional contacts with the CWs should have been made. The auditor has recommended that greater efforts be made by OCTC to scan all documents received after a file is closed into Odyssey as it appears that this is not done routinely.

Many of the errors regarding correspondence with Respondents pertained to the content of the letters requesting an explanation to the issues raised in the complaints, known as TR letters, or Respondents' responses to them. Some Respondents did not reply or provided inadequate responses and yet the files were closed based on uncooperative CWs without notifying these Respondents in the closing letters of their duty to cooperate. Conversely, in one matter where the Respondent provided a full explanation and documentation to warrant closure, it was not adequately reviewed by staff, resulting in wasted time and resources in the trial unit when it should have been closed at the investigation level.

Another group of checklist questions focus on the work performed by OCTC after an investigation is completed and a determination is made on the appropriate disposition. There are questions regarding the sufficiency of the documentation substantiating these decisions contained in closing memoranda prepared by investigators or in charging memoranda written by deputy trial counsel all of which require approval by supervisors. The auditor therefore evaluated both the content of the documents and whether or not there was documentation of supervisorial approval which was missing in one of the files reviewed.

With regard to cases that did not result in discipline, errors were identified in the closing memos or closing letters in fifteen cases. The lack of analysis or improper analysis resulted in significant mishandling of five of these cases which were either closed prematurely or moved forward in the process when they should have been closed. Anomalies were also noted such as a 43-page closing memo in one case when a few pages would have sufficed and a supervisor's note in another file indicating they did not bother reviewing the file and trusted that staff had acted correctly.

Charging memos are prepared by deputy trial counsel prior to filing a case with the State Bar Court to identify and explain all charges to be contained in a Notice of Disciplinary Charges and to obtain supervisor approval for the discipline to be sought through settlement or trial. Five cases were determined to have faulty charging memos containing proposed charges and/or discipline recommendations not supported by the facts or applicable law.

There are five questions in the audit regarding the content of resolution documents. In this audit, issues of concern were identified in three of the four Resource Letters, four of the fifteen Warning Letters, and four of the sixteen cases resolved with stipulations. In two cases, the Respondents sent letters asking follow up questions pertaining to the resource letters and there were no responses by OCTC addressing the unresolved issues. In one stipulation, neither the attorneys nor the approving judge realized that the statement of facts prepared by OCTC did not support the restitution condition imposed on Respondent.

The checklist contains four questions regarding the content of Notices of Disciplinary Charges and OCTC's handling of other litigation issues. In this audit, fifty cases were designated trial files, however only forty-one of them proceeded far enough to have NDCs prepared before they were resolved. Issues pertaining to at least one of these four questions were identified in twenty-two of these files. This is more than double the number of cases with issues of concern raised in the prior audit. Most of the errors were pointed out and corrected by State Bar Court judges including overcharging in Notices, erroneous filing for summary review when the issues raised would not qualify for such review, publicly filing a confidential document, improperly attempting to use collateral estoppel to prove a case, filing motions containing insufficient information to warrant the actions sought by the court, and filing a stipulation without citing legal authorities to justify the discipline sought. Three matters involved over-zealous prosecution where OCTC insisted on proceeding with State Bar Court proceedings rather than engaging in reasonable settlements. Two of the three Respondents were *in pro per* and disbarred through default proceedings.

Question 30 of the checklist asks if there was compliance with office policies, procedures, disciplinary standards, and case law. Fifteen cases were determined to be non-compliant. These items range from erroneous language in an Agreement in Lieu of Discipline to errors in the closing of filings at the intake and investigation levels to trial errors raised in other portions of the report.

The final area of checklist questions pertains to the accuracy and completeness of information posted on Odyssey and the contents of paper files. Issues were identified in sixty-one files. Most of the items raised were not detrimental to the outcome of the case, but did impede the ability of the auditor to review some of the files completely. Other areas are simply training issues for individual office staff in becoming more proficient in working with Odyssey.

The concluding portion of the report focuses on training recommendations. Items raised in this section include the closure of files due to complainants deemed non-cooperative, the content of closing letters and closing memoranda, inconsistencies in the handling of matters, legal issues that were inappropriately assessed or disregarded, non-compliance with OCTC and court procedures, and the selection of files for the audit to avoid duplication and enable sufficient information to assess each case. OCTC considers the entire report and not just this section to develop additional training of staff.

Submitted by Alyse M. Lazar

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