



The State Bar of California

OPEN SESSION AGENDA ITEM REGULATION AND DISCIPLINE COMMITTEE III.F

DATE: March 24, 2022

TO: Members, Regulation and Discipline Committee

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Report on Random Audit of the Office of Chief Trial Counsel Files Closed Between March 1, 2020, and August 31, 2020, and Office of Chief Trial Counsel Response

EXECUTIVE SUMMARY

This informational item relates to the random audit of cases closed by the Office of Chief Trial Counsel (OCTC) during the period March 1, 2020, through August 31, 2020, and OCTC's response to the results of the random audit.

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 audit's purpose is to ensure that actions taken by the OCTC are appropriate and consistent with 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. The OCTC recently revised its policy directive relating to the random audit to require a report to the Regulation and Discipline Committee (RAD) on the results of each random audit and the OCTC's response to those results.

On January 20, 2022, the OCTC received the report of the audit for files from the period March 1, 2020, through August 31, 2020, which includes recommendations for training to improve the OCTC's effectiveness.¹ The OCTC agrees with many of the recommendations and issues noted

¹ 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

by the auditor about the handling of certain files and will take corrective action. In particular, the OCTC has reviewed the 10 cases recommended for reopening by the audit and will be reopening 9 of these cases.

BACKGROUND

Effective October 2000, the OCTC established procedures for systematic random review of closed cases. Originally, the random review was conducted by team leaders and the Assistant Chief Trial Counsel, with the results compiled into a summary report by a Deputy Chief Trial Counsel. In 2006, following the reestablishment of the 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 nonemployee 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 actions, if any. In 2010, in response to 2009 recommendations by the State Auditor, OCTC established a formal process for management to follow up and ensure implementation of recommendations from the semiannual audits. In November 2021, 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 were provided to RAD. The OCTC's procedures have now been modified to require such presentations as additional audit reports are received.

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 actions, 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 outcome of the case disposition.

DISCUSSION

The auditor's primary recommendations from the audit of files closed during the period of March 1, 2020, through August 31, 2020, and the OCTC's responses, are as follows:

instances, have not been the subject of public disciplinary proceedings on the matters referenced" in the audit report.

RECOMMENDATIONS TO REOPEN 10 FILES

One of the benchmarks for the OCTC's performance is the number of files that the auditor recommends be reopened. The auditor is to determine whether to recommend the reopening of any files due to an identified deficiency in the work performed bearing on the outcome of the case disposition. The auditor's recommendation to reopen 10 files (3.9 percent of total files audited) is similar to the last audit (3.1 percent of the total). The fact that the auditor recommended reopening only 10 files out of 255 audited suggests that overall OCTC staff are appropriately resolving cases. As in prior audits, the auditor commended the OCTC and stated 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."

The OCTC reviews the auditor's recommendations for reopening and makes final determinations whether the cases will be reopened. The OCTC will reopen a case based on the auditor's recommendation unless it determines 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, office policy, or case law precedent; or (2) a clear error of judgment outside the acceptable range of prosecutorial discretion.² The OCTC has reviewed the 10 files recommended for reopening by the auditor (files 12, 77, 84, 85, 92, 94, 103, 132, 159, and the related case to file 154) using this standard and has determined that it will reopen 9 of these files for additional investigation or action. The OCTC has determined that the tenth file was closed on the merits when it actually should have been closed as a duplicate of another file that remains open pending investigation; accordingly, the OCTC is not reopening this tenth file. Thus, the OCTC is reopening 9 files (3.5 percent of the total of 255 files audited).

The auditor also recommended conducting follow-up on an additional six files (files 1, 6, 34, 152, 174, and 188) to determine whether that follow-up indicates that they should be reopened; the OCTC is conducting the recommended follow-up and will then assess whether reopening of these additional files is appropriate.

MORAL TURPITUDE PER SE IN DOMESTIC VIOLENCE-RELATED CRIMINAL CONVICTION CASES

The auditor noted in several cases that the OCTC pursued domestic violence-related crimes such as penal code section 273.5 as crimes of moral turpitude per se despite contrary rulings from the State Bar Court Review Department. Domestic violence and battery of an intimate partner causing traumatic injury is morally reprehensible and intrinsically wrong in every instance. As a result, the State Bar has taken the position in many prior cases that conviction of such a crime (Pen. Code, § 273.5, subd. (a)) involves moral turpitude per se. In the past, in the context of attorney discipline, the Supreme Court has not viewed domestic violence convictions as per se acts of moral turpitude but rather as other misconduct warranting discipline. (See *In re Hickey* (1990) 50 Cal.3d 571 [no moral turpitude where attorney convicted of gun possession

² This is a standard that has been used in practice for several years but was not codified in the policy directive at the time of this audit. Thus, along with other revisions to the directive, the OCTC incorporated these changes in policy directive 2022-01, the revised directive regarding random audits.

threatened and assaulted his ex-wife] and *In re Otto* (1989) 48 Cal.3d 970 [no moral turpitude for felony violations (reduced post-conviction to misdemeanors) of Pen. Code, §§ 273.5, subd. (a), and 245, subd. (a)].) *Hickey* and *Otto* were decided approximately 29 years ago, however, and society's views on domestic violence have evolved since then. (See *In the Matter of Guillory* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 402, 411 [discipline imposed in 1966 is no longer applicable, in light of current societal rejection of impaired driving].)

Since *Hickey* and *Otto* were decided, criminal and civil courts have held that penal code section 273.5, subdivision (a), is a crime of moral turpitude per se. (See *People v. Rodriguez* (1992) 5 Cal.App.4th 1398 and *Donley v. Davi* (2009) 180 Cal.App.4th 447.) In *People v. Rodriguez*, in holding the defendant's prior 273.5 conviction admissible for impeachment as a felony conviction that "necessarily involves moral turpitude, even if the moral trait is one other than dishonesty," the Court of Appeal reasoned:

[T]he assailant must, at the very least, have set out, successfully, to injure a person . . . in a special relationship for which society rationally demands, and the victim may reasonably expect, stability and safety, and in which the victim, for these reasons among others, may be especially vulnerable. To have joined in, and thus necessarily to be aware of, that special relationship, and then to violate it willfully and with intent to injure, necessarily connotes the general readiness to do evil that has been held to define moral turpitude.

(*People v. Rodriguez, supra*, 5 Cal.App.4th at p. 1402.)

This position was echoed in *Donley v. Davi*, which is particularly apt because it involved an applicant for a professional license. *Donley* was denied an unrestricted California real estate license based on his misdemeanor conviction for violating penal code section 273.5, subdivision (a). The commissioner of the California Department of Real Estate found the crime did not inherently involve moral turpitude, but that the specific facts of Donley's conduct did and warranted denial of the requested license. The Superior Court upheld the commissioner's denial of the unrestricted license. Donley appealed, relying on cases including *In re Otto* (1989) 48 Cal.3d 970 to support his contention that the commissioner had correctly held that section 273.5 did not necessarily involve moral turpitude. (*Donley v. Davi, supra*, 180 Cal.App.4th at p. 459–460.) The Court of Appeal found these authorities unpersuasive,³ as well as *Donley's* arguments that he was convicted only of a misdemeanor and that section 273.5, subdivision (a), is not a specific intent crime. The Court of Appeal explicitly held that a violation of a penal code section 273.5, subdivision (a), is a crime involving moral turpitude "as a matter of law." (*Id.* at p. 461.) In finding moral turpitude per se, the court reasoned as follows:

³ Specifically, the Court of Appeal distinguished *Otto*, holding: "Cases are not authority for propositions not considered and decided." (*Donley v. Davi, supra*, 180 Cal.App.4th at p. 460.) The Court of Appeal pointed out that in *Otto* the State Bar Court Review Department filed a report and recommendation seeking discipline for the domestic violence convictions as misconduct warranting discipline, but not misconduct involving moral turpitude. And, since the Supreme Court agreed with the State Bar that the facts and circumstances surrounding the commission of the offenses amounted to misconduct warranting discipline, it did not consider whether or not the conviction involved moral turpitude. (*Ibid.*)

We find a “readiness to do evil” is present in a section 273.5 violation because the offense is defined by a willful infliction of injury upon, as *Rodriguez* put it, “a person of the opposite sex in a special relationship for which society rationally demands, and the victim may reasonably expect, stability and safety, and in which the victim, for these reasons among others, may be especially vulnerable.” It is the assailant’s awareness of this special relationship and willful abuse of such relationship by the use of violence that demonstrates moral turpitude. (*Id.* at p. 459 (citations and footnote omitted).)

The OCTC’s arguments are based on California Court of Appeals precedent and are not frivolous or the result of uninformed staff making unauthorized arguments. Thus far, the State Bar Court has not agreed with OCTC’s arguments. The OCTC, however, has respectfully made arguments to the court that acknowledge the court’s disagreement with the OCTC’s position. For example, in file 222 (consolidated criminal conviction and original jurisdiction matters), in the OCTC’s closing brief, the OCTC acknowledges that State Bar Court has limited purview over the issue of whether domestic violence-related crimes constitute moral turpitude per se. The OCTC then explains its position that it believes every violation of penal code 273.5 is a crime of moral turpitude, while requesting that the court find the particular facts and circumstances of the conviction underlying file 222 also demonstrated moral turpitude.

The auditor’s criticism of the OCTC’s legal argument is not justified. The OCTC does not have to agree with the Review Department’s legal analysis in every case. It should be free to advance theories and arguments in a respectful manner, especially when, as here, other courts have adopted the same legal argument in licensing matters. File 222 and several other files noted by the auditor are examples of the OCTC’s legitimate advancement of its position that domestic violence is a crime of moral turpitude per se. Finally, an additional reason for the OCTC’s advancement of the argument in multiple cases is that the State Bar Court has found that the OCTC waived its argument that penal code 273.5 is a crime of moral turpitude per se by not alleging it in the transmittal of the conviction. See [*In the Matter of Imran Khaliq*](#), 17-C-05540 (June 12, 2019) (unpublished) (p. 9).

With respect to file 222, the auditor also appears to criticize the OCTC for pleading duplicative counts alleging original discipline matters. The case involved serious misconduct and resulted in disbarment. That the OCTC pleaded several counts that the court later considered duplicative is not deserving of criticism. Even if the counts were duplicative, it did not cause prejudice to the respondent as the counts were based on the same underlying facts and were a “belt and suspenders” approach to ensure that all of the respondent’s misconduct would be captured. Such alternative pleading of multiple charges based on the same underlying facts is recognized as a valid charging strategy.

ALLEGED DELAY IN PROSECUTION OF CRIMINAL CONVICTION CASES

The auditor notes that of the 61 cases audited with dispositions at the trial level, 29 of the matters involved criminal convictions and many were very old. Specifically, the auditor noted that nine files (226, 233, 234, 235, 240, 244, 245, 259, and 261) had delays in conviction proceedings. The auditor also commented in several additional sections that there was no explanation for why the OCTC did not pursue these conviction matters earlier.

It appears that the auditor was not advised that the OCTC received thousands of referrals from the re-fingerprinting process pursuant to California Rule of Court 9.9.5 that occurred in approximately 2019. See [State Bar FAQ: Fingerprinting Rule Requirement](#). The conviction referral source is noted in Odyssey and is included in the note section or under the case origin heading. It may be that the auditor did not see this reference or did not understand its bearing on why the cases originated in 2019.

As a result of the re-fingerprinting, the OCTC was never notified of these criminal conviction matters until at least 2019. Some of the convictions are old, and therefore, obtaining records has been difficult in some matters due to public agency record retention and destruction policies. This, however, is not the result of any delay by the OCTC in processing criminal conviction matters.

CALIBRATION

The auditor notes that in several criminal conviction cases (e.g., file 235) it appeared that respondents received different levels of discipline even though the facts were similar (second DUI). The OCTC is aware of these issues with numerous older criminal conviction cases that were referred after the re-fingerprinting in 2019. While the auditor is correct that the OCTC can improve its documentation in Odyssey of the reasons for the level of discipline, the OCTC is confident that its staff are carefully analyzing the mitigation and aggravation in each case and appropriately assessing the level of discipline based on the individual facts of each matter. The OCTC recently revised its policy directive regarding Driving Under the Influence Convictions to ensure that this occurs. (Policy directive 2021-01 replaced policy directive 2018-02 effective May 27, 2021).

The auditor criticizes OCTC's handling of other criminal conviction cases, for example, noting that the OCTC closed a driving under the influence matter after transmittal, instead of doing a better job evaluating the case prior to transmitting the matter to State Bar Court (file 260). This case is not an example of the OCTC's failure to properly evaluate a case. The issue for the OCTC is that in some instances, it does not receive complete information prior to transmittal, and that transmittal is required within 30 days of receipt of the certified record of conviction (Business and Professions Code section 6101). Thus, the OCTC evaluates each conviction based on the information that is available at the time it receives the certified records of conviction and makes an informed decision based on the evidence it has at that time. After the case is transmitted, respondents sometimes provide mitigating evidence or other information that may change the discipline analysis and warrant a dismissal.

INCONSISTENT CLOSING LETTERS AND MEMOS

The auditor noted in several cases that the OCTC could improve its closing letters and memos in terms of consistency and substance. OCTC's managers have reviewed the files at issue and will address the suggestions from the auditor with the appropriate staff persons (e.g., files 40, 67, 90, 106, 108, 109, 143, 150, 178, 181, 182, 190, and 191). The OCTC also agrees with the auditor that closing letters remains an area in which more work by the OCTC is needed. While the OCTC concurs with the auditor on the need to continue to improve its practices and

consistency associated with closing letters, it does disagree with one criticism in the audit, which took issue with the length of a particular closing letter (10 pages) and the attachment to that closing letter of approximately 400 pages of exhibits. While the OCTC agrees that closing letters and memos should be as concise as possible, 10 pages is not extreme in a complex case, and at times, attaching exhibits to support the OCTC's decision to close a matter is helpful both to the OCTC and the complaining witness. The OCTC needs to retain flexibility in terms of deviating from its otherwise standard closing letters in certain matters.

ODYSSEY: PROPERLY DOCUMENTING FILES AND SCANNING

This is the second 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 throughout the audit and suggested that the OCTC continue to improve its efforts to scan all documents into Odyssey. The OCTC acknowledges deficiencies in its staff's use of the case management system and continues to emphasize the importance of following Odyssey procedures and ensuring that relevant documents are scanned and uploaded into Odyssey. The OCTC has continued to conduct training relating to Odyssey and scanning procedures, including but not limited to a January 2022 training on Adobe software used to handle scanned documents.

It should also be noted that this audit period covers the time when the COVID-19 pandemic required the OCTC (and most businesses) to transition from in-person office work to full-time remote work. Although the OCTC believes the transition was relatively smooth given the circumstances, there were challenges with Odyssey in terms of ensuring that scanning was done and files properly documented. Some of these errors were apparent in the auditor's findings concerning documentation of disposition and other categories.

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

The OCTC acknowledges the auditor's findings that some files reflect deficiencies including insufficient detail in work product such as investigation plans, charging memos, closing memos, closing letters sent to complaining witnesses and respondents, and warning letters sent to respondents. The OCTC is addressing these issues by way of training for the office as a whole where the issues reflect broadly upon the office and, where appropriate, for the specific staff who handled the particular 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, among other topics, the OCTC is emphasizing continued training sessions on client trust account violations and the rule of limitations.

OTHER TRAINING RECOMMENDATIONS

The auditor recommends training on a number of issues, including: (1) proper review of files prior to closing; (2) rule of limitation; (3) personal versus professional expression; (4) subpoena of relevant records only; (5) supervisor culpability; and (6) rule 1.15. The 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. The OCTC will also review existing OCTC training in these areas and determine whether additional or modified training is necessary. As noted above, the OCTC is already planning training this year on the rule of limitations and client trust account violations, including rule 1.15.

Regarding the auditor's note relating to the elimination of phone calls to complaining witnesses, the OCTC intentionally modified its policy to relieve investigators from making additional phone calls that were not essential given the information contained in closing letters. The OCTC did so after first piloting elimination of phone calls in some cases to determine whether there was any significant impact on complaining witness satisfaction, measured by the complaining witness surveys. After determining that there was no significant impact, the OCTC eliminated closing calls in some cases and retained the requirement in others, such as cases that have been reopened by the Complaint Review Unit.

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. The 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.⁴

OCTC'S COUNTING OF CONSOLIDATED TRIAL FILES

The auditor again noted the issue regarding how trial files are counted. The OCTC has been working with the auditor on this issue and provided additional files so that the auditor had a sufficient number of trials files to audit. 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. The OCTC agrees with this recommendation and has revised its policy directives accordingly. See policy directive 2022-01 (replacing and superseding OCTC's earlier policy directives regarding the random audit effective as of January 18, 2022). The most significant changes are:

- Clarifying that the OCTC works in collaboration with the Office of Research and Institutional Accountability to randomly select files for auditing.
- Clarifying that cases in the investigation and trial stages will be selected equally from each OCTC trial team, with a representative number of files handled by special deputies.

⁴ This requirement is incorporated in OCTC's revisions to its policy directives.

- 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 the OCTC to respond in writing to the auditor's findings and conclusions.
- Articulating the process by which the 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

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

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: 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.

RECOMMENDATIONS

None

ATTACHMENT LIST

- A. Random Audit of the Office of the Chief Trial Counsel Files Closed Between March 1, 2020, and August 31, 2020 – Executive Summary (without referenced appendices)

This document constitutes confidential work product, protected from disclosure by attorney-client privilege which may be waived by the client.

**Executive Summary for the Random Audit Report Prepared for
the Office of the Chief Trial Counsel
for Files Closed Between March 1, 2020 and August 31, 2020**

The Office of the Chief Trial Counsel (“OCTC”) Policy Directives 2006-02 and 2010-01¹ 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 following State Bar Court proceedings.

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. Lazar².

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 in which some of the documentation has not been scanned into Odyssey, the physical/paper files are provided to the auditor for review. Thirty-one boxes of files were reviewed by the auditor in the current audit. A checklist³ containing 32 questions is completed for each file audited and, where deficiencies are observed and/or training issues identified, explanatory comments are included. An appendix to the audit report includes a copy of these comments with references to the applicable 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

¹ See Appendix 1.

² 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.

³ See Appendix 2.

regarding the Respondents and the cases to protect the confidentiality of the matters which, for the most part, are non-public.

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 255 files which were closed or otherwise resolved during the six-month period commencing March 1, 2020 through August 31, 2020. There has generally been 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. Due to covid, there were unanticipated delays involved in the completion of the prior and 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.

One group of checklist questions focuses on staff compliance with OCTC's operating procedures, and practices. This includes whether or not accurate and complete information about all actions taken on a case and all documents prepared and received for a file are maintained on Odyssey and/or in the files. In this audit, twenty-six files had insufficient information posted on Odyssey regarding actions taken and thirty-three files were missing documentation that should have been prepared/received and scanned into Odyssey. This includes warning letters which were to be sent to Respondents pursuant to State Bar Court dismissals in several cases. The absence of this information resulted in incomplete checklists for some of the files where certain questions could not be answered. Staff training on using Odyssey is ongoing and the deficiencies noted in the audit should provide guidance as to which areas need improvement.

The audit reviews the adequacy of documents prepared in all phases of the handling of a case. Checklist question 1 asks if all appropriate culpability issues have been identified. Other questions which assist in answering question 1 focus on the sufficiency of investigation plans, charging memoranda, correspondence with complainants and Respondents (attorneys who are the subject of the investigation), and any and all documents prepared in State Bar Court proceedings.

In this audit, deficiencies in the identification of culpability issues were noted in eleven files at the intake and investigation levels with insufficient information to answer the question in four additional files. Seven investigation level files contained investigation plans which either missed issues requiring investigation and/or directed investigation of issues not present in the case. There were few charging memos reviewed for this audit due to the fact that eighteen of them were not scanned into Odyssey. Three of the files contained charging memoranda with inaccurate or insufficient information to justify the discipline recommendations, including citing inapplicable case law. Consequently, delays resulted in resolving these matters, including trying cases rather than entering into stipulated dispositions.

The auditor commented on thirty-three of the 255 files regarding communications with complainants including, but not limited to, failures to obtain sufficient information from the complainant to determine whether or not the file should be closed, failure to make a referral to the

client security fund or fee arbitration and, more egregiously, including speculation and misinformation in letters regarding the basis for case closure. OCTC also failed in several cases to respond to questions raised by complainants requiring a response to provide important information. It did not provide sufficient detail explaining the reasons for closure in other cases which may have impacted the complainants' decisions on whether or not to seek reopening of their complaints.

OCTC sends correspondence, including emails, to Respondents to obtain their explanation for alleged misconduct and thereafter, if the matter does not proceed to the trial unit, to close the case with a form closing letter, a resource letter or a warning letter advising them that professional misconduct occurred which does not warrant disciplinary action. Errors occurred in eleven files regarding the content of letters of inquiry including not addressing some of the misconduct apparent from the complaint or raising issues that do not constitute misconduct such as failing to notify the State Bar regarding discovery sanctions. Sixteen cases raised issues of concern regarding the content of closing and warning letters including resolving four cases with a straight closing letter when a warning letter was warranted. Five of the warning letters that were issued did not correctly identify and describe the misconduct committed by the Respondent which diminishes the prophylactic effect of such letters to prevent repeated misconduct in the future.

Eight audit questions focus on how OCTC attorneys handle cases at the pre-trial, trial and appellate levels of the State Bar Court. In this audit, sixty cases were resolved following some interaction with the State Bar Court. Errors and/or inconsistencies were identified by the auditor in twenty-eight of these cases. Five files involved errors made in the information and legal analysis provided to the State Bar Court in the referral of criminal convictions which could have potentially significantly harmed the Respondents if not flagged by the court. OCTC erroneously argued for disbarment in one case based on a statute that was not in effect at the relevant time. In several cases, inappropriate motions were made and/or opposed by OCTC, including seeking to amend the charges after the trial had concluded which would have denied Respondent his right to challenge them. Ten conviction referral cases were to some extent impacted due to excessive delays in filing the cases and an inability to obtain evidence and witnesses as a result of lengthy passages of time. Other errors were based in large part on court findings, including the dismissal of numerous charges in a default proceeding when the court is required to deem the facts as true and correct, but they were insufficient to support findings of culpability. Many of the issues raised in these matters have also been recommended for training.

Compliance with State Bar policies, procedures, disciplinary standards, and case law is also assessed in the audit. This includes determination as to whether or not cases are properly evaluated for the running of the rule of limitation before investigations are undertaken which were erroneously handled in five matters. Assignment of priority codes by OCTC impacts the speed in handling an investigation and no significant errors were noted in this audit. In thirty-four cases either there was no information regarding whether or not the disposition was approved by a supervisor and/or there was a lack of documentation to support the resolution of the case. Twenty files at the intake and investigation levels were identified for explicit non-compliance with various office policies, practices and procedures and/or failure to handle cases in conformance with existing State Bar law. This includes errors in recognizing certain types of misconduct which is set forth in the current Rules of Professional Conduct but did not exist in the prior version.

As part of the process, the auditor is to make recommendations regarding cases at the intake and investigation levels that should be reopened. The auditor has recommended 10 cases be reopened for additional investigation and possible prosecution. Seven other cases have been identified for follow-up with the possibility of reopening depending upon the current status of the underlying matters, whether or not other cases have been opened by OCTC on the matters, and whether or not additional action is appropriate for relatively low-level misconduct. 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.

The final portion of the audit report focuses on training recommendations. Items raised in this section include, but are not limited to, irregular file closure practices, inappropriate expression of personal opinions in public correspondence, disclosure of confidential information, inconsistent handling of matters, the wasteful use of State Bar resources, insufficient knowledge of the law and compliance with State Bar Court procedures, and maintenance of Odyssey.

In addition to reviewing the audit report and providing training to staff, OCTC will be conferring with the auditor regarding the content of the audit to discuss issues of agreement and disagreement and to share information regarding new and revised office practices and policies which have or will be implemented.

Submitted by Alyse M. Lazar

Date: January 20, 2022

APPENDIX 1

State Bar Policy Directives

Date: February 28, 2006

Policy Directive

Policy Directive 2006-02

Random Audits of Closed Files

Introduction

On August 2, 2004, the Office of the Chief Trial Counsel (OCTC) re-established the Audit and Review Unit, a small unit of experienced attorneys charged with, among other things, conducting random, semi-annual audits of closed files. The purpose of this policy directive is to establish a procedure for these random audits 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. This policy directive supersedes Policy Directive 2000-02 and the addendum to Policy Directive 2000-02 dated March 1, 2001.

Relevant Rules and Policies

On September 8, 2000, the Acting Chief Trial Counsel issued Policy Directive 2000-02: Systematic Review of Cases. Policy Directive 2000-02 established a procedure for the systematic random review of files resolved by closure, stipulation or trial. On March 1, 2001, the Action Chief Trial Counsel issued a memorandum modifying Policy Directive 2000-02 by decreasing the number of annual audits from four to two.

Summary of Past Practice

Prior to re-establishment of the Audit and Review Unit, randomly selected files were assigned to the team leaders and Assistant Chief Trial Counsel (ACTC), who reviewed the matters and completed a review form for each file reviewed. ACTC then randomly selected 10 percent of the files reviewed by the team leaders to ensure the appropriateness of the

review undertaken. The manager then prepared a final summary report and submitted it, along with the completed review forms, to a Deputy Chief Trial Counsel who compiled the reports into one final audit summary.

Statement of New Policy

Twice a year, OCTC will randomly select at least 250 files for audit from Intake, Investigations and Trials, which have been resolved by closure, stipulation or trial during a six-month audit period, either from March 1 through August 31 or from September 1 through the end of February. File types selected for audit will be roughly in proportion to the percentage of file types system-wide.

The Role of Central Administration

Within 10 calendar days of the conclusion of each six-month audit period, Central Administration will generate a list of the files resolved during that audit period to be audited and will provide the list to the Audit and Review Supervising Trial Counsel (STC), the Audit and Review Secretary and the OCTC Special Assistant. Within 10 calendar days of generating the list, Central Administration will deliver the files in boxes to the Audit and Review Secretary.

The Role of Audit and Review

The Audit and Review Secretary will begin assigning boxes to the attorneys within the Audit and Review Unit no later than one week after receipt of the files from Central Administration. All of the files will be assigned and audited within six weeks.

During the course of the audit, each attorney will complete a Random Audit Checklist for each file he or she audits (a sample checklist is attached). On the Random Audit Checklist, the attorney will note whether each of the identified benchmarks or criteria were met or are present, 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. The attorney may also include any comments, overall findings and/or recommendation with respect to the file. If an attorney believes a file should be reviewed further and/or reopened, the attorney will write a separate memorandum to the Audit and Review STC, which will include grounds for further reviewing or reopening the file.

After all of the files have been audited, each attorney will prepare a memorandum outlining his or her overall audit findings and any concerns or training issues found. Each attorney's checklists and memoranda will be completed and submitted to the OCTC Special Assistant no later than two weeks after all the files have been audited.

The Role of the OCTC Special Assistant

The OCTC Special Assistant will review the lists and any memoranda and prepare a Random Audit Findings memorandum summarizing the overall findings of the audit. Within four weeks of receipt of the lists and any memoranda, the OCTC special Assistant will provide the Random Audit Findings memorandum to the management team for its review and discussion and for the identification of training issues, policy issues and corrective action, if any.

Policy Directive

Policy Directive 2010-01

Sharing and Implementation of Findings of Random Audits of Closed Files

Introduction

On August 2, 2004, the Office of the Chief Trial Counsel (OCTC) re-established the Audit and Review Unit, a small unit of experienced attorneys charged with, among other things, conducting random, semi-annual audits of closed files.

The purpose of this policy directive is to establish a formal process to follow up on and ensure implementation of recommendations that arise from the Audit and Review Unit's semi-annual audits.

Relevant Rules and Policies

Policy Directive 2006-02 establishes a procedure for the random audits conducted by the Audit and Review Unit 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.

In the 2009 Recommendations of the Bureau of State Audits (2009-030), the State Auditor recommends the creation of a formal process to follow up on and ensure implementation of recommendations that arise from the Audit and Review Unit's semi-annual audits.

Summary of Past Practice

Under Policy Directive 2006-02, at the conclusion of each audit, the OCTC Special Assistant prepares a Random Audit Findings memorandum summarizing the overall findings of the audit and provides that memorandum to the OCTC management team for its review and discussion and for the identification of training issues, policy issues and corrective action, if any.

Statement of New Policy

At the conclusion of each audit, the OCTC Special Assistant will prepare a Random Audit Findings memorandum summarizing the overall findings of the audit and will provide that memorandum to the OCTC management team in accordance with Policy Directive 2006-02. In addition, for the purpose of following up on and implementing the recommendations that arise from Audit and Review Unit's semi-annual audits, the following formal process will be followed.

Managers meeting. After each audit, the management team will discuss the Random Audit Findings memorandum within 30 days of the completion of the memorandum. The Administrative Secretary to the Deputy Chief Trial Counsel will keep a record of this discussion in the minutes to the meeting.

Staff meeting/training. After each audit, the Audit and Review Unit Supervising Trial Counsel, with the assistance of an OCTC manager, will conduct a staff meeting within 60 days of the completion of the Random Audit Findings memorandum to discuss the findings and provide appropriate training. At that meeting:

- Staff will be informed of the Random Audit Findings and
- Staff will receive training as indicated by the Random Audit Findings memorandum.

The Administrative Secretary to the Deputy Chief Trial Counsel will keep a record of any training conducted.

APPENDIX 2

Audit Checklist

File No:

Respondent's Name:

State Bar Number:

Case Number:

Case Categorization:

INTAKE:

INVESTIGATION:

TRIAL:

ALL CASES

1. Were all appropriate culpability issues considered whether or not specifically identified by complainant? Yes: No: N/A:
Comment:
2. Was the disposition approved by the appropriate supervisor? Yes: No: N/A:
Comment:
3. Was an adequate closing letter * sent to the complainant? Yes: No: N/A:
Comment:
4. If the respondent was contacted, was the respondent accurately notified of the closing decision? Yes: No: N/A:
Comment:
5. If a Resource or Warning Letter was sent, did it accurately inform respondent as to the reasons for its issuance? Yes: No: N/A:
Comment:
6. If post-closing correspondence was received from the complainant, was it handled appropriately *? Yes: No: N/A:
Comment:
7. Were significant actions documented in Odyssey? Yes: No: N/A:
Comment:
8. Did staff make all appropriate referrals to law enforcement, other agency and/or the client security fund? Yes: No: N/A:
Comment:
9. Were copies of all letters, memos, and other appropriate materials scanned into Odyssey and/or placed in the file, if applicable?

Yes: No: N/A:

Comment:

INVESTIGATION LEVEL (Answered for cases that proceeded to investigation or trial)

10. Were the proper priority code and reason(s) utilized? Yes: No: N/A:

Comment:

11. Was an investigation plan prepared or waived? Yes: No: N/A:

Comment:

12. If an investigation plan was prepared, was it adequate in light of the priority code designation and public protection? Yes: No: N/A:

Comment:

13. If an investigation plan was prepared, was it followed or was the investigation appropriately modified? Yes: No: N/A:

Comment:

14. Did OCTC complete the work up of the case before the rule of limitation expired and only perform work concerning non time-barred allegations? Yes: x No: N/A:

Comment:

15. If investigation plan directs such action, was the complainant interviewed or, if not, was the interview waived/excused *? Yes: No: N/A:

Comment:

16. If the complainant was interviewed, was the interview adequate and properly documented? Yes: No: N/A:

Comment:

17. Was all necessary documentary evidence obtained? Yes: No: N/A:

Comment:

18. Were all necessary witness interviews conducted? Yes: No: N/A:

Comment:

19. If witness interviews were conducted, were the interviews adequate and properly documented? Yes: No: N/A:

Comment:

20. Was the respondent contacted or, if not, was the contact waived or deemed unnecessary (e.g., because the case was abated)? Yes: No: N/A:

Comment:

21. If the respondent was contacted for a response to the complaint, were such contacts properly documented and adequate *? Yes: No: N/A:

Comment:

TRIAL LEVEL (Answered for all cases that proceeded to the State Bar Court)

22. Was a charging memorandum prepared and, if so, was it adequate and approved by a supervisor? Yes: No: N/A:

Comment:

23. If a notice of disciplinary charges was filed, were the factual allegations clear and appropriate? Yes: No: N/A:

Comment:

24. If a notice of disciplinary charges was filed, were the conclusions of law appropriate?

Yes: No: N/A:

Comment:

25. If a stipulation was filed, did it contain statements of the facts and conclusions of law sufficient to explain the basis for the OCTC's settlement decision? Yes: No: N/A:

Comment:

26. If a stipulation was filed, did it contain a correct legal analysis and adequate description of the facts and was it written in a clear/comprehensible manner? Yes: No: N/A:

Comment:

27. If a stipulation was filed, did it contain an adequate explanation of why OCTC agreed to the level of discipline? Yes: No: N/A:

Comment:

28. If the matter was reviewed by the review department, did OCTC submit competent briefing and motions, if applicable? Yes: No: N/A:

Comment:

29. Were the litigation issues (e.g., ENECs, settlement discussions, stipulations, motions, subpoenas, service, etc.) handled appropriately, so far as the file/Odyssey shows? *

Yes: No: N/A:

Comment:

COMPLIANCE (Answered for all cases)

30. Does the final disposition comply with applicable office policies, procedures and disciplinary standards, and case law? Yes: No: N/A:

Comment:

31. If the matter did not result in discipline, does the file/Odyssey contain a memorandum or other documentation that provides an adequate, written explanation for the final disposition? Yes: No: N/A:

Comment:

32. Should OCTC reopen the file to reconsider its closing decision? Yes: No: N/A:

Comment:

*See Glossary of Definitions/Terminology for Use with Checklist

GLOSSARY OF DEFINITIONS/TERMINOLOGY FOR USE WITH CHECKLIST

Adequate closing letter means a letter that explains the basis for the decision in a way that can be understood by recipient and contains sufficient information to determine whether the correct decision was made. (Checklist Question 3)

Appropriate handling of post-closure correspondence means case forwarded to the Complaint Review Unit, as appropriate, or reviewed and acknowledged or reopened for further investigation. (Checklist Question 6)

Excused interview means that reasonable efforts which were made to contact CW were unsuccessful. (Checklist Question 15)

Adequacy of letters of inquiry and interviews means OCTC inquired as to all the issues identified for investigation, requested appropriate substantiation and followed up when provided an insufficient or no response. (Checklist Question 21)

Charging memorandum adequate means that it contained sufficient and accurate information and analysis of all important issues. (Checklist Question 22)

In assessing the appropriate handling of litigation issues, the auditor is requested to identify clear and objectively verifiable litigation errors. The purpose of this question is not for auditor to substitute his or her judgment for that of the handling attorney. (Checklist Question 29)