



The State Bar *of California*

OPEN SESSION AGENDA ITEM 60-2 NOVEMBER 2022

DATE: November 17, 2022

TO: Members, Board of Trustees

FROM: George S. Cardona, Chief Trial Counsel

SUBJECT: Report on Random Audit of the Office of Chief Trial Counsel Files Closed Between September 1, 2020, and February 28, 2021, 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 September 1, 2020, through February 28, 2021, 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 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. In January 2022, OCTC revised its policy directive relating to the random audit to require a report to the Regulation and Discipline Committee (RAD) (now the Board following action at the September 2022 Board meeting) on the results of each random audit and OCTC's response to those results. In response to a recommendation made in connection with the most recent state audit, this item also provides a timeline for OCTC to report back to the Board on its implementation of recommendations from the random audit.

On July 15, 2022, OCTC received the report of the random audit for files from the period September 1, 2020, through February 28, 2021, which includes recommendations for training

to improve OCTC's effectiveness.¹ The audit report was reviewed and discussed with OCTC managers on August 6, 2022. 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, OCTC has reviewed the 12 cases recommended for reopening by the audit and will be reopening 9 of these cases. OCTC also provided training for staff on a number of issues identified in the audit on September 13, 2022, and training on the rule of limitations as recommended by the audit on October 26, 2022. A timeline for OCTC's other corrective actions is included in this report.

BACKGROUND

Effective October 2000, 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 OCTC's Audit and Review Unit, that unit assumed responsibility for the review, with its results compiled into a summary report by OCTC's 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 OCTC's 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, 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. In January 2022, OCTC's procedures were modified to require such presentations as additional audit reports are received.

On April 14, 2022, State Audit Report 2022-030 ("The State Bar of California's Attorney Discipline Process – Weak Policies Limit Its Ability to Protect the Public from Attorney Misconduct") made several recommendations regarding the random audit. The state audit report recommended that the Legislature require the State Bar to do the following:

- Regularly change its external reviewer.
- Have its external reviewer present its findings and recommendations, with all confidential information redacted, directly to the Board of Trustees of the State Bar.
- Require the State Bar to report periodically to the board on the actions it takes to address the external reviewer's recommendations.

The state audit report also recommended that, to "increase the independence and objectivity of the external review of its case files, the State Bar should amend its policies by July 2022" to:

- Require its external reviewer to select the cases for the semiannual review.

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

- Establish formal oversight to ensure that it follows up and addresses the external reviewer's findings.

Effective July 18, 2022, OCTC revised its procedures to address the state audit report's recommendations regarding the independence of the external auditor and reporting to the Board on implementation of recommendations of the external auditor. In particular, OCTC revised its procedures to:

- provide that the random selection of files for review would be done by the retained external auditor (rather than OCTC) with the assistance of the Mission Advancement & Accountability Division (MAAD)
- remove OCTC from the selection process for the retained external auditor, leaving that selection to MAAD
- require MAAD to ensure that any prior connection the external auditor may have had to OCTC does not affect the external auditor's independence
- require MAAD, to the extent possible, to identify multiple available external auditors so that retention for consecutive external audits can be rotated to different identified external auditors
- require the delivery of the external auditor's "findings and recommendations, with all confidential information redacted" (this is the executive summary prepared by the auditor, which does not contain any confidential case information) to MAAD, which will in turn deliver it directly to the Board (and to OCTC for response)
- require OCTC, in its report to the Board, to set out proposed timelines for implementing audit recommendations and reporting on implementation to the Board.

The current random audit is a catch-up audit, attempting to get back on schedule following delays caused by the COVID-19 pandemic, conducted under OCTC procedures in place prior to the July 18 revisions. Future audits will be conducted under the revised procedures.

A minimum of 290 closed files are randomly selected for each audit, with at least approximately 260 of these files to be audited (the balance constitutes potential replacement files in case the auditor determines that some number of the original 290 cannot or should not be audited or that additional audit files are required to ensure that at least 45 separate cases closed at the trial level are audited). The approximately 260 audited files are to consist of approximately 100 files closed at the intake level, approximately 100 files closed or otherwise resolved at the investigation stage, and approximately 60 files closed at the trial level. For cases closed at the investigation and trial levels, the files are to be selected equally from each OCTC trial team, with a representative number of files handled by special deputy trial counsel (SDTC).

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 reviewed a total of 255 files closed between September 1, 2020, and February 28, 2021. Due to difficulties encountered in reviewing information on closed files assigned to SDTC, only eleven SDTC cases were audited. (Files 1, 20, 23, 101, 109, 116, 177-179, 199, 201, and 214) The auditor's primary recommendations from the audit of these 255 files, and OCTC's responses, are as follows:

RECOMMENDATIONS TO REOPEN TWELVE FILES

One of the benchmarks for 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 12 files (4.7 percent of total files audited) is similar to the last audit (3.9 percent of total according to the auditor and 3.5 percent after OCTC's review). Three of the files recommended to be reopened involved a subsequently disbarred attorney; excluding these three, 9 files will be reopened (3.4 percent of total files audited). The target metric for random audit reopening recommendations is 4.3 percent.

The fact that the auditor recommended reopening only 12 files out of 255 audited suggests OCTC staff are overall, appropriately resolving cases. As in prior audits, the auditor recognized that although "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, office policy or case law precedent; or (2) a clear error of judgment outside the acceptable range of prosecutorial discretion. OCTC will give the auditor's recommendation great weight and deference and will reopen the case as recommended by the external auditor unless it finds that the audit recommendation was clearly erroneous or that other circumstances make it inappropriate to reopen the case.

OCTC reviewed the twelve files recommended for reopening by the auditor using this standard and will reopen nine files for additional investigation or action. It will not reopen three files that were closed and relate to an attorney who has subsequently been disbarred. (Files 255, 256, and 260)

Some issues identified by the auditor in the files recommended for reopening include:

- Two files involved premature closures by a staff attorney at the intake stage. (Files 13 and 21) In one matter, the staff attorney should have followed up with the complaining witness and sought additional information. In the other matter, the facts supported referral for investigation and contact with the respondent for a response to the allegations despite the complainant's failure to provide requested additional information.
- In six files, including one in which a warning letter was issued, the auditor noted that OCTC's investigation was inadequate, incomplete, or otherwise contained incorrect conclusions, resulting in all six files requiring further investigation. (Files 113, 142, 157, 175, 176 and 184)
- In one file involving a warning letter, the auditor recommended reopening to ensure that respondent complied with the conditions in the letter. (File 254)

OCTC reopened the above-referenced 9 files pursuant to the auditor's recommendations. For three of those files, after additional investigation and review, OCTC has determined that reclosure is appropriate:

- In file 21, OCTC followed up with the complaining witness as recommended, but the complaining witness indicated they did not want to pursue the complaint and declined to cooperate with the investigation; OCTC determined that without the complaining witness's cooperation, OCTC could not develop sufficient evidence to proceed.
- In file 142, in which a warning letter was issued, OCTC obtained additional court documents as recommended; after review of those documents, OCTC determined that the original disposition by way of warning letter remained appropriate.
- In file 254, OCTC determined that respondent had substantively complied with the conditions of the warning letter. The initial belief to the contrary was based in part on OCTC's misfiling of a document submitted by the respondent.

OCTC will conduct further investigation and address any individual performance issues reflected in the handling of the remaining 6 files.

In addition to the files recommended for reopening, the audit noted that "[e]ven though errors are identified in an additional eight files that should technically be reopened, such action has not been recommended." Though the audit report does not explain the absence of a reopening recommendation, the cited errors appear minor and/or procedural and unlikely to result in a change in the substantive decision to close. Three of the 8 files (files 1, 178, and 199) are Special Deputy Trial Counsel (SDTC) files and will be referred to the SDTC Administrator to address with the SDTC. OCTC has reviewed the other 5 files (files 43, 98, 103, 139, and 259) and has determined not to reopen any of them. The issues identified by the auditor will be incorporated in training for OCTC staff.

Report on Implementation: OCTC will report back to the Board at its March 2023 meeting regarding the 6 remaining reopened cases.²

TRAINING RECOMMENDATIONS

The audit recommended substantive training regarding specific errors identified in complying with OCTC policies and practices such as non-trust account bank subpoenas, delays in the resolution of certain cases, and the inconsistent handling of similar matters. In addition, the audit identified legal issues pertaining to the Rules of Professional Conduct as well as civil court procedures that were incorrectly analyzed in various files and, as such, should be considered for either individual or office-wide training. Similarly, follow-up with OCTC staff on compliance with specific State Bar Court procedures is recommended to address issues of concern identified by the auditor and, in most instances, raised by the court.

OCTC agrees with the general training recommendations noted by the auditor. OCTC provided initial training in the form of an overview of the issues identified by the auditor on September 13, 2022. In addition, OCTC provided a two-hour staff training on the Rule of Limitations on October 26, 2022.

OCTC will provide training on bank subpoenas (both non-trust and trust account). Training will also be conducted to reinforce OCTC's current case processing policies that are designed to prevent long delays in the investigation or resolution of cases. Regarding inconsistent handling of similar matters, OCTC will continue its efforts to calibrate its staff's assessments regarding charging and level of discipline. OCTC conducts regular training on the Rules of Professional Conduct, State Bar Court procedures, and relevant civil court procedures, but will ensure that this training touches on particular issues identified in the audit report. In addition, OCTC will conduct trainings on other issues identified in the audit such as the importance of documenting case information in Odyssey and the importance of accurate and complete communications with complainants and respondents. Finally, OCTC will provide reminders to its staff about the need to document compliance with conditions imposed in conjunction with the issuance of warning letters.

Report on Implementation: OCTC will report back to the Board regarding its further implementation of the recommended training at the Board's March 2023 meeting.

Rule of Limitations (ROL)

The audit identified five files with errors evaluating the running of the ROL. In Files 107 and 168, the ROL issues were properly identified, but OCTC then took too long to close both matters, doing unnecessary work including unnecessary requests for information to complainants and/or respondents. This issue will be addressed in training on case processing goals. In file 193, OCTC erred in failing to accurately determine the date of the running of the ROL, while in file 243, no analysis of the ROL was included in either the investigation plan or investigation

² If the Board prefers, OCTC can report on implementation in detail to the discipline liaisons rather than the full Board.

report, despite the alleged failure to properly distribute estate trust funds having occurred ten years earlier. These issues were addressed in the ROL training conducted on October 26, 2022. In file 119, OCTC believes the audit is incorrect in finding that OCTC improperly analyzed the ROL because the audit conflates the charges involving a violation of a court order from 2012 that did not involve reportable sanctions with a reportable sanction order from 2019; the charges for a violation of a court order in 2012 were properly analyzed by OCTC as barred by the ROL.

Report on Implementation: OCTC will report back to the Board regarding its implementation of training on case processing goals at the Board's March 2023 meeting.

REFERRALS TO FEE ARBITRATION AND THE CLIENT SECURITY FUND

Several cases (files 31, 85, 99, 115, 128, 194, 209) involved incorrect referrals, or incorrect failures to refer, to fee arbitration and the Client Security Fund. OCTC will emphasize to staff the need to ensure that cases are properly referred or not referred to CSF and fee arbitration as dictated by the individual facts of the case.

Report on Implementation: OCTC will report back to the Board regarding its communication of information relating to referral of matters to CSF and fee arbitration at the Board's January 2023 meeting.

OLDER CRIMINAL CONVICTION MATTERS REFERRED TO OCTC DUE TO THE 2019 REFINGERPRINTING PROCESS

The audit notes that three criminal conviction matters (files 226, 227, and 228) were closed because OCTC could not obtain evidence needed due to the age of the conviction. The problems related to obtaining evidence in older conviction matters are the result of the re-fingerprinting process pursuant to California Rule of Court 9.9.5 that occurred in approximately 2019. This process uncovered many old unreported convictions. The issues related to the closures of older conviction matters indicated in the audit are unrelated to OCTC's case handling.

Report on Implementation: None.

COMMUNICATIONS WITH COMPLAINANTS AND RESPONDENTS

The audit notes 20 files involving communication issues with complainants, including incomplete or erroneous content of closing letters, inappropriate justification for closure, improper referrals to fee arbitration or CSF, and absence of follow-up with complainants who contacted OCTC after receiving notice that their files had been closed. (Files 1, 13, 21, 31, 43, 59, 82, 85, 98, 99, 114, 128, 175, 176, 194, 200, 209, 217, and 218.) The audit notes that the number of errors in this category are significantly less than in the prior three audits.

The audit also notes errors in 14 files (files 102, 113, 123, 128, 159, 169, 175, 181, 196, 197, 220, 254, 255, and 259) regarding the handling and/or content of letters of inquiry to respondents, including not addressing some of the misconduct apparent from the complaint,

requesting information unrelated to the complaint, and raising issues that do not constitute misconduct.

Finally, the audit also notes errors in 11 files (files 69, 116, 132, 176, 178, 184, 227, 228, 230, 245, and 255) relating to closing, resource, or warning letters to respondents, including not sending closing letters to respondents, sending closing letters to respondents who were unaware that complaints had been filed against them, and incomplete or inappropriate content.

OCTC will address all these issues in its planned training on communications with complainants and respondents.

Report on Implementation: OCTC will report back to the Board regarding its implementation of training on communications with complainants and respondents at the Board's March 2023 meeting.

OCTC DISAGREES WITH THE AUDIT'S CONCLUSIONS REGARDING SEVERAL TRIAL MATTERS

OCTC disagrees with the audit's criticism of several trial matters.

In File 216, the audit is critical of one of OCTC's charges (failure to obey a court order) and states that "[s]taff should be reminded to carefully analyze the facts of each matter and make sure they fall within the specific violations alleged." The criticism and admonition by the auditor is misplaced and an exaggeration of the issue in the case. The State Bar Court Hearing Department found in OCTC's favor and agreed that respondent failed to obey a court order. That the Review Department ultimately did not agree does not make OCTC and the Hearing Department's analysis necessarily incorrect or warrant admonitions to OCTC staff. Moreover, the Review Department Opinion recommended that respondent be disbarred. OCTC's "failure" to prevail on every charge does not reflect a "clear error in judgment outside the acceptable range of prosecutorial discretion" especially when the Hearing Department and Review Department do not agree on the analysis of the facts and law.

In File 237, the auditor criticizes OCTC's decision to file a partial request for depublication and suggests that OCTC did not properly handle the case. OCTC's potentially valid reasons for the request for partial depublication, however, were properly set forth in its request. That the Review Department denied the motion does not mean that it was improperly motivated.

In File 238, the audit criticizes OCTC for requesting an extension for briefing at the Review Department stage as well as for requesting publication of the case. As an initial matter, the audit fails to mention the Review Department's favorable ruling granting OCTC's appeal and recommending that respondent be disbarred. Regarding the extension, the audit fails to note that the extension requested was merely a courtesy advisal to the Court that OCTC needed the standard "grace period" for filing under Rule 5.152(D). The audit further improperly speculates that that assigned OCTC attorney was not working enough hours or not willing to work weekends when the auditor has no information about the attorney's caseload or other events that may have precluded the attorney from finishing the brief by the original due date.

Moreover, the respondent did not object to the extension. Regarding the request for publication, the audit asserts that it lacked compelling reasons. OCTC's request was appropriate, however, and set forth its analysis to justify publication. That the Review Department did not ultimately agree does not render OCTC's request a clear error in judgment outside the range of its prosecutorial discretion.

In File 247, the audit criticizes OCTC's decision to take this matter to trial based on the end result (an admonition). The finding of culpability and ultimate result, however, are not reflective of the underlying facts and circumstances which, in OCTC's view, indicated far more concerning misconduct. OCTC's decision to go to trial in this case was not a clear error of judgment outside the acceptable range of prosecutorial discretion.

Report on Implementation: None.

ODYSSEY: PROPERLY DOCUMENTING FILES

The auditor notes a number of deficiencies in maintaining accurate and complete information in Odyssey, including: 22 files in which documents which would have either been helpful or were essential to determining the proper handling of the case were missing from Odyssey, including letters, analytical memos, notes documenting conversations, and documentary evidence provided to the State Bar; 11 files in which incomplete or inaccurate information was posted in Odyssey; and 52 files in which actions were taken in Odyssey, but the prompts calling for these actions were not removed. As the auditor notes, many of these errors are *de minimis* and do not reflect any significant errors in the handling of the cases. As the auditor also notes, staff training on properly Odyssey remains ongoing, and the deficiencies noted by the auditor will be used to provide guidance in formulating this ongoing training.

Report on Implementation: None – Odyssey training for OCTC staff remains ongoing.

Special Deputy Trial Counsel files (Rule 2201)

This audit included several SDTC files pursuant to revised Policy Directive 2022-01. The SDTC administrator is independent and reports directly to the Board. OCTC, however, provides general substantive training to the SDTC; the Office of General Counsel (OGC) serves as an administrative liaison between the SDTC program and the State Bar. To ensure adequate training and calibration of the SDTC, a small percentage of files are included in the random audits to identify areas of need for training purposes. The auditor noted that due to a lack of Odyssey entries, twelve special deputy files were not audited and were replaced with OCTC files. The audit did find minor issues with at least three SDTC files that were audited but none required reopening. Going forward, OCTC, OGC, and the SDTC administrator are working together to better coordinate the file maintenance and reporting in Odyssey as well as SDTC access to OCTC training materials.

Going forward it is also the plan for two separate audit reports to be generated for each semiannual period – one report for cases handled by OCTC and a separate report for cases handled by SDTC. The reports will be shared with the discipline liaisons and discussed with

OCTC and the SDTC administrator, each of whom will then present their report and response to the Board.

Report on Implementation: OCTC will report back to the Board regarding its work with OGC and the SDTC Administrator to implement file maintenance and reporting in Odyssey for SDTC files at the Board's March 2023 meeting.

CONCLUSION

OCTC acknowledges that some files reflect deficiencies including insufficient details and errors in work product such as investigation plans, charging memos, and communications between OCTC and complaining witnesses and respondents. OCTC is addressing these issues by way of training where the issues reflect broadly upon the office and, where the issues are specific to staff who handled individual complaints, by directed communications with those particular staff. 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 an intensive training program over their first several weeks of employment. As noted by the auditor, OCTC improved its performance in several areas from prior audits. OCTC will strive to continue improving in other areas identified in this audit.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- a. 3. Sustain a well-resourced, motivated, and accountable, prosecutorial workforce.

Goal 4. Protect the Public by Engaging Partners

- a. 1. Increase access to State Bar data and performance outcomes.

RECOMMENDATIONS

None

ATTACHMENT LIST

- A.** Executive Summary of the Random Audit Report Prepared for the Office of the Chief Trial Counsel on Files Closed from September 1, 2020, to February 28, 2021 (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 OF THE RANDOM AUDIT REPORT
PREPARED FOR THE OFFICE OF THE CHIEF TRIAL COUNSEL
ON FILES CLOSED FROM SEPTEMBER 1, 2020 TO FEBRUARY 28, 2021**

This Executive Summary is presented to the State Bar Board of Trustees' Regulation and Discipline Committee (RAD) in compliance with the Office of the Chief Trial Counsel ("OCTC") Policy Directive 2022-01 entitled Twice-Yearly Random Audits of Closed Files¹.

Policy Directive 2022-01 was adopted on January 18, 2022. It supersedes and replaces OCTC Policy Directives 2006-02 and 2010-01 which were developed to define and describe the random audit process. The new directive does not change the purposes for the audits. It does update the processes and procedures including requiring preparation of this Executive Summary in order to increase transparency and enable additional oversight of the process. This document presents an overview of the Random Audit Report which is also prepared in accordance with the policy directive. Due to confidential information contained in the report pertaining to California attorneys who have not been publicly disciplined and State Bar personnel issues, the complete audit is provided only to the State Bar's Office of the Chief Trial Counsel and the Office of Research and Institutional Accountability ("ORIA").

In accordance with the policy directive, audits are 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. Files are chosen from both the Los Angeles and San Francisco offices of OCTC as well as a representative number of files handled by special deputy trial counsel appointed pursuant to State Bar Rule of Procedure 2201. Approximately 100 files closed at the intake level, 100 files closed at the investigation level, and a minimum of 45 cases resolved at the post-investigation/trial level are evaluated in each audit. A total of 255 files were audited for the period between September 1, 2020 and February 28, 2021. Due to difficulties encountered in reviewing information on closed files assigned to special deputy trial counsel, only eleven of the twenty-three cases selected in this group were audited. The remainder were replaced with files handled by OCTC staff.

The purpose of the audit is "to ensure that OCTC's actions are within the acceptable range of its prosecutorial discretion and comply with statutory provisions, case law precedent, and OCTC policies and procedures." To prevent bias in the results of the audits, they are conducted by outside independent counsel. Despite efforts made by OCTC and ORIA to obtain a group of auditors, all but one of the audits completed between 2012 to the present have been performed by Alyse M. Lazar². These offices are encouraged to continue their efforts to recruit additional qualified

¹ A copy of this policy directive is attached as 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.

attorneys to provide these legal services in order to facilitate a broader range of perspectives and a more timely completion of the audits in accordance with recommendations from the California State Auditor made in April 2022.

Each file is evaluated on a wide-range of criteria which are elicited through thirty-two questions set forth in a checklist³. Some of the questions are procedural and focus on whether or not OCTC staff are complying with standardized office practices. Other questions require an assessment of the substantive work performed on each file. Of the 255 files audited, comments on perceived errors and/or training issues are noted in 140 cases of which 36 are considered technical issues regarding documentation of activities performed on the files.

Additionally, the auditor is to determine whether or not to recommend certain files closed without the imposition of any discipline should be reopened due to identified deficiencies bearing on the case disposition (e.g., closing a file without obtaining sufficient available evidence to make a valid determination). 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 auditor has recommended reviewing and possibly reopening twelve files. Even though errors are identified in an additional eight files that should technically be reopened, such action has not been recommended. These errors include staff's failure to obtain necessary information to determine if a *de minimus* violation of the Rules of Professional Conduct occurred; failure to consider certain information submitted by a CW which would not change the disposition of the case; and failure to provide sufficient time to a CW to respond to a request for additional documentation prior to closing a complaint where no misconduct has been alleged.

Information about each file is reviewed on OCTC's on-line file retention system Odyssey. For those files in which some or all of the documentation has not been scanned into Odyssey, the paper files are provided to the auditor. This occurred for twenty-nine cases contained in twenty-six boxes delivered to the auditor in the current audit. The checklist is completed for each file audited and, where errors are observed and/or training issues identified, explanatory comments are included. An appendix to the audit report includes substantially similar comments with references to the applicable checklist questions listing each file with the State Bar case numbers as well as the assigned audit numbers and Respondents' names. This appendix is utilized to prepare the Random Audit Report which analyzes the results of the audit in a more cohesive fashion.

Within thirty days after receipt of the Random Audit Report, the findings are to be reviewed and discussed by the OCTC management team. 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.

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 last three audit. In coordination with OCTC and ORIA, efforts will be made to catch up on these audits to provide more timely feedback.

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 A copy of the audit checklist is attached as Appendix 2.

The auditor 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 considered whether or not specifically raised by the complainant. 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.

Thirteen cases are identified with Question 1 deficiencies for either failing to obtain adequate information and evidence to determine if the attorney engaged in disciplinable conduct and/or failing to properly analyze the information in the file. For example, a file was closed when the Respondent presented proof of payment of sanctions but serious underlying misconduct which resulted in the sanctions was not investigated. Six additional investigation level files contained investigation plans which misstated or misanalysed the issues; failed to include significant facts or issues; directed investigation of issues not present in the case; and/or contained instructions that were not followed by the investigator. Similarly, one of the charging memoranda reviewed in this audit failed to accurately analyze the issues presented in the case impacting the litigation and delaying resolution of the case.

The auditor commented on twenty of the 255 files regarding communication issues with the individuals who filed the State Bar complaints (“CWs”). Many of these concern incomplete or erroneous content of closing letters and in some cases, inappropriate justification for the closure of files without a full investigation. Also, referrals to fee arbitration or the client security fund were made in some cases where the facts clearly show that the CW could not pursue this remedy. Such referrals were not made in other cases that did qualify. In five cases where the CWs contacted OCTC after receiving notice that the files were closed, there was no follow-up to these correspondences contrary to office policy and the express language contained in the closing letters.

OCTC sends correspondence, including emails, to Respondents to obtain their explanation for alleged misconduct. Thereafter, if the matter does not proceed to the trial unit, Respondents are notified of file closure 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 fourteen cases regarding the handling and/or content of letters of inquiry including not addressing some of the misconduct apparent from the complaint; requesting information unrelated to the complaint; and raising issues that do not constitute misconduct resulting in requiring Respondents to reply to unmeritorious matters.

Eleven cases raise issues of concern regarding closing and warning letters. In some instances, the letters were not prepared and sent to the Respondents or sent to a Respondent who was unaware that a complaint had been filed. In other matters, the content of the letters was incomplete or inappropriate such as, in a warning letter emanating from a seven-year-old conviction for disorderly conduct, “hoping” that Respondent will contact the Bar’s Lawyers Assistance Program to discuss the substance of the conviction and address “any issues you may be struggling with”. If OCTC thought that the Respondent had some type of current health issue possibly impacting the practice of law which required an evaluation and/or treatment, it should have been spelled out in the letter with a requirement to attend classes or counseling as a condition of the warning letter. There is no evidence that the State Bar Court made this recommendation in dismissing the case.

Eight of the audit checklist questions focus on how OCTC attorneys handle cases at the pre-trial, trial and appellate levels of the State Bar Court. This includes cases that are resolved with Stipulations as well as motions to dismiss prior to trying the matter before the State Bar Court. Some of the problems identified with Stipulations were resolved when pointed out by State Bar Court judges requiring revisions prior to approval. Such Stipulations failed to include an adequate discussion of the appropriate discipline in light of the Respondents' prior disciplinary record and/or failed to comply with the Court's procedural rules and requirements for Stipulations. In one matter, the Stipulation was written by the deputy trial counsel to justify the low-level resolution and contained false statements including that there were no aggravating factors when four such factors had been identified in the charging memorandum. Consequently, the Court was unaware of the errors at the time the document was approved.

In six cases, problematic motions were filed with the State Bar Court. These include a request for additional time to file a brief which contained no facts or legal basis to justify the request as well as incomplete motions for default judgments that were rejected requiring amendment and refile due to a failure to comply with technical mandates. A motion for summary judgment was filed in a criminal conviction matter for which the conviction was not final. Fortunately, the State Bar Court denied the motion as premature and, when the conviction was reduced to a misdemeanor, it was no longer eligible for summary disbarment. Similarly, due to the staff attorney's failure to understand certain civil court procedures, OCTC prematurely pursued discipline against a Respondent who had taken the steps necessary to preserve his right to appeal a sanction order. After four years of litigation in State Bar Court, which could have been avoided if OCTC had agreed to an abatement, the case was dismissed when the sanction order was reversed on appeal. In two cases, there were staff errors regarding the violations alleged in the Notices of Disciplinary Charges due to a failure to accurately comprehend and apply the State Bar's self-reporting requirements and its reciprocal jurisdiction mandates.

Compliance with State Bar policies, procedures, disciplinary standards, and case law is also assessed in the audit. To avoid redundancy, trial conduct is not considered in answering audit checklist question 30. Eighteen files were identified with one or more of these issues. Many of them resulted in closing files that should have been investigated or warranted a disposition other than a straight closure. In one case involving the apparent mishandling of small quantities of trust account funds, a convoluted argument contrary to the law in this area was presented by the staff attorney to rationalize closing the file. In two cases involving the same misconduct and resulting in stipulation to public reproofs, one Respondent was required to pass the multistate professional responsibility exam (MPRE) and the other was not with no explanation for this discrepancy.

One OCTC procedure that is considered separately pertains to whether or not cases are properly evaluated for the running of the rule of limitation before investigations are undertaken. Errors regarding this issue were identified in five files. In one matter, the case was pending in investigation for two years even though it was evident from the information in the file at initiation that the rule of limitation had run.

Fifteen cases were identified with issues regarding the failure or inability to obtain documentary evidence required to adequately assess and/or prosecute the matter. In one case, OCTC staff instructed the CW to provide OCTC with confidential records from Respondent's law office in

which the CW was employed without recognizing that this would require the consent of the clients and the law firm. Because the cause was closed, albeit inappropriately, this improperly obtained evidence was not used or made public in any disciplinary matter.

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 twenty-two files, documents which would have either been helpful or were essential to determining the proper handling of the case were missing from Odyssey including letters, analytical memos, notes documenting conversations, and documentary evidence provided to the State Bar. In one case, voluminous papers provided by a Respondent via a dropbox for which the link is no longer valid were never scanned into Odyssey. Consequently, the auditor relied on staff representations regarding the content of these documents rather than independently verifying.

Odyssey also contains activity logs which are to be used to document all actions taken on a case and the dates these actions occur. Incomplete and/or erroneous information is posted on Odyssey regarding eleven of the files audited. Moreover, Odyssey has a section flagging activities for which actions are due. In fifty-two files, these actions were apparently performed, however the prompts were not removed from this "to do" screen on Odyssey. Staff training on properly using Odyssey is ongoing and the deficiencies noted in the audit should provide guidance as to which areas need improvement. Because some of the errors identified by the auditor are *de minimis*, even though the number of errors in a particular section may be relatively large, they may not reflect adversely upon the overall work of OCTC and are more instructive in dealing with certain staff on an individual basis.

The final portion of the audit report focuses on recommendations for training and possible modifications to OCTC practices and procedures. Items raised in this section include irregular file closure practices; difficulties in obtaining sufficient information regarding some of the files assigned to special deputy trial counsel because these attorneys do not have access to Odyssey and their maintenance of physical files is not consistent; and improving the use of Odyssey. Substantive training has been recommended regarding specific errors identified in complying with OCTC policies and practices such as non-trust account bank subpoenas, delays in the resolution of certain cases and the inconsistent handling of similar matters. Legal issues pertaining to the Rules of Professional Conduct as well as civil court procedures which were incorrectly analyzed in various files are raised for either individual or office-wide training. Similarly, follow-up with OCTC staff on compliance with specific State Bar Court procedures is recommended to address issues of concern identified by the auditor and, in most instances, raised by the court.

In addition to reviewing the audit report and providing training to staff, OCTC will be conferring with the auditor to discuss issues of agreement and disagreement and to share information regarding any new and revised office practices and policies which have or will be implemented. This feedback is essential to the process to enable the auditor to review the files with knowledge of current practices and thereby provide the greatest benefit to the Office of the Chief Trial Counsel in accurately assessing files in future audits.