



The State Bar of California

OPEN SESSION AGENDA ITEM 60-2 MARCH 2023

DATE: March 16, 2023

TO: Members, Board of Trustees
Sitting as the Regulation and Discipline Committee

FROM: George S. Cardona, Chief Trial Counsel

SUBJECT: Report on Random Audit of the Office of Chief Trial Counsel Files Closed
Between March 1, 2021, and August 31, 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 March 1, 2021, through August 31, 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 sitting as RAD following action by the Board at its September 2022 meeting) on the results of each random audit and OCTC's response to those results. In response to a recommendation contained in the most recent State audit, this report also provides a timeline for OCTC to report back to the Board on its implementation of recommendations from the random audit.

On or about December 9, 2022, OCTC received the report of the audit for files from the period March 1, 2021, through August 31, 2021, which includes recommendations for training to

improve OCTC's effectiveness.¹ The audit report was reviewed and discussed with OCTC managers on January 6, 2023. On February 3, 2023, OCTC provided training to OCTC attorneys, investigators and paralegals concerning the random audit findings. 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 11 cases recommended for reopening by the audit and will be reopening 6 of these cases. OCTC has also reviewed an additional 8 cases recommended by the auditor for review and will reopen two of these cases. 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:

¹ Attachment A is an executive summary of the audit report prepared by the auditor. 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 most of whom have not been the subject of public disciplinary proceedings on the matters referenced in this report." Attachment B is the audit checklist used by the auditor in reviewing individual files.

- Require its external reviewer to select the cases for the semiannual review.
- 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 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 another catch-up audit, attempting to get back on schedule following delays caused by the COVID-19 pandemic, and was conducted under OCTC procedures in place prior to the July 18 revisions. In accordance with these procedures, a total of 256 files were audited for the period between March 1, 2021, and August 31, 2021: 100 closed at the intake level; 100 closed at the investigation level; and 56 closed at the trial level. Included in these 256 files were six files handled by special deputy trial counsel (SDTC) (Files 101, 102, 103, 119, 145, and 155).²

Each file is evaluated on numerous criteria including whether: file closing procedures were

² Effective February 14, 2023, OCTC revised its procedures to require that only 212 files (86 closed at the intake level, 86 closed at the investigation level, and 35 closed at the pre-or post-trial level) be selected for the random audit. This reduction in the number of files randomly selected for audit is based on two modifications to the overall audit program: (1) the 260 files previously required to be audited included "a representative number of files handled by Special Deputies"—approximately 3–5 cases handled by special deputies will now, pursuant to a policy directive issued by the special deputy trial counsel administrator, be the subject of a separate random audit in each audit period; and (2) a new portion is being added to the audit to address the roughly 2 percent of respondents (based on data for calendar years 2019 to 2022) who have 15 or more prior complaints during a five year period—this portion of the audit will involve approximately 48 files, bringing the total for the separate SDTC audit and both portions of the OCTC random audit to approximately 260 files for case selection for the random audit.

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 256 files closed between March 1, 2021, and August 31, 2021. The auditor's primary recommendations from the audit of these 256 files, and OCTC's responses, are as follows:

RECOMMENDATIONS TO REOPEN ELEVEN 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 4.2 percent of the audited files (11 of the total of 256 files audited) is similar to the last several audits:

September 1, 2020, to February 28, 2021:	4.7% (12 of 255)
March 1, 2020, to August 31, 2020:	3.9% (10 of 255)
September 1, 2019, to February 29, 2020:	3.1% (8 of 251)
March 1, 2019, to August 31, 2019:	3.6% (9 of 250)
September 1, 2018, to February 28, 2019:	3.2% (8 of 251)
March 1, 2018, to August 31, 2018:	4.7% (12 of 258)
September 1, 2017, to February 28, 2018:	3.9% (10 of 258)

As discussed below, after review, OCTC is declining to reopen five of the files recommended for reopening; excluding these five, six files (files 18, 38, 45, 52, 68, and 125) will be reopened (2.3 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 11 files out of 256 audited suggests that 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.

Using this standard, OCTC reviewed the 11 files recommended for reopening by the auditor (files 18, 38, 45, 52, 68, 125, 185, 199, 207, 226, and 231) and will reopen six files for additional investigation or action. Five are not being reopened for the following reasons:

- Three of the five files not being reopened (files 185, 207, and 231) involved OCTC's failure to advise the complainant of the result of the investigation (e.g., that respondent received discipline or that the case was closed). OCTC will issue reminders to staff to follow up with complainants; however, the failure to provide notice to a complainant generally does not require reopening the case, especially when, as in file 231, the Supreme Court has already imposed discipline.
- In the two others (files 199 and 226), closure with the issuance of a warning letter fell within OCTC's prosecutorial discretion, and the other technical errors noted in the files will be corrected but do not warrant reopening.

Of the six files being reopened:

- In three (files 18, 45, and 52), OCTC failed to follow up with complainants who provided or offered to provide additional information regarding the respondent's conduct.
- In one (file 38), OCTC failed to provide an opportunity for the complainant's son (the actual client) to join in the complaint.
- In one (file 68), OCTC missed a substantive issue regarding a conflict of interest.
- In one (file 125), OCTC prematurely closed a complaint without knowing or considering the outcome of an appeal of a sanctions order.

The auditor also recommended review of an additional eight files to consider possibly reopening those files. OCTC has reviewed these eight files and, following review, will reopen two:³

- In one (file 39), though the case was flagged as a Rule 2201 conflict case and should have been referred to the 2201 administrator, instead OCTC closed the file; OCTC has now reopened the file and referred it to the 2201 administrator.
- In the other (file 194), OCTC agrees that reopening is appropriate for follow-up investigation based on the outcome of a fee arbitration.

The other six will remain closed after OCTC's review. The auditor's recommendations and summary of OCTC's errors are noted, and OCTC will follow up on individual and office

³ This brings the total number of files being reopened to 8, which is 3.1 percent of the total of 256 audited files.

performance issues as recommended by the auditor. The identified errors in these files, however, do not warrant reopening:

- In four (files 71, 76, 95, and 97), new matters in Odyssey were opened based on new information or new complaints submitted by the complainants after their original matters were closed; the opening of these new matters rendered it unnecessary to reopen the original matters.
- In one (file 227), OCTC failed to advise the complainant that the complaint had resulted in the Supreme Court imposing discipline; OCTC will send a closing letter to the complainant, but this does not warrant reopening of a matter in which the Supreme Court has already imposed discipline.
- In the last (file 253), OCTC should not have transmitted a criminal conviction; following transmittal, however, OCTC ultimately dismissed in favor of a non-public resolution, and the respondent's attorney profile page does not contain any reference to the transmittal; there is no basis for reopening.

Report on Implementation: OCTC has reopened and is conducting follow up investigation on 8 files. OCTC will report back to the Board at its May 2023 meeting regarding the 8 reopened files.⁴

TRAINING RECOMMENDATIONS

The section of the audit dedicated to recommendations regarding areas for training and possible modifications to OCTC practices and procedures highlighted the following items: inconsistencies in the handling of various matters; delays in the processing of OCTC files; deceased respondent issues including the need to obtain death certificates rather than relying on grieving family members to do so; consideration of possible misconduct beyond that alleged in the complaint; using a balanced approach to law and motion practice; and the handling of reciprocal disciplinary matters including issues arising from different rules in other State Bars.

OCTC agrees with the general training recommendations noted by the auditor and has already conducted training on some issues identified in this audit and in prior audits such as handling of J cases (April 2022), the rule of limitations (October 2022), and handling complaints from parents on behalf of minor children (February 2023). OCTC will conduct trainings on the remaining issues by July 2023. Regarding other issues identified in the audit such as the importance of accurate and complete communications with complainants and respondents, OCTC will provide ongoing reminders to its staff about the importance of following OCTC policies regarding communication and the need to document that communication in Odyssey.

The audit also noted additional items in specific cases on which training should be provided: properly identifying assumption issues pursuant to Business and Professions Code section 6180 when a respondent dies; handling of complaints filed by non-clients, including parents of minor

⁴ At the May 2023 meeting, OCTC will also report to the Board on implementation of recommendations from the prior audit. Reporting on many of those recommendations was originally to be done in January and March 2023, but has been postponed to May 2023 given this intervening audit report.

children; lack of communication by OCTC staff with both complainants and respondents; making appropriate decisions regarding abatement of cases; failure to follow up with both respondents and complainants when mail is returned to OCTC; failure to properly identify and analyze misconduct.

The auditor specifically referenced two cases where OCTC either requested or received confidential client information from the complainant who was an employee of the respondent without either the clients' or respondents' consent. The auditor also noted the erroneous content of closing letters sent to CWs; failures to follow up appropriately on new information received from complainants including change of address information; and failures to document on Odyssey evidence reviewed and conversations with complainants and respondents significant to the decisions on how to resolve the matters.

At the litigation level, several instances were identified where the auditor concluded that OCTC pursued matters unnecessarily and/or without good cause. The auditor referenced a case where OCTC provided incorrect information to respondent that resulted in a default disbarment. In another file, the auditor noted that OCTC proceeded with a default even though staff acknowledged that it lacked clear and convincing evidence. In addition, in five cases, the auditor noted that OCTC sought to "vigorously" pursue allegations involving respondents' failure to cooperate even though respondents had participated in some form during the investigation. The auditor recommended that OCTC set parameters on when to charge a violation of Business and Professions Code section 6068(i).

OCTC will follow up on the issues noted above and provide ongoing training to staff on when and when not to seek defaults, communications with complainants and respondents, assumption issues, and when and when not to charge a violation of section 6068(i).

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

CONCLUSION

OCTC acknowledges the deficiencies identified by the auditor and 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. OCTC will report back to the Board as noted in the discussion above.

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

ATTACHMENTS LIST

- A. Random Audit of the Office of the Chief Trial Counsel Files Closed Between March 1, 2021, and August 31, 2021 – Executive Summary (without referenced appendices)
- B. Audit Checklist

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 Case Audit Report Prepared for
the Office of Compliance/MAAD and the Office of the Chief Trial Counsel
for Cases Resolved Between March 1 and August 31, 2021**

This Executive Summary is presented to the State Bar Board of Trustees through its 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 Files.

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 current 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 Case Audit Report which is also prepared in accordance with the policy directive. The complete report is provided only to the State Bar’s Office of Compliance/MAAD and Office of the Chief Trial Counsel due to confidential information contained in the report pertaining to State Bar personnel issues and to California attorneys who, in most of the files audited, have not been publicly disciplined.

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 256 files were audited for the period between March 1, 2021 and August 31, 2021. The metrics of this audit are set forth below.

The vast majority of these files are reviewed exclusively through OCTC’s on-line system known as Odyssey. Due to the fact that special deputy trial counsel have not had access to input information on the cases they handle into Odyssey, paper files were provided for the six outside examiner files reviewed for this audit. Paper files for sixteen trial level cases which were commenced prior to the implementation of Odyssey were retrieved from closed files and delivered to the auditor for her review to supplement information posted on Odyssey.

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 the Office of Compliance/MAAD to obtain a group of auditors, all but one of the audits completed between 2012 to the present have been performed by Alyse M. Lazar. It is anticipated that additional qualified attorneys will be brought on 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 checklist. 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 256 files audited, comments on perceived errors and/or training issues are noted in 140 cases of which 31 cases only have technical errors regarding on-line documentation of the activities performed and six cases raise training issues only. This is similar to the prior audit which identified 140 cases with errors and/or training issues in the 255 cases reviewed.

The auditor is to determine whether or not to recommend certain files be reopened due to identified deficiencies bearing on the case disposition (e.g., closing a file without following up with complainants including not obtaining sufficient available evidence to make a valid determination and not notifying them of the outcome of the case). 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 reopening eleven files and possibly reopening an additional eight files depending on the current facts. Some of these additional files lack information as to whether or not a new complaint form submitted by the complainant (“CW”) was simply filed in the closed case or a new OCTC case was generated and investigated; whether or not OCTC should move to seal the records of a dismissed criminal conviction referred to the State Bar Court in error; and whether or not an intake case that was identified as a possible Rule 2201 matter should be reevaluated by a special deputy trial counsel.

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 is to occur within the following sixty days. OCTC independently considers and determines which files identified by the auditor will be reopened. In addition, 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.

The audit is framed by the thirty-two checklist questions. In order to make the audit report more manageable and cohesive, similar questions are grouped together for discussion in the report. Consequently, the audit report is divided into seventeen sections as listed below followed by the number of cases discussed in these sections with identified errors. Because some errors identified by the auditor are *de minimis* and others apply to more than one checklist question, 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 may be more instructive in dealing with certain staff on an individual basis.

- General observations, including reopening files: 19 cases
- Identification of all appropriate culpability issues: 10 cases
- Rule of limitation: 3 cases
- Accurate documentation of actions on Odyssey: 14 cases with substantive errors
- Proper priority code and investigation plans: 6 cases
- Interactions with complaining witness and other witnesses: 27 cases

- Obtaining documentary evidence: 3 cases
- Post-closure handling of requests for review: 13 cases
- Client security fund, law enforcement and other agency referrals: 2 cases
- Interactions with respondents: 11 cases
- Charging memorandum: 9 cases
- Documentation and supervisor approval of disposition: 15 cases
- Content of resolution documents including closure and warning letters, agreements in lieu of discipline and stipulations: 11 cases
- Handling of trial matters, including charging documents, settlements and all litigation issues at the hearing and Review Department levels: 24 cases
- Compliance with office policies, procedures, disciplinary standards, case law: 14 cases
- File maintenance and completeness of Odyssey scanning: 18 cases
- Training issues

This summary is not intended to provide information regarding every case identified in the audit report with errors and/or training issues. Instead, some of the cases raising issues of significant concern are briefly discussed as follows.

At the intake level, a case was summarily closed due to the death of the Respondent shortly before receipt of the complaint. The complainant was being represented by Respondent in an active probate court matter and had not been notified of Respondent's death by anyone on Respondent's behalf. Business and Professions Code Section 6180 et seq. sets forth the process for the State Bar to assist clients when an attorney dies and no one has taken responsibility for notifying clients and the courts about the death and, if necessary, assuming jurisdiction over the attorney's law practice and returning files to clients. This issue was not identified and the complainant and any other clients of the Respondent with pending matters, if any, were left on their own to deal with their cases. By limiting review to whether or not OCTC had jurisdiction to pursue discipline, this matter was mishandled.

OCTC inappropriately closed several cases without any investigation based on the fact that the clients had not filed the complaints. In two matters, parents of minor children were the complainants and in a third case the complainant had a power of attorney for the client. In these matters, the complainants had standing to pursue these complaints without the joinder of the clients by acting in the capacity of the clients' representatives/legal guardians. Training on this issue was recommended in the prior audit and, if it has not been completed with all staff, follow up is recommended.

A lack of communications by OCTC with CWs and Respondents are identified as issues of concern in numerous cases. In one investigation file, the Respondent offered to pursue the client's case and in another the Respondent offered to provide additional copies of the file to the client who had experienced difficulties opening a thumb drive. OCTC failed to follow-up with the CWs and share this information, missing the opportunity to assist these clients. In two cases, the CWs timely contacted OCTC in response to the closing letters indicating that they had additional documents that they wanted to submit to OCTC and required information about how to deliver them to OCTC. There was no response to either CW and these cases remained closed contrary to OCTC policy regarding reconsideration of closed files.

OCTC staff inexplicably failed to promptly respond to two requests by Respondent's counsel to abate an investigation. The first request was based on a pending civil case related to the alleged misconduct

which normally would trigger abatement. The other was due to Respondent's hospitalization and severe illness and asking if a doctor's note was required to abate the case. Nearly two months later, when OCTC responded to the second request, staff was advised that Respondent had died the prior week. In another case, the Respondent contacted OCTC staff requesting information on how he could resolve the case to which there was no response. Instead, resources were unnecessarily expended in a case that could have been promptly resolved.

OCTC failed to follow up in several cases where mail was returned to the State Bar. In one matter, a warning letter was sent to Respondent's counsel containing information that Respondent had engaged in conduct determined by OCTC to violate the Rules of Professional Conduct, but which warranted a warning letter due to the surrounding circumstances. The purpose of a warning letter is to put a Respondent on notice of the misconduct with the goal that it will not be repeated. Respondent has never received this notice, because the letter to Respondent's counsel was returned to the State Bar and OCTC made no effort to follow up either with Respondent's counsel or with Respondent, if no longer represented, defeating the purpose for this resolution.

Many of the other errors identified in cases handled at the intake and investigation levels pertain to failures to accurately identify and analyze the alleged misconduct and to obtain the necessary documentation to do so; the erroneous content of closing letters sent to CWs; failures to follow up appropriately on new information received from CWs including change of address information; and failures to document on Odyssey evidence reviewed and conversations with CWs and Respondents significant to the decisions on how to resolve the matters. There are two cases where OCTC either requested or received confidential client information from the CW who was an employee of the Respondent without either the clients' or Respondents' consent. Training on this issue is recommended.

At the litigation level, several instances are identified in the audit regarding pursuing matters unnecessarily and/or without good cause. In one instance, the Respondent had voluntarily resigned with charges pending in Oregon and desired to do so in California for the same misconduct. Rather than assisting the Respondent in doing so by referring her to State Bar Rules of Procedure 5.420 et seq. and California Rules of Court, Rule 9.21(b), OCTC staff misrepresented to Respondent that the only avenue open to her if she did not desire to contest the charges was to allow the case to be filed in State Bar Court and proceed to a default disbarment. Moreover, Respondent was not informed that OCTC had evaluated the misconduct as warranting six months suspension at most and that such a disposition would have been possible through a stipulation. Because of this misinformation, significant State Bar resources were used pursuing a default disbarment unnecessarily.

A staff note in a different file acknowledges that OCTC lacks clear and convincing evidence to pursue any of the alleged misconduct, however, the case was filed with the State Bar Court because "we anticipate that respondent may default." As the prosecuting agency, OCTC has an obligation to have a good faith belief that it has sufficient evidence to prove the case prior to filing, especially because filing with the court triggers public disclosure impacting the lawyer's reputation in the community. The case was ultimately dismissed and resolved with a resource letter, a disposition utilized when OCTC determines that no misconduct has occurred.

In five of the cases audited, OCTC sought to vigorously pursue allegations involving a respondent's failure to cooperate in the investigation of a complaint pursuant to Business and Professions Code Section 6068(i) when the level of cooperation was not as great as OCTC requested, even though the

Respondents had actively participated. In one case, where Respondent's counsel refused to have his client attend a pre-filing deposition based on legal arguments supported by the State Bar's rules limiting such depositions to witnesses, not parties to a case, OCTC went forward with the deposition without responding to the objections. The sole purpose for doing so was to create a section 6068(i) violation. It is recommended that reasonable parameters be developed regarding when it is appropriate for OCTC to charge such misconduct.

Numerous cases reviewed in this audit which were resolved by Stipulation were submitted by OCTC without sufficient attention to and compliance with the applicable rules and court orders, resulting in rejection by the State Bar Court and the necessity to correct errors that should have been known to OCTC staff. In one case, the court erroneously approved a stipulation and, when OCTC realized that it contained major errors inconsistent with Business and Professions Code Section 6049.1, it had to revoke the filing and amend it to prevent rejection by the California Supreme Court. OCTC should not rely on State Bar Court judges to catch these mistakes.

The final section of the audit report is entitled recommendations regarding areas for training and possible modifications to OCTC practices and procedures. These recommendations are made in order to improve and enhance the quality of the work performed by OCTC staff. While this section includes information regarding mistakes made by staff, the purpose is not to address such errors, but to present possible solutions and/or propose review of various OCTC policies and practices. Items discussed include inconsistencies in the handling of various matters; delays in the processing of OCTC files; deceased Respondent issues including the need to obtain death certificates rather than relying on grieving family members to do so; consideration of possible misconduct beyond that alleged in the complaint; using a balanced approach to law and motion practice; and the handling of reciprocal disciplinary matters including issues arising from different rules in other State Bars.

The audit provides a snapshot in time that is considered to be based on a valid sampling of the cases and is not intended to definitively present a review of the handling of all cases in the Office of the Chief Trial Counsel during the designated period.

Submitted by: Alyse M. Lazar, Attorney at law*

Date: December 5, 2022

*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.

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: 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)