



The State Bar of California

OPEN SESSION AGENDA ITEM 60-5 JULY 2023

DATE: July 20, 2023

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

FROM: George S. Cardona, Chief Trial Counsel
Ron Pi, Program Manager, Mission Advancement & Accountability Division

SUBJECT: Report on Results of Client Trust Account and Bank Reportable Action Pilot Project

EXECUTIVE SUMMARY

In its April 2022 report (number 2022-30), the State Auditor made several recommendations regarding the handling of bank reportable actions and client trust account related cases. In response to certain of these recommendations, on August 1, 2022, the Office of Chief Trial Counsel (OCTC) implemented a pilot program under which a dedicated team of attorneys, investigators, and other staff applied investigative procedures consistent with the auditor's recommendations to approximately 50 percent of these matters, selected at random. As a control group, the other 50 percent of these matters were handled by OCTC's other trial teams using existing procedures. A review by the Mission Advancement & Accountability Division (MAAD) of initial data compiled as of March 31, 2023, comparing the handling of these matters by the pilot program and the control group, demonstrated promising results from the pilot program. In particular: (1) cases assigned to the pilot program appear to have moved more quickly through the investigation stage; and (2) more cases assigned to the pilot program resulted in warning letters or forwarding for charging. A review of more complete data will be done once all of the cases handled during the pilot program period have moved through investigation. Given the promising results suggested by the review of the initial data, however, OCTC has determined that it will permanently dedicate a trial team to handling these matters using the pilot program procedures.

BACKGROUND

On April 14, 2022, the State Auditor released its report 2022-030, which made several findings and recommendations regarding OCTC's handling of bank reportable action (BRA) and client trust account related (CTA) cases. In particular, to ensure that OCTC "appropriately reviews complaints involving overdrafts and alleged misappropriations from client trust accounts," the auditor recommended that, by July 2022, OCTC: "When investigating client trust account-related cases and bank reportable actions not closed *de minimis*, require its staff to obtain both the bank statements and the attorney's contemporaneous reconciliations of the client trust account, and determine if the relevant transactions are appropriate."¹ The State Bar initially objected to this recommendation. Following a June 2, 2022, discussion with the State Auditor regarding resource needs for full implementation of this recommendation, the State Bar developed a pilot project for partial implementation to provide data for better assessing resource needs.

The pilot project was initiated effective August 1, 2022. Under the pilot project, a subset of OCTC Trial Team 6 consisting of the following 12 staff was assigned as the pilot team: the supervising attorney, three trial counsel, four Investigators, two paralegals, and two program specialists. On a weekly basis, from the pool of BRA and CTA cases that moved forward from intake to investigation, approximately 50 percent (with a cap of 20) were assigned to the pilot team, which was required to handle all these cases in accordance with the State Auditor's recommendations. In particular, the pilot team was directed that no pilot project case could be closed until the pilot team: (a) obtained bank statements for the relevant CTA for the relevant time period; (b) obtained the respondent attorney's contemporaneous reconciliations of the relevant CTA for the relevant time period; and (c) performed such analysis as is necessary to determine whether the relevant transactions in the CTA are appropriate (with this analysis, where appropriate, including consultation with OCTC's newly-hired forensic accountant). The balance of the BRA and CTA cases that moved forward from intake to investigation were assigned to OCTC's other trial teams for handling in accordance with OCTC's standard policies and procedures.

¹ OCTC closes BRAs *de minimis* when the bank reported insufficient funds transaction on a client trust account is less than \$50 and certain other conditions are met. The auditor made three recommendations regarding *de minimis* closures of BRAs: (1) "Discontinue its use of informal guidance for review of bank reportable actions and direct all staff to follow the policies established in its intake procedures manual (intake manual)"; (2) "Revise its intake manual to disallow *de minimis* closures if the attorney has a pending or prior bank reportable action or case alleging a client trust account violation"; and (3) "Establish a monitoring system to ensure staff are following its policies for *de minimis* closures." On April 6, 2022, intake staff, which reviews and implements *de minimis* closures of BRAs, were instructed to discontinue use of informal guidance and comply with OCTC's formal guidance for *de minimis* closures of BRAs. Effective July 7, 2022, OCTC revised its formal guidance to disallow *de minimis* closure of a BRA for insufficient funds activity less than \$50 if the respondent had either (1) a pending BRA or CTA-related complaint; or (2) a closed BRA (other than a closure based on bank error) or a closed CTA-related complaint within the last two years. Implementation of a monitoring system to ensure compliance with these policies for *de minimis* closures was postponed pending completion of the pilot program discussed in the text below.

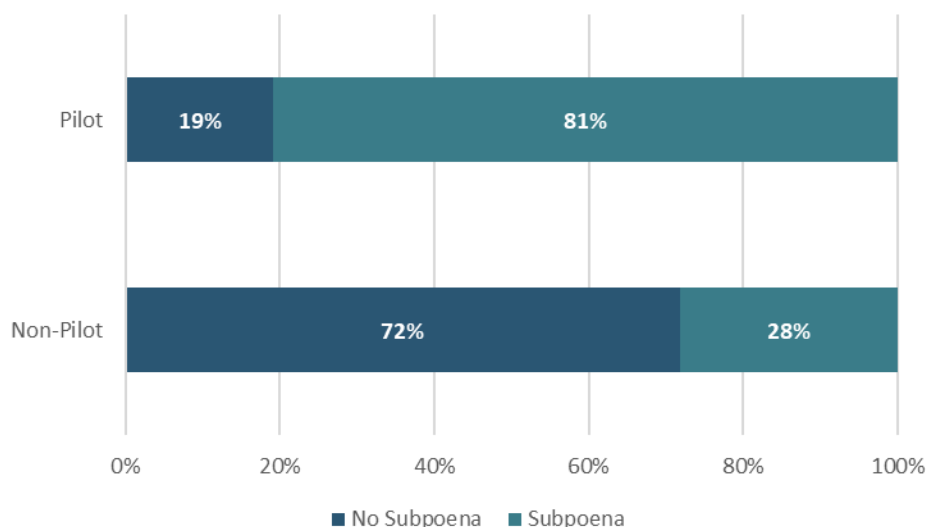
As of March 31, 2023, 296 BRA and CTA cases (involving 201 respondents) were assigned to the pilot team, while 347 cases (involving 227 respondents) were assigned to other OCTC trial teams. The cases assigned to other OCTC trial teams served as a control group for purposes of comparing the handling of cases assigned to the pilot team.

DISCUSSION

To ensure that the random assignment process produced two sets (pilot team cases and control group cases) of comparable cases, MAAD examined the following case/respondent characteristics for each of the two case sets: case type (BRA or CTA), firm size (solo, 2–10, 11–50, 50+, no information), race/ethnicity (white, Asian, multiracial, Hispanic/Latino, black/African-American, other, no information), gender (female, male, other, no information), and age (under 40, 40–54, 55–69, and 70+). Based on available data, MAAD found no statistically significant differences between the two case sets on any of these characteristics.

MAAD analyzed the handling and outcomes of pilot team cases as compared to control group cases. As expected, given the criteria applied by the pilot team, MAAD found that the pilot team issued subpoenas for bank records in a significantly higher percentage of cases (81 percent) than did the control group (28 percent). (See Figure 1.)

Figure 1. Proportion of Cases with Bank Subpoenas Issued



With respect to the speed with which cases were moved to final disposition, MAAD found that as of March 31, 2023, the pilot team had moved a significantly greater percentage of cases to final disposition (60 percent) than had the control group (44 percent). (See Figure 2.) MAAD also examined the distribution patterns of investigation time, which suggest that pilot team cases achieved faster disposition due to: (1) more pilot team cases reaching disposition sooner (as indicated by a substantial portion of pilot team cases lying to the left of the distribution curve for control group cases); and (2) fewer pilot team cases taking longer times at the other end of the distribution (as indicated by the smaller hump of pilot team cases with investigation

times beyond 150 days. (See Figure 3.)² As a result of this analysis, MAAD reached a preliminary conclusion that cases assigned to the pilot team moved through investigation to final disposition at a faster pace than cases assigned to the control group.³

Figure 2. Proportion of Cases In Open/Closed Status as of March 31, 2023

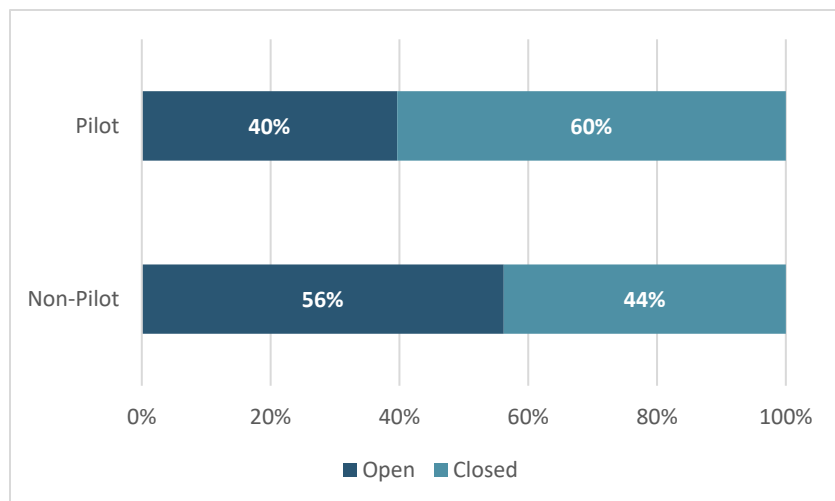
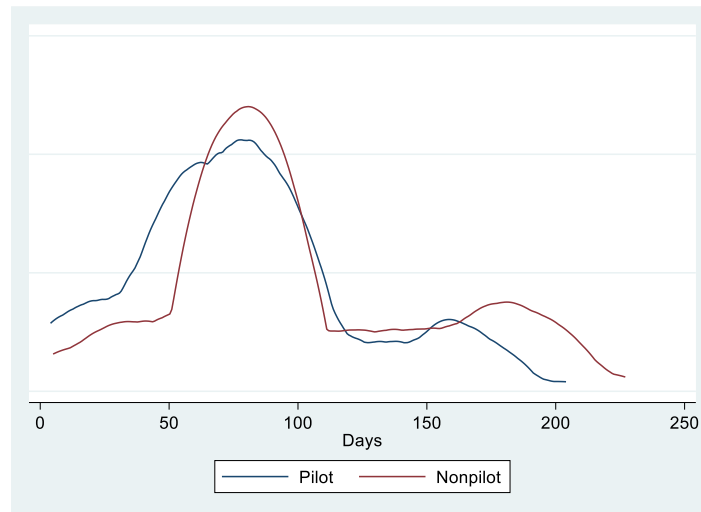


Figure 3. Investigation Time by Assignment Group

² Cases included for the analysis of distributions of investigation time were limited to those assigned to the pilot team and control group prior to December 31, 2023, to allow for sufficient post-assignment investigation time in both groups of cases. More analysis will need to be done toward the end of 2023, at which point a much larger proportion of the pilot program and control group cases should have moved through investigation to a final disposition.

³ One factor that may have contributed to the greater speed at which the pilot team moved cases to final disposition was the pilot team's active effort to quickly identify and process related cases tied to the same respondent. As referenced in the text below, the pilot team closed a greater percentage of cases as duplicates (12 percent) than did the control group (3 percent).



With respect to outcomes of cases, MAAD found that, as of March 31, 2023, while only a small fraction of cases had moved beyond the investigation stage, a higher percentage (4 percent) of pilot team cases had moved to the charging stage (prefiling or post-filing) than in the control group (less than 0.5 percent). (See Figure 4.)⁴ Even though small, the difference is statistically significant and may result from pilot cases having a higher chance of being forwarded to charging, pilot cases moving more quickly through investigation, or some combination of these factors. More analysis will need to be done toward the end of 2023, at which point a much large proportion of the pilot program and control group cases should have moved through investigation. MAAD also found that the pilot team closed cases in the investigation stage for insufficient evidence less frequently than the control group (17 percent as compared to 81 percent) and with the issuance of a warning letter more frequently than the control group (30 percent as compared to 4 percent). (See Figure 5.) As a result of this analysis, MAAD reached a preliminary conclusion that pilot program cases resulted in more warning letters being issued as well as more cases moving on to charging.

Figure 4. Case Stage by Assignment Group

⁴ As for its analysis of the speed with which cases moved through investigation, for its outcome analysis MAAD examined only cases that had been assigned to the pilot team or control group prior to December 31, 2022. See note 2 above.

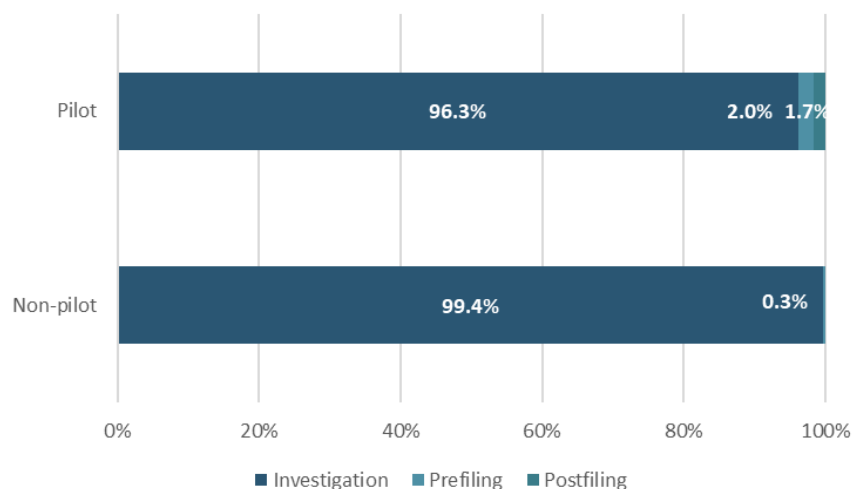
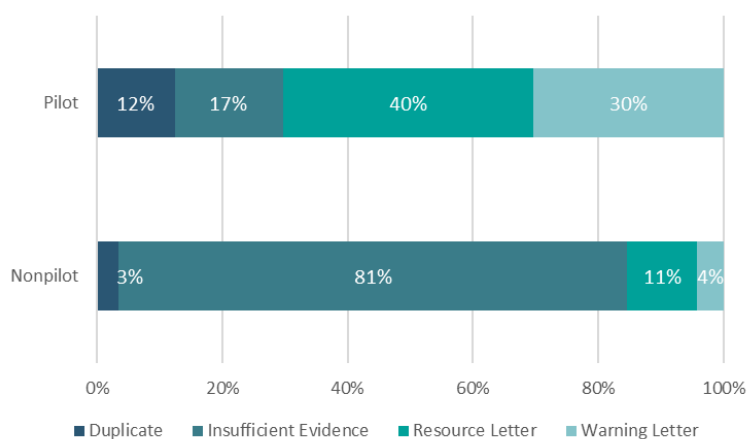


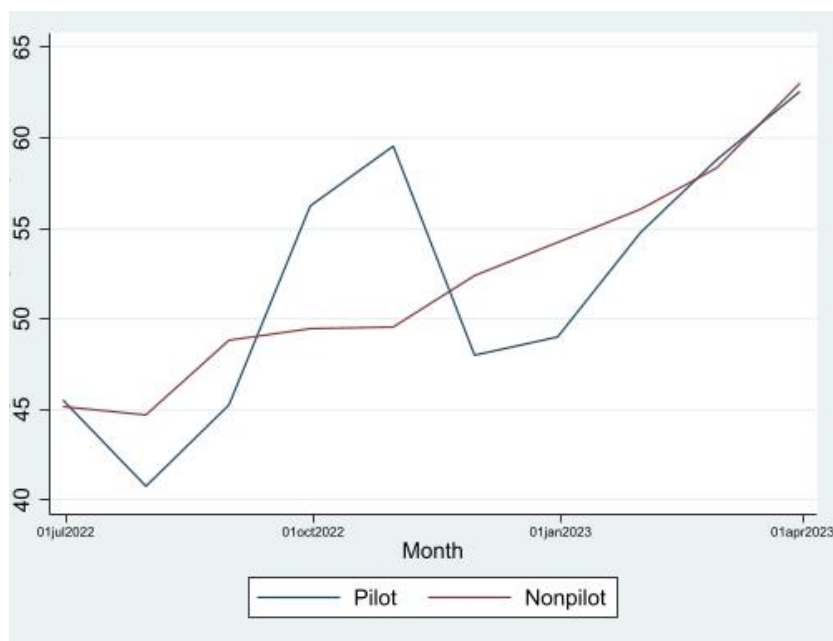
Figure 5. Outcome of Cases Closed in Investigation



To address the possibility that observed differences in speed and outcomes between the pilot team and control group were the result of differing workloads among those groups, MAAD examined investigator workload during the study period. MAAD found no noticeable or consistent difference in workload that might have benefited the pilot team. Rather, the transition in creating a pilot team resulted in more fluctuation of workload on the pilot team relative to a steadier upward trend in workload for the control group. (See Figure 6.) For the

pilot team investigators, workload fluctuated from an average of approximately 45 cases per investigator at the start of the period, peaked briefly at approximately 60 cases per investigator, dropped to approximately 50 cases per investigator at the beginning of 2023, and then rose steadily back to approximately 60 cases per investigator as of March 31, 2023. Based on this workload data, MAAD concluded that it appears unlikely that workload differences between the pilot team and control group contributed to the observed differences in speed and outcomes.

Figure 6. Investigator Workload



MAAD also did a preliminary examination of pilot team and control group case outcomes based on respondent demographics. In the control group, MAAD found no statistically significant difference in outcomes based on gender. In the pilot team, however, MAAD found a statistically significant difference in outcomes based on gender. Female respondents had lower rates of both lower level (closure for insignificant evidence) and higher level (warning letter) outcomes than male respondents (8 percent and 16 percent respectively for female respondents as compared to 21 percent and 29 percent respectively for male respondents). (See Figure 7.) Other demographic factors did not appear to display any statistically significant differences in outcomes within the pilot team or control group, though there were observable differences in outcome in the pilot team based on firm size. As noted above, however, the sample size for case outcomes was very small. More analysis will need to be done toward the end of 2023, at which point a much large proportion of the pilot team and control group cases should have moved to final outcomes.

While more analysis needs to be done later in 2023, based on the favorable preliminary results, that is, that pilot team cases appear to have moved through investigation more quickly and resulted in more higher level outcomes (warning letters and moving to charging) than control group cases, effective July 1, 2023, OCTC elected to implement on a permanent basis a trial

team dedicated to the handling of BRA and CTA cases using the pilot team procedures as recommended by the State Auditor.

Figure 7. Pilot Case Outcomes by Gender



FISCAL/PERSONNEL IMPACT

In 2022, OCTC was provided with 12 additional FTE to reflect the dedication of resources to the pilot team. These positions were funded through reallocation of resources within the State Bar, resulting in additional positions being allocated to OCTC. Based on the preliminary analysis of the results of the pilot project, OCTC will be establishing on a permanent basis a trial team dedicated to the handling of BRA and CTA cases. This permanent team, which will handle the bulk of all BRAs and CTA cases that move to investigation, will involve 17 positions: supervising attorney, 4 attorneys, 7 investigators, 2 paralegals, 1 legal secretary, and 2 program specialists. OCTC is assembling the team from existing resources, including the 12 additional FTE provided in connection with implementation of the pilot team. Fiscal/personnel impact will be further assessed as part of the planned staffing needs analysis in connection with the proposed SB 211 case processing standards.

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

None