



The State Bar of California

OPEN SESSION AGENDA ITEM 60-1 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

SUBJECT: Report on Implementation of Random Audit Recommendations

EXECUTIVE SUMMARY

This is an informational item reporting on the continuing implementation by the Office of Chief Trial Counsel (OCTC) of recommendations from the last two random audits—(1) the random audit of files closed between September 1, 2020, and February 28, 2021, which was the subject of a report to the Board at its November 2022 meeting; and (2) the random audit of files closed between March 1, 2021, and August 31, 2021, which was the subject of a report to the Board at its March 2023 meeting.

BACKGROUND

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 (now the full Board sitting as the Regulation and Discipline Committee) following action at the September 2022 Board meeting on the results of each random audit and OCTC's response to those results.

On July 15, 2022, OCTC received the report of the random audit for files closed between September 1, 2020, and February 28, 2021. (Attachment A) OCTC reported to the Board on the results of that audit at the Board's November 2022 meeting. In accordance with a recommendation from the April 2022 State Audit, the report set out a timeline for OCTC to

report back to the Board on implementation of the random audit recommendations; reporting on many of these recommendations was originally to be done in January and March 2023, but that was postponed to May 2023 given the intervening audit report.

On December 9, 2022, OCTC received the report of the random audit for files closed between March 1, 2021, and August 31, 2021. (Attachment B) OCTC reported to the Board on the results of that audit at the Board's March 2023 meeting. The report set out a timeline for OCTC to report back to the Board on implementation of the random audit recommendations; the timeline specified the May 2023 meeting for reporting on implementation of one recommendation.

At the Board's May 2023 meeting, OCTC reported on its implementation of the recommendations from the two audits referenced above. (Attachment C – without attachments). The report indicated that OCTC would report on additional training in response to the audit recommendations at the Board's July meeting.

DISCUSSION

Set out below are recommendations from the two random audit reports that called for additional training and a follow-up report on implementation of the training recommendations.

Training: Both audit reports recommended training on a variety of different issues. Additional training responsive to audit recommendations has been conducted as follows:

May 17, 2023 – (all OCTC attorneys, investigators, and paralegals) section 6068(i) violations for failing to cooperate with a State Bar investigation and follow up on handling reciprocal disciplinary matters involving differing rules from other states.¹

June 8, 2023 – (all OCTC attorneys and investigators) Involuntary inactive enrollments under Business and Professions Code sections 6007(a) and (b).

June 29, 2023 – (Intake attorneys) Handling complaints involving minors.

Additional training will continue to be conducted in July/August, including on State Bar Court consideration of misconduct beyond that alleged in the Notice of Disciplinary Charges and avoiding delays in the processing of OCTC files (e.g., case processing timelines). Also, additional training on handling complaints involving minors will be provided to all attorneys and investigators. OCTC will report on additional training at the Board's September meeting.

Communications with Complainants and Respondents: Training on dealing with individuals whose communications with OCTC posed issues identified as common scenarios was provided to a group of approximately 35 investigators and attorneys in two two-hour sessions conducted on March 30, 2023, and April 12, 2023. More general training on communicating with complaining witnesses, respondents, and other third parties was provided to all OCTC attorneys, investigators, and paralegals on May 17, 2023.

¹ OCTC conducted a comprehensive staff training on reciprocal discipline cases, commonly referred to as "J" cases, last year on April 28, 2022.

File Maintenance and Reporting in Odyssey for SDTC Files: In or about October 2022, OCTC provided the SDTC Administrator and identified SDTCs with access through a shared Microsoft Teams folder to OCTC training materials, including Odyssey training manuals, the State Bar Court Reporter, policy directives, training outlines, manuals (both procedural and substantive) and Zoom recorded trainings. On May 17, 2023, OCTC provided training on file maintenance and reporting in Odyssey to SDTC identified for the training by the SDTC Administrator.

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. Agenda Item 60-2 November 2022, 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
- B. Agenda Item 60-2 March 2023, 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
- C. Agenda Item 60-7 May 2023, Report on Implementation of Random Audit Recommendations (without attachments)



The State Bar of California

ATTACHMENT A

**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.



The State Bar of California

ATTACHMENT C

OPEN SESSION AGENDA ITEM 60-7 MAY 2023

DATE: May 18, 2023

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

FROM: George S. Cardona, Chief Trial Counsel

SUBJECT: Report on Implementation of Random Audit Recommendations

EXECUTIVE SUMMARY

This is an informational item reporting on the implementation by the Office of Chief Trial Counsel (OCTC) of recommendations from the last two random audits – (1) the random audit of files closed between September 1, 2020, and February 28, 2021, which was the subject of a report to the Board at its November 2022 meeting; and (2) the random audit of files closed between March 1, 2021, and August 31, 2021, which was the subject of a report to the Board at its March 2023 meeting.

BACKGROUND

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 (now the full Board sitting as the Regulation and Discipline Committee) following action at the September 2022 Board meeting) on the results of each random audit and OCTC's response to those results.

On July 15, 2022, OCTC received the report of the random audit for files closed between September 1, 2020, and February 28, 2021. (Attachment A) OCTC reported to the Board on the results of that audit at the Board's November 2022 meeting. In accordance with a

recommendation from the April 2022 State Audit, the report set out a timeline for OCTC to report back to the Board on implementation of the random audit recommendations; reporting on many of these recommendations was originally to be done in January and March 2023, but that was postponed to May 2023 given an intervening audit report.

On December 9, 2022, OCTC received the report of the random audit for files closed between March 1, 2021, and August 31, 2021. (Attachment B) OCTC reported to the Board on the results of that audit at the Board's March 2023 meeting. The report set out a timeline for OCTC to report back to the Board on implementation of the random audit recommendations; the timeline specified the May 2023 meeting for reporting on implementation of one recommendation.

DISCUSSION

Set out below are the recommendations from the two random audit report and a report on implementation of those recommendations:

Review and Follow Up on Reopened Cases: In response to the random audit report received July 15, 2022, OCTC reopened 9 files pursuant to the auditor's recommendations (files 13, 21, 113, 142, 157, 175, 176, and 184). At the November 2022 Board meeting, OCTC reported that it had reviewed three of the reopened cases (files 21, 142, and 254) and determined that reclosure of those cases was appropriate. OCTC has reviewed and conducted follow up on the remaining 6 reopened files (files 13, 113, 157, 175, 176, and 184) and determined as follows:

- Files 13, 113, 157, and 176 remain open. OCTC is continuing to conduct investigations to determine whether to pursue charges pursuant to recommendations by the auditor.
- File 184 has a recommendation pending by OCTC staff to reclose the matter that is currently under review.
- File 175 was reclosed with a warning letter for two minor technical violations. Respondent has over twenty years of discipline free practice, accepted responsibility and there was no client harm involved.

In response to the random audit report received December 9, 2022, OCTC reopened 8 files according to the auditor's recommendations (files 18, 38, 39, 45, 52, 68, 125, and 194). OCTC has reviewed and conducted follow up on these 8 reopened files and determined as follows:

- Files 18, 38, 68 and 125 remain open and are being investigated pursuant to the auditor's recommendations.
- File 39 was referred to the Special Deputy Trial Counsel for review based on the auditor's recommendation and thereafter was reclosed.
- File 45 was reclosed after consideration of additional documents pursuant to the auditor's recommendation.
- File 52 remains closed after OCTC staff contacted the complaining witness to obtain any further outstanding documentation for review pursuant to the auditor's recommendation. To date, the complaining witness has not submitted any further documentation for review.

- File 194 was determined by the auditor to be properly closed and was recommended for reopening only for the limited purpose of following up on the outcome of an anticipated fee arbitration; follow up was conducted as recommended and the file was reclosed after learning that the matter had not proceeded to fee arbitration.

Training: Both audit reports recommended training on a variety of different issues. Training responsive to audit recommendations has been conducted as follows:

September 13, 2022 – Overview of issues identified by the auditor in the random audit report received July 15, 2022, with training on the following topics: handling of complaints filed by a parent on behalf of their minor child, ensuring that all relevant information is input into Odyssey, case processing time standards and the need to avoid lengthy delays between investigative actions, including fee arbitration language in closing letters only when appropriate, and including CSF referrals in closing letters only when appropriate.

September 14, 2022 – Training on Probation matters conducted by the Office of Probation for OCTC staff.

October 5, 2022 – Translation, Check Requests/Invoice Processing & Odyssey Cascading Approval Updates.

October 26, 2022 – Rule of Limitations.

December 20, 2022 – Annual review of Review Department opinions from the last year, with training on the following topics: the hearsay rule; intentional misappropriation; violations of court orders (Business and Professions code section 6103); reciprocal discipline proceedings (“J” cases/Business and Professions Code section 6049.1); criminal conviction referrals; progressive discipline under standard 1.8(a); discipline for frivolous litigation; aggravation/mitigation principles.

February 3, 2023 – Overview of issues identified by the auditor in the random audit report received December 9, 2022, with training on the following topics: rule of limitations, handling of complaints filed by a parent on behalf of their minor child, ensuring that all relevant information is scanned and input into Odyssey (i.e., Odyssey file maintenance), making CSF referrals when appropriate, including CRU review language in closing letters, handling new information received post-closing from a complainant, and redacting confidential information from court filings.

February 15, 2023 – Revisions to Rules of Professional Conduct, Rule 1.15 and Introduction to Client Trust Account Protection Program.

March 9, 2023 – Conflicts of Interest and Ethical Screens.

March 30, 2023 – Calibration meeting, with training on the following topics: commingling offenses under rule 1.15(c), State Bar Court procedures and practices regarding stipulations including 9.20 conditions, State Bar Court procedures and practices regarding monetary sanctions, interim suspensions under section 6102 and involuntary inactive enrollment under section 6007(c)(5).

April 5, 2023 – Attorney meeting, discussion of recent State Bar Court decisions and their implications for evaluating transmissions of DUI convictions based on assessments of aggravating and mitigating factors.

April 6, 2023 – Pre- and Post-Filing Odyssey procedures.

April 18, 2023 – OCTC All Staff Meeting with demonstration of new tool for supervisors and staff to track caseloads and easily identify cases that are close to or have moved beyond the times specified in case processing standards.

Additional training will continue to be conducted in May/June, including in particular training on when to charge a violation of section 6068(i), State Bar Court consideration of misconduct beyond that alleged in the Notice of Disciplinary Charges, avoiding delays in the processing of OCTC files (e.g., case processing timelines), and follow up training on the handling of reciprocal disciplinary matters involving differing rules from other states,¹ and handling complaints involving minors. OCTC will report on additional training at the Board's July meeting.

Referrals to Fee Arbitration and the Client Security Fund: As noted above, training on this topic was included in the overview training on issues identified by the auditor in the random audit report received July 15, 2022, as well as in the overview training on issues identified by the auditor in the random audit report received December 9, 2022.

Communications with Complainants and Respondents: This training will be completed by May 17, 2023, prior to the May Board of Trustees meeting.

File Maintenance and Reporting in Odyssey for SDTC Files: In or about October 2022, OCTC provided the SDTC Administrator and identified SDTCs with access through a shared Microsoft Teams folder to OCTC training materials, including Odyssey training manuals, the State Bar Court Reporter, policy directives, training outlines, manuals (both procedural and substantive) and zoom recorded trainings. Any follow up training specific to file maintenance and reporting in Odyssey will be provided at the direction of the SDTC administrator by May 17, 2023, prior to the May Board of Trustees meeting.

FISCAL/PERSONNEL IMPACT

None

¹ OCTC conducted a comprehensive staff training on reciprocal discipline cases, commonly referred to as "J" cases, last year on April 28, 2022.

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. Agenda Item 60-2 November 2022, 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
- B. Agenda Item 60-2 March 2023, 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 Response



The State Bar of California

ATTACHMENT B

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)