



The State Bar of California

OPEN SESSION AGENDA ITEM 60-2 SEPTEMBER 2023

DATE: September 21, 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 September 1, 2021, and February 28, 2022, and Office of Chief Trial
Counsel Response

EXECUTIVE SUMMARY

This informational item relates to the random audit of cases closed or otherwise resolved by the Office of Chief Trial Counsel (OCTC) during the period September 1, 2021, through February 28, 2022, and OCTC's response to the results of the random audit.

OCTC policy directives require an audit twice each year of randomly selected closed or otherwise resolved 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 April 2022 report from the State Auditor, 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 June 15, 2023, OCTC received the report of the audit for files closed or otherwise resolved during the period September 1, 2021, through February 28, 2022.¹ For the first time, in accordance with a policy change made in February 2023, the audit report includes a review of selected cases regarding respondents who were the subject of at least fifteen cases closed by the State Bar in the prior five years. The audit report, which includes recommendations for training to improve OCTC's effectiveness, was reviewed and discussed with OCTC managers on July 14, 2023. On August 10, 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. OCTC is reviewing the 12 cases recommended for reopening by the audit and will determine which of those files it will reopen. OCTC is also reviewing an additional 9 cases recommended by the auditor for review for possible reopening and will determine which if any of these cases warrant reopening. 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:

¹ Attachment A is an executive summary of the audit report prepared by the auditor. As the auditor notes, the audit report itself is confidential "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." Attached to the executive summary is the audit checklist used by the auditor in reviewing individual files. As the auditor notes, this checklist was modified in early 2023 "to make each question more substantive in nature," "to avoid repetition to the extent possible in setting forth the results of the audit," and to include questions "to determine if internal conflicts checks have been performed and to assess OCTC's handling of Respondents who are the subject of at least fifteen cases closed by the State Bar in the prior five years."

- 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.
- 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

Effective February 14, 2023, OCTC revised its procedures to require that only 207 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 was 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 was 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 255 files for case selection for the random audit.

The current random audit is another catch-up audit, attempting to get back on schedule following delays caused by the COVID-19 pandemic. Though the audit applies to cases closed or otherwise resolved between September 1, 2021, and February 28, 2022, it was conducted under the procedures in place following the July 18, 2022, and February 14, 2023, revisions. In accordance with these procedures, a total of 255 files were audited: 86 closed or otherwise resolved at the intake level; 86 closed or otherwise resolved at the investigation level; 35 closed or otherwise resolved at the trial level either before or after initiating litigation before the State Bar Court; and 48 files relating to six different repeat respondents (8 for each repeat respondent), some of which were closed or otherwise resolved prior to the audit time period.

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 or otherwise resolved between September 1, 2021, and February 28, 2022, of which 48 relating to repeat responders may have been closed or otherwise resolved prior to September 1, 2021. The auditor's primary recommendations from the audit of these 255 files, and OCTC's responses, are as follows:

RECOMMENDATIONS TO REOPEN 12 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 target metric for random audit reopening recommendations is 4.3 percent. The auditor recommended the reopening of 9 files (Nos. 12, 39, 65, 109, 166, 211, 212, 229 and 255) as well as the possible reopening of three files depending on current facts surrounding those three matters (Nos. 60, 99, and 222). Taking both sets of files, the number recommended for reopening is 12, which is 4.7 percent of the audited files (12 of the total of 255 files audited), close to the target and similar to the last several audits:

March 1, 2021, to August 31, 2021:	4.2% (11 of 256)
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)

The fact that the auditor recommended reopening only 12 files out of 255 audited suggests that OCTC staff are overall, appropriately resolving cases. As in prior audits, the auditor recognized that “the small number of files requiring reopening 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 is still reviewing the 12 files recommended for reopening to make final determinations regarding reopening.

The auditor also recommended review of an additional eight files (Nos. 6, 8, 21, 61, 63, 111, 195, 209, and 235) for follow-up to determine if they had been reopened or opened as a new file based on various reasons including the receipt of additional information after the file was closed; the auditor was unable to confirm in Odyssey whether the necessary follow-up had been done. OCTC is still reviewing these eight files, though a preliminary review suggests that appropriate actions were taken and neither reopening nor the opening of any new files will be required.

Report on Implementation: OCTC is reviewing both the 12 files recommended for reopening and the 9 files recommended for further review. OCTC will report back to the Board at its November 2023 meeting with respect to all 21 of these files.

IDENTIFIED ERROR RATE

Of the 255 files audits, the auditor made comments on errors, issues of concern, and/or suggested training in 118 of the files (46.3 percent). As the auditor notes, because of the significant revisions to the audit question checklist, it is not possible to accurately compare these results to those of prior audits. Nevertheless, this identified error rate was slightly lower than that observed in the last random audit, in which auditor comments were made in 140 of 256 files (54.6 percent).

Report on Implementation: Future audit reports will continue to report the number of reviewed files in which the auditor comments on errors, issues of concern, and/or suggested training.

REOPENING OF CLOSED FILES

The audit noted numerous cases with possible failures to promptly reopen a closed file or open a new file based on the submission of additional information after an original closure. The audit suggests that OCTC consider a more formal system for handling correspondence received after a case is closed, including ensuring that the information is posted on Odyssey and requiring a subsequent Odyssey entry to show what action was taken in response to the new information, even if that action is a decision that the new information does not affect the original closure decision.

Report on Implementation: OCTC will consider a more formal system as recommended and report back to the Board at its November 2023 meeting.

COMPLAINTS AGAINST OCTC STAFF

The audit noted one file in which a respondent complained about the assigned staff attorney, whose direct supervisor, who had been involved in decisions regarding the handling of the underlying case, conducted the investigation of the respondent's complaint. The audit suggests that under the circumstances, the respondent's complaint should have been assigned to either a different OCTC attorney or possibly a special deputy trial counsel. The audit suggests that OCTC set a policy for the handling of such complaints to make sure they are assigned to someone unassociated with the subject of the investigation.

Report on Implementation: OCTC will consider adopting a policy for the handling of respondent complaints about OCTC staff conduct and report back to the Board at its November 2023 meeting.

WORKING FROM HOME

The audit identified one file in which an investigator working from home attempted to call a CW using a cell phone with a blocked number to protect the investigator's privacy but was unable to do so because the CW's phone would not accept calls from blocked numbers. The audit indicates that this is an issue that should be addressed by OCTC. With the recent adoption of Teams Voice, which enables calls to be made from home using OCTC work laptops and staff's office numbers, this issue has been addressed.

Report on Implementation: Already addressed – no follow-up report necessary.

INCONSISTENT HANDLING OF MATTERS

The audit notes inconsistencies in certain files regarding the issuance of resource and warning letters. Effective as of October 31, 2022, OCTC issued a new policy directive providing detailed guidance on the use of nonpublic resolutions of disciplinary complaints, including the use of resource and warning letters. OCTC plans to provide additional training on this policy and an anticipated diversion program by December 2023. The audit also notes inconsistencies in the handling of several cases involving disbursements of settlement funds from client trust accounts to lienholders. Following a pilot program that began August 1, 2022, as of July 1, 2023,

OCTC has established a specialized unit for the handling of client trust related complaints—this should provide the desired consistency.

Report on Implementation: *Already partially addressed – OCTC will report to the Board on training on non-public resolutions of disciplinary complaints at the Board’s January 2024 meeting.*

CONSIDERATION OF REPEAT RESPONDER MATTERS

In certain repeat responder files, the audit notes a failure to adequately and accurately consider the respondent’s histories of complaints in determining what resolution is appropriate. Since the closures that are the subject of the audit, however, OCTC has adopted a number of new policies and procedures to ensure that such consideration occurs, namely:

February 25, 2022:	new policy directive regarding intake consideration of prior closed complaints
October 31, 2022:	new policy directive regarding nonpublic resolutions of disciplinary complaints that requires consideration of an attorney’s prior discipline and prior closed complaints
December 1, 2022:	implementation of prior complaints pattern dashboard that provides information on closed and open complaints, with allegations grouped and displayed in 25 charge categories to allow easier recognition of patterns
July 1, 2023:	formalized procedures for assignments of repeat respondents
July 1, 2023:	formalized procedures for handling of respondents with 15+ complaints over the prior 5 years.

Report on Implementation: *Already addressed – no follow-up report necessary.*

TRAINING RECOMMENDATIONS

The section of the audit dedicated to recommendations regarding areas for training and possible modifications to OCTC practices and procedures highlighted several areas. Because this is a catch-up audit, many of the identified areas have already been addressed. To the extent issues in these areas are identified as specific to particular individuals, discussion and training will occur with those individuals. The generally applicable training recommendations, with a brief discussion of each, are as follows:

Closure of Files: The audit identified numerous files that were closed prematurely without obtaining all necessary information and documentation to accurately assess the merits of the complaint. Specifically, the audit noted several instances in which a complainant was not provided with a reasonable period of time to provide additional information. The audit also identified several files in which closing letters contained both technical and more substantive errors. For example, one closing letter focused on representations from the respondent’s counsel regarding the facts because OCTC had not obtained other available documents to determine the actual facts. As another example, a case was closed based on the erroneous

assertion that a parent had no ability to submit a complaint on behalf of their minor child; this is a repeat issue noted in prior audits.

Subsequent to the file closures that were the subject of this audit, OCTC has already provided recommended training to staff as follows:

Handling of complaints filed by a parent on behalf of their minor child: September 13, 2022; February 3, 2023; June 29, 2023 (intake attorneys)

Handling new information received post-closing from a complainant: February 3, 2023

Communicating with complaining witnesses, respondents, and other third parties: May 17, 2023 (attorneys, investigators, paralegals)

OCTC plans to provide additional training on file closures and closing letters by December 2023.

LEGAL AND PROCEDURAL ISSUES

The audit recommends training in the following areas: rule of limitations, inadmissible evidence, temporary representation rules, inclusion of case law to support level of discipline analyses, content of stipulations, and ensuring that Odyssey documentation is complete and timely. On October 26, 2022, OCTC provided a training session dedicated to the rule of limitations. On April 6, 2023, OCTC provided training on pre- and post-filing Odyssey procedures. OCTC will provide additional training on the other identified topics and report back to the Board.

***Report on Implementation:** OCTC will report back to the Board regarding its implementation of the recommended training at the Board's January 2024 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

ATTACHMENT LIST

- A. Executive Summary of the Random Case Audit Report (including attached Random Audit Checklist Questions)

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 State Bar's Office of Mission Advancement and Accountability
Division-Office of Compliance by independent counsel Alyse M. Lazar
Regarding: The Audit of the Office of the Chief Trial Counsel Cases Resolved
Between September 1, 2021 and February 28, 2022

This Executive Summary is presented to the State Bar Board of Trustees 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 and revised on July 18, 2022 and February 14, 2023. 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 Findings Memorandum ("Audit Report") which is also prepared in accordance with the policy directive. The complete report is provided only to the State Bar's Mission Advancement and Accountability Division's Office of Compliance ("MAAD-OOC") and OCTC 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. A total of between 250 and 260 cases are to be reviewed consisting of 86 files at the intake level, 86 cases at the investigation level, 35 matters at the trial level closed either before or after initiating litigation before the State Bar Court and approximately 50 cases regarding Respondents who are the subject of at least fifteen cases closed by the State Bar in the prior five years ("repeat respondents"). In this audit, the numbers indicated for each category were actually audited including forty-eight repeat respondent files. Other than the repeat respondent cases and one file miscategorized as an intake file, all cases audited were closed or otherwise resolved between September 1, 2021 and February 28, 2022.

The vast majority of these files are reviewed exclusively through OCTC's on-line system known as Odyssey. Due to the fact that some of the repeat respondent files were opened and closed earlier than the audit period, paper files were provided to the auditor for most of these cases as well as some of the older trial level cases to enable review of documents that were not scanned into Odyssey. It is anticipated that within the next few cycles, all documents for each file will be available 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, all audits are conducted by outside independent counsel. In accordance with recommendations from the California State Auditor made in April 2022, MAAD-OOC is utilizing three attorneys with extensive prior experience in OCTC to conduct these audits. This audit was performed by Alyse M. Lazar who has been conducting such audits for the State Bar since 2012 and continues to work with MAAD-OOC and OCTC to revise and improve the audit process in line with changing policies and focuses of the State Bar.

Each file is evaluated on a wide-range of criteria which are elicited through twenty questions set forth in a checklist (see attached). This checklist, which previously consisted of thirty-two questions was substantially revised in early 2023. It not only consolidates some of the items from the former checklist into single questions, it adds a question regarding OCTC staff performing conflicts checks on all assigned cases and two questions eliciting information on repeat respondent matters.

Of the 255 files audited, comments on perceived errors, issues of concern and/or suggested training have been identified in 118 of the files. Because of the significant revisions to the checklist, it is not possible to accurately compare these results to those of prior audits. Nonetheless, these numbers demonstrate the value of continuously auditing OCTC files and providing feedback.

As required by the directive, the auditor is to determine whether or not to recommend certain files be reopened due to identified deficiencies bearing on the case disposition. The auditor has recommended reopening nine files and possibly three more depending on the current facts surrounding those cases. In an additional nine cases where a decision had been made for OCTC to reopen the file or open a new case, there is no information on Odyssey in the files audited to show that this was accomplished. Therefore, follow-up has been advised. Even though the audit provides a sampling of the work of OCTC in a six-month period rather than eliciting information on each and every file actually completed, the small number of files requiring reopening reflects positively on the overall professionalism and quality of the work performed by OCTC.

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 and MAAD-OOC 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 auditors 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 report addresses each of the twenty checklist questions, identifying errors as well as noting other observations on the subject area of the question. It separately discusses recommended training and possible modifications to OCTC practices and procedures. An appendix to the audit contains information on all 255 cases reviewed including the auditor’s comments on every question for which a training issue, error or concern has been identified. This summary is not intended to provide information regarding all such errors and training issues. Instead, it focuses on significant concerns and important trends raised by the audit as briefly discussed with case exemplars.

There were only two files included in the audit which contain any information regarding OCTC staff checking for conflicts of interest due to the fact that OCTC's more formalized conflicts check policy was implemented after the audit period which ended February 28, 2022. One case which was actually closed after the audit period, did contain a conflicts check form. In the other matter, OCTC properly prepared an ethical screening memorandum to prevent a certain staff person from having any interaction with the case. On a related issue, OCTC failed to recognize or take any corrective action about the conflict apparent from a supervising attorney handling the investigation of a complaint from a Respondent about an OCTC attorney regarding a matter over which the supervising attorney was providing oversight and advice.

An important aspect in handling complaints from the intake level through conclusion is the identification and appropriate consideration of all culpability issues whether or not specifically identified by the complainant as evaluated in checklist question 3. Eleven files are noted with errors in this area. Four of these cases including two repeat respondent matters are recommended to be reopened due to a failure to identify and/or accurately analyze the issues presented. In another case which was part of a trial matter, due to a missed issue, important documentary evidence was not obtained from the court which may have established additional misconduct. Also, in a case that was resolved with a warning letter, many issues of alleged misconduct were not investigated and OCTC staff failed to take into consideration the Respondent's extensive thirty-year disciplinary history in resolving the case.

Question 4 of the checklist asks whether or not OCTC completed the work up of the case before the rule of limitation expired and only performed work concerning non-time-barred allegations. A serious digression from this requirement was observed in one file. After conducting an investigation, the file was properly closed upon determining that the rule of limitation had run with no applicable tolling provisions or exclusions. Thereafter, without noting that the case was time-barred in any documentation provided to the State Bar Court, OCTC included it in a stipulation to a resignation with charges pending, publicly disclosing misconduct for which Respondent could not have been disciplined and designating it as "binding" for all future purposes including disciplinary proceedings if the resignation was rejected. Furthermore, OCTC informed CW of the opportunity to seek reimbursement from the client security fund for an alleged monetary loss based on the untimely inclusion of the case in the stipulation.

In forty-two of the audit files, concerns have been raised about interactions with complaining witnesses which is the focus of checklist question 6, 7 and 8. Similar volumes of errors in this area have been identified in prior audits. Most of the errors occurred in closing letters that were deemed deficient for various reasons including failing to provide accurate and complete information regarding: the actions taken by OCTC in closing the case including the basis for issuing warning letters and the reasons for closure; the rights of the complainant to seek reconsideration and review of the closure; and referrals to fee arbitration resources in cases identifying fee disputes. In one case that was closed rather than abated pending appellate review of the issues, the closing letter failed to request that CW provide OCTC with information regarding the outcome of the litigation if the misconduct (a civil court finding that Respondent engaged in extortion under the penal code) was upheld on appeal. Instead, the letter suggests that Respondent's version of the facts is correct despite being contrary to the court's findings. In another case recommended for reopening, OCTC failed to notify the judge who had referred the case, about the closure even though updates had been requested.

The content of some of the closing letters is troublesome for various reasons including suggesting a

bias against the CW or an incomplete investigation by quoting respondent's response as the only basis for closure rather than referencing evidentiary documents that were considered. In one case where the complainant is a criminal defense counsel, the closing letter strangely states that the deputy trial counsel met with former deputy district attorneys employed as senior OCTC attorneys and they took a unanimous position that the conduct of the Respondent, employed in a district attorney's office, was not improper. The prior experience of OCTC attorneys is irrelevant and the explanation for OCTC's determination should have focused on the facts and relevant law.

In evaluating interactions with Respondents, in seven cases the communications were deemed deficient. This includes determinations that the contents of closing letters contain insufficient language to inform the Respondents of the facts and/or their misconduct as determined by OCTC.

A total of thirty-one files included in the audit were resolved through actions taken by the State Bar Court by stipulation or trial. Sixteen of these cases were identified with issues regarding inadequately prepared documents and or other actions taken on matters before the Court. Some of the errors were identified by State Bar Court judges in rejecting stipulations containing erroneous or incomplete information including failing to cite any case law authority to support the discipline sought. In two uncontested matters, the Court was compelled to not find culpability on some of the charges due to deficiently pled Notices of Disciplinary Charges. OCTC also lacked good cause to oppose actions taken by the Respondents including one seeking referral to the alternative discipline program (ADP) and another seeking deletion of a restitution provision based on Respondent's representation that payment had been made and OCTC's lack of verified evidence to the contrary.

For the first time since 2012 to the best of the auditor's recollection, there are no cases randomly selected for the audit that proceeded to the Review Department for appellate consideration. Therefore, no information is available to answer checklist question 16. This absence of relevant files is most likely attributable to the fact that prior audits included between fifty and sixty cases at the post-investigation level. This audit contains only thirty-seven such cases including one repeat respondent matter and one investigation file that was improperly identified. Consideration should be given to adjusting this number because the post-investigation files tend to contain the greatest expanse of activity upon which to evaluate the performance of OCTC.

Checklist questions 1 and 18 focus on the documentation posted on Odyssey, including actions taken by OCTC and, in particular, decisions approved by supervisory staff. A total of twenty-six files were identified with errors or omissions regarding one or both of these areas of consideration. For example, in one matter, Odyssey contains no information explaining why, after filing the case with the State Bar Court which had been evaluated to warrant actual discipline, it was dismissed and resolved with a warning letter. In another matter involving misappropriation allegations, the deputy trial counsel proffered a settlement less than the discipline authorized by the supervisor with no information on Odyssey to explain this action. Such omissions, including a lack of documentation of conversations with other staff members and witnesses, make it difficult if not impossible for persons auditing or otherwise reviewing the files to determine if they were handled correctly. For other cases, Odyssey contains notes indicating documents were received and reviewed, however, if this did occur, they were not scanned into Odyssey and therefore unavailable for the auditor's consideration.

This is the first audit evaluating whether or not prior complaints and patterns of conduct have been adequately considered in the handling of each file. This issue was only evaluated for the forty-eight repeat respondent files. Thirty-seven of these files contain no documentation to establish that any of

the other files regarding these respondents was considered prior to disposition primarily due to the fact that many of the files were closed prior to OCTC adopting formal policies regarding repeat respondents. One of the cases alleging misrepresentations to the court and to clients has been recommended for reopening to determine if other files on this Respondent contain similar assertions that were not considered when this case was closed. In other files, there is evidence of patterns of possible misconduct prompting recommendations for OCTC to flag such issues when reviewing other files on the Respondent.

The final checklist question encompasses compliance with all applicable office policies, procedures and disciplinary standards, and case law and, where applicable, taking into account any history of prior complaints against the Respondent and any patterns of conduct revealed by that history. Fourteen cases have been noted with such errors in this audit and include explanations as to why many of these cases have been recommended for reopening due to insufficient investigation, inaccurate analysis of the issues, or failure to take appropriate actions in the closing of the file.

The last substantive 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/or 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; an issue arising from staff working at home and using private phones; the inclusion of legally inadmissible evidence in a publicly filed State Bar case; using a balanced approach to law and motion practice; issues regarding an attorney practicing law in other states pursuant to temporary representation rules; and the need for OCTC to provide sufficient legal support for disciplinary recommendations.

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*

Date: June 15, 2023

*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.

RANDOM AUDIT CHECKLIST QUESTIONS (REVISED 3/2023)

1. Were all significant actions and approvals documented in Odyssey with appropriate event entries and the scanning and uploading of all relevant letters, memos and other documents?

Yes: No: N/A:

2. Were conflict checks appropriately completed and entered into Odyssey for both attorneys and investigators both at or about the time of assignment and prior to any decisions regarding closing or filing.? Yes: No: N/A:

3. Were all appropriate culpability issues considered whether or not specifically identified by complainant? Yes: No: N/A:

4. 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:

5. Did staff make all appropriate referrals to law enforcement, other agency and/or the client security fund? Yes: No: N/A:

6. Was the closing letter sent to the complainant adequate and complete (e.g., did it adequately address and explain the basis for closing all of the complainant's allegations in a way that could be understood by the complainant, contain sufficient information to determine whether the correct decision was made, and provide correct information regarding the ability to seek CRU review)? Yes: No: N/A:

7. Were all other interactions (interviews, telephone calls, emails, letters) with the complainant adequate and properly documented*? Yes: No: N/A:

8. If post-closing correspondence was received from the complainant, was it handled appropriately*? Yes: No: N/A:

9. Was the case properly prioritized and investigated pursuant to an investigation plan and/or other directives and timely completed in light of the priority code designation and public protection? Yes: No: N/A:

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

11. Were all interactions (meetings, telephone calls, emails, letters) with the Respondent and/or Respondent's counsel adequate* and properly documented? Yes: No: N/A:

12. Were all interactions (meetings, telephone calls, emails, letters) with other parties and/or necessary witnesses, if any, adequate and properly documented? Yes: No: N/A:

13. Was the case properly referred for charging* by the OCTC investigator and legal advisor and was the investigation report and/or all other documents supporting the referral adequate, appropriate,* and approved by a supervisor, if necessary? Yes: No: N/A:

14. Were all documents prepared at the post-investigation level (charging memorandum, notice of disciplinary charges, ENEC/settlement conference statements, stipulations, motions, trial briefs) clear and appropriate* both factually and legally and approved by a supervisor, if necessary?

Yes: No: N/A:

15. Were the litigation issues at the hearing department level (e.g., ENECs, settlement discussions, subpoenas, service, depositions, trial presentation, etc.) handled appropriately*? Yes: No: N/A:

16. Were the litigation issues at the review department level (e.g., requests for review, motions, briefing, etc.) handled appropriately*? Yes: No: N/A:

17. Were all case resolution documents provided to and/or entered into with Respondent (closing letters, warning and resource letters, agreements in lieu of discipline, stipulations) legally and factually sufficient to explain the basis for OCTC's decision to resolve the case in the manner approved? Yes: No: N/A:

18. 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 and document that the disposition was approved by the appropriate supervisor? Yes: No: N/A:

19. Does Odyssey include documentation indicating appropriate consideration of any history of prior complaints against the Respondent and any patterns of conduct revealed by that history? Yes: No: N/A:

20. Taking into account any history of prior complaints against the Respondent and any patterns of conduct revealed by that history, does the final disposition comply with all applicable office policies, procedures and disciplinary standards, and case law (i.e., was the case properly closed and, if not, should OCTC reopen the file to reconsider its closing decision)? Yes: No: N/A:

(Special attention should be given to questions 19 and 20 for Respondents identified as having 15 or more complaints against them in the prior five years.)

*See Glossary of Definitions/Terminology for Use with Checklist

GLOSSARY OF DEFINITIONS/TERMINOLOGY FOR USE WITH CHECKLIST

Adequacy of interactions with the complainant means OCTC appropriately requested information necessary to understand and assess the allegations in the complaint, requested appropriate documentation likely to be in the complainant's possession, and timely responded to questions and status inquiries from the complainant as needed to keep the complainant advised of the status of the complaint. (Checklist Question 7)

Appropriate handling of post-closure correspondence means the correspondence was reviewed and acknowledged as appropriate and the case was forwarded to the Complaint Review Unit or reopened for further investigation as appropriate. (Checklist Question 8)

Adequacy of letters of inquiry and other interactions with the respondent and/or respondent's counsel means OCTC inquired as to all the issues identified for investigation, requested appropriate substantiation and followed up when provided an insufficient or no response, and timely addressed communications from respondent and/or respondent's counsel. Contacts with respondents and/or respondents' counsel can be waived or deemed unnecessary (e.g., because the case was abated). (Checklist Question 11)

Referral for charging means assignment to an OCTC attorney to prepare a charging memorandum and, where appropriate, commence State Bar Court proceedings through filing of a stipulation or Notice of Disciplinary Charges and/or filing documents with the State Bar Court to initiate a conviction referral case. (Checklist Question 13)

Appropriate means the documents contain sufficient and accurate information and analysis of all important issues. (Checklist Questions 13 and 14)

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 the auditor to substitute his or her judgment for that of the handling attorney. (Checklist Questions 15 and 16)