



The State Bar of California

OPEN SESSION AGENDA ITEM 60-2 MARCH 2024

DATE: March 21, 2024

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

FROM: Stacia Laguna, Special Deputy Trial Counsel Administrator

SUBJECT: Report on Random Audit of the Special Deputy Trial Counsel Files Closed
Between June 1, 2022, and May 31, 2023, and Special Deputy Trial Counsel
Administrator Response

EXECUTIVE SUMMARY

This informational item relates to the random audit of cases closed by Special Deputy Trial Counsel (SDTC) during the period June 1, 2022, through May 31, 2023, and the SDTC Administrator's response to the results of the random audit.

SDTC Policy Directive 2023-01 requires an annual audit of at least 30 randomly selected closed files handled by SDTCs. Prior to the implementation of this policy directive, the external auditor reviewed a selection of SDTC files as part of the twice-yearly audit of files closed by the Office of Chief Trial Counsel (OCTC). Policy Directive 2023-01 established that an audit of files handled by the Rule 2201 SDTC Program was to be conducted separate and apart from the audit of OCTC files.

BACKGROUND

The auditors reviewed 32 randomly selected SDTC files closed between June 1, 2022, and May 31, 2023. The SDTC Administrator shared the auditors' findings with the SDTC panel on November 21, 2023.

Pursuant to the Policy Directive, the SDTC Administrator must prepare a written response to the audit in which the Administrator: (1) indicates agreement or disagreement, in whole or in part, with any recommendations regarding particular cases, including recommendations to reopen particular cases, and provides plans for implementing any agreed upon

recommendations; (2) indicates agreement or disagreement, in whole or in part, with any proposed changes to Rule 2201 Program practices or policies and provides plans for implementing any agreed upon changes; and (3) indicates agreement or disagreement, in whole or in part, with any recommendations regarding training and provides plans for implementing any agreed upon training recommendations.

DISCUSSION

The auditors' primary recommendations from the audit of these 32 files, and the SDTC Administrator's responses, are as follows.

ALL CLOSING DISPOSITIONS DEEMED APPROPRIATE

The auditors found the closing dispositions to be appropriate in all 32 files reviewed. According to the auditors, the fact that no files require reopening "reflects positively on the overall professionalism and quality of the good work performed by the SDTCs." (Executive Summary, p. 2.) Accordingly, the auditors did not recommend reopening any files.

RECOMMENDATIONS REGARDING SPECIFIC CASES

While all dispositions were deemed appropriate, the auditors made comments on all 32 of the files regarding perceived errors, issues of concern, and/or suggested training. Some of the comments pertained to de minimis technical errors involving a failure to comport with OCTC practices or procedures. (Audit Memorandum, p. 4.) Many of the comments related to completeness of the information maintained in the Odyssey files, most often regarding compliance with conflict-check policies. (Ibid.)

Response and report on implementation: *The Administrator agrees, in part, with the auditors' recommendations regarding specific files.*

The auditors' concerns regarding documenting conflicts checks are addressed by SDTC Policy Directive 2023-02, implemented in late April 2023. Pursuant to that directive, SDTCs are now required to document their conflicts checks in one of two ways: 1) SDTCs who are Odyssey users document their conflicts checks by creating a case event in the system, as is the practice in OCTC; or 2) SDTCs who are not Odyssey users complete a conflicts certification form that mirrors the Odyssey case event, which is uploaded to Odyssey either by the legal secretary or the Administrator. The Administrator also receives a weekly report from MAAD demonstrating cases where conflicts checks are missing so that the missing data can be input and remediated.

The Administrator agrees that it is important to maintain files consistent with the policies and practices of OCTC where practicable. However, historically, SDTCs have worked exclusively from physical files. The Administrator began offering Odyssey access to SDTCs in the fall of 2022.¹ During the timeframe relevant to the audit, many SDTC files

¹ Approximately half of the SDTCs on the panel are Odyssey users as of the date of this memorandum. The case assignments to SDTC Odyssey users represent approximately 93 percent of the program inventory at this time. The

were maintained in physical files or had at least some physical component. Unfortunately, the scope of the auditors' review was limited to the information contained in the State Bar's Odyssey case management system. Accordingly, the auditors did not have the benefit of reviewing the entirety of the file in some cases.

To update SDTC files in Odyssey, the SDTC program's legal secretary (hired in October 2022) has worked to scan documents from closed physical files and upload them to the case management system and input appropriate case events. This effort is ongoing.

In further efforts to ensure file maintenance consistent with OCTC's practices, in May 2023, OCTC provided training to SDTCs who use Odyssey regarding Odyssey file maintenance. This training video remains available in Microsoft Teams for incoming SDTCs to review and for existing SDTCs to reference as needed.

To ensure ongoing proper file maintenance, the Administrator is implementing the use of a case closure checklist that set forth various file maintenance requirements that the SDTCs and legal secretary can reference upon file closure. The Administrator expects to implement this practice in the second quarter of 2024.

ADDITIONAL SUPPORT FOR SDTCs: ROUND TABLE DISCUSSIONS

The auditors recommended that the SDTC Administrator formalize a means by which SDTCs can seek input from other SDTCs and the SDTC Administrator through a round-table-type discussion about complicated cases as well as any cases going to trial, including discussion and input regarding the facts and charges, evidence, challenges to proving the case, level of discipline, etc. The auditors recommended that the round-table include at least two other attorneys with at least one attorney having prior experience within OCTC, subject to clearance of conflicts for all participants. The auditors recommended that the SDTC Administrator consider making such round-table discussions mandatory for complicated cases and for any cases going to trial.

Response and report on implementation: *The SDTC Administrator agrees with the auditor's recommendation. While the current practice is for SDTCs to confer with the Administrator on all cases, and SDTCs sometimes informally confer with other SDTCs, a formal policy outlining the availability of these consultations would be helpful. The Administrator also agrees that it would be beneficial to require these meetings in all matters proceeding to trial. The Administrator plans to issue a policy directive on this topic in the second quarter of 2024.*

ADDITIONAL SUPPORT FOR SDTCs: INVESTIGATOR SERVICES

The auditors recommended that the SDTC Administrator and the State Bar consider hiring attorney investigators or investigators to solely focus on providing investigative support on SDTC cases because, where an SDTC both investigates and prosecutes a case, conflicts can occur, including the possibility of an SDTC becoming a witness.

Administrator, in her discretion, has not extended Odyssey access to SDTCs who handle very few cases or handle cases infrequently due to program resource constraints.

Response and report on implementation: This recommendation has been partially implemented. The SDTC Administrator agrees with the auditor's recommendation that there should be independent investigators available to avoid circumstances where an SDTC could become a witness in their assigned case, locate witnesses, prepare and serve subpoenas, and similar tasks. The State Bar recently retained an investigator based in Southern California to provide services on an as-needed basis. The Administrator plans to continue to utilize this investigator's services, and the Administrator also plans to locate potential investigator services based in Northern California.

TRAINING RECOMMENDATION: TRAINING REGARDING APPLICABLE OCTC POLICIES

The auditors recommended that SDTCs receive training regarding the most common OCTC policy directives relevant to SDTCs.

Response and report on implementation: The SDTC Administrator agrees with the auditors' recommendation. While OCTC's policies are available to SDTCs to review, a training session where attendees can ask questions would be beneficial. The Administrator plans to appoint an SDTC with significant OCTC experience to lead the training to the rest of the group. Implementation of this recommendation is expected in the second or third quarter of 2024.

TRAINING RECOMMENDATION: TRAINING REGARDING FILE MAINTENANCE IN ODYSSEY

The auditors recommended that the SDTCs receive additional training so they can document the Odyssey file by memorializing significant actions with appropriate event entries and scanning/uploading of all relevant documents.

Response and report on implementation: This recommendation was implemented in May 2023. As referenced above, OCTC provided training to SDTCs who use Odyssey regarding Odyssey file maintenance. This training video remains available to in Microsoft Teams for incoming SDTCs to review and for existing SDTCs to reference as needed.

Also mentioned above, the Administrator is in the process of finalizing a case-closure checklist for SDTCs and the legal secretary to reference upon closure of all files to ensure ongoing proper file maintenance.

TRAINING RECOMMENDATION: TRAINING REGARDING COMPLAINT HISTORY

The auditors recommended that the SDTCs receive training on the appropriate consideration of a respondent's history of prior complaints and any patterns of conduct revealed by that history.

Response and report on implementation: The Administrator agrees with the auditors' recommendation. As a practical matter, the SDTCs who are Odyssey users are doing this now to a large extent by searching the Odyssey database upon receipt of their assignments. The SDTCs were also recently introduced to MAAD's Complaint History Tool that is also used in OCTC. The Administrator plans to provide training on appropriate consideration of complaint history in the second or third quarter of 2024.

CONCLUSION

The Administrator acknowledges the areas for program improvement identified by the auditors and is working to implement their recommendations.

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

d.1. Align and implement recommendations of the Special Discipline Case Audit Committee and the Ad Hoc Commission on the Discipline System.

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

To: The State Bar of California's
Office of Mission Advancement and Accountability Division-Office of Compliance

From: Kristin L. Ritsema and Katherine D. Kinsey

Re: Random Audit of Rule 2201 Files
Closed from June 1, 2022 through May 31, 2023

This Executive Summary is presented to the State Bar Board of Trustees ("Board") in compliance with SDTC Policy Directive 2023-01, entitled Policy Directive Regarding Random Audits of Closed Rule 2201 Files,¹ adopted on January 19, 2023 and revised in June 2023.

The policy directive was implemented to address guidelines and parameters for the review of rule 2201 files by independent auditors and related reporting to the Board regarding implementation of recommendations of the external auditor. Prior to the implementation of this policy directive, as part of the twice-yearly audit of files closed by the Office of Chief Trial Counsel ("OCTC"), the external auditor also reviewed a selection of files handled by Special Deputy Trial Counsel ("SDTC") pursuant to rule 2201. Policy Directive 2023-01 established that an audit of files handled by the Rule 2201 SDTC Program was to be conducted separate and apart from the audit of OCTC files.

This document presents an overview of the Random Case Audit Findings Memorandum ("audit report" or "audit") that was prepared in accordance with the policy directive. The complete audit report is provided only to the State Bar's Mission Advancement and Accountability Division's Office of Compliance ("MAAD-OOC") and to the SDTC Administrator due to confidential information contained in the report pertaining to independent contractors and to California attorneys who have not been publicly disciplined.

To ensure its integrity, the audit process is overseen exclusively by MAAD-OOC, with the audit conducted by independent outside counsel who possess significant prior experience with the work of the State Bar disciplinary system. For this audit, MAAD-OOC selected two auditors, Kristin L. Ritsema and Katherine D. Kinsey, who both have extensive former State Bar experience and are broadly familiar with the policies and practices of OCTC and the State Bar Court. Ms. Ritsema worked as a trial attorney and supervising attorney in OCTC from 1993 to 2021, and Ms. Kinsey worked as a trial attorney in OCTC from 2000 to 2021. MAAD-OOC assigned half of the randomly selected files to Ms. Kinsey and half to Ms. Ritsema. Each of the auditors independently reviewed and evaluated the files assigned to them. However, because each auditor conducted only half of the audit for the current audit period, with the permission of MAAD-OOC, the auditors collaborated in preparing the audit report and this executive summary in order to summarize in one document the

¹ Rule 2201 of the Rules of Procedure of the State Bar addresses circumstances in which the Office of Chief Trial Counsel ("OCTC") is required to recuse itself or in its discretion may recuse itself from handling complaints of attorney misconduct due to actual conflicts of interest or to avoid the appearance of impropriety. Rule 2201 provides that in the event of OCTC's recusal, the matter shall be referred to the Special Deputy Trial Counsel Administrator or designee.

overall findings of the entire audit as well as recommendations for modifications to office practices and training based on those findings.

In accordance with the policy directive, audits are to be conducted of a random selection of a minimum sample of 30 closed files annually. This audit is limited to a review of files closed between June 1, 2022 and May 31, 2023. In total, 32 case files were randomly selected for this audit. This total of 32 cases audited conforms with the policy directive's requirements. As assigned by MAAD-OOC, Ms. Kinsey audited 16 files and Ms. Ritsema audited 16 files. The files were reviewed exclusively through the State Bar's on-line case management system known as Odyssey.

Pursuant to the policy directive, within 60 days after receipt of the audit report, the SDTC Administrator shares findings of the audit with the current panel of contract SDTCs in writing. To the extent the audit report recommends individual or group training or reforms to office practices and/or policies, the SDTC Administrator considers the recommendations and, if appropriate, implements and documents the recommended reforms or training in response to the audit findings. As an important follow-up to each audit, the SDTC Administrator also provides MAAD-OOC with feedback concerning the accuracy and utility of the audit findings and recommendations and this information is conveyed to the external auditor(s). This practice will enable the SDTC Administrator to inform MAAD-OOC and the auditors of new and revised SDTC practices and policies which could impact the assessment of files in subsequent audits, increasing the audit's accuracy and benefit to the SDTC program.

As set forth in the policy directive, the purpose of the audit is "to review SDTC performance at all stages of the proceedings" to identify "legal errors, clear errors in judgment, and whether actions were taken in accordance with Rule 2201 Program policies and practices, California statutes and ethical rules, and California case law." With respect to errors in judgment, the audit is to "identify exercises of SDTC's prosecutorial discretion that the external auditor believes reflect a clear error in judgment outside the acceptable range of prosecutorial discretion." In order to meet these objectives, the auditor evaluates each file based on a multitude of criteria which are elicited through 20 questions set forth in an audit checklist provided by MAAD-OOC.²

All 32 of the files reviewed by the auditors received comments of some type--whether technical, substantive, or both--regarding perceived errors, issues of concern, and/or suggested training. Many of the comments relate to completeness of the information maintained in the Odyssey files, while others relate to compliance with policies, most often regarding compliance with conflict-check policies. While all files received comments, 31 of the 32 files reviewed were closed by SDTC at the intake or investigation stage, and the auditors found all the closings to be appropriate. 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 auditors have not recommended reopening any of the files. Even though the audit provides a sampling of the work of the SDTCs in a year rather than eliciting information on every file actually completed, the fact that no files require reopening reflects positively on the overall professionalism and quality of the good work performed by the SDTCs.

One file reviewed was tried by an SDTC, and all charges were dismissed. The SDTC appealed, and the Review Department affirmed the Hearing Department's dismissal. However, the auditor who reviewed this case is not questioning the SDTC's decision to pursue the case. Pursuing the case was

² A copy of the audit checklist is attached.

appropriate. The outcome of this case spotlights the challenges of litigating disciplinary matters without the experience and support that can be found within OCTC. Considering that SDTCs stand in the shoes of OCTC while investigating and prosecuting cases, the auditors have made recommendations designed to help ensure that the SDTCs have the information and support resources that align with those of OCTC. The recommendations include formalizing a means by which an SDTC can obtain input from other SDTCs and the SDTC Administrator through a round-table-type discussion about complicated cases as well as any cases going to trial, including discussion and input regarding the facts and charges, evidence, and challenges to proving the case. It is also recommended that the SDTC Administrator and the State Bar consider hiring attorney investigators or investigators to solely focus on providing investigative support on SDTC cases. There are challenges when attorneys both investigate and prosecute cases, including the possibility of an SDTC becoming a witness on his or her case. Additional training is also recommended, including training regarding common OCTC policy directives relevant to the work of the SDTCs; additional Odyssey training with an emphasis on requiring SDTCs to maintain complete and accurate records of all significant actions and documents in the Odyssey file; and training on the appropriate consideration of a respondent's complaint history, including the importance of reviewing past complaints in addition to prior records of discipline.

The mix of cases selected for the audit is random so there is no guarantee that a particular type of file will be audited or that the files audited truly reflect the variety of cases handled by the Rule 2201 SDTC Program. The present audit included twenty files closed at the intake stage, eleven files closed at the investigation stage, and the one post-filing matter that proceeded to trial. Most cases closed at the intake stage were closed based only on a review of the complaint, which is consistent with most cases closed at the intake stage. One warning letter was issued based on a determination that the R had engaged in misconduct for which discipline could be imposed, but the violation was minor and caused no significant harm.

There were five cases in which the conflict arose or was discovered after OCTC had begun the investigation, and the cases were then referred to the SDTC Administrator for handling. In those matters, comments regarding the investigation apply to work performed by OCTC and the assigned SDTCs. One file was designated as a 2201 case but was incorrectly forwarded for investigation and assigned to an OCTC attorney/investigator team before being sent out five days later to the SDTC Administrator. There was no evidence in the file that work was performed before being sent to the SDTC Administrator.

By definition all files reviewed in this audit were sent to the SDTC Administrator based on conflicts of some kind, but the audit noted errors in documenting the files as to those conflicts as well as steps missed to prevent further conflicts. Four files were not designated as 2201 matters because the appropriate Odyssey event³ had not been added to the file, and therefore the files were not flagged in Odyssey as 2201 files. Sixteen files did not have events reflecting that the case was being assigned to a SDTC. Eighteen files did not have events reflecting that conflict checks were conducted at the time the files were assigned to a SDTC pursuant to OCTC Policy Directive 2022-05. In three files, SDTCs provided email confirmation of no conflicts before the file was assigned. Twenty-six files did not have entries reflecting that conflict checks were completed prior to closing the cases.

³ Events in Odyssey are like activity log entries that are to be used to document all significant actions and documents.

Although the auditors found significant delays in the handling of some of the older 2201 files, they noted that recent files have been handled more promptly. Finally, the auditors were particularly impressed with the quality of the SDTC's closing letters in the files reviewed. The letters were thorough and detailed. They generally began with an explanation of the role of the SDTCs in providing independent review and decision in cases in which the OCTC is recused due to a conflict. The letters represented that the complaints had been thoroughly reviewed and then established that they had been by walking through each allegation and addressing them individually with facts, case law, rules, and/or statutes. While there are complaining witnesses who would not be satisfied by any response to their complaints, there are others who want some recognition that their complaints were heard, and these closing letters establish that they were.

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 by the Rule 2201 SDTC Program during the designated period.

Submitted by: Katherine D. Kinsey and
Kristin L. Ritsema

Date: June 18, 2023

RANDOM AUDIT CHECKLIST (REVISED 6/2023)

File No:

Respondent's Name:

Case Number:

Case Categorization: Intake ____ **Investigation** ____ **Trial** ____

Answer all questions. Use N/A if question does not apply to the case.

1. Were all significant actions and approvals contained in the physical file or otherwise documented in Odyssey with appropriate event entries and the scanning and uploading of all relevant letters, memos and other documents? Yes: No: N/A:

Comment:

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

Comment:

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

Comment:

4. Did the SDTC 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:

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

Comment:

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 complaint, contain sufficient information to determine whether the correct decision was made, and provide correct information regarding the ability to seek a secondary review by another SDTC)? Yes: No: N/A:

Comment:

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

Comment:

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

Comment:

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:

Comment:

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

Comment:

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:

Comment:

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:

Comment:

13. Was the case properly prepared for charging* by the SDTC and was the evidence supporting the charging decision adequate, appropriate,* and approved by a supervisor, if necessary? Yes: No: N/A:

Comment:

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:

Comment:

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:

Comment:

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

Comment:

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 the SDTC's decision to resolve the case in the manner approved? Yes: No: N/A:

Comment:

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:

Comment:

19. Does the file/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:

Comment:

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 the SDTC Administrator reopen the file to reconsider its closing decision)? Yes: No: N/A:

Comment:

(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)