



The State Bar of California

OPEN SESSION AGENDA ITEM 60-1 MARCH 2024

DATE: March 21, 2024

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 Resolved
Between March 1, 2022, and August 31, 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 March 1, 2022, through August 31, 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 September 20, 2023, OCTC received the report of the audit for files closed or otherwise resolved during the period March 1, 2022, through August 31, 2022.¹ For the first time, the audit was done by two different auditors, both new. The addition of the new auditors complies with a recommendation by the California State Auditor in its April 2022 report to ensure that there are varying perspectives that may be presented by different auditors. For the second time, the audit report included 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 included recommendations for training to improve OCTC's effectiveness, was reviewed and discussed with OCTC managers on October 31, 2023 (slightly outside the 30-day period from receipt called for by internal policy). On December 13, 2023 (slightly outside the 60-day period from receipt called for by internal policy), 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 or possible 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

¹ Attachment A is an executive summary of the audit report prepared jointly by the two auditors. As the auditors note, 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 auditors note, this checklist was modified in early 2023 "to consolidate some of the items from the former checklist into single questions, and new questions were added to determine whether conflict checks were performed and to assess OCTC's handling of repeat respondent matters."

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.
- 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% 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 March 1, 2022, and August 31, 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 March 1, 2022, and August 31, 2022, of which 48 relating to repeat responders may have been closed or otherwise resolved prior to March 1, 2022. 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%. The auditors recommended the reopening of 10 files (Nos. 30, 37, 50, 74, 123, 156, 172, 189, 208, and 238) as well as the possible reopening of two files depending on current facts surrounding those two matters (Nos. 100 and 176). As noted in the audit report, the "reasons for reopening range from OCTC failing to identify and investigate certain allegations that could subject respondent to discipline; failing to appropriately follow-up with CWs including those who provided additional information upon being notified of file closure; prematurely closing a file without obtaining all necessary information; and failing to notify the complainant of the closure." For the last of these reasons, OCTC typically does not reopen the case, but rather ensures that the complainant is notified and then evaluates any additional information that may be provided by the complainant to determine whether reopening is warranted.

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:

September 1, 2021 to February 28, 2022:	4.7% (12 of 255)
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 auditors recommended reopening only 12 files out of 255 audited suggests that OCTC staff are overall, appropriately resolving cases. As in prior audits, the auditors 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 auditors’ recommendations for reopening and makes final determinations whether the cases will be reopened. OCTC will reopen a case based on the auditors’ 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 has reviewed the 12 files recommended for reopening and made the determination to reopen 10 of those files (Nos. 30, 50, 74, 100I 123, 156, 172, 176, 208, and 238). OCTC has determined that two files will remain closed (Nos. 37 and 189). In each of these files, the auditors recommended reopening only for the limited purpose of notifying the complainant of the closure because the file did not already reflect such notice. In one file, the complainant (not a client) did not request updates or a notification of the resolution and referred OCTC to a third party if any additional information was needed—OCTC is not reopening this file but will send notice to the complainant of the closure. In the other file, a closing letter was sent by mail but returned undeliverable—OCTC is not reopening this file but will send an updated closing letter to the complainant at the email address provided.

The auditors also recommended issue review of an additional nine files (Nos. 83, 130, 135, 192, 197, 200, 202, 205, and 206) to address whether follow-up was needed on certain identified issues (for example, the absence of conflict-of-interest forms) and whether this follow-up

warranted reopening.² OCTC has reviewed these nine files and determined that all should stay closed, but it is taking corrective action in four of these files as follows: (a) for two files (Nos. 83 and 130), doing a conflict check and entering the appropriate conflict check form in Odyssey; (b) for one file (No. 135), following up with the respondent to confirm completion of Ethics/CTA school as required in connection with a warning letter issued in the case; and (c) for one file (No. 192), correcting Odyssey entries to reflect that the respondent received an actual suspension, not just a stayed suspension.

The auditors identified one file (No. 107) for which they recommended that OCTC open a new file based on information provided by the complainant in response to the closing of the CWs' original complaint. OCTC has reviewed this file and determined that rather than opening a new file, it will reopen the existing file to address the new post-closure information.

The auditors also recommended that one of the repeater respondent's closed files (Nos. 212 and 242-278) be reviewed to determine whether follow up to request actions on behalf of individual clients (e.g., locating client files, providing accountings, or providing refunds) is needed. OCTC has reviewed these files and, to the extent possible, will be pursuing potential additional actions on behalf of individual clients in 19 of them.

Report on Implementation: OCTC has reviewed and is reopening 10 of the 12 files recommended for reopening or possible reopening. OCTC has reviewed the 9 files recommended for further issue review and, though it will not be reopening any of these files, is taking corrective actions in 4 of these files. OCTC reviewed 1 file in which the auditors recommended the opening of a new file – OCTC is instead reopening the existing file. OCTC has reviewed the 37 repeater files recommended for further review to determine if any additional action is needed, and will be taking additional action in 19 of these files.

Identification of Culpability

The auditors noted 38 cases in which they found errors relating to the "identification of all culpability issues whether or not specifically identified by the complainant," including in one matter the apparent missing of a "misappropriation of client funds of more than \$5,200." The auditors noted that this was "a significant number of cases in which allegations were missed." The auditors also noted that the errors noted "suggest that reviewing retainer agreements should be a standard part of the investigation. There were a number of files in which prohibited language in the agreements (e.g., 'nonrefundable' 'earned upon receipt') was not identified or addressed. OCTC attorneys should be pro-active in addressing with respondents the prohibited language in their retainer agreements and educating them about the difference between a true retainer and an advance fee."

Report on Implementation: OCTC supervisors are emphasizing to investigators and attorneys the importance of identifying all culpability issues, whether or not specifically

² The auditors listed 11 files in this category, but after review one of the listed files (No. 156) was included in the 12 recommended for reopening as described above, and another (No. 152) appears to have been included by error as its description of the issues identified is a duplicate of that for No. 135.

identified by the complainant. On March 1, 2024, OCTC circulated to all OCTC attorneys direction to ensure that in all investigations on which they serve as legal advisors the retainer agreement is reviewed to determine whether it improperly designates a refundable advance payment for legal services to be performed in the future as “non-refundable,” “earned on receipt,” or with similar language. The directions also contained education on the difference between a true retainer and an advance fee.

Intake Issues

The auditors noted two issues with intake handling of matters, while commenting that overall “the audit was a reminder that the work of Intake remains essential and impressive.” First, the auditors noted that errors in Intake “generally related to closing a file prematurely” without giving a complainant the opportunity to provide supporting documents. In this regard, the auditors noted that even in the absence of supporting documentation, if the “facts presented in a complaint would violate State Bar rules and statutes, then the complaining witness should be contacted for further information,” “especially since complaining witnesses often do not know what documentation to provide with their complaints.” Second, the auditors noted that “Intake attorneys should examine the respondent’s complaint history to see if recent complaints have been made against the respondent with similar allegations.” Finally, the auditors noted that another “possible issue for Intake is the over reliance on communication letters and return of file letters,” recognizing that these are “most effective when the alleged misconduct is recent” and when these “are the single issues of the complaint.”

Report on Implementation: *First, an OCTC Policy Directive issued February 25, 2022, makes clear that a complaint may warrant forwarding from intake to investigation if either the complaint itself sets out specific facts that, if proved would be sufficient to establish a violation or even if this is not the case intake can identify reasonable avenues of investigation reasonably likely to obtain information that, coupled with the factual allegations in the complaint, would be sufficient to establish whether or not a violation has occurred. This guidance is being incorporated into the Intake Manual, which will add guidance that a reasonable avenue of investigation in many cases will be reaching out to the complainant to request any supporting documents for the complaint. In many cases this is already done in intake through standard requests for information sent to complainants.*

Second, since the closures that are the subject of the audit, OCTC has adopted a number of new policies and procedures to ensure that consideration of prior complaint histories occurs, namely:

<i>October 31, 2022:</i>	<i>new policy directive regarding non-public resolutions of disciplinary complaints that requires consideration of an attorney’s prior discipline and prior closed complaints</i>
<i>December 1, 2022:</i>	<i>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</i>

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.

Finally, effective as of October 31, 2022, OCTC issued a new policy directive providing detailed guidance on the use of non-public resolutions of disciplinary complaints, including the use of communication, file return, resource, and warning letters. On October 23, 2023, OCTC adopted a new diversion program that encompasses use of many of these same types of letters, including in intake. OCTC provided training on the diversion program on October 18, 2023, shortly in advance of its effective date.

Investigation Delays

Based on their review of 86 investigation files, the auditors noted “a significant issue with investigations: delays and especially unexplained delays. It was not unusual to see straightforward complaints sit for months with no activity and no explanation in the files as to why. Many files were reassigned, and some files were reassigned multiple times prior to disposition. This appears to have contributed to delays, but it also means staff members are making decisions on files they are not familiar with, increasing the likelihood that evidence and charges are missed.” In connection with this issue, the auditors noted that in conducting the audit, they “were consistently impressed by the work of OCTC’s expeditor teams,” in which investigators and legal advisors closely collaborated on investigations using expedited investigation procedures. The auditors noted that in matters handled in this way, they “did not see the delays frequently occurring in standard investigator matters” and stated that “the level of interaction between the investigator and the legal advisor appears to be a key.”

Report on Implementation: *Since the closures that are the subject of the audit, effective July 1, 2023, OCTC underwent a significant reorganization that included the creation of three horizontal investigation teams to handle the bulk of investigations. Effective January 2, 2024, the reorganization was modified to add a fourth horizontal investigation team. At the same time, OCTC issued a new policy directive that the expedited investigation procedures previously limited to cases assigned to expeditor teams would now be the norm for all horizontal investigation case and the default in most vertical investigation cases unless a determination was made that more formal procedures are needed given the nature of the case. The expedited investigation procedures that are now the norm include the close interaction and collaboration between investigator and legal advisor that the auditors noted as a key to avoiding unexplained delays. OCTC also created/modified Odyssey events to implement these expedited investigation procedures as the norm. These changes should address as well the training issues identified with respect to communications with respondents and respondents’ counsel as under the expedited investigation procedures, legal advisors will now be playing more of a role in crafting those communications.*

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:

Warning Letters and Conditional Warning Letters: The auditors noted misunderstanding regarding the standards for issuing warning letters, and failures to document in Odyssey compliance with conditions in conditional warning letters. As noted above, on October 18, 2023, OCTC provided training on its new diversion program, which encompasses, and in many instances substitutes for, the use of warning and conditional warning letters. The diversion program also includes the designation of two paralegals who serve as monitors tasked with ensuring compliance with conditions and the entry into Odyssey of information regarding this compliance.

Interactions with Complaining Witnesses and Closing Letters: The auditors identified deficiencies in many closing letters, including incorrect advisements as to why matters were being closed. On January 23, 2024, OCTC posted on its SharePoint site sample language for use in closing letters to accurately describe the basis for closure in most common types of complaints.

Legal and Procedural Issues: The auditors recommend training in the following areas: how to petition to obtain dependency records, cases involving failure to timely comply with rule 9.20, expert designations in State Bar Court, Odyssey entries relating to the rule of limitations, mislabeling of documents in Odyssey, and missing documents in Odyssey because links or passwords necessary to access documents had expired. Some of the recommended training has already been provided. 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 additional of the recommended training at the Board's July 2024 meeting.*

Conclusion

OCTC acknowledges the deficiencies identified by the auditor and is addressing these issues by various means including 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

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

From: Katherine D. Kinsey and Kristin L. Ritsema

Re: Random Audit of the Office of Chief Trial Counsel Cases
Resolved from March 1, 2022 through August 31, 2022

This Executive Summary is presented to the State Bar Board of Trustees ("Board") in compliance with the Office of 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" and "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.

To ensure its integrity, the audit process is overseen exclusively by MAAD-OOC, with the audits 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. Ritsema and half to Ms. Kinsey. 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 overall findings of the entire audit as well as recommendations for training based on those findings.

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. In total, 298 cases were randomly selected for this audit, including 43 replacement files. In total, 255 case files were actually audited 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 48 cases regarding respondents who are the subject of at least fifteen cases closed by the State Bar in the prior five years (“repeat respondents”). This total of 255 cases audited conforms with the policy directive’s requirements. Other than the repeat respondent cases and one file miscategorized as an intake file, all cases audited were closed or otherwise resolved from March 1, 2022 through August 31, 2022.

The majority of the files were reviewed exclusively through the State Bar’s on-line case management system known as Odyssey. Some of the repeat respondent files were opened and closed earlier than the audit period and the Odyssey files contained only skeletal information; therefore, paper files were provided to an auditor for ten of these cases. It is anticipated that within the next few cycles, all documents for each file will be available on Odyssey.

As set forth in the policy directive, 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.” In order to meet this objective, the auditor evaluates each file based on a wide range of criteria which are elicited through 20 questions set forth in a checklist provided by MAAD-OOC.¹ This checklist, which previously consisted of thirty-two questions, was substantially revised in early 2023. It was streamlined to consolidate some of the items from the former checklist into single questions, and new questions were added to determine whether conflict checks were performed and to assess OCTC’s handling of repeat respondent matters.

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 recommended reopening ten files and possibly two more depending on the current facts surrounding those cases. In addition, one of the auditors has recommended the review of files closed regarding a repeat respondent because the files were closed without investigation. Review is being recommended because respondent was incarcerated in 2018, his office was shut down that same year, and there are rule of limitation concerns. 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.

¹ A copy of the checklist is attached.

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. Each auditor's respective appendix to the audit contains information on all cases reviewed by that auditor, 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. For this audit, Ms. Kinsey reviewed 128 files, and Ms. Ritsema reviewed 127 files. With the benefit of reviewing 255 total files, the following are the strongest impressions from the audit.

Checklist Question 2 is the question added to the checklist this year that asks whether conflict checks were appropriately completed and entered into the Odyssey file. OCTC formalized a conflicts check policy that became effective on June 1, 2022. Notwithstanding the fact that many of the files audited were resolved prior to the effective date of the policy, of the 127 files audited by one of the auditors, a total of 37 files contained information indicating that the appropriate conflict checks were being completed after the policy became effective. It is anticipated that this number should increase next audit period since all cases will have been resolved after the effective date of the policy.

As evaluated in Checklist Question 3, one important aspect of handling complaints is the identification of all culpability issues whether or not specifically identified by the complainant. In the current audit, thirty-eight cases were found to have errors in this area--a significant number of cases in which allegations were missed. In one matter, it appears that a misappropriation of client funds of more than \$5,200 was missed. The errors noted under Checklist Question 3 also suggest that reviewing retainer agreements should be a standard part of the investigation. There were a number of files in which prohibited language in the agreements (e.g., "nonrefundable" "earned upon receipt") was not identified or addressed. OCTC attorneys should be pro-active in addressing with respondents the prohibited language in their retainer agreements and educating them about the difference between a true retainer and an advance fee.

Attorneys reviewing complaints at the intake level are somewhat at a disadvantage because they have access to limited information in making determinations about complaints, especially since complaining witnesses often do not know what documentation to provide with their complaints. The errors found in Intake files generally related to closing a file prematurely. For example, the auditors are recommending reopening two files that were both closed in Intake. In one of the files, although the complainant did not provide supporting documentation, if the information she presented in her complaint was accurate, she provided sufficient facts to initiate an investigation of respondent's failure to perform and improper withdrawal. Complaining witnesses often assume they will be contacted for further information. If the facts presented in a complaint would violate State Bar rules and statutes, then the complaining witness should be contacted for further information. In one of the files reviewed, an Intake attorney followed up with specific questions regarding the complaint. Once the information was received, the complaint was forwarded for investigation. In addition, Intake attorneys should examine the respondent's complaint history to see if recent complaints have been made against the respondent with similar allegations.

Another possible issue for Intake is the over-reliance on communication letters and return of file letters. These letters are a valuable resource and very often address the underlying issue that prompted the complaint. However, they are most effective when the alleged misconduct is recent. A complaint from a client who has been requesting his file for a month could be addressed with a return of file

letter. A complaint from a client who has been requesting his file for a year is likely an investigation matter. In addition, communication letters and return of file letters are appropriate and effective when those are the single issues of the complaint. While the auditors note these issues, the audit was a reminder that the work of Intake remains essential and impressive.

Checklist Question 9 asks, “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?” Based on our review of 86 Investigation files, this question goes to the heart of a significant issue with investigations: delays and especially unexplained delays. It was not unusual to see straightforward complaints sit for months with no activity and no explanation in the files as to why. Many files were reassigned, and some files were reassigned multiple times prior to disposition. This appears to have contributed to the delays, but it also means staff members are making decisions on files they are not familiar with, increasing the likelihood that evidence and charges are missed.

In conducting the audit, with one exception, the auditors were consistently impressed by the work of OCTC’s expeditor teams. The expeditor team has existed for years, and each team has generally been comprised of an experienced investigator and experienced attorney. In the past, the expeditor teams were expected to investigate and resolve cases within 60 days. They are not subject to as many requirements as standard investigations. Nevertheless, their letters to respondents seeking information and their closing letters to complainants were often more thorough and detailed than those in standard investigation matters. The expeditor teams also seem to benefit from close collaboration. In the files reviewed, investigators or legal advisors emailed respondents about the complaint within days of the assignment. When the response was received, the investigator and legal advisor consulted immediately. Any guidance given was addressed within days, if not the same day. We did not see the delays frequently occurring in standard investigator matters. It is true the expeditor teams can waive many investigative steps (e.g., investigative plans, complaining witness interviews etc.), but we saw the same steps being waived in some of the standard investigations, and straightforward cases still went into backlog. The level of interaction between the investigator and the legal advisor appears to be a key.

With the addition of Question 19, 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 assessed in relation to the forty-eight repeat respondent files. Both auditors have decades of experience evaluating complaints, and in reviewing the forty-eight files, neither saw evidence of serious misconduct in handling client matters. There is a pattern with the repeater respondents in that they generally run high-volume offices, with employee turnover, and poor communication with clients. They have received complaints for years and whatever the causes, they have not addressed them. It is as if they have baked State Bar complaints into the price of doing business.

Submitted by: Katherine D. Kinsey
Kristin L. Ritsema

Date: September 18, 2023
(Revised September 20, 2023)

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)