

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 Erica L. M. Dennings

Re: Random Audit of Rule 2201 Files
Closed from **May 1, 2023, through April 30, 2024**

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, Erica L. M. Dennings, 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. Dennings worked as a trial attorney in OCTC from 1992 to 2023, 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. Dennings. Both auditors have collaborated on previous audits. Each auditor independently reviewed and evaluated the files assigned to them but 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 modifications to office practices and training based on those findings.

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.

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 **May 1, 2023, through April 30, 2024**. In total, 30 case files were randomly selected for this audit. This total of 30 cases audited conforms with the policy directive's requirements. As assigned by MAAD-OOC, Ms. Dennings audited 15 files and Ms. Kinsey audited 15 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 21 questions set forth in an audit checklist provided by MAAD-OOC.²

29 of the 30 files reviewed by the auditors received comments of some type, whether technical, substantive, or both--regarding perceived errors or issues of concern. Many of the comments relate to completeness and accuracy of the information maintained in the Odyssey files. For instance, there were eight files in which there was no case summary on Odyssey. Other comments relate to compliance with policies - most often regarding compliance with conflict-check policies, with a majority of the files not fully complying with the conflict-check policy. In addition, most SDTCs did not consider the respondent's complaint history before determining the final disposition of the file. While all files received comments, the 30 files reviewed were closed by SDTCs at the intake or investigation stage, and the auditors found all the closings to be appropriate. As required by the directive, the auditors are 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. While 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 no files require reopening reflects positively on the continued professionalism and quality of work performed by the SDTCs.

Additional training is recommended regarding compliance with consideration of a respondent's complaint history prior to disposition. As it stands now, there is no clear understanding of what

² A copy of the audit checklist is attached.

documentation is required in the file to show compliance and what is deemed to be an “appropriate consideration.” That said, files reviewed in this audit show no effort to review a respondent’s complaint history. However, it is also unclear which SDTCs had access to Odyssey and/or whether they had access to the respondent’s complaint history or just the assigned files.

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-one files closed at the intake stage, and nine files closed at the investigation stage. 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 resource letter was issued after determining a respondent’s handling of a settlement offer raised concerns.

There were two cases in which the conflict arose or was discovered after being assigned to OCTC and after the investigation was initiated, and the cases were later referred to the SDTC Administrator for handling. In those matters, comments regarding the investigation largely apply to work performed by OCTC. 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 a few 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. Three files were not designated as 2201 matters because the appropriate Odyssey event had not been added to the file, and therefore the files were not flagged in Odyssey as 2201 files. Five files did not have events reflecting the case was being assigned to the SDTC Administrator and/or the assignment to a SDTC. Eight files did not have events reflecting that conflict checks were conducted at the time the files were assigned to a SDTC/SDTC Administrator pursuant to OCTC Policy Directive 2022-05. In three files, SDTCs provided email/written confirmation of no conflicts before the file was assigned and this may have been because they did not have access to Odyssey at the time. Three files did not have entries reflecting that conflict checks were completed prior to closing the cases.

The auditors noted delays in the handling of the 2201 files, including delays between assignment with the SDTC Administrator and the assignment to an SDTC. In two files, the files reflected no work done by a particular SDTC for the months between assignment and the SDTC’s contract ending, raising the question as to whether there is a system in place to monitor the progress of cases assigned to the various SDTCs. As with the last audit, the auditors were largely impressed with the quality of the closing letters in the 2201 files reviewed. Except for one file where the SDTC did not properly explain the basis for closing, closing letters continue to be thorough and detailed. While there were CWs who did not agree with the closing of their matters, a majority of the closing letters left no doubt that their complaints, including the supporting documentation, were reviewed and considered.

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.

Summary of Recommendations

Complaint History Review

The auditors recommend a prompt be added to Odyssey requiring an attorney to confirm they reviewed a respondent's complaint history before the matter can be closed. The second recommendation relates to training. SDTCs may not know what an "appropriate consideration" of the complaint history entails, especially since some SDTCs have no prior experience working in OCTC. Therefore, the auditors recommend a training/discussion where an instructor walks the process of considering complaint histories, including those closed without discipline or resolved with alternatives to discipline e.g. warning letter or resource letter. The training should address the weight that should be given to closed complaints, including consideration of the age of the file, the number of closed complaints, and whether they contain similar fact and/or allegations.

Boilerplate language

The auditors recommend against using the following boilerplate language in closing letters: "Under the laws of California, the facts as you alleged them would not be grounds for disciplinary action." The use of this language can be misleading when it is more accurate to say there is a lack of facts and/or evidence to establish a violation. It is infrequent that allegations would not be grounds for disciplinary action, or some type of corrective action, if proven.

Case processing consistency

The auditors noted letters to CWs were often sent via US mail only. It is recommended that SDTCs letters be sent via email by default, for consistency and efficiency. Email communications are easier to upload to Odyssey thereby assuring the entries are accurate. It is also more efficient than dealing with returned mail. SDTCs using email accounts dedicated only to SDTC matters may also allow the SDTC administrator to have access to email communications, including for those SDTCs who cease handling 2201 matters for the State Bar or are available for a length of time.

Case Management

The auditors noted files in which no work was performed over a significant period of time. The auditors suggest the SDTC administrator be provided with a monthly report showing the most recent activity on all assigned files in order to assure files are timely processed.

Submitted by: Katherine D. Kinsey and
Erica L. M. Dennings

Date: September 18, 2024

RANDOM AUDIT CHECKLIST (REVISED 6/20/23)

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)