



The State Bar of California

OPEN SESSION

6.5 AGENDA ITEM

MAY 2025

BOARD OF TRUSTEES

DATE: May 22, 2025

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

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Report on Random Audit of the Office of Chief Trial Counsel Files Closed
Between March 1, 2023, and August 31, 2023, 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, 2023, through August 31, 2023. The audit includes a review of selected cases regarding respondents who were the subject of at least fifteen cases closed by the State Bar in the prior five years. The audit report was received on or about September 27, 2024, and was reviewed and discussed with OCTC managers on October 23, 2024 (within the 30-day period from receipt called for by internal policy). On November 21, 2024 (within 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 has reviewed the 13 cases recommended for reopening by the audit and has reopened 6 but has determined not to reopen the remaining 7. OCTC has also reviewed an additional 20 cases recommended for issue review by the auditor for training purposes or for correction of technical errors. Many of the corrective actions discussed in the audit report have already been taken; additional corrective actions will be taken as discussed below.

RECOMMENDED ACTION

Informational item only.

DISCUSSION

FILES REVIEWED

The auditors reviewed a total of 255 files closed or otherwise resolved at the following stages: 86 files at the intake level; 86 files at the investigation level; 35 files closed either before or after initiating litigation before the State Bar Court; and 48 files regarding a total of 6 repeat respondents who were the subject of at least 15 cases closed by the State Bar in the previous five years.¹ Other than certain files relating to the repeat respondents, all of the reviewed files were closed or otherwise resolved between March 1, 2023, and August 31, 2023.

Recommendations to Reopen 13 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 13 files (Nos. 10, 43, 50, 60, 131, 146, 161, 212, 213, 237, 245, 247, and 248). As noted in the audit report, the reasons for recommending reopening include "OCTC failing to identify, investigate, and/or prosecute certain allegations that could subject respondent to discipline; failing to appropriately follow up on additional information provided by complaining witnesses upon being notified of the file's closure; prematurely closing a file without obtaining all necessary information; and closing a complaint submitted by someone who was not a client without giving the client the opportunity to join in the complaint and/or submit their own complaint." (Attachment A at 2.) The auditors also noted that one case was resolved with a warning letter contrary to OCTC policies, and that in a number of these cases, the attorney's complaint history was not reviewed.

The 13 cases recommended for reopening are 5.1 percent of the 255 audited files, above the target and above the rate of the last several audits:

September 1, 2022, to February 28, 2023:	3.1% (8 of 255)
March 1, 2022, to August 31, 2022:	4.7% (12 of 255)
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)

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." (Attachment A at 1.) 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, with a few additional revisions in December 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." (Attachment A at 2.)

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)

That the auditors recommended reopening only 13 files out of 255 audited suggests that overall OCTC staff are appropriately resolving cases. As in prior audits, the auditors recognized that “the small number of files requiring reopening continues to reflect positively on the overall professionalism and quality of the work performed by OCTC.” (Attachment A at 3.)

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.

After reviewing the reopening recommendations, OCTC has reopened 6 files:

File 43 (closure based on the complainant’s failure to cooperate, but two alleged violations did not require complainant’s cooperation for investigation; reopened to issue letter requesting information from attorney and subsequent follow-up investigation)

File 60 (facts alleged, including attorney missing court dates, could, if true, support discipline; reopened for further investigation)

File 131 (closing letter did not adequately explain the basis for closure, which was premature and did not address claim that attorney improperly withdrew after failure to prosecute resulted in dismissal of personal injury matter; reopened for further investigation)

File 146 (closing letter did not adequately explain the basis for closure, which was premature and did not address certain claims)

File 161 (reopening for further investigation into validity of attorney’s claim in response to this and several other matters that he was the victim of previously unreported identity theft)

File 213 (closing letter did not adequately explain the basis for closure, which was premature and did not address court order removing attorney as complainant’s counsel based on failure to appear; reopened for further investigation)

OCTC is not reopening the remaining 7 files for a variety of reasons:

File 10 (OCTC disagrees that the attorney for a trust executor has an independent duty to communicate with and provide an accounting to a complainant who is a trust beneficiary—“the attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee.” *Wells Fargo Bank v. Superior Court* (2000) 222 Cal. 4th 201, 212.)

File 50 (OCTC is declining to reopen this audit file, which involved non-serious misconduct that the attorney resolved with the CW, but given the attorney’s complaint history, is following the auditor’s recommendation to reopen a non-audit file involving the same attorney)

Files 212, 245, 247, and 248 (OCTC is declining to reopen these 4 files against a repeat attorney, which are unlikely to result in any additional discipline as they involve allegations similar to and during the same time period as a series of allegations on which the attorney was previously disciplined)

File 237 (OCTC issued warning letter based on one violation, but not two others; OCTC agrees that other violations should have been included but is declining to reopen simply to reissue a warning letter with additional violations)

The auditors also recommended issue review in an additional 20 files (Nos. 46, 48, 55, 73, 114, 121, 130, 143, 148, 149, 152, 154, 198, 200, 221, 231, 236, 242, 251, and 252). Several of these files were recommended for review based on the auditors’ identification of deficiencies bearing on the case disposition that required further inquiry or training but did not warrant a recommendation for reopening. Others were recommended for review based on technical errors that need correction, such as files that reflect an incorrect closing status, or based on issues on which follow up of some kind is required, such as confirming whether an attorney was regularly using a retainer agreement that contained language out of compliance with the rules, or in which the issues should be reviewed with the handling attorney for training purposes. OCTC has reviewed these files and will correct the technical errors and incorporate the issues identified into its training (see training discussion below).

Report on Implementation: OCTC has reviewed and is reopening 6 files but is not reopening an additional 7 files recommended for reopening. OCTC has reviewed the 20 files recommended for further issue review and will correct the technical errors and incorporate issues identified into its training.

Rule of Limitations

The auditors noted that in “many of the files, the rule of limitation dates were incorrect, because the complaint origin date (date of receipt of the complaint) was used as the offense date for the charges, even though information in the complaint suggested an earlier date.” (Attachment A at 3.)

Report on Implementation: OCTC’s initial training for new investigators and attorneys includes instructions to review the offense date, rule of limitations, and possible reasons for tolling of the rule of limitations for each identified charge. After the rule of limitations was identified as an issue in prior audits, OCTC provided specific training on the rule of limitations to attorneys and investigators on October 26, 2022, and February 3, 2023. In

addition, as of October 28, 2024, in conjunction with implementation of investigation benchmarks to comply with a State Auditor recommendation, OCTC modified its expedited investigation procedures to have the Odyssey event for “Legal Advisor’s Instructions to Investigator” require the attorney assigned to an investigation to verify for rule of limitation purposes that the alleged offense dates for the charges to investigate are accurate and that any applicable rule of limitations tolling events have been added to the Odyssey case file. OCTC will also continue to emphasize to supervisors, attorneys, and investigators the need for Odyssey to correctly reflect the applicable rule of limitations date.

Conflict Checks

In the last audit, the auditors noted 41 files in which, after the June 1, 2022, implementation date of OCTC’s new conflict check policy, one or more required conflict checks were not completed. The auditors noted that the audit period had begun just three months after the new policy was put in place, and stated their anticipation that future audits would show an improvement in compliance. In this audit, that expected improvement was observed: “a majority of the files were compliant with this policy and there were significantly fewer conflict checks that were not completed and entered into Odyssey compared to the last audit.” (Attachment A at 3.) The auditors stated that they “anticipate the number of files reflecting compliance with the policy will continue to increase in the next audit period.” (Id.)

Report on Implementation: *As noted, OCTC’s conflict check policy was implemented effective June 1, 2022. Subsequently, an annual training requirement was added to the policy. OCTC staff have since received training (provided as part of broader training on conflicts of interest in conjunction with the Office of General Counsel) on the conflict check policy on March 9, 2023, and March 6, 2024. In addition, on April 29, 2023, OCTC updated and revised its conflict check policy to streamline and make more efficient the conflict check procedures. OCTC will await the next random audit to see if, as anticipated, the number of files with missing conflict checks continues to decrease.*

Identification of Culpability

The auditors noted “several files in which one or more culpability issues that should have been considered were not considered and were not added to the Odyssey file, including allegations related to the language in retainer agreements” and concluded that this suggests “retainer agreements are not regularly reviewed as part of the investigation.” (Attachment A at 3.)

Report on Implementation: *As noted in response to similar findings in two previous audits, OCTC supervisors are continuing to emphasize to investigators and attorneys the importance of identifying all culpability issues, even if not specifically identified by the complainant. With respect to retainer agreements, in response to a prior audit, on March 1, 2024, OCTC circulated to all attorneys guidance on the difference between a true retainer and an advance fee, and instructions that in all investigations they should ensure that 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 suggesting,*

incorrectly, that such an advance payment belongs to the attorney on receipt and is not available for refund on termination if not earned as the result of legal services performed

Closing Letters to Complainants

The auditors identified a number of files in which, although the cases were appropriately closed, “the closing letter to the complainant was inadequate or incomplete for various reasons, including failure to address all key allegations of the complaint, failure to explain reasons for closing certain allegations, or providing improper reasons for closing certain allegations.” The auditors also noted “an overreliance on boilerplate language in a number of closing letters.” (Attachment A at 3-4.)

Report on Implementation: *The adequacy and completeness of closing letters to complaining witnesses has been identified as an issue in several prior audits. General training on communicating with complaining witnesses was provided to all OCTC attorneys, investigators, and paralegals on May 17, 2023. 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. OCTC supervisors are continuing to emphasize to investigators and attorneys the need for closing letters to complainants to be complete and thorough since this provides the basis for closure decisions, which decisions are subject to review by the Complaint Review Unit (CRU) and (in the event of a Walker petition) the Supreme Court. OCTC is in the process of implementing a new software tool for generating closing letters, with an expected rollout in Q2 and Q3 2025 – OCTC has designed the document creation templates in this software tool to encourage the addressing of all key allegations. OCTC will continue to emphasize the importance of complete and thorough closing letters to complainants and will await future audits to see if the steps described above resolve the issues*

Investigation Delays and Deficiencies

The auditors identified “unexplained delays” in “numerous files,” primarily during the investigation stage. The auditors also noted several files with “substantive deficiencies” during investigation, including “incorrect or improper analysis of factual and/or legal issues, failure to address all key allegations, and failure to investigate or fully investigate misconduct, including misconduct for which clear and convincing [evidence] was evidenced by documentation in the file.” Finally, in connection with one repeater respondent, the auditors noted a “failure to recognize respondent’s pattern of misconduct throughout various investigations resulting in cases being closed prematurely.” (Attachment A at 4.)

Report on Implementation: *The majority of the “substantive deficiencies” noted by the auditors appear to arise from individual staff actions in particular cases (including many of those identified for reopening or issue review as discussed above). The issues in these cases will be discussed with individual staff for training purposes. The failure to recognize a repeater’s pattern of misconduct relates to individual staff, with whom it will be discussed, but is also relevant to the more general issue of ensuring that prior complaint patterns are reviewed, which is discussed below.*

Unexplained delays in the investigation stage have been identified as an issue in several prior audits. In part to address delays and seek to expedite investigations, 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. Effective January 2, 2024, OCTC also 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. OCTC has continued to revise and update its expedited investigation procedures to eliminate unnecessary investigation formalities while still ensuring that investigations are thorough and complete; the most recent revisions were effective as of April 28, 2025. The expedited investigation procedures that are now the norm include the close interaction and collaboration between investigator and legal advisor that the auditors have previously noted as a key to avoiding unexplained delays. As of October 28, 2024, in response to a State Auditor recommendation, OCTC implemented additional investigation benchmarks intended to ensure that initial investigative steps necessary to get an investigation moving are completed within specified time frames; as discussed above and below, these benchmarks include requirements that the legal advisor confirm that the prior complaint history has been reviewed and that rule of limitation dates have been correctly identified. Finally, as of January 2024 and January 2025, OCTC adopted annual case disposition targets for its various investigation teams to encourage expeditious moving of cases to closure or filing, as appropriate. OCTC will continue to monitor and, as necessary, revise its procedures to seek to ensure that investigations are conducted both expeditiously and effectively.

Communications with Respondents and Respondents' Counsel

The auditors noted that in “many files, the interactions with respondent and/or respondent’s counsel were not adequate,” with the “primary issue” being whether the inquiry letter requesting a response to the allegations from respondent and/or respondent’s counsel was “inadequate or incomplete for various reasons, including failure to inquire about all key allegations of the complaint, inclusion of requests for information/documents that were not relevant to the allegations of the complaint, and a failure to follow up with a respondent after receiving his or her response.” In connection with the last point, the auditors noted as a particular example, in instances where a complaining witness alleged respondent failed to return her file, a failure to follow up to “obtain evidence to corroborate” a respondent’s claim that they had returned the file, “such as a receipt showing shipping of a physical file, a receipt signed by the complaining witness acknowledging receipt, or cover letter that accompanied the file.” The auditors also noted overreliance in communications with respondents “on the wording and accusations by complaining witnesses, even when inappropriate.” Finally, the auditors noted that in “a number of the expeditor cases,” the one-page notice advising respondents of the risk to their license posed by the investigation was missing from the initial communication with the respondent. (Attachment A at 4.)

Report on Implementation: *The shift discussed above to using as the norm expedited investigation procedures that include close interaction and collaboration between the investigator and legal advisor should address the issues identified with respect to the completeness and accuracy of inquiry letters to respondents and respondents' counsel as under the expedited investigation procedures, legal advisors will be playing more of a role in crafting those communications. OCTC will also remind investigators and attorneys of the need to ensure that these communications are complete and accurate.*

OCTC has also modified its procedures to emphasize the need for obtaining documentation corroborating respondent's responses. For example, since its inception the specialized investigation team that handles client trust-account related matters requires respondents to produce their client-trust account related ledgers and reconciliations and subpoenas bank records to verify responses. In addition, in late 2024, OCTC modified its approach to directional letters issued in communication and return of file cases to require the respondent to provide proof that communication has resumed or that a file has been returned before closure. OCTC supervisors will continue to emphasize the need to, where possible, require corroborating documentation before relying on a respondent's responses.

Expeditor teams were eliminated as part of the July 2023 reorganization. In addition, effective January 20, 2023, the one-page notice referenced by the auditors was incorporated into the forms used to generate inquiry letters. Included in the expedited investigation procedures adopted as the norm for most investigations effective January 2, 2024, were instructions to investigators on how to attach this one-page notice to inquiry emails sent in lieu of a letter to expedite the investigation process. OCTC will await future audits to see if these changes have addressed the auditors' concerns with this form.

Prior Complaint Histories

The auditors noted that "in the majority of the files reviewed, there was no documentation indicating the respondent's history of prior complaints and any patterns of conduct revealed by that history were considered. This does not necessarily mean staff members did not consider the respondent's complaint history. It simply means any such consideration was not documented." (Attachment A at 4.)

Report on Implementation: *The absence of documentation has been similarly noted in prior audits. Over the last few years, OCTC has adopted a number of new policies and procedures to ensure that consideration of prior complaint histories occurs and is documented, namely:*

February 25, 2022: *new policy directive regarding intake consideration of prior closed complaints*

October 31, 2022: *new policy directive regarding nonpublic resolutions of disciplinary complaints that requires consideration of an attorney's prior discipline and prior closed complaints*

December 1, 2022: implementation of prior complaints pattern dashboard that provides information on closed and open complaints, with allegations grouped and displayed in 25 charge categories to allow easier recognition of patterns

July 1, 2023: formalized procedures for assignments of repeat respondents

July 1, 2023: formalized procedures for handling of respondents with 15+ complaints over the prior 5 years.

January 2, 2024: “Expedited Investigation Procedures” require investigators to perform and document a complaint history analysis for the respondent either as part of the investigation plan (if not waived) or in the comment box to the “Investigative Plan / Complaint History Analysis” event (if investigation plan is waived).

May 6, 2024: Revised “Expedited Investigation Procedures” note that effective as of this date, the respondent’s complaint history will be added to Odyssey via a “Complaint History” event at the time the case is assigned to an investigator and legal advisor, who then should use the link contained in the document to review and consider any patterns or trends of prior or pending complaints.

October 28, 2024: Revised “Expedited Investigation Procedures” require attorneys to confirm in the “Legal Advisor’s Instructions to Investigator” event that they have reviewed the respondent’s complaint history.

April 28, 2025: Revised “Expedited Investigation Procedures” eliminate the Odyssey “Complaint History” event and instead require investigators and/or attorneys to review the attorney’s prior complaint history using the web-based Power BI prior complaints dashboard; procedures include a link to a video tutorial on how to do this; procedures retain the requirement that attorneys confirm in the “Legal Advisor’s Instructions to Investigator” event that they have reviewed the respondent’s complaint history.

OCTC will await future audits to see if these changes have resolved the issues and will also remind staff of the need to ensure that the review and consideration of prior complaint history is documented in each case.

Training and Procedures Recommendations

The section of the audit dedicated to recommendations regarding areas for training and/or modifications to procedures highlights several areas. (Attachment A at 5.) Because this is a catch-up audit, many of the identified areas have already been addressed. To the extent issues in these areas are limited to specific individuals, discussion and training will occur with those individuals. Some of the generally applicable training and procedures recommendations are addressed under specific topics above, including rule of limitations and review and consideration of prior complaint history. In addition, the November 21, 2024, training for OCTC staff on the results of this audit included discussion of these topics, as well as discussion of the cases recommended for reopening, certain of the cases the auditors flagged for issue review, and the auditors’ observations regarding closing letters, investigation delays, prior complaint histories, and major case designations. For repeat respondents, in July 2023, OCTC formalized procedures for their handling and for flagging and handling respondents with 15 or more complaints over the last five years. With respect to the use of boilerplate language identified by the auditors as confusing, OCTC will modify its form closing letters to omit this language as part of its move to the new closing letter templates discussed above.

Conclusion

OCTC acknowledges the issues identified by the auditors and is addressing these issues by various means including modifications to OCTC procedures, 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 staff.

PREVIOUS ACTION

This is a recurring informational item. A report on the audit of files closed between September 1, 2022, and February 28, 2023, was provided at the Board's July 2024 meeting (Agenda Item 5.3): <https://calbar.primegov.com/Portal/Meeting?meetingTemplateId=163>.

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.

RESOLUTIONS

None

ATTACHMENT LIST

- A. Executive Summary of the Random Case Audit Report