



The State Bar of California

OPEN SESSION AGENDA ITEM 5.3 JULY 2024 BOARD OF TRUSTEES

DATE: July 18, 2024

TO: Members, Board of Trustees

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Report on Random Audit of the Office of Chief Trial Counsel Files Closed Between September 1, 2022, and February 28, 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 September 1, 2022, through February 28, 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 May 24, 2024, and was reviewed and discussed with OCTC managers on July 9, 2024 (outside the 30-day period from receipt called for by internal policy). On July 17, 2024 (within the 60-day period from receipt called for by internal policy), OCTC is providing 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 8 cases recommended for reopening by the audit and will reopen those cases. OCTC is also reviewing 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 this report have already been taken. A timeline for additional corrective actions is included in this report.

RECOMMENDED ACTION

None, informational item only.

DISCUSSION

The auditor reviewed a total of 255 files closed or otherwise resolved between September 1, 2022, and February 28, 2023, of which 48 relating to repeat responders may have been closed or otherwise resolved prior to September 1, 2022. The auditor's primary recommendations from the audit of these 255 files, and OCTC's responses, are set out below.¹ By November 2024, OCTC hopes to implement the majority of the corrective actions referenced below that have not already been implemented; OCTC will report on implementation at the Board's November 2024 meeting.

Recommendations to Reopen 8 Files

One of the benchmarks for OCTC's performance is the number of files that the auditor recommends be reopened. The auditor is to determine whether to recommend the reopening of any files due to an identified deficiency in the work performed bearing on the outcome of the case disposition. The target metric for random audit reopening recommendations is 4.3 percent. The auditors recommended the reopening of 8 files (Nos. 35, 58, 69, 71, 72, 93, 146, and 152). 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 CW upon being notified of file closure; prematurely closing a file without obtaining all necessary information; closing a complaint submitted by someone who was not the client without giving the client the opportunity to join in the complaint and/or submit their own complaint; and resolving a case with a warning letter contrary to OCTC policies."

The 8 cases recommended for reopening are 3.1 percent of the audited files (8 of the total of 255 files audited), below the target and at the low end of the last several audits:

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)
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)

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."

That the auditors recommended reopening only 8 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 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 8 files recommended for reopening and made the determination to reopen all 8 of those files.

The auditors also recommended issue review in an additional 20 files (Nos. 53, 63, 65, 73, 96, 131, 132, 137, 141, 148, 155, 161, 190, 195, 197, 200, 202, 212, 230, and 239). As explained by the auditors: “9 of these are files in which deficiencies bearing on the case disposition were identified, but for various reasons, reopening has not been recommended. These files are recommended for review for training purposes. The rest are files in which technical errors were identified that should be corrected, such as files that reflect an incorrect closing status, or in which follow up of some kind is required, such as confirming whether respondent complied with the conditions of an agreement in lieu of discipline.” 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 all 8 of 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 48 files in which the rule of limitation date noted in Odyssey was incorrect “because the date of receipt of the complaint was used as the offense date for the charges, even though information in the complaint or documents submitted with the complaint suggested an earlier date.”

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. OCTC will reemphasize to supervisors, attorneys, and investigators the need for Odyssey to correctly reflect the applicable rule of limitations date. The auditors have suggested changes to Odyssey procedures for entering rule of limitation dates; OCTC will consider these changes.

Conflict Checks

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 current audit period began "just three months after the conflict check policy was formalized" and that it was "anticipated that the number of files reflecting lack of compliance will decrease next audit period because by then compliance with the policy should have become more routine and ingrained in the day-to-day handling of cases." The auditors also suggest a modification to OCTC's conflict check policy to specify whether a conflict check is required post-closure when issuing a letter (a "stay-closed" letter) to the complainant advising them that their complaint will remain closed despite, in many instances, the complainant's submission of additional information post-closure.

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 decreases. OCTC will modify its conflict check policy to provide clarity on when a post-closure conflict check is required in connection with the decision to issue a "stay-closed" letter.*

Identification of Culpability

The auditors noted 26 files in which they found errors relating to whether "all appropriate culpability issues were considered, whether or not specifically identified by the complainant." As noted, this was a decrease from the last audit, in which 38 files were found to have errors in this area.

Report on Implementation: *As noted in response to this same finding in the previous audit, OCTC supervisors are continuing to emphasize to investigators and attorneys the importance of identifying all culpability issues, whether or not specifically identified by the complainant.*

Closing Letters to Complainants

The auditors identified 23 files in which "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, providing improper reasons

for closing certain allegations, and failure to explain the misconduct found that formed the basis for warning letters or an agreement in lieu of discipline.” The auditors also identified 7 files in which “no information was provided in the closing letter to the complainant regarding seeking review by the Office of General Counsel’s Complaint Review Unit (CRU).”

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 CRU and (in the event of a Walker petition) the Supreme Court. With respect to ensuring that letters include information regarding the ability to seek review by CRU, training was provided to OCTC attorneys, investigators, and paralegals on February 3, 2023. In addition, closing letter forms have been modified to ensure that they include this information, providing complainants with instructions for seeking review through written requests submitted to CRU either by email or the United States mail. OCTC will await future audits to see if these changes have resolved the issues and will also remind staff of the need to include CRU review information in every closing letter for a matter for which CRU review is available.*

Case Assignment Letters to Complainants

The auditors identified 15 files in which case assignment or reassignment letters “were not sent to the complainant, meaning that the complainant was not kept apprised for which staff members were handling his or her case.” The auditors noted that this was observed most often in cases assigned to an expeditor team. The auditors also noted 6 files in which a complainant was sent the incorrect case assignment letter, containing requests for information and documents not applicable to the complainant’s situation.

Report on Implementation: *Since the closures that are the subject of this 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. These changes eliminated the prior expeditor teams. Also effective January 2, 2024, however, 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. With the reorganization and the general shift to expedited investigation procedures, effective January 2, 2024, OCTC modified, simplified, and automated its case assignment letters. These changes eliminated the previous different forms and implemented a single case assignment letter that simply advises the complainant to whom the case is assigned. These changes also automated the*

preparation and generation of the assignment letter through an Odyssey form. OCTC will await future audits to see if these changes have resolved the issues.

Investigation Delays

The auditors identified 16 files with “unexplained delays,” including 11 files with delays in investigation, 3 with delays in prefiling, 1 with a delay in transmitting records of the finality of a criminal conviction, and 1 with a delay in assigning a case to a supervising attorney during the investigation stage. As the auditors noted, the “unexplained delays in handling files were observed less frequently in this audit than in the last audit.” In connection with this issue, the auditors noted that, “as was the case in the last audit, with only a few exceptions, the auditors were consistently impressed by the work of OCTC’s expeditor teams. As noted in the last audit, the expeditor teams seem to benefit both from the flexibility to waive certain investigative steps deemed unnecessary in straightforward cases and from close collaboration between the attorney legal advisor and the investigator.”

Report on Implementation: *As noted above, 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. These procedures eliminated the prior expeditor teams. At the same time, however, 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 also address the issues identified with respect to communications with respondents and respondents’ counsel (see below) as under the expedited investigation procedures, legal advisors will now be playing more of a role in crafting those communications.*

Communications with Respondents and Respondents’ Counsel

The auditors identified 12 files in which an inquiry letter to respondent or respondent’s counsel requesting a response to the allegations of misconduct was inadequate or incomplete for various reasons, including failure to inquire about all key allegations of the complaint, failure to accurately summarize the key allegations of the complaint, inclusion of allegations or questions based on incorrect analysis or understanding of facts or law, inclusion of requests for information/documents that were not relevant to the allegations of the complaint, and failure to acknowledge prior written responses to the same inquiry.” The auditors also identified 14 files in which the inquiry letter to the respondent (which puts the respondent on notice of the pendency of a disciplinary complaint) failed to include a form that OCTC now requires be included with all such letters, namely, “a one-page notice to respondent that his or her State Bar license was at risk, which encourages respondents to take the investigation seriously and consider consulting with/hiring counsel, etc.” The auditors noted that this notice was missing

most often in expeditor cases and recommended in particular that staff be instructed to include the notice in all types of disciplinary cases.

Report on Implementation: *As noted above, the shift 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. 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 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 also remind investigators and attorneys of the need to include this notice with all inquiry letters sent to respondents in all types of disciplinary cases, including reciprocal discipline cases and rule 9.20 violation cases. In probation and reproof violation cases and criminal conviction cases, inquiry letters are not ordinarily sent and notice to the respondent of the pendency of the potential charges may be by way of different letter – the forms for these letters were not previously modified to include the one-page notice, but OCTC will revise the forms to include the notice.*

Prior Complaint Histories

The auditors noted 141 files in which “there was no documentation indicating that the respondent’s history of prior complaints and any patterns of conduct revealed by that history were considered.” As the auditors noted, such a review “is important and required in determining whether to close or move forward with a case, whether it is appropriate to resolve the case with some form of non-disciplinary action, or whether to seek the imposition of discipline, and, if so to determine the appropriate level of discipline,” and is also “crucial in assessing and recognizing when patterns [of misconduct] are emerging.” As the auditors also noted, the absence of documentation “does not necessarily mean that staff members were not considering the respondent’s complaint history; it simply means that any such consideration was not documented.”

Report on Implementation: *Over the last two years, OCTC has adopted a number of new policies and procedures to ensure that consideration of prior complaint histories occurs and is documented, namely:*

<i>February 25, 2022:</i>	<i>new policy directive regarding intake consideration of prior closed complaints</i>
<i>October 31, 2022:</i>	<i>new policy directive regarding nonpublic 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</i>

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.

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 Recommendations

The section of the audit dedicated to recommendations regarding areas for training 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. Some of the generally applicable training recommendations are addressed under specific topics above. The other generally applicable training recommendations, with a brief discussion of each, are as follows:

Training on OCTC Policies and Procedures: The auditors recommend office-wide periodic training regarding OCTC policy directives and procedures, with initial focus on OCTC policy directives regarding non-disciplinary resolutions (specifically encompassing the guidelines for issuance of warning letters), conflict checks, and major case designations and procedures. OCTC will provide this training. OCTC notes that 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.

Training on Maintenance of Information and Documents in Odyssey: The auditors recommend office-wide training "regarding various issues involving maintenance of information and documents in the Odyssey file." Specific Odyssey issues identified for training include: designation of document types, entry of correct rule of limitations dates, correct complainant party record entries, complete and accurate entries for charges and reconciliations of charges, and correct closing status entries. Odyssey training is an ongoing function, particularly as new Odyssey procedures are

implemented. OCTC will continue this training with an emphasis on reminding staff of the need to comply with OCTC's established procedures to ensure that entries in Odyssey are accurate and complete.

Training Regarding Requests for Translation Services: The auditors noted several files in which a complainant requested translation services, but communications were sent to the complainant in English. The auditors recommend office-wide training on the need to insert a "Complaining Witness Needs Translator" event where appropriate to ensure that cases are flagged for translation, and to remind staff that whenever a complainant requests translation services, that request should be honored, even if some of the complainant's communications to the Bar are in English. OCTC will provide the recommended training.

Training on Legal Issues: The auditors recommend training on the correct understanding and application of Business and Professions Code section 6068(o) and 6103 regarding court orders and on the correct understanding and application of California Rule of Professional Conduct 1.15(d)(4) regarding prompt accounting of held property. OCTC will provide the recommended training.

Conclusion

OCTC acknowledges the issues identified by the auditors 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.

PREVIOUS ACTION

This agenda item is presented periodically, as new audit reports are received. Most recently, the previous audit report (covering cases closed between March 1, 2022, and August 31, 2022) was discussed in a staff report on the [March 2024 agenda](#) (Item 60-1). That staff report contains a detailed discussion of the background and history of modifications to the random audit process.

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 (with attached Random Audit Checklist Questions)