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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: Erica M. Dennings and Kristin L. Ritsema

Re: Random Audit of the Office of Chief Trial Counsel Cases
Resolved from September 1, 2022 through February 28, 2023

This Executive Summary is presented to the State Bar Board of Trustees ("Board") in compliance with 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 It superseded and replaced OCTC Policy Directives 2006-02 and 2010-01, which were developed to define and describe the random audit process.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 also is 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, Erica M. Dennings and Kristin L. Ritsema, 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 2022. Ms. Ritsema worked as a trial attorney and supervising attorney in OCTC from 1993 to 2021 and in collaboration with another auditor conducted the audit of OCTC files closed from March 1, 2022 through August 31, 2022. MAAD-OOC assigned half of the randomly selected files to Ms. Dennings and half to Ms. Ritsema. Each of the auditors independently reviewed and evaluated the files assigned to them. However, because each auditor conducted only half of the audit for the current audit period, with the permission of MAAD-OOC, and at the request of OCTC, 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 files closed during the six-month period to which the audit pertains, alternating between September through

February and March through August. Closure occurs when OCTC terminates an investigation without seeking formal discipline, disciplinary proceedings are completed with respect to the case, or the matter is otherwise resolved (e.g., resignation of the attorney). MAAD-OOC randomly selects the files to be evaluated by the auditors. For this audit, 294 cases were randomly selected, including 39 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 were the subject of at least 15 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, all cases audited were closed or otherwise resolved from September 1, 2022 through February 28, 2023.

For this audit, all files were reviewed primarily through the State Bar’s on-line case management system known as Odyssey. In trial-level cases in which information and/or documents at the trial level were missing from the Odyssey file, the State Bar Court’s online case information and documents also were reviewed. Some of the cases selected as repeat respondent files were handled prior to the implementation of Odyssey, and therefore the Odyssey files for those cases contained only skeletal information that migrated from the prior case management system. However, for those cases, the physical files were scanned and attached to the Odyssey file for review by the auditors.

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, ethics rules, case law precedent, and OCTC policies and procedures. In order to meet this objective, the auditors evaluate each file based on a wide range of criteria which are elicited through 21 questions set forth in a checklist provided by MAAD-OOC.¹ This checklist, which previously consisted of 32 questions, was substantially revised in early 2023 with a few additional revisions in December 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. Some of the checklist questions are technical or procedural and focus on whether or not OCTC staff are complying with standardized office practices, while other questions require an assessment of the substantive work performed on each file. The auditors complete a checklist for each file audited, and where errors are observed and/or training issues are identified, explanatory comments are included in an appendix attached to the audit report. The majority of the files audited received a comment of some type – technical, substantive, or both. Many of the comments relate to the accuracy or completeness of the information maintained in Odyssey. While important, these comments do not reflect criticism of the substantive work in OCTC. By design, audits generally focus on areas of improvement, and the review of 255 files permitted the auditors to observe the important work of OCTC and offer recommendations for improvement. Overall, the auditors were impressed by the good work performed by OCTC. The vast majority of cases were handled appropriately.

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 recommended reopening 8 files. 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.

¹ A copy of the checklist is attached.

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.

The auditors also have recommended issue review in 20 files. 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.

The audit report addresses each of the 21 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. An appendix to the audit report 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. Dennings reviewed 127 files, and Ms. Ritsema reviewed 128 files. With the benefit of reviewing 255 total files, the following are the strongest impressions from the audit.

Checklist Question 1 focuses on the accuracy and completeness of information in the Odyssey file, including whether all significant actions and approvals were appropriately documented and whether all relevant documents were scanned or uploaded into the file. Several issues were identified in this area. In 46 files audited, one or more significant actions and/or documents were not appropriately memorialized in the Odyssey file. In 48 files, the rule of limitation dates were 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. In 9 files, incorrect closing procedures resulted in the file reflecting an incorrect closing status or charges that were not properly reconciled. And, 6 files in which the respondent was an elected public official should have been designated as major cases but they were not.

Checklist Question 2 was added to the checklist in 2023 and asks whether conflict checks were appropriately completed and entered into the Odyssey file. Because OCTC formalized a conflict check policy that became effective on June 1, 2022, this audit noted any lack of compliance with those procedures after that date. In 41 files, one or more required conflict checks were not completed and entered into Odyssey. The current audit period began just three months after the conflict check policy was formalized. It is 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.

Checklist Question 3 asks whether all appropriate culpability issues were considered, whether or not specifically identified by the complainant. In 26 files, one or more culpability issues that should have been considered were not considered and were not added to the Odyssey file. This represents a decrease from the last audit, in which 38 files were found to have errors in this area. It is important that all appropriate culpability issues be reflected in the Odyssey file because the culpability issues constitute the real substance of a respondent's complaint history, which will be consulted and relied upon in future cases to determine whether a pattern of misconduct exists or is emerging.

Checklist Questions 6 and 7 focus on communications with complaining witnesses. Question 6 asks whether the closing letter to the complainant was adequate and complete, while Question 7 asks whether other communications with the complainant were adequate and properly documented. In 23 files, 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. In 7 files, 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). This issue was observed most often in cases closed in Intake based on the complainant's failure to cooperate. In 15 files, case assignment letters and/or case reassignment letters were not sent to the complainant, meaning that the complainant was not kept apprised of which staff members were handling his or her case. This issue was observed most often in cases assigned to an expeditor team. The incorrect case assignment letter was sent to complainant in 6 files. Because the case assignment letter includes standard requests for information and documents tailored depending on the relationship between the complaining witness and the respondent, if the wrong case assignment letter is sent, most of the requests for information and documents contained in the letter will not apply to the complaining witness's situation.

Checklist Question 9 asks whether the case was 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. Unexplained delays in handling files were observed less frequently in this audit than in the last audit. 16 files reflected unexplained delays, including delays in the investigation in 11 files, pre-filing delays in 3 files, delays in transmitting records of finality of conviction to the review department in 1 file, and delay in assigning a case to a supervising attorney in the investigation stage in 1 file. 14 files were identified with substantive deficiencies in the 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 existed.

Checklist Question 11 asks whether all interactions with respondent and/or respondent's counsel were adequate and properly documented. In 12 files, the inquiry letter to respondent/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. At some point, OCTC began including with inquiry letters sent to respondents during the investigation stage 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. This is good. However, in 14 files audited, the notice was not sent to respondent. The notice was missing most often in expeditor cases.

Checklist Question 19 was added in 2023 and asks whether the Odyssey file includes documentation indicating appropriate consideration of any history of prior complaints against the respondent and any patterns of conduct revealed by that history. In 141 files, there was no documentation indicating that the respondent's history of prior complaints and any patterns of conduct revealed by that history were considered. This 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. Review of a respondent's complaint history 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. It also is crucial in assessing and recognizing when patterns are emerging. Unfortunately, without documentation, in the majority of cases, the auditors were unable to ascertain whether analysis of a respondent's complaint history had been performed at all or, if so, to what extent.

5 of the 8 cases recommended for reopening were closed at the intake stage, and 3 of the cases were closed at the investigation stage. As noted in the last audit, attorneys reviewing complaints at the intake stage 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 identified in intake files generally related to closing a file prematurely. When a complaining witness fails to provide specific facts or documents to support allegations of misconduct, if the allegations would subject the respondent to discipline if proven, then the complaining witness should be contacted for further information.

Similarly, the errors identified in investigation files generally related to failure to identify and fully investigate certain allegations that could subject respondent to discipline. The auditors observed that in many cases, the investigation was only as good as its investigative plan. The investigative plan forms the basis for the State Bar investigation. If the investigative plan was incomplete and left out a key allegation, then more often than not, that issue was never addressed. It is important that staff take the time to prepare thorough and thoughtful investigative plans and carefully review the complaint and all documents submitted in support of the complaint before creating or approving the investigative plan and commencing the investigation. Otherwise, important issues can be missed and/or valuable time and resources can be lost focusing on incorrect issues.

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.

The final portion of the audit report focuses on recommendations for training and possible modifications to OCTC practices and procedures designed to improve and/or enhance the quality of the work performed by OCTC staff. The recommendations are wide-ranging. Office-wide training is recommended regarding various OCTC policies and procedures, including periodic training regarding OCTC policy directives, with initial focus on the policy directive regarding non-disciplinary resolutions and specifically the guidelines regarding when warning letters are appropriate, as well as the policy directives regarding conflict checks and major cases. Either individual or office-wide training is recommended regarding specific legal issues pertaining to the Rules of Professional Conduct and the State Bar Act that were incorrectly analyzed in various files. Similarly, follow up with staff members regarding compliance with specified State Bar Court rules and procedures is recommended to address identified issues of concern. And, office-wide training is recommended regarding various issues involving maintenance of information and documents in the Odyssey file. In addition to training, the recommendations include: a suggestion to improve Odyssey functionality; a recommendation regarding expanding the distribution of the notices to respondents that their State Bar license is at risk to include respondents in cases such as reciprocal discipline cases, California Rules of Court rule 9.20 violation cases, probation and reprobation violation cases, and criminal conviction cases; and a recommendation regarding creation of a uniform method to document review and analysis of a respondent's prior complaint history and any patterns of conduct revealed by that history.

Pursuant to the random audit policy directive, within 30 days after receipt of the 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 60 days. OCTC independently considers and determines which files identified by the auditors will be reopened. In addition, OCTC will confer with the auditors 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 been 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 OCTC in accurately assessing files in future audits.

Submitted by: Erica M. Dennings
Kristin L. Ritsema

Date: May 23, 2024

RANDOM AUDIT CHECKLIST QUESTIONS (REVISED 12/2023)

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, and whether or not the complainant withdrew their complaint or otherwise declined to cooperate with the investigation? 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, court-level 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, diversion agreements) 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)? Yes: No: N/A:

21. If the case was not properly closed, should OCTC reopen the file to reconsider its closing decision?

(Special attention should be given to questions 19, 20, and 21 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)