



THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: December 21, 2010

TO: Joseph Chairez, Chair, Regulation, Admissions & Discipline Committee
William Gailey, Vice-Chair, Regulation, Admissions & Discipline Committee
Members, Regulation, Admissions & Discipline Committee

FROM: Jim Towery, Chief Trial Counsel

SUBJECT: OCTC Status Report

I have now served as Chief Trial Counsel for four months, and these have been four invigorating, challenging and rewarding months. I have survived my first end-of-year sprint to address our backlogs, and, as described below, I am very gratified with the results. We have started initiatives in several directions. I am deeply appreciative of the staff at OCTC, which is both talented and hard-working.

Goals for 2011

I anticipate that 2011 will involve a continuation of our concerted effort to reduce both our statutory investigative backlog and our notice open inventory. We have put in place a number of constructive plans to deal with those two backlogs, and I am confident we will continue to make progress in 2011.

Beyond those ongoing challenges, my primary focus in 2011 will be upon the small number of lawyers who cause a disproportionate amount of harm to the public. This falls into two categories: attorney loan modification misconduct and misappropriation. In the loan modification area, despite OCTC's efforts to tackle loan modification misconduct by lawyers through education and aggressive prosecution, the volume of complaints we receive in this area continues unabated. Roughly, one third of our total workload consists of loan modification misconduct complaints.

In the misappropriation area, we must find methods to quickly identify and aggressively pursue lawyers who steal money from their clients. In the coming year, I will be focusing my efforts on ways to leverage our limited resources against these relatively few respondents, including expediting disciplinary prosecutions and pursuing immediate interim measures to protect the public. We also expect to bring several recommendations to RAD in early 2011 to address loan modification misconduct as aggressively and strategically as possible.

Overview of OCTC Workload

Calls Received. As shown by the attached dashboard, our incoming telephone call volume continues to be steady, at approximately 6,500 per month.

Inquiries Opened. Our number of inquiries opened, reflecting our receipt of written complaints- also reflected in the attached dashboard- decreased slightly, but is still above 1200 per month. This number is consistent with the upward trend over the last two years.

Open Investigations. The dramatic increase in our workload this past year continues, as reflected by the number of open investigations. Historically, this workload was around 1500 cases. In 2009, this number increased to 2500. In 2010, we averaged 3500 cases during our peak. This trend continues, as we are close to 3300 as of today's date.

Despite this crush, OCTC achieved dramatic results recently by decreasing the number of cases in our investigative backlog (cases older than six months) from close to 911 on July 31, 2010 to 390 as of today's date. This is particularly impressive considering that in addition to reducing the number of cases in backlog, we resolved an additional 796 cases that would have rolled into backlog during the last three months of the year.

This remarkable productivity results from a number of concerted measures and policies we have put into place to reach our goal for year-end. Some of the key innovations include: prioritization, revised intake guidelines to clarify the threshold for sufficiency of evidence, increased settlement authority, and not least, investigators and their supervisors working harder. Authority to pay investigators for overtime - which did not affect the State Bar's budget - also increased investigative output significantly.

Notice Open Inventory of Cases awaiting Notice-Drafting. The notice open inventory, which rose steadily over the past five years, consists of cases with completed investigations, where the case is awaiting the drafting and filing of disciplinary charges or other resolution. This inventory grew steadily from roughly 600 cases in 2005 to a peak of over 1400 cases in January 2010. The inventory now stands at close to 1163 cases. The median time at present for a case pending in the Notice Open inventory is approximately 203 days.

Although the notice open inventory remains unacceptably high, we believe it actually reflects a positive outcome: increased productivity at the notice open stage because that number is at least holding steady. In fact, as the graph below on notice open inventory shows, our increased productivity at the notice open stage has been truly remarkable. Between years 2007 and 2010, the number of cases resolved actually doubled (by warning letter, stipulation, closure or the filing of a notice) from 902 to 1987. From 2009 to 2010, we achieved an increase in productivity of 75%.

Due to the higher volume of investigation cases moving into the notice open inventory, that this notice open inventory is not higher attests to increased work efforts and the implementation of a number of aggressive and innovative steps. These steps include: the formation of two notice drafting teams, enhanced settlement authority, more rapid resolution of minor misconduct cases, assistance from OGC with notice drafting, uniform office policies to draft more concise notices, and assignment of notice drafting to attorney staff across the board, including trial attorneys, managers, supervisors, and even the Chief Trial Counsel, to help the notice drafting teams.

Our ambitious goal is to reduce the notice open inventory to 500 cases in twelve months. We also adopted a goal to reduce the average age of the inventory, so that 75% of all cases would have charges filed or otherwise be resolved in six months, 95% in twelve months, and 100% in 18 months.

Other OCTC Activities

In addition to our focused efforts to address the investigative and notice open inventories, OCTC forges ahead with many innovative, proactive areas worth highlighting here.

- The Loan Modification Task Force. The Task Force continues to make great strides as a national model of cooperating with local, state, and federal agencies that are pursuing loan modification misconduct. As of mid-December, 20 of the most egregious offenders in the loan modification fraud arena have been removed from the practice of law through resignations or disbarments. In an attempt to prevent further harm to the public and deter other attorneys from engaging in similar misconduct, we expect to file next month several B & P Code Section 6007(c) petitions. Our goal is to aggressively pursue such orders to inactively enroll the respondents who have generated the largest numbers of loan modification complaints. This will be part of a more comprehensive, strategic effort by OCTC in the coming year.
- Responding to the Report of the Northern California Innocence Project (NCIP). OCTC is reviewing the harmful error cases reported by the NCIP involving approximately 130 prosecutors. We expect to complete our review and respond to the Report in early January 2011. In the interim, we have already begun to implement one of NCIP's key recommendations: that the State Bar educate criminal prosecutors about their professional responsibilities under the State Bar Act and Rules of Professional Conduct.¹
- Internal work groups are meeting on various initiatives, including 1) the creation of an alternative true diversion program to divert low level misconduct cases such as first time DUI offenses with aggravating circumstances; and 2) drafting revisions to the Disciplinary Standards.
- In December, Deputy Trial Counsel Sherrie McLetchie presented training sessions to all staff (north and south) on the new rules of procedure effective January 1, 2011. Staff will also attend a training session on these rule changes sponsored by the State Bar Court.
- The office obtained several significant disbarments recently. In what may be one of the first cases where an attorney is disbarred for having sex with clients, Patrick Marshall, a former San Benito County public defender, was disbarred by the Supreme Court for having sex with two incarcerated clients.

¹ To that end, Deputy Trial Counsel Cyd Batchelor and I will address the annual conference of the California District Attorneys Association (CDAA) in Costa Mesa, on January 26, 2010 as well as participate in its webinar training to reach even more prosecutors. In addition, State Bar Court Judge Donald Miles and Cyd presented a training session in early December for prosecutors and county counsel in San Mateo County. Based on the enthusiastic feedback from incumbent DA James Fox, we expect to offer this training to the state's largest DA offices next year. To address federal prosecutorial education, Cyd is exploring collaborative opportunities between the State Bar and the Office of Professional Responsibility of the Department of Justice.

- OCTC is developing a plan to reinstate its Audit & Review Unit, which we suspended in June to focus resources on notice-drafting efforts.

Conclusion.

I look forward to a collaborative relationship with the members of RAD for the remainder of this Board year. As always, please let me know if you have any questions or comments about this update.