

The State Bar of California

Date:	June 1, 2022 (revised January 6, 2023)
То:	All Office of Chief Trial Counsel (OCTC) Staff
From:	George S. Cardona, Chief Trial Counsel
Subject:	Policy Directive 2022-05 Conflicts of Interest, Gifts from Outside Sources, Outside Employment

This policy directive sets out policies and procedures relating to conflicts of interest, gifts from outside sources, and outside employment. The conflicts of interest procedures set forth in this policy directive will be effective as of June 1, 2022, with entries in Odyssey of the new "OCTC Conflict Check" event needing to be made only for actions for which it is required (e.g., assignments, closures, resolutions, filings of NDCs or stipulations, or transmittals of criminal convictions) that occur on or after June 1, 2022. Procedures for referring matters to Special Deputy Trial Counsel (SDTC) or implementing an ethical screen once a conflict of interest has been identified are set out in Policy Directive 2016-01, Ethical Screens (June 27, 2016, revised Sep. 2, 2021).

INTRODUCTION

For the disciplinary system to be effective, it is crucial that we maintain public confidence that our decisions, whether in closing cases, conducting investigations, or seeking discipline, are driven by our best assessments of what is necessary for public protection, unaffected by any conflicts of interest or outside influence.

The State Bar has in place policies and procedures relating to conflicts, gifts, and outside employment that apply to all or designated State Bar employees. *See* Administrative Advisory No. 21-05: Rule 2201 Conflict of Interest Compliance (Dec. 3, 2021); State Bar Conflict of Interest Code for Designated Employees (Nov. 19, 2020); Incompatible Activities Policy (Sep. 16, 2021). This policy directive supplements these policies and procedures with additional policies and procedures applicable to employees of OCTC. Such additional policies and procedures are appropriate given our status as the enforcement arm of the State Bar tasked with and given authority to pursue disciplinary action against individual attorneys and the

need, as noted

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above, to ensure that our decisions regarding such actions are unaffected by any conflicts of interest or outside influence. These additional policies and procedures are issued pursuant to the authority granted the Chief Trial Counsel by State Bar Rule of Procedure 2201(a)(2) and (b) and are intended to address findings and recommendations relating to the identification and prevention of conflicts of interest set out in California State Auditor Report 2022-030 (issued April 14, 2022).

CONFLICTS OF INTEREST

A. Substantive Rules

No OCTC employee may participate, directly or indirectly, in the review, investigation, or prosecution of any matter for which any of the following is true:

- 1. The matter involves a person who is, or within the last 12 months was, any of the following:
 - a. The Chief Trial Counsel;
 - b. A State Bar employee;
 - c. A member of the Board of Trustees; or
 - d. A person with a personal, financial, or professional relationship to the Chief Trial Counsel.
- 2. The matter involves a person with whom the employee has, or within the last 12 months had, a personal or professional relationship.
- 3. The matter involves a person that the employee is aware has, or within the last 12 months had, a personal or professional relationship with the State Bar, any other State Bar employee, or any member of any committee, commission, or sub-entity of the State Bar, unless, in accordance with Policy Directive 2016-01, Ethical Screening, the employee has reported the potential conflict to their supervisor and (a) a determination has been made that the relationship does not create a conflict or (b) the circumstances are such that screening can be effective and the employees with a potential conflict have been screened from the matter.
- 4. The employee holds, or within the last 12 months held, a financial interest that could be affected by the resolution of the matter.
- 5. The employee is aware that any other State Bar employee holds, or within the last 12 months held, a financial interest that could be affected by the resolution of the matter,

unless, in accordance with Policy Directive 2016-01, Ethical Screening, the employee has reported the potential conflict to their supervisor and (a) a determination has been made that the financial interests of the other employees do not create a conflict or (b) the circumstances are such that screening can be effective and the employees with a potential conflict have been screened from the matter.

6. The matter is such that there is an appearance that the Office of Chief Trial Counsel may not exercise its discretionary functions in an evenhanded manner, including an appearance that either the complainant or respondent in the matter may not receive fair treatment, unless, in accordance with Policy Directive 2016-01, Ethical Screening, the employee has reported the potential conflict to their supervisor and (a) a determination has been made that the relevant circumstances do not create a conflict or (b) the circumstances are such that screening can be effective and the employees with a potential conflict have been screened from the matter.

For purposes of the above, the following terms have the following meanings:

- a. A "matter involves a person" when the person is a complainant or respondent, or the resolution of the matter may materially affect the person.
- b. The resolution of a matter "may materially affect" a person (including a potential witness in the matter) when the resolution of the matter may affect in any way a known financial interest of the person or would be perceived by a reasonable person as affecting the reputation of the person. Thus, for example, a matter against a respondent who is a partner in a law firm may materially affect the other partners in the law firm because its resolution may affect the known financial interests of those partners in the law firm. As another example, a matter against a respondent who asserts as a defense that he acted on advice from another person may materially affect the other person because it may test the quality of the advice or credibility of the alleged advisor) be perceived by a reasonable person as affecting the reputation of the reputation of the alleged advisor. As another example, a matter in which a person is a significant witness whose credibility is likely to be at issue may materially affect that person because possible court findings regarding that person's credibility may be perceived by a reasonable person as affecting the reputation of that person.
- c. An individual has a "personal relationship" with a person if the person and the individual are relatives or they have another relationship of a nature that could be perceived by a reasonable person as personal and potentially affecting the individual's ability to act impartially with respect to the person. For these purposes, "relative" means spouse or domestic partner or significant other; child, including foster, step or adopted; great-

grandparents; grandparents; parents; father-in-law or father of domestic partner or significant other; mother-in-law or mother of a domestic partner or significant other; uncles; aunts; siblings; grandchildren; great-grandchildren; sons-in-law; daughters-in-law; nephews; nieces; and first cousins. Thus, for example, an individual would have a personal relationship with any of the following: parent, sibling, first cousin, significant other, roommate, close friend, any attorney listed on the individual's State Bar Conflict of Interest form under questions 2 or 3.

- d. An individual has a "professional relationship" with a person if the individual employs or is a partner, officer, director, or employee of an entity that employs the person; is employed by the person or an entity in which the person is a partner, officer, director, or employee; is a member of a joint venture, partnership, or other for-profit or non-profit entity of which the person is also a member; represents or is a member of an entity that represents the person; is represented by the person or an entity in which the person is a member; or has another relationship of a nature that could be perceived by a reasonable person as professional and potentially affecting the individual's ability to act impartially with respect to the person. Thus, for example, an individual would have a professional relationship with any of the following: an attorney who is a partner or associate in a law firm from which another attorney who is a partner or associate is representing the individual in any legal dispute; a handyman employed by the individual; a person who sits on the board of a non-profit food bank for which the individual is also a board member; any attorney listed on the individual's State Bar Conflict of Interest form under questions 5 or 6..
- e. An individual has a "financial interest that could be affected by the resolution of the matter" if the individual holds, directly or indirectly, a financial interest that a reasonable person could perceive as potentially increasing or decreasing in value as the result of the resolution of the matter. For these purposes, financial interest includes any direct or indirect investment or interest in any asset, including stocks, bonds, cybercurrency, or real estate. Thus, for example, an individual would have a financial interest that could be affected by the resolution of the matter if: the individual holds stock in a corporation controlled by the respondent or complainant; the individual holds an interest in a piece of land that was involved in litigation that is the subject of the complaint against the respondent; the individual has reached an agreement with a third party to hold on behalf of the individual an interest in a piece of land that was involved in litigation that is the subject of the complaint against the respondent; any of the financial interests listed on the individual's Form 700 could be viewed by a reasonable person as potentially increasing or decreasing in value as the result of the resolution of the matter; the individual has an investment with, gift from, or loan to or from an attorney who is listed on the individual's State Bar Conflict of Interest form under question 4.

f. An individual holds an item or interest "directly or indirectly" if the individual themselves holds the item or interest, or if the individual causes the item or interest to be held (i) by another person with whom the individual has a personal relationship of the type described in subparagraph (c) above or (ii) by another person with whom the individual, or a third party acting on the individual's behalf, has made an arrangement of any kind regarding the holding of the item or interest.

B. Procedures

- 1. All complaints and reportable actions received will be reviewed by data entry staff upon receipt to determine whether the complainant or respondent is listed in the conflict-of-interest database, with action based on this review taken in accordance with Policy Directive 2016-01, Ethical Screens. In Odyssey, the completion of the conflict check by data entry staff will be indicated by adding an event status of "Completed" to the "2201 Conflict Check" event. If data entry staff identify a potential conflict, they add a "Designated 2201 Case" event in Odyssey and refer the matter to Intake for resolution of the conflict. If the potential conflict does not result in a transfer of the matter to SDTC, resolution of the potential conflict will be indicated in Odyssey by either an "Ethical Screening Memo" event (if an ethical screen for one or more OCTC employees has been approved and implemented) or a "Remove 2201 Designation" event if after review it was determined there was no potential conflict requiring further action.
- 2. While assigned to a matter at any stage, including intake, investigation, pre-filing, postfiling, and appeal, all OCTC investigators and attorneys have an ongoing obligation to identify any potential conflict set out in Section A.1 through A.6 above. If any OCTC investigator or attorney identifies a potential conflict, they must immediately stop work on the matter and notify their direct supervisor (e.g., Supervising Attorney or Assistant Chief Trial Counsel) so that action can be taken in accordance with Policy Directive 2016-01, Ethical Screens.
- 3. (a) Intake. In Intake, when first assigned to a matter, all Intake attorneys must, before doing work on the matter, review the matter and determine whether there is any potential conflict set out in Section A.1 through A.6 above. Given the high volume of cases handled by Intake attorneys, and that Intake attorneys are assigned to cases shortly after the completion of the conflict check based on the conflict-of-interest database by data entry staff, Intake attorneys will not be required, at assignment, to recheck the conflict-of-interest database or enter a new "OCTC Conflict Check" event in Odyssey as required for all OCTC attorneys and investigators assigned to cases at other later stages (see paragraph 4 below).

(b) **Criminal Convictions**. In Criminal Convictions, when first assigned to a matter, an attorney must, before doing work on the matter, review the matter and determine whether there is any potential conflict set out in Section A.1 through A.6 above. Given the nature of criminal conviction referrals, criminal conviction attorneys will not be required, at assignment, to recheck the conflict-of-interest database or enter a new "OCTC Conflict Check" event as required for other types of case (see paragraph 4 below).

- 4. Whenever assigned to a matter that has moved beyond Intake, at whatever stage that assignment occurs, including investigation, pre-filing, post-filing, and appeal, any OCTC investigator or attorney must, as soon as practicable and before doing work on the matter, review the matter, including checking the current conflict-of-interest database (through the conflict of interest portal on the State Bar intranet), and determine whether there is any potential conflict set out in Sections A.1 through A.6 above. In Odyssey, the employee must then do the following:
 - a. Add the "OCTC Conflict Check" event (see screen shot 1 in Appendix);
 - b. Before saving the event, click on the question mark to the right of the comment box to pull up a series of question/answer prompts (see screen shot 2 and full text of question/answer prompts in Appendix);
 - c. Answer all the questions using the pull-down menus for each question to select the appropriate answer and then click "Finish" (see screen shot 3 and full text of question/answer prompts in Appendix);
 - d. Save the new event, which will result in a completed conflict-of-interest check event showing in the case (see screen shot 4 in Appendix).

As indicated in the Odyssey prompts, if the employee identifies a potential conflict, the employee must not do any work on the matter, and must notify their direct supervisor (e.g., Supervising Attorney or Assistant Chief Trial Counsel) so that action can be taken in accordance with Policy Directive 2016-01, Ethical Screens.

5. Prior to closing or otherwise resolving a matter at any stage, including intake, investigation, pre-filing, or post-filing; prior to filing a NDC or stipulation or drafting any closing letter; and prior to initiating a transmittal to the Review Department of a criminal conviction, any OCTC investigator or attorney assigned to the matter must again review the matter, including checking the current conflict-of-interest database

> (through the conflict of interest portal on the State Bar intranet), and determine whether there is any potential conflict set out in Sections A.1 through A.6 above. In Odyssey, the employee must then add a new "OCTC Conflict Check" event in accordance with the directions in paragraph 4 above. As indicated in the Odyssey prompts, if the employee identifies a potential conflict, the employee must not proceed with any action in the matter, , and must notify their direct supervisor (e.g., Supervising Attorney or Assistant Chief Trial Counsel) so that action can be taken in accordance with Policy Directive 2016-01, Ethical Screens.

> **Note 1**: Non-Intake Closures Within 30 days of Assignment. While the assigned investigator and attorney must still review the matter and determine whether there is a potential conflict prior to closure or resolution, if the closure or resolution occurs less than 30 days after the OCTC investigator and attorney assigned to the matter were assigned and entered a conflict check event in Odyssey pursuant to section B.4 above, no new "OCTC Conflict Check" needs to be added to memorialize the conflict check unless the investigator or attorney after review identifies a potential conflict that has arisen within the 30 days. Because Intake attorneys and criminal conviction attorneys are not required to enter a conflict check event in Odyssey at assignment pursuant to section B.4 above, all Intake attorneys must, prior to closing or otherwise resolving a matter in Intake, and all criminal conviction attorneys must, prior to closing or transmitting a criminal conviction matter, perform a review for potential conflicts and complete an "OCTC Conflict Check" event in accordance with this paragraph B.5.

Note 2: Appeals. When cases move to appeals, the appeals attorney assigned will need to complete a conflict check and add a new "OCTC Conflict Check" event in Odyssey in accordance with section B.4 above. While appeals attorneys must still monitor matters to ensure there is no new potential conflict, given that appeals will involve proceedings in the Review Department overseen by State Bar Court judges, the appeals attorney will not be required to complete a new "OCTC Conflict Check" event prior to filing briefs or motions or taking other actions in the appeal.

6. If a potential conflict identified pursuant to section 2, 3, 4, or 5 above is posed with respect to the employee by a lawyer not included on the employee's current conflict of interest form, the employee must promptly update their current conflict of interest form (through the conflict of interest portal on the State Bar intranet) to include the attorney in the appropriate category, including in particular under question 3, which covers any attorney with whom the employee has a close relationship such that the

relationship might be perceived to interfere with the performance of the employee's official duties.

7. To ensure that the conflict-of-interest database is kept up to date for Supervising Attorneys, Assistant Chief Trial Counsel, and the Deputy Chief Trial Counsel, Special Assistant to the Chief Trial Counsel, and Chief Trial Counsel, as required to ensure the accuracy of employee conflict checks when receiving and closing cases throughout the year, Supervising Attorneys, Assistant Chief Trial Counsel, and the Deputy Chief Trial Counsel, Special Assistant to the Chief Trial Counsel, and Chief Trial Counsel, and the Deputy Chief Trial Counsel, Special Assistant to the Chief Trial Counsel, and Chief Trial Counsel must update their conflict of interest forms (through the conflict of interest portal on the State Bar intranet) on a quarterly basis, that is, on or around March 31, June 30, September 30, and December 31 of each year.

GIFTS FROM OUTSIDE SOURCES

No OCTC employee shall receive or accept, directly or indirectly, any gift the receipt or acceptance of which would violate Section D of the Incompatible Activities Policy, which precludes all State Bar employees from receiving or accepting, directly or indirectly, any gift from any person or organization (a) that is doing or seeking to do business of any kind with the State Bar or (b) whose activities are regulated or controlled by the State Bar, under circumstances from which it could reasonably be inferred that the gift was intended either (1) to influence the employee in their official duties or (2) as a reward for any official actions performed by the employee.

In addition, regardless of the circumstances, no OCTC attorney or investigator shall receive or accept, directly or indirectly, any gift, including any money, service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value, from any licensed California attorney unless there is a preexisting personal or professional relationship between the OCTC attorney or investigator and the licensed California attorney that would, regardless of the gift, require the imposition of an ethical screeen preventing the OCTC attorney or investigator from participating, directly or indirectly, in the review, investigation, or prosecution of any matter involving the California licensed attorney. Prior to accepting any gift from any licensed California attorney is listed on their current conflict of interest form, and if asked thereafter about the conflict the OCTC attorney or investigator must disclose the gift. The acceptance of a gift from any licensed California attorney will be deemed to reflect a close relationship of the type requiring the licensed California attorney to be listed on the OCTC attorney or investigator's conflict of interest form in response to question 3 of that form; if asked about the conflict, the OCTC attorney or investigator must disclose the gift.

For purposes of this section, an individual receives or accepts a gift "directly or indirectly" if the individual themselves receives or accepts the gift or if the individual causes the gift to be received or accepted (i) by another person with whom the individual has a personal relationship of the type described in subparagraph (c) of subsection A of the conflicts section above or (ii) by another person with whom the individual, or a third party acting on the individual's behalf, has made an arrangement of any kind regarding the receipt or acceptance of the gift.

OUTSIDE EMPLOYMENT, BUSINESS, AND VOLUNTEER RELATIONSHIPS

Under Section C of the Incompatible Activities Policy, OCTC attorneys generally will not be authorized to engage in outside practice of law, subject to two limited exceptions that may apply based on the particular circumstances: (a) to provide non-criminal legal services, pro bono, to their parents, grandparents, children, and grandchildren, so long as doing so will not interfere with the ability to perform OCTC duties; and (b) to provide non-criminal pro bono legal services under the auspices of an established pro bono legal services program. If authorized to provide non-criminal legal services under the auspices of an established pro bono legal services program, the OCTC attorney must list each attorney employed by the established pro bono legal services program on their conflict-of-interest form under question 3.

ANNUAL TRAINING

All OCTC staff will receive annual training on the State Bar's policies and procedures relating to conflicts, gifts, and outside employment and the additional policies and procedures regarding conflicts, gifts, and outside employment applicable to employees of OCTC under this policy directive.