

# AGENDA ITEM

## MAY 2016

**DATE:** April 28, 2016

**TO:** Members, Regulation and Discipline Committee  
**FROM:** Vanessa Holton, General Counsel

**SUBJECT:** Proposed Amendment to Rule 2201 of the Rules of Procedure of the State Bar of California Relating to Appointment and Authority of Special Deputy Trial Counsel, Request for Public Comment

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### EXECUTIVE SUMMARY

The proposed amendment to rule 2201, if adopted, will largely require the Chief Trial Counsel to recuse himself from certain inquiries or complaints that presently he “may” review and consider for possible recusal. This expansion of mandatory recusals is intended to ensure impartiality and the absence of bias in the review of disciplinary inquiries and complaints. The proposed amendment will also create a procedure by which all recused inquiries and complaints are referred to a Special Deputy Trial Counsel Administrator who will conduct a preliminary review of these matters to determine whether they should be closed or assigned to a Special Deputy Trial Counsel for investigation or prosecution, if appropriate. Finally, the proposed amendment moves away from a volunteer model of appointed Special Deputy Trial Counsel to a compensated model.

This item requests that the Regulation and Discipline Committee circulate, for a 45-day public comment period, a proposed amendment to rule 2201.

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### BACKGROUND

#### Current Rule 2201

State Bar Rules of Procedure rule 2201 sets forth a procedure for assigning disciplinary complaints or inquiries to outside counsel (Special Deputy Trial Counsel) when those complaints or inquiries involve categories of individuals with close ties to the State Bar. The purpose of the rule is to ensure impartiality in disciplinary decision-making and to avoid the appearance of bias. To ensure independence, a Special Deputy Trial Counsel appointed under rule 2201 maintains all the powers and duties of the Chief Trial Counsel in connection with any resulting investigation or charging decision. (Rule 2201 (b).)

Rule 2201 describes two types of complaints which entail different procedures for appointing a Special Deputy Trial Counsel. Under rule 2201(a), the Chief Trial Counsel “may” appoint a Special Deputy Trial Counsel when he receives an inquiry or complaint regarding (1) a member

employed by the State Bar, (2) an attorney member of the Board of Trustees, (3) an attorney member of the governing board of any other entity of the State Bar, or (4) a member with a close personal, financial, or professional relationship to the State Bar. The current form of rule 2201(a) allows the Chief Trial Counsel or designee to conduct a preliminary review of an inquiry that falls under this section and either close the matter or refer it to a Special Deputy Trial Counsel for further action.

Under rule 2201(i) the Chief Trial Counsel is required to recuse himself with respect to any inquiry or complaint that (1) involves the Chief Trial Counsel, (2) furthers the interests of justice, or (3) raises a reasonable doubt that the Chief Trial Counsel would be impartial. In such cases, the inquiry or complaint is not reviewed by the Chief Trial Counsel for possible closure or assignment to a Special Deputy Trial Counsel. Rather, it is referred to the Chair of the Board's Regulation and Discipline Committee who is authorized to appoint a Special Deputy Trial Counsel. In the past, recusal cases were forwarded to former Deputy Executive Director Robert Hawley who acted on behalf of the RAD chairperson. With Mr. Hawley's departure, cases within the scope of subsection (i) are now referred to the General Counsel for handling and referral to a Special Deputy Trial Counsel.

### Proposed Revised Rule 2201

The proposed amendments to rule 2201, which appear in Attachments B and C, are intended to expand the types of inquiries and complaints from which the Chief Trial Counsel must recuse himself. The purpose of expanding the mandatory recusal criteria is to enhance public confidence in how the State Bar addresses possible conflict cases and minimize questions about the State Bar's impartiality.

The proposed amendments introduce a process for referring all rule 2201 cases to a Special Deputy Trial Counsel Administrator who will be responsible for conducting the initial review of all rule 2201 cases and assigning such cases to Special Deputy Trial Counsel, if appropriate. This procedure is intended to expedite the assigning, investigation and disposition of rule 2201 cases. The Office of General Counsel will monitor all referrals to the Administrator and Special Deputy Trial Counsel on behalf of the Chair of the Regulation and Discipline Committee. The proposed amendments provide that the General Counsel monitor referrals in a manner that maintains the necessary impartiality and confidentiality, which means that the identifying information must be anonymized for cases under rule 2201(a)(1)(i-iv).

The proposed amendments also address the difficulties inherent in a volunteer model of appointed Special Deputy Trial Counsel by authorizing that Special Deputy Trial Counsel be compensated. Historically, it has been difficult to locate Special Deputy Trial Counsel with the necessary enthusiasm, skill and knowledge and who are willing to serve without compensation. The volunteer model coupled with the independence of a Special Deputy Counsel has raised issues of accountability and timeliness in the past. It is hoped that allowing Special Deputy Trial Counsel to be reasonably compensated will increase the availability of attorneys willing to accept rule 2201 cases and improve their performance and efficiency. Other than clarifying that attorneys who agree to serve as Special Deputy Trial Counsel may be compensated, the duties and responsibilities of the Special Deputy Trial Counsel remain the same as originally drafted in rule 2201.

Overall, this proposed revision is an effort to further improve the integrity of the consideration of rule 2201 inquiries and complaints.

## DISCUSSION

The proposed amendment restructures rule 2201 in fundamental ways. As noted above, the current version of rule 2201 provides for permissive recusal in specified situations (rule 2201(a)) and mandatory recusal in other specified situations. (Rule 2201(i).) Revised rule 2201 largely eliminates permissive recusals and provides for mandatory recusal in most circumstances. In addition, the Chief Trial Counsel would be required to forego any preliminary review of such matters and submit them to a Special Deputy Trial Counsel Administrator for preliminary review, closure or assignment to a Special Deputy Trial Counsel for investigation and prosecution, if appropriate.

Under current rule 2201, the Chief Trial Counsel is also permitted to determine whether recusal is appropriate when a matter involves “a member who has a current or recent personal, financial, or professional relationship to the State Bar, its employees, or a member of the Board of Trustees, or in other appropriate circumstances to avoid the appearance of impropriety.” The proposed amendment requires recusal only if the member has a current or recent personal, financial, professional relationship to the Office of the Chief Trial Counsel (“OCTC”) or its employees. In situations where the member’s relationship to the State Bar does not involve OCTC, recusal would remain subject to his discretion.

Revised subsection 2201(a) merges into its text the mandatory recusal items previously enumerated in subsection 2201(i).

The proposed amendment provides that all inquiries and complaints from which the Chief Trial Counsel recuses himself be referred to a Special Deputy Trial Counsel Administrator (“Administrator”). The Administrator will be tasked with conducting a preliminary review of all cases referred to him or her to determine whether to close the matter or appoint a Special Deputy Trial Counsel to investigate the matter further. The Administrator will also monitor the progress and status of all matters in the hands of Special Deputy Trial Counsels. The Administrator (as well as a Special Deputy Trial Counsel) may be removed for good cause by the Chairperson of the Regulation and Disciplinary Committee or her designee under the proposed amendment.

In non-rule 2201 disciplinary matters, complainants are informed that they may request review of closed complaints or inquiries. If a complainant requests a review of a closed non-rule 2201 disciplinary matter, the second look review is conducted by OCTC’s Audit and Review Unit. Closed 2201 complaints and inquiries, however, have not been subject to second look review. Revised rule 2201 provides for second look review of closed complaints and inquiries.

The time period for conducting a preliminary review of recusal matters is retained at 60 days.

An inquiry or complaint will be assigned to a Special Deputy Trial Counsel by the Administrator if he or she determines that the factual allegations of the inquiry or complaint are sufficiently specific and, if proven, will result in discipline of the member. These factors also guide the Chief Trial Counsel’s preliminary review of inquiries and complaints under current subsection 2201(a). Current subsection 2201(a) also provides that when performing his preliminary review, the Chief Trial Counsel should consider whether the inquiry is or is not “from a credible source.” Determinations on whether to close an inquiry or complaint or to forward them to a Special Deputy Trial Counsel are based more on the specific facts alleged and not on the perceived “credibility” of the complainant. Therefore, this factor has been removed in the proposed revision

and would not be a consideration when the Administrator conducts his or her preliminary review of recused matters.

As noted above, the duties and responsibilities of the Special Deputy Trial Counsel remain the same as originally drafted in rule 2201.

Current rule 2201(a) provides that a Special Deputy Trial Counsel “shall not” receive compensation for services unless the Chief Trial Counsel has contracted in advance with the Special Deputy Trial Counsel to receive compensation. The current rule also provides that a Special Deputy Trial Counsel “may” request that the Chief Trial Counsel or designee authorize payment of reasonable expenses and for investigative, administrative and legal support. The proposed revised rule allows Special Deputy Trial Counsel to be compensated for services rendered and for reimbursement of costs and expenses in all rule 2201 matters.

Finally, revised rule 2201 requires the Administrator or the Office of General Counsel to report to the Regulation and Discipline Committee no less than twice a year about the processing of rule 2201 inquiries and complaints.

#### **FISCAL/PERSONNEL IMPACT**

The proposed amendment contemplates that the Special Deputy Trial Counsel Administrator and assigned Special Deputy Trial Counsel will be compensated for their services and receive reimbursement of reasonable expenses for investigative, administrative and legal support. These expenditures will be incurred by the State Bar.

#### **RULE AMENDMENTS**

Rules of Procedure of the State Bar of California, Title III, Division II, Chapter 2

#### **BOARD BOOK IMPACT**

None

#### **BOARD COMMITTEE RECOMMENDATION**

The Office of General Counsel recommends that the Regulation and Discipline Committee authorize staff to circulate for a 45-day period of public comment, the proposed amendment to rule 2201, Rules of Procedure of The State Bar of California, as set forth in Attachments A and B.

#### **PROPOSED BOARD COMMITTEE RESOLUTION:**

Should the Regulation and Discipline Committee agree with the above recommendation, the following resolution would be appropriate:

**RESOLVED**, that the Regulation and Discipline Committee authorizes staff to make available, for a public comment period of 45 days, the proposed amendment to rule 2201, in the form attached; and it is

**FURTHER RESOLVED**, that this authorization for release for public comment is not, and shall not be construed as a statement of recommendation of approval of the proposed item.

**ATTACHMENT(S) LIST**

- A. Current version of Rule 2201
- B. Redline Version of Revised Rule 2201
- C. Clean Version of Revised Rule 2201