

## **AGENDA ITEM**

**121 JULY 21 – 22, 2016**

**DATE:** July 8, 2016

**TO:** Members, Regulation and Discipline Committee  
Members, Board of Trustees

**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 Adoption Following Public Comment

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### **EXECUTIVE SUMMARY**

The proposed amendment to State Bar Rules of Procedure rule 2201 is intended to ensure the highest impartiality and the most efficient processing of disciplinary inquiries and complaints that pose a conflict for the Office of Chief Trial Counsel. If adopted, new Rule 2201 will largely require the Chief Trial Counsel (CTC) to recuse herself or himself from certain inquiries or complaints that presently the CTC “may” review and consider for possible recusal. 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 (SDTC) for investigation or prosecution, if appropriate. Finally, the proposed amendment moves away from a volunteer to a compensated model of appointed SDTC.

On May 12, 2016, the Regulation and Discipline Committee (RAD) authorized the release of the proposed amendment to Rule 2201 for a 45-day public comment period. No comments were received. The Office of General Counsel recommends that the RAD recommend to the Board of Trustees adoption of the proposed amendment to Rule 2201.

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### **DISCUSSION**

Current Rule 2201 describes the procedure to be followed when the CTC recuses herself or himself from consideration of certain disciplinary inquiries and complaints and appoints outside SDTC to review and investigate those matters. Rule 2201 provides two different procedures for appointing an SDTC:

Under Rule 2201 subsection (a), the CTC *may* appoint an SDTC when she or 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 CTC or designee to conduct a preliminary review of a matter that falls under this section and either close the matter or refer it to an SDTC for further action.

Under Rule 2201 subsection (i) the CTC *is required to* recuse herself or himself with respect to any inquiry or complaint that (1) involves the CTC, (2) furthers the interests of justice, or (3) raises a reasonable doubt that the CTC would be impartial. In such cases, the inquiry or complaint is not reviewed by the CTC for possible closure or assignment to a SDTC. Rather, it is referred to the Chair of the RAD who is authorized to appoint an SDTC. In the past, subsection (i) recusal cases were forwarded to former Deputy Executive Director Robert Hawley who acted with approval of the RAD chairperson. With Mr. Hawley's departure, those cases are now referred to the General Counsel for handling.

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. Revised Rule 2201 largely eliminates permissive recusals and provides for mandatory recusal in most circumstances. Permissive recusal is retained in those situations where the CTC receives an inquiry or complaint concerning a member who has a current or recent personal, financial, or professional relationship to the State Bar, other than the Office of the CTC. In addition, the CTC retains the discretion to recuse herself or himself, if necessary, to avoid the appearance of impropriety. In all other circumstances, recusal would be mandatory. In addition, the CTC must forego any preliminary review of recused matters and submit them to a Special Deputy Trial Counsel Administrator for preliminary review, closure or assignment to an SDTC for possible investigation and prosecution.

The proposed amendment provides that all inquiries and complaints from which the CTC recuses herself or himself be referred to an SDTC Administrator tasked with conducting a preliminary review of all cases referred to the Administrator to determine whether to close the matter or appoint an SDTC to investigate the matter further. The time period for conducting a preliminary review of recusal matters is retained at 60 days. The Administrator will assign an inquiry or complaint to an SDTC if the Administrator determines that the factual allegations of the inquiry or complaint are sufficiently specific and, if proven, will result in discipline of the member. The Administrator will also monitor the progress and status of all matters in the hands of SDTCs. The Administrator and an SDTC may be removed for good cause by the Chairperson of the RAD or her designee under the proposed amendment.

Revised Rule 2201 also provides for second look review of a closed complaint by a different SDTC than closed the case.

The duties and responsibilities of the SDTC remain the same as originally drafted in Rule 2201.

The proposed amendment also addresses the difficulties in a volunteer model of appointed SDTC by authorizing that SDTC be compensated. Current Rule 2201(a) provides that an SDTC "shall not" receive compensation for services unless the CTC has contracted in advance with the SDTC to receive compensation. The current rule also provides that an SDTC "may" request that the CTC or designee authorize payment of reasonable expenses and for investigative, administrative and legal support. The proposed rule allows SDTC to be compensated for services rendered and for reimbursement of costs and expenses in all Rule 2201 matters. It is hoped that allowing SDTC to be reasonably compensated will increase the availability of

attorneys willing to accept appointment as SDTC in Rule 2201 matters and improve their performance and efficiency.

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

### **FISCAL/PERSONNEL IMPACT**

The proposed amendment contemplates that the Administrator and assigned SDTC 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 GOALS & OBJECTIVES**

Adoption of this recommendation is consistent with the mission of the State Bar, as set forth in Section 6001.1 of the Business and Professions Code, which places protection of the public as the highest priority of the Bar and the Board of Trustees. The proposed amendment also furthers Goal and Objective number 1 of the 2012-2017 Five-Year Plan to “[e]nsure a timely, fair, and appropriately resourced discipline and regulatory system.”

### **BOARD COMMITTEE RECOMMENDATION**

If the RAD agrees that the proposed amendment to Rule 2201, Rules of Procedure of the State Bar of California, as set forth in attachments B and C, should be adopted, effective upon adoption, it should recommend that the Board of Trustees approve the following resolution.

**RESOLVED**, after a 45-day period for public comment and no comments having been received, and upon recommendation of its Regulation and Discipline Committee, the Board of Trustees adopts the proposed amendment to Rule 2201, Rules of Procedure of the State Bar of California, Title III, Division II, Chapter 2, as set forth in attachments B and C, effective upon adoption.

### **ATTACHMENT(S) LIST**

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