

AGENDA ITEM

122 NOVEMBER 2016

DATE: October 26, 2016

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

FROM: Robert G. Retana, Deputy General Counsel

SUBJECT: Proposed Amendment to Rule 2302 of the State Bar Rules of Procedure
Request for Adoption Following Public Comment

EXECUTIVE SUMMARY

At its July 21, 2016 meeting, the Regulation and Discipline Committee (“RAD”) approved circulating for public comment proposed amendments to rule 2302 of the State Bar Rules of Procedure. The proposed amendments clarify that there is no duty of confidentiality with respect to non-attorneys engaged in the unauthorized practice of law (“UPL”). The Office of General Counsel has received no comments to the proposed rule amendments. Therefore, it is recommended that RAD and the Board of Trustees adopt the rule as amended.

BACKGROUND

In general, the State Bar’s obligations with respect to the confidentiality of its records pertains to members of the public and members of the bar. There is no duty of confidentiality with respect to non-attorneys engaged in UPL. The State Bar may, for policy reasons, nevertheless decide to withhold records of such investigations. However, State Bar Rule of Procedure 2302, in its current form, could arguably be construed to require the Office of the Chief Trial Counsel (“OCTC”) to treat investigations of non-attorneys as confidential. Therefore, an amendment to the rule should be considered. The rule was circulated for public comment for 45 days, with the public comment period ending on September 8, 2016. No comments were received.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

Rules of Procedure of the State Bar of California, Division II, Chapter 3, Rule 2302.

BOARD BOOK IMPACT

None.

BOARD GOALS & OBJECTIVES

Adoption of the amendments to the rule is suggested to clear up any ambiguity regarding whether there is a duty of confidentiality with respect to non-attorneys. The way the rules are written, they could be construed to require the State Bar to treat non-attorney UPL complaints as confidential. The rules require notice to a member before confidentiality is waived. This notice requirement presumably would not apply with respect to non-attorneys; however, the rules are not entirely clear on this point.

Aside from the issue of notice, the rules could be construed to require OCTC to conduct a balancing test before waiving confidentiality with respect to complaints against non-attorneys. Rule 2302(d)(1). However, this implies there is a duty of confidentiality to non-attorneys in the first instance. If this is not the intention of the rule, it should be amended.

BOARD COMMITTEE RECOMMENDATIONS

Should the Regulation and Discipline Committee agree with the proposed amendment to rule 2302 of the Rules of Procedure of the State Bar of California, attached hereto as Exhibit C, the following resolution would be appropriate:

RESOLVED, following publication for comment and notice and upon recommendation of the Regulation and Discipline Committee, that the Board of Trustees adopts the proposed amendment to rule 2302 of the Rules of Procedure of the State Bar of California, as set forth in attachment C, effective upon adoption.

ATTACHMENT(S) LIST

- A.** Current version of rule 2302
- B.** Redlined version of rule 2302 with proposed amendments
- C.** Rule 2302 with changes accepted