

AGENDA ITEM

APRIL 2016

DATE: April 1, 2016

TO: Members, Regulation and Discipline Committee

FROM: Vanessa Holton, General Counsel

SUBJECT: Request for Authorization to Circulate for Public Comment Proposed Amendment to Rule 2603 of the Rules of Procedure of the State Bar of California to Delegate to the Office of General Counsel Authority to Conduct "Second Look" Reviews in Closed Disciplinary Complaints

EXECUTIVE SUMMARY

"Second look" review of closed disciplinary complaints is presently one of two responsibilities of the Audit and Review unit of the Office of Chief Trial Counsel (OCTC). The California State Auditor's June 2015 report on the State Bar recommends that, to provide effective oversight of OCTC, complainant requests for review of closed complaints should be performed by a department independent of OCTC. Consistent with the State Auditor's recommendation, executive staff has determined that this function should be transferred to the Office of General Counsel (OGC). The attached proposed amendment to Rule 2603, Rules of Procedure of the State Bar of California is needed to fully implement Recommendation No. 10 of Report 2015-030 of the State Auditor and, if adopted, will memorialize the Board of Trustees' delegation of authority to conduct second look review to OGC.

This item requests that the Regulation and Discipline Committee circulate, for a 30-day period, a proposed amendment to Rule 2603.

BACKGROUND

The second look review function considers complainant requests to reopen closed cases and makes a recommendation whether to grant those requests. Second look review serves as a check and balance on the investigatory process.

The California State Auditor Report of June 2015 reviewed, among other things, the functioning of OCTC's Audit and Review unit, which (1) performs random audits of closed cases, and (2) conducts reviews of closed cases at complainant requests ("second look" reviews). The Report noted that in 2014 the review unit received 1,029 requests for second-look reviews, resulting in the reopening of 97 cases. The other option available to complainants is to submit a petition for review of the decision to close a case to the Supreme Court, otherwise known as a Walker Petition.

The State Auditor determined that "[t]he State Bar's audit and review unit lacks the independence and stability needed to provide effective oversight of the Office of the Chief Trial Counsel's processing of disciplinary complaints." State Auditor Report 2015-030, June 2015, p. 38. In addition to other recommendations, the State Auditor recommended that "[t]o provide independent oversight of the Office of Chief Trial Counsel and assurance that it properly closes its case files, the audit and review unit should report to an individual or body that is separate from the chief trial counsel, such as the executive director or the board." State Auditor Report, 2015-030, June 2015, Recommendation No. 10.¹ The State Auditor's recommendation addressed only the reporting structure of second look reviews and did not express concerns with the actual review process. In regards to second look reviews, executive staff accepted the State Auditor's recommendation and agreed to transfer this function to OGC.

To fully implement Recommendation No. 10 of Report 2015-030 of the State Auditor and to effectuate this operational transfer of second look reviews, it is recommended that State Bar Rules of Procedure rule 2603 be amended to provide that the Board of Trustees expressly delegates this authority to the Office of General Counsel.

The purpose of these amendments is to clarify and ratify OGC's authority to conduct second look reviews.

DISCUSSION

Rule 2101 provides:

The Board of Trustees of the State Bar delegates to the Office of the Chief Trial Counsel exclusive jurisdiction to review inquiries and complaints, conduct investigations and determine whether to file notices of disciplinary charges in the State Bar Court.

Current rule 2603 describes the standard upon which OCTC may reopen an inquiry, investigation, or complaint:

¹ Recommendations in the State Auditor's report 2015-030 were renumbered in the State Auditor's implementation report (2016-406). Thus, recommendation number 6 in State Auditor report 2015-030 is now renumbered as recommendation number 10.

The Office of the Chief Trial Counsel may, subject to Rule 51 [Period of Limitations], reopen an inquiry, investigation, or complaint in the following limited circumstances:

- (a) if there is new material evidence; or
- (b) if the Chief Trial Counsel or designee, in his or her discretion, determines that there is good cause.

The proposed amendment to rule 2603 adds language that expresses the Board's delegation of authority to OGC to review closed complaints upon the request of complainants and further provides that OCTC may reopen an investigation at the recommendation of OGC. Amended rule 2603 will read as follows:

- (a) The Office of the Chief Trial Counsel may, subject to Rule 51 [Period of Limitations], reopen an inquiry, investigation, or complaint in the following limited circumstances:
 - (1) if there is new material evidence; or
 - (2) if the Chief Trial Counsel or designee, in his or her discretion, determines that there is good cause.
- (b) Notwithstanding the Office of the Chief Trial Counsel's exclusive jurisdiction over disciplinary matters as expressed in Rule 2101, the Board of Trustees of the State Bar delegates to the Office of General Counsel the authority to review closures of complaints upon request by complainants. Upon recommendation by the Office of General Counsel following review of a request by a complainant to review closure of a complaint, the Office of the Chief Trial Counsel may reopen the case for investigation.

FISCAL/PERSONNEL IMPACT

Enhancement of OGC's scope of authority to include second look reviews will require the hiring and training of necessary employees.

RULE AMENDMENTS

Rules of Procedure of the State Bar of California, Title III, Division II, Chapter 6

BOARD BOOK IMPACT

None

BOARD COMMITTEE RECOMMENDATION

OGC recommends that the Regulation and Discipline Committee authorize staff to circulate for a 30-day period of public comment, the proposed amendments to Rule

2603, Rules of Procedure of the State Bar of California, as set forth in Attachments A, B, and C.

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 30 days the proposed amendment to Rule 2603, 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.

ATTACHMENTS

- A.** Current version of Rule 2603
- B.** Redline Version of Revised Rule 2603
- C.** Clean Version of Revised Rule 2603
- D.** Recommendation No. 10 of Report 2015-030 of State Auditor