

AGENDA ITEM

121 MAY 2016

DATE: April 28, 2016

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

FROM: Vanessa Holton, General Counsel

SUBJECT: 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; Request for Adoption Following Public Comment

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 the 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 of the 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.

On April 11, 2016, in a special meeting of the Regulation and Discipline Committee, the Committee authorized the release of the proposed amendment to rule 2603 for a 30-day public comment period. To date, no comments have been received.

Following circulation for public comment, a non-substantive modification was made to the proposed rule as described below.

The Office of General Counsel recommends that the Regulation and Discipline Committee recommend to the Board of Trustees adoption of the proposed amendment to Rule 2603.

BACKGROUND

The second look review function considers complainant requests to reopen closed cases and allows staff to make a recommendation whether to grant those requests. Second look review serves as a check and balance on the investigatory process. 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 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 Audit and Review unit received 1,029 requests for second-look reviews, resulting in the reopening of 97 cases. The State Auditor determined that "[t]he State Bar's [A]udit and [R]eview 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 [A]udit and [R]eview unit should report to an individual or body that is separate from the [C]hief [T]rial [C]ounsel, 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 and to effectuate this operational transfer of second look reviews, it is recommended that rule 2603 of the State Bar Rules of Procedure be amended to provide that the Board of Trustees expressly delegates this authority to OGC.

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

With the approval of the Regulation and Discipline Committee, the proposed amendment was circulated for a 30-day public comment period, which ends on May 11, 2016. To date, no comments have been received. If comments are received between the date of this agenda item and May 12, 2016, an addendum to this item will be prepared and posted on the State Bar's website.

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 Report 2015-030 is now renumbered as recommendation number 10.

DISCUSSION

Rule 2101 of the State Bar Rules of Procedure 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.

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

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 (new subsection (b)) 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. As circulated for public comment, amended rule 2603 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.

Following public comment, amended rule 2603 was modified to conform the language in new subsection (b) to the title of the rule. The title of rule 2603 is "Reopening Inquiries, Investigations and Complaints." In new subsection (b), the words "inquiries,

investigations” are added before the word “complaint” in two sentences. Thus, proposed rule 2603, subsection (b), has been modified to read:

- (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 **inquiries, investigations and** 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 **an inquiry, investigation or** complaint, the Office of the Chief Trial Counsel may reopen the case for investigation.

Pursuant to State Bar Rule 1.10(B) (2), additional public comment is not required if, after circulation for public comment, the board deems the modification non-substantive. The additional modification described above merely conforms the language of new subsection (b) to the title of rule 2603. Accordingly, the modification is non-substantive and additional public comment is not required.

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

Rule 2603 of the Rules of Procedure of the State Bar of California, Title III, Division II, Chapter 6

BOARD BOOK IMPACT

None

BOARD COMMITTEE RECOMMENDATION

If the Regulation and Discipline Committee agrees that the proposed amendment to rule 2603 of the Rules of Procedure of the State Bar of California, as set forth in attachments B and C, should be adopted it should recommend that the Board of Trustees approve the following resolution.

RESOLVED, following notice and publication for comment, and having received no comments, and upon recommendation of the Regulation and Discipline Committee, the Board of Trustees adopts the proposed amendment to rule 2603 of the Rules of Procedure of the State Bar of California, Title III, Division II, Chapter 6, as set forth in attachments B and C, effective immediately.

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