

OPEN SESSION AGENDA ITEM

701 MAY 2018

DATE: May 18, 2018

TO: **Members, Board of Trustees**

FROM: Steven Moawad, Chief Trial Counsel, Office of Chief Trial Counsel

SUBJECT: Proposed Revisions to State Bar Rule of Procedure 2302 – Confidentiality Rule – Return From Public Comment and Request for Approval

EXECUTIVE SUMMARY

OCTC proposes clarifying amendments to Rules of Procedure of the State Bar, rule 2302, governing confidentiality of investigations. OCTC proposes that rule 2302 be amended in several locations to clarify confidentiality obligations. Specifically, the rule should be amended to eliminate references to a waiver of confidentiality. This is consistent with the fact that information may be disclosed to specified individuals and entities, but the material remains confidential for all other purposes. OCTC also proposes that rule 2302 be amended to eliminate all references to the “President of the State Bar.” Pursuant to rule 2101, OCTC has exclusive jurisdiction over State Bar discipline, and that rule 2302(e) be amended to expressly allow disclosure to a tenth category of persons, i.e., employees of a language interpretation or language translation company under contract with the State Bar to provide language translation or language interpretation services. The interpreter service would be contractually bound by a confidentiality clause.

At the March 2018 meeting, the Regulation and Discipline Committee resolved to send out for public comment the proposed amendments to the Disclosure of Information rule. The close of public comment was April 30. No public comments were received during the 45-day public comment period.

BACKGROUND

The rule pertaining to confidentiality of State Bar investigations states that the Chief Trial Counsel “may waive confidentiality” of the investigation. This phrase misrepresents the effect of disclosure of information pursuant to Rule 2302(d)(1). For example, even after disclosure of information to another regulatory agency or to a law enforcement agency, OCTC would still consider the investigation confidential. Amendments to the rule clarifying that information can be provided without changing the confidential nature of the material are appropriate.

Additionally, OCTC is proposing general clean-up of the rule to reflect that OCTC has exclusive jurisdiction over State Bar disciplinary matters pursuant to rule 2101 and to explicitly allow the use of outside interpreters and translators without violating the confidentiality of the investigation.

At the March 2018 meeting, in Item III.D., the Regulation and Discipline Committee resolved to send out for public comment the proposed amendments to the letters of inquiry rules. No public comments were received during the 45-day public comment period.

DISCUSSION

This proposal, if adopted, would amend rule 2302 in the following ways:

1. **Rule 2302(d)(1).** Rule 2302(d)(1) currently provides, in part:

(d) (1) The Chief Trial Counsel or designee or the President of the State Bar, after private notice to the member, may waive confidentiality concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:...

OCTC believes the phrase “may waive confidentiality” misrepresents the effect of disclosure of information pursuant to Rule 2302(d)(1). For example, even after disclosure of information to another regulatory agency or to a law enforcement agency, OCTC would not deem confidentiality to be waived for all purposes. Instead, the language was intended to mean that the duty of confidentiality does not prevent the disclosure of the information in those circumstances. The disclosure of the information does not, however, change the confidential nature of the material.

Further, OCTC also believes the “President of the State Bar” (now called the “Chair”) should not have authority over the disclosure of information concerning complaints or investigations because OCTC has exclusive jurisdiction over State Bar disciplinary matters pursuant to rule 2101 (“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, except as provided in Title III, rules 2201 and 2502, and Title II, rules 150-157.”)

OCTC suggests the following clarification:

(d) (1) Notwithstanding paragraph (a) and without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel or designee, after private notice to the member, may disclose documents and information concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:...

2. **Rule 2302(d)(3).** Rule 2302(d)(3) currently provides, in part:

(3) After a waiver of confidentiality pursuant to paragraph (d)(1)(A) above, the Chief Trial Counsel or designee, may define the scope of information disseminated and may limit the disclosure of information to specified individuals or entities.

Again, OCTC believes the phrase “waiver of confidentiality” misrepresents the effect of disclosure of information pursuant to Rule 2302(d)(1)(A). OCTC proposes the following language:

(3) The Chief Trial Counsel or designee, may define the scope of information disclosed and may limit the dissemination of information pursuant to paragraph (d)(1)(A), above, to specified individuals or entities.

3. Rule 2302(d)(4). Rule 2302(d)(4) currently provides, in part:

(4) Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee or the President waives confidentiality pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel, the President or designee may issue...

OCTC believes the phrase “waives confidentiality” misrepresents the effect of disclosure of information. OCTC suggests changing the language of the rule as follows:

(4) Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee discloses documents or information pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel or designee may issue...

4. Rule 2302(e). Rule 2302(e) currently provides:

(e) Notwithstanding the provisions of paragraph (d), and without waiving confidentiality, the Chief Trial Counsel, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:...

OCTC believes the phrase “and without waiving confidentiality” is ambiguous and poorly drafted. The language was intended to mean that the information could be provided confidentially to the nine listed categories of persons or entities without otherwise changing the confidential nature of the material. OCTC suggests the following clarification:

(e) Notwithstanding paragraph (a), without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:...

5. Interpreters. OCTC investigates many cases in which the complainants or witnesses do not speak English, and/or documents are received in a foreign language. Therefore, OCTC frequently requires the services of language interpreters to translate interviews or documents. Some OCTC employees are qualified to do these translations in some languages, but we often need to employ outside interpretation services. While we believe that this practice does not violate the rule of confidentiality, OCTC requests that rule 2302 be amended to expressly authorize OCTC to use these outside services without violating confidentiality. Under our proposal, OCTC would contractually require the translation service provider to maintain confidentiality.

6. Any additional references to the State Bar President in rule 2302. As discussed above, the Chair of the Board of Trustees does not have jurisdiction over State Bar disciplinary matters, and therefore should not have authority to determine whether confidential materials are disclosed or whether confidentiality should otherwise be waived.

For consistency with the current version of other rules, the term “member” has been used instead of “licensee” in these proposed rule revisions. However, OCTC supports a future amendment of all the rules to replace the term “member” with “licensee.” These proposed rules should be similarly amended at that time.

OCTC is simultaneously seeking authorization to request that the Legislature make corresponding amendments to Business and Professions Code section 6086.1.

FISCAL/PERSONNEL IMPACT

No negative fiscal or personnel impact is anticipated.

RULE AMENDMENTS

Title 3, Division 2, Chapter 4, Rule 2302, Rules of Procedure of the State Bar

BOARD BOOK AMENDMENTS

None.

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

RECOMMENDATION

It is recommended that the Board of Trustees approve the following resolution:

RESOLVED, that following a 45-day public comment period, the Board of Trustees hereby adopts the amendments to the rules of Procedure of the State Bar, as set forth in Attachment A; and it is

FURTHER RESOLVED, that the amendments to rule 2302 of the Rules of Procedure of the State Bar are effective immediately and will apply to all pending and future matters.

ATTACHMENT(S) LIST

- A. Clean draft of proposed amended rules 2302.
- B. Redline version of proposed rules 2302.

ATTACHMENT A (Clean Version of New Rule 2302)

Rule 2302. DISCLOSURE OF INFORMATION

(a) Except as otherwise provided by law or these rules, information concerning inquiries, complaints or investigations is confidential. There is no duty of confidentiality with respect to non-members; however, the Chief Trial Counsel or designees may assert confidentiality with respect to inquiries, complaints, or investigations regarding non-members, if, in the discretion of the Chief Trial Counsel or designees, that is necessary to protect members of the public.

(b) A member whose conduct is the subject of an inquiry, complaint or investigation may waive confidentiality.

(c) Notwithstanding the provisions of paragraph (b), the Chief Trial Counsel or designee may decline to waive confidentiality regarding an inquiry, complaint or investigation, if it is determined that an ongoing investigation may be substantially prejudiced by a public disclosure before the filing of a notice of disciplinary charges.

(d) (1) Notwithstanding paragraph (a), without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel or designee, after private notice to the member, may disclose documents or information concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:

(A) A member has caused, or is likely to cause, harm to client(s), the public, or to the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. The following additional factors shall be considered in making this determination:

(i) The maintenance of public confidence in the discipline system's exercise of self-regulation;

(ii) The member's current membership status;

(iii) The record of prior discipline of the member;

(iv) The potential for the imposition of a substantial disciplinary sanction;

(v) The existence of any other public matters;

(vi) The status of the complaint or investigation;

(vii) The waiver of confidentiality by the member;

(viii) The gravity of the underlying allegations; and

(ix) The member's cooperation with the State Bar.

(B) A member has committed criminal acts or is under investigation by law enforcement authorities;

(C) A member is under investigation by a regulatory or licensing agency, or has committed acts or made omissions which may reasonably result in investigation by a regulatory or licensing agency;

(D) The member is the subject of multiple complaints and the Office of the Chief Trial Counsel has determined not to pursue all of the complaints. The Office of the Chief Trial Counsel may inform complainants whose allegations have not been pursued of the status of the other investigations or the manner in which the other complaint(s) against the member have been resolved, e. g., by directional letter, warning letter, admonition, agreement in lieu of discipline, or private reproof; or

(2) If the Chief Trial Counsel, for any reason, declines to exercise the authority provided by paragraph (d)(1), or disqualifies himself or herself from acting under paragraph (d)(1), he or she shall appoint a designee to act in his or her place.

(3) The Chief Trial Counsel or designee, may define the scope of information disclosed and may limit the information disclosed pursuant to paragraph (d)(1)(A), above, to specified individuals or entities.

(4) Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee discloses documents or information pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a member(s), which includes a statement of the status or disposition of the complaint(s) or investigation(s); clarifying the procedures involved; and defending the right of the member(s) to a fair hearing on the allegations of misconduct.

(5) The Chief Trial Counsel or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a non-member(s) when such disclosure would serve to protect the public, including, but not limited to, protecting the public from an individual(s) who has engaged in the unauthorized practice of law.

(e) Notwithstanding paragraph (a), without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:

(1) To employees of the State Bar Office of the Chief Trial Counsel, the State Bar Office of General Counsel or any Special Deputy Trial Counsel;

(2) To members of the Judicial Nominees Evaluation Commission or Review Committee as to matters concerning nominees in any jurisdiction;

(3) To witnesses or potential witnesses in conjunction with an inquiry, complaint, investigation, or proceeding;

(4) To other governmental agencies responsible for the enforcement of civil or criminal laws, including but not limited to information within the definitions set forth in Business and Professions Code sections 6043.5 and 6044.5;

(5) To agencies and other jurisdictions responsible for professional licensing;

(6) To the complainant or lawful designee;

(7) To the member(s) who is (are) the subject of the inquiry, complaint or investigation or their counsel of record, if any;

(8) To judges of the State Bar Court; or

(9) To any other person or entity to the extent that such disclosure is authorized by Business and Professions Code sections 6094.5(b), 6086.14 or other statutory provision or any other law.

(10) To employees of a language interpretation or language translation company under contract with the State Bar to provide language translation or language interpretation services. Any contract between the State Bar and a language interpretation or language translation company shall include a confidentiality clause or non-disclosure agreement.

ATTACHMENT B (Proposed Amendments to Rule 2302 – Redline Version)

Rule 2302. DISCLOSURE OF INFORMATION

(a) Except as otherwise provided by law or these rules, information concerning inquiries, complaints or investigations is confidential. There is no duty of confidentiality with respect to non-members; however, the Chief Trial Counsel or designees may assert confidentiality with respect to inquiries, complaints, or investigations regarding non-members, if, in the discretion of the Chief Trial Counsel or designees, that is necessary to protect members of the public.

(b) A member whose conduct is the subject of an inquiry, complaint or investigation may waive confidentiality.

(c) Notwithstanding the provisions of paragraph (b), the Chief Trial Counsel or designee ~~or the President~~, may decline to waive confidentiality regarding an inquiry, complaint or investigation, if it is determined that an ongoing investigation may be substantially prejudiced by a public disclosure before the filing of a notice of disciplinary charges.

(d) (1) Notwithstanding paragraph (a) and without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel or designee ~~or the President of the State Bar~~, after private notice to the member, may disclose documents or information concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:

(A) A member has caused, or is likely to cause, harm to client(s), the public, or to the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. The following additional factors shall be considered in making this determination:

- (i) The maintenance of public confidence in the discipline system's exercise of self-regulation;
- (ii) The member's current membership status;
- (iii) The record of prior discipline of the member;
- (iv) The potential for the imposition of a substantial disciplinary sanction;
- (v) The existence of any other public matters;
- (vi) The status of the complaint or investigation;
- (vii) The waiver of confidentiality by the member;
- (viii) The gravity of the underlying allegations; and
- (ix) The member's cooperation with the State Bar.

(B) A member has committed criminal acts or is under investigation by law enforcement authorities;

(C) A member is under investigation by a regulatory or licensing agency, or has committed acts or made omissions which may reasonably result in investigation by a regulatory or licensing agency;

(D) The member is the subject of multiple complaints and the Office of the Chief Trial Counsel has determined not to pursue all of the complaints. The Office of the Chief Trial Counsel may inform complainants whose allegations have not been pursued of the status of the other investigations or the manner in which the other complaint(s) against the member have been resolved, e. g., by directional letter, warning letter, admonition, agreement in lieu of discipline, or private reproof; or

(2) If the Chief Trial Counsel, for any reason, declines to exercise the authority provided by paragraph (d)(1), or disqualifies himself or herself from acting under paragraph (d)(1), he or she shall appoint a designee to act in his or her place.

(3) ~~After a waiver of confidentiality pursuant to paragraph (d)(1)(A) above, the~~ The Chief Trial Counsel or designee, may define the scope of information ~~disseminated~~ disclosed and may limit the ~~disclosure dissemination~~ of information pursuant to paragraph (d)(1)(A), above, to specified individuals or entities.

(4) Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee ~~or the President waives confidentiality~~ discloses documents or information pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel, ~~the President~~ or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a member(s), which includes a statement of the status or disposition of the complaint(s) or investigation(s); clarifying the procedures involved; and defending the right of the member(s) to a fair hearing on the allegations of misconduct.

(5) The Chief Trial Counsel, ~~the President~~ or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a non-member(s) when such disclosure would serve to protect the public, including, but not limited to, protecting the public from an individual(s) who has engaged in the unauthorized practice of law.

(e) Notwithstanding the provisions of paragraph (d), and without ~~waiving~~ violating the duty of confidentiality, confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:

(1) To employees of the State Bar Office of the Chief Trial Counsel, the State Bar Office of General Counsel or any Special Deputy Trial Counsel;

(2) To members of the Judicial Nominees Evaluation Commission or Review Committee as to matters concerning nominees in any jurisdiction;

(3) To witnesses or potential witnesses in conjunction with an inquiry, complaint, investigation, or proceeding;

(4) To other governmental agencies responsible for the enforcement of civil or criminal laws, including but not limited to information within the definitions set forth in Business and Professions Code sections 6043.5 and 6044.5;

(5) To agencies and other jurisdictions responsible for professional licensing;

(6) To the complainant or lawful designee;

(7) To the member(s) who is (are) the subject of the inquiry, complaint or investigation or their counsel of record, if any;

(8) To judges of the State Bar Court; or

(9) To any other person or entity to the extent that such disclosure is authorized by Business and Professions Code sections 6094.5(b), 6086.14 or other statutory provision or any other law.

(10) To employees of a language interpretation or language translation company under contract with the State Bar to provide language translation or language interpretation services. Any contract between the State Bar and a language interpretation or language translation company shall include a confidentiality clause or non-disclosure agreement.