



# The State Bar *of California*

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## **OPEN SESSION**

## **AGENDA ITEM**

**SEPTEMBER 2019**

## **REGULATION AND DISCIPLINE COMMITTEE ITEM III.B**

**DATE:** September 19, 2019

**TO:** Members, Regulation and Discipline Committee

**FROM:** Destie L. Overpeck, Assistant General Counsel, Office of General Counsel  
Carissa N. Andresen, Assistant General Counsel, Office of General Counsel

**SUBJECT:** Amendment to Rule of Procedure 2201 (Appointment and Authority): Request to Circulate for Public Comment

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## **EXECUTIVE SUMMARY**

Rules of Procedure of the State Bar, Rule 2201 (Rule 2201) requires the recusal of the Chief Trial Counsel (CTC) in any case involving individuals with close ties to the State Bar. The rule sets forth grounds for mandatory and discretionary recusals. Conflict cases are referred by the CTC to the Special Deputy Trial Counsel Administrator (SDTC Administrator), who assigns investigations and prosecutions to Special Deputy Trial Counsel (SDTC).

This item proposes the following amendments to Rule 2201: (1) revising the CTC's mandatory recusal ground from a judicial conflict of interest standard to a more appropriate prosecutor's conflict of interest standard; (2) adding "or other matters within the jurisdiction of the Office of Chief Trial Counsel" to allow the SDTCs to handle matters where the Office of Chief Trial Counsel (OCTC) has a conflict, such as a Business and Professions Code section 6007 Involuntary Enrollment proceeding and adding subdivision (c)(4) to set forth the Administrator's duties when reviewing "other matters;" (3) designating certain conflicts currently defined as mandatory conflicts (such as complaints about committee members and OCTC employees) as discretionary conflicts; (4) revising current mandatory recusal subdivision (a)(v) to only apply to the CTC, as opposed to all OCTC staff members; (5) replacing the phrase "current or recent" with "within the past 12 months" to clarify the time period; (6) striking the words "or designee" because the definition of CTC already includes "designee;" (7) including all attorney conflicts for Board of Trustee members in the discretionary recusal section; (8) revising subdivision (c)(2) and (3) to reflect the preliminary review procedure followed by OCTC; (9) replacing the terms "himself or herself" with "the Office of Chief Trial Counsel" and "his or her" with "the Chief Trial

Counsel;” and (10) reorganizing subdivision (b) to mirror the format and language in subdivision (a).

This item requests that the Committee direct this proposed rule amendment to be circulated for public comment for a period of 45 days.

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## BACKGROUND

Current Rule 2201 sets forth grounds for mandatory and discretionary recusals for the CTC for inquiries or complaints involving individuals with close ties to the State Bar. (Rule 2201 (a) and (b).) Pursuant to Rule 2201, when the CTC determines that recusal is appropriate, the inquiry or complaint is referred to the SDTC Administrator. (Rule 2201 (c)(1).) The SDTC Administrator conducts a preliminary review to determine whether to close the matter or appoint a Special Deputy Trial Counsel (SDTC) to investigate the matter further. (Rule 2201 (c)(2) and (3).) The SDTC Administrator and SDTC act in the place of the CTC with regard to an inquiry or complaint. (Rule 2201 (e)(1).)

## DISCUSSION

This agenda item requests the Regulation and Discipline Committee to direct this proposed rule amendment to be circulated for public comment for a period of 45 days. In general, the proposed revisions will lessen the mandatory recusal standard to allow OCTC to handle more complaints in-house, and to the extent necessary, screen OCTC attorneys from complaints if there is an appearance that an attorney who is the subject of the inquiry or complaint will not receive fair treatment.<sup>1</sup> Specifically, the following amendments are proposed:

1. Revising subdivision (a)(2) to reflect a prosecutor’s conflict of interest standard as opposed to the judicial standard. The proposed language is based on *People v. Vasquez* (2006) 39 Cal.4th 47, 55, where the court found there was a conflict because “there was a ‘reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner’—and that its severity required the LACDA be disqualified—i.e., that the conflict was ‘so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.’” (*People v. Conner* (1983) 34 Cal.3d 141, 148, 193 Cal.Rptr. 148, 666 P.2d 5; see *People v. Eubanks*, *supra*, 14 Cal.4th at p. 594, 59 Cal.Rptr.2d 200, 927 P.2d 310 (*Eubanks*).)” *People v. Vasquez* (2006) 39 Cal.4th 47, 55. As the Supreme Court noted, “[T]he strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional

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<sup>1</sup> On May 4, 2016, OCTC issued a policy directive that sets forth procedures to establish an ethical screen for Rule 2201 cases when it is not necessary to disqualify the entire office. The policy provides the procedures to ensure that a conflicted OCTC employee is barred from participating in the case and from receiving information about it.

regime.” *Id.*, p. 64. Currently, Rule 2201 provides for mandatory recusal where the CTC cannot be “impartial.” The proposed revision will provide for mandatory recusal where the circumstances of the matter creates an appearance that the office may not exercise its discretionary functions in an evenhanded manner and that those circumstances are so grave as to render it unlikely that an attorney will receive fair treatment or that the public will not be protected.

In adapting the prosecutorial standard to OCTC’s disciplinary duties, the word “attorney” replaces “defendant” and the phrase “or that the public will not be protected” has been added to reflect the State Bar’s statutory duty to protect the public.

2. Adding “or other matter within the jurisdiction of the Chief Trial Counsel” to (a)(1), (b)(1), (b)(2), (b)(3), and (e)(1) to allow the SDTC to handle other matters where OCTC has a conflict, such as a Business and Professions Code section 6007 Involuntary Enrollment proceeding. Adding subdivision (c)(4) to set forth the Administrator’s duties when reviewing “other matters.”

3. Designating inquiries or complaints about “Attorney members of any State Bar committee or commission” (current subdivision (a)(iv)) and “attorneys who have a current or recent personal, financial or professions relationships to OCTC employees” (current subdivision (a)(v)) as grounds for discretionary recusal instead of mandatory recusal. For example, under the proposal, if there is a complaint concerning a member of the Board of Legal Specialization, OCTC will have the discretion to handle the investigation. If there is an OCTC attorney who has a current professional relationship with the attorney under investigation, OCTC could screen the attorney to avoid the appearance of impropriety. Similarly, if there is a complaint regarding the relative of an OCTC staff member or OCTC attorney, the OCTC employee could be screened off from the matter.

4. Revising current subdivision (a)(v) to only apply to personal, financial or professional relations to the Chief Trial Counsel, as opposed to all staff members in OCTC.

5. Replacing the term “current or recent” with “within the past 12 months” to provide a clear time frame for both mandatory and discretionary recusals. The 12-month timeframe is consistent with Political Reform Act’s one-year ban that restricts officials, for one year after leaving governmental service, from being paid to communicate with their former agency in an attempt to influence certain actions or proceedings.

6. Striking the words “or designee” from subdivisions (a), (a)(1)(i), and (a)(2) because Rules of Procedure of the State Bar, Rule 5.4 (Definitions) defines “Chief Trial Counsel” to include the counsel’s designee.

7. Striking “non-attorney” from subdivision (b)(1)(i) to include attorney conflicts for all Board of Trustee members in the discretionary recusal section.
8. Revising subdivisions (c)(2) and (3) to reflect the preliminary review procedure followed by OTCT.
9. Replacing the terms “herself or himself” with “the Office of Chief Trial Counsel” in subdivisions (a) and (b), and “his or her” with “the Chief Trial Counsel’s” in subdivision (e)(1).
10. Re-organizing subdivision (b) to mirror the format and language in subdivision (a).

### **FISCAL/PERSONNEL IMPACT**

Adoption of the proposed rule will reduce the bases for the Office of Chief Trial Counsel’s mandatory recusals under Rule 2201. In turn, this should reduce the number of complaints referred to Special Deputy Trial Counsel Administrator. Because the attorneys who work in OCTC are full time employees and have resources such as investigators and support staff, the complaints should be resolved more efficiently.

### **RULE AMENDMENTS**

Title III, Division II, Chapter 2

### **BOARD BOOK AMENDMENTS**

None

### **STRATEGIC PLAN GOALS & OBJECTIVES**

None

### **RECOMMENDATIONS**

**It is recommended that the Regulation and Discipline Committee approve the following resolution:**

**RESOLVED**, that staff is authorized to make available for a 45-day public comment period the proposed amendment to Rules of Procedure of the State Bar, Rule 2201, attached hereto as Attachment A; and it is

**FURTHER RESOLVED**, that this authorization for release of public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new Rule of Procedure.

**ATTACHMENT(S) LIST**

- A. Proposed amended Rule 2201.

**Rule 2201. APPOINTMENT AND AUTHORITY**

(a) The Chief Trial Counsel ~~or designee~~ shall recuse ~~herself or himself~~ the Office of Chief Trial Counsel when:

(1) Any inquiry or complaint or other matter within the jurisdiction of the Office of Chief Trial Counsel is about:

i. The Chief Trial Counsel ~~or designee~~;

ii. An attorney employed by the State Bar of California;

iii. An attorney member of the Board of Trustees; or

~~iv. An attorney member of any State Bar committee or commission; or~~

~~iv.~~ An attorney who within the past 12 months has had ~~has a current or recent a~~ personal, financial, or professional relationship to ~~the Office of~~ the Chief Trial Counsel ~~or its employees~~; or,

(2) The Chief Trial Counsel ~~or designee~~ believes: the circumstances of any inquiry or complaint or other matter within the jurisdiction of the Office of Chief Trial Counsel creates an appearance that the office may not exercise its discretionary functions in an evenhanded manner and that those circumstances are so grave as to render it unlikely that an attorney will receive fair treatment or that the public will not be protected.

~~i. That his or her recusal would further the interests of justice; or,~~

~~ii. There is a substantial doubt as to his or her capacity to be impartial; or~~

~~(3) A person aware of the facts might reasonably entertain a doubt that the Chief Trial Counsel or designee would be able to be impartial.~~

(b) The Chief Trial Counsel may recuse ~~herself or himself~~ the Office of Chief Trial Counsel when:

(1) ~~Any~~ ~~if she or he receives an~~ inquiry or complaint or other matter within the jurisdiction of the Office of Chief Trial Counsel is about: ~~concerning~~

i. ~~An~~ attorney, who within the past 12 months has had ~~has a current or recent a~~ personal, financial, or professional relationship to the State Bar, its employees, other than the Chief Trial Counsel ~~those employees referenced in subsection (a)(1)(v), above,~~ or a ~~non-attorney~~ member of the Board of Trustees; or

ii. An attorney member of any State Bar committee or commission; or

(2) ~~in other appropriate circumstances~~ To avoid the appearance of any impropriety, when it appears that the attorney who is the subject of the inquiry or complaint or other matter will not receive fair treatment.

(c) Duties of the Special Deputy Trial Counsel Administrator

- (1) In the event of the Chief Trial Counsel's recusal, the inquiry or complaint or other matter shall be referred to the Deputy Trial Counsel Administrator or delegate ("Administrator").
- (2) The Administrator shall conduct a preliminary review of the inquiry or complaint, which may include reasonable attempts to determine if additional facts exist that, in conjunction with the complaint, may establish a colorable violation ~~includes reasonable and limited outside inquiries.~~
- (3) If the Administrator determines that the factual allegations of the inquiry or complaint do not articulate a violation ~~are not sufficiently specific~~, or that the factual allegations contained therein, if proven, would not result in discipline of the attorney, the Administrator shall close the matter. In all other cases, including where the Administrator is unable to determine whether the factual allegations, if proven, would result in discipline of the attorney, the Administrator shall assign ~~refer~~ the matter ~~to a Special Deputy Trial Counsel~~ for investigation.
- (4) With regard to other matters, the Administrator shall conduct a preliminary review. If the Administrator determines that the matter should proceed, the Administrator shall assign the matter for prosecution.
- ~~(4)~~(5) The preliminary review required by section (c)(2)-~~(3)~~ shall be completed within sixty (60) days after the written inquiry or complaint is first received, provided, however, that such time limit is not jurisdictional.
- ~~(5)~~(6) A complainant may request review of a decision by an Administrator to close a complaint or inquiry. The Administrator shall refer such a request for review to a Special Deputy Trial Counsel.

(d) Duties of Special Deputy Trial Counsel

- (1) Upon receipt of a referral by the Administrator, the Special Deputy Trial Counsel shall conduct an investigation and all such other proceedings as necessary and appropriate.
- (2) A complainant may request review of a decision by a Special Deputy Trial Counsel to close a complaint or inquiry. The Administrator shall refer such a request for review to a different Special Deputy Trial Counsel than was originally assigned to complainant's case. Upon receipt of a referral by the Administrator to perform a review of a closed disciplinary

complaint, the Special Deputy Trial Counsel will determine whether to recommend to the Administrator that the complaint should be reopened for investigation.

(e) The Administrator and Special Deputy Trial Counsel:

- (1) Shall have all the powers and duties of the Chief Trial Counsel and shall act entirely in the Chief Trial Counsel's~~her or his~~ place with regard to an inquiry or complaint or other matter and any resulting investigation or prosecution.
- (2) Must be active licensees in good standing of the State Bar of California, but may not be employees of the State Bar, members of the Board of Trustees, or Judges Pro Tempore of the State Bar Court.
- (3) May receive compensation for services and reimbursement of reasonable expenses for investigative, administrative and legal support.
- (4) Shall comply with the written or other established policies of the State Bar of California and the Office of the Chief Trial Counsel, except to the extent that compliance would be inconsistent with the purposes of this rule.
- (5) May be removed by the Chairperson of the Regulation and Discipline Committee or designee only for good cause, including any condition that impedes the timely performance of their duties.

(f) The State Bar's Office of General Counsel may be designated by the Chairperson of the Board's Regulation and Discipline Committee to monitor all referrals to the Administrator and Special Deputy Trial Counsel in a manner that maintains the required impartiality and confidentiality. The State Bar's Office of General Counsel may also be designated by the Chairperson of the Board's Regulation and Discipline Committee to remove the Administrator or Special Deputy Trial Counsel as provided in section (e)(5) of this rule.

(g) Upon the request of the Chairperson of the Board's Regulation and Discipline Committee, but no less than twice a year, the Administrator and/or the Office of General Counsel shall submit a full report to the Committee in the appropriate session of its meeting about the processing of all inquiries and complaints in a manner that maintains the necessary impartiality and confidentiality of the matters under review pursuant to this rule.

(Adopted, eff. Jan. 1, 1996. As amended, eff. Sept. 1, 2006; Jan. 1, 2012; July 22, 2016.)