



The State Bar of California

OPEN SESSION

AGENDA ITEM

JULY 2021

REGULATION AND DISCIPLINE COMMITTEE III.B

DATE: July 22, 2021

TO: Members, Regulation and Discipline Committee

FROM: Vanessa Holton, General Counsel, Office of General Counsel
Carissa Andresen, Assistant General Counsel, Office of General Counsel

SUBJECT: Proposal to Increase Compensation for Special Deputy Trial Counsel

EXECUTIVE SUMMARY

Rules of Procedure of the State Bar, rule 2201 governs the recusal of the Office of Chief Trial Counsel (OCTC) in specified matters involving individuals with close ties to the State Bar. Conflict cases are referred by the chief trial counsel (CTC) to the special deputy trial counsel (SDTC) administrator, who assigns cases to an SDTC for investigation and prosecution, as appropriate.

Rule 2201 provides that SDTCs and the SDTC administrator may receive compensation for services and reimbursement of reasonable expenses. The current contract compensation rate for SDTCs is \$100 per hour and for the SDTC administrator, \$150 per hour. These rates are significantly below market rate for attorneys qualified to perform this work.

This item proposes an increase in the compensation for both SDTCs and the SDTC administrator to \$200 per hour for SDTCs and \$250 per hour for the SDTC administrator.

BACKGROUND

Rule 2201 governs the recusal of OCTC in specified matters involving individuals with close ties to the State Bar. Conflict cases are referred by the CTC to the SDTC administrator, who assigns cases to an SDTC for investigation and prosecution, as appropriate. SDTCs and the SDTC

administrator may receive compensation for services and reimbursement of reasonable expenses; the current rates are \$100 per hour for SDTCs and \$150 per hour for the SDTC administrator.

DISCUSSION

Rule 2201 governs the recusal of OCTC in matters involving individuals with close ties to the State Bar. These conflict cases are referred by the CTC to the SDTC administrator, who assigns cases to SDTCs for investigation and prosecution, as appropriate. Each SDTC performs the duties of the position independently without the support or resources of OCTC other than coordinated training.

Rule 2201 provides that SDTCs and the SDTC administrator may receive compensation for services and reimbursement of reasonable expenses. The current contract compensation rate for SDTCs is \$100 per hour, and for the SDTC administrator, \$150 per hour. These rates have been in effect since approximately 2016.

The independent nature of the SDTC and SDTC administrator positions requires recruitment of highly qualified individuals, who are knowledgeable about both attorney ethics and the attorney disciplinary system, and experienced litigators.

The current group of 23 SDTCs are generally comprised of attorneys with experience as ethics counsels, prosecutors, former OCTC attorneys, and trial attorneys. The hourly contract rate for the SDTCs and SDTC administrator position is significantly below market rate for similar work.

Example of Hourly Rates for Professional Services ¹	
Ethics-related work	\$500 per hour
Discipline defense	\$500 per hour
Insurance rate for malpractice defense	\$375 per hour

Given the low volume of SDTC work and hourly compensation rate, the SDTCs for the most part perform these services in addition to their primary legal practice. While many SDTCs view their work for the State Bar as a public service, recruitment and retention of well-qualified individuals has posed challenges.

To make the hourly rate for SDTCs and SDTC administrator compensation more commensurate with the market rate for similar work, and in an attempt to improve recruitment and retention of qualified practitioners, this item proposes a \$100 per hour increase in the compensation for both SDTCs and the SDTC administrator. The proposed increased rate for SDTCs is \$200 per hour; the proposed increased rate for the SDTC administrator is \$250 per hour.

¹ These rates were obtained by calling practitioners in the substantive areas listed.

In 2020, the State Bar paid approximately \$275,186 in compensation for SDTC and SDTC administrator services. Based on the hours billed for these services, the proposed hourly rate increase would result in projected future total annual compensation of \$528,948, an increase of \$253,762. In the past, it has informally been determined that structuring different models, including retention of firms, or hiring regular State Bar staff to perform the SDTC and SDTC administrator work, would not be cost efficient. Those models also present challenges with creating a back-up system of SDTCs to take on matters in which SDTCs are conflicted out from a matter, or to perform the “second look” function when requested by a complaining witness whose case is closed by an SDTC.

FISCAL/PERSONNEL IMPACT

An increase to the SDTC and SDTC administrator compensation rate will result in increased expenditures on the rule 2201 program. Based on 2020 expenditures, approval of this proposal would result in a projected approximate increase of \$253,762 per year.

AMENDMENTS TO RULES OF THE STATE BAR

Title III, Division II, Chapter 2

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

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.

Objective: b. Implement and pursue governance, composition, and operations reforms needed to ensure that the Board’s structure and processes optimally align with the State Bar’s public protection mission.

RECOMMENDATIONS

Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Regulation and Discipline Committee approves the contract rate for compensation for special deputy trial counsel and is increased to \$200 per hour and the contract rate for compensation for the special deputy trial counsel administrator is increased to \$250 per hour, effective August 1, 2021.

ATTACHMENT(S) LIST

- A.** State Bar Rule of Procedure 2201
- B.** Current List of SDTCs

Rule 2201. APPOINTMENT AND AUTHORITY

(a) The Chief Trial Counsel shall recuse 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;
 - ii. An attorney employed by the State Bar of California;
 - iii. An attorney member of the Board of Trustees; or
 - iv. An attorney who within the past 12 months has had a personal, financial, or professional relationship to the Chief Trial Counsel; or,
- (2) The Chief Trial Counsel 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.

(b) The Chief Trial Counsel may recuse 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. An attorney who within the past 12 months has had a personal, financial, or professional relationship to the State Bar, its employees, other than the Chief Trial Counsel, or a member of the Board of Trustees; or
 - ii. An attorney member of any State Bar committee or commission; or
- (2) 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 Special Deputy Trial Counsel Administrator or delegee ("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.

(3) If the Administrator determines that the factual allegations of the inquiry or complaint do not articulate a violation, 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 the matter 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.

(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.

(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 place with regard to an inquiry or complaint or other matter and any resulting investigation or prosecution.

- (2) Must be active attorneys 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.

CURRENT SPECIAL DEPUTY TRIAL COUNSEL

Special Deputy	Year Admitted	Year Appointed	Background
Charles Berwanger	1970	2017 or earlier	Partner: Gordon & Reese Practice areas: varied and extensive CLA Sections: Litigation, Property Member, San Diego County Bar Ethics Committee
David Boyd	1976	2019	Law Office of David Boyd Arbitrator and mediator Practice areas: professional responsibility and legal ethics. CLA Section: Litigation
Alara Chilton	2005	2017 or earlier	Law Office of Alara Chilton Practice area: consumer protection, criminal law Member, San Diego County Bar Ethics Committee
Lawrence J. Dal Cerro (Current Administrator)	1982	2019	Former Assistant Chief Trial Counsel, State Bar
Kevin DeSantis (Conflicts SDTC)	1988	2020	Partner: Dunn DeSantis, Walt & Kendrick Certified Specialist: Legal Malpractice
David Eisen	1981	2017 or earlier	Partner: Wilson Elser Moskowitz Edelman & Dicker Practice area: commercial litigation, employment law, professional responsibility
Robert Hawley	1978	2019	Practice areas: attorney regulation; professional responsibility Former Deputy Executive Director, State Bar of California
Evan Hess	2010	2019	Practice areas: employee rights, constitutional law, litigation, business law CLA Section: Law Practice Management & Technology
Lawrence Jacobson	1968	2018 or earlier	Lawrence H. Jacobson APC Practice areas: legal malpractice and expert testimony work CLA Sections: Business Law, Real Property Law

Adam Koss	2006	2018 or earlier	The Koss Firm Practice areas: legal ethics and professional responsibility Certified Specialist: Legal Malpractice
Joel Mark	1972	2017 or earlier	Practice areas: attorney fee disputes, legal malpractice and attorney ethics Member, COPRAC
Edward McIntyre (former Administrator; current SDTC)	1978	2016	Practice areas: professional responsibility and legal malpractice Member, San Diego County Bar Ethics Committee
Joel Miliband	1977	2017 or earlier	Partner: Brown, Rudnick Practice areas: litigation, arbitration, and alternative dispute resolution
Charles Murray	1990	2018 or earlier	Former Deputy Trial Counsel, State Bar of California
Steven Piser	1974	2019	Law Office of Steven B. Piser Certified Specialist: Legal Malpractice Law
Robert Sall	1978	2017 or earlier	Partner: Sall Spencer Callas & Krueger Certified Specialist: Legal Malpractice
Brooke Schafer	1998	2020	Former Deputy Trial Counsel, State Bar of California Former Deputy District Attorney, Riverside County
Rizamari Gonzaga Sitton	1988	2020	Former Deputy Trial Counsel, State Bar of California
Cydney Strickland	1984	2020	Former Deputy Trial Counsel, State Bar of California
Jim Tanizaki	1981	2019	Former Chief Assistant District Attorney, Orange County
Neil Wertlieb	1984	2017 or earlier	Wertlieb Law Corp. Practice areas: professional responsibility, mediation and arbitration Co-Chair, CLA ethics committee
Deborah Wolfe	1981	2017 or earlier	Wolfe Legal Group Certified Specialist: Legal Malpractice Civil Trial Advocate (National Board of Trial Advocacy) Member, San Diego County Bar Ethics Committee