



The State Bar of California

OPEN SESSION

AGENDA ITEM

54-121 SEPTEMBER 2021

REGULATION AND DISCIPLINE COMMITTEE III.C

DATE: September 23, 2021

TO: Members, Board of Trustees
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 and Administrator

EXECUTIVE SUMMARY

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

Rule 2201 provides that SDTCs and the SDTC administrator may receive compensation for their services. The current 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 and lower than the rate paid to State Bar Court appointed respondents counsel under rules 5.174 and 5.192.

This item proposes an increase in the hourly compensation for SDTCs and the SDTC administrator to \$250 and \$275, respectively. Though not full market rate, the proposed rates are intended to enhance recruitment and retention of quality and productive attorneys as SDTCs and the SDTC administrator, and align more fairly with the rate paid to State Bar Court appointed counsel, who practice in the same substantive area, while recognizing that SDTC and

SDTC administrator work is in part a voluntary contribution to the attorney profession and to the State Bar.

BACKGROUND

Rule 2201 (Attachment A) 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 SDTCs for investigation and prosecution, as appropriate. Rule 2201 provides that SDTCs and the SDTC administrator may receive compensation for services. The current hourly rates are \$100 for SDTCs and \$150 for the SDTC administrator. On May 1, 2021, the hourly billable rate for appointed counsel in State Bar Court proceedings was temporarily increased from \$100 to \$300.

DISCUSSION

SDTCs must mirror the work of OCTC while performing the duties of their positions independent of OCTC. The current contract hourly rates for SDTCs and for the SDTC administrator 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 in both attorney ethics and the attorney disciplinary system and who are experienced litigators. The current group of 23 SDTCs and the SDTC Administrator (Attachment B) are generally attorneys with significant experience as ethics counsel, prosecutors, former OCTC attorneys, and trial attorneys.

In about the last year and a half, there has been an approximately 30 percent attrition rate in the SDTC corps. Several have departed because of the low compensation, and it would not surprise if that trend were to continue. Current SDTCs, some of whom would like to make the work a greater portion of their practice, cannot afford to do so at the \$100 hour rate. Significantly, the aging of rule 2201 cases is still a problem, in part because many SDTCs cannot give the handling of these cases as high a priority as the cases of their higher-paying clients. Likewise, the program's recruitment efforts have been rejected by potential SDTC's, who point to the low compensate rate as the primary reason. Finally, the program needs to improve its demographic diversity. Attracting a greater pool of candidates with fair rates is a reliable method of increasing diversity.

The below chart reflects that the hourly contract rate for the SDTCs and SDTC Administrator are significantly below market rate, including for similar work:

Table 1. Example of Hourly Rates for Professional Services¹

Professional Services	Hourly Rate
State Bar Court appointed respondent's counsel	\$300
Private ethics counsel	\$500
Private discipline defense counsel	\$500
Private insurance rate malpractice defense counsel	\$375
Clio ² California attorney	\$338

An increase in the SDTC compensation rate approximately equal to the current rate for appointed counsel in State Bar Court proceedings is appropriate to ensure near parity between SDTC and appointed counsel, both of which practice in the same substantive area.³ Additionally, the compensation increase will aid recruitment and retention of well-qualified and productive SDTCs.

This item seeks approval of an increased hourly rate for SDTCs and the SDTC administrator to \$250 and \$275, respectively.

For parity fairness the item proposes the increases be made retroactive to May 1, 2021, to align with the May 1, 2021, effective date of the hourly increase provided State Bar Court appointed counsel who perform work in the same substantive area.

Finally, it is recommended that, after one year of implementation of the new compensation rates, using relevant data on the rule 2201 program the Regulation and Discipline Committee review whether any adjustment should be recommended in the rule 2201 program, including but not limited to the SDTC and administrator compensation structure and OCTC's referral of cases to it.

¹ Private sector rates were obtained by contacting representative practitioners in the substantive areas listed.

² Clio provides law practice management software. This figure was reported in Clio's 2020 Legal Trends Report as the hourly rate for lawyers in California based on data collected from its paid subscribers.

³ The lower proposed rate for SDTCs is justified by the fact that the State Bar does not indemnify State Bar Court appointed counsel from any claims filed against them in the course of their representation of private respondents in discipline proceedings before State Bar Court. Further, State Bar Court guidelines establish "prima facie allowances" (hours presumed reasonable for a given service). Hours claimed in excess of those allowances must include an explanation why additional time is necessary.

FISCAL/PERSONNEL IMPACT

An increase to the SDTC and SDTC administrator hourly rate will result in increased expenditures for the rule 2201 program. Table 2 reflects the total amounts of annual invoices by SDTCs and the SDTC administrator for three years.

Table 2. Amounts of Invoices by SDTCs and SDTC Administrator for Three Years

	2019	2020	2021 (through 8/21)	3-Year Average
SDTC	\$103,689	\$210,912	\$167,663	\$160,775
Administrator	\$42,440	\$66,975	\$68,805	\$59,393
Total	\$146,129	\$227,887	\$236,468	\$220,168

The 2021 SDTC budget totals \$250,000. Annual expenditures vary based on the number of conflict cases, their complexity, and the stage at which they were resolved, among other factors. Applying the new rates to a three-year average of program expenses results in 2021 SDTC expenditures totaling \$290,000, and future year projected annual rule 2201 expenses of approximately \$315,000. Thus, the proposed change would increase current year spending by \$40,000 in excess of budget; future year expenses would increase 2021 budgeted levels by an estimated \$65,000 annually. Current and future year expenses will be absorbed by the General Fund.

OGC and Finance have identified internal challenges in tracking and reconciling SDTC charges, for example, segregation of hourly charges and other expense reimbursements. Going forward, Finance will revise the SDTC invoice input procedure, and information in Oracle will be aligned with OGC's records. This will enable the analysis that RAD is suggested to undertake one year post implementation, as outlined in the discussion section above.

AMENDEMENTS TO RULES

None

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 a new hourly compensation rate of \$250 for special deputy trial counsel and a new hourly compensation rate of \$275 for the special deputy trial counsel administrator, retroactive to May 1, 2021, and it is

FURTHER RESOLVED, that the Regular and Discipline Committee, after one year of implementation of the new hourly compensation rates, review relevant data on the rule 2201 program to determine whether any adjustments, including in the SDTC and administrator compensation structure and OCTC's referral of cases to the program, should be recommended.

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee approves a new hourly compensation rate of \$250 for special deputy trial counsel and a new hourly compensation rate of \$275 for the special deputy trial counsel administrator, retroactive to May 1, 2021, and it is

FURTHER RESOLVED, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee, after one year of implementation of the new hourly compensation rates, review relevant data on the rule 2201 program to determine whether any adjustments, including in the SDTC and administrator compensation structure and OCTC's referral of cases to the program, should be recommended.

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