



The State Bar of California

OPEN SESSION AGENDA ITEM SEPTEMBER 2021 REGULATION AND DISCIPLINE COMMITTEE III.B

DATE: September 23, 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: Amendment to Rule of Procedure 2201 (Appointment and Authority): Request to Circulate for Public Comment

EXECUTIVE SUMMARY

Rules of Procedure of the State Bar, rule 2201 addresses the recusal of the chief trial counsel (CTC) in discipline cases involving individuals with close ties to the State Bar. The rule sets forth grounds for mandatory and discretionary recusals. Such 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 (SDTCs).

As specifically described herein, this item proposes amendments to rule 2201 that are designed to further refine the functioning and integrity of the SDTC program. It requests the Regulation and Discipline (RAD) Committee approve these amendments for circulation for public comment for a period of 45 days.

BACKGROUND

Current rule 2201 sets forth grounds for mandatory and discretionary recusals of the CTC in discipline 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 administrator conducts a preliminary review to determine whether to close the matter or to

appoint an SDTC to investigate the matter further. (Rule 2201 (c)(2) and (3).) The current rule provides that both the administrator and each SDTC act in the place of the CTC with regard to an inquiry, complaint or other matter and any resulting investigation or prosecution. (Rule 2201 (e)(1).)

At its July 2021 meeting, RAD approved a request to circulate for public comment proposed revisions to rule 2201. However, subsequently, in consultation among RAD chairs, the Office of General Counsel (OGC) and the Office of Chief Trial Counsel (OCTC), it was determined that a broader set of proposed rule 2201 revisions should be circulated for public comment. Therefore, staff is not returning for approval the previously-circulated revisions; instead, this item requests approval to circulate for public comment an integrated, broader set of proposed revisions, as the current and previously-circulated proposed revisions are appropriately considered together.

DISCUSSION

Rule 2201 has been amended several times in recent years as necessary to further professionalize the SDTC program. The following amendments were previously circulated for public comment and are again proposed as part of the integrated, broader set of proposed revisions¹:

1. Relocate current subparagraph (e)(1) to new subparagraph (c)(2) in order to vest the CTC's powers and duties in the SDTC administrator only. Current subparagraph (e)(1) provides that both the SDTC administrator and individual SDTCs each 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." The purpose of this amendment is to authorize more supervision in the SDTC administrator and to ensure a greater level of consistency in decision-making, settlement, and prosecutions.
2. Add new subparagraph (e)(1) to clarify that SDTCs and the administrator are subject to the oversight of RAD.
3. Remove provisions in paragraph (f) that permit the State Bar's OGC to be designated to remove the SDTCs or the SDTC administrator for good cause. Under the proposed amended rule, only the chair of RAD will have the authority to remove SDTCs or the SDTC administrator. The purpose of this proposed amendment is to acknowledge that OGC should not have decision-making authority over a conflicts system that may handle matters involving OGC attorneys or staff.

¹ The proposal to add a provision that RAD establishes the compensation rate for the SDTCs and the SDTC administrator included in the previously-circulated proposed revisions is not proposed as part of the integrated, broader set of revisions to better align with current practices with respect to other similar outside contractor positions.

4. Revise current paragraph (g) to require that the administrator provide a full report to RAD at each of its regularly scheduled meetings. This amendment would conform to prior Board resolution and current practice.
5. Revise current paragraph (f) to substitute the term “track” for “monitor” to more appropriately reflect current practice.
6. Revise current subparagraph (e)(3) to provide for reimbursement of “approved” reasonable expenses, codifying the current practice that provides for the necessary level of State Bar control over the SDTC program expenses.
7. Conforming changes as necessary to update internal references to amended rule paragraphs.

Subsequent to the circulation of the proposed revisions described above, and in consultation among RAD chairs, OGC and OCTC, it was determined that a broader set of revisions should be proposed. Specifically, it was determined that the proposal to vest CTC authority solely in the SDTC administrator will add supervisory responsibilities necessary to ensure consistency, including additional training for SDTCs, increased oversight of SDTC case handling and decisions, and measures to ensure compliance with OCTC standards and protocols. Therefore, the administrator needs flexibility to assign certain of their current responsibilities (e.g., intake functions) as necessary to accommodate the added supervisory responsibilities. The following additional amendments are also proposed as part of the integrated, broader set of proposed revisions:

1. Revise current subparagraphs (c)(2) and (c)(3) to add “delegee” to provide flexibility to the administrator to delegate the duties described in these subparagraphs to an appropriate SDTC, as may be necessary to allow the performance of the administrator’s additional supervisory duties described above.
2. Conforming changes as appropriate to update terminology and internal references.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF PROCEDURE

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 authorizes staff 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 amended Rule of Procedure.

ATTACHMENT(S) LIST

- A.** Proposed amended Rule 2201 – clean version
- B.** Proposed amended Rule 2201 – redline version

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;
 - 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 ("Administrator") or designee.

- (2) In the absence of the Special Deputy Trial Counsel Administrator, the powers and duties of the Special Deputy Trial Counsel Administrator shall be exercised by the alternate Special Deputy Trial Counsel Administrator.
- (3) The Administrator 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.
- (4) The Administrator or delegee 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.
- (5) If the Administrator or delegee 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 or delegee shall close the matter. In all other cases, including where the Administrator or delegee 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.
- (6) 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.
- (7) The preliminary review required by sections (c)(3)-(4) 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.
- (8) A complainant may request review of a decision by the Administrator or delegee 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.

- (3) 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 be reopened for investigation.

(e) The Administrator and Special Deputy Trial Counsel:

- (1) Are subject to the oversight of the Regulation and Discipline Committee.
- (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 approved reasonable expenses for investigative, administrative and legal support.
- (4) Shall comply with the written or other established policies of the State Bar 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 Regulation and Discipline Committee to track referrals to the Administrator and Special Deputy Trial Counsel in a manner that maintains the required impartiality and confidentiality.

(g) The Administrator and/or the Office of General Counsel shall submit a full report to the Regulation and Discipline Committee in the appropriate session of each regularly scheduled 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.

Rule 2201. APPOINTMENT AND AUTHORITY

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 - 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") or designee.

(2) In the absence of the Special Deputy Trial Counsel Administrator, the powers and duties of the Special Deputy Trial Counsel Administrator shall be exercised by the alternate Special Deputy Trial Counsel Administrator.

(3) ~~The Administrator~~ The Administrator 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.

~~(3)~~(4) The Administrator or delegee 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.

~~(4)~~(5) ~~(3)~~ If the Administrator or delegee 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 or delegee shall close the matter. In all other cases, including where the Administrator or delegee 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.

~~(5)~~(6) ~~(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.

~~(6)~~(7) ~~(5)~~ The preliminary review required by ~~section~~sections (c)(2)-(3)-(4) 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.

~~(7)~~(8) ~~(6)~~ A complainant may request review of a decision by ~~an~~the Administrator or delegee 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) ~~(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) ~~(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.

- ~~(2)~~(3) 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.~~

(1) Are subject to the oversight of the Regulation and Discipline Committee.

(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) ~~(3)~~ May receive compensation for services and reimbursement of approved reasonable expenses for investigative, administrative and legal support.

(4) ~~(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~~ track 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~~ The Administrator and/or the Office of General Counsel shall submit a full report to the Regulation and Discipline Committee in the appropriate session of ~~its~~ each regularly scheduled 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.