

Section 6. Responding to Opinion Requests

(a) *Committee's options for responding to opinion requests.* When presented with a request that the committee issue a formal opinion, the committee may elect (a) not to opine; (b) to issue a private letter opinion to the requestor; or (c) to issue a formal, published opinion. The committee may accept requests for an opinion from anyone, including the public, members of the Bar, the committee's own members and persons affiliated with the Bar, such as members of Board of Trustees and State Bar staff. Requests shall be presented to the committee for resolution along with a recommendation from the chair, if the chair so elects.

(b) *Criteria for issuing formal opinions.* The committee may determine to proceed with the development of a formal opinion when a majority of the voting members of the Committee (not just a majority of those present at a meeting) determines that a request setting forth hypothetical facts presents issues of general interest to the Bar and/or the public and that the committee has satisfactorily resolved the issues presented by the hypothetical facts. However, the committee shall not issue a formal opinion when any of the following circumstances exist:

- (1) The requesting attorney is a member of a local bar association which has an ethics committee, provided that the committee may respond to the inquiry if forwarded by a local bar association ethics committee or if the request concerns an ethics problem on which there is a division of views among local bar association ethics opinions.
- (2) There is a pending State Bar complaint, investigation, proceeding or litigation concerning the subject of the request.
- (3) The request constitutes a complaint against member(s) of the State Bar.
- (4) The request involves procedures employed by the bar in processing complaints against members of the State Bar.
- (5) The request involves questions or issues, the resolution of which turns principally on law unrelated to the law governing lawyers.
- (6) Where it is known that the request involves a situation in litigation or concerns threatened litigation or involves the propriety of sanctions within the purview of the courts, such as contempt.
- (7) The chair and vice-chair have jointly determined that it would be inadvisable to respond to the request.

(Source: Board of Governors' Resolution, July 1979, December 2004.)

(c) *Letter Opinions.* If the committee elects not to issue a formal opinion in response to a request, then the committee may issue a private letter opinion or decline to opine. In either event, the requestor shall be notified by letter. The committee typically issues letter opinions when there is no policy reason for the committee to decline comment on the request and the request is simple,

routine or otherwise not of general interest to the Bar's members. The letter shall be drafted by the chair or by a member assigned by the chair. The committee may approve the opinion by affirmative vote as provided in these rules.

(Source: Board of Governors' Resolution, July 1979, December 2004; Board of Trustees Resolution, November 2.)

(d) *Changed circumstances.* If, at any time after an opinion request has been assigned for drafting as a formal opinion, but before final publication, the committee shall decline to act further on the request and no opinion shall be published if any of the circumstances listed in section (b), subdivisions (1) through (6) above, come to light.

(e) *Format of Formal Opinions.* Drafts of formal opinions shall be prepared by the member or members assigned by the chair or staff. The drafter shall ordinarily circulate their draft to the committee in a pre-meeting agenda packet distributed by the staff. Each opinion shall set forth:

- (1) A statement of issue or issues addressed;
- (2) A concise digest summarizing the committee's conclusions and reasoning;
- (3) Hypothetical facts of the ethical question presented in a general manner without identification of the requesting attorney or any details of the request which would permit such identification;
- (4) The Rules of Professional Conduct or other authorities relied upon;
- (5) An analytical discussion of the applicable rules applied to the hypothetical facts; and
- (6) A conclusion.

(Source: Board of Governors' Resolution, July 1979, December 2004; Board of Trustees Resolution, November 2016.)

(f) *Dissenting Opinions.* While the Committee typically issues opinions on the basis of consensus, or at least substantial majority vote, a member may elect to have notice of his or her dissent included with the opinion. In this event, the number of dissenters, but not their names, will be noted in the final opinion. In the rarest of cases, a dissenting opinion or opinions explaining the reasons for any dissent may be added to the opinion, in the discretion of the chair. As with the opinion of the Committee, the dissenting opinion will not be attributed to particular authors but will note on how many members' behalf the dissent is filed.

(g) *Publication of Proposed Formal Opinions for Public Comment.* The committee shall publish proposed formal opinions, and provide an opportunity for public comment of no less than 60 days, before approving a formal opinion for final publication. Upon a vote of the committee, the formal opinion shall be distributed to members of appropriate committee or committees of the Board of Trustees, key individuals on the State Bar staff who participate in regulatory activities,

the chairpersons of local bar association ethics committees and, in the discretion of the chair, other interested persons or entities, advising them that the hypothetical is under consideration by the committee for a formal opinion and requesting their comments. Proposed opinions published for public comment shall be made available to the public through means reasonably available to the committee, such as through the committee staff and the State Bar website.

(h) *Issuance of Formal Opinions Following Public Comment.* After considering any public comment received on a draft formal opinion, the committee may vote to issue the opinion as drafted, to modify the opinion and approve the modified opinion for publication, to decline to opine or to issue a private letter opinion. In the event a proposed formal opinion is modified after publication for public comment in such a manner as to reflect the committee's view that additional ethical duties or obligations apply to the hypothetical facts, then the proposed formal opinion shall be published again for public comment as provided in section (g).

(i) *Majority Vote Required.* Proposed opinions may be approved pursuant to sections (g) and (h) only by a majority of all voting members of the committee, at a meeting.

(j) *Transmission to Requestor and Board Committee.* Once the committee has approved a formal opinion for publication pursuant to section (i), the formal opinion shall be issued to the requesting party and the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of the Board Committee on Regulation and Discipline for decision.

(k) *Publication and Maintenance of Opinions.* Once approved pursuant to section (j), formal opinions shall be published in State Bar publications, including the State Bar web site, as space is available, and the committee may cause its formal opinion or a summarization thereof to be published in other appropriate publications. All approved letter and formal advisory opinions shall be maintained on file at all State Bar offices and shall be available to any member of the bench, bar or public upon request. A reasonable charge to defray the costs of reproduction of such opinions and postage may be required.

(Source: Board of Governors' Resolution, December 2004; Board of Trustees Resolution, November 2016.)