



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM 705 NOVEMBER 2023**

**DATE:** November 16, 2023

**TO:** Board of Trustees Sitting as the Regulation and Discipline Committee

**FROM:** Melanie J. Lawrence, Program Director, Office of Professional Support and Client Protection

**SUBJECT:** Proposed Amendments to Rules of Procedure Regarding Probation Rules (Rules 2701–2703): Request to Circulate for Public Comment

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### **EXECUTIVE SUMMARY**

In order to implement the Attorney Supervision and Assistance Redesign (ASAR) Project, the Office of Professional Support & Client Protection (OPSCP) seeks to update the Rules of Procedure related to the role of the Office of Probation. The proposed changes will aid the office in identifying individual supervision needs and will inform evidenced-based supervision strategies for all disciplined attorneys with the goal of reducing recidivism.

This item requests the Board's approval to release these proposed amendments to the existing State Bar Rules of Procedure as set forth in Title III, Division III, Rules 2701-2703 of the Rules of Procedure of the State Bar of California, for a 60-day public comment period.

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### **BACKGROUND**

The purpose of the ASAR project is to reduce recidivism of attorneys in the discipline system and increase public protection by providing a framework for systems change to improve performance and rehabilitation for respondents under State Bar supervision. ASAR was launched in the latter part of 2019, after data available at the time revealed a high rate of recidivism among respondent attorneys in the discipline system. There was a small percentage of attorneys in the discipline system, compared to the attorney population as a whole, but the same attorneys continued to reoffend.

A major component of the project is a reorientation of the Office of Probation to supervision of probationers using evidence-based and evidence-informed practices, including more current,

customized supervision techniques like those more recently developed in the criminal probation context. The project also aims to assist the State Bar Court by informing orders that will be more targeted to address the root causes of the misconduct that brought the respondent under State Bar supervision.

Progress towards evolving the system has included, among other things, developing with experts an attorney supervision and assistance strategies tool based on historical data (static factors) and training staff in motivational interviewing and case planning.

In addition to historical, static factors, dynamic or stabilizing factors such as employment circumstances, family and support networks and law practice management resources are also important data points in understanding the individual circumstances of each respondent. To further understand how these dynamic factors may influence recidivism and to individualize supervision conditions and identify useful resources for attorneys currently on supervision, the State Bar anticipates collecting information from attorneys under supervision about various potential dynamic factors. Recognizing that this information may be highly sensitive, and in order to encourage participation in the voluntary collection of that information for individual and research purposes, OPSCP proposes changes to the current rules to ensure that information is confidential except as specified.

## **DISCUSSION**

To inform the proposed rule changes, staff has provided an early draft of the proposed rule changes to the State Bar Court, the Office of Chief Trial Counsel, and the Association of Discipline Defense Counsel. The complete proposed set of amendments, informed by the input received to date, are attached as Attachments A and B, and can be summarized as follows:

### **PROPOSED AMENDMENT TO RULE OF PROCEDURE OF THE STATE BAR OF CALIFORNIA, RULE 2701 OUTLINING THE ROLE OF THE OFFICE:**

Proposed changes include re-titling the office from “Office of Probation” to one that more fully reflects the changed focus of the office to “Office of Case Management and Supervision” (OCMS). Further, the proposed amendment refines the purpose of the office to further reflect the focus on the public protection aspect of supervision including both the purposes of discipline and the goal of reducing recidivism.

### **PROPOSED REPEAL OF RULE OF PROCEDURE OF THE STATE BAR OF CALIFORNIA, RULE 2702, SETTING FORTH THE DUTIES OF A PROBATION MONITOR REFEREE:**

This rule defines the scope of a “probation monitor referee” -- a role that has not actually been utilized in more than 10 years; OPSCP proposes to eliminate it in its entirety accordingly.

## **PROPOSED AMENDMENT TO RULE OF PROCEDURE OF THE STATE BAR OF CALIFORNIA, RULE 2703, CONFIDENTIALITY OF PROBATION FILES AND INFORMATION:**

Files of the Office of Probation are currently confidential to the public, but files are available to parties (OCTC, respondent, a respondent's attorney). A "file" includes information regarding supervision conditions and compliance with those conditions and related communications such as those between attorneys on supervision and their Probation Case Coordinator or third parties. Under the proposed amendments, this will continue to be the case.

The proposal would add two sub-sections to the rule. Proposed subsection (B) defines the materials typically maintained in a "file"—that is, materials core to that function of the office aimed at supervising compliance with conditions of the Court's orders. Subsection (C) defines the term "records," to include information that the office will request and collect to inform the individual's supervision needs. Additionally, the rule would specify that the information collected can be used by the State Bar for research purposes—that is, to further develop evidence to inform supervision strategies aimed at reducing recidivism.

Recognizing that the additional information (related to dynamic/stabilization factors) may be of a sensitive nature and to encourage candid and truthful responses, proposed sub-section (C) provides that information collected for both individual supervision needs and for research purposes will be confidential, and not available to the Office of Chief Trial Counsel, the licensee, or licensee's counsel, but gives them the ability to seek it upon motion and order of the State Bar Court and finding of good cause. The subsection also allows offices within the State Bar who are engaged in data collection, analysis, or a State Bar office providing support or advice thereto or to any person or entity providing related services access to that information but only for research purposes to inform general supervision strategies. To further ensure confidentiality of that material, any such person or entity must agree to maintain confidentiality of any such material received. Results of any collection, analysis or research can only be shared publicly in the aggregate and without use of information that potentially identifies any individual. Lastly, the proposed amendments would clarify that if a referral is made to the Office of Chief Trial Counsel for non-compliance with supervision conditions or OCMS files a motion to revoke probation due to non-compliance, relevant information to that noncompliance can be disclosed.

This proposed amendment would also renumber the confidentiality Rule 2703 to Rule 2702 upon deletion of the full section on "probation monitor referees."

## **FISCAL/PERSONNEL IMPACT**

None

## **AMENDMENTS TO RULES OF PROCEDURE**

Title III, Division III, Rules 2701-2703

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

### **STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS**

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- c. 3. Identify and implement strategies to address other disparities in discipline rates and outcomes, including those related to solo and small firm practitioners.

Goal 3. Protect the Public by Regulating the Legal Profession

- b. 3. Provide effective support for attorneys experiencing practice management and other challenges that affect competency.

### **RECOMMENDATIONS**

**Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Board of Trustees sitting as the Regulation and Discipline Committee; authorizes staff to make available for public comment for a period of 60 days, the proposed revisions to Title III, Division III, of the Rules of Procedure of the State Bar, as provided in Attachment A (clean) and Attachment B (redline); 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 revised rules.

### **ATTACHMENTS LIST**

- A.** Proposed Rules of Procedure of the State Bar of California, Title III, Division III (clean)
- B.** Proposed Rules of Procedure of the State Bar of California, Title III, Division III (redline)

**DIVISION III. OFFICE OF CASE MANAGEMENT AND SUPERVISION**

**Rule 2701. Office of Case Management and Supervision**

The Office of Case Management and Supervision shall supervise licensees who are the subject of orders issued by the Supreme Court or the State Bar Court in furtherance of the purposes of discipline as set forth in standard 1.1 and with the intent of reducing recidivism.

Eff. January 1, 1996; Revised January 1, 2004; January 25, 2019. Source: TRP 605 (substantially revised).

Eff. January 1, 1996; Revised January 1, 2004; January 25, 2019.  
Source: TRP 614.5 (substantially revised).

**Rule 2702. CONFIDENTIALITY OF OFFICE OF CASE MANAGEMENT AND SUPERVISION FILES**

A. Except as otherwise provided by law or by these rules, the files and records of the Office of Case Management and Supervision are confidential and shall not be disclosed pursuant to any state law, including but not limited to, the California Public Records Act (Division 10 (commencing with section 7920.000) of Title 1 of the Government Code).

B. As it is used in this section, the term “files” includes information regarding a licensee’s supervision conditions ordered by the Court, the licensee’s compliance or noncompliance with those conditions, and related communications. Except as otherwise provided by law or these rules, files are generally available to the licensee, the licensee’s counsel, and the Office of Chief Trial Counsel but shall not be available to the public.

C. As it is used in this section, the term “records” includes information that the Office of Case Management and Supervision may request and collect from licensees subject to supervision that it deems useful to inform individual supervision needs. Such information is highly sensitive and in order to encourage candid and truthful responses, such records shall not be accessible outside of the Office of Case Management and Supervision except as follows:

- 1) Upon a motion pursuant to Rule 5.45 and a State Bar Court order finding good cause to make the information accessible to the licensee, the licensee’s counsel, or the Office of Chief Trial Counsel;
- 2) To any office of the State Bar engaged in data collection, analysis, or research, and to any office of the State Bar providing support or advice thereto or to any person or entity providing related services, and only for research purposes to inform general supervision strategies.

- 3) Any such person or entity providing related services must execute a confidentiality agreement or non-disclosure agreement with the State Bar or a contract containing a confidentiality or non-disclosure clause.
- 4) Results of any such collection, analysis or research shall only be publicly disclosed in the aggregate, without reference to any individual or information that may allow any individual to potentially be identified.
- 5) In the event the Office of Case Management and Supervision refers a matter to the Office of Chief Trial Counsel for noncompliance with disciplinary conditions, or files a motion to revoke probation with the State Bar Court, information relevant to the noncompliance may be disclosed.

Eff. Revised January 1, 2004. Source: New

**DIVISION III. OFFICE OF CASE MANAGEMENT AND SUPERVISION PROBATION**

**Rule 2701. Office of Case Management and Supervision Probation**

The Office of Case Management and Supervision Probation, including probation monitor referees, shall supervise licenceslicensees who are the subject ~~attorneys placed on probation or conditions attached to reprobals by disciplinary orders~~ of orders issued by the Supreme Court or the State Bar Court in furtherance of the purposes of discipline as set forth in standard 1.1 and with the intent of reducing recidivism. ~~or pursuant to the terms of agreements in lieu of disciplinary prosecution.~~

Eff. January 1, 1996; Revised January 1, 2004; January 25, 2019. Source: TRP 605 (substantially revised).

**~~Rule 2702. DUTIES OF PROBATION MONITOR REFEREES~~**

~~It shall be the duty of a probation monitor referee to:~~

- ~~(a) Review the applicable disciplinary order or agreement in lieu of disciplinary prosecution and any conditions of probation or reprobals applicable to the attorney;~~
- ~~(b) Promptly review with the attorney the conditions of probation or reprobals and establish a manner and schedule of compliance and reports of compliance to the probation monitor;~~
- ~~(c) Report to the Office of Probation, 845 S. Figueroa Street, Los Angeles, CA 90017-2515, within forty five (45) days of receipt of the conditions of probation or reprobals, upon the manner and schedule of compliance, and thereafter on a quarterly basis upon the compliance of the attorney;~~
- ~~(d) Determine from time to time, after assessment of the relevant facts, the extent and degree of the attorney's compliance with the conditions of probation or reprobals; and~~

~~(e) After assessment of the relevant facts and making a determination that an attorney has failed to comply with the conditions of probation or reprobation or agreement in lieu of disciplinary prosecution, report such failure to the Probation Unit.~~

Eff. January 1, 1996; Revised January 1, 2004; January 25, 2019.

Source: TRP 614.5 (substantially revised).

**Rule 27023. CONFIDENTIALITY OF OFFICE OF CASE MANAGEMENT AND SUPERVISION FILES  
PROBATION FILES**

A. Except as otherwise provided by law or by these rules, the files and records of the Office of Case Management and Supervision ~~Probation~~ are confidential and shall not be disclosed pursuant to any state law, including but not limited to, the California Public Records Act (Division 10 (commencing with section 7920.000) of Title 1 of the Government Code).

B. As it is used in this section, the term “files” includes information regarding a licensee’s supervision conditions ordered by the Court, the licensee’s compliance or noncompliance with those conditions, and related communications. Except as otherwise provided by law or by these rules files are generally available to the licensee, the licensee’s counsel, and the Office of Chief Trial Counsel but shall not be available to the public.

C. As it is used in this section, the term “records” includes information that the Office of Case Management and Supervision may request and collect from licensees subject to supervision that it deems useful to inform individual supervision needs. Such information is highly sensitive and in order to encourage candid and truthful responses, such records shall not be accessible outside of the Office of Case Management and Supervision except as follows:

- 1) Upon a motion pursuant to Rule 5.45 and a State Bar Court order finding good cause to make the information accessible to the licensee, the licensee’s counsel, or the Office of Chief Trial Counsel;
- 2) To any office of the State Bar engaged in data collection, analysis, or research, and to any office of the State Bar providing support or advice thereto or to any person or entity providing related services, and only for research purposes to inform general supervision strategies.
- 3) Any such person or entity providing related services must execute a confidentiality agreement or non-disclosure agreement with the State Bar or a contract containing a confidentiality or non-disclosure clause.
- 4) Results of any such collection, analysis or research shall only be publicly disclosed in the aggregate, without reference to any individual or information that may allow any individual to potentially be identified.



5) In the event the Office of Case Management and Supervision refers a matter to the Office of Chief Trial Counsel for noncompliance with disciplinary conditions, or files a motion to revoke probation with the State Bar Court, information relevant to the noncompliance may be disclosed.

Eff. Revised January 1, 2004. Source: New