



The State Bar of California

OPEN SESSION AGENDA ITEM 50-2 MARCH 2024

DATE: March 21, 2024

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

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

SUBJECT: Proposed Amendments to Rules of Procedure Regarding Probation Rules (Rules 2701–2703): Return from Public Comment and Request for Approval

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 Office of Probation and its work. 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.

At its November 2023 meeting the Board released a package of proposed amendments for a 60-day public comment period. Three comments were received as described below. After review, staff recommends that the Board sitting as the Regulation and Discipline Committee adopt the 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.

BACKGROUND

In furtherance of the ASAR project, the OPSCP seeks to update the Rules of Procedure related to the Office of Probation, including formally changing the name of the office to the Office of Case Management and Supervision, specifying the extent to which files of the office are confidential, and deleting an obsolete rule related to “Probation Monitor Referees.” 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.

On November 16, 2023, the Board of Trustees, sitting as the Regulation and Discipline Committee, authorized the State Bar to issue a package of proposed amendments to the rules governing probation for a 60-day public comment period ending January 22, 2024.

DISCUSSION

A major component of the ASAR 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. 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).

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, the proposed amendments will provide clarity regarding the treatment of such information and ensure it is confidential except as specified. A complete set of the proposed amendments are provided in Attachment A.

The request for public comment was posted on the State Bar's social media channels, sent to those who signed up to receive notice of public comment and posted on the State Bar's public website. In addition, a link to the item was provided to the Association of Discipline Defense Counsel president.

The State Bar received three public comments, two of which agree with the amendments. One commenter also agreed "only if modified." While the commenter did not specify how they believed the proposal should be modified, they expressed that the amendments should only be adopted "if the State Bar really can assure affected lawyers that their information will be kept confidential and that encryption steps are taken to ensure this confidentiality." As discussed above, staff concurs with the sentiment of the comment and in fact, the need for confidentiality motivates the proposed changes. Staff believes that the proposed amendments provide the needed clarity regarding the confidentiality of sensitive information and does not recommend any additional revisions to rules 2701–2703 based on the public comments received. The full text of comments received are provided in Attachment C.

Accordingly, staff requests that the Board of Trustees adopt the amendments, as proposed.

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, hereby approves and adopts amendments to Title III, Division III, Rules 2701–2703 of the Rules of Procedure of the State Bar of California, provided as Attachment A, effective May 1, 2024.

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)
- C.** Public comment received regarding proposed amendments to Rules of Procedure of the State Bar of California, Title III, Division III

DIVISION III. OFFICE OF CASE MANAGEMENT & SUPERVISION

Rule 2701. Office of Case Management & Supervision

The Office of Case Management & 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 & 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 & 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 & 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; and
- 5) In the event the Office of Case Management & 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 licensees 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; and

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

ATTACHMENT C

Comment #	Name	Licensure Status	Subject to Disciplinary Probation	Position (A/AM/D/NP)*	Comments
1	Edward Tabash	Attorney	No	AM	This change should only come about if the State Bar really can assure affected lawyers that their information will be kept confidential and that encryption steps are taken to ensure this confidentiality. Also, there must be not be even the slightest hint of any more favorable treatment for attorneys who agree to participate in this program. There can be no coercive elements whatsoever
2	Anonymous	Attorney	-	A	Octc constantly lies and manipulated the system. Octc acts in bad faith 100% of time. This is all window dressing. All attorneys staff who touched any Girardi file should be fired and start over. Same with state bar judges who signed off on closing files Girardi. All were paid off, and should subpoena records order refunds.
3	George Gliaudys	Attorney	-	A	This approach should assist attorneys who are on probation to understand the context of the disciplinary action more fully.

Note: All respondents were asked if they were currently or previously a member of the Association of Discipline Defense Counsel and responded “No.”

* A = Agree with proposal; AM = Agree if modified; D = Disagree with proposal; NP = No position on proposal