



The State Bar of California

OPEN SESSION AGENDA ITEM 4.11 NOVEMBER 2024 BOARD OF TRUSTEES

DATE: November 14, 2024

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

FROM: Erika Doherty, Program Director, Office of Professional Competence
Christina Gates, Senior Program Analyst

SUBJECT: Committee on Professional Responsibility and Conduct Revised Formal
Opinion Number 2021-206: Colleague Impairment – Request for Approval for
Publication

EXECUTIVE SUMMARY

This agenda item seeks approval for the publication of proposed Revised Formal Opinion 2021-206 (Colleague Impairment). There are three changes recommended in the revised opinion. Two would clarify the obligations of an attorney, including the duty to report certain misconduct by another lawyer under Rule of Professional Conduct 8.3 and the duty to evaluate the need for a succession plan. The third change would clarify the offerings of the State Bar Lawyer Assistance Program.

RECOMMENDED ACTION

This agenda item seeks approval for the publication Revised Formal Opinion 2021-206 to supersede the currently posted version.

DISCUSSION

COPRAC is charged with developing the State Bar's advisory ethics opinions.¹ Authority to approve the issuance of an ethics opinion is exercised by the Board of Trustees sitting as the

¹ Each published opinion includes the following statement: "This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar." Although nonbinding, State Bar formal ethics opinions have been

Regulation and Discipline Committee (RAD) in accordance with applicable State Bar policy and procedure,² which provides that once COPRAC has approved a formal opinion following consideration of public comment, the formal opinion and the issue of whether the formal opinion shall be published are presented to RAD for decision.

This opinion was [previously approved](#) by the Board of Trustees, Regulation and Discipline Committee on May 13, 2021. Formal Opinion 2021-206 considers, “What ethical obligations does a lawyer have when the lawyer or a lawyer in that lawyer’s law firm has violated, is violating, or will violate the California’s Rules of Professional Conduct or the State Bar Act in the course of representing a client as a result of the lawyer’s possible mental impairment?” There are three changes recommended in the revised opinion. Two would clarify the obligations of an attorney, and the third would clarify the offerings of the State Bar Lawyer Assistance Program.

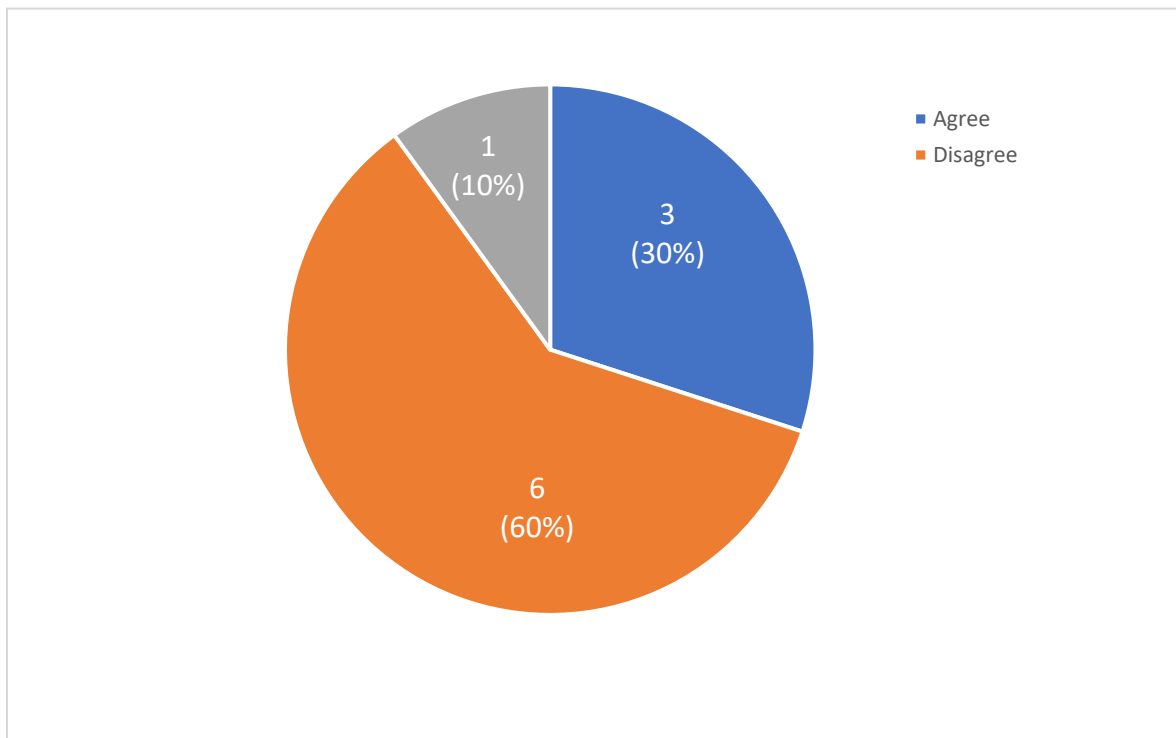
First, as part of the current opinion 2021-206, COPRAC advises that there is no duty to report any possible misconduct by the impaired colleague because there was no version of Rule of Professional Conduct 8.3 in California. However, effective August 1, 2023, the California Supreme Court approved new Rule of Professional Conduct 8.3, which obligates an attorney to report certain misconduct by another attorney. As such, proposed Revised Formal Opinion 2021-206 includes an analysis of rule 8.3. Second, the opinion adds a new footnote 7, which provides reference to proposed new Formal Opinion 2024-209 (Succession Planning), which, if also adopted by the Board, would advise that an attorney is required to evaluate whether they should have a succession plan for their practice and, if so, create such plan. This addition will assist attorneys in determining how they could assist the impaired colleague, as well as remind the attorney of their own obligations in succession planning. If the Board does not adopt proposed Formal Opinion 2024-209, this footnote will be removed prior to publication. Finally, the revised opinion clarifies that the State Bar Lawyer Assistance Program can assist a lawyer by referring them to personal counseling or career counseling sessions, as well as provide professional monitoring and participation in group sessions.

Public Comment

COPRAC conducted a 90-day public comment period regarding these three changes. There were ten public comments during the public comment period.

cited by the California courts in analyzing issues of attorney professional responsibility (See e.g., *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 459.)

² See Board Resolutions, July 1979, December 2004, and November 2016.



Three comments agreed with the opinion, one agreed with the opinion if modified, one indicated no position, and five disagreed with the opinion. Of the comments that disagreed with the opinion, none disagreed with the proposed changes to the opinion. Instead, two comments only disagreed without providing an explanation, three disagreed with the overarching duties regarding an impaired colleague that have been part of the opinion since its initial adoption in 2021³, and one was unrelated to the opinion itself. The California Lawyers Association Ethics Committee agreed with the opinion if modified to make clarifying changes, which were substantively incorporated by COPRAC.

Following consideration of the public comments received at the September 13, 2024, meeting, COPRAC approved the opinion for submission to the Board for approval and publication. COPRAC requests that the Board of Trustees sitting as RAD approves the publication of proposed Revised Formal Opinion 2021-206.

PREVIOUS ACTION

Rad previously approved the [prior version](#) of this opinion at its May 13, 2021 meeting.

FISCAL/PERSONNEL IMPACT

None

³ As part of the feedback regarding the previously adopted opinion, one commenter indicated that the prior language describing a colleague as appearing “frazzled” was too board of a description to indicate an impairment. The committee revised this language in the opinion in response to this comment.

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 3. Protect the Public by Regulating the Legal Profession

RESOLUTIONS

Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur, it is:

RESOLVED, that, following publication for public comment and consideration of the comments received, and upon the recommendation of the State Bar Standing Committee on Professional Responsibility and Conduct, the Board of Trustees sitting as the Regulation and Discipline Committee approves the publication of Revised Formal Ethics Advisory Opinion 2021-206, attached hereto as Attachment A.

ATTACHMENTS LIST

- A.** Revised Formal Opinion 2021-206
- B.** Full Text of the Public Comments Received