

ATTACHMENT B

March 1, 2013

Dear Board Members:

I am Vice Chair of the Law Committee of the Association of Discipline Defense Counsel (ADDC) (www.disciplinedefensecounsel.org). The ADDC is the bar association of lawyers who regularly represent respondents in disciplinary proceedings in State Bar Court.

On the agenda for the March 6, 2012 meeting of the Regulation, Admissions and Discipline Oversight Committee (RAD) is the Chief Trial Counsel's proposal to change Rule 5.41 of the State Bar Rules of Procedure. That rule governs the charging document that initiates a disciplinary proceeding in State Bar Court, the notice of discipline charges (NDC).

According to the accompanying memorandum prepared by the Chief Trial Counsel (CTC), the proposed change would make it clear that "notice pleading" is the standard in State Bar Court by requiring facts "in ordinary and concise language" without requiring "technical averments or ... allegations of matters not essential to be proved." The rationale for the rule change is that the Office of Chief Trial's counsel current pleading practice leads to unnecessary delay in prosecuting discipline cases.

The CTC's memorandum in support of this proposal is inaccurate, if not misleading.

First, it is represented that the modification does not change the applicable law in any way. Controlling Supreme Court and Review Department precedent require the State Bar to provide a level of detail necessary to prepare a defense, consistent with due process. But those same cases cited by the CTC, especially *Baker v. State Bar*, discuss another important purpose served by a specific pleading: insuring meaningful review of the discipline decision by the Supreme Court.

Once again we are constrained to call to the attention of the State Bar Court the importance of identifying with specificity both the rule or statutory provision that underlies each charge and the manner in which the conduct allegedly violated that rule or statutory provision. While petitioner here does not complain of any due process violation in lack of notice, this specificity is also essential to meaningful review of the recommendation of the State Bar Court. (See Guzzetta v. State Bar (1987) 43 Cal.3d 962, 968, 239 Cal.Rptr. 675, 741 P.2d 172; Maltaman v. State Bar (1987) 43 Cal.3d 924, 931, 239 Cal.Rptr. 687, 741P.2d185.)

Baker v. State Bar (1989) 49 Cal.3d 804, 816 (emphasis added).

The Supreme Court in *Baker* held that more specificity than the minimum required by due process is essential. There is no acknowledgment or discussion of this important statement of law in the CTC's memorandum in support of putting the rule change out for public counsel. Instead, this part of *Baker* is simply ignored.

Second, the Chief Trial Counsel, in her selective review of the history of disciplinary pleading, ignores the seminal event that led OCTC to its current pleading practice. I personally know that history well. At the time that event occurred, I was a Deputy Trial Counsel in the Office of Chief Counsel and participated in the Office's response to it.

That event that triggered the development of OCTC's current pleading practice was the Review Department decision *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179. Not only is the *Varakin* ignored by the CTC, but her memorandum contains this inaccurate statement:

Since and in response to these opinions, OCTC has overcompensated in its factual allegations in its NDCs. Although *Maltaman*, *Guzetta*, and *Glasser* involved criticisms of individual charging documents, not an indictment of OCTC's broader charging practices, OCTC responded *to these cases* by informally adopting a custom and practice of pleading virtually every fact that it intended to present at trial, including those not material to proving the elements of the charged offense.

(Emphasis added). This statement rewrites the historical record in two ways:

First, it was *Varakin* that prompted the change in pleading practices, not those earlier cases.

Second, *Varakin* was very much an indictment of OCTC's broader charging practices. While the statement that *Maltaman*, *Guzzetta* and *Glasser* involved criticisms of individual charging practices and not an indictment of broader charging practices might be accurate, it is nonetheless misleading because *Varakin* (and to lesser extent, *Baker*) both discuss the inadequacy of OCTC's broader charging practices. This extended excerpt from *Varakin* will allow the Committee to judge for itself the accuracy of Chief Trial Counsel's representations to it :

The State Bar still appears to be following its historic pleading practice of reciting all of the factual allegations separately from a catch-all charging paragraph which gives no explanation for the citation of any particular statute or rule allegedly violated. No justification has been offered for the continuation of this practice which was severely criticized several years ago in two Supreme

Court opinions - *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 931 and *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968 - and criticized again by the Supreme Court two years later in *Baker v. State Bar* (1989) 49 Cal.3d 804, 816.

Although the opinions in *Maltaman* and *Guzzetta* are best known for their criticism of the inadequacy of the volunteer referees' written decisions, in both *Maltaman* and *Guzzetta* the Supreme Court specified that *the charges were just as problematic as the volunteer referees' conclusory findings*, noting that, "Not only does this failure *make the work of this court more difficult ...* , but it also *brings into question the adequacy of the notice given to an attorney of the basis for the disciplinary charges.*" (*Guzzetta v. State Bar, supra*, 43 Cal.3d at p. 968, fn. 1 (citations omitted); accord, *Maltaman v. State Bar, supra*, 43 Cal.3d at p. 931, fn.1.)

In *Baker v. State Bar, supra*, the Supreme Court again pointed to the vexing problem created when the State Bar did not identify "with *specificity* both the rule or statutory provision that underlies each charge *and the manner in which the conduct allegedly violated that rule or statutory provision.*" (49 Cal.3d at p. 816 (emphasis added).) Again in *In the Matter of Glasser* (Review Dept.1990) 1 Cal. State Bar Ct. Rptr. 163, 172 the State Bar was reminded of the three prior Supreme Court admonitions. This review department then noted "It is not only incumbent upon the Office of Trial Counsel to determine which specific conduct of the respondent is at issue, but to articulate the nature of the conduct with particularity in the notice to show cause, correlating the alleged misconduct with the rule or statute allegedly violated thereby." (*Ibid.*; emphasis added.) *It is disturbing that the same pleading problems persist despite three Supreme Court opinions and a review department opinion on the subject in the past seven years.*

Varakin 3 Cal. State Bar Ct. Rptr. 179 at 185 (emphasis added, except where noted.)

The Chief Trial Counsel at the time, Judy Johnson (now Judge Johnson of the Contra Costa Superior Court) reacted to the acidic criticism in *Varakin* and ordered a complete revision of OCTC's pleading practices, and the adoption of a new pleading format that married the factual allegations with the specific section or rule allegedly violated in a separate count. I was part of the team that helped devise the practice instituted in response to *Varakin*, along with other counsel in the OCTC, some of whom continue to work there to this day.

The pleading format that we devised, the one that the CTC labels "exaggerated fact pleading" has been used for almost 18 years almost without question. It strains belief that the current Chief Trial Counsel could be unaware of *Varakin* and its

significance. The Chief Trial Counsel makes the argument that less notice is permissible in the NDC because the respondent has, at the point charges are filed, been given notice three times, first, in the initial letter from the investigator, second, in the letter notifying the respondent that OCTC intends to file charges and finally, in the early neutral evaluation conference process, where OCTC is required by rule to provide the court with a draft NDC.

Despite the language of Rule 2409, OCTC does not always contact a respondent in the investigation process before filing the NDC based on that investigation. The investigation letters that OCTC does send often just restate the complainant's allegations in broad language, allegations that may or may not be related to the misconduct that is ultimately charged. The investigation letter is usually one of the first steps in the investigation. It does not constitute adequate notice for charging purpose.

The notice of intent letter usually contains a skeletal recitation of citations to statutes and rules allegedly violated with the lawyerly caveat "including but not limited to." It usually does not discuss the facts and their relationship to the "charges." Indeed one of the purposes of the Early Neutral Evaluation Conference (ENEC) is to "smoke out" the factual basis for charging a certain rule or section because it is often unclear what OCTC's theory of culpability is. Despite the rule requiring the presentation of a draft NDC or summary of facts supporting each violation at the ENEC, OCTC does not universally adhere to this requirement. If the proposal presented to the Committee were to be adopted, the charging document for discussion at the ENEC would become the "short form" NDC. which would do little to address the "notice problem."

The Chief Trial Counsel evidently wishes to reduce the pleading standard to the barest minimum level of notice to that "consistent with criminal procedure". Those who have read the charging documents typical in criminal cases understand just how minimal that can be. The Chief Trial Counsel argues that this is acceptable because "a member's duties and oaths vis a vis the Rules of Professional Conduct and the State Bar Act are also presumed" just like every person is presumed to know the criminal law. In other words, we don't have to tell you what you did wrong; you already should know.

RAD has not been provided with an exemplar of what the proposed "short form" notice of disciplinary charges will look like. Without this specific information, it cannot be determined exactly *how* minimal the notice provided by the "short form" will be. The omission of this important information, the evident disregard for the "essential" interest identified by the Supreme Court in the *Baker* case and the misleading account of history in the memorandum from the Chief Trial Counsel, should cause this Committee to be extremely skeptical of even putting this proposal out for public comment. Endorsing "notice pleading" based on this proposal creates a real danger that the notice required in disciplinary matters will be cut down not only to the level criticized in *Baker* and *Varakin*, but a level that deprives respondents of due process.

Notice pleading in criminal courts presumes robust discovery procedures for determining the basis for the charges. With the rule changes enacted in 2011, discovery

procedures available as a matter of right in disciplinary proceedings have been pared back to a simple witness and document exchange. Those rule changes also removed the procedural protection of the Evidence Code from State Bar proceedings. The rationale for all these changes is to remove delay from the disciplinary proceedings. But the speed of the process should not be the only or even primary consideration in evaluating proposals such as the current one before the Committee. Fundamentally, any change must not lose sight of all our commitment to the process being fair. This present proposal presents a real danger of institutionalizing unfairness.

Very truly yours,
David Cameron Carr
Vice Chair of the Law Committee of the Association of Discipline Defense Counsel

cc: Jayne Kim