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Subject: OPPOSED to Proposed Amendment to Rule 5.44I(A) of the Rules of Procedure
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OPPOSED to Proposed Amendment to Rule 5.44I(A) of the Rules of Procedure

This proposal does not solve any existing problems. It may create some. I oppose the proposal.

My Background

I am in my 46th years as an attorney. My first 8 years were in general practice. My next 5 years were as a staff attorney for the State Bar. My next 9 years were as a State Bar discipline prosecutor. Since 1992, I have been in private practice, primarily representing attorneys. I have a steady practice representing attorneys in State Bar investigations and prosecutions. I also represent moral character applicants. I have advised perhaps 30 - 40 prospective reinstatement applicants and tried 5 such cases.

I am a founding member of the Association of Discipline Defense Counsel and regularly discuss Bar issues with the other 35 +/- members.

Reason for my opposition

I am not aware of any reinstatement case in which a problem arose due to the inability of the State Bar to obtain relevant information on a reinstatement applicant. I am not aware of any case in which a successful applicant was later found to have blocked the State Bar from obtaining relevant information. I am not aware of any case in which any sort of disciplinary problem arose from information that the State Bar could not obtain during the reinstatement process.

The agenda item itself does not articulate any specific problem, just a generalized desire to get information.

Under current practice, reinstatement applicants are expected to disclose financial and employment information, three years of tax returns, employment history; account for activities since the disbarment; and write a narrative that shows why they should be reinstated. They are expected to answer **relevant** requests for follow information posed by OCTC.

Sometimes, OCTC asks for information that has no reasonable relationship to the case. My experience is that when asked to explain why information is requested under current practice, most prosecutors are willing to refine a request so it applies to relevant, timely information. If there is a genuine dispute, a brief motion gets a judge to resolve it.

The risk to an applicant for withholding valid consent or information is great -- the applicant has the burden of proof, by clear and convincing evidence, and the failure to provide relevant information can be used to deny the application.

The overlooked public protection issue

Often times, confidential information and documents identify third parties and describe unfounded allegations against them. And from time to time, confidential

information either slips out or is misused. Here, the State Bar seeks the broadest amount of information under the broadest waiver, and then absolves itself for any misuse or negligent treatment of the information. The public is not protected when a government entity can demand all sorts of private information, without guidelines, and then claims that the entity is not responsible for misuse of that information. The opposite should be true. If the State Bar demands the unfettered right to gather unlimited amounts of sensitive information, the State Bar should take full responsibility for handling that information.

The release purports to absolve from liability, "any Third Party." Thus, if the State Bar improperly releases information to a third party, and that person misuses the information, even that person is allegedly absolved of responsibility. This sort of release threatens the public.

I don't make up this issue lightly. With all its controls, the State Bar does sometimes slip up. For example, a DTC once obtained a confidential federal probation report and release it in the litigation. Another DTC once agreed to provide a witness with a transcript of the witness's own statement, then released the entire investigation file by mistake. Another DTC once released the privileged portion of a file and retained the unprivileged portion. None of these were deliberate; they are the sort of errors that can occur in any large office over time.

Conclusion

The agenda item does not identify any pattern of problems in reinstatement cases. It does not even purport to identify one past problem. Rather, it speaks of a bureaucracy that would like to fish around for sensitive and private information and absolve itself for any misuse of that information. This proposal should be voted down.

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