

# **OPEN SESSION AGENDA ITEM**

## **REGULATION AND DISCIPLINE COMMITTEE – B.4**

**DATE:** May 17, 2018

**TO:** **Members, Regulation and Discipline Committee**

**FROM:** Antonia G. Darling, Chief Court Counsel, State Bar Court

**SUBJECT:** Request to Circulate for Public Comment Changes to the Rules regarding Defaults (Proposal to Amend Rules 5.80 and 5.85, Rules of Proc. of State Bar)

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### **EXECUTIVE SUMMARY**

The Rules of Procedure that deal with the process for (1) entry of default against a respondent who fails to respond to a Notice of Disciplinary Charges (NDC), and (2) for bringing a petition for disbarment based upon the default, do not provide a time deadline for Office of the Chief Trial Counsel (OCTC) to bring the actions. This proposal would amend rules 5.80 (Entry of Default), and 5.85 (Petition for Disbarment) to require that the motion for entry of default and the petition for disbarment be filed within 15 days after OCTC becomes entitled to do so.

In addition, rule 5.80(a)(4) is proposed to be amended to require that the motion for entry of default must include as part of its proof of service a copy of the certified mail tracking records to show when the NDC was sent and whether it was delivered.

This item requests that the Board circulate, for a 45-day public comment period, proposed amendments to State Bar Rules of Procedure.

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### **BACKGROUND**

The Rules of Procedure provide that a disciplinary proceeding is commenced by OCTC with the filing and service of an NDC. Rule 5.35 provides that service of an NDC on a respondent is to be made by certified mail, return receipt requested, directed to the attorney's official membership records address (if that address is in the United States) or by "certified mail or other conforming method that confirms delivery" (if the address is outside the United States). Service by posting the NDC in conformance with this rule is deemed by statute to be effective service. (Bus. & Prof. Code, § 6002.1, subd. (c).) Once the NDC is served, the respondent has 20 days to appear in the action, by filing either a motion to dismiss or an answer to the charges.

Although section 6002.1 requires that an attorney's official membership address be kept current, the incident of non-compliance with this requirement is high. (Rule 5.80(B)(2).) When named respondents receive actual notice of a disciplinary proceeding pending against them, those who

intend to appear in the proceeding will eventually take steps to do so. However, often the only pressure on respondents to appear in an action is the filing of a motion for entry of default.

The time for a filed disciplinary action to get to trial begins to run when the NDC is sent by certified mail to the respondent. Where there is any extended delay, it is common for one or both of the parties to seek a continuance of the scheduled trial date and to show good cause for one to be granted. The result is to delay both the commencement of the trial and the eventual resolution of the proceeding. Such delays are inconsistent with a disciplinary goal of protecting the public. Therefore setting a deadline for OCTC to bring the default motion will motivate respondents to take action if they intend to, and allow the case to move forward expeditiously if the respondent does not intend to participate.

In addition, the current rules do not require that the motion for entry of default include a tracking report showing that the certified mail was actually delivered by the postal authority to the respondent's official membership records address. Rule 5.25 expressly defines the approved manner of service to include the availability of such tracking information, for the purpose of enabling the court and parties to verify that the NDC was validly served. But when OCTC provides only the tracking number to the court (but not the tracking report itself), ethical rules prohibit the court from conducting its own investigation outside the record by checking the internet to confirm that the NDC was properly sent and delivered. (See Rothman, California Judicial Conduct Handbook, 4th ed. (2017), §5.16 ["Gathering evidence outside the record"], pp. 286-289.)

In considering whether to enter a respondent's default, the need for both OCTC and the State Bar Court to actually verify that the NDC was properly and timely delivered to the respondent's official membership records address is an important protection for the respondent.

Rule 5.85(A) provides that if the member fails to set aside the default, OCTC must file a petition requesting the Court to recommend the member's disbarment to the Supreme Court. While the rule specifies the "earliest" date that OCTC may file such a petition, it neither requires OCTC to act promptly after that earliest date has passed nor provides a deadline by which the petition must be filed. The State Bar Court is without power to resolve the matter without OCTC's petition. This delays both the ability of injured former clients to obtain financial relief from the Client Security Fund and the court's resolution of the proceeding within the case-handling time standards established for State Bar Court proceedings.

## **DISCUSSION**

This proposal would ensure that a motion for entry of default will be filed promptly, absent an agreement or an order extending the time for filing a response. Having a 15 day deadline will allow the prosecuting attorney to impress on the respondent the urgency of acting promptly, while eliminating delay caused when the respondent does not intend to participate.

Requiring that the motion for default include as part of its proof of service a copy of the certified mail tracking records to show when the NDC was sent and whether it was delivered, serves to protect a respondent; informs the court as to the factual basis for a requested default; and avoids the delays in the disciplinary process when a previously-entered default is subsequently vacated as having been unjustified.

While the attorney is involuntarily enrolled ineligible to practice law at the time the default is entered, the actual disciplinary charges remain undecided until after the default proceeding is completed by the State Bar Court and sent to the Supreme Court for determination. Avoidable delays in resolving the disciplinary charges still pending against the defaulting attorney benefits

the parties who have been injured by a respondent and are consistent with the disciplinary processes' goal of protecting the public. This proposed amendment seeks to eliminate such unnecessary delays in the default process by adding a 15 day deadline to file the petition for disbarment following the default.

These proposed amendments to Rules 5.80 and 5.85 will address the unnecessary delays in the default process.

OCTC staff comments were taken into consideration and adjustments were made to the language.

#### **FISCAL/PERSONNEL IMPACT**

Minor savings of time for court staff.

#### **RULE AMENDMENTS**

Title 5, Division 2, Chapter 5, Rules 5.60 and 5.85, Rules of Procedure of the State Bar.

#### **BOARD BOOK AMENDMENTS**

None.

#### **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

#### **RECOMMENDATION**

**It is recommended that the Regulation and Discipline Committee approve the following resolution:**

**RESOLVED**, that staff is authorized to make available, for public comment for a period of 45-days, proposed amendments to: Title 5, Division 2, Chapter 5, Rules 5.80 and 5.85 of the Rules of Procedure of the State Bar;

and it is

**FURTHER RESOLVED**, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed amended Rules of Procedure or Board policy.

#### **ATTACHMENT(S) LIST**

- A. Proposed language of Rule 5.80 and 5.85 (Clean version).
- B. Proposed language of Rules 5.80 and 5.85 (Redline version).

**ATTACHMENT A**  
**Proposed Revised Rule of Procedure 5.80 and 5.85**  
**Clean version**

**Rule 5.80 Default Procedure for Failure to File Timely Response**

- (A) Motion for Entry of Default.** When a member fails to timely file a response, the deputy trial counsel must file and serve on the member a motion for entry of default. The motion must be filed within 15 days after the response is due, absent an agreement or order extending the time for filing by the member of a response, and must contain:
- (1) The filing date of notice and date of service of disciplinary charges;
  - (2) A statement that the member did not timely file a response under rule 5.43;
  - (3) The following language in prominent type:  
“If you do not file a response with the State Bar Court within 10 days of service of this motion, the court will enter your default, deem the facts in the notice of disciplinary charges admitted by you, and may admit evidence against you that would otherwise be inadmissible. You will lose the opportunity to participate further in these proceedings unless you timely make—and the court grants—a motion to set aside your default. If your default is entered, and you fail to timely move to set it aside, this court will enter an order recommending your disbarment without further hearing or proceeding.”;
  - (4) An authenticated print-out of the certified mail tracking report of the United States Postal Service, showing that the mailing of the initiating pleadings or notice was sent by certified mail and the status of its delivery and possible receipt.
- (B) Declaration of Reasonable Diligence.** The motion must be supported by a declaration establishing that the deputy trial counsel acted with reasonable diligence to notify the member of the proceedings. The declaration must:
- (1) State whether a signed return receipt for the notice of disciplinary charges was received from the member;
  - (2) If a signed return receipt is not received from the member, show the deputy trial counsel or agent took those additional steps a reasonable person would have taken under the circumstances to provide notice.
- (C) Service of Default Motion.** The deputy trial counsel must serve the motion under rule 5.25.
- (D) Order Entering Default.** If the member fails to file a written response within 10 days after the motion is served, the court may order the entry of the

member's default. Service of the default order must comply with rule 5.25. The order must include this language in prominent type:

"Because you did not timely file a response to the notice of disciplinary charges filed in this proceeding, the court has entered your default and deemed the facts alleged in the notice of disciplinary charges admitted. Except as ordered by the court, you may participate in these proceedings only if the court sets aside your default. If you fail to timely move to set aside your default, this court will enter an order recommending your disbarment without further hearing or proceeding. (Rule 5.80 et seq., Rules of Procedure of the State Bar of California.)"

### **Rule 5.85 Petition for Disbarment After Default**

- (A) Petition.** If the member fails to have the default set aside or vacated, the Office of Chief Trial Counsel must file a petition requesting the court to recommend the member's disbarment to the Supreme Court. The petition must be supported by one or more declarations stating whether:

  - (1) Any contact with the member has occurred since the default was entered;
  - (2) Any other investigations or disciplinary charges are pending against the member;
  - (3) The member has a prior record of discipline; and
  - (4) The Client Security Fund has paid out claims as a result of the member's misconduct.
- (B) Support for Petition.** All documents referenced in a petition, including prior records of discipline, must be filed with the petition and supported by declaration.
- (C) Timing of Petition.** The earliest a petition may be filed is:

  - (1) 91 days after the default order is served under rule 5.80, or
  - (2) 46 days after the default order is served under rule 5.81.
- (D) Service.** The Office of Chief Trial Counsel must serve the petition under rule 5.25, and must file a petition for disbarment within 15 days after it becomes entitled to do so pursuant to this rule.
- (E) Response.** Within 20 days of service of the petition, the member may file and serve a motion to set aside or vacate the default.
- (F) Ruling.**

  - (1) If the member fails to file a response or the court denies a motion to set aside or vacate the default and all other relief from default, the court must recommend the member's disbarment if the evidence shows:

- (a) The notice of disciplinary charges was served on the member properly;
  - (b) The member had actual notice or reasonable diligence was used to notify the member of the proceedings prior to the entry of default;
  - (c) The default was properly entered; and
  - (d) The factual allegations deemed admitted in the notice of disciplinary charges or pursuant to the notice of hearing on conviction support a finding that the member violated a statute, rule, or court order that would warrant the imposition of discipline.
- (2) If the court determines that any of the factors set forth under subdivision (1) is not established, it must deny the petition, vacate the default, and take other appropriate action to ensure that the matter is promptly resolved.

## ATTACHMENT B

### Proposed Revised Rule of Procedure 5.80 and 5.85

#### Redline version

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- (D) **Order Entering Default.** If the member fails to file a written response within 10 days after the motion is served, the court may order the entry of the

member's default. Service of the default order must comply with rule 5.25. The order must include this language in prominent type:

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