

AGENDA ITEM

May 122

Proposed Amendment to Rules of Procedure of the State Bar, Rule 5.41, Authorizing “Notice Pleading” in Notice of Disciplinary Charges. Request for Adoption following Public Comment.

DATE: April 29, 2013

TO: Members, Regulation, Admissions and Discipline Oversight
Members, Board of Trustees

FROM: Jayne Kim, Chief Trial Counsel

SUBJECT: Proposed Amendment to Rules of Procedure of the State Bar,
rule 5.41 – Request for Adoption following Public Comment

EXECUTIVE SUMMARY

At its March 2013 meeting, the Committee on Regulation, Admissions and Discipline Oversight (“RAD”) approved circulation of the proposed amendment to rule 5.4, Rules of Procedure of the State Bar of California, for a 45-day period of public comment. The Office of Chief Trial Counsel (OCTC) received one public comment during the 45-day public comment period and received one comment prior to the commencement of the public comment period.

BACKGROUND

Rule 5.41 governs the contents and manner in which misconduct must be alleged in the Notice of Disciplinary Charges (“NDC”), which is the formal charging document in State Bar disciplinary proceedings. Subsections (B)(1-3) of rule 5.41 reflect the minimum requirements expected in a NDC and are not inconsistent with notice pleading.

The proposed amendment to rule 5.41 does not involve any substantive revision to the rule. The proposed amendment to rule 5.41 merely clarifies that a NDC need not contain technical averments or any allegations of matters not essential to be proved and that the statement of facts shall be written in concise and ordinary language.

More specifically, the proposed amendment is limited to subsection (B)(2) and is as follows:

[Proposed] Rule 5.41:

(A) Initial Pleading. A notice of disciplinary charges is the initial pleading in a disciplinary proceeding, unless specified otherwise in the rules.

(B) Contents. The notice of disciplinary charges must:

(1) cite the statutes, rules or Court orders that the member allegedly violated or that warrant the proposed action;

(2) contain ~~a statement of facts~~, in concise and ordinary language, comprising the violations in sufficient detail to permit the preparation of a defense; no technical averments or any allegations of matters not essential to be proved are required;

(3) relate the stated facts to the statutes, rules or Court orders that the member allegedly violated or that warrant the proposed action;

(4) contain a notice that the member may be ordered to pay costs; and

(5) contain the following language in capital letters at or near the beginning of the notice:

“IF YOU FAIL TO FILE A WRITTEN ANSWER OT THIS NOTICE
WITHIN 20 DAYS AFTER SERVICE, OR IF YOU FAIL TO APPEAR
AT THE STATE BAR COURT TRIAL:...”

Based upon the comments received, OCTC proposes that this Committee recommend that the Board of Trustees adopt the amendment to rule 5.41 in the form hereto attached as Attachment C, effective January 1, 2014, and the amended rule will apply to all future matters filed in the State Bar Court.

PUBLIC COMMENT

The only public comment received during the 45-day public comment period was from former Board President John K. Van de Kamp in support of the proposed amendment. A copy of the text of this public comment in support is hereto attached as Attachment A. As reflected in Attachment A, John K. Van de Kamp's opinion is based upon his experience as RAD Chair in 2003-04 and his work with the United States Attorney's Office and the Federal Public Defender's Office. In summary, while RAD Chair, Mr. Van de Kamp was surprised by the extraordinary detail that went into disciplinary pleadings and believed that substantial attorney time was wasted in the drafting of lengthy, cumbersome and overly detailed pleadings. Mr. Van de Kamp recognized that defense counsel would want as much information as possible to use OCTC's present format of "exaggerated" pleadings to challenge and urge exclusion of information not mentioned in the NDC. As a whole, however, the proposed amendment

is modest and should provide adequate notice and adequate opportunity for discovery before filing. Consequently, Mr. Van de Kamp urges Board approval of the proposed amendment.

The only other comment received was from David C. Carr in opposition of the proposed amendment. A copy of the text of this comment is hereto attached as Attachment B. As reflected in Attachment B, David C. Carr's opinion is based upon his background as a former OCTC attorney and current disciplinary defense counsel. In summary, Mr. Carr believes that Supreme Court precedent requires "more specificity" than the minimum required by due process, that existing procedural safeguards are not sufficient to warrant notice pleading, that OCTC is selectively ignoring case precedent and rewriting the history behind OCTC's current pleading practice.

OCTC RESPONSE TO PUBLIC COMMENT OPPOSING THE PROPOSED RULE

Notably, nowhere in Mr. Carr's comment does he object to or otherwise challenge the actual language of the proposed amendment to rule 5.41. The actual proposed language does not revise the minimum requirements of a NDC nor otherwise makes substantial revision to the rule. In fact, nothing in the proposed language contradicts or conflicts with existing case law. The proposed amendment merely clarifies that a NDC shall be written in concise and ordinary language, comprising the violations in sufficient detail to permit the preparation of a defense but not requiring technical averments or any allegations of non-essential matters.

As Mr. Carr's opposition makes several different arguments, this response will address them individually as follows:

Baker v. State Bar

In his comment, Mr. Carr claims that the Supreme Court in *Baker* required "more specificity than the minimum required by due process" and that OCTC selectively ignored the holding in *Baker* in Agenda Item 111 March 2013, Proposed Amendment to Rules of Procedure of the State Bar, rule 5.41, Authorizing "Notice Pleading" in Notice of Disciplinary Charges ("OCTC's memorandum"). To support this claim, Mr. Carr relied upon the following quote from *Baker*:

"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."

Baker v. State Bar, supra, 49 Cal.3d at 816.

Because Mr. Carr's comment did not provide a factual understanding of *Baker*, a summary is provided herein. The disciplinary proceeding in *Baker* was based upon stipulated (uncontested) facts involving ten separate client matters. The State Bar Court had found violations of Business and Professions Code sections 6068 (duties of an attorney), 6103 (violation of a court order) and 6106 (moral turpitude) in each of the client matters. Upon review of the stipulated facts, however, the Supreme Court concluded that several of the charges and findings failed to allege or state the manner in which Baker's conduct had violated the statutes. For example, the only plausible grounds for a finding of moral turpitude were Baker's misappropriation of advanced costs or his knowing issuance of checks without sufficient funds. In some client matters, however, the stipulated facts regarding moral turpitude only included Baker's issuance of bad checks and did not include evidence of Baker's knowledge of insufficient funds or evidence of misappropriation. In that context, the Supreme Court admonished the State Bar Court of the "importance" of specificity which was "essential to meaningful review" by the Supreme Court.

OCTC does not agree with Mr. Carr's contention that the Supreme Court somehow requires "more specificity" than that which suffices for due process. OCTC does agree, however, that a NDC must identify with specificity the rule or statute allegedly violated and the manner in which the rule or statute was violated. In fact, OCTC's memorandum specifically acknowledged the notice requirements as discussed in *Baker* and other influential cases, as follows:

"The seminal case on the topic of adequacy of notice is *Woodard v. State Bar* (1940) 16 Cal.2d 755. In that case, the Supreme Court emphasized that "[t]he right to practice law is a valuable one which should be suspended or revoked only on charges alleged and proved and to which full notice and opportunity to defend have been accorded." (*Id.* at 757.)

Woodard disapproved of a disciplinary culpability finding of a violation for which the Respondent was not charged in the initial notice to show cause. The court in *Woodard* affirmed the need to, at the very least, file a formal amendment to the notice citing the particular regulation alleged to have been violated and provide the respondent with a reasonable opportunity to formally answer those amended charges and procure evidence in his or her defense. Since then, the Supreme Court held fast to this requirement in numerous published cases. (e.g., *Gendron v. State Bar* (1983) 35 Cal.3d 409, 420.)

In 1987, a pair of Supreme Court cases criticized the State Bar for deficiencies in its Notices to Show Cause (renamed Notice of Disciplinary Charges, effective January 1, 1995). In *Maltaman v. State Bar* (1987) 43 Cal.3d 924, the Supreme Court disapproved of "material gaps in the analytical path from charges to proof to findings and conclusions to recommendations" (*Id.* at 931) as well as "mismatched" charges. (*Id.* at 932.) In *Guzetta v. State Bar* (1987) 43 Cal.3d 962, the court criticized the notice's failure to relate the conduct charged to the statute or rule alleged

to have been violated. In *Baker v. State Bar* (1989) 49 Cal.3d 804, the court once again highlighted these two basic requirements. (*Id.* at 816.) Subsequent to *Maltaman*, *Guzetta* and *Baker*, the State Bar codified these requirements into the Rules of Procedure. These attempts are reflected in the current rule 5.41(B)(3)."

OCTC's memorandum, page 5.

Notably, the proposed amendment to rule 5.41 does not alter subsection (B)(3) in any way, so the requirement that alleged facts correlate to the specific rule and statutory violations charged remains in effect.

In the Matter of Varakin

In his comment, Mr. Carr claims that OCTC ignored *Varakin* and rewrote the history behind OCTC's pleading practice. Mr. Carr claims that it was inaccurate for OCTC to state that "[a]lthough *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." The decisions in *Maltaman*, *Guzetta*, and *Glasser*, however, did focus on the individual charging documents, not on broader charging practices. Regardless, Mr. Carr contends that *Varakin* was an indictment of OCTC's broader charging practices and it was *Varakin* – not earlier cases – that prompted changes in OCTC's pleading practice. Here, a review and understanding of *Varakin* is helpful.

The *Varakin* disciplinary proceeding focused on misconduct in four matters wherein Varakin, representing himself and sometimes his mother, filed numerous frivolous motions for the purpose of harassment and intentionally failed to report sanctions and to cooperate with State Bar investigations. Count One of the NDC alleged misconduct in all four matters with a catch-all paragraph concluding that Varakin had "committed the above-referenced acts in willful violation of [his] oath and duties as an attorney under disciplinary case law and/or California Business and Professions Code sections 6068(b), 6068(c), 6068(f), 6068(g), 6103 and 6106; and of former Rules of Professional Conduct 2-110(A), 2-110(B), 2-110(C), 6-101(A)(2), and 6-101(B)(2); and of current Rules of Professional Conduct 3-110(A), 3-200(A), 3-200(B), 3-700(B)(1)." See *In the Matter of Varakin, supra*, 3 Cal. State Bar Ct. Rptr. 179.

On review, Varakin argued that the NDC had failed to correlate respondent's conduct with the alleged rule and statutory violations. The State Bar responded that Varakin had waived the issue by failing to file a motion to dismiss and failed to show prejudice given that the State Bar's pretrial statement specified the reasons for each of the charges. The Review Department agreed with both parties and, ultimately, recommended Varakin's disbarment. Relying upon earlier cases such as *Maltaman*, *Guzetta*, and *Glasser*, the Review Department specifically held:

“As we observed in *In the Matter of Glasser*, before the State Bar files charges it has a duty to determine whether reasonable cause exists for charging a member with statutory or rule violations. (*citations omitted*). Presumably, the draftspersons of the notices to show cause in *Maltaman*, *Guzzetta*, *Baker*, *Glasser* and the instant case knew why violation of every statute and rule listed in the catch-all final paragraph of each pleading was charged. **All that the Supreme Court and this court require is that the reason be articulated in the pleading so that neither the respondent nor the court is left to guess at the reason for any specified rule or statute being listed as violated. This should not place an undue burden on the State Bar which must in any event establish that correlation clearly and convincingly in order to prevail at trial.**”

Id. at 185. (Emphasis added).

In short, the discussion of notice in *Varakin* includes a recitation of prior cases all of which were referenced and discussed in OCTC’s memorandum. Although Mr. Carr contends that *Varakin* alone is responsible for OCTC’s current pleading practice, the *Varakin* decision itself demonstrates a broader historical record and supports OCTC’s proposed amendment to rule 5.41.

Under the very reasoning of *Varakin*, which Mr. Carr relies upon, notice pleading is sufficient where a NDC articulates the reason why violations of specific rules or statutes were alleged. Proposed rule 5.41, as drafted, neither changes the substance of the rule nor ignores existing case law.

OCTC’s Exaggerated Fact Pleading

In his comment, Mr. Carr states that he was part of the OCTC team that devised the current pleading format which married factual allegations with specific rules or statutes and that the current pleading format has been used for approximately 18 years virtually without question.

First, OCTC disagrees that the current pleading format has been used without question. As stated in OCTC’s memorandum, defense bar has been able to use OCTC’s exaggerated form of fact pleading as a sword in challenging and excluding relevant evidence at trial if not specifically articulated in the NDC. Second, current State Bar personnel is well versed in the history of OCTC’s pleading practice. Third, the proposed amendment to rule 5.41 does not change the requirement of relating factual allegations with specific rules or statutes that are alleged to have been violated.

Procedural Safeguards

In his comment, Mr. Carr claims that the pre-filing procedural safeguards mentioned in OCTC's memorandum are not always followed and that the procedural safeguards do not constitute adequate notice for charging purposes.

Notably, Mr. Carr failed to provide any factual support for his claims asserting that OCTC does not always send investigation letters to respondents as required by rule 2409, that when OCTC sends investigation letters, the letters broadly restate the complainant's allegations which may or may not relate to the misconduct ultimately charged, and that OCTC does not universally adhere to the requirement that it provide a draft NDC or summary of facts supporting each violation at an early neutral evaluation conference ("ENEC"). What is also notably missing from Mr. Carr's comment is the fact that if OCTC fails to comply with the procedural safeguards, the available remedy is dismissal.

In fact and in truth, OCTC makes every effort to comply with procedural safeguards because non-compliance would likely result in a dismissal of the action. This remedy was recognized in *In the Matter of Respondent AA* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 727, wherein the Hearing Department dismissed charges based upon uncontroverted evidence that the respondent had been deprived of the opportunity to participate in a 20-day meeting and ENEC. The Review Department found that the Hearing Department had not abused its discretion by dismissing the NDC without prejudice on the grounds that a typographic error on the respondent's change of address form had caused the State Bar's correspondence to be returned as undeliverable, the respondent had not deliberately avoided the State Bar's investigation or requirements, the State Bar had not prejudiced by the dismissal, and the respondent should not be deprived of "significant procedural opportunities" such as the 20-day meeting and ENEC. *Id.* at 727-730.

In short, nothing about proposed rule 5.41 alters due process requirements or minimizes other existing procedural safeguards.

Speculation Regarding "Minimal" Pleadings

Mr. Carr's comment concludes by criticizing OCTC's analogy to criminal notice pleading and the Board's previous amendments to the rules of procedure as they relate to discovery and evidence.

The Supreme Court, however, has recognized that legal protections in the disciplinary system often invoke civil and criminal procedural rules when necessary to insure administrative due process. See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 225-226; *Werner v. State Bar* (1944) 24 Cal.2d 611, 615. Moreover, the Review Department in *Glasser* held that the principle of due process in criminal settings applied with "equal force in State Bar proceedings." See *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 168. "Due process of law requires that an accused be

advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.” *Id.* citing *People v. Thomas* (1987) 43 Cal.3d 818, 823.

It is therefore understandable why OCTC’s memorandum provided a discussion of the rules governing criminal proceedings and, in particular, an analogy to Penal Code section 952 which provides that a criminal charge shall contain a statement “made in ordinary language without any technical averments or any allegations of matter not essential to be proved” that the accused committed a specified public offense. See OCTC memorandum, page 4.

Mr. Carr’s charge that proposed amended rule 5.41 would permit OCTC to lower its pleading standard to an unacceptable level of notice like that “typical in criminal cases” ignores the express language of rule 5.41 which requires certain minimum requirements in a NDC and which is not affected by the proposed amendment. As demonstrated by the limited proposed amendment and the plain language of the rule, a move to short-form or notice pleading would still require a NDC to state the rules, statutes or orders allegedly violated, state facts in sufficient detail to permit the preparation of a defense, and relate the stated facts to the statutes, rules or court orders allegedly violated.

Exemplars of the Proposed “Short Form” NDC

What may be at the heart of Mr. Carr’s comment is a desire to force OCTC to produce public templates of its (future) NDCs or, in other words, to peek into the internal thinking and workings of OCTC. According to Mr. Carr, “[w]ithout this specific information, it cannot be determined exactly *how* minimal the notice provided by the “short form” will be.”

However, OCTC does not now publically disseminate NDC templates or draft NDCs unless the draft NDC is produced for a scheduled ENEC, pursuant to rule 5.30.

The narrowly drafted proposed rule amendment – **which neither adds nor takes away from the minimum requirements of a NDC** – does not change any existing State Bar procedure nor alter the available remedies for challenging a defective NDC in court.

Challenges based upon inadequacy of notice, therefore, should continue to be made before the State Bar Court and this Committee should not be swayed otherwise by meritless claims of insidious motives by OCTC or a vague cry of potential due process violations. Each NDC is based upon the unique facts and circumstances of the case and, as addressed above, must not only identify the specific statutes or rules alleged to be violated but also state the facts that comprise the violations in sufficient detail to explain the manner in which a respondent’s conduct allegedly violated the rule or statute and to permit the preparation of a defense at trial.

In conclusion, proposed rule 5.41 does not lessen notice requirements or otherwise involve substantive change to existing rule of law. To the contrary, the language of proposed rule 5.41 explicitly preserves the minimum requirements of a NDC and, therefore, will continue to mandate that OCTC: (1) specify statutes, rules or Court orders that the member allegedly violated, (2) allege facts comprising the violations in sufficient detail to permit the preparation of a defense, and (3) correlate the stated facts to the statutes, rules or Court orders that the member allegedly violated or that warrant the proposed action.

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

The rule amendment will modify Title V, Division II, Chapter 2, Rule 5.41.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

OCTC recommends amendment to rule 5.41 in the form hereto attached as Attachment C.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Regulation, Admissions and Discipline Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Regulation, Admissions and Discipline Oversight Committee recommends that the Board of Trustees adopts the proposed amendment to rule 5.41, Rules of Procedure of the State Bar of California, effective January 1, 2014, as set forth herein in Attachment C.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board of Trustees concur with the Committee on Regulation, Admissions and Discipline Oversight's recommendation, the following resolutions would be in order:

RESOLVED, that upon the recommendation of the Committee on Regulation, Admissions and Discipline Oversight, the Board of Trustees hereby adopts the amendment to rule 5.41, Rules of Procedure of the State Bar of California, effective January 1, 2014, as set forth herein in Attachment C.