

# AGENDA ITEM

**DATE:** November 6, 2015

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

**FROM:** Jayne Kim, Chief Trial Counsel

**SUBJECT:** Proposed Amendment to Rule 5.441(A) of the Rules of Procedure of the State Bar of California Relating to the Filing Requirements for Reinstatement Proceedings. Request for Release for Public Comment.

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## EXECUTIVE SUMMARY

A reinstatement petitioner is a party seeking reinstatement to membership in the State Bar of California after disbarment or resignation. The proposed amendment to rule 5.441(A) of the Rules of Procedure of the State Bar of California would require reinstatement petitioners to sign and serve on the Office of Chief Trial Counsel (OCTC) an authorization and release similar to that required of applicants seeking admission to the State Bar of California. The proposed reinstatement authorization and release would authorize third parties to cooperate with OCTC in providing relevant information and documents regarding the petitioner, facilitating OCTC's ability to complete a prompt and thorough investigation within 120 days from the filing of a reinstatement petition. OCTC seeks to circulate, over a 45-day public comment period, a proposed amendment to rule 5.441(A) and corresponding proposed authorization and release form.

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## BACKGROUND

A party seeking reinstatement to membership in the State Bar after disbarment or resignation must, among other things, establish present moral qualifications for reinstatement, pursuant to rule 5.445, Rules of Procedure of the State Bar of California. If the petitioner is seeking reinstatement after disbarment or resignation with charges pending, the petitioner must also establish rehabilitation from prior misconduct.

A petitioner initiates reinstatement proceedings by filing a verified petition with the Clerk of the State Bar Court and complying with service and pre-filing requirements as stated in rule 5.441. OCTC has 120 days from the filing of the petition to complete an investigation to determine whether to oppose the petition for reinstatement. As provided in rule 5.443, the 120-day investigation period may not be extended without a finding of good cause by the State Bar Court.

The current rules governing reinstatement proceedings do not require the petitioner to sign an authorization and release of any kind. In contrast, applicants seeking first-time admission to the State Bar must sign a broad authorization and release enabling the Committee of Bar Examiners (CBX) and its agents to conduct a thorough investigation in order to appropriately evaluate an applicant's moral character.

The proposed amendment to rule 5.441(A) would require reinstatement petitioners – who have been previously disbarred or resigned from the practice of law – to sign an authorization and release similar to that required of applicants seeking first-time admission. This authorization and release would better enable OCTC to conduct a thorough investigation in order to appropriately evaluate the petitioner’s moral qualifications for reinstatement and evaluate the petitioner’s rehabilitation in cases where the petitioner has been disbarred or resigned with charges pending.

## DISCUSSION

The proposed amendment to rule 5.441(A), in essence, adds language requiring a reinstatement petitioner to complete an authorization and release form, as reflected in Attachment A and as follows:

### Current rule 5.441(A)

Filing Petition and Disclosure Statement. A petitioner must complete and verify a petition and disclosure statement on the forms approved by the Court and in compliance with the instructions therein. The original and three copies of the petition must be filed with the Clerk of the State Bar Court. The disclosure statement is not filed with the Court but must be served on the Office of the Chief Trial Counsel.

### Proposed amended rule 5.441(A)

Filing Petition, ~~and~~ Disclosure Statement, and Authorization and Release. A petitioner must complete and verify a petition and disclosure statement on the forms approved by the Court and in compliance with the instructions therein. The original and three copies of the petition must be filed with the Clerk of the State Bar Court. The disclosure statement is not filed with the Court but must be served on the Office of the Chief Trial Counsel. In addition, a petitioner must complete an authorization and release approved by the State Bar. The authorization and release is not filed with the Court but must be served on the Office of the Chief Trial Counsel.

Under the current rules, OCTC is limited to a 120-day investigation period following the filing of a reinstatement petition – an investigation period which may not be extended without a finding of good cause by the State Bar Court. This limited four-month period is challenging by itself, particularly considering the time-consuming nature of the subpoena process and where OCTC is seeking information from third parties in jurisdictions beyond the reach of its subpoena power or must investigate a time prior to the petitioner’s disbarment or resignation.<sup>1</sup> An authorization and release from the petitioner would expedite the investigation process and facilitate OCTC’s ability to conduct a thorough and prompt investigation into the petition’s present moral qualifications and, where applicable, rehabilitation from prior misconduct.

An amendment to rule 5.441(A) to require reinstatement petitioners to sign and submit to OCTC a broad authorization and release, similar to the one currently required of first-time applicants

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<sup>1</sup> OCTC may investigate conduct which occurred prior to the petitioner’s disbarment or resignation with charges-pending where the petitioner claims that the misconduct which led to disbarment or resignation was aberrational or where there is evidence of prior misconduct that had not been fully investigated at the time of disbarment or resignation.

for admission, will serve to protect the public and promote confidence in the profession and administration of justice in that it will empower OCTC investigators to complete more efficient and thorough reinstatement investigations within the short period allowed. It will promote cooperation by third parties to provide relevant information and documents to OCTC. Moreover, it will help ensure that all relevant evidence is available for presentation in a reinstatement proceeding and, consequently, aid the Court in its determination as to whether the petitioner is, in fact, rehabilitated and morally fit to practice law.

Attachment B is a copy of the current authorization and release required of every applicant seeking first-time admission to the State Bar of California. The admission authorization and release enables CBX and its agents to conduct a thorough investigation in order to appropriately evaluate an applicant's moral character to assure that only those who possess the requisite good moral character are admitted to practice law in California. The authorization and release specifically authorizes CBX and its agents to conduct an investigation into the applicant's moral character. And, more importantly, it authorizes third parties to cooperate with CBX in providing relevant information and documents regarding the applicant. Specifically, it authorizes "every person, organization, association, firm, company, corporation, school, employer (past or present), bank, financial institution, franchise tax board, consumer or credit reporting agency, law enforcement agency, governmental agency or instrumentality, court, or any other third party (collectively "Third Party") having an opinion about [the applicant] or knowledge or control of any documents, records, or data pertaining to [the applicant], including but not limited, any confidential or sealed records, public or private disciplinary records, or any criminal history record information (collectively "Information") to reveal, furnish, and release to CBX any such Information, and further authorizes and requests any Third Party to answer any and all inquiries, questions, or interrogatories asked by the CBX concerning [the applicant] or such Information about [the applicant] and to appear before the CBX or the State Bar Court and give full and complete testimony concerning [the applicant] or such Information about [the applicant]."

The admissions authorization further specifically authorizes the National Personnel Records Center, St. Louis, Missouri, or other custodian of the applicant's military records, to release information from the applicant's military personnel file to CBX. It also specifically authorizes other state bars, bar associations, bar grievance councils, and educational institutions to release information and documents regarding the applicant to CBX. Finally, the authorization includes a release of the State Bar and its officers, employees, agents and representatives and any third party from any claims arising out of or in connection with any information furnished to CBX pursuant to the authorization and release.

OCTC seeks to utilize a similar authorization and release for reinstatement proceedings where a disbarred or resigned attorney is seeking re-admission to the practice of law. As referenced above, unlike first-time applicants for admission, petitioners seeking reinstatement are not currently required to sign an authorization and release of any kind. While the public protection reasons for requiring applicants for admission to sign an authorization and release are obvious, the public protection rationale for requiring the same of reinstatement petitioners is, arguably, even more compelling. Reinstatement petitioners are those who lost membership to the State Bar of California as a consequence of disbarment or resignation and must now prove, among other things, the present moral qualifications for reinstatement to the State Bar and rehabilitation from past misconduct in cases of disbarment or resignation with charges pending. Given public protection concerns, it is reasonable to require a disbarred or resigned attorney seeking readmission to sign an authorization and release similar to the one required when the petitioner first applied for admission.

Attachment C provides a red-line comparison of the current admissions authorization and release language and the proposed reinstatement authorization and release language.

Attachment D provides a clean version of the proposed authorization and release form to be used in reinstatement proceedings, pursuant to proposed amended rule 5.441(A). The scope of the authorization and release would be limited to that described within the form itself.

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

None.

#### **RULE AMENDMENTS**

Rule 5.441(A), Rules of Procedure of the State Bar of California, Title 5, Division 7, Chapter 2.

#### **BOARD BOOK IMPACT**

None.

#### **RECOMMENDATION:**

OCTC recommends that the Committee on Regulation and Discipline authorize staff to circulate, for a 45-day period of public comment, the proposed amendment to rule 5.441(A), Rules of Procedure of the State Bar of California, as set forth in Attachments A through D.

#### **PROPOSED BOARD COMMITTEE RESOLUTION:**

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

**RESOLVED**, that the Committee on Regulation and Discipline authorizes staff to make available, for a public comment period of 45 days, the proposed amendment to rule 5.441(A) in the form attached; 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 item.

#### **ATTACHMENTS LIST**

Attachment A: Proposed Amendment to Rule 5.441(A)

Attachment B: Moral Character Authorization and Release

Attachment C: Red-line Comparison of the Moral Character and Proposed Reinstatement Authorization and Release Proposed Reinstatement Authorization and Release

Attachment D: Proposed Reinstatement Authorization and Release Form