

DATE: January 27, 2016

TO: BOARD OF TRUSTEES FOR THE STATE BAR OF CALIFORNIA

FROM: CHAUNÉ WILLIAMS, ESQ.

SUBJECT: Public Comment re Proposed Amendment to Rule 5.441(A) of the
Rules of Procedure of the State Bar of California

INTRODUCTION

The Board of Trustees should reject the proposed amendment to Rule 5.441(A) as well as the proposed “Authorization and Release” Form submitted as Attachment D. The exclusive procedure for the parties in a formal proceeding to conduct discovery is set forth in Rules 5.463 and 5.65 of the State Bar Rules of Procedure. The proposed amendment to Rule 5.441(A) would enable the OCTC to conduct clandestine discovery outside the boundaries of Rules 5.463 and 5.65. An opposing party (i.e. a petitioner for reinstatement) would be deprived of his/her due process right to object or challenge the propriety of the OCTC seeking disclosure of privileged or private financial records which may have no bearing whatsoever on a petitioner’s fitness to practice law. Fortunately for the State Bar system, the Board of Trustees adopted discovery guidelines in 2011 which provide a balanced discovery approach and allow discovery propounded to third parties to be conducted by subpoena after reasonable notice to an opposing party.

Furthermore, the proposed Authorization/Release Form violates the California Right to Financial Privacy Act because it authorizes the Franchise Tax Board and financial institutions to disclose a petitioner's financial information but does not: (1) include a termination/expiration date for the authorization; (2) identify the records which are authorized to be disclosed; and (3) include a written notification to the person authorizing the disclosure that he/she has the right at any time to revoke the authorization.

Although the OCTC is correct that it has 120 days from the filing of a petition for reinstatement to complete its investigation to determine whether it should oppose the petition, the proposed amendment to Rule 5.441(A) does not restrict the OCTC'S use of the proposed Authorization/Release Form to the 120-day investigation period. Allowing the OCTC to use the proposed Authorization and Release Form as a discovery tool, beyond the 120-day investigation period, conflicts with exclusive procedures for discovery set forth in Rules 5.463 and 5.65.

The OCTC asserts that the proposed Authorization and Release Form is necessary for public protection but offers no explanation as to why the OCTC'S investigatory subpoena power available under Business and Professions Code section 6049 is insufficient to achieve its investigatory objective. If a subpoena is used, a Notice to Consumer would be required and the consumer would be able to object or file a motion to quash if the propriety of the subpoena is in question.

For these reasons, as set forth in more detail below, the Board of Trustees should reject the proposed amendment to Rule 5.441(A) and the proposed Authorization/Release Form. An Authorization/Release Form is not necessary for public protection because the OCTC has the investigatory subpoena power to obtain documents from third parties under Business and Professions Code section 6049.

Alternatively, the Board of Trustees should require that any proposed Authorization/Release Form (that authorizes the Franchise Tax Board or a financial institution to disclose a petitioner's financial records) conform to the requirements set forth in the California Financial Right to Privacy Act and that any amendment to Rule 5.441(A) include a provision requiring the OCTC to serve a Notice to Consumer on the petitioner whose records are being sought and afford him/her an opportunity to object and/or file a motion to quash with the State Bar Court.

DISCUSSION

A. The Proposed Amendment to Rule 5.441(A) is not necessary because the OCTC Has Investigatory Subpoena Power to Obtain Disclosure of Information from Third Parties

Under Business and Professions Code section 6049, “[i]n the conduct of investigations, the chief trial counsel or his or her designee, may compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the investigation.” Cal. Bus. Prof. Code Ann. §6049(b).

Here, the OCTC asserts the proposed amendment to Rule 5.441(A) “would better enable OCTC to conduct a thorough investigation in order to appropriately evaluate the petitioner’s qualifications for reinstatement and evaluate the petitioner’s rehabilitation in cases where the petitioner has been disbarred or resigned with charges pending.” But the OCTC offers no explanation as to why a thorough investigation cannot be accomplished with the subpoena power afforded under Business and Professions Code section 6049(b). Section 6049(b) affords the OCTC power to compel attendance of witnesses and production of documents.

By utilizing Section 6049(b) power, the OCTC is required to provide notice to an opposing party and afford that party an opportunity to object and/or file a motion to quash. This makes sense. It preserves the due process rights of the consumer/opposing party and affords the State Bar Court an opportunity to perform its judicial functions. While it may be convenient for the OCTC to bypass any perceived nuances associated with utilizing a subpoena, the convenience does not outweigh the risk of depriving a consumer/opposing party of due process or interference with the adjudicatory independence of the State Bar Court to hear and decide the matters submitted to it fairly, correctly and efficiently.

Given the fact the OCTC has investigatory subpoena power afforded under Business and Professions Code section 6049(b), the proposed amendment to Rule 5.441(A) is not necessary and should be rejected.

B. The Proposed Authorization/Release Form Does Not Comply with the Requirements Set Forth in the California Right to Financial Privacy Act

“The Legislature finds and declares as follows: (a) Procedures and policies governing the relationship between financial institutions and government agencies have in some cases developed without due regard to citizens’ constitutional rights; (b) the confidential relationships between financial institutions and their customers are built on trust and must be preserved and protected; (c) the purpose of this chapter is to clarify and protect the confidential relationship between financial institutions and their customers and to balance a citizen’s right of privacy with the governmental interest in obtaining information for specific purposes and by specified procedures as set forth in this chapter.” Cal. Gov. Code Ann. §§ 7460-7461(a), (b), (c) (West 2016).

Notwithstanding the Legislative concerns in enacting the Financial Privacy Act, a customer may authorize disclosure if those seeking disclosure furnish to the financial institution a signed and dated statement by which the customer: (1) authorizes such disclosure for a period to be set forth in the authorization statement; (2) specifies the name of the agency or department to which disclosure is authorized and, if applicable, the statutory purpose for which the information is to be obtained; and (3) identifies the records which are authorized to be disclosed. Cal. Gov. Code Ann §7473 (West 2016.)

Here, the proposed Authorization/Release Form does not comply with the Act because it does not: (1) authorize disclosure for a period set forth in the Authorization (in other words, there is no termination/expiration date of the authorization); and (2) identify the records which are authorized to be disclosed.

Furthermore, any state or local agency seeking customer authorization for disclosure of customer financial records must include in the form which the customer signs granting authorization written notification that the customer has the right at any time to revoke such authorization. Cal. Gov. Code Ann §7473(c) (West 2016.)

Here, the proposed Authorization/Release Form does not contain a written notification to the applicant/petitioner that he/she has the right at any time to revoke the authorization.

Finally, any evidence obtained in violation of the California Right to Financial Privacy Act is inadmissible in any proceeding, except a proceeding to enforce the provisions of the Act. Cal. Govt. Code Ann. §7489 (West 2016). Failure to comply with the Act not only renders evidence obtained in violation of the Act inadmissible, it also subjects the violator to misdemeanor charges. *People v. Nosler*, 151 Cal. App. 3d 125, 132 (1984).

Here, because the proposed Authorization/Release Form does not comply with the requirements set forth in the California Right to Financial Privacy Act, any evidence the OCTC obtains (by virtue of the proposed Authorization/Release Form)

during the 120-day investigation would be inadmissible and could subject any entity producing the records to criminal penalty.

Given the fact the proposed Authorization/Release Form does not comply with the California Right to Financial Privacy Act, the Board of Trustees should reject the proposed Authorization/Release in its present form. Simply put, the proposed Authorization/Release Form must specify the records sought; and contain a termination/expiration date and written notification that the applicant/petitioner can at any time revoke the Authorization/Release.

C. If the Amendment to Rule 5.441(A) is Approved, the OCTC'S Use of an Authorization/Release Form Should Be Restricted to the 120-day Investigation Time Period

In first-time admissions cases, where an applicant initiates a formal moral character proceeding following an adverse moral character determination by the Committee of Bar Examiners, the OCTC has a practice of improperly using the Authorization/Release Form. After the 120-day investigation ends, OCTC uses the form as a discovery weapon to develop evidence to support its opposition to the moral character application. This practice is improper.

The problem with allowing the OCTC to use an Authorization/Release Form as a discovery weapon, after the 120-day investigation period, is that a petitioner: (1) is not served with a Notice to Consumer; (2) is not afforded an opportunity to object to disclosure of privileged or private information; and (3) is deprived of

his/her due process right to file a motion to quash any effort by the OCTC to improperly obtain privileged or private information because the OCTC is not required to notify a consumer when the Authorization/Release Form is deployed.

Stated simply, once the OCTC concludes its 120-day investigation and elects to oppose a petition for reinstatement, any Authorization/Release Form should terminate/expire by operation of law. The OCTC should be limited (just as any petitioner is limited) to conduct discovery in accordance with the Rules of the State Bar as it provides the exclusive means for parties to conduct discovery in a formal proceeding. The discovery-gathering playing field must be level.

In accordance with Title 5, Division 2, “Case Proceedings” of the Rules of the State Bar of California, “the procedures in this rule constitute the exclusive procedures for discovery. No other form of discovery is permitted without prior Court order under rules 5.66 or 5.68.” Rules, Rule 5.65(A).

Here, nothing in the proposed amendment to Rule 5.441(A) precludes the OCTC from using the proposed Authorization/Release Form to conduct discovery (after the 120-day investigation ends) in support of its opposition to a petition for reinstatement. The consumer/petitioner cannot object or file a motion to quash and the State Bar Court is deprived of the adjudicatory independence to hear and decide the matters submitted to it fairly, correctly and efficiently.

CONCLUSION

This much is clear: the Legislature empowered the OCTC to compel attendance of witnesses and production of documents by use of a subpoena pursuant to Business and Professions Code section 6049; thus, the proposed amendment to Rule 5.441(A) is not necessary and should be rejected.

Furthermore, the proposed Authorization and Release Form is very broad. It requires financial institutions to disclose a customer's financial information notwithstanding the fact the proposed Authorization and Release Form does not conform to the requirements set forth in the California Right to Financial Privacy Act. The purpose of enacting the Act was "to protect the confidential relationship between financial institutions and their customers and to balance a citizen's right of privacy with the governmental interest in obtaining information for specific purposes and by specified procedures" as set forth in the Act. The OCTC cannot be permitted to frustrate the purpose of the Act by requiring a petitioner to provide an Authorization/Release Form that does not comply with the express requirements of the Act; thus, the Board of Trustees should reject the proposed Authorization and Release Form; or require the OCTC to conform the proposed form to the requirements set forth in the Financial Privacy Act.