

Legal Ethics Committee of Bar Association of San Francisco
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San Francisco, CA 94111
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February 4, 2016

Letty Ramos
Office of Chief Trial Counsel
The State Bar of California
845 South Figueroa Street
Los Angeles, CA 90017

Re: Bar Association of San Francisco's Legal Ethics Committee's Comments
to 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

Dear Letty Ramos:

On behalf of the Legal Ethics Committee of the Bar Association of San Francisco ("BASF"), we submit the following comments to the proposed amendment to Rule 5.441(A) of the Rules of Procedure of the State Bar of California.

The State Bar Office of the Chief Trial Counsel has proposed a significant change to Rule 5.441 (A) relating to reinstatement proceedings after either disbarment, a resignation with charges pending or a resignation without charges pending. Currently, there is no requirement as a condition for filing a petition for reinstatement that an applicant for reinstatement sign an authorization and release to permit the State Bar Office of the Chief Trial Counsel to obtain a multitude of documentation and information (undefined).

A copy of the proposed authorization and release is enclosed with this letter for easy reference. Of particular concern to our active Legal Ethics Committee members is paragraph two, which authorizes the release of specified information, including documents, records or data pertaining to the individual from banks, financial institutions, law enforcement, etc. Significantly, this paragraph also purports to allow for the collection of such information and documents from "any other third-party" without defining that third-party or the time frame for the requested documents. In other words, the authorization and release is open ended as to time and is not limited to the relevant time between the resignation or disbarment and the current date. Moreover, it is unlimited as to third-parties from whom information could be sought and could therefore, include the equivalent of Yelp reviews with no indicia of reliability or means of testing such reliability.

Furthermore, the final line of paragraph one states that the withdrawal of the Authorization and Release terminates the reinstatement qualifications determination process. That provision precludes the possibility of a petitioner discovering an abuse of

the process and a revocation to address such an occurrence.

California Government Code Section 7473 has specific language regarding a party's authorization to disclosure of documents by a financial institution. Section (a)(1) states that there must be a period set forth in the authorization statement. There is no such language in the proposed authorization and release. Section (a)(2) states that the name of the agency or department from which disclosure is being sought must be specifically named and the statutory purpose for which the information is to be obtained must be stated. The full text of section 7473 is provided below:

(a) A customer may authorize disclosure under paragraph (1) of subdivision (a) of Section 7470 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 financial records which are authorized to be disclosed.

(b) No such authorization shall be required by a financial institution as a condition of doing business with such financial institution.

(c) Any officer, employee or agent of a state or local agency seeking customer authorization for disclosure of customer financial records shall 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, except where such authorization is required by statute.

(d)(1) An agency or department examining the financial records of a customer pursuant to this section shall notify the customer in writing of such examination within 30 days of the agency or department's receipt of any of the customer's financial records, except that by application to a judge of a court of competent jurisdiction in the county in which the records are located upon a showing of good cause to believe that disclosure would impede the investigation, such notification requirements may be extended for two additional 30-day periods. Thereafter, by application to a court upon a showing of extreme necessity for nondisclosure, such notification requirements may be extended for three additional 30-day periods. At the end of that period or periods the agency or department shall inform the customer that he has the right to make a written request as to the reason for such examination. Such notice shall

specify the financial records which were examined and, if requested, the reason for such examination.

(2) Wherever practicable, an application for an additional extension of notification time shall be made to the judge who granted the first extension of notification time. In deciding whether to grant an extension of the notification time, the judge shall endeavor to provide the customer with prompt notification, consistent with the purpose of this chapter, and on the presumption that prompt notification is the rule and delayed notification the exception.

It would be appropriate that any authorization and release set forth the exact information sought, from whom, the authority to receive such information and the time period that the authorization and release is to cover. It is also reasonable that the authorization and release be limited to the time period from the disbarment or resignation to the date of hearing/trial in the reinstatement petition. An open ended trolling through one's past may be appropriate for an admission matter, but not for reinstatement. The criteria for reinstatement are current ability in the law and rehabilitation for the past misconduct as set forth in Rule of Procedure 5.445, which addresses "present moral qualifications."

It is entirely appropriate for the Office of the Chief Trial Counsel to inquire into the facts and circumstances that led to disbarment, including all of the underlying facts and prior instances, if any, of discipline, in order to determine if the Petitioner has rehabilitated himself/herself from the past instance[s] of misconduct. It is also appropriate to look into the past history to determine if the Petitioner has the present moral character and meets the high standards of the profession. Similarly, in Resignation with Charges Pending instances, the same inquiry is appropriate. That is, what were the facts and circumstances of the misconduct that led to the Resignation, has the Petitioner been rehabilitated and does the Petitioner possess the requisite present moral character to be reinstated.

The Office of the Chief Trial Counsel of the State Bar of California has offered little justification for this significant change to the current rule. There is merely a recitation to the goal of public protection without any empirical evidence or other justification. Nothing has been presented that reflects an abuse of the reinstatement process.

Reinstatements are extremely difficult to achieve in the current system. Among other requirements is a retaking of the California Bar Examination. This proposal would make it that much more difficult. We propose a more narrow authorization and release form be drafted that complies with the Government Code and takes into account our Committee's concerns.

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Thank you for the opportunity to share our comments.

Sincerely,



Sarah J. Banola, Chair BASF Legal Ethics Committee



Kendra Basner, Vice Chair BASF Legal Ethics Committee

AUTHORIZATION AND RELEASE

IN RE THE PETITION OF
NAME: _____

I, _____, hereby consent to an investigation into my qualifications for reinstatement to practice law in California to be conducted by the State Bar of California, Office of Chief Trial Counsel. I expressly authorize the Office of Chief Trial Counsel, by and through its authorized agents or representatives (collectively, the "Chief Trial Counsel"), to make inquiries and request information from third parties which, in the sole discretion of the Chief Trial Counsel, is deemed necessary to determine my qualifications for reinstatement to practice law in California. I understand that this Authorization and Release will remain effective throughout the entire reinstatement qualifications determination process, which includes proceedings before the State Bar Court and the California Supreme Court. I acknowledge and agree that withdrawal of this Authorization and Release will terminate the reinstatement qualifications determination process.

I authorize and request 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 any information or an opinion about me or knowledge or control of any documents, records, or data pertaining to me, including, but not limited to, any confidential or sealed records, public or private disciplinary records, or any criminal history record information (collectively, "Information") to reveal, furnish, and release to the Chief Trial Counsel any such Information. I further authorize and request any Third Party to answer any and all inquiries, questions, or interrogatories asked by the Chief Trial Counsel concerning me or such Information about me and to appear before the State Bar Court and give full and complete testimony concerning me or such Information about me.

Without limiting the previously described release, I specifically authorize the National Personnel Records Center, St. Louis, Missouri, or other custodian of my military records, to reveal, furnish, and release Information to the Chief Trial Counsel from my military personnel file, including related medical records or a DD Form 214, Report of Separation, if any. I also specifically authorize the release of Information from other state bars, bar associations, or bar grievance councils regarding charges or complaints filed against me, formal or informal, pending or closed, or any other pertinent Information, as well as all undergraduate, graduate, or law school Information relating to my admission and my conduct during my enrollment in such schools.

I hereby release, discharge, and exonerate the State Bar of California, including its Board of Trustees and the Chief Trial Counsel, and all officers, employees, agents and representatives (as the same may be constituted from time to time) and any Third Party from and against any and all claims, demands, causes of action, damages, judgments, debts, obligations, or liabilities of every nature and kind arising out of or in connection with any Information furnished to the Chief Trial Counsel or used by the Chief Trial Counsel pursuant to this Authorization and Release.

For purposes of this Authorization and Release the undersigned gives permission to use a photocopy of his/her signature on this form as an original signature.

Executed on _____
(Date)

at _____
(City and State)

(Print Name)

SIGN HERE _____
(Signature)