



THE STATE BAR  
OF CALIFORNIA

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**TO:** Members of the Board of Trustees  
**THROUGH:** Vanessa Holton, General Counsel  
**FROM:** James Chang, Assistant General Counsel  
**DATE:** 8/16/2016  
**SUBJECT:** Proposed Amendment to Rule 5.441(A) – Compliance with  
California Right to Financial Privacy Act

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**EXECUTIVE SUMMARY**

At its July 21, 2015 regular meeting, the Board of Trustees asked the Office of General Counsel (OGC) to advise whether the Proposed Amendment to Rule 5.441(A) of the Rules of Procedure for the State Bar of California Relating to the Filing Requirements for Reinstatement Proceedings (“Proposed Amendment”) and the associated Proposed Reinstatement Authorization and Release Form (“Proposed Release Form”) comport with the California Right to Financial Privacy Act, Cal. Govt. Code § 7460 et. seq. (“CRFPA” or “the Act”).

OGC suggests two revisions to the Proposed Release Form to ensure that the form fully complies with the CRFPA. First, the form should be revised to identify specifically the types of financial records authorized to be released. Cal Govt. Code § 7473(a)(3). Second, the form should include a more explicit notification that the petitioner has a right to revoke the release at any time. Cal. Govt. Code § 7473(c). These issues were raised during the public comment period for the proposed rule change.

OGC also reviewed a third objection to the Proposed Form regarding the effective period of the Release and determined that no change is necessary in response.

While these changes would ensure that the Proposed Release Form fully complies with CRFPA, OCTC’s current routine practice of issuing subpoenas to request financial records already complies with CRFPA because the Act allows disclosure of records in response to either a subpoena *or* an authorized release that complies with the Act.

If the Board agrees that these revisions to the Proposed Release Form should be made, the best course of action would be to re-circulate the proposal for public comment for 30 days.

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## BACKGROUND

At its September 12, 2016 special meeting, the Board of Trustees will consider amending Rule 5.441(A) of the Rules of Procedure of the State Bar to require that a petitioner seeking reinstatement to the Bar after disbarment or resignation sign an authorization and release to facilitate the Bar's investigation. The Proposed Amendment has already been circulated and received public comment.

<b>Proposed Amended Rule 5.441(A) (proposed changes to existing rule in italics)</b>
Filing Petition, Disclosure Statement, <i>and Authorization and Release</i> . 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. <i>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.</i>

Some public commenters have expressed concerns that the Proposed Release Form could violate the CRFPA because the Release Form “does not (1) include a termination/expiration date for the authorization; (2) identify the records which are authorized to be disclosed; [or] (3) include a written notification to the person authorizing the disclosure that he/she has the right at any time to revoke the authorization.”<sup>1</sup>

## DISCUSSION

OGC advises that two changes be made to the Proposed Release Form to ensure compliance with the CRFPA.

### **Suggested Revision #1: The Proposed Release Form Should be Revised to Specifically Identify the Types of Financial Records Authorized to be Released.**

OGC advises that the Proposed Release Form be modified to more specifically identify the types of financial records authorized to be released.

<b>Statutory Requirement</b>	<b>Current Proposed Release Form Language</b>
“Identifies the financial records which are authorized to be disclosed.”	“I authorize and request every . . . bank, financial institution, franchise tax board, consumer or credit reporting agency . . . having <b>any</b> information or an opinion about me or any knowledge <b>or control of any documents, records, or data pertaining to me . . . to</b>

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<sup>1</sup> Jan. 27, 2016 Public Comment of Chauné Williams, Esq., included as Attachment F to the July 5, 2016 Memorandum from Gregory Dresser to the Board of Trustees. The Legal Ethics Committee of the Bar Association of San Francisco also expressed similar concerns (Attachment G to the July 5 Memorandum).

Cal. Govt. Code § 7473(a)(3)	reveal, furnish, and release to the Chief Trial Counsel any such information.”
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he current Proposed Release Form refers only broadly to “any documents, records, or data pertaining to [petitioner].” In *Fendrich v. Van de Kamp*, 182 Cal. App. 3d 246 (Cal. App. 2d Dist. 1986), the Court held that Cal. Govt. Code § 7473(a)(3) requires a “specific identification of the records to be disclosed.” *Id.* at 269. The Court held that the California Department of Justice’s release form for gaming license applicants, which permitted release of “any and all documents, records or correspondence pertaining to [applicant]” was insufficient under the CRFPA. *Id.* at 269, fn. 18. The California Department of Justice’s current revised release form for gaming license applicants now specifies the types of financial records to be released: “Records from financial institutions include bank statements and account information such as number of accounts and account balances. Records from tax agencies include, for example, copies of federal tax returns.” OGC advises that similar language be incorporated into the Proposed Release Form.

**Suggested Revision #2: The Proposed Release Form Should be Revised to Explicitly Notify the Petitioner that the Authorization is Revocable.**

The current language of the Proposed Release Form does not sufficiently notify the reinstatement petitioner that the authorization is revocable at any time.

Statutory Requirement	Current Proposed Release Form Language
A valid release must include “in the form which the customer signs granting authorization <b>written notification that the customer has the right at any time to revoke such authorization</b> , except where such authorization is required by statute.” Cal. Govt. Code § 7473(c)	“I acknowledge and agree that withdrawal of this Authorization and Release will terminate the reinstatement qualifications determination process.”

To ensure compliance with the CRFPA, the Proposed Release Form should be revised to more explicitly notify the petitioner of his/her right to revoke the release. We advise that the Release Form be modified to read “**I understand that I may withdraw this authorization at any time**, and I acknowledge and agree that withdrawal of this Authorization and Release will terminate the reinstatement qualifications determination process.”

**The Proposed Release Form Sufficiently Specifies an Effective Period**

OGC considered an additional potential CRFPA issue identified by a public commenter that the Proposed Release Form specify an effective period. We determine that the current Proposed Release Form complies with CRFPA and no changes are required.

Statutory Requirement	Current Proposed Release Form Language
<p>“Authorizes such disclosure for a period to be set forth in the authorization statement”</p> <p>Cal. Govt. Code § 7473(a)(1)</p>	<p>“I understand that this Authorization and Release <b>will remain effective throughout the entire reinstatement qualifications determination process</b>, which includes proceedings before the State Bar Court and the California Supreme Court.”</p>

The Proposed Release Form meets the statutory requirement that the disclosure specify an effective period. It clearly states that it “will remain effective throughout the entire reinstatement qualifications determination process.” While the public commenter opposed to the Proposed Rule suggested that a “termination/expiration date for the authorization” is required, the statute merely requires a “period” rather than a fixed date. The Proposed Release Form’s specification of a reasonable fixed period – during the pendency of the reinstatement qualifications determination process – is likely sufficient to meet the CRFPA’s requirement that such disclosure be for a certain “period.”

We have attached a substitute Proposed Release Form for consideration.

### **OCTC’s Routine Practice of Issuing Subpoenas to Request Financial Records Independently Complies with CRFPA**

While OGC suggests revising the Proposed Release Form to ensure compliance with the CRFPA, OCTC’s current routine practice of issuing subpoenas to request financial records already complies with the Act. The CRFPA provides that a state agency may request financial records in connection with an investigation if the customer has authorized release *or* in response to a subpoena:

7470. (a) Except as provided in Section 7480, no officer, employee, or agent of a state or local agency or department thereof, in connection with a civil or criminal investigation of a customer, whether or not such investigation is being conducted pursuant to formal judicial or administrative proceedings, may request or receive copies of, or the information contained in, the financial records of any customer from a financial institution unless the financial records are described with particularity and are consistent with the scope and requirements of the investigation giving rise to such request and:

- (1) **Such customer has authorized disclosure** to such officer, employee or agent of such state or local agency or department thereof in accordance with Section 7473; **or**
- (2) **Such financial records are disclosed in response to an administrative subpoena** or summons which meets the requirements of Section 7474; **or**
- (3) Such financial records are disclosed in response to a search warrant which meets the requirements of Section 7475; **or**
- (4) Such financial records are disclosed in response to a judicial subpoena or subpoena duces tecum which meets the requirements of Section 7476.

In its memorandum to the Board of Trustees recommending adoption of the Proposed Rule and addressing public comments concerning CRFPA compliance, OCTC explained that financial institutions require the issuance of a subpoena regardless of the existence of a release, and that OCTC's practice is to issue subpoenas when requesting financial records.<sup>2</sup> Thus, the State Bar would be in compliance with the CRFPA because OCTC intends to issue subpoenas when requesting financial records rather than relying solely on a petitioner's release form.

In defending against claims of potential CRFPA violations, the State Bar should clarify that financial records obtained in the course of reinstatement investigations are pursuant to its subpoena authority, which is an independent basis for obtaining records under the CRFPA. The Proposed Amendment would give OCTC additional flexibility to request other non-financial records from third parties to facilitate reinstatement investigations.

## **BOARD RECOMMENDATIONS**

OGC advises that the Proposed Release Form be revised consistent with the recommendations in this memo and as attached.

Rules of The State Bar of California, Title 1, Div. 2, Rule 1.10 grants the Board discretion not to re-circulate the proposal for public comment if it deems modifications to be "non-substantive or reasonably implicit in the original proposal." While the revisions proposed by OGC are arguably substantive, those changes pertain to the release form, not the Proposed Rule. OGC does not propose changes to the Proposed Rule. As such, the Rule need not be re-circulated. However, the Board could re-circulate for a 30-day period. Rule 1.10 specifies that rule proposals are normally to be circulated for 45 days but permits the Board to shorten the period to a minimum of 30 days. OGC believes that the shorter 30-day period would be appropriate here where the Proposed Rule has already been circulated and received comment and the proposed modifications merely clarify the proposal to conform to exist.

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<sup>2</sup> July 5, 2016 Memorandum from Gregory Dresser to Members of the Regulation and Discipline Committee and Members of the Board of Trustees, at 5 ("Financial Institutions require the issuance of subpoenas regardless of the existence of an authorization and release. OCTC currently provides a subpoena and complies with all relevant statutory requirements when it seeks financial records as part of a moral character investigation for applicants for admission even though the Moral Character Authorization and Release contains the same language as that proposed here regarding financial information. The same will be true with the adoption of a Reinstatement Authorization and Release.")

## 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 understand that I may withdraw this authorization at any time, and 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. Records from financial institutions include, for example, bank statements and account information such as number of accounts and account balances. Records from tax agencies include, for example, copies of federal tax returns. 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)