

AGENDA ITEM

709 SEPTEMBER 2016

DATE: August 25, 2016

TO: Members, Board of Trustees

FROM: Gregory Dresser, Interim 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 Second Public Comment.

EXECUTIVE SUMMARY

At the July 21, 2016 Regulation and Discipline Committee meeting, the Office of Chief Trial Counsel (OCTC) presented to the committee a report recommending adoption of proposed amendments to Rule 5.441(A) of the Rules of Procedure of the State Bar, and the related authorization and release, to facilitate the investigation of a petitioner seeking reinstatement to the Bar after disbarment or resignation. The report discussed and responded to public comment. The committee asked the Office of General Counsel (OGC) to conduct research and provide input on specific language in the authorization and release, and postponed taking action on the report until OGC concluded its work. Based on the input of OGC, the Office of Chief Trial Counsel (OCTC) concurs with the recommendation to revise the authorization and release and to circulate it for a 30-day public comment period.

BACKGROUND

A party seeking reinstatement to membership in the State Bar after disbarment or resignation ("reinstatement petitioner" or "petitioner") must, among other things, establish present moral qualifications for reinstatement, pursuant to rule 5.445 of the Rules of Procedure. If the petitioner seeks 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. 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.

Unlike applicants seeking first-time admission to the Bar, reinstatement petitioners are not currently required to sign a broad authorization and release that permits the Bar to obtain information about the petitioner. For applicants for admission, the authorization and release

assists the Committee of Bar Examiners, and its agents, in conducting a thorough investigation to appropriately evaluate an applicant's moral character.

The proposed amendment to rule 5.441(A) requires reinstatement petitioners – that is, individuals who have been previously disbarred or resigned from the practice law – to sign an authorization and release similar to that required of applicants seeking first-time admission. Such an authorization and release will better enable OCTC to conduct a thorough investigation to appropriately evaluate the petitioner's moral qualifications for reinstatement and, where applicable, evaluate the petitioner's rehabilitation from prior misconduct.

DISCUSSION

On November 19, 2015, the Regulation and Discipline Committee approved circulating for public comment a proposal to amend rule 5.441(A) of the Rules of Procedure of the State Bar, and to adopt an authorization and release to facilitate the investigation of a petitioner seeking reinstatement to the Bar after disbarment or resignation.¹ OCTC received four public comments during the 75-day public comment period. After thorough review and consideration of the public comments, OCTC brought to RAD a recommendation to adopt the amendment to Rule 5.441(A) and the authorization and release as circulated. A copy of that report is attached as Attachment A.²

After a discussion of comments relating to the California Right to Financial Privacy Act, Cal. Govt. Code § 7460 et. seq. (CRFPA), the Regulation and Discipline Committee, in exercising appropriate caution, asked OGC to review the language of the authorization and release. Upon conclusion of its review, OGC recommended two clarifying amendments to the authorization and release form to ensure that the form fully complies with the CRFPA:

- 1) Providing examples of the types of financial records subject to the authorization and release; and
- 2) Including a more explicit notification that the petitioner has a right to revoke the release at any time.

The amended version of the authorization and release, consistent with the suggestions of OGC, is attached as Attachment B. For reference, a red-line comparison between the version initially proposed, and this revision, is attached as Attachment C.

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.

¹ Available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000013957.pdf>.

² The report is also available at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000015319.pdf>.

BOARD GOALS & OBJECTIVES

Adoption of this recommendation is consistent with mission of the State Bar, as set forth in Section 6001.1 of the Business and Professions Code, which places protection of the public as the highest priority for the Bar and the Board of Trustees “in exercising their licensing, regulatory, and disciplinary functions.” It carries out Goal and Objective number 1 of the 2012-2017 Five-Year Plan – “Ensure a timely, fair, and appropriately resourced discipline and regulatory system.”

BOARD COMMITTEE RECOMMENDATIONS

Should the Board of Trustees agree with re-circulating the amended authorization and release for a 30-day public comment period, the following resolution would be appropriate:

RESOLVED, following revision to the authorization of release in response to public comment, the Board of Trustees authorizes staff to circulate for a 30-day period of public comment the Revised Authorization and Release, as set forth in Attachment B; 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

- A.** Report to the Regulation and Discipline Committee and Board of Trustees: 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 Adoption Following Public Comment.
- B.** Revised Authorization and Release.
- C.** Red-line Comparison of Prior Authorization and Release Circulated for Public Comment and Revised Authorization and Release.