

OPEN SESSION AGENDA ITEM

702 MAY 2018

DATE: May 18, 2018

TO: **Members, Board of Trustees**

FROM: Steven Moawad, Chief Trial Counsel, Office of Chief Trial Counsel

SUBJECT: Proposed Revisions to State Bar Rules of Procedure 2409(b) and 5.104(G) – Electronic Notification of Letters of Inquiry – Return From Public Comment and Request for Approval

EXECUTIVE SUMMARY

OCTC proposes amending the Rules of Procedure of the State Bar to expressly authorize OCTC to transmit letters of inquiry to lawyers through the internet. The letters of inquiry would be confidentially posted on the lawyer's "My State Bar Profile" portion of the State Bar's website. Attorneys would receive notification via the private e-mail addresses that they have provided to the State Bar pursuant to California Rule of Court rule 9.9 (formerly rule 9.7).

At the March 2018 meeting, in Item III.D., the Regulation and Discipline Committee resolved to send out for public comment the proposed amendments to the letters of inquiry rules. The close of public comment was April 30. Three public comments were received during the 45-day public comment period.

BACKGROUND

Before filing disciplinary charges, OCTC is required to notify the attorney in writing about the nature of the charges, and provide the attorney an opportunity to provide an explanation or defense to the allegations. (Rule 2409(a), Rules Proc. of the State Bar.) This notification is referred to as a letter of inquiry. Rule 2409 does not specify any particular method of service of this letter. Business and Professions Code section 6085 provides any person complained against to have a right to "fair, adequate and reasonable notice," but does not define the format of such notice.

Attorneys are required to cooperate in a State Bar investigation and may be subject to discipline if he or she does not do so. (Bus. & Prof. Code, § 6068(i).)

Currently, the State Bar sends letters of inquiry by U.S. Mail to the licensee's membership record address and any other address of which we are aware. If the licensee does not respond, we send a second letter. This results in a delay in completing our investigations. Despite these multiple letters, licensees frequently claim, rightly or wrongly, that they have not received the letter of inquiry. Members of the attorney's defense bar have similarly complained that OCTC

use of the US Mail causes undue delay, which impacts their ability to provide a response by the deadline set in the letter of inquiry.

OCTC proposes to mitigate these problems through the use of electronic communication as has been done in other areas of the law. In the federal courts, for example, pleadings are routinely filed and served electronically.

On February 1, 2010, the Supreme Court adopted California Rule of Court rule 9.9 (formerly rule 9.7) to facilitate online communications between the State Bar and licensees. As contemplated by the rule, the State Bar provides its licensees with a secure online account, called "My State Bar Profile," by which information the State Bar can confidentially transmit information to licensees. Rule 9.9(a) requires licensees to provide the State Bar with a confidential e-mail address "to facilitate communications by the State Bar with its members..."

At the March 2018 meeting, the Regulation and Discipline Committee resolved to send out for public comment the proposed amendments to the letters of inquiry rules. Three public comments were received during the 45-day public comment period. The public comments are reproduced in Attachment C.

DISCUSSION

This proposal, if adopted, would specifically authorize OCTC to use a licensee's "My State Bar Profile" page to transmit letters of inquiry to licensees who are the subject of misconduct allegations. OCTC would provide the licensee with substantially contemporaneous notification of the posting of the written notice of the nature of the charges by sending an e-mail to the licensee's confidential e-mail address. Once a licensee has opened the letter of inquiry, the State Bar's computer system would provide a notification to OCTC.

As under the current rules, evidence that a licensee has failed to respond to the e-mail or letter of inquiry could be used to prove that the licensee has failed to cooperate in the investigation.

Some licensees are exempt from providing an e-mail address because they do not have online access or an e-mail address. (Cal. Rule of Ct. 9.9(d).) In such cases, OCTC would continue to transmit letters of inquiry by regular mail.

To initiate a disciplinary proceeding, OCTC would still need to use certified mail. (See Bus. & Prof. Code, § 6002.1(c)).

OCTC believes that the proposed process will be beneficial for all concerned. Licensees will receive the letters of inquiry more expeditiously, and OCTC will know for certain whether the licensees have received the letters of inquiry.

To implement the proposed process, OCTC recommends that two rules be amended:

1. The following language should be added to Rule of Procedure 2409(a) to explicitly authorize OCTC to transmit letters of inquiry electronically:

The Office of Chief Trial Counsel may transmit the letter of inquiry by: (1) posting the letter of inquiry to the member's "My State Bar Profile" on the State Bar's website and (2) sending an e-mail notification to the confidential address the member maintains pursuant to rule 9.9(a)(2) of the California Rules of Court. The e-mail notification must state that a letter of inquiry from the Office of Chief Trial Counsel has been posted on the member's "My State Bar Profile" and remind the member of his or her duty to cooperate and participate in the State Bar's disciplinary

investigation. If the member has not provided the State Bar with an e-mail address pursuant to rule 9.9(a)(2), the Office Chief Trial Counsel shall transmit the letter of inquiry by personal delivery or by regular mail.

2. The following language should be added to Rule of Procedure 5.104 to create a rebuttable presumption that, if not returned as undeliverable, a properly addressed e-mail to the licensee was received by the licensee. This would be an electronic equivalent of the mailbox rule.

(G) Letters of Inquiry.

(i) Proof that the Office of Chief Trial Counsel sent an e-mail notification to a member in compliance with rule 2409(a), Rules of Procedure of the State Bar, coupled with proof that the e-mail was not returned as undeliverable, creates a presumption affecting the burden of producing evidence that the member viewed the e-mail on or about the date it was sent.

(ii) Proof that a letter of inquiry was remotely accessed on a member's "My State Bar Profile" on a given date creates a presumption affecting the burden of producing evidence that the member received the letter of inquiry on that date.

(iii) The Office of Chief Trial Counsel may establish the proof necessary under paragraphs (i) and (ii) by submitting copies of State Bar records, supported by declaration(s) of State Bar staff attesting to the authenticity and nature of the records.

For consistency with the current version of other rules, the term "member" has been used instead of "licensee" in these proposed rule revisions. However, OCTC supports a future amendment of all the rules to replace the term "member" with "licensee." These proposed rules should be similarly amended at that time.

OCTC is mindful of concerns about spam filters and other potential issues with electronic delivery. By proposing the rule, OCTC is seeking to reduce delivery costs and, more significantly, gain efficiencies for the vast majority of cases wherein the email will be properly delivered. While the "e-mailbox rule" establishes a necessary method of proof of notice of the letter of inquiry, it is not the intent of OCTC to file charges of failure to cooperate with a State Bar investigation based solely on an unacknowledged email. If an attorney does not respond to an emailed notice of a letter of inquiry, OCTC would attempt to contact him or her by phone or by mail at the address provided to the State Bar by the attorney.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

Title 3, Division 2, Chapter 4, Rule 2409, Rules of Procedure of the State Bar
Title 5, Division 2, Chapter 5, Rule 5.104, Rules of Procedure of the State Bar

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

RECOMMENDATION

It is recommended that the Board of Trustees approve the following resolution:

RESOLVED, that following public comment and consideration of the comments received, the Board of Trustees hereby adopts the amendments to the rules of Procedure of the State Bar, as set forth in Attachment A; and it is

FURTHER RESOLVED, that the amendments to rules 2409 and 5.104 of the Rules of Procedure of the State Bar are effective immediately and will apply to all pending and future matters.

ATTACHMENT(S) LIST

- A.** Clean version of new rules 2409 and 5.104
- B.** Proposed amendments to rules 2409 and 5.104 redline version.
- C.** Public comments on proposed amended rules 2409 and 5.104

ATTACHMENT A (Clean Version of New Rules 2409 and 5.104)

Rule 2409, Rules of Procedure of the State Bar (Office of Chief Trial Counsel Rules).

- (a) Prior to the filing of a Notice of Disciplinary Charges, the Office of the Chief Trial Counsel shall notify the member in writing of the allegations forming the basis for the complaint or investigation and shall provide the member with a period of not less than two weeks within which to submit a written explanation. The Office of Chief Trial Counsel may transmit the letter of inquiry by: (1) posting the letter of inquiry to the member's "My State Bar Profile" on the State Bar's website and (2) sending an e-mail notification to the address the member maintains pursuant to California Rule of Court 9.9(a)(2). The e-mail notification must state that a letter of inquiry from the Office of Chief Trial Counsel has been posted on the member's "My State Bar Profile" and remind the member of his or her duty to cooperate and participate in the State Bar's disciplinary investigation. If the member has not provided the State Bar with an e-mail address pursuant to rule 9.9(a)(2), the Office Chief Trial Counsel shall transmit the letter of inquiry by personal delivery or by regular mail.

An extension of time for submission of the member's written explanation shall be granted only upon written request to the Office of the Chief Trial Counsel and for good cause shown as to the specific constraints on the member's practice which are claimed to necessitate the additional time. This rule does not prohibit the Office of the Chief Trial Counsel from contacting a member by telephone for purposes of resolution of minor matters or investigation.

- (b) In response to the Office of the Chief Trial Counsel's written notification pursuant to paragraph (a), the member may provide a written response claiming any applicable constitutional or statutory privilege; however, the availability of an applicable constitutional or statutory privilege shall not excuse the member from submitting a written response to the Office of the Chief Trial Counsel to the extent necessary to identify and exercise the claimed privilege.

Rule 5.104 Evidence (Rules of Procedure of the State Bar)

- (A) Oral Evidence. Oral evidence must be taken only on oath or affirmation.

- (B) Rights of Parties. Each party will have these rights:

- (1) to call and examine witnesses;
- (2) to introduce exhibits;
- (3) to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination;
- (4) to impeach any witness regardless of which party first called him or her to testify;
- (5) to rebut the evidence against him or her; and,
- (6) if the member does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination.

- (C) Relevant and Reliable Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(D) Hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(E) Privileges. The rules of privilege will be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(F) Judicial Discretion. The hearing judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

(G) Letters of Inquiry.

(1) Proof that the Office of Chief Trial Counsel sent an e-mail notification to a member in compliance with rule 2409(a), Rules of Procedure of the State Bar, coupled with proof that the e-mail was not returned as undeliverable, creates a presumption affecting the burden of producing evidence that the member viewed the e-mail on or about the date it was sent.

(2) Proof that a letter of inquiry was remotely accessed on a member's "My State Bar Profile" on a given date creates a presumption affecting the burden of producing evidence that the member received the letter of inquiry on that date.

(3) The Office of Chief Trial Counsel may establish the proof necessary under paragraphs (i) and (ii) by submitting copies of State Bar records, supported by declaration(s) of State Bar staff attesting to the authenticity and nature of the records.

ATTACHMENT B (Proposed Amendments to Rules 2409 and 5.104 – Redline Version)

Rule 2409, Rules of Procedure of the State Bar (Office of Chief Trial Counsel Rules).

- (a) Prior to the filing of a Notice of Disciplinary Charges, the Office of the Chief Trial Counsel shall notify the member in writing of the allegations forming the basis for the complaint or investigation and shall provide the member with a period of not less than two weeks within which to submit a written explanation. The Office of Chief Trial Counsel may transmit the letter of inquiry by: (1) posting the letter of inquiry to the member's "My State Bar Profile" on the State Bar's website and (2) sending an e-mail notification to the address the member maintains pursuant to California Rule of Court rule 9.9(a)(2). The e-mail notification must state that a letter of inquiry from the Office of Chief Trial Counsel has been posted on the member's "My State Bar Profile" and remind the member of his or her duty to cooperate and participate in the State Bar's disciplinary investigation. If the member has not provided the State Bar with an e-mail address pursuant to rule 9.9(a)(2), the Office Chief Trial Counsel shall transmit the letter of inquiry by personal delivery or by regular mail.

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- (b) In response to the Office of the Chief Trial Counsel's written notification pursuant to paragraph (a), the member may provide a written response claiming any applicable constitutional or statutory privilege; however, the availability of an applicable constitutional or statutory privilege shall not excuse the member from submitting a written response to the Office of the Chief Trial Counsel to the extent necessary to identify and exercise the claimed privilege.

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ATTACHMENT C (Public Comments)

Yolanda H., Esq. – emailed comment – March 21, 2018

“Emails are not infallible. I and every other person is aware of circumstances where an email did not arrive or was not received. Furthermore, I received tens and sometimes more emails a day. It is easy to over look an email, or have an email be sorted into a rarely viewed folder. Spam even.

Due process requires insuring that an attorney actually receives the letter, and even if there is some delay, fairness trumps convenience. I would suggest that multiple channels be used, electronic and a physical copy, but I am not comfortable nor confident in relying on email solely.”

Roger S., Esq. – emailed comment – March 21, 2018

“I understand the issues involved in the rule change and support the concept of adding electronic notice of misconduct allegations. To the extent that electronic notification is given, the proposed rule change seems to adequately protect the privacy of the accused and provide the Bar proof of the opening of accusation.

Given the inconsistency of internet service and electronic delivery, I suggest that the rule be amended to require both electronic service as set out in the proposed rule change AND delivery of a hard copy of the notice by certified or overnight mail. The Bar has proof of delivery and delivery is speeded over First Class mail.

Notice to an attorney of allegations of misconduct brought against him is too important to leave to an email that could easily be overlooked in the flood of emails attorneys often get. What's more, the notice could easily be misdirected to a spam folder.

Both hard and electronic notice should be given.”

Kate N. – emailed comment – March 22, 2018

“This is a terrible idea

I know many competent attorneys who hate email. Dont like the immediacy of it, want time to think. So they dont check email

In other cases, you have to CHANGE your email, due to hacking, glitching, whatever... and you dont update the state bar because there's lots of other things going on. So you would potentially be taking away someone's livelihood based on an unreliable communication option

this is really a bad idea...”.