

# **OPEN SESSION AGENDA ITEM**

## **MAY 2018 REGULATION AND DISCIPLINE COMMITTEE, ITEM III.A.3.**

**DATE:** May 17, 2018

**TO:** **Members, Regulation and Discipline Committee**

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

**SUBJECT:** Request to Circulate for Public Comment Changes to the Rules Pertaining To the Investigation of Reinstatement Cases (Proposal to Amend Rules 5.400, 5.403, 5.405, 5.408, 5.409, 5.411, 5.440, and 5.443, Rules Proc. of State Bar)

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### **EXECUTIVE SUMMARY**

This proposal would: (1) delete any requirement that reinstatement proceedings be expedited and expressly state that reinstatement proceedings do not take precedence over disciplinary proceedings; (2) expand the time that the Office of Chief Trial Counsel (OCTC) has to conduct follow-up investigation after the deposition of a disbarred or resigned attorney who is seeking reinstatement to the practice of law; and (3) broaden OCTC's ability to obtain pertinent information concerning suspended attorneys who are petitioning to return to active practice based on a claim that they are rehabilitated and possess current learning and ability in the law.

This item requests that the Board circulate, for a 45-day public comment period, proposed rule amendments to State Bar Rules of Procedure rules 5.400, 5.403, 5.405, 5.408, 5.409, 5.411, 5.440, and 5.443.

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### **BACKGROUND**

Prior to 2011, the Rules of Procedure of the State Bar provided for discovery that was generally consistent with civil discovery rules. In 2011, the Rules of Procedure were amended to implement an abbreviated administrative discovery model. The purpose was to simplify discovery in general State Bar disciplinary cases; however, these changes have negatively impacted the Office of Chief Trial Counsel in reinstatement cases. For example, prior to 2011, former rule 663 of the Rules of Procedure provided for a 120-day investigation period followed by a 120-day discovery period in reinstatement cases. After the rule change, OCTC is given only 120 days to conduct the entire investigation after a petition for reinstatement is filed.

After the rule change, OCTC also lost the ability to perform meaningful follow-up discovery and investigation after the deposition of the petitioner and other evidence produced by way of deposition-related production demands was received.

In reinstatement cases, an attorney who was disbarred or resigned with charges pending has a history of ethical violations that sometimes includes deceit and dishonesty. The deposition is an important discovery tool in these matters. Statements under oath made by the deponent must then be vetted via follow-up investigation and discovery. On occasion, deponents in these matters testify differently than the information contained in their petition or provide information not previously anticipated. In many instances, considerable follow-up discovery is needed to confirm or disprove the additional information. With the abbreviated discovery period, it is next to impossible for us to perform this important work. The result is that the full truth never comes to light and public protection suffers.

During Admissions and Discipline System Training, some members of the Board of Trustees expressed concern about the shortened discovery period in reinstatement cases and invited further discussion about proposed rule changes that would increase public protection.

## **DISCUSSION**

There are two types of reinstatement proceedings:

First, to be reinstated, disbarred or resigned attorneys must establish by clear and convincing evidence that they are rehabilitated (see rule 5.445(A), Rules Proc. of State Bar)<sup>1</sup>, and their reinstatement is not effective until it is approved by the California Supreme Court (see rule 9.10(f), Cal. Rule of Ct.). These proceedings are called “full” reinstatement proceedings.

Second, attorneys who receive lengthy suspensions must prove by a preponderance of the evidence that they are rehabilitated and possess current learning and ability in the general law before they may return to active status. (Std. 1.2(c)(1), Standards for Atty. Sanctions for Prof. Miscond.) These proceedings are colloquially known as “mini” reinstatement proceedings.

### **1. REINSTATEMENT PROCEEDINGS SHOULD NOT TAKE PRECEDENCE OVER DISCIPLINARY PROCEEDINGS.**

Reinstatement proceedings should be completed within a reasonable period of time. However, because public protection is the State Bar's highest priority (Bus. & Prof. Code, § 6001.1), reinstatement cases should not take precedence over disciplinary and regulatory cases pending in the State Bar Court. To the contrary, in order to assure public protection, OCTC should be given sufficient time to locate, evaluate and present the evidence that is necessary for a determination as to whether the reinstatement applications should be granted.

#### **(a). Full Reinstatement Proceedings (Disbarred and Resigned Attorneys) Should Not Be Expedited.**

The State Bar Court's time-pendency guidelines provide that all proceedings should be completed within eight months:

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<sup>1</sup> “In seeking reinstatement, petitioner bears a heavy burden of proving rehabilitation. (Calaway v. State Bar (1986) 41 Cal.3d 743, 745, 225 Cal.Rptr. 267, 716 P.2d 371; Tardiff v. State Bar (1980) 27 Cal.3d 395, 403, 165 Cal.Rptr. 829, 612 P.2d 919.) He must show by the most clear and convincing evidence that efforts made towards rehabilitation have been successful. (Feinstein v. State Bar (1952) 39 Cal.2d 541, 546–547, 248 P.2d 3.) The evidence presented is to be considered in light of the moral shortcomings that previously resulted in discipline. (Tardiff, supra, 27 Cal.3d at p. 403, 165 Cal.Rptr. 829, 612 P.2d 919; Roth v. State Bar (1953) 40 Cal.2d 307, 313, 253 P.2d 969.)”

(Hippard v. State Bar (1989) 49 Cal.3d 1084, 1091–1092.)

The Hearing Department's decision or order regarding complete disposition in a proceeding should ordinarily be filed by the Clerk within eight (8) months of the filing of the initial pleading, unless a shorter time is set forth in the Rules of Procedure.

(Rule 1130(B), Rules of Practice of the State Bar Court). However, it is far more difficult to complete a reinstatement proceeding in eight months than it is to complete a disciplinary case in eight months. The investigation of a disciplinary matter occurs *before* the Notice of Disciplinary Charges is filed and therefore the time spent investigating a disciplinary case does not count against the eight-month clock. On the other hand, pursuant to Rule 5.443(A) of the Rules of Procedure of the State Bar, OCTC is permitted only 120 days to conduct an investigation after a petition for reinstatement is filed and the 120-day discovery period counts against the eight-month clock.

Trial dates in reinstatement cases are frequently set so close in time to the deposition cut-off date that OCTC must routinely request expedited service to obtain the deposition transcript prior to the start of trial. In a number of instances, trial was scheduled to begin within days of the deposition, thus rendering the deposition virtually meaningless.

The eight-month deadline gives reinstatement proceedings undue calendaring priority compared to disciplinary proceedings. This proposal, if implemented, would change the rules to expressly deprioritize full reinstatement proceedings.

**(b). Mini-Reinstatement Proceedings (Suspended Attorneys) Should Not Be Expedited.**

The rules of procedure require that proceedings for reinstatement of suspended attorneys "will be expedited." (Rule 5.400(B), Rules Proc. of State Bar.) The rules implement this by: (1) limiting OCTC's investigation to 45 days (rule 4.403(A)); (2) requiring the court to schedule a hearing within 35 days after OCTC files its response to the petition for reinstatement (rule 5.403(C)), (3) requiring the court to issue its decision within 15 days after the hearing (rule 5.408), and (4) requiring that the Review Department decide any appeal within 30 days after submission (rule 4.409). This proposal, if implemented, would deprioritize reinstatement proceedings and modify these deadlines.

**2. THE TRIAL OF A FULL REINSTATEMENT PROCEEDING (DISBARRED OR RESIGNED ATTORNEY) SHOULD NOT OCCUR UNTIL OCTC HAS HAD SUFFICIENT TIME TO ANALYZE AND INVESTIGATE THE REPRESENTATIONS MADE AT THE PETITIONER'S DEPOSITION.**

After a reinstatement petition is filed, OCTC has 120 days to investigate the matter. (Rule 5.443(A), Rules Proc. of State Bar.) Within 10 days after the investigation period ends, OCTC must file a response to the application. (Rule 5.443(B), Rules Proc. of State Bar.) OCTC then has an additional 15 days to serve a discovery request ((Rule 5.443(C)), Rules Proc. of State Bar) and 45 days to schedule the petitioner's deposition (Rule 5.443(D)), Rules Proc. of State Bar).

As a result of the eight-month time-pendency rule, the State Bar Court frequently schedules the trial to occur shortly after the petitioner's deposition. When this happens, OCTC does not have sufficient time to investigate the veracity of the statements made by the petitioner at the deposition. OCTC therefore requests that rule 5.443 of the Rules of Procedure of the State Bar be changed to allow an additional 120-day period during which OCTC may take the applicant's deposition, request written discovery, and conduct follow-up investigation.

### **3. OCTC's AUTHORITY TO INVESTIGATE MINI-REINSTATEMENT PETITIONS (SUSPENDED ATTORNEYS) SHOULD BE STRENGTHENED.**

Unlike the full reinstatement proceedings applicable to disbarred or resigned attorneys, the rules governing reinstatement proceedings for suspended attorneys: (1) prescribe a lower burden of proof (Rule 5.404); (2) allow for very limited discovery and investigation by OCTC (Rule 5.405); (3) provide for trial by written declaration rather than live testimony (Rule 5.406); (4) allow limited appellate rights (Rule 5.409); and (5) do not provide for direct review by the California Supreme Court (see Rule 5.410).

OCTC has only 45 days to conduct its investigation in this type of reinstatement proceeding. (Rule 5.403(A).) OCTC may take the petitioner's deposition (Rule 5.405(A)), but is not allowed any other discovery unless the State Bar Court so orders (Rule 5.405(B)). It can be difficult for OCTC to obtain such an order because the current rules require that these proceedings be expedited (Rule 5.400(B)) and because a showing of good cause is required (Rule 5.405(B)).

In order to protect the public, OCTC needs both a longer discovery period and the ability to subpoena necessary records for the hearing. The evidence contained in mini-reinstatement petitions (declarations and exhibits) must be analyzed and investigated.

First, OCTC needs to interview the witnesses who have submitted declarations on the petitioner's behalf, and possibly other witnesses with knowledge of the issues raised in the petition. This takes time and effort, and should not be done in an hurried manner.

Second, to fully assess or evaluate petitioner's rehabilitation, OCTC also needs the ability to issue subpoenas related to the facts, declarations, or exhibits supporting the petition. For example, if a petitioner presents medical evidence of rehabilitation, OCTC may need to obtain additional medical records from the doctors identified in the petition. The Legislature intended for OCTC to have such authority:

In 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.

(Bus. & Prof. Code, § 6049(b).)

Finally, OCTC must conduct its own independent investigation to ascertain whether the reinstatement petitioner has rehabilitated himself or herself during the years in which he or she was on suspension. The issues include: whether the petitioner has committed new misconduct; whether the petitioner has complied with his or her disciplinary probation; and whether the petitioner has made required reports to the State Bar. If, for example, we learn that petitioner has convictions that were not disclosed, OCTC may need to obtain law enforcement or court records.

#### **Court Comment**

While the State Bar Court may still be guided by disposition time standards, State Bar Court staff has reviewed this proposal and raised no objection to the language.

#### **FISCAL/PERSONNEL IMPACT**

None.

## **RULE AMENDMENTS**

Title 5, Division 7, Chapter 1, Rule 5.400, Rules of Procedure of the State Bar  
Title 5, Division 7, Chapter 1, Rule 5.403, Rules of Procedure of the State Bar  
Title 5, Division 7, Chapter 1, Rule 5.405, Rules of Procedure of the State Bar  
Title 5, Division 7, Chapter 1, Rule 5.408, Rules of Procedure of the State Bar  
Title 5, Division 7, Chapter 1, Rule 5.409, Rules of Procedure of the State Bar  
Title 5, Division 7, Chapter 1, Rule 5.411, Rules of Procedure of the State Bar  
Title 5, Division 7, Chapter 3, Rule 5.440, Rules of Procedure of the State Bar  
Title 5, Division 7, Chapter 3, Rule 5.443, 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 Regulation and Discipline Committee approve the following resolution:**

**RESOLVED**, that staff is authorized to make available, for public comment for a period of 45-days, proposed amendments to:

Title 5, Division 7, Chapter 1, Rule 5.400, Rules of Procedure of the State Bar,  
Title 5, Division 7, Chapter 1, Rule 5.403, Rules of Procedure of the State Bar,  
Title 5, Division 7, Chapter 1, Rule 5.405, Rules of Procedure of the State Bar,  
Title 5, Division 7, Chapter 1, Rule 5.408, Rules of Procedure of the State Bar,  
Title 5, Division 7, Chapter 1, Rule 5.409, Rules of Procedure of the State Bar,  
Title 5, Division 7, Chapter 1, Rule 5.411, Rules of Procedure of the State Bar,  
Title 5, Division 7, Chapter 3, Rule 5.440, Rules of Procedure of the State Bar,  
Title 5, Division 7, Chapter 3, Rule 5.443, Rules of Procedure of the State Bar; as set forth in Attachment A; 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 amended Rules of Procedure or Board policy.

## **ATTACHMENT(S) LIST**

- A.** Proposed amended rules 5.400, 5.403, 5.405, 5.408, 5.409, 5.411, 5.440, and 5.443 (Clean Version).
- B.** Proposed amended rules 5.400, 5.403, 5.405, 5.408, 5.409, 5.411, 5.440, and 5.443 (Redline Version).
- C.** Title 5, Division 7, Chapter 1, as proposed (Redline Version).
- D.** Title 5, Division 7, Chapter 3, as proposed (Redline Version).

**Proposed Amended Rules 5.400, 5.403, 5.405, 5.408, 5.409, 5.411, 5.440, 5.443 (Clean Version)**

**Rule 5.400 Scope and Expedited Nature of Proceeding**

**(A) Scope.** These rules apply when a petitioner seeks relief from actual suspension under a disciplinary order that requires compliance with standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct.

**(B) Service.** The petition and all pleadings, decisions and other documents must be served by personal delivery or by overnight mail.

**Rule 5.403 Response; Request for Hearing**

**(A) Timing of Response.** Within 90 days after the petition is served, the Office of the Chief Trial Counsel must file and serve a response, which may be accompanied by declarations, exhibits, and requests for judicial notice.

**(B) Position Taken.** The response will:

- (1) oppose the petition;
- (2) state that the Office of the Chief Trial Counsel does not oppose the petition; or
- (3) state that the Office of the Chief Trial Counsel does not possess sufficient facts to determine whether or not it opposes the petition.

**(C) Hearing.** A hearing will be set, and 15 days' notice will be given, under the following circumstances:

- (1) the Office of the Chief Trial Counsel opposes the petition or states that it does not possess sufficient facts to determine whether or not it opposes the petition;
- (2) any party requests a hearing; or
- (3) the Court is considering denying the petition.

**(D) No Hearing.** If the Office of the Chief Trial Counsel's response states that it does not oppose the petition, and no party has requested a hearing, the Court may consider and grant the petition without a hearing.

**(E) Withdrawal of Petition.** The petitioner may elect to withdraw the petition without prejudice at any time before the matter is submitted.

**Rule 5.405 Discovery**

**(A) Deposition.** The Office of the Chief Trial Counsel may take the petitioner's deposition promptly after the petition is filed. Unless the Court orders an extension for good cause, the timing of the deposition will not extend any time limits required under these rules. A petitioner for reinstatement who does not reside in California must be given 30 days' written notice of the time and place of the deposition, and must appear for it in California at his or her own expense.

**(B) Other Discovery.** The Office of Chief Trial Counsel may issue subpoenas duces tecum after the petition is filed. Unless the Court orders an extension for good cause, receipt of documents pursuant to a subpoena duces tecum will not extend any time limits required under these rules. All responses to subpoenas received by the Office of Chief Trial Counsel must be provided to petitioner within three court days of receipt. No other discovery will be allowed unless ordered by the Court for good cause. The Court's order will set forth the permitted extent and conditions for additional discovery.

#### **Rule 5.408 Decision**

Unless the petitioner waives the time or additional time is otherwise justified by the circumstances, the Court will file its decision within 30 days after the hearing ends. If no hearing is held, the Court will file its decision within 30 days after the Office of the Chief Trial Counsel files its response, or if none was filed, within 30 days from the date the response was due. The decision granting or denying the petition must contain findings of fact and conclusions of law.

#### **Rule 5.409 Review**

A decision is reviewable under rule 5.150. The Review Department's decision must be filed within 60 days after the matter is submitted.

#### **Rule 5.411 Applicable Rules**

**(A) Inapplicable Rules.** The following rules do not apply to proceedings on a petition for relief from actual suspension under standard 1.2(c)(1):

- (1) rules that by their terms apply only to disciplinary proceedings or to other specific proceedings, and
- (2) rules 5.80-5.100 (default; obligation to appear at trial) and rules 5.151-5.157 (review).

**(B) Conditionally Applicable.** All other rules apply, except that:

- (1) Rules 5.25 (service of initial pleading) and 526 (service of subsequent pleadings) apply subject to the provisions of rule 5.400(B), and
- (2) Rules 5.65-5.71 (discovery) apply only if and to the extent that the Court permits additional discovery.

#### **Rule 5.440 Beginning Proceeding**

**(A) Applicability of Rules.** These rules apply to proceedings for reinstatement to membership in the State Bar after resignation with or without charges pending and after disbarment.

**(B) Reinstatement Proceedings Do Not Have Calendar Preference.** Reinstatement proceedings are not to be expedited and will not receive calendar preference over disciplinary proceedings that are ready for trial.

**(C) Petition.** The party seeking reinstatement begins the reinstatement proceeding by filing and serving a petition for reinstatement and paying the required fee.

#### **Rule 5.443 Investigation and Discovery**

**(A) Initial Investigation.** For 120 days after the petition is filed with the Court, the Office of the Chief Trial Counsel will investigate the petition to determine whether to oppose it. For good cause, the Court may extend the investigation period.

**(B) Response to Petition.** Within 10 days after the investigation period ends, the Office of the Chief Trial Counsel will file and serve a response to the petition stating, for each issue set forth in rule 5.445 (A) or (B), whether it opposes the petition. If it opposes the petition, the Office of the Chief Trial Counsel will state in its response its grounds for opposition.

**(C) Discovery and Subsequent Investigation.** For 120 days after its response to the petition is filed, the Office of Chief Trial Counsel may conduct discovery and complete its investigation of the matter. Except as set forth in subsection (D), discovery may be conducted under rule 5.65. Requests for discovery must be made within 15 days after service of the Office of the Chief Trial Counsel's response.

**(D) Petitioner's Deposition.** The Office of the Chief Trial Counsel may take the petitioner's deposition. It must be held no later than 45 days after the date the response is due under subsection (B). A petitioner for reinstatement who resides outside California must appear in California at his or her own expense for his or her deposition, on 30 days' written notice of the time and place of the deposition.



**Proposed Amended Rules 5.400, 5.403, 5.405, 5.408, 5.409, 5.411, 5.440, 5.443 (Redline Version)**

**Rule 5.400 Scope and Expedited Nature of Proceeding**

**(A) Scope.** These rules apply when a petitioner seeks relief from actual suspension under a disciplinary order that requires compliance with standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct.

**(B) ~~Expedition; Service.~~ ~~Proceedings under these rules will be expedited.~~** The petition and all pleadings, decisions and other documents must be served by personal delivery or by overnight mail.

**Rule 5.403 Response; Request for Hearing**

**(A) Timing of Response.** Within ~~45~~<sup>90</sup> days after the petition is served, the Office of the Chief Trial Counsel must file and serve a response, which may be accompanied by declarations, exhibits, and requests for judicial notice.

**(B) Position Taken.** The response will:

- (1) oppose the petition;
- (2) state that the Office of the Chief Trial Counsel does not oppose the petition; or
- (3) state that the Office of the Chief Trial Counsel does not possess sufficient facts to determine whether or not it opposes the petition.

**(C) Hearing.** A hearing will be set ~~within 35 days after the response is served~~, and 15 days' notice will be given, under the following circumstances:

- (1) the Office of the Chief Trial Counsel opposes the petition or states that it does not possess sufficient facts to determine whether or not it opposes the petition;
- (2) any party requests a hearing; or
- (3) the Court is considering denying the petition.

**(D) No Hearing.** If the Office of the Chief Trial Counsel's response states that it does not oppose the petition, and no party has requested a hearing, the Court may consider and grant the petition without a hearing.

**(E) Withdrawal of Petition.** The petitioner may elect to withdraw the petition without prejudice at any time before the matter is submitted.

**Rule 5.405 Discovery**

**(A) Deposition.** The Office of the Chief Trial Counsel may take the petitioner's deposition promptly after the petition is filed. Unless the Court orders an extension for good cause, the timing of the deposition will not extend any time limits required under these rules. A petitioner for

reinstatement who does not reside in California must be given 30 days' written notice of the time and place of the deposition, and must appear for it in California at his or her own expense.

**(B) Other Discovery.** The Office of Chief Trial Counsel may issue subpoenas duces tecum after the petition is filed. Unless the Court orders an extension for good cause, receipt of documents pursuant to a subpoena duces tecum will not extend any time limits required under these rules. All responses to subpoenas received by the Office of Chief Trial Counsel must be provided to petitioner within three court days of receipt. No other discovery will be allowed unless ordered by the Court for good cause. The Court's order will set forth the permitted extent and conditions for additional discovery.

### **Rule 5.408 Decision**

Unless the petitioner waives the time or additional time is otherwise justified by the circumstances, the Court will file its decision within ~~45~~30 days after the hearing ends. If no hearing is held, the Court will file its decision within ~~45~~30 days after the Office of the Chief Trial Counsel files its response, or if none was filed, within ~~45~~30 days from the date the response was due. The decision granting or denying the petition must contain findings of fact and conclusions of law.

### **Rule 5.409 Review**

A decision is reviewable under rule 5.150. The Review Department's decision must be filed within ~~30~~60 days after the matter is submitted.

### **Rule 5.411 Applicable Rules**

**(A) Inapplicable Rules.** The following rules do not apply to proceedings on a petition for relief from actual suspension under standard 1.2(c)(1):

- (1) rules that by their terms apply only to disciplinary proceedings or to other specific proceedings, and
- (2) rules 5.80-5.100 (default; obligation to appear at trial) and rules 5.151-5.157 (review).

**(B) Conditionally Applicable.** All other rules apply, except that:

- (1) Rules 5.25 (service of initial pleading) and 526 (service of subsequent pleadings) apply subject to the provisions of rule 5.400(B), and
- (2) Rules 5.65-5.71 (discovery) apply only if and to the extent that the Court permits additional discovery.

## **Rule 5.440 Beginning Proceeding**

**(A) Applicability of Rules.** These rules apply to proceedings for reinstatement to membership in the State Bar after resignation with or without charges pending and after disbarment.

**(B) Reinstatement Proceedings Do Not Have Calendar Preference.** Reinstatement proceedings are not to be expedited and will not receive calendar preference over disciplinary proceedings that are ready for trial.

**(C) Petition.** The party seeking reinstatement begins the reinstatement proceeding by filing and serving a petition for reinstatement and paying the required fee.

## **Rule 5.443 Investigation and Discovery**

**(A) Initial Investigation.** For 120 days after the petition is filed with the Court, the Office of the Chief Trial Counsel will investigate the petition to determine whether to oppose it. For good cause, the Court may extend the investigation period.

**(B) Response to Petition.** Within 10 days after the investigation period ends, the Office of the Chief Trial Counsel will file and serve a response to the petition stating, for each issue set forth in rule 5.445 (A) or (B), whether it opposes the petition. If it opposes the petition, the Office of the Chief Trial Counsel will state in its response its grounds for opposition.

**(C) Discovery and Subsequent Investigation.** For 120 days after its response to the petition is filed, the Office of Chief Trial Counsel may conduct discovery and complete its investigation of the matter. Except as set forth in subsection (D), ~~after the investigation ends,~~ discovery may be conducted under rule 5.65. Requests for discovery must be made within 15 days after service of the Office of the Chief Trial Counsel's response.

**(D) Petitioner's Deposition.** The Office of the Chief Trial Counsel may take the petitioner's deposition. It must be held no later than 45 days after the date the response is due under subsection (B). A petitioner for reinstatement who resides outside California must appear in California at his or her own expense for his or her deposition, on 30 days' written notice of the time and place of the deposition.

## **Title 5, Division 7, Chapter 1, as proposed (Redline Version)**

### **Rule 5.400 Scope and Expedited Nature of Proceeding**

**(A) Scope.** These rules apply when a petitioner seeks relief from actual suspension under a disciplinary order that requires compliance with standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct.

**(B) ~~Expedition; Service. Proceedings under these rules will be expedited.~~** The petition and all pleadings, decisions and other documents must be served by personal delivery or by overnight mail.

### **Rule 5.401 Petition for Relief from Actual Suspension**

**(A) Verification; Statements.** The petitioner must verify the petition for relief and state with particularity the facts alleged to demonstrate the petitioner's rehabilitation, present fitness to practice, and present learning and ability in the general law.

**(B) Attachments.** The petition must be supported by declarations, exhibits, or requests for judicial notice to establish the alleged facts.

**(C) Filing and Service.** No filing fee will be charged to file the petition. The petitioner must serve a copy of the verified petition and supporting documents on the Office of the Chief Trial Counsel by personal delivery or overnight mail.

### **Rule 5.402 Earliest Time for Filing**

The earliest a petition may be filed is six months before the actual suspension may be terminated. If a prior petition was denied, a subsequent petition may be filed six months after the order is final, unless the Court orders a shorter period for good cause.

### **Rule 5.403 Response; Request for Hearing**

**(A) Timing of Response.** Within ~~45~~90 days after the petition is served, the Office of the Chief Trial Counsel must file and serve a response, which may be accompanied by declarations, exhibits, and requests for judicial notice.

**(B) Position Taken.** The response will:

- (1) oppose the petition;
- (2) state that the Office of the Chief Trial Counsel does not oppose the petition; or
- (3) state that the Office of the Chief Trial Counsel does not possess sufficient facts to determine whether or not it opposes the petition.

**(C) Hearing.** A hearing will be set ~~within 35 days after the response is served~~, and 15 days' notice will be given, under the following circumstances:

- (1) the Office of the Chief Trial Counsel opposes the petition or states that it does not possess sufficient facts to determine whether or not it opposes the petition;
- (2) any party requests a hearing; or
- (3) the Court is considering denying the petition.

**(D) No Hearing.** If the Office of the Chief Trial Counsel's response states that it does not oppose the petition, and no party has requested a hearing, the Court may consider and grant the petition without a hearing.

**(E) Withdrawal of Petition.** The petitioner may elect to withdraw the petition without prejudice at any time before the matter is submitted.

#### **Rule 5.404 Burden of Proof**

The petitioner has the burden of proving by a preponderance of the evidence that the petitioner has satisfied the conditions of standard 1.2(c)(1).

#### **Rule 5.405 Discovery**

**(A) Deposition.** The Office of the Chief Trial Counsel may take the petitioner's deposition promptly after the petition is filed. Unless the Court orders an extension for good cause, the timing of the deposition will not extend any time limits required under these rules. A petitioner for reinstatement who does not reside in California must be given 30 days' written notice of the time and place of the deposition, and must appear for it in California at his or her own expense.

**(B) Other Discovery.** The Office of Chief Trial Counsel may issue subpoenas duces tecum after the petition is filed. Unless the Court orders an extension for good cause, receipt of documents pursuant to a subpoena duces tecum will not extend any time limits required under these rules. All responses to subpoenas received by the Office of Chief Trial Counsel must be provided to petitioner within three court days of receipt. No other discovery will be allowed unless ordered by the Court for good cause. The Court's order will set forth the permitted extent and conditions for additional discovery.

#### **Rule 5.406 Documentary Evidence**

Except on Court order for good cause, no party may submit documentary evidence other than that filed with the application or the response. A request to submit additional documentary evidence must be written, have a copy of the proposed documentary evidence attached, and be filed and served at least 10 days before the hearing.

#### **Rule 5.407 Testimonial Evidence**

**(A) Petitioner; Rebuttal.** The petitioner may testify at the hearing. Any party may present oral testimony to rebut oral testimony presented by the opposing party.

**(B) Other Oral Testimony.** Other oral testimony is not permitted unless ordered by the Court for good cause shown. A party who wants to present oral testimony for purposes other than rebuttal must file a written statement summarizing the proposed testimony and stating the reasons why the testimony cannot be presented by declaration. The statement must be filed and served at least 10 days before the hearing.

#### **Rule 5.408 Decision**

Unless the petitioner waives the time or additional time is otherwise justified by the circumstances, the Court will file its decision within ~~45~~30 days after the hearing ends. If no hearing is held, the Court will file its decision within ~~45~~30 days after the Office of the Chief Trial

Counsel files its response, or if none was filed, within ~~45~~<sup>30</sup> days from the date the response was due. The decision granting or denying the petition must contain findings of fact and conclusions of law.

#### **Rule 5.409 Review**

A decision is reviewable under rule 5.150. The Review Department's decision must be filed within ~~30~~<sup>60</sup> days after the matter is submitted.

#### **Rule 5.410 Termination of Actual Suspension**

While the petition is pending before the Court, the petitioner will remain on actual suspension. If the petition is granted, the petitioner will remain on actual suspension until the actual suspension period expires, and until the petitioner satisfies any other requirements for terminating actual suspension under the disciplinary order.

#### **Rule 5.411 Applicable Rules**

**(A) Inapplicable Rules.** The following rules do not apply to proceedings on a petition for relief from actual suspension under standard 1.2(c)(1):

- (1) rules that by their terms apply only to disciplinary proceedings or to other specific proceedings, and
- (2) rules 5.80-5.100 (default; obligation to appear at trial) and rules 5.151-5.157 (review).

**(B) Conditionally Applicable.** All other rules apply, except that:

- (1) Rules 5.25 (service of initial pleading) and 526 (service of subsequent pleadings) apply subject to the provisions of rule 5.400(B), and
- (2) Rules 5.65-5.71 (discovery) apply only if and to the extent that the Court permits additional discovery.

## **Title 5, Division 7, Chapter 3, as proposed (Redline Version)**

### **Rule 5.440 Beginning Proceeding**

**(A) Applicability of Rules.** These rules apply to proceedings for reinstatement to membership in the State Bar after resignation with or without charges pending and after disbarment.

**(B) Reinstatement Proceedings Do Not Have Calendar Preference. Reinstatement proceedings are not to be expedited and will not receive calendar preference over disciplinary proceedings that are ready for trial.**

**(C) Petition.** The party seeking reinstatement begins the reinstatement proceeding by filing and serving a petition for reinstatement and paying the required fee.

### **Rule 5.441 Filing Requirements**

**(A) Filing Petition, Disclosure Statement, and Authorization and Release.** 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. 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.

**(B) Pre-Filing Requirements and Proof.** Prior to filing the petition, the petitioner must satisfy the following requirements and must attach proof of compliance to the petition:

(1) Fingerprints Submitted. Under Business and Professions Code § 6054, the petitioner must have submitted fingerprints to the California Department of Justice via Live Scan technology, or if the petitioner resides outside the state, two sets of original fingerprints on record cards furnished by the State Bar must have been submitted to the Office of the Chief Trial Counsel;

(2) Discipline Costs Paid and Client Security Fund Payments Reimbursed. Petitioner must have paid all discipline costs imposed under § 6086.10(a) and reimbursed all payments made by the Client Security Fund as a result of the petitioner's conduct, plus applicable interest and costs, under Business and Professions Code § 6140.5(c).

(3) Passage of the Attorneys' Examination.

(a) Resigned with Charges Pending or Disbarred. Petitioners who resigned with charges pending or who were disbarred must establish that they have taken and passed the Attorneys' Examination by the Committee of Bar Examiners within three years prior to the filing of the petition for reinstatement.

(b) Resigned without Charges Pending. Petitioners who resigned without charges pending more than five years before filing the petition for reinstatement must establish that they have taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners within five years prior to the filing of the application for readmission or reinstatement.

**(C) Filing Fee.** The petition must include a filing fee of \$1,600, which will be given to the Office of the Chief Trial Counsel to defray incurred costs. The Clerk will reject the petition for filing if the fee is not included.

**(D) Service.** The petition and disclosure statement must be served on the Office of the Chief Trial Counsel under rule 5.25.

**(E) Dismissal.** Failure to comply with any of the requirements of this rule will be grounds to dismiss the petition.

#### **Rule 5.442 Earliest Time for Filing Reinstatement Petition**

**(A) Filing after Resignation without Charges Pending.** After resignation without charges pending, a first or subsequent petition for reinstatement may be filed at any time.

**(B) Filing after Resignation with Charges or Disbarment.** Except as provided in the order of disbarment, no petition for reinstatement will be filed within five years after the effective date of the petitioner's disbarment, interim suspension following a disbarment recommendation, or interim suspension following criminal conviction, or the filing date of the petitioner's resignation with charges pending, whichever occurred earliest. No petitioner who has been disbarred by the Supreme Court on two previous occasions may apply for reinstatement.

**(C) Subsequent Petitions.** If a petitioner received an adverse decision on a prior petition following disbarment or resignation with charges pending, a subsequent petition cannot be filed for two years after the effective date of the adverse decision, unless a shorter period is ordered by the Court for good cause.

#### **Rule 5.443 Investigation and Discovery**

**(A) Initial Investigation.** For 120 days after the petition is filed with the Court, the Office of the Chief Trial Counsel will investigate the petition to determine whether to oppose it. For good cause, the Court may extend the investigation period.

**(B) Response to Petition.** Within 10 days after the investigation period ends, the Office of the Chief Trial Counsel will file and serve a response to the petition stating, for each issue set forth in rule 5.445 (A) or (B), whether it opposes the petition. If it opposes the petition, the Office of the Chief Trial Counsel will state in its response its grounds for opposition.

**(C) Discovery and Subsequent Investigation.** For 120 days after its response to the petition is filed, the Office of Chief Trial Counsel may conduct discovery and complete its investigation of the matter. Except as set forth in subsection (D), ~~after the investigation ends,~~ discovery may be conducted under rule 5.65. Requests for discovery must be made within 15 days after service of the Office of the Chief Trial Counsel's response.

**(D) Petitioner's Deposition.** The Office of the Chief Trial Counsel may take the petitioner's deposition. It must be held no later than 45 days after the date the response is due under subsection (B). A petitioner for reinstatement who resides outside California must appear in California at his or her own expense for his or her deposition, on 30 days' written notice of the time and place of the deposition.

#### **Rule 5.444 Notice of Hearing; Publication**

The Clerk will serve notice of the hearing on the parties. The Office of the Chief Trial Counsel may publish the fact that a petition for reinstatement has been filed with the State Bar Court, the petitioner's identity, and other relevant information identifying the proceeding.



### **Rule 5.445 Burden of Proof**

**(A) Reinstatement after Resignation with Charges Pending or Disbarment.** Petitioners for reinstatement must:

- (1) pass a professional responsibility examination within one year prior to filing the petition;
- (2) establish their rehabilitation;
- (3) establish present moral qualifications for reinstatement; and
- (4) establish present ability and learning in the general law by providing proof that they have taken and passed the Attorneys' Examination by the Committee of Bar Examiners within three years prior to the filing of the petition.

**(B) Reinstatement after Resignation without Charges Pending.** Petitioners for reinstatement must:

- (1) pass a professional responsibility examination within one year prior to filing the petition;
- (2) establish their present moral qualifications for reinstatement; and
- (3) establish present ability and learning in the general law. If the petitioner resigned without charges pending more than five years before filing the petition, the petitioner must establish present ability and learning in the general law by providing proof that he or she has taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners within five years prior to the filing of the petition.

### **Rule 5.446 Inapplicable Rules.**

The following rules do not apply in a reinstatement proceeding:

**(A) General.** Rules that by their terms apply only to disciplinary proceedings or to other specific proceedings, and

**(B) Specific.** Rules 5.80-5.100 (default; obligation to appear at trial) and rules 5.105-5.108 (admission of certain evidence).