

OPEN SESSION AGENDA ITEM

MAY 2018 REGULATION AND DISCIPLINE COMMITTEE, ITEM III.A.4.

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 Tolling of the Rule of Limitations (Proposal to Amend Rule 5.21, Rules Proc. of State Bar)

EXECUTIVE SUMMARY

This proposal would amend the Rule of Limitations: (1) to allow both the State Bar Court and the Office of Chief Trial Counsel to dismiss disciplinary matters without prejudice when respondent attorneys are enrolled inactive because they lack mental capacity, and (2) to clarify three existing tolling provisions.

This proposal would also make non-substantive amendments to the Rule of Limitations, to reflect the fact that the responsibility for reviewing appeals by complainants has been transferred from the former Audit and Review Unit of the Office of Chief Trial Counsel (OCTC) to the Complaint Review Unit of the Office of General Counsel.

This item requests that the Board circulate, for a 45-day public comment period, proposed rule amendments to State Bar Rules of Procedure 5.21.

BACKGROUND

Currently, there are in excess of 200 cases in which the respondent is enrolled inactive pursuant to subsection (a) or subsection (b) of Business and Professions Code § 6007. All of those cases are either abated or held, the functional equivalent of being abated. The vast majority of those cases are in backlog.

OCTC policy requires quarterly written status reports on each abated or held case. Quarterly reports must include the reasons the matter was abated or held and an analysis of whether the circumstances have changed such that the abated or held status is no longer appropriate. Every second quarter, the complaining witness must also be advised of the status of the matter.

DISCUSSION

1. Dismissal Without Prejudice of Disciplinary Proceedings.

The State Bar Court has authority to place attorneys on inactive status for reasons of mental incapacity. (See Bus. & Prof. Code, § 6007(a) & (b).) A significant portion of these attorneys also have disciplinary allegations pending against them, but these charges cannot be prosecuted unless and until the attorney regains his or her mental capacity. Current rules toll the rule of limitations when a disciplinary investigation or proceeding is abated. (rule 5.21(c)(7), Rules Proc. Of State Bar.) However, these disciplinary investigations or proceedings cannot be closed or dismissed because the Rule of Limitation would run and subsequent refile and prosecution would be barred. (See rule 5.21, Rules Proc. of State Bar.)

Therefore, under current practice, both the State Bar Court and the Office of Chief Trial Counsel maintain these cases in abated status—often for many years. As a result, the State Bar expends resources in monitoring the status of these cases. For example, the State Bar Court conducts periodic status conferences concerning cases that have been filed. In addition, the Office of Chief Trial Counsel maintains approximately 200 of these abated cases in its investigation inventory.

This proposal would provide that the Rule of Limitations is tolled during the time an attorney is on inactive status because of mental incapacity. This would allow the State Bar Court and the Office of Chief Trial Counsel to dismiss such matters without prejudice to reopening should circumstances change. This would save resources and improve the accuracy of our backlog statistics.

2. Attorney Conceals, Misrepresents, or Fails to Cooperate.

Rule 5.21(C) currently provides that the Rule of Limitations is tolled when the attorney conceals facts about the violation (rule 5.21(C)(4)), fails to cooperate with the State Bar investigation (rule 5.21(C)(5)), or makes false or misleading statements to the State Bar about the violation (rule 5.21(C)(6)). These provisions, however, do not clearly state when the tolling periods begin and end. OCTC recommends that the rule's language be amended to expressly state that the tolling periods begin when the attorney conceals, misrepresents or fails to cooperate and end when the truth is discovered or the attorney substantially cooperates in the investigation. This proposal is similar to Penal Code section 803(c), which states that the statute of limitation for fraud, embezzlement and similar felonies does not begin to run until the offense is discovered.

3. Transition to the Office of General Counsel Complaint Review Unit.

When the Office of Chief Trial Counsel closes an investigation without filing a disciplinary proceeding, the complainant has the right to have this decision reviewed. The Rule of Limitation contains tolling provisions applicable when complainants request such a review. (See rule 5.21(C)(10) & (E).) In 2016, the Board of Trustees transferred responsibility for these complainant appeals from the Audit and Review Unit of the Office of Chief Trial Counsel to the Complaint Review Unit of the Office of General Counsel. (See rule 2603(b), Rules Proc. of State Bar.) However, the Board has not yet amended the Rule of Limitation tolling provisions to reflect this transfer of responsibility.

Court Comment

State Bar Court staff has reviewed this proposal and raised no objection to the language.

FISCAL/PERSONNEL IMPACT

Minor resource savings may result from no longer providing quarterly updates on some abated or held cases.

RULE AMENDMENTS

Title 5, Division 2, Chapter 1, Rule 5.21, 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 2, Chapter 1, Rule 5.21, 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 rule 5.21 (Clean Version)
- B.** Proposed amended rule 5.21 (Redline Version)

ATTACHMENT A: Proposed Amended Rule 5.21 (Clean Version).

Rule 5.21 Limitations Period

(A) Time Limit for Complaint. If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation.

(B) When Violation Occurs. The State Bar Act or a Rule of Professional Conduct is violated when every element of a violation has occurred. But if the violation is a continuing offense, the violation occurs when the offensive conduct ends.

(C) Tolling. The five-year limit is tolled:

- (1) while the member represents the complainant, the complainant's family member, or the complainant's business or employer;
- (2) while the complainant is a minor, insane, or physically or mentally incapacitated;
- (3) while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal;
- (4) from the time the member conceals facts about the violation until the State Bar or the victim discovers the true facts;
- (5) from the time the member fails to cooperate with an investigation of the violation until the member provides substantial cooperation;
- (6) from the time the member makes false or misleading statements to the State Bar concerning the violation until the State Bar discovers the true facts;
- (7) while the disciplinary investigation or proceeding is abated under rule 5.50;
- (8) while the member is participating in an Alternative Dispute Resolution Mediation Discipline program, Agreement in Lieu of Discipline Prosecution program, or other authorized diversion program;
- (9) while the investigation is ended by admonition;
- (10) while the complaint or investigation is pending before the Office of General Counsel Complaint Review Unit; or
- (11) while the member is on inactive status pursuant to Business and Professions Code section 6007, subdivision (a) or (b).

(D) Authorized Diversion Program. If the member successfully completes an Alternative Dispute Resolution Mediation Discipline program, Agreement in Lieu of Discipline Prosecution program, or other authorized diversion program, the underlying allegations are barred.

(E) Office of General Counsel Complaint Review Unit. The State Bar must begin disciplinary proceedings within two years after proceedings before the Complaint Review Unit conclude.

(F) Death of Complainant. If a prospective complainant dies before the time to begin a disciplinary procedure expires, a surviving family member or the estate's executor or

administrator may file a complaint with the State Bar within two years after the complainant's death.

(G) Independent Source. The five-year limit does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant.

(H) Waiver. The member and State Bar may agree in writing to waive or extend the limitations in this rule.

(I) Reinstatement Proceedings. This rule does not apply to reinstatement proceedings.

ATTACHMENT B (Redline Version)

Rule 5.21 Limitations Period

(A) Time Limit for Complaint. If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation.

(B) When Violation Occurs. The State Bar Act or a Rule of Professional Conduct is violated when every element of a violation has occurred. But if the violation is a continuing offense, the violation occurs when the offensive conduct ends.

(C) Tolling. The five-year limit is tolled ~~while~~:

- (1) while the member represents the complainant, the complainant's family member, or the complainant's business or employer;
- (2) while the complainant is a minor, insane, or physically or mentally incapacitated;
- (3) while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal;
- (4) from the time the member conceals facts about the violation until the State Bar or the victim discovers the true facts;
- (5) from the time the member fails to cooperate with an investigation of the violation until the member provides substantial cooperation;
- (6) from the time the member makes false or misleading statements to the State Bar concerning the violation until the State Bar discovers the true facts;
- (7) while the disciplinary investigation or proceeding is abated under rule 5.50;
- (8) while the member is participating in an Alternative Dispute Resolution Mediation Discipline program, Agreement in Lieu of Discipline Prosecution program, or other authorized diversion program;
- (9) while the investigation is ended by admonition;
- (10) while the complaint or investigation is pending before the ~~Audit and~~ Office of General Counsel Complaint Review Unit; or
- (11) while the member is on inactive status pursuant to Business and Professions Code section 6007, subdivision (a) or (b).

(D) Authorized Diversion Program. If the member successfully completes an Alternative Dispute Resolution Mediation Discipline program, Agreement in Lieu of Discipline Prosecution program, or other authorized diversion program, the underlying allegations are barred.

(E) ~~Audit and~~ Office of General Counsel Complaint Review Unit. The State Bar must begin disciplinary proceedings within two years after proceedings before the ~~Audit and~~ Complaint Review Unit conclude.

(F) Death of Complainant. If a prospective complainant dies before the time to begin a disciplinary procedure expires, a surviving family member or the estate's executor or administrator may file a complaint with the State Bar within two years after the complainant's death.

(G) Independent Source. The five-year limit does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant.

(H) Waiver. The member and State Bar may agree in writing to waive or extend the limitations in this rule.

(I) Reinstatement Proceedings. This rule does not apply to reinstatement proceedings.