

# **OPEN SESSION AGENDA ITEM**

## **54-122 SEPTEMBER, 2018 RAD AGENDA ITEM, II.B-3**

**DATE:** September 14, 2018

**TO:** **Members, Board of Trustees  
Members, Regulation and Discipline Committee**

**FROM:** Antonia G. Darling, Chief Court Counsel, State Bar Court

**SUBJECT:** Changes to the Rules regarding Disqualification of a Judge (Proposal to Amend Rule 5.46, Rules Proc. of State Bar)- Return from Public Comment and Request for Approval.

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### **EXECUTIVE SUMMARY**

This proposal would make a clarifying amendment to the wording of the rule 5.46 regarding the appointment of a judge to hear a motion to disqualify another judge.

At the May 2018 meeting, the Regulation and Discipline Committee resolved to send for public comment the proposed amendments to the Rules of Procedure. The close of the 60 day public comment period was July 30. No public comments were received on this proposal.

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### **BACKGROUND**

Rule 5.46, subsection (k) of the Rules of Procedure of the State Bar of California currently states that when a disqualification motion is filed against a particular judge, the presiding or supervising judge must appoint "another" judge to hear the motion. This has led to occasional contentions that the presiding or supervising judge may not appoint himself/herself to hear the motion, which is the usual practice in situations where the original disqualification motion is not directed at the presiding or supervising judge. The proposed change is to replace the word "another judge" with the phrase "a judge other than the challenged judge".

### **DISCUSSION**

The language in the rule requiring a disqualification motion to be assigned to "another judge" is intended to mean that the motion must be assigned for decision to a judge other than the

challenged judge. Unfortunately, the language is arguably ambiguous, leading to an occasional challenge to the presiding or supervising judge actually deciding the disqualification motion. The proposed language will eliminate any ambiguity and make clear that the appointing judge may assign the motion to himself/herself for decision if he/she is not the judge being challenged in the original disqualification motion.

## **FISCAL/PERSONNEL IMPACT**

Minor savings of time for the court to rule on challenges if the presiding or supervisory judge appoints himself/herself to decide the disqualification challenge of another judge.

## **RULE AMENDMENTS**

Title 5, Division 2, Chapter 5, Rule 5.46, 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 the 60 day public comment period, the Board of Trustees hereby adopts the amendments to Rule 5.46 of the Rule of Procedure of the State Bar, as set forth in Attachment A; and it is

**FURTHER RESOLVED**, that the amendments to the Rules of Procedure of the State Bar are effective January 1, 2019.

## **ATTACHMENT(S) LIST**

- A.** Proposed language of Rule 5.46 (Clean version).
- B.** Proposed language of Rule 5.46 (Redline version).

## ATTACHMENT A

### Proposed Revised Rule of Procedure 5.46

#### Clean version

#### Rule 5.46 Disqualifying a Judge

- (A) **Disqualification under Code of Civil Procedure § 170.1.** When Code of Civil Procedure § 170.1 applies, the judge must be disqualified.
- (B) **Judge Pro Tempore.** A judge pro tempore must be disqualified if the judge pro tempore or the judge pro tempore's office is affiliated with or represents:
  - (1) A party to pending litigation that involves any party, counsel, or law office affiliated with any party or counsel; or
  - (2) A party represented by any party, counsel, or law office affiliated with any party or counsel.
- (C) **Applicable Provisions; Recusal.** Only the provisions of Code of Civil Procedure §§ 170.1, 170.2, 170.3(b), 170.4, and 170.5(b)–(g) apply to judicial disqualification in State Bar Court proceedings.
- (D) **Notice of Recusal.** Judges who recuse themselves must promptly give notice of the recusal to the judge who has authority to assign the matter to another judge.
- (E) **Review of Stipulation.** An assigned judge's consideration or rejection of a stipulation in a proceeding is not a basis to disqualify the judge from the proceeding.
- (F) **Settlement Judge.** Unless the parties stipulate otherwise, a settlement judge is disqualified from presiding over the trial of the matter.
- (G) **Proceeding Involving Relief from Default.** When a party seeks relief from default, the judge may not be disqualified on the basis that the judge heard evidence or filed a decision before the party filed the motion for relief.
- (H) **Motion to Disqualify.** If a judge refuses or fails to disqualify himself or herself, any party may file a motion to disqualify. The motion must contain a verified statement setting forth the facts constituting the grounds for disqualification. Copies of the motion must be served on the opposing party and must be personally served upon the judge the party seeks to disqualify or upon his or her case administrator if the judge is present in the State Bar's office or in chambers.

- (I) **When to File Motion.** If the party seeking disqualification did not know the matter was assigned to the judge or the ground for disqualification in time to file the motion under the other provisions of this rule, the party must file the motion promptly and make an oral motion when the next hearing, trial, conference, or argument begins. Otherwise, a party must move to disqualify within the earliest of:
- (1) 10 days after the party or the party's counsel learns of the ground for disqualification;
  - (2) Before the trial begins; or
  - (3) 20 days before oral argument is held before the Review Department.
- (J) **Consent or Answer to Motion.** After a motion to disqualify is filed, the judge may:
- (1) Consent to disqualification within 10 days after the motion is served and promptly notify the judge who has authority to assign the matter to another judge;
  - (2) File a verified answer within 10 days after the motion is served, admitting or denying any or all of the allegations in the motion and setting forth any additional facts material or relevant to the question of disqualification, and the Clerk must transmit a copy of the judge's answer to each party; or
  - (3) Fail to expressly consent or timely answer, in which case the judge's consent to disqualification is presumed, and the Clerk must promptly notify the judge who has authority to assign the matter to another judge.
- (K) **Ruling on Disqualification.** A judge who refuses to recuse himself or herself may not rule on his or her own disqualification. The presiding or supervising judge must assign a judge other than the challenged judge to decide the motion. If the judge hearing the motion decides that the judge is disqualified, the judge must promptly notify the judge who has authority to assign the matter to another judge.
- (L) **Petition for Review.** A ruling on a motion for disqualification is reviewable under rule 5.150. The party must file the petition within 10 days of service of the ruling. The Review Department must expedite action on the petition.

## ATTACHMENT B

### Proposed Revised Rule of Procedure 5.46

#### Redline version

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