

OPEN SESSION AGENDA ITEM

54-122 SEPTEMBER, 2018 RAD AGENDA ITEM II.B-5

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: Comment Changes to the in Rules Regarding Prior Record of Discipline
(Proposal to Amend Rule 5.106, Rules of Proc. of State Bar)
- Return from Public Comment and Request for Approval.

EXECUTIVE SUMMARY

This proposal would amend the rule regarding the admissibility of evidence of a respondent's prior record of discipline to clarify that the court need only make a tentative finding of culpability before such records may be introduced into evidence solely for the purpose of showing aggravation.

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.

BACKGROUND

Rule 5.106 of the Rules of Procedure, dealing with evidence of an attorney's prior record of discipline, currently provides that evidence of prior discipline is inadmissible until the court makes a finding of culpability, unless the evidence also tends to prove a fact in issue in determining culpability. The court has historically interpreted rule 5.106 to require only that a tentative decision of culpability of at least one count be reached to satisfy the requirement of the rule. This proposed amendment of the rule would codify that long-standing interpretation.

DISCUSSION

Where evidence of a prior record of discipline is only relevant as an aggravating factor, rule 5.106 theoretically protects an attorney from being prejudiced on issues of culpability by not allowing the Office of Chief Trial Counsel to introduce evidence of prior discipline until the court "finds culpability." Because State Bar Court decisions must be in writing and are made only

after a matter is submitted for decision, the court has historically interpreted rule 5.106 only to require the court to make an oral tentative finding of the respondent's culpability of at least one count. Despite this oral "finding" there is nothing preventing the court from changing its mind later as the decision is being written.

To interpret the rule otherwise would require the State Bar Court to bifurcate every case in which prior discipline is an aggravating factor. The aggravation/mitigation portion would come only after the court has rendered a written decision on issues of culpability, and the discipline decision/recommendation would be rendered only after both portions of the bifurcated hearing have been completed. Such an elongated process would be inefficient and result in delay.

FISCAL/PERSONNEL IMPACT

Minor savings of time as ruling on motions that relate to the formal language.

RULE AMENDMENTS

Title 5, Division 2, Chapter 5, Rules 5.106, 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 5.106 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 5.106 (Clean version).
- B. Proposed language of Rule 5.106 (Redline version).

ATTACHMENT B
Proposed Revised Rule of Procedure 5.106
Clean version

Rule 5.106 Prior Record of Discipline

- (A) **Included Items.** A prior record of discipline comprises an authenticated copy of all charges, stipulations, findings, and decisions (final or not) reflecting or recommending that discipline be imposed on a party. It may include:
- (1) Records from any jurisdiction stated in Business and Professions Code § 6049.1, and
 - (2) Recommended discipline that the court of last resort in the jurisdiction has not yet approved.
- (B) **Excluded Items.** A prior record does not include the following dispositions if ordered in California, or the equivalent if ordered elsewhere:
- (1) Inactive enrollment;
 - (2) Suspension for nonpayment of State Bar fees;
 - (3) Interim suspension after conviction of crime;
 - (4) Admonition; and
 - (5) Agreements in lieu of discipline.
- (C) **Lost or Destroyed Records.** If part or all of the record is lost or destroyed, the record may be established by clear and convincing evidence.
- (D) **Admissibility.** A record, or the existence of a record, is inadmissible unless and until the Court makes a tentative finding of culpability or it tends to prove a fact in issue in determining culpability.
- (E) **Nonfinal Records.** A record of prior discipline is not made inadmissible by the fact that the discipline has been recommended but has not yet been imposed. If a record of prior discipline that is not yet final is admitted, the court shall specify the disposition:
- (1) If the non-final prior discipline recommendation is adopted; and
 - (2) If the non-final prior discipline recommendation is dismissed or modified.

ATTACHMENT B
Proposed Revised Rule of Procedure 5.106
Redline version

Rule 5.106 Prior Record of Discipline

- (A) **Included Items.** A prior record of discipline comprises an authenticated copy of all charges, stipulations, findings, and decisions (final or not) reflecting or recommending that discipline be imposed on a party. It may include:
- (1) Records from any jurisdiction stated in Business and Professions Code § 6049.1, and
 - (2) Recommended discipline that the court of last resort in the jurisdiction has not yet approved.
- (B) **Excluded Items.** A prior record does not include the following dispositions if ordered in California, or the equivalent if ordered elsewhere:
- (1) Inactive enrollment;
 - (2) Suspension for nonpayment of State Bar fees;
 - (3) Interim suspension after conviction of crime;
 - (4) Admonition; and
 - (5) Agreements in lieu of discipline.
- (C) **Lost or Destroyed Records.** If part or all of the record is lost or destroyed, the record may be established by clear and convincing evidence.
- (D) **Admissibility.** A record, or the existence of a record, is inadmissible unless and until the Court makes a tentative finding of culpability or it tends to prove a fact in issue in determining culpability.
- (E) **Nonfinal Records.** A record of prior discipline is not made inadmissible by the fact that the discipline has been recommended but has not yet been imposed. If a record of prior discipline that is not yet final is admitted, the court shall specify the disposition:
- (1) If the non-final prior discipline recommendation is adopted; and
 - (2) If the non-final prior discipline recommendation is dismissed or modified.