

OPEN SESSION AGENDA ITEM

54-122 SEPTEMBER, 2018 RAD AGENDA ITEM II.B-6

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 Proceedings Based on Professional Misconduct in another Jurisdiction - How Commenced; Notice of Disciplinary Charges; Response. (Proposal to Amend Rule 5.351, Rules of Proc. of State Bar)
- Return from Public Comment and Request for Approval.

EXECUTIVE SUMMARY

This proposal would amend the rule regarding the Notice of Disciplinary Charges (NDC) in proceedings based on professional misconduct in another jurisdiction to require that the Office of Trial Counsel (OCTC) designate in the NDC which findings by the foreign court support the allegations of a violations of the statutes and rules cited by the OCTC in the notice.

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 5.351 provides that an NDC must cite the statutes, rules or court orders that the member has allegedly violated or warrant the proposed action and “contain facts in concise and ordinary language, comprising the violations in sufficient detail to permit the preparation of a defense” and “relate the stated facts to the statutes, rules, or court orders that the member allegedly violated or that warrant the proposed action.”

Rule 5.351 applies to charges based on professional misconduct in another jurisdiction. Under this rule, OCTC is only required to include in the NDC information regarding what specific California statutes or rules are allegedly violated by the misconduct. It does not require OCTC to identify which specific findings by the foreign court support the violation of each rule. The NDC in such cases typically attaches the disciplinary findings and record of the foreign jurisdiction along with a list of statutes and rules which are allegedly violated by some aspect of

that evidence. This deprives the court and the respondent of clear notice of what facts support the charges.

DISCUSSION

The Rules of Procedure are designed to ensure that the respondent is fully aware of the nature of the disciplinary charges so he/she can fairly defend against the allegations. The court also needs to know exactly what conduct is alleged to have violated the identified California statutes and rules.

In order to ensure that the respondent is fully apprised of the charges being brought and that the court can know and decide every contention being made, the rule is amended to adopt the same requirement applicable to other disciplinary proceedings - that the specific facts that support each alleged violation of the California rules or statutes be designated in the NDC. OCTC staff reviewed this proposal and does not feel such specificity is required.

FISCAL/PERSONNEL IMPACT

Time savings of court counsel and the court attempting to determine which facts support OCTC's allegations.

RULE AMENDMENTS

Title 5, Division 2, Chapter 5, Rules 5.351, 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 5.351 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 5.351 (Clean version).
- B. Proposed language of Rule 5.351 (Redline version).

ATTACHMENT A
Proposed Revised Rule of Procedure 5.351
Clean version

Rule 5.351 How Commenced; Notice of Disciplinary Charges; Response

- (A) **Beginning Proceeding.** A proceeding begins when a notice of disciplinary charges is filed and served on the member.
- (B) **Notice.** A notice of disciplinary charges issued under these rules may state that its only basis is the findings and final order of the other jurisdiction that imposed discipline on the member. The notice must give sufficient detail to permit identification of the foreign disciplinary proceeding. The notice of disciplinary charges must also cite the California statutes or rules allegedly violated or that warrant the proposed action, and designate the specific finding(s) in the foreign proceeding supporting each allegation. The notice must have attachments:
- (1) a certified copy of the foreign jurisdiction's findings and final order; and
 - (2) a copy of the statutes, rules, or court orders of the foreign jurisdiction found to have been violated by the member.
- (C) **Response.** Within 20 days after the notice of disciplinary charges is served, the member must file with the Clerk and serve on the Office of Chief Trial Counsel a response limited to the issues set forth in Business and Professions Code § 6049.1(b)(1)–(3).

ATTACHMENT B
Proposed Revised Rule of Procedure 5.351
Redline version

Rule 5.351 How Commenced; Notice of Disciplinary Charges; Response

- (A) **Beginning Proceeding.** A proceeding begins when a notice of disciplinary charges is filed and served on the member.
- (B) **Notice.** A notice of disciplinary charges issued under these rules may state that its only basis is the findings and final order of the other jurisdiction that imposed discipline on the member. The notice must give sufficient detail to permit identification of the foreign disciplinary proceeding. The notice of disciplinary charges must also cite the California statutes or rules allegedly violated or that warrant the proposed action, and designate the specific finding(s) in the foreign proceeding supporting each allegation. The notice must have attachments:
- (1) a certified copy of the foreign jurisdiction's findings and final order; and
 - (2) a copy of the statutes, rules, or court orders of the foreign jurisdiction found to have been violated by the member.
- (C) **Response.** Within 20 days after the notice of disciplinary charges is served, the member must file with the Clerk and serve on the Office of Chief Trial Counsel a response limited to the issues set forth in Business and Professions Code § 6049.1(b)(1)–(3).