

OPEN SESSION AGENDA ITEM

54-122 SEPTEMBER, 2018 RAD AGENDA ITEM II.B-7

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: Proposed New Rule regarding Disclosure and Discovery of Expert Witnesses (Proposal to Add Rule 5.XXX, Rules of Proc. of State Bar)- Return from Public Comment and Request for Approval.

EXECUTIVE SUMMARY

This proposal would add a new rule that sets forth the procedure for disclosing expert witnesses and the formal exchange of information through discovery.

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

Currently the Rules of Procedure have no special provisions for disclosing expert witnesses prior to the filing of pretrial conference statements or conducting discovery regarding expert witnesses. In cases where one or both of the parties intend to offer expert testimony, any late disclosure of such witnesses results in either continuances of scheduled trials or unfairness.

This proposed rule would govern the disclosure and discovery of expert witnesses, using the rules applicable to civil cases in the superior courts as a model, but creating a timeline consistent with State Bar Court proceedings.

DISCUSSION

The proposed rule directs all parties in every disciplinary proceeding to assume that a timely demand for exchange of information regarding expert witnesses has been made pursuant to CCP § 2034.210 et seq. The rule then follows the procedures set forth in the Code of Civil Procedure, but streamlines the process to comply with the trial timelines of State Bar Court proceedings. The procedures set forth parameters for: the timing for the required disclosure of any intended experts; the exchange of information regarding such experts, including expert

reports and source documents; the disclosure of rebuttal expert witnesses; and the taking of the depositions of disclosed expert witnesses. As a final measure, the rule provides that a party's failure to comply with the rule may result in an order that the expert of such party may not be permitted to testify at trial.

OCTC staff reviewed the proposal and raised no objections.

FISCAL/PERSONNEL IMPACT

Minor savings of time for staff and judges as the process is clearly spelled out for parties and the court does not need to craft special orders for cases involving expert witnesses.

RULE AMENDMENTS (NEW)

Title 5, Division 2, Chapter 5, Rules 5.XXX, 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 new Rule 5.XXX of the Rule of Procedure of the State Bar, as set forth in Attachment A; and it is

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

ATTACHMENT(S) LIST

- A. Proposed language of new Rule 5.XXX

ATTACHMENT A
Proposed Rule of Procedure 5.XXX
Clean version

Rule 5.XXX Expert Disclosure / Discovery

[NEW]

Unless otherwise ordered by the court, each case is to be treated as though each side has made a timely and valid demand for the exchange of information concerning expert witnesses pursuant to Code of Civil Procedure (CCP) § 2034.210 et seq., including demands for production of documents and to take the deposition of all disclosed experts, and is subject to the following procedures and deadlines:

- (A) The date for the exchange of expert information will be the last court day at least 50 days prior to the first scheduled trial date in the case. At the time of such exchange, any party wishing to call or question a witness as an expert witness for purposes of the trial of this matter must disclose in writing the name of each such witness. Such disclosure shall include for each such witness, all of the information specified in CCP § 2034.260 and copies of all of the documents described in CCP § 2034.270. If a party does not intend to offer expert testimony at trial at the time of this initial disclosure deadline, such party shall nonetheless comply with CCP § 2034.260(b)(2) by providing a written statement that such party does not presently intend to offer the testimony of any expert witness.
- (B) On or before 30 days prior to the first scheduled trial date in the case, a party may disclose a rebuttal expert to an expert disclosed by the other side, as provided in CCP § 2034.280.
- (C) All parties are authorized to take the deposition of any disclosed expert witness pursuant to the provisions of CCP §§ 2034.410–2034.470. However, any such

deposition must be completed by the close of business 10 days prior to the scheduled trial date in the case.
- (D) The expert disclosures made by any party pursuant to CCP §§ 2034.260 and/or 2034.280 (but not the materials produced pursuant to CCP § 2034.270) must be served on the opposing party and filed with this court on or before the respective deadlines for such disclosures, as set forth above.
- (E) Failure to comply with the provisions of this order, including the referenced sections, may result in the exclusion at trial of proffered expert testimony.

ATTACHMENT B
Proposed Rule of Procedure 5.XXX
Redline version

Rule 5.XXX Expert Disclosure / Discovery

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