

OPEN SESSION AGENDA ITEM

54-121.4 SEPTEMBER 2018 REGULATION AND DISCIPLINE COMMITTEE ITEM II.A.4

DATE: September 13, 2018

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

FROM: Melanie J. Lawrence, Interim Chief Trial Counsel, Office of Chief Trial Counsel

SUBJECT: Rule Regarding Declarations Issued As Part of Third Party Subpoenas in Confidential Proceedings (Rule 2302(e), Rules Proc. of State Bar) – Return From Public Comment and Request for Approval

EXECUTIVE SUMMARY

This proposal would clarify the Rules of Procedure of the State Bar by expressly authorizing the Office of Chief Trial Counsel to provide subpoena declarations to third parties whose confidential records are being subpoenaed. These declarations will be narrowly tailored, but will contain sufficient information such that the third parties will know why their records are being subpoenaed and will have an adequate opportunity to assert their privacy rights in a motion to quash.

At the May 2018 meeting, in Item III.A.5., the Regulation and Discipline Committee resolved to send out for public comment the proposed amendments to rule 2302 regarding declarations in third party subpoenas. The close of public comment was July 31st. No comments were received during the 60-day public comment period.

BACKGROUND

The Chief Trial Counsel has authority to issue subpoenas, both at the investigation stage of investigations and after formal proceedings are commenced. (Bus. & Prof. Code, § 6049(b) and (c)). These subpoenas may be used to secure testimony, procure documents, or both. (Id.). The State Bar Act contains special provisions governing State Bar access to trust account records (Bus. & Prof. Code, § 6069(a)) and other types of financial records (Bus. & Prof. Code, § 6069(b)). In addition, the State Bar is exempted from the Notice to Consumers Act. (Code Civ. Proc., § 1985.3(a)(3).) The Board of Trustees has adopted rules of procedure to implement the State Bar's statutory subpoena powers. Rules 2501 to 2503 govern OCTC's issuance of subpoenas at the investigation stage. Rules 5.61 to 5.64 and 5.70 govern subpoenas issued at the discovery and trial stages, motions to quash subpoenas, and enforcement of subpoenas.

DISCUSSION

A special problem arises when the Chief Trial Counsel seeks to subpoena materials from a third party in a moral character proceeding or during the course of a confidential investigation. There is a tension between the privacy rights of the subpoenaed party and the confidentiality interest of the moral character applicant or respondent.

This proposed rule amendment is intended to strike an appropriate balance between these two interests.

1. Constitutional Privacy Rights of Subpoenaed Party. Recipients of subpoenas have a right of privacy with respect to their confidential records. This “inalienable right” of privacy is based on the California Constitution (Art I, § 1) and protects “one’s confidential financial affairs as well as to the details of one’s personal life.” (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656.) A subpoenaed person may enforce his or her right to privacy by bringing a motion to quash in the State Bar Court. (Bus. & Prof. Code, §§ 6051.1, 6069(b); rule 5.60(b), Rules Proc. of State Bar.) In making a motion to quash, the subpoenaed party must establish that “the scope of the records the subpoena seeks is not consistent with the scope and requirements of the investigation.” (Rule of Proc. 5.60(F)(4) [re financial records] and rule 5.60(G)(4) [re non-financial records].)

In order to protect his or her right of privacy by means of a motion to quash, the subpoenaed party needs to know why his or her records are being subpoenaed. Thus, should the State Bar subpoena a third party’s personal records, and not tell that person why we are doing so, that person could complain that we have violated his or her constitutional right of privacy. Yet the subpoenaed party’s privacy interests conflict with the confidentiality interest of the moral character applicant.

2. Limited Confidentiality of Moral Character Proceedings and State Bar Investigations. State Bar investigations and moral character proceedings are confidential (Bus. & Prof. Code, §§ 6060.2, 6086.1(b)). This confidentiality was created by statute, not by the Constitution, and there are a number of exceptions. (See, e.g., rule 2302, Rules Proc. State Bar.) One obvious example is that Supreme Court pleadings and opinions in moral character proceedings are available to the public. (See *In re Glass* (2014) 58 Cal.4th 500.) A second example is that the Chief Trial Counsel may disclose information regarding investigations when necessary to protect the public. (Bus. & Prof. Code, § 6086.1(b)). Finally, disciplinary investigations become a matter of public record once a notice of disciplinary charges is filed. (Id.) Despite the exceptions to confidentiality, when the Office of Chief Trial Counsel subpoenas a third party’s records, and informs that third party why we are doing so, a moral character applicant or a respondent under investigation might still complain that we have violated confidentiality requirements.

The State Bar’s Historical Practice

These statutes and rules, and the State Bar’s subpoena practices, have remained essentially unchanged for scores of years. The State Bar has always attempted to strike a reasonable balance between the privacy rights of subpoenaed individuals and the confidentiality desires of moral character applicants. As a result, for many years, our practice was to provide third-party individual¹ witnesses with a declaration to justify our subpoena of materials; however, we drafted the declarations narrowly. Further, we omitted the name of the moral character applicant or respondent from the face of the subpoena and the declaration.

We believe that this practice was justified for the following reasons:

¹A declaration justifying subpoenas of materials was not provided to financial institutions.

First, as mentioned above, the recipients have the right to receive the information justifying the issuance of the subpoena.

Second, we originally established our procedures to track those followed in civil cases. Code of Civil Procedure 1985 provides as follows:

(a) The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness. It may also require a witness to bring any books, documents, electronically stored information, or other things under the witness's control which the witness is bound by law to produce in evidence. When a county recorder is using the microfilm system for recording, and a witness is subpoenaed to present a record, the witness shall be deemed to have complied with the subpoena if the witness produces a certified copy thereof.

(b) **A copy of an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case,** and stating that the witness has the desired matters or things in his or her possession or under his or her control.

(c) The clerk, or a judge, shall issue a subpoena or subpoena duces tecum signed and sealed but otherwise in blank to a party requesting it, who shall fill it in before service. An attorney at law who is the attorney of record in an action or proceeding, may sign and issue a subpoena to require attendance before the court in which the action or proceeding is pending or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein; the subpoena in such a case need not be sealed. An attorney at law who is the attorney of record in an action or proceeding, may sign and issue a subpoena duces tecum to require production of the matters or things described in the subpoena.

(Emphasis added.)

In 2004, the Civil Discovery Act was amended, so that supporting declarations are no longer required for civil discovery (see *Terry v. Slico* (2009) 175 Cal.App.4th 352). When the Legislature amended the Civil Discovery Act, it did not make conforming amendments to the State Bar Act's provisions regarding investigatory subpoenas. The Legislature also left intact Code of Civil Procedure 1985's supporting declaration requirement for trial subpoenas.

Moreover, there is a significant difference between civil discovery and confidential State Bar proceedings. In a civil case, a subpoenaed party can simply visit the courthouse, review the public file, learn what the case is about, and file a motion to quash. In a moral character case, the State Bar Court cannot and does not allow non-parties to review the file or obtain any information about the file. In a pre-Notice of Disciplinary Charges State Bar investigation case, the court does not even maintain a file.

Third, rule 2302(e)(3), Rules of Procedure of the State Bar, expressly authorizes the Chief Trial Counsel to disclose information that is otherwise confidential: "To witnesses or potential witnesses in conjunction with an inquiry, complaint, investigation, or proceeding..." Again, this rule recognizes that even though some proceedings and investigations are confidential, that

confidentiality is limited. In order to do its job, OCTC must disclose some information to third parties.

The Need for Clarification

In April 2017, an applicant to the State Bar filed a motion to quash two investigative subpoenas issued by the Committee of Bar Examiners. The motion alleged that the investigator's declaration accompanying the investigative subpoenas violated the confidential nature of the proceeding. The Committee of Bar Examiners, by and through the Office of Chief Trial Counsel, opposed the motion to quash. The two investigative subpoenas were served on the financial institutions and on the applicant's spouse and mother, who were joint mortgage applicants.

The Court granted the motion to quash the subpoenas, but allowed OCTC to re-subpoena the materials by means of a subpoena that did not include information about the case. In evaluating the order, OCTC noted the need to balance the competing interests of the applicant and the third party was not sufficiently discussed, specifically, the privacy rights of subpoenaed parties (as discussed above) were not mentioned. We believe that providing "carefully written and narrowly tailored" declarations that "provide the third party with sufficient information," but do "not disclose more information than is necessary" is the right balance between the competing interests.

As a result, the Office of Chief Trial Counsel believes that the Rules of Procedure should be clarified to expressly allow supporting declarations to be provided to third party. This would remove any doubt concerning the appropriate procedure to be followed, and would eliminate any claim that a State Bar subpoena has either violated the subpoenaed party's privacy rights, or has violated the confidentiality rights of a respondent or moral character applicant.

Court Comment

This proposal was given to the State Bar Court for comment prior to submission to the Regulation and Discipline Committee. The State Bar Court raised no objection to this proposal.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

Title 3, Division 2, Chapter 3, Rule 2302(e), 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 a 60-day public comment period, the Board of Trustees

hereby adopts the amendments to the rules of Procedure of the State Bar, as set forth in Attachment A; and it is

FURTHER RESOLVED, that the amendment to rule 2302 of the Rules of Procedure of the State Bar is effective immediately and will apply to all pending and future matters.

ATTACHMENT(S) LIST

- A. Proposed amended rule 2302 (Clean Version)
- B. Proposed amended rule 2302 (Redline Version)

ATTACHMENT A (Clean Version)

Rule 2302. DISCLOSURE OF INFORMATION

(a) Except as otherwise provided by law or these rules, information concerning inquiries, complaints or investigations is confidential. There is no duty of confidentiality with respect to non-members; however, the Chief Trial Counsel or designees may assert confidentiality with respect to inquiries, complaints, or investigations regarding non-members, if, in the discretion of the Chief Trial Counsel or designees, that is necessary to protect members of the public.

(b) A member whose conduct is the subject of an inquiry, complaint or investigation may waive confidentiality.

(c) Notwithstanding the provisions of paragraph (b), the Chief Trial Counsel or designee may decline to waive confidentiality regarding an inquiry, complaint or investigation, if it is determined that an ongoing investigation may be substantially prejudiced by a public disclosure before the filing of a notice of disciplinary charges.

(d) (1) Notwithstanding paragraph (a), without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel or designee, after private notice to the member, may disclose documents or information concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:

(A) A member has caused, or is likely to cause, harm to client(s), the public, or to the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. The following additional factors shall be considered in making this determination:

(i) The maintenance of public confidence in the discipline system's exercise of self-regulation;

(ii) The member's current membership status;

(iii) The record of prior discipline of the member;

(iv) The potential for the imposition of a substantial disciplinary sanction;

(v) The existence of any other public matters;

(vi) The status of the complaint or investigation;

(vii) The waiver of confidentiality by the member;

(viii) The gravity of the underlying allegations; and

(ix) The member's cooperation with the State Bar.

(B) A member has committed criminal acts or is under investigation by law enforcement authorities;

(C) A member is under investigation by a regulatory or licensing agency, or has committed acts or made omissions which may reasonably result in investigation by a regulatory or licensing agency;

(D) The member is the subject of multiple complaints and the Office of the Chief Trial Counsel has determined not to pursue all of the complaints. The Office of the Chief Trial Counsel may inform complainants whose allegations have not been pursued of the status of the other investigations or the manner in which the other complaint(s) against the member have been resolved, e. g., by directional letter, warning letter, admonition, agreement in lieu of discipline, or private reproof; or

(2) If the Chief Trial Counsel, for any reason, declines to exercise the authority provided by paragraph (d)(1), or disqualifies himself or herself from acting under paragraph (d)(1), he or she shall appoint a designee to act in his or her place.

(3) The Chief Trial Counsel or designee, may define the scope of information disclosed and may limit the information disclosed pursuant to paragraph (d)(1)(A), above, to specified individuals or entities.

(4) Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee discloses documents or information pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a member(s), which includes a statement of the status or disposition of the complaint(s) or investigation(s); clarifying the procedures involved; and defending the right of the member(s) to a fair hearing on the allegations of misconduct.

(5) The Chief Trial Counsel or designee may issue, if appropriate, one or more public announcements and may disclose information concerning a complaint(s) or investigation(s) involving a non-member(s) when such disclosure would serve to protect the public, including, but not limited to, protecting the public from an individual(s) who has engaged in the unauthorized practice of law.

(e) Notwithstanding paragraph (a), without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:

(1) To employees of the State Bar Office of the Chief Trial Counsel, the State Bar Office of General Counsel or any Special Deputy Trial Counsel;

(2) To members of the Judicial Nominees Evaluation Commission or Review Committee as to matters concerning nominees in any jurisdiction;

(3) To witnesses or potential witnesses in conjunction with an inquiry, complaint, investigation, or proceeding;

(4) To other governmental agencies responsible for the enforcement of civil or criminal laws, including but not limited to information within the definitions set forth in Business and Professions Code sections 6043.5 and 6044.5;

(5) To agencies and other jurisdictions responsible for professional licensing;

(6) To the complainant or lawful designee;

(7) To the member(s) who is (are) the subject of the inquiry, complaint or investigation or their counsel of record, if any;

(8) To judges of the State Bar Court;

(9) To any other person or entity to the extent that such disclosure is authorized by Business and Professions Code sections 6094.5(b), 6086.14 or other statutory provision or any other law;

(10) To employees of a language interpretation or language translation company under contract with the State Bar to provide language translation or language interpretation services. Any contract between the State Bar and a language interpretation or language translation company shall include a confidentiality clause or non-disclosure agreement; or

(11) To third-party recipients of subpoenas duces tecum, when service of a narrowly tailored supporting declaration is necessary to inform subpoenaed party why his or her private information is being subpoenaed.

ATTACHMENT B (Redline Version)

Rule 2302. DISCLOSURE OF INFORMATION

(a) Except as otherwise provided by law or these rules, information concerning inquiries, complaints or investigations is confidential. There is no duty of confidentiality with respect to non-members; however, the Chief Trial Counsel or designees may assert confidentiality with respect to inquiries, complaints, or investigations regarding non-members, if, in the discretion of the Chief Trial Counsel or designees, that is necessary to protect members of the public.

(b) A member whose conduct is the subject of an inquiry, complaint or investigation may waive confidentiality.

(c) Notwithstanding the provisions of paragraph (b), the Chief Trial Counsel or designee may decline to waive confidentiality regarding an inquiry, complaint or investigation, if it is determined that an ongoing investigation may be substantially prejudiced by a public disclosure before the filing of a notice of disciplinary charges.

(d) (1) Notwithstanding paragraph (a), without violating the duty of confidentiality or waiving confidentiality for other purposes, the Chief Trial Counsel or designee, after private notice to the member, may disclose documents or information concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances:

(A) A member has caused, or is likely to cause, harm to client(s), the public, or to the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. The following additional factors shall be considered in making this determination:

(i) The maintenance of public confidence in the discipline system's exercise of self-regulation;

(ii) The member's current membership status;

(iii) The record of prior discipline of the member;

(iv) The potential for the imposition of a substantial disciplinary sanction;

(v) The existence of any other public matters;

(vi) The status of the complaint or investigation;

(vii) The waiver of confidentiality by the member;

(viii) The gravity of the underlying allegations; and

(ix) The member's cooperation with the State Bar.

(B) A member has committed criminal acts or is under investigation by law enforcement authorities;

(C) A member is under investigation by a regulatory or licensing agency, or has committed acts or made omissions which may reasonably result in investigation by a regulatory or licensing agency;

(D) The member is the subject of multiple complaints and the Office of the Chief Trial Counsel has determined not to pursue all of the complaints. The Office of the Chief Trial Counsel may inform complainants whose allegations have not been pursued of the status of the other investigations or the manner in which the other complaint(s) against the member have been resolved, e. g., by directional letter, warning letter, admonition, agreement in lieu of discipline, or private reproof; or

(2) If the Chief Trial Counsel, for any reason, declines to exercise the authority provided by paragraph (d)(1), or disqualifies himself or herself from acting under paragraph (d)(1), he or she shall appoint a designee to act in his or her place.

(3) The Chief Trial Counsel or designee, may define the scope of information disclosed and may limit the information disclosed pursuant to paragraph (d)(1)(A), above, to specified individuals or entities.

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(1) To employees of the State Bar Office of the Chief Trial Counsel, the State Bar Office of General Counsel or any Special Deputy Trial Counsel;

(2) To members of the Judicial Nominees Evaluation Commission or Review Committee as to matters concerning nominees in any jurisdiction;

(3) To witnesses or potential witnesses in conjunction with an inquiry, complaint, investigation, or proceeding;

(4) To other governmental agencies responsible for the enforcement of civil or criminal laws, including but not limited to information within the definitions set forth in Business and Professions Code sections 6043.5 and 6044.5;

(5) To agencies and other jurisdictions responsible for professional licensing;

(6) To the complainant or lawful designee;

(7) To the member(s) who is (are) the subject of the inquiry, complaint or investigation or their counsel of record, if any;

(8) To judges of the State Bar Court; ~~or~~

(9) To any other person or entity to the extent that such disclosure is authorized by Business and Professions Code sections 6094.5(b), 6086.14 or other statutory provision or any other ~~law~~ law;

(10) To employees of a language interpretation or language translation company under contract with the State Bar to provide language translation or language interpretation services. Any contract between the State Bar and a language interpretation or language translation company shall include a confidentiality clause or non-disclosure ~~agreement~~ agreement; or

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