

OPEN SESSION AGENDA ITEM

NOVEMBER 2018

REGULATION AND DISCIPLINE COMMITTEE, II.A.

DATE: 11/15/2018

TO: **Members, Regulation and Discipline Committee**

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

SUBJECT: State Bar Court (SBC) Proposed Changes to Rules of Procedure 5.340, 5.341, 5.342, 5.343 and 5.344 (Conviction proceedings): Request to Circulate for Public comment.

EXECUTIVE SUMMARY

In the 2019 fee bill, amendments were made to Business and Professions Code Section 6007(c), requiring the inactive enrollment of an attorney sentenced for 90 days incarceration or more and Section 6102(c) adding an additional ground for a summary disbarment upon a conviction of a crime. This proposal would amend the Rules of Procedure needed to implement the changes. The proposals also incorporate the change of the word “member” to “licensee” pursuant to previous legislative changes.

This item requests that the Committee direct that these proposed amendments be circulated for public comment, for a period of 45 days.

BACKGROUND

Effective January 1, 2019 Business and Professions Code § 6007 (c), is amended to add subsections (5) and (6), renumbering the old (5) as (7). The language added two requirements. First that any attorney who is sentenced to incarceration for 90 days or more as the result of a criminal conviction, shall be placed on involuntary inactive enrollment for at least the period of time in which the attorney is incarcerated. Second, it adds that any attorney who is placed on inactive enrollment under this subdivision, be required to comply with Rule 9.20 of the California Rules of Court, that is notify their clients and provide proof they have done so.

Also effective January 1, 2019, Business and Professions Code §6102(c) is amended to add as an additional ground for summary disbarment following a conviction, that the facts and circumstances of the offense involved moral turpitude.

In order for the Court to procedurally handle these new sections, changes were required to the Rules of Procedure which address conviction proceedings.

Rule 5.340 Nature of Proceedings

This rule is amended to add that the rule applies also to a conviction resulting in a sentence of incarceration for 90 days or more and to add a reference to Business and Professions Code §6007.

Rule 5.341 Beginning Proceedings

This Rule was amended to add a reference to a conviction with a sentence of incarceration for 90 days or more to the conviction proceedings that can be initiated, and to add that the Office of the Chief Trial Counsel must file a supplemental record of such conviction under rule 5.25.

Rule 5.342 Interim Suspension or Involuntary Active Enrollment

(A) Review Department Examination.

This Rule was amended to add an A (2) to add an involuntary active enrollment procedure, as set forth in Business and Professions Code § 6007(c)(5) and also adds that the court will order the licensee to comply with Rule 9.20 of the Rules of Court.

(B) Filing and Responding to Briefs.

This subsection was amended to add references to an involuntary active enrollment under § 6007(c)(5) when the licensee is sentenced to incarceration for 90 days or more.

(D) Motion to Vacate, or to Delay or Stay Order for Interim Suspension or Involuntary Active Enrollment.

This subsection is amended to add “or inactive enrollment” allowing a licensee to file a motion in the Review Department to vacate, delay the effective date of, or temporarily stay the effect of an order of interim suspension.

(E) Review of Order for Involuntary Active Enrollment.

A new subsection added to provide that an order granting or denying involuntary active enrollment under § 6007(c)(5) is reviewable under rule 5.150.

(F) Eligibility After Order for Involuntary Active Enrollment.

A new subsection, added to specify that a licensee may seek return to active enrollment at the conclusion of incarceration, following the usual rules for such a motion.

Rule 5.343 Summary Disbarment

This Rule is amended to add that if the motion for summary disbarment is filed under Business and Professions Code § 6102(c), that the Review Department may refer the case to the Hearing Department to determine whether or the facts and circumstances involve moral turpitude.

Rule 5.344 Final Convictions

This Rule was only amended to change “member” to Licensee”.

DISCUSSION

For both the Business and Profession Code section amendments to the conviction referral process, the procedure to handle the summary disbarment or involuntary inactive enrollment, already existed. However references to the new language needed to be inserted into the existing rules to provide guidance to the parties and to ensure due process and full transparency to the process.

Additionally, as summary disbarments are currently handled by the Review Department level, and the Review Department does not conduct evidentiary hearings, it was necessary to provide a method for the Review Department to refer the matter to the Hearing Department for the limited purpose of determining if the facts and circumstances of the conduct did involve moral turpitude, if the crime itself did not involve moral turpitude per se. It is anticipated that the specifics of that referral, including the timing and method of report back, will simply be handled in the referral order, therefore no additional rules were deemed necessary. .

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

Title 5, Division 6, Chapter 2, Rules 5.340, 5.341, 5.342, 5.343, and 5.344, 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 licenses in California.

Objective: 1. Successfully transition to the "new State Bar" - an agency focused on public protection, regulating the legal profession, and promoting acces to justice.

RECOMMENDATION

It is recommended that the Regulation and Discipline Committee approve the following resolution:

RESOLVED, that that staff is authorized to make available, for public comment for a period of 45-days, proposed amendments to: Title 5, Division 6, Chapter 2, Rules 5.340, 5.341, 5.342, 5.343, and 5.344 of the Rules of Procedure of the State Bar;; and that it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed amended Rules of Procedure or Board policy.

ATTACHMENT(S) LIST

- A. Proposed language of Rules 5.340, 5.341, 5.342, 5.343, and 5.344 (Clean version).**
- B. Proposed language of Rules 5.340, 5.341, 5.342, 5.343, and 5.344 (Redline version).**

ATTACHMENT A

Proposed Revised Rules of Procedure 5.340, 5.341, 5.342, 5.343, 5.344

Clean version

Division 6. Special Proceedings

Chapter 2. Conviction Proceedings

Rule 5.340 Nature of Proceedings

These rules apply to proceedings that result from a licensee's criminal conviction or sentence of incarceration for 90 days or more and are held under Business and Professions Code §§ 6007, 6101, and 6102, California Rules of Court, rule 9.10, and these Rules of Procedure of the State Bar.

Rule 5.341 Beginning Proceedings

Conviction proceedings are initiated in the Review Department of the State Bar Court when the Office of the Chief Trial Counsel files a certified copy of the record of conviction or sentence of incarceration for 90 days or more. If the conviction is not final as defined in California Rules of Court, rule 9.10(a), but becomes final later, the Office of the Chief Trial Counsel must file a supplemental record of conviction containing sufficient proof that the conviction is final. Any record of conviction or sentence of incarceration for 90 days or more filed must be served on the licensee under rule 5.25.

(A) Review Department Examination. The Review Department will examine the record of conviction or sentence of incarceration for 90 days or more:

- (1) If any ground for suspension set forth in Business and Professions Code § 6102(a) is present, the Review Department may interimsly suspend the licensee until a further order of the Review Department or until final disposition of the conviction proceeding.
- (2) If any ground for involuntary active enrollment set forth in Business and Professions Code § 6007(c)(5) is present, the Review Department shall order involuntary active enrollment and order the licensee to comply with rule 9.20 of the Rules of Court.

(B) Filing and Responding to Briefs. Within 10 days after the initial record of conviction or sentence of incarceration for 90 days or more is served, either party may file a brief addressing whether grounds for interim suspension under § 6102(a) or grounds for involuntary active enrollment under § 6007(c)(5) are

present. The brief may include evidence from the record of the proceedings resulting in the conviction or sentence of incarceration, including a transcript of any testimony. The opposing party has 10 days after the brief is served to file and serve a written response.

(C) Misdemeanor Conviction and Moral Turpitude. In cases involving misdemeanor convictions, the Review Department, on its own or on motion of any party, may direct the Hearing Department to conduct a hearing for the sole purpose of resolving factual issues as to whether there is probable cause to believe that the conviction involved moral turpitude, and if found, to make a recommendation whether interim suspension should be imposed. Proceedings pursuant to this subsection will be conducted as follows:

- (1) the court may allow discovery only if good cause is shown;
- (2) within 30 days after the referral order, each party must file and serve:
 - (a) a list of all witnesses to be called at the hearing, except for impeachment or rebuttal; and
 - (b) copies of all exhibits to be offered.
- (3) a hearing will be held within 45 days after the referral order is served.
The court will file and submit its report to the Review Department within 15 days after the hearing concludes.
- (4) rules 5.80-5.86 do not apply to these proceedings. If a member fails to appear at the hearing in person or by counsel, the hearing will proceed unless the court continues it for good cause.
- (5) a recommendation for interim suspension is reviewable under rule 5.150.

(D) Motion to Vacate, or to Delay or Stay Order for Interim Suspension or Involuntary Active Enrollment. At any time while a conviction proceeding is pending in the State Bar Court, a licensee may file a motion in the Review Department to vacate, delay the effective date of, or temporarily stay the effect of an order of interim suspension. Rule 5.162 of these rules governs the motions.

(E) Review of Order for Involuntary Active Enrollment. An order granting or denying involuntary active enrollment under § 6007(c)(5) is reviewable under rule 5.150.

(F) Eligibility After Order for Involuntary Active Enrollment. A licensee who has been transferred to inactive enrollment under § 6007(c)(5) may petition

for transfer to active enrollment, with or without interim remedies, pursuant to Chapter 7, rules 5.240 – 5.253.

Rule 5.343 Summary Disbarment

The Office of the Chief Trial Counsel may file a motion for the licensee's summary disbarment under Business and Professions Code § 6102(c)(1) or (2). The motion must be filed concurrently with the record of conviction showing that the conviction is final. The licensee's written response must be filed within 10 days after the motion is served. If the motion is pursuant to (c)(2), the Review Department may refer the case to the Hearing Department to determine if the facts and circumstances involve moral turpitude.

Rule 5.344 Final Convictions

(A) Convictions Not Subject to Summary Disbarment. After a conviction that is not subject to summary disbarment is final, the Review Department will refer the case to the Hearing Department to hear the case and decide the issues in the order of referral.

(B) Waiver of Finality. At any time before a conviction becomes final, a licensee may file a notice waiving finality and asking the Review Department to refer the case to the Hearing Department to hear and decide the case.

ATTACHMENT B

Proposed Revised Rules of Procedure 5.340, 5.341, 5.342, 5.343, 5.344

Redline version

Division 6. Special Proceedings

Chapter 2. Conviction Proceedings

Rule 5.340 Nature of Proceedings

These rules apply to proceedings that result from a ~~member~~ licensee's criminal conviction or sentence of incarceration for 90 days or more and are held under Business and Professions Code §§ 6007, 6101, and 6102, California Rules of Court, rule 9.10, and these Rules of Procedure of the State Bar.

Rule 5.341 Beginning Proceedings

Conviction proceedings are initiated in the Review Department of the State Bar Court when the Office of the Chief Trial Counsel files a certified copy of the record of conviction or sentence of incarceration for 90 days or more. If the conviction is not final as defined in California Rules of Court, rule 9.10(a), but becomes final later, the Office of the Chief Trial Counsel must file a supplemental record of conviction containing sufficient proof that the conviction is final. Any record of conviction or sentence of incarceration for 90 days or more filed must be served on the ~~member~~ licensee under rule 5.25.

Rule 5.342 Interim Suspension or Involuntary Active Enrollment

(A) Review Department Examination. The Review Department will examine the record of conviction or sentence of incarceration for 90 days or more:

(1) If any ground for suspension set forth in Business and Professions Code § 6102(a) is present, the Review Department may interimsly suspend the ~~member~~licensee until a further order of the Review Department or until final disposition of the conviction proceeding.

(2) If any ground for involuntary active enrollment set forth in Business and Professions Code § 6007(c)(5) is present, the Review Department shall order involuntary active enrollment and order the licensee to comply with rule 9.20 of the Rules of Court.

(B) Filing and Responding to Briefs. Within 10 days after the initial record of conviction [or sentence of incarceration for 90 days or more](#) is served, either party may file a brief addressing whether grounds for interim suspension under § 6102(a) [or grounds for involuntary active enrollment under § 6007\(c\)\(5\)](#) are present. The brief may include evidence from the record of the proceedings resulting in the [conviction or sentence of incarceration](#), including a transcript of any testimony. The opposing party has 10 days after the brief is served to file and serve a written response.

(C) Misdemeanor Conviction and Moral Turpitude. In cases involving misdemeanor convictions, the Review Department, on its own or on motion of any party, may direct the Hearing Department to conduct a hearing for the sole purpose of resolving factual issues as to whether there is probable cause to believe that the conviction involved moral turpitude, and if found, to make a recommendation whether interim suspension should be imposed. Proceedings pursuant to this subsection will be conducted as follows:

- (1) the court may allow discovery only if good cause is shown;
 - (2) within 30 days after the referral order, each party must file and serve:
 - (a) a list of all witnesses to be called at the hearing, except for impeachment or rebuttal; and
 - (b) copies of all exhibits to be offered.
 - (3) a hearing will be held within 45 days after the referral order is served.
- The court will file and submit its report to the Review Department within 15 days after the hearing concludes.
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(F) Eligibility After Order for Involuntary Active Enrollment. A licensee who has been transferred to inactive enrollment under § 6007(c)(5) may petition for transfer to active enrollment, with or without interim remedies, pursuant to Chapter 7, rules 5.240 – 5.253.

Rule 5.343 Summary Disbarment

The Office of the Chief Trial Counsel may file a motion for the ~~member~~ licensee's summary disbarment under Business and Professions Code § 6102(c)(1 or (2)). The motion must be filed concurrently with the record of conviction showing that the conviction is final. The ~~member~~ licensee's written response must be filed within 10 days after the motion is served. If the motion is pursuant to (c)(2), the Review Department may refer the case to the Hearing Department to determine if the facts and circumstances involve moral turpitude.

Rule 5.344 Final Convictions

(A) Convictions Not Subject to Summary Disbarment. After a conviction that is not subject to summary disbarment is final, the Review Department will refer the case to the Hearing Department to hear the case and decide the issues in the order of referral.

(B) Waiver of Finality. At any time before a conviction becomes final, a ~~member~~ licensee may file a notice waiving finality and asking the Review Department to refer the case to the Hearing Department to hear and decide the case.