



The State Bar *of California*

OPEN SESSION

AGENDA ITEM

54-123 JANUARY 2019

REGULATION AND DISCIPLINE COMMITTEE II.A

DATE: January 25, 2019

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

FROM: Antonia G. Darling, Chief Court Counsel/Chief Court 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): Return from Public Comment
and Request for Approval

EXECUTIVE SUMMARY

In the 2019 fee bill (AB 3249), amendments were made to Business and Professions Code §6007(c), requiring the inactive enrollment of an attorney sentenced for 90 days incarceration or more and §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.

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 to 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

Rule 5.340 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

Rule 5.341 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

The title of Rule 5.342 is amended to add the words “or Involuntary Inactive Enrollment”. Subsection (A) was amended to add a subsection (A)(2) which adds an involuntary active enrollment procedure, as set forth in Business and Professions Code §6007(c)(5) and also adds the new requirement that the licensee must comply with Rule 9.20 of the Rules of Court.

Subsection (B) Filing and Responding to Briefs, is amended to add references to an involuntary active enrollment under Business and Professions Code §6007(c)(5) when the licensee is sentenced to incarceration for 90 days or more.

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

Subsection (E) Review of Order for Involuntary Active Enrollment, is a new subsection, added to provide that an order granting or denying involuntary active enrollment under Business and Professions Code §6007(c)(5), is reviewable under Rule 5.150.

Subsection (F) Eligibility after Order for Involuntary Active Enrollment, is a new subsection, added to specify that a licensee may seek return to active enrollment at the conclusion of incarceration by following the usual rules of procedure for such a motion.

Rule 5.343 Summary Disbarment

Rule 5.343 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 (Change Withdrawn)

In the initial proposal by the State Bar Court, Rule 5.344 was proposed to be amended to change “member” to “licensee”, pursuant to AB 3249. However, this change is now contained in an omnibus request being presented in a separate agenda item to the Board, changing the word “member” to “attorney” in all Rules of Procedure; therefore the court withdraws this requested amendment.

Note: The original version of the proposed Rule changes that were sent out for public comment also reflected technical corrections, changing the word “member” to “licensee”. In order to conform with other technical amendments changing the word “member” to “attorney” in the other Rules of Procedure, the language here shows the word “member” as changed to “attorney”.

DISCUSSION

The amendments to the Business and Professions Code regarding the conviction of a crime by an attorney adds a new ground for a summary disbarment (the conduct surrounding the commission of a crime involved moral turpitude even if the crime is not considered moral turpitude per se), and a new ground for enrolling an attorney involuntarily inactive (when sentenced to 90 days in jail or more). The procedure to handle summary disbarments or involuntary inactive enrollments required under the two Business and Professions Code section amendments already exist. However, references to the new grounds needed to be inserted into the existing rules 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, when 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 to effectuate the process.

PUBLIC COMMENTS

Only one public comment was received regarding the proposed rule changes, and it did not address the specific rule changes. The comments came from Susan Bassi of Los Gatos (See Attachment C). In her email she stated her view that the State Bar does not do enough to identify attorneys who are convicted of crimes, or to take action against them. She specifically references an attorney who she alleges was convicted of a white collar crime of victimizing an elderly man, and she stated that the lawyer is still practicing law. Ms. Bassi's comments were forwarded to the intake office for the Office of Chief Trial Counsel for review.

As there were no actual objections to the rule revisions, we recommend that the changes be approved as submitted to Rules of Procedure 5.340, 5.341, 5.342, and 5.343. We have withdrawn our proposed amendment to Rule 5.344 as it is being addressed in an omnibus clean-up recommendation also before the Board.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

Title 5, Division 6, Chapter 2, Rules 5.340, 5.341, 5.342, and 5.343, 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.

RECOMMENDATIONS

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

RESOLVED, that the Board of Trustees approve that following the 60-day public comment period, the Board of Trustees hereby adopts the amendments to Rule 5.340, 5.341, 5.342, and 5.343 of the Rules 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 25, 2019.

ATTACHMENT(S) LIST

- A.** Proposed language of Rules 5.340, 5.341, 5.342, and 5.343 (Clean version).
- B.** Proposed language of Rules 5.340, 5.341, 5.342, and 5.343 (Redline version).
- C.** Public Comment- Susan Bassi

ATTACHMENT A

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

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 attorney'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 attorney 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 interimly suspend the attorney 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 attorney 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 attorney 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 attorney 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 attorney'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 attorney'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.

ATTACHMENT B

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

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 [attorney'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 [attorney](#) 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 interimly suspend the [attorney](#) 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 attorney 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 [attorney](#) 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 [attorney](#) 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 [attorney'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 [attorney'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.

ATTACHMENT C

Public Comment

From: Susan Bassi [mailto:gilroybassi@gmail.com]

Sent: Tuesday, December 04, 2018 2:00 AM

To: sbcrulescomment

Subject: Public Comment- Proposed Changes to Rules of Procedure 5.40 - 5.44 (Conviction Proceedings)

The State Bar continues to adopt rules that protect lawyers over members of the public. Already BPC6101 is an impotent law that no local law enforcement agencies enforce. For example, in Santa Clara County lawyer Valerie Houghton was indicted for white collar felony crimes where the victim was an elderly man. These alleged crimes clearly involved moral turpitude, yet the Bar allowed Ms. Houghton to continue practicing family law, even publish articles in State Bar publications, which allowed Ms. Houghton to continue to seek court appointments in divorce cases where she represents children. And where other lawyers Houghton worked with referred her to clients and instructed those clients to pay Houghton in cash, so it would not be "discoverable".

The policies and practice of the Bar continue to allow the public to be harmed by hiring, and paying, lawyers indicted for crimes involving moral turpitude. Ms. Houghton's criminal trial has been pending for nearly 3 years, as she has continued to do business with unsophisticated legal consumers who are left in the dark about the pending charges.

A media investigation also shows that lawyers charged with DUI, theft and domestic violence are not reported in a manner that allows members of the public to be informed prior to hiring them. This allows for victims of domestic violence to unknowingly hire a lawyer who is known to beat a spouse, or have a drinking problem, re victimizing clients of family law attorneys where domestic violence and alcohol addiction issues may be at hand.

Like all other professions, if lawyers are charged with, not just convicted, crimes involving moral turpitude, they should be suspended, not allowed to wait for a conviction of 90 days or more before legal consumers are notified.

Wording in any Professional Rule that provides that a lawyer would not even be suspended, or disbarred, while in jail is just dumb. Of course you cannot practice law if you are in jail. The rules need input from "reasonable" persons, not just lawyers, or the public will continue to face potential harm.

The Bar Rules continue to favor lawyers and fail to protect the public especially when it comes to crimes involving domestic violence and moral turpitude.

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