



The State Bar *of California*

OPEN SESSION

AGENDA ITEM

54-122 SEPTEMBER 2019

REGULATION AND DISCIPLINE COMMITTEE III.E

DATE: September 19, 2019

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

FROM: James J. Chang, Assistant General Counsel, Office of General Counsel
Carissa N. Andresen, Assistant General Counsel, Office of General Counsel

SUBJECT: Proposed New Rule of Procedure 2605 (Vexatious Complainants) and
Amendment to Rule of Procedure 5.10 (Confidential Proceedings): Return from
Public Comment and Request for Approval

EXECUTIVE SUMMARY

At its July 2019 meeting, the State Bar Regulation and Discipline Committee (RAD) authorized a 45-day public comment period for proposed new Rule of Procedure 2605 and proposed amendment to Rule of Procedure 5.10. Proposed rule 2605 would grant the Office of Chief Trial Counsel (OCTC) authority to apply a vexatious complainant designation under specified criteria, thereby relieving OCTC of the requirement to review or process subsequent complaints from the vexatious complainant unless the complaint is verified under penalty of perjury and submitted on the complainant's behalf by an active licensed attorney. Proposed rule 5.10 reflects amendments to clarify that vexatious complainant proceedings within State Bar Court are confidential proceedings.

The State Bar received two public comments, both of which support the adoption of the proposed new and amended rules. This item requests approval of proposed Rule of Procedure 2605 and amendment to Rule of Procedure 5.10.

BACKGROUND

The background of this item was discussed at the July 2019 meeting, and is provided in Attachment A, the July 2019 Agenda Item III.B. (The full text of the proposed and amended rules is provided as Attachments A and B, respectively, to the July 2019 Agenda Item III.B.)

DISCUSSION

During the 45-day public comment period, the State Bar received comments from the California Lawyers Association Ethics Committee, and the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association. Both commenters support the adoption of the proposed new and amended rules; no response is required. The full text of the public comments received is provided as Attachment B.

FISCAL/PERSONNEL IMPACT

Adoption of the proposed rule would conserve OCTC personnel resources currently dedicated to processing repeat complaints from complainants who meet the criteria to be deemed vexatious under the proposed rule.

RULE AMENDMENTS

Title III, Division II, Chapter 6, of the Rules of Procedure would be amended to add new rule 2605.

Title 5,¹ Division 1, Rule 5.10 of the Rules of Procedure would be amended to add that proceedings under new rule 2605 are confidential.

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

None

RECOMMENDATIONS

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

RESOLVED, that the Board of Trustees hereby approve and adopt proposed State Bar Rule of Procedure 2605 and proposed amendment to State Bar Rule of Procedure 5.10, attached hereto in Attachment A.

¹ The Roman numeration of Title III and Arabic numeration of Title 5 of the Rules of Procedure are in the original.

ATTACHMENT(S) LIST

- A.** July 2019 Meeting Agenda Item III.B, with original attachments
- B.** Public Comments



The State Bar *of California*

OPEN SESSION

AGENDA ITEM

JULY 2019

REGULATION AND DISCIPLINE COMMITTEE ITEM III.B

DATE: July 11, 2019

TO: Members, Regulation and Discipline Committee

FROM: James J. Chang, Assistant General Counsel
Carissa N. Andresen, Assistant General Counsel

SUBJECT: Proposed New Rule of Procedure 2605 (Vexatious Complainants) and
Amendment to Rule of Procedure 5.10 (Confidential Proceedings): Request
to Circulate for Public Comment

EXECUTIVE SUMMARY

The State Bar does not currently have a formal procedure for handling complainants who file excessive numbers of meritless or frivolous complaints. Continued processing of those complaints unduly burdens the State Bar's limited resources and hampers its ability to serve the general public.

Proposed Rule of Procedure 2605 would grant the Office of Chief Trial Counsel ("OCTC") authority to apply a vexatious complainant designation to complainants who have filed 10 or more complaints in the preceding two-year period that were closed at the inquiry stage due to a finding that the complaints lacked sufficient factual or legal grounds to warrant investigation. Upon such a designation, OCTC would not be required to review or process subsequent complaints from the vexatious complainant unless the complaint is verified under penalty of perjury and submitted on the complainant's behalf by an active licensed attorney. OCTC's decision to apply the vexatious complainant designation would be reviewable by the State Bar Court.

This item also proposes an amendment to Rule of Procedure 5.10 to clarify that State Bar Court proceedings regarding a vexatious complainant's request for review of the vexatious complainant designation would be confidential, consistent with the statutory requirement that information concerning complaints that do not result in disciplinary charges cannot be disclosed publicly.

This item requests that the Committee direct that this proposed rule and rule amendment be circulated for public comment for a period of 45 days.

BACKGROUND

This new rule is necessary because there is currently no rule or other clear legal guidance to allow OCTC to depart from its ordinary process of acknowledging and processing every new complaint¹ received.

Business and Professions Code Section 6093.5 requires OCTC to acknowledge receipt of a written complaint of attorney misconduct and to inform the complainant of the reasons for the disposition of the complaint. OCTC's current practice is to acknowledge and process every complaint that it receives and send an individualized closing letter in response to every complaint, regardless of the number of complaints an individual submits.

The process for reviewing and acknowledging every new complaint includes creating a new case number entry in the case management system, substantively reviewing the complaint, drafting a narrative summary of the allegations, and analyzing whether the complaint alleges facts that could establish a potential violation of the Rules of Professional Conduct or State Bar Act so that further investigation should be conducted. If the intake attorney determines that the complaint does not sufficiently allege a violation, the intake attorney drafts a letter to the complainant informing them of the reasons for closing the complaint.

Some complainants have filed large numbers of meritless complaints (in one recent case, a single complainant submitted over 1,500 complaints against different attorneys). OCTC has dedicated significant staff resources to reviewing and processing frivolous complaints, including hiring a temporary contract attorney dedicated to reviewing complaints from complainants who would qualify as vexatious under this proposed rule. The Complaint Review Unit within the Office of General Counsel has also been negatively impacted by the volume of complaints from vexatious complainants. The number of vexatious complainants is expected to rise with the recent launch of the online complaint submission process.

The only existing vexatious litigant statute applicable to the State Bar, Business and Professions Code Section 6158.4, subdivision (j), applies by its terms only to complainants alleging violations of the attorney advertising statutes. Business and Professions Code Section 6158.4 allows complainants to pursue a private enforcement action against an attorney for alleged advertising violations after first filing a complaint with the State Bar. Complainants who file five or more such unfounded complaints within a seven-year period are deemed vexatious litigants

¹ As used in this agenda item, "complaint" refers to a communication submitted to the State Bar alleging misconduct by an attorney. This usage is consistent with OCTC's practice of referring to all such communications as "complaints." However, the proposed rule uses the term "communications" rather than "complaints" because Rule of Procedure 5.4(13) defines "complaint" as a "communication alleging misconduct by a State Bar member sufficient to warrant an investigation that may result in discipline of the member if the allegations are proved." Because the proposed rule applies only to those communications alleging misconduct that are not sufficient to warrant an investigation, the term "complaint" is not used in the rule. This is to maintain consistency across the rules of procedure and to avoid confusion.

and are required to post a security of \$25,000 before the State Bar may consider any complaints from that person. The legislative history indicates that this limitation was imposed to deter frivolous litigation. The proposed new rule concerning vexatious complainants alleging other disciplinary violations is significantly less restrictive, and does not require the posting of a security.

DISCUSSION

A. Proposed New Rule of Procedure 2605 (Vexatious Complainants)

Proposed rule 2605 would allow OCTC to designate a person a vexatious complainant if that person has filed 10 or more complaints in the preceding two-year period that were finally closed without investigation at the inquiry stage. The vexatious complainant may seek review of the designation from the State Bar Court. The State Bar Court's scope of review would be to confirm that OCTC properly applied the criteria necessary to invoke the vexatious complainant designation (10 or more complaints finally closed in the preceding two-year period).

Upon designation of a person as a vexatious complainant, OCTC would not be required to acknowledge or process new complaints from the vexatious complainant unless the new complaint is verified under penalty of perjury and submitted on the complainant's behalf by an active licensed attorney who is not currently subject to disciplinary proceedings or on disciplinary or criminal probation. This process ensures that there will continue to be a method for vexatious complainants who have meritorious complaints to have their allegations evaluated and potentially investigated by the State Bar.

This rule is intended to reasonably construe the requirement of Business and Professions Code Section 6093.5 that the State Bar acknowledge receipt of a complaint within two weeks of receipt and provide the complainant with the reasons for the disposition of a complaint. The rule is intended to avoid an overly literal interpretation that would create an absurd result if the State Bar were required to continue acknowledging and processing every complaint received by a complainant even in a case where a complainant has previously submitted large numbers of frivolous complaints. *See, e.g., Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1304 ["Although enactments must ordinarily be construed in accordance with the plain and ordinary meaning of their words, the literal language of the measure may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers."]. The rule appropriately balances the individual right of petition with the public interest in ensuring that the government's ability to serve the broader public is not unreasonably impaired. *See, e.g., Vargas v. City of Salinas* (2011) 200 Cal. App. 4th 1331, 1342 ["While the right of petition is accorded a paramount and preferred place in the democratic system, it has never been absolute . . . Reasonable, narrowly drawn restrictions designed to prevent abuse of the right can be valid."] [citations and quotations omitted].

The rule is modeled on, but less restrictive than, California's vexatious litigant statute (Code of Civil Procedure section 391), which has consistently been held to meet due process and constitutional requirements. *See generally Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 60-62 [vexatious litigant statute does not violate due process because procedural

safeguards allow vexatious litigant to apply to presiding judge for permission to file lawsuit upon showing of merit].

The proposed rule is retroactive to January 1, 2018. This retroactivity provision is intended to allow OCTC to apply the vexatious complainant designation to complainants who have submitted large numbers of meritless complaints in the past year, not all of which have yet been processed. If this rule is enacted, OCTC would be given the authority to designate those persons as vexatious and to forego processing of the complaints already received but not yet processed.

B. Proposed Amendment to Rule of Procedure 5.10 (Confidential Proceedings)

This item also proposes an amendment to Rule of Procedure 5.10 to clarify that the proceedings in State Bar Court regarding a request for review of the vexatious complainant designation would be confidential.

Business and Professions Code Section 6086.1(b) requires that “all disciplinary investigations are confidential until the time that formal charges are filed. . .” The State Bar is therefore prohibited from disclosing publicly information about allegations of attorney misconduct which did not result in disciplinary charges.

Rule 5.10 currently provides that proceedings concerning appeals of adverse moral character decisions and involuntary inactive enrollment proceedings under Business and Professions Code section 6007(b)(3) are confidential. This amendment to rule 5.10 would add vexatious complainant proceedings to the list of State Bar Court proceedings that are confidential.

This amendment to rule 5.10 is necessary so that the review procedure in State Bar Court concerning the vexatious complainant designation will not result in public disclosure about previous complaints filed by the complainant against other attorneys which did not result in charges.

FISCAL/PERSONNEL IMPACT

Adoption of the proposed rule would conserve OCTC personnel resources currently dedicated to processing repeat complaints from complainants who meet the criteria to be deemed vexatious under the proposed rule.

RULE AMENDMENTS

Title III, Division II, Chapter 6, of the Rules of Procedure would be amended to add new rule 2605.

Title 5,² Division 1, Rule 5.10 of the Rules of Procedure would be amended to add that proceedings under new rule 2605 are confidential.

BOARD BOOK AMENDMENTS

² The Roman numeration of Title III and Arabic numeration of Title 5 of the Rules of Procedure are in the original.

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 approve the following resolution:

RESOLVED, that staff is authorized to make available for a 45-day public comment period: (1) proposed State Bar Rule of Procedure 2605, attached hereto as Attachment A; and (2) proposed amendment to State Bar Rule of Procedure 5.10, attached hereto as Attachment B.

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

ATTACHMENT(S) LIST

- A.** Proposed language of new State Bar Rule of Procedure 2605.
- B.** Proposed language of amendment to State Bar Rule of Procedure 5.10.

ATTACHMENT A

Rule 2605. Vexatious Complainants

- (a) The Office of Chief Trial Counsel may designate a person a vexatious complainant if, in the preceding two-year period, the complainant has submitted to the State Bar 10 or more communications alleging attorney misconduct that have been finally closed at the inquiry stage without investigation because the communications did not allege sufficient factual or legal grounds to indicate a potential disciplinary violation. The Office of Chief Trial Counsel will mail notice of the designation and a copy of this rule to the complainant at the complainant's last known address.
- (b) For purposes of this rule, a complainant's communication has been "finally closed" if:
 - (i) the complainant failed to seek reopening of the complaint by the Complaint Review Unit of the Office of General Counsel within 90 days of the closure of the communication; or
 - (ii) the Complaint Review Unit denied the complainant's request to reopen the communication and the complainant did not timely file an accusation arising from the communication with the Supreme Court in compliance with California Rules of Court, rule 9.13(d) through (f); or
 - (iii) the Supreme Court denied an accusation arising from the communication.
- (c) A complainant designated as vexatious under this rule may seek review of the designation by filing a request for review with the Presiding Judge of the Review Department of the State Bar Court within 30 days of the mailing of the vexatious complainant notice issued by the Office of Chief Trial Counsel under subsection (a). The request for review must include a copy of the vexatious complainant designation notice and be accompanied by proof of service on the Office of Chief Trial Counsel, Intake Unit, at the Los Angeles office of the State Bar, and on the Clerk of the State Bar Court at the Los Angeles office. The Office of Chief Trial Counsel may file and serve an answer to the complainant's request for review within 20 days of service of the complainant's request for review. Based upon these written submissions, the State Bar Court will determine whether the complainant has, in the two-year period preceding the notice of vexatious complainant designation, submitted ten or more communications alleging attorney misconduct that have been finally closed. If the State Bar Court determines that requirement was not met, the vexatious complainant designation will be vacated; otherwise, the designation will remain in place. Proceedings under this rule shall be confidential. The Executive Committee of the State Bar Court may adopt rules of practice for these proceedings.
- (d) The Office of Chief Trial Counsel may decline to review and process any subsequent

ATTACHMENT A

communications from a person designated a vexatious complainant under this rule unless the communication is verified by the complainant under penalty of perjury and the communication is submitted on the complainant's behalf by an attorney who holds an active license to practice law in the State of California and is not currently in disciplinary proceedings or on disciplinary or criminal probation. If the vexatious complainant is an attorney licensed to practice law in the State of California, the communication must be submitted on the vexatious complainant's behalf by another attorney who is actively licensed to practice law in the State of California and is not currently in disciplinary proceedings or on disciplinary or criminal probation and is not designated as a vexatious complainant pursuant to this rule.

- (e) This rule shall apply retroactively to January 1, 2018.
- (f) This rule does not apply to complaints filed pursuant to Business and Professions Code section 6158.4.

ATTACHMENT B

Rule 5.10 Confidential Proceedings

(a) Unless the applicant or member waives confidentiality, proceedings under Business and Professions Code § 6007(b)(3) and moral character proceedings are confidential.

(b) Proceedings under rule 2605 (vexatious complainants) are confidential. The confidentiality of proceedings under rule 2605 may not be waived.

CALIFORNIA
LAWYERS
ASSOCIATION

August 14, 2019

Ms. Donna Lum
Office of General Counsel
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed New and Amended Rules of Procedure of the State Bar Regarding
Vexatious Complainants – Rule 2605

Dear Ms. Lum:

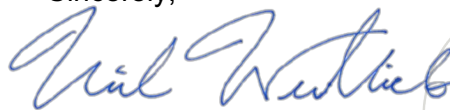
The California Lawyers Association Ethics Committee appreciates the opportunity to comment on the proposed new and amended Rules of Procedure of the State Bar governing the designation of vexatious complainants.

Our Committee was recently formed by the California Lawyers Association. While our Committee is new in the ethics community, our members are not. Of our 12 founding members: nine are former COPRAC members, including five former COPRAC chairs; two were members of the Commission for the Revision of the Rules of Professional Conduct; all are or were members of local bar association ethics committees, including five current or former officers; and one is a Special Deputy Trial Counsel on behalf of the State Bar Office of Chief Trial Counsel.

Our Committee supports the adoption of proposed Rule of Procedure 2605 and the proposed amendment to Rule of Procedure 5.10. By empowering the Office of Chief Trial Counsel to decline to review and process any communications from a vexatious complainant (as determined in accordance with proposed Rule 2605), the limited resources of the Office of Chief Trial Counsel could be more appropriately allocated to better serving the general public.

Thank you for the opportunity to comment on proposed new and amended Rules of Procedure of the State Bar governing the designation of vexatious complainants.

Sincerely,



Neil J Wertlieb
Co-Chair
California Lawyers Association Ethics Committee



Los Angeles County Bar Association

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Donna Lum
Office of General Counsel
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed New and Amended Rules of Procedure 2605
and Amendment to Rule of Procedure 5.10

Dear Ms. Lum:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association ("PREC") appreciates the opportunity to submit the following comments on Proposed New Rule of Procedure 2605 and Amendment to Rules of Procedure 5.10. of the State Bar.

For the reason set forth below, our Committee supports the adoption of proposed Rule of Procedure 2605, and the proposed amendment to Rule of Procedure 5.10, and requests your consideration of one additional issue.

One of the fundamental goals of the State Bar discipline system has always been public protection. This proposed rule furthers the public protection mission of the State Bar, since it conserves the resources of the agency from being squandered on pointless complaints from serial complaining witnesses or complainants. Additionally, the proposed rule contains exceptions that ensure that truly meritorious complaints will be investigated and prosecuted as appropriate.

Proposed new Rule of Procedure 2605 also reflects issues suggested by Business and Professions Code Section 6043.5, which maintains that knowingly filing a false or malicious complaint with the State Bar is punishable as a misdemeanor. We suggest that, when the Office of Chief Trial Counsel classifies a complaining witness as vexatious, such complainant be informed of Business and Professions Code Section 6043.5. For their own protection, such complainants should be notified of the potential criminal liability that may result from their continued conduct.

Thank you for the opportunity to comment on proposed new and amended Rules of Procedure of the State Bar governing the designation of vexatious complainants.

Sincerely,

A handwritten signature in black ink, consisting of a stylized capital 'B' followed by a long, horizontal, slightly wavy line extending to the right.

Brandon Niles Krueger
Chair
Professional Responsibility and Ethics Committee,
Los Angeles County Bar Association