



The State Bar of California

OPEN SESSION

AGENDA ITEM

REGULATION AND DISCIPLINE COMMITTEE III.D

DATE: November 18, 2021

TO: Members, Regulation and Discipline Committee

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Proposed Amendment to Rule 5.80 of the Rules of Procedure: Request for Public Comment

EXECUTIVE SUMMARY

Rule 5.80 of the Rules of Procedure of the State Bar of California provides that a declaration in support of a motion for entry of default must “show the deputy trial counsel took those additional steps a reasonable person would have taken under the circumstances to provide notice.” The proposed revision to 5.80(B) would provide clarity and consistency by specifying the steps that should be taken to provide notice. Additional proposed changes specify how the Office of Chief Trial Counsel (OCTC) may prove compliance with the rule.

BACKGROUND

Rule 5.25(B) of the Rules of Procedure of the State Bar states that initial pleadings, including a Notice of Disciplinary Charges (NDC) must be served by certified mail, return receipt requested. Rule 5.80 of the Rules of Procedure of the State Bar of California sets forth the procedure to seek the default of a respondent attorney who failed to file a timely response to an NDC. Subdivision (B) of rule 5.80 states that a motion for entry of default must be supported by a declaration establishing either (1) a signed return receipt for the NDC was received from the attorney or (2) if not, “the deputy trial counsel took those additional steps a reasonable person would have taken under the circumstances to provide notice.” The proposed revision to 5.80(B) would provide additional clarity and consistency by specifying the steps that should be taken to provide notice in the absence of a signed return receipt.

DISCUSSION

Where a respondent attorney has failed to file a timely response to an NDC, and the OCTC has not received a signed return receipt for the NDC, subdivision (B) of rule 5.80 requires that a motion for entry of default must be supported by a declaration that shows “the deputy trial counsel took those additional steps a reasonable person would have taken under the circumstances to provide notice.”

To provide clarity and ensure consistency, the proposed revision would replace the general requirement for those steps “a reasonable person” would take by specifying the steps that should be taken depending on the circumstances. Further, the proposed revision would specify that additional steps to provide notice are not required where the record establishes that the respondent has actual notice of the proceedings. On at least one occasion, the OCTC was ordered to take additional steps to notify the respondent of the proceedings despite the fact that the respondent had actual knowledge of the proceedings and had chosen not to respond to the NDC. The proposed revision would also specify what constitutes sufficient proof of the required steps, and that proof of these steps creates a presumption affecting the burden of producing evidence that the licensee has actual notice of the proceeding.

The proposed rule would require that before a motion for default could be filed, the OCTC must submit a declaration providing evidence that:

1. A signed return receipt for the NDC was received from the attorney; or
2. If a signed return receipt for the NDC was not received from the attorney, the OCTC posted the NDC to the attorney’s “My State Bar Profile” page, the OCTC sent notice to the attorney’s electronic service address that a document was posted, and the posted NDC was accessed by logging into the attorney’s “My State Bar” profile; or
3. If a signed return receipt for the NDC was not received from the attorney, the posted NDC was not accessed, and there is no other evidence that the respondent has actual notice of the proceeding, the OCTC attempted to contact the respondent via email, first class mail, or telephone, at any contact information discovered by:
 - a. Reviewing the respondent’s file for any other recent and known addresses where the OCTC reasonably believes the respondent may be found;
 - b. Reviewing the respondent’s file for any known telephone numbers and electronic message or email addresses;
 - c. If the respondent had been ordered to comply with probation or reprobation conditions pursuant to orders issued by the California Supreme Court or the State Bar Court, checking with the Office of Probation for the respondent’s latest contact information;
 - d. Conducting at least one Internet search for any other known and available contact information for the respondent using a reasonably available, free search engine; and
 - e. If conviction proceedings were involved, making reasonable efforts to contact the respondent’s defense counsel, if known, for contact information.

While the discipline system would benefit from clarity and consistency as to the steps required to provide notice regardless of COVID-19, the problem has been exacerbated since March 2020 because the U.S. Postal Service is not requiring recipients to sign return receipts for certified mail, even when the OCTC requests one.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF PROCEDURE

Title 5, Division 2, Chapter 4, Rule 5.80

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

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

Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Regulation and Discipline Committee authorize staff to make available for public comment for a period of 45 days proposed amendments to rule 5.80 of the Rules of Procedure of the State Bar of California, and 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 of the State Bar of California.

ATTACHMENT(S) LIST

- A.** Proposed Rule 5.80 (Clean Version)
- B.** Proposed Rule 5.80 (Redline Version)

Proposed Rule 5.80 (Clean Version)

- (A) **Motion for Entry of Default.** When an attorney fails to timely file a response, the deputy trial counsel must file and serve on the attorney a motion for entry of default. The motion must be filed within 15 days after the response is due, absent an agreement or order extending the time for filing by the attorney of a response, and must contain:
- (1) The filing date of notice and date of service of disciplinary charges;
 - (2) A statement that the attorney did not timely file a response under rule 5.43;
 - (3) The following language in prominent type:
 “If you do not file a response with the State Bar Court within 10 days of service of this motion, the court will enter your default, deem the facts in the notice of disciplinary charges admitted by you, and may admit evidence against you that would otherwise be inadmissible. You will lose the opportunity to participate further in these proceedings, unless you timely make—and the court grants—a motion to set aside your default. If your default is entered, and you fail to timely move to set it aside, this court will enter an order recommending your disbarment and may recommend the imposition of monetary sanctions without further hearing or proceeding. (See Rules Proc. of State Bar, rules 5.80 et seq. & 5.137.)”
 - (4) An authenticated printout of the certified mail tracking report of the United States Postal Service, showing that the mailing of the initiating pleadings or notice was sent by certified mail and the status of its delivery and possible receipt.
- (B) **Declaration of Reasonable Diligence.** The motion must be supported by a declaration establishing that the deputy trial counsel acted with reasonable diligence to notify the attorney of the proceedings. The declaration must:
- (1) State whether a signed return receipt for the notice of disciplinary charges was received from the attorney;
 - (2) If a signed return receipt is not received from the attorney, show the deputy trial counsel or agent posted the notice of disciplinary charges to the attorney's "My State Bar Profile" page and sent notice to the attorney's electronic service address that a document was posted, and state whether the posted document was accessed by logging into the attorney's "My State Bar" profile page.
 - (3) If a signed return receipt for the notice of disciplinary charges was not received from the attorney, the notice of disciplinary charges posted to the attorney's "My State Bar Profile" was not accessed, and there is no other proof the attorney has actual notice of the proceedings, show the deputy trial counsel or agent attempted contact via email, first class mail, or telephone, at any contact information discovered by:
 - (a) Reviewing the respondent's file for any other recent and known address(es) where OCTC reasonably believes the respondent may be found;

- (b) Reviewing the respondent's file for any known telephone numbers and electronic mail (email) addresses;
 - (c) If the respondent had been ordered to comply with probation or reprobation conditions pursuant to orders issued by the California Supreme Court and/or the State Bar Court, checking with the Office of Probation for the respondent's latest contact information;
 - (d) Conducting at least one Internet search for any other known and available contact information for the respondent using a reasonably available, free search engine; and
 - (e) If conviction proceedings were involved, making reasonable efforts to contact the respondent's defense counsel, if known, for contact information.
- (C) **Proof of Reasonable Diligence.** The Office of Chief Trial Counsel may establish the proof necessary under subdivision (B) by submitting copies of State Bar records, supported by declarations of State Bar staff attesting to the authenticity and nature of the records.
- (D) **Service of Default Motion.** The deputy trial counsel must serve the motion under rule 5.25.
- (E) **Burden of Production.** Proof that a signed return receipt for the notice of disciplinary charges was received from the attorney or that the notice of disciplinary charges posted to an attorney's "My State Bar" profile was accessed by logging into the attorney's "My State Bar" profile on a given date creates a presumption affecting the burden of producing evidence that the licensee has actual notice of the proceeding. Proof that the Office of Chief Trial Counsel sent an e-mail notification to the licensee coupled with proof that the e-mail was not returned as undeliverable creates a presumption affecting the burden of producing evidence that the licensee viewed the e-mail on or about the date it was sent.
- (F) **Order Entering Default.** If the attorney fails to file a written response within 10 days after the motion is served, the Court may order the entry of the attorney's default. Service of the default order must comply with rule 5.25. The order must include this language in prominent type:
 "Because you did not timely file a response to the notice of disciplinary charges filed in this proceeding, the Court has entered your default and deemed the facts alleged in the notice of disciplinary charges admitted. Except as ordered by the Court, you may participate in these proceedings only if the Court sets aside your default. If you fail to timely move to set aside your default, this Court will enter an order recommending your disbarment and may recommend the imposition of monetary sanctions without further hearing or proceeding. (See Rules Proc. of State Bar, rules 5.80 et seq. & 5.137.)"

Proposed Rule 5.80 (Redline Version)

- (A) **Motion for Entry of Default.** When an attorney fails to timely file a response, the deputy trial counsel must file and serve on the attorney a motion for entry of default. The motion must be filed within 15 days after the response is due, absent an agreement or order extending the time for filing by the attorney of a response, and must contain:
- (5) The filing date of notice and date of service of disciplinary charges;
 - (6) A statement that the attorney did not timely file a response under rule 5.43;
 - (7) The following language in prominent type:
 “If you do not file a response with the State Bar Court within 10 days of service of this motion, the court will enter your default, deem the facts in the notice of disciplinary charges admitted by you, and may admit evidence against you that would otherwise be inadmissible. You will lose the opportunity to participate further in these proceedings, unless you timely make—and the court grants—a motion to set aside your default. If your default is entered, and you fail to timely move to set it aside, this court will enter an order recommending your disbarment and may recommend the imposition of monetary sanctions without further hearing or proceeding. (See Rules Proc. of State Bar, rules 5.80 et seq. & 5.137.)”
 - (8) An authenticated printout of the certified mail tracking report of the United States Postal Service, showing that the mailing of the initiating pleadings or notice was sent by certified mail and the status of its delivery and possible receipt.
- (B) **Declaration of Reasonable Diligence.** The motion must be supported by a declaration establishing that the deputy trial counsel acted with reasonable diligence to notify the attorney of the proceedings. The declaration must:
- (1) State whether a signed return receipt for the notice of disciplinary charges was received from the attorney;
 - (2) If a signed return receipt is not received from the attorney, show the deputy trial counsel or agent ~~took those additional steps a reasonable person would have taken under the circumstances to provide notice.~~ posted the notice of disciplinary charges to the attorney's "My State Bar Profile" page and sent notice to the attorney's electronic service address that a document was posted, and state whether the posted document was accessed by logging into the attorney's "My State Bar" profile page.
 - (3) If a signed return receipt for the notice of disciplinary charges was not received from the attorney, the notice of disciplinary charges posted to the attorney's "My State Bar Profile" was not accessed, and there is no other proof the attorney has actual notice of the proceedings, show the deputy trial counsel or agent attempted contact via email, first class mail, or telephone, at any contact information discovered by:

- (a) Reviewing the respondent's file for any other recent and known address(es) where OCTC reasonably believes the respondent may be found;
- (b) Reviewing the respondent's file for any known telephone numbers and electronic mail (email) addresses;
- (c) If the respondent had been ordered to comply with probation or reprobation conditions pursuant to orders issued by the California Supreme Court and/or the State Bar Court, checking with the Office of Probation for the respondent's latest contact information;
- (d) Conducting at least one Internet search for any other known and available contact information for the respondent using a reasonably available, free search engine; and
- (e) If conviction proceedings were involved, making reasonable efforts to contact the respondent's defense counsel, if known, for contact information.

(C) Proof of Reasonable Diligence. The Office of Chief Trial Counsel may establish the proof necessary under subdivision (B) by submitting copies of State Bar records, supported by declarations(s) of State Bar staff attesting to the authenticity and nature of the records.

(D) Service of Default Motion. The deputy trial counsel must serve the motion under rule 5.25.

(E) Burden of Production. Proof that a signed return receipt for the notice of disciplinary charges was received from the attorney or that the notice of disciplinary charges posted to an attorney's "My State Bar" profile was accessed by logging into the attorney's "My State Bar" profile on a given date creates a presumption affecting the burden of producing evidence that the licensee has actual notice of the proceeding. Proof that the Office of Chief Trial Counsel sent an e-mail notification to the licensee coupled with proof that the e-mail was not returned as undeliverable creates a presumption affecting the burden of producing evidence that the licensee viewed the e-mail on or about the date it was sent.

(E) Order Entering Default. If the attorney fails to file a written response within 10 days after the motion is served, the Court may order the entry of the attorney's default. Service of the default order must comply with rule 5.25. The order must include this language in prominent type:
 "Because you did not timely file a response to the notice of disciplinary charges filed in this proceeding, the Court has entered your default and deemed the facts alleged in the notice of disciplinary charges admitted. Except as ordered by the Court, you may participate in these proceedings only if the Court sets aside your default. If you fail to timely move to set aside your default, this Court will enter an order recommending your disbarment and may recommend the imposition of monetary sanctions without further hearing or proceeding. (See Rules Proc. of State Bar, rules 5.80 et seq. & 5.137.)"