



The State Bar of California

OPEN SESSION

AGENDA ITEM

REGULATION AND DISCIPLINE COMMITTEE III.C

DATE: November 18, 2021

TO: Members, Regulation and Discipline Committee

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Proposed Amendment to Rules 5.65, 5.337, and 5.345 of the Rules of Procedure: Request for Public Comment

EXECUTIVE SUMMARY

This proposal would amend various rules of the Rules of Procedure of the State Bar to:

1. Authorize discovery of a respondent's financial records and other evidence of financial hardship where the respondent intends to request that monetary sanction be waived, in whole or in part, that monetary sanctions be paid in installments, or that the time to pay be extended;
2. Authorize discovery of the names, addresses, and telephone numbers of any person or entity to which the attorney was required by rule 9.20 to provide notice of a disbarment, suspension, or resignation; deliver papers or property; or refund fees that had not been earned, in matters in which a violation of rule 9.20 of the California Rules of Court is alleged; and
3. Authorize the Office of Chief Trial Counsel (OCTC) to take the respondent's deposition after service of the answer to the notice of hearing on conviction following transmittal of a certified record of conviction.

BACKGROUND

FINANCIAL RECORDS

Effective January 1, 1993, Business and Professions Code section 6086.13, allows monetary sanctions to be ordered against attorney respondents in disciplinary proceedings. The amounts

collected must be deposited into the Client Security Fund (Bus. & Prof. Code § 6086.13(b)). The statute states that “the State Bar shall, with the approval of the Supreme Court, adopt rules setting forth guidelines for the imposition and collection of monetary sanctions under this section” (Bus. & Prof. Code, § 6086.13(c)).

On March 23, 2020, the California Supreme Court approved rule 5.137, which sets forth guidelines for the imposition of monetary sanctions pursuant to Business and Professions Code section 6086.13(c), with an effective date of April 1, 2020. At its meeting on November 19, 2020, the Board of Trustees approved changes to rules 5.56, 5.57, 5.101, 5.137, 5.138, 5.139, 5.343, and 5.427 of the Rules of Procedure of the State Bar to provide a process for attorneys to seek reduction, waiver, or extension of time to pay imposed sanctions.

NOTICE PROVIDED UNDER RULE 9.20

Rule 9.20 of the California Rules of Court provides that the Supreme Court, in any order disbarring or suspending a licensee of the State Bar, or accepting their resignation, may direct the attorney to:

- Notify all clients with pending matters and any co-counsel of their disbarment, suspension, or resignation;
- Notify all clients with pending matters to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another attorney or attorneys;
- Deliver to all clients in pending matters any papers or other property to which the clients are entitled;
- Refund any part of fees paid that have not been earned;
- Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties of the disbarment, suspension, or resignation; and
- File a notice with the court, agency, or tribunal before which any litigation is pending for inclusion in the respective file or files.

Similarly, the State Bar Court may order respondents to comply with rule 9.20 of the California Rules of Court, for example, when placing a respondent on interim suspension. Violations of rule 9.20 of the California Rules of Court when compliance with that rule was ordered by the State Bar Court are generally charged as violations of Business and Professions Code section 6103 [Failure to Obey a Court Order].

Rule 5.337 provides for discovery in matters involving a violation of rule 9.20 of the California Rules of Court as ordered by the Supreme Court. Rule 5.65 governs discovery where a violation of Business and Professions Code section 6103 is alleged based on failure to comply with rule 9.20 of the California Rules of Court as ordered by the State Bar Court.

DEPOSITION IN CRIMINAL CONVICTION MATTERS

Subdivision (c) of Business and Professions Code section 6101 states that within 30 days of receipt of the record of any conviction which involves or may involve moral turpitude the OCTC shall transmit the record of conviction, which initiates disciplinary proceedings. In addition to crimes which involve moral turpitude as a matter of law (moral turpitude *per se*) and crimes

that involve moral turpitude based on the facts and circumstances of the offense (may involve moral turpitude), an attorney can also be disciplined for the commission of crimes wherein their conduct amounts to “other conduct warranting discipline.” Rule 5.345 governs the Hearing Department proceedings in matters based on criminal convictions.

DISCUSSION

FINANCIAL RECORDS

While the Rules of Procedure of the State Bar provide a process for attorneys to seek reduction, waiver, or extension of time to pay monetary sanctions, there is no rule that permits the OCTC to assess the financial condition of a respondent who intends to seek a reduction, waiver, or extension of time to pay monetary sanctions.

The proposed amendment to add rule 5.65(C)(4) would permit the OCTC to request financial records and other proof of financial hardship, including a completed State Bar Court Financial Declaration, if the disclosing party intends to request that any monetary sanction be waived, in whole or in part, or be paid in installments, or the time to pay be extended. Such records would allow OCTC to evaluate the need for a reduction, waiver, or extension and make an informed decision as to whether to stipulate, submit, or oppose such a motion.

NOTICE PROVIDED UNDER RULE 9.20

The proposed change to rule 5.337 permits discovery that more closely parallels the notice requirements of rule 9.20. The proposed addition of “co-counsel” to subparagraphs (B)(1)(c) and (B)(2) is consistent with the language of rule 9.20(a)(1). The proposed addition of “(or in the absence of counsel, the adverse party)” to subparagraphs (B)(1)(c) and (B)(2) permits discovery of the notice required in rule 9.20(a)(4). The proposed addition of subparagraph (B)(1)(d) permits discovery of information relevant to 9.20(a)(2) and (a)(3).

When an allegation of a violation of Business & Professions Code section 6103 is based on the respondent’s failure to comply with the State Bar Court’s order to comply with rule 9.20 of the California Rules of Court, an original (O) case type is opened. As a result, the OCTC is not entitled to the specific discovery listed in rule 5.337, because rule 5.330 provides that rule 5.337 only applies to 9.20 proceedings (N case type). The proposed amendment to rule 5.65(C)(5) would permit the same discovery in prosecutions of violations of rule 9.20 regardless of the court that ordered the respondent to comply with rule 9.20.

DEPOSITION IN CRIMINAL CONVICTION MATTERS

A criminal conviction matter is initiated by the transmittal of a certified record of conviction. However, while the certified record of conviction, may establish that a crime was moral turpitude *per se*, the certified record of conviction is generally insufficient to establish that the crime committed was moral turpitude based on the facts and circumstances of the offense or that the commission of the crime constituted other conduct warranting discipline.

Because by statute, criminal conviction matters must be referred within 30 days of the receipt of a certified record of conviction, there is no investigation period. As a result, the OCTC generally does not have sufficient time to establish the facts and circumstances underlying the offense. Even when the OCTC has time to request police reports and other court records, frequently, those records no longer exist or are not provided.

Therefore, it is appropriate to permit the OCTC to depose the respondent, to obtain the underlying facts and records. The proposed amendment to 5.345 would permit the OCTC to conduct one deposition of the respondent in criminal conviction matters.

The language in 5.345(D) which states that a respondent who does not reside in California must be given 30 days' written notice of the time and place of the deposition and must appear for it in California at his or her own expense tracks similar provisions in rule 5.405(A), pertaining to discovery in proceedings to demonstrate rehabilitation, fitness, and present learning and ability in the law according to Standard 1.2(c)(1), and rule 5.443(D), pertaining to discovery in reinstatement proceedings.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF PROCEDURE

Title 5, Division 2, Chapter 3, Rule 5.65

Title 5, Division 6, Chapter 1, Rule 5.337

Title 5, Division 6, Chapter 2, Rule 5.345

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 rules 5.65, 5.337, and 5.345 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 5.65 (Clean Version)
- B.** Proposed Rule 5.65 (Redline Version)
- C.** Proposed Rule 5.337 (Clean Version)
- D.** Proposed Rule 5.337 (Redline Version)
- E.** Proposed Rule 5.345 (Clean Version)
- F.** Proposed Rule 5.345 (Redline Version)

Proposed Rule 5.65 (Clean Version)

Rule 5.65 Discovery Procedures

- (A) **Generally.** The procedures in this rule constitute the exclusive procedures for discovery. No other form of discovery is permitted without prior Court order under rules 5.66 or 5.68.
- (B) **Timing of Discovery Requests.** All requests for discovery must be made in writing and served on the other party within 10 days after service of the answer to the notice of disciplinary charges, or within 10 days after service of any amendment to the notice.
- (C) **Scope of Discovery.** Upon request, a party must provide to the other party:
 - (1) The name, address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its allegations or defenses, including in mitigation and aggravation;
 - (2) The name (and, if not previously provided, the address and telephone number) of each individual the disclosing party then intends to call as a witness, including expert witnesses and those it may call if the need arises, including in mitigation and aggravation;
 - (3) A copy – or description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its allegations or defenses, including in mitigation and aggravation. This includes:
 - (a) all statements about the subject matter of the proceedings, including any impeaching evidence, made by any witness then intended to be called or may be called if the need arises by the disclosing party;
 - (b) all statements about the subject matter of the proceedings made by a person named or described in the notice, or amendment to the notice, other than the attorney when it is claimed that an act or omission of the attorney as to the person named or described is a basis for the discipline proceeding;
 - (c) all investigative reports made by or on behalf of the disclosing party about the subject matter of the proceeding;
 - (d) all reports of mental, physical, and blood examinations then intended to be offered in evidence by the disclosing party.
 - (4) Financial records and/or other proof of financial hardship, including a completed State Bar Court Financial Declaration, if the disclosing party intends to request that any monetary sanction be waived, in whole or in part, or be paid in installments, or the time to pay be extended.
 - (5) When a violation of Business and Professions Code section 6103 is alleged based

on a failure to comply with rule 9.20 of the California Rules of Court as ordered by the State Bar Court, discovery is permitted as provided by rule 5.337(B).

- (D) **Definition of Statement.** For purposes of these procedures, statement means either:
 - (1) a written statement that the person has signed or otherwise adopted or approved; or
 - (2) a contemporaneous stenographic, mechanical, electrical, or other recording – or a transcription of it – that recites substantially verbatim the person’s oral statement.
- (E) **Form and Time of Response.** All responses under subdivision (C) must be in writing, signed and served within 20 days after service of the request. All documents and tangible things described but not served with the responses must be made available for inspection and copying by the requesting party within the same time period.
- (F) **Basis for Initial Disclosure; Unacceptable Excuses.** A party must make its disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures.
- (G) **Continuing Duty.** If a party receives a written request for discovery, the party receiving the request has a continuing duty to provide discovery of items listed in the request until proceedings before the Court are concluded. When a written request for discovery is made in accordance with these rules, discovery must be provided within a reasonable time after any discoverable items become known to the party obligated to provide discovery.
- (H) **Failure to Comply with Discovery Request.**
 - (1) Inadmissible. If any party fails to comply with a discovery request as authorized by these procedures, the items withheld are inadmissible or, if the items have been admitted into evidence, may be stricken from the record. If testimony is elicited during direct examination and the party eliciting the testimony withheld any statement of the testifying witness in violation of these discovery procedures, the testimony may be ordered stricken from the record.
 - (2) Reasonable Continuance. Upon a showing of good cause for failure to comply with a discovery request, the Court may admit the items withheld or direct examination testimony of a witness whose statement was withheld upon condition that the party against whom the evidence is sought to be admitted is granted a reasonable continuance to prepare against the evidence, or may order the items or testimony suppressed or stricken from the record.
- (I) **Privileged or Protected Material.**
 - (1) Applicable. Nothing in these procedures authorizes the discovery of any writing

or thing which is privileged from disclosure by law or is otherwise protected. Statements of any witness interviewed by the deputy trial counsel, by any investigators for either party, by the attorney, or by the attorney's counsel are not protected as work product.

- (2) **Information Withheld.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or otherwise protected, the party must make the claim expressly and must describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable the other party to assess the applicability of the privilege or protection.

- (J) **Protective Orders.** The Court may, upon application supported by a showing of good cause, issue protective orders to the extent necessary to maintain in effect such privileges and other protections as are otherwise provided by law.

- (K) **Discovery requests.** Requests served upon an opposing party, as opposed to motions to compel discovery, must not be filed with the court unless attached as an exhibit to a motion.

Proposed Rule 5.65 (Redline Version)

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 - (b) all statements about the subject matter of the proceedings made by a person named or described in the notice, or amendment to the notice, other than the attorney when it is claimed that an act or omission of the attorney as to the person named or described is a basis for the discipline proceeding;
 - (c) all investigative reports made by or on behalf of the disclosing party about the subject matter of the proceeding;
 - (d) all reports of mental, physical, and blood examinations then intended to be offered in evidence by the disclosing party.
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- (K) **Discovery requests.** Requests served upon an opposing party, as opposed to motions to compel discovery, must not be filed with the court unless attached as an exhibit to a motion.

Proposed Rule 5.337 (Clean Version)

Rule 5.337 Expedited Proceeding; Limited Discovery

- (A) **Expedition.** A proceeding charging a failure to comply with a rule 9.20 order will be expedited.
- (B) **Discovery By Chief Trial Counsel.** After the due date for filing the response, the Office of Chief Trial Counsel may conduct discovery without leave of court only for the following limited issues:
 - (1) For all matters that were pending when the rule 9.20 order was filed, counsel may discover:
 - (a) the names, addresses and telephone numbers of clients;
 - (b) the case numbers and names of any litigation filed in a court, and the names of the courts in which pending litigation was filed; and
 - (c) the names, addresses and telephone numbers of co-counsel and opposing counsel (or in the absence of counsel, the adverse party) in pending litigation; and
 - (d) the names, addresses and telephone numbers of any person or entity to which the attorney was required by rule 9.20 to deliver papers or property or refund fees that had not been earned, including whether such delivery or refund was actually accomplished.
 - (2) The documents used to provide notice, as required by rule 9.20, to clients, courts, co-counsel, and opposing counsel (or in the absence of counsel, the adverse party).
- (C) **Other Discovery.** Neither party may conduct any other discovery unless the Court allows it for good cause shown.
- (D) **Applicable Rules.** Unless specific to another proceeding by their terms, all other rules apply.

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 - (d) the names, addresses and telephone numbers of any person or entity to which the attorney was required by rule 9.20 to deliver papers or property or refund fees that had not been earned, including whether such delivery or refund was actually accomplished.
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- (C) **Other Discovery.** Neither party may conduct any other discovery unless the Court allows it for good cause shown.
- (D) **Applicable Rules.** Unless specific to another proceeding by their terms, all other rules apply.

Proposed Rule 5.345 (Clean Version)

Rule 5.345 Hearing Department Proceedings

- (A) **Referred Proceeding; Notice.** When a conviction proceeding is referred under rule 5.344, the Clerk will file and serve under rule 5.25 a notice of hearing on conviction. A copy of the order of referral must be attached to the notice as an exhibit. The notice must state that the attorney may be ordered to pay costs pursuant to Business and Professions Code section 6086.10 and monetary sanctions pursuant to section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar, and must include the following language in capital letters:

“IF YOU FAIL TO FILE A WRITTEN ANSWER TO THIS NOTICE WITHIN 20 DAYS AFTER SERVICE, OR IF YOU FAIL TO APPEAR AT THE STATE BAR COURT TRIAL:

(1) YOUR DEFAULT WILL BE ENTERED;

(2) YOUR STATUS WILL BE CHANGED TO INACTIVE AND YOU WILL NOT BE PERMITTED TO PRACTICE LAW;

(3) YOU WILL NOT BE PERMITTED TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS YOU MAKE A TIMELY MOTION AND THE DEFAULT IS SET ASIDE; AND

(4) YOU WILL BE SUBJECT TO ADDITIONAL DISCIPLINE. SPECIFICALLY, IF YOU FAIL TO TIMELY MOVE TO SET ASIDE OR VACATE 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). UNDER THE RULES OF PROCEDURE OF THE STATE BAR, YOU MUST FILE YOUR WRITTEN RESPONSE TO THIS NOTICE WITHIN 20 DAYS AFTER THIS NOTICE IS SERVED.”

- (B) **Response to Notice.** The attorney must file and serve a response to the notice within 20 days after it is served, unless the court grants an extension. The response must state the attorney’s position on the issues stated in the order of referral and must contain an address for service on the attorney.
- (C) **State Bar Court Record.** The State Bar Court record includes all court orders and documents on file with the Clerk of the State Bar Court in the proceeding, whether or not introduced in evidence. The evidence may include that permitted by Business and Professions Code section 6102, subdivision (g).
- (D) **Deposition.** The Office of Chief Trial Counsel may take the respondent’s deposition after service of the answer to the notice of hearing on conviction is filed. A respondent who does not reside in California must be given 30 days’ written notice of the time and place of the deposition and must appear for it in California at his or her own expense.

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