



The State Bar *of California*

OPEN SESSION

AGENDA ITEM

REGULATION AND DISCIPLINE COMMITTEE III.C

DATE: January 20, 2022

TO: Members, Regulation and Discipline Committee

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Proposed Amendment to Rule 5.21 of the Rules of Procedure: Request for Public Comment

EXECUTIVE SUMMARY

Rule 5.21 of the Rules of Procedure of the State Bar of California sets out the limitations period for initiation of disciplinary proceedings. It generally requires that a Notice of Disciplinary Charges be filed “within five years from the date of the violation,” specifies a range of circumstances that will toll this time, and exempts from the time limitation disciplinary proceedings investigated and initiated “based on information received from an independent source other than a complainant.” The proposed revisions to rule 5.21 would:

- Ensure that the Office of Chief Trial Counsel (OCTC) has the necessary time to investigate complaints submitted at or near the five-year time limit by providing the OCTC with up to two years to investigate and initiate disciplinary proceedings based on such complaints;
- Provide that the time limit is tolled while an attorney owes a fiduciary duty to the complainant;
- Provide that tolling during the pendency of related civil, criminal, or administrative actions extends to such actions taken to remediate the violation, including efforts to collect funds owed as the result of the violation;
- Specify that the two-year period for initiating disciplinary proceedings following review of the OCTC’s decision to close a complaint applies to review by both the Complaint Review Unit and the California Supreme Court;
- Provide that if a surviving family member or the estate’s executor or administrator files a complaint within two years after a prospective complainant’s death, OCTC will have two years from the date of filing to initiate disciplinary proceedings;

- Clarify that the independent source exception applies even if the State Bar is notified of the independent source by a complainant and provide examples of what constitutes an independent source; and
- Make several more minor modifications for clarity and consistency.

BACKGROUND

The American Bar Association’s Model Rules for Lawyer Disciplinary Enforcement recommend against application of any statute of limitations for disciplinary proceedings, explaining: “Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice. The time between the commission of the alleged misconduct and the filing of a complaint predicated thereon may be pertinent to whether and to what extent discipline should be imposed, but should not limit the agency’s power to investigate.” ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 18, Commentary (July 20, 2020).

Rule 5.21 of the Rules of the Procedure of the State Bar, however, imposes a time limitation for the initiation of disciplinary proceedings. In relevant part, rule 5.21:

1. Establishes a general time limit within which a disciplinary proceeding “based solely on a complainant’s allegations of a violation” must begin as “five years from the date of the violation.” Rule 5.21(A).
2. Sets a variety of circumstances that will toll the five year limitations period, including:
 - a. While the attorney represents the complainant, or the complaint’s family member, business, or employer, rule 5.21(C)(1);
 - b. While civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal, rule 5.21(C)(3); and
 - c. While the complaint or investigation is pending before the Office of General Counsel Complaint Review Unit, rule 5.21(C)(10), with OCTC allowed two years after the completion of review to begin disciplinary proceedings, rule 5.21(E).
3. Provides that if a prospective complainant dies before the time to begin a disciplinary procedure expires, “a surviving family member or the estate’s executor or administrator may file a complaint with the State Bar within two years after the complainant’s death.” Rule 5.21(F).
4. Exempts from the general time limit disciplinary proceedings “investigated and initiated by the State Bar based on information received from an independent source other than a complainant.” Rule 5.21(G).

DISCUSSION

The proposed amendments to rule 5.21 are shown in redline in Attachment B. The basis for these proposed amendments is as follows:

General Time Limitation, Subsection (A): Under the current rule, absent a tolling provision applying, the OCTC must initiate disciplinary proceedings by filing the initial pleading (most often a Notice of Disciplinary Charges (NDC)) within five years of the occurrence of the violation, regardless of when the OCTC receives the complaint. As a result, whether a complaint is filed three years after a violation or four years and 360 days after a violation, the result is the same, the OCTC must file a NDC within five years from the date of the violation. This poses the risk that the OCTC may be unable to pursue a complaint alleging serious misconduct that would require substantial investigation (for example, a complicated misappropriation of substantial funds) simply because the complaint, though submitted within five years, was submitted by the complainant (most often not an attorney familiar with the rules) too close to the five-year cutoff to permit the necessary investigation. To address this, the OCTC proposes that the general time limitation be modified to provide that a NDC must be filed within the later of: (1) five years from the date of the violation; or (2) two years from the date the complaint is submitted (so long as that submission occurs within five years from the date of the violation). Under this proposed rule, for example, if a complaint alleging serious but complicated misconduct were submitted four years and 10 months after the date of the alleged violation, the OCTC would have time to investigate and could file a NDC at any time prior to two years after the submission of the complaint, that is, up to six years and 10 months after the date of the violation. The two-year period from the date the complaint is filed is consistent the current rule's provision that the OCTC has two years to initiate disciplinary proceedings after review of a closure decision by the Office of General Counsel Complaint Review Unit. See Rule 5.21(E).

Tolling based on an existing attorney-complainant relationship, Subsection (C)(1): The current rule tolls the time limitation "while the attorney represents the complainant" or specified individuals or entities related to the complainant. The purpose of this tolling is to enable disciplinary proceedings to be put off until they will not interfere with an ongoing relationship between the attorney and complainant. In *Matter of Bret Merrick Saxon*, SBC 17-O-01259 (Review Department, June 26, 2020), the Review Department held that this tolling applies "during the period of time that the attorney acts in a fiduciary relationship [with the complainant], even if it is other than an attorney-client relationship." Consistent with this holding, the OCTC proposes a modification of the rule to make explicit that the tolling applies while the attorney "represents or otherwise owes a fiduciary duty" to the complainant or specified individuals or entities related to the complainant.

Tolling based on pending civil, criminal, or administrative proceedings, Subsection (C)(3): The current rule tolls the time limitation "while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending." In *Saxon, supra*, the Review Department held that proceedings in a Tennessee civil action alleging breach of contract and fraud based on Saxon's fraudulent misuse of funds was based on the same acts or circumstances as the violation because it "directly found that [complainant] had been defrauded by Saxon and was entitled to damages," but proceedings in a California civil action seeking to enforce the Tennessee judgment and an adversary proceeding filed in Saxon's Chapter 7 bankruptcy were not based on the same acts or circumstances as the violation because they were "derivative actions to the Tennessee Action--only filed to collect an outstanding debt (the Tennessee judgment)." The Review Department recognized that the

Bankruptcy court found that “Saxon defalcated the \$1.5 million when he fraudulently transferred the funds,” but discounted this because the court “did so only to determine if the debt was dischargeable in bankruptcy.” *Saxon* demonstrates the difficulties with line drawing between different civil proceedings, particularly for complainants who are most often not lawyers but whose decisions as to when to file a complaint will affect whether disciplinary proceedings are or are not time barred. To limit these difficulties, and account for the fact that “derivative actions” such as those to collect funds owed may nevertheless involve determinations relevant to the scope and harm of a particular violation that may impact disciplinary decisions, the OCTC proposes modifying this tolling provision to provide examples of the types of proceedings that are “based on the same acts or circumstances as the violation,” specifically to include “actions to be taken to remediate the violation, including efforts to collect funds owed as the result of the violation.” The examples also serve to clarify that habeas actions, which typically address both the scope and nature of an alleged investigatory or prosecutorial violation and the harm from that violation, will toll the time limitation.

Filing after review, Subsections (C)(10) and (E): The current rule tolls the time limitation “while the complaint or investigation is pending before the Office of General Counsel Complaint Review Unit,” rule 5.21(C)(10), and allows the State Bar to “begin disciplinary proceedings within two years after proceedings before the Complaint Review Unit conclude,” rule 5.21(E). The OCTC’s decisions to close complaints are subject to two levels of review. The first, internal within the State Bar, is currently conducted by the Office of General Counsel Complaint Review Unit but has at various previous times been conducted elsewhere within the State Bar. The second is at the Supreme Court, upon filing by a complainant of a *Walker* petition. *See In re Walker* (1948) 32 Cal.2d 488. The OCTC proposes modifications to these two provisions of the rule to ensure that the tolling and subsequent two-year filing period will apply wherever within the State Bar the review function is assigned and following review by the Supreme Court.

Filing following the death of a complainant, Subsection (F): The current rule provides that if a prospective complainant dies before the time to begin a disciplinary procedure expires, a surviving family member or the estate’s executor or administrator, may file a complaint with the State Bar within two years after the complainant’s death. The current rule does not specify any time following the filing of such a complaint within which the State Bar may initiate disciplinary proceedings. To address this, the OCTC proposes amendment to specify that a disciplinary proceeding must be initiated within two years after the filing of the complaint.

Independent source exception, Subsection (G): The current rule exempts from the five-year limit disciplinary proceedings “that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant.” The rule does not define an independent source and does not specify whether the exception applies if a complaint is submitted based on an independent source. As an example, the OCTC has received complaints against prosecutors submitted by academic researchers premised on their review of public source materials including newspaper reports and judicial opinions. The OCTC believes that disciplinary proceedings arising from complaints of this type should be treated as independent source proceedings given that the complainant is simply a conduit for identifying independent source information, but the rule is unclear. Accordingly, the OCTC proposes

amendments to: (1) provide examples of what constitutes independent source information, including court orders or opinions, a judge's report, or a media report; and (2) make clear that the independent source exception applies regardless of how the State Bar learns of independent source information, even if the State Bar is notified of the information by a complainant.

Modifications for consistency and clarity: For clarity and consistency with the modifications to the rule discussed above, the OCTC is proposing additional modifications as show in redline in Attachment B.

Retroactive application: The OCTC proposes the addition of language making the proposed amendments effective retroactively to pleadings initiating disciplinary proceedings whose filing would have been timely as of the date of adoption of the amendments. Other rules have provisions calling for retroactive application. See Rule 5.137(H) ("This rule shall apply to all disciplinary and criminal conviction proceedings commenced and stipulations signed on or after April 1, 2020."); Rule 2605(e) ("This rule shall apply retroactively to January 1, 2018.").

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 5.21 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 5.21 (Clean Version)
- B.** Proposed Rule 5.21 (Redline Version)

Proposed Rule 5.21 (Clean Version)**Rule 5.21 Limitations Period**

(A) Time Limit for Complaint. If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the initial pleading must be filed within the later of (1) five years from the date the violation occurred or (2) two years from the date the first complaint regarding the violation is submitted to the State Bar, so long as that complaint is submitted to the State Bar within five years from the date the violation occurred.

(B) When Violation Occurs. A violation of the State Bar Act or a Rule of Professional Conduct occurs when every element of a violation has occurred. But if the violation is a continuing offense, the violation occurs when the offensive conduct ends.

(C) Tolling. The time limit for the filing of an initial pleading under section (A) above is tolled:

(1) while the attorney represents or otherwise owes a fiduciary duty to the complainant, or the complainant's family member business, or employer;

(2) while the complainant is a minor, insane, or physically or mentally incapacitated;

(3) while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation, including but not limited to proceedings seeking to determine whether a violation has occurred, the scope of the violation, the harm resulting from the violation, or any actions to be taken to remediate the violation, including efforts to collect funds owed as the result of the violation, are pending with any governmental agency, court, or tribunal;

(4) from the time the attorney conceals facts about the violation until the State Bar or the victim of the violation discovers the true facts;

(5) from the time the attorney fails to cooperate with the State Bar's investigation of the violation until the attorney provides substantial cooperation with the State Bar's investigation;

(6) from the time the attorney makes false or misleading statements to the State Bar concerning the violation until the State Bar discovers the true facts;

(7) while the disciplinary investigation or proceeding is abated under rule 5.50;

(8) while the attorney is participating in an Alternative Dispute Resolution Mediation Discipline program, Agreement in Lieu of Discipline Prosecution program, or other authorized diversion program concerning the violation;

(9) while the investigation of the violation is ended by admonition given pursuant to rule 5.126 or 2602;

(10) while the Office of Chief Trial Counsel's decision to close the complaint without the filing of an initial pleading is under review by the Office of General Counsel Complaint Review Unit or an equivalent review unit within the State Bar, or the State Bar's decision to close the complaint without the filing of an initial pleading is under review by the California Supreme Court and for any additional period

necessary to provide the State Bar with two years to file an initial pleading following the later of the conclusion of review by the Office of General Counsel Complaint Review Unit or equivalent review unit within the State Bar or the conclusion of review by the California Supreme Court; or

(11) while the attorney is on inactive status pursuant to Business and Professions Code section 6007, subdivision (a) or (b).

(D) Authorized Diversion Program. If the attorney successfully completes an Alternative Dispute Resolution Mediation Discipline program, Agreement in Lieu of Discipline Prosecution program, or other authorized diversion program concerning the violation, the State Bar will be barred from filing an initial pleading alleging the violation.

(E) Initial Pleading After Review. The State Bar must file an initial pleading within two years after the later of (1) the Office of General Counsel Complaint Review Unit or an equivalent review unit within the State Bar concluding its review of the Office of Chief Trial Counsel's decision to close the complaint without the filing of an initial pleading; or (2) the California Supreme Court concluding its review of the State Bar's decision to close the complaint without the filing of an initial pleading.

(F) Death of Complainant. If a prospective complainant dies before the time to begin a disciplinary procedure expires, a surviving family member of the complainant, or the complainant's estate's executor or administrator, may file a complaint with the State Bar within two years after the complainant's death and if such a complaint is filed an initial pleading initiating a disciplinary proceeding based on that complaint must be filed within two years after the filing of the complaint with the State Bar.

(G) Independent Source. The time limit to begin a disciplinary procedure under section (A) above does not apply to disciplinary proceedings that were initiated and investigated by the State Bar based on information from a source independent of a complainant. The independent source exception to the time limit under section (A) above applies regardless of how the State Bar receives or discovers the information, even if the State Bar is notified of the independent source by a complainant. An independent source may include a court order or opinion, a judge's report pursuant to Code of Judicial Ethics, Canon 3(D)(2), or a media report.

(H) Waiver. The attorney and State Bar may agree in writing to waive or extend the limitations in this rule.

(I) Reinstatement Proceedings. This rule does not apply to reinstatement proceedings.

(J) Retroactive Application. The amendments to this rule adopted March 24, 2022 shall apply retroactively to any initial pleading the filing of which would, as of March 24, 2022, have been within the time limit imposed by this rule prior to the March 24, 2022 amendments.

Proposed Rule 5.21 (Redline Version)**Rule 5.21 Limitations Period**

(A) Time Limit for Complaint. If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the ~~proceeding must begin~~ initial pleading must be filed within the later of (1) five years from the date ~~of~~ the violation occurred or (2) two years from the date the first complaint regarding the violation is submitted to the State Bar, so long as that complaint is submitted to the State Bar within five years from the date the violation occurred.

(B) When Violation Occurs. A violation of ~~T~~the State Bar Act or a Rule of Professional Conduct ~~occurs is violated~~ when every element of a violation has occurred. But if the violation is a continuing offense, the violation occurs when the offensive conduct ends.

(C) Tolling. The ~~five-year~~ time limit for the filing of an initial pleading under section (A) above is tolled:

- (1) while the attorney represents or otherwise owes a fiduciary duty to the complainant, or the complainant's family member, ~~or the complainant's~~ business, or employer;
- (2) while the complainant is a minor, insane, or physically or mentally incapacitated;
- (3) while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation, including but not limited to proceedings seeking to determine whether a violation has occurred, the scope of the violation, the harm resulting from the violation, or any actions to be taken to remediate the violation, including efforts to collect funds owed as the result of the violation, are pending with any governmental agency, court, or tribunal;
- (4) from the time the attorney conceals facts about the violation until the State Bar or the victim of the violation discovers the true facts;
- (5) from the time the attorney fails to cooperate with the State Bar's ~~an~~ investigation of the violation until the attorney provides substantial cooperation with the State Bar's investigation;
- (6) from the time the attorney makes false or misleading statements to the State Bar concerning the violation until the State Bar discovers the true facts;
- (7) while the disciplinary investigation or proceeding is abated under rule 5.50;
- (8) while the attorney is participating in an Alternative Dispute Resolution Mediation Discipline program, Agreement in Lieu of Discipline Prosecution program, or other authorized diversion program concerning the violation;
- (9) while the investigation of the violation is ended by admonition given pursuant to rule 5.126 or 2602; ~~or~~
- (10) while the Office of Chief Trial Counsel's decision to close the complaint without the filing of an initial pleading ~~complaint or investigation~~ is under review by ~~pending before~~ the Office of General Counsel Complaint Review Unit or an equivalent review unit within the State Bar, or the State Bar's decision to close the complaint without the filing of an initial pleading is under review by the California Supreme Court and for any additional period necessary to provide the State Bar with two years to file an

initial pleading following the later of the conclusion of review by the Office of General Counsel Complaint Review Unit or equivalent review unit within the State Bar or the conclusion of review by the California Supreme Court; or

(11) while the attorney is on inactive status pursuant to Business and Professions Code section 6007, subdivision (a) or (b).

(D) Authorized Diversion Program. If the attorney successfully completes an Alternative Dispute Resolution Mediation Discipline program, Agreement in Lieu of Discipline Prosecution program, or other authorized diversion program concerning the violation, the State Bar will be barred from filing an initial pleading alleging the violation ~~underlying allegations are barred.~~

(E) Initial Pleading After Review. ~~Office of General Counsel Complaint Review Unit.~~ The State Bar must file an initial pleading ~~begin disciplinary proceedings~~ within two years after ~~proceedings before the later~~ of (1) the Office of General Counsel Complaint Review Unit or an equivalent review unit within the State Bar concluding ~~esits~~ review of the Office of Chief Trial Counsel's decision to close the complaint without the filing of an initial pleading; or (2) the California Supreme Court concluding its review of the State Bar's decision to close the complaint without the filing of an initial pleading.

(F) Death of Complainant. If a prospective complainant dies before the time to begin a disciplinary procedure expires, a surviving family member of the complainant, or the complainant's estate's executor or administrator, may file a complaint with the State Bar within two years after the complainant's death and if such a complaint is filed an initial pleading initiating a disciplinary proceeding based on that complaint must be filed within two years after the filing of the complaint with the State Bar.

(G) Independent Source. The ~~time five-year~~ limit to begin a disciplinary procedure under section (A) above does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information from a source independent of a complainant. The independent source exception to the time limit under section (A) above applies regardless of how the State Bar receives or discovers the information, even if the State Bar is notified of the independent source by a complainant. An independent source may include a court order or opinion, a judge's report pursuant to Code of Judicial Ethics, Canon 3(D)(2), or a media report ~~received from an independent source other than a complainant.~~

(H) Waiver. The attorney and State Bar may agree in writing to waive or extend the limitations in this rule.

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