



The State Bar Court *of California*

OPEN SESSION AGENDA ITEM 704 FEBRUARY 2022

DATE: February 25, 2022

TO: Members, Board of Trustees

FROM: Michelle Cramton, Clerk of Court, State Bar Court
Erika Doherty, Projects Attorney, State Bar Court

SUBJECT: Proposed New Rules of Procedure Regarding Provisional Licensure Program:
Request to Circulate for Public Comment

EXECUTIVE SUMMARY

Pursuant to the California Supreme Court's direction and following its adoption of rule 9.49 and later rule 9.49.1 of the California Rules of Court, the State Bar created the Provisional Licensure Program, which permits certain qualified law school graduates to temporarily engage in the practice of law until June 1, 2022, while supervised by a licensed attorney or judge. Additionally, rule 9.49.1 provides a pathway to permanent licensure.

This agenda item proposes new Rules of Procedure that create a process to adjudicate allegations of misconduct made against Provisionally Licensed Lawyers (PLLs) in the State Bar Court. This item requests that the Board of Trustees approve that these new Rules of Procedure be circulated for a 45-day public comment period.

BACKGROUND

On July 16, 2020, the California Supreme Court directed the State Bar of California "to implement, as soon as possible, a temporary supervised provisional licensure program—a limited license to practice specified areas of law under the supervision of a licensed attorney."

In response to this directive, this Board, in turn, directed the formation of a working group to develop a proposed Rule of Court that was ultimately approved by the California Supreme Court.

Rule 9.49 of the California Rules of Court, effective November 17, 2020, launched the Provisional Licensure Program. This program provides the opportunity for 2020 law school graduates (and those who became eligible to sit for the bar exam in 2020) to temporarily engage in the practice of law through June 1, 2022, under the supervision of a licensed attorney or a judge.

Rule 9.49.1, effective February 1, 2021, built on the Provisional Licensure Program established by rule 9.49, broadening eligibility for the program to those who scored between 1390 and 1439 on any California bar exam administered between July 2015 and February 2020. Additionally, rule 9.49.1 provides a pathway to permanent licensure following satisfactory completion of 300 hours of supervised legal practice in the program without retaking another bar exam if all other entry requirements provided in rule 9.49.1 are satisfied.

DISCUSSION

To participate in the Provisional Licensure Program, a PLL must agree to “be subject to the disciplinary authority of the Supreme Court of California and the State Bar with respect to the laws of the state of California and governing the conduct of lawyers.” (Cal. Rules of Ct., rules 9.49(c)(1)(B) & 9.49.1(c).) Relatedly, a PLL is subject to termination from the program upon “imposition of any sanction for misconduct by the State Bar of California or any other professional or occupational licensing authority, including administrative or stayed suspension against the Provisionally Licensed Lawyer.” (Cal. Rules of Ct., rules 9.49(j)(1)(A) & 9.49.1(h).)

The proposed Rules of Procedure provide a process for the State Bar Court to adjudicate allegations of misconduct against PLLs. A discipline proceeding that concerns a PLL will occur in the same manner as a discipline proceeding filed against a permanently licensed attorney, with a few modifications, including the following:

CONVICTIONS

If a PLL is criminally convicted and the conviction would provide any ground for interim suspension or involuntary inactive enrollment under existing rule 5.342, the Review Department shall issue an order referring the matter to the Office of Admissions. It is the Office of Admissions, not the State Bar Court, that determines whether a PLL remains eligible to participate in the Provisional Licensure Program and/or their ability to qualify for admission to the State Bar under the Provisional Licensure Program.

STATE BAR COURT DECISIONS AND OPINIONS

Because a PLL’s license terminates upon imposition of *any* sanction for misconduct by the State Bar of California, proposed rule 5.484 allows for the State Bar Court to limit a decision to whether the court would order a reproof or recommend greater discipline, since the level of discipline has no bearing on the PLL’s ability to remain in the program. (Cal. Rules of Ct., rules 9.49(j)(1)(A) & 9.49.1(h).)

DISMISSAL OF CERTAIN PROCEEDINGS

If the PLL is provisionally licensed pursuant to California Rules of Court, rule 9.49, proposed rule 5.483 requires the dismissal of a pending proceeding in the State Bar Court on June 1, 2022, as the licensee’s ability to practice law terminates on that date. The allegations that were the basis

for the State Bar Court disciplinary proceeding, however, may be grounds for an adverse moral character determination or for the filing of new charges by the Office of Chief Trial Counsel if the PLL becomes a licensed attorney. If the PLL is provisionally licensed pursuant to California Rules of Court, rule 9.49.1, the State Bar Court disciplinary proceeding will continue after June 1, 2022, as the State Bar Court's decision will have bearing on the ability of the PLL to obtain permanent licensure.

NO PAYMENT OF DISCIPLINE COSTS OR MONETARY SANCTIONS, NO ETHICS SCHOOL REQUIREMENT

Proposed rule 5.486 does not require a PLL to pay discipline costs or monetary sanctions if they are disciplined by the State Bar Court. Additionally, the PLL is not required to attend State Bar Ethics School, since they will no longer be eligible to practice law in California.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF PROCEDURE

Title III, Division 7, Chapter 4

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 Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment, for a period of 45 days, proposed rules 5.480–5.486 of the Rules of Procedure of the State Bar of California; and it is

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 Rules of Procedure.

ATTACHMENT LIST

- A. Proposed Rules of Procedure 5.480–5.486.

Division 7, Chapter 4 Provisionally Licensed Lawyer Proceedings**5.480 Nature of Proceeding**

- (A) **Scope.** These rules apply to a “Provisionally Licensed Lawyer,” as defined and licensed pursuant to California Rules of Court, rules 9.49 and/or 9.49.1.
- (B) **Issues.** The issues in a proceeding under these rules are limited to whether the Provisionally Licensed Lawyer is culpable of conduct that would result in discipline if the Provisionally Licensed Lawyer were fully licensed by the State Bar of California.
- (C) **Applicable Rules.** The Rules of Procedure that by their terms apply to disciplinary proceedings shall govern these proceedings except as provided in rule 5.486. In all such applicable rules, any reference to “attorney” shall apply to a Provisionally Licensed Lawyer.

5.481 Beginning Proceeding

- (A) **Notice of Disciplinary Charges.** A notice of disciplinary charges is the initial pleading, except where a Provisionally Licensed Lawyer is criminally convicted, and must include the content required by rule 5.41(B), except as follows:
 - (1) The notice of disciplinary charges shall not provide notice concerning costs or monetary sanctions as required by rule 5.41(B)(4); and
 - (2) The notice language set forth in rule 5.41(B)(5) must be replaced with the following:

“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 PROVISIONAL LICENSE WILL TERMINATE 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 REFERRED TO THE OFFICE OF ADMISSIONS FOR A DETERMINATION REGARDING YOUR ELIGIBILITY TO PARTICIPATE IN THE PROVISIONAL LICENSURE PROGRAM AND/OR ABILITY TO QUALIFY FOR ADMISSION TO THE STATE BAR UNDER THE PROVISIONAL LICENSURE PROGRAM. (SEE CAL. RULES OF COURT, RULES 9.49 & 9.49.1.)”
- (B) **Notice of Record of Conviction.** Conviction proceedings against a Provisionally Licensed Lawyer are initiated in the Review Department of the State Bar Court when the Office of Chief Trial Counsel files a certified copy of the record of conviction or sentence of incarceration for 90 days or more. Rules 5.340 through 5.347 will apply to the proceeding, except as follows:
 - (1) The Review Department will examine the record of conviction or sentence of incarceration for 90 days or more, and if the conviction would provide any ground

for interim suspension or involuntary inactive enrollment under rule 5.342, the Review Department shall issue an order referring the matter to the Office of Admissions for a determination regarding the Provisionally Licensed Lawyer's eligibility to participate in the Provisional Licensure Program and/or ability to qualify for admission to the State Bar under the Provisional Licensure Program.

- (2) If the conviction does not provide any ground for referral to the Office of Admissions under subparagraph (B)(1), upon finality or a waiver of finality, the conviction shall be referred by the Review Department to the Hearing Department. After the conviction is referred to the Hearing Department, the procedures under rule 5.435 apply except that:

- i. The notice of hearing on conviction shall not provide notice concerning costs or monetary sanctions as required by rule 5.345(A); and
- ii. The notice language set forth in rule 5.345(A) must be replaced with the following:

"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 PROVISIONAL LICENSE WILL TERMINATE 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 REFERRED TO THE OFFICE OF ADMISSIONS FOR A DETERMINATION REGARDING YOUR ELIGIBILITY TO PARTICIPATE IN THE PROVISIONAL LICENSURE PROGRAM AND/OR ABILITY TO QUALIFY FOR ADMISSION TO THE STATE BAR UNDER THE PROVISIONAL LICENSURE PROGRAM. (SEE CAL. RULES OF COURT, RULES 9.49 & 9.49.1.)"

5.482 Default

If a Provisionally Licensed Lawyer does not file a response to the notice of disciplinary charges under rules 5.80 or 5.346, or fails to appear at trial under rules 5.81 or 5.346, and the Provisionally Licensed Lawyer does not vacate or set aside the default pursuant to rule 5.83, the court shall issue an order referring the matter to the Office of Admissions for termination from the Provisional Licensure Program pursuant to California Rule of Court, rules 9.49(j)(1)(A) or 9.49.1(h).

5.483 Termination of Provisional Licensure Program

- (A) **Dismissal of Proceeding.** If a Provisionally Licensed Lawyer who is provisionally licensed pursuant to California Rules of Court, rule 9.49 is the subject of a pending proceeding in the State Bar Court, the court must dismiss the proceeding without prejudice on the date the Provisional Licensure Program terminates as set forth in California Rules of Court, rule 9.49(a)(2). The allegations set forth in the Notice of Disciplinary Charges or the record of conviction may be grounds for an adverse moral character determination or for the filing of

new charges by the Office of Chief Trial Counsel if the Provisionally Licensed Lawyer becomes a licensed attorney.

- (B) Continuation of Proceeding.** If a Provisionally Licensed Lawyer who is provisionally licensed pursuant to California Rules of Court, rule 9.49.1 is the subject of a pending proceeding in the State Bar Court, the court shall continue with the proceeding after the date the Provisional Licensure Program terminates as set forth in California Rules of Court, rule 9.49.1(i)(5).

5.484 Decision

The court's decision shall be limited to whether, based on any finding of culpability and any aggravating or mitigating circumstances, the court would issue a reproof or recommend a greater degree of discipline. The decision may, but is not required to include, the degree of discipline that the court would recommend if it would exceed a reproof.

5.485 Service of Final Decision

The State Bar Court's final decision must be served on the parties, the Office of Admissions, and the California Supreme Court.

5.486 Inapplicable Rules

The following rules do not apply to Provisionally Licensed Lawyer proceedings:

- (A) General.** Rules that by their terms apply only to involuntary inactive enrollment proceedings (rules 5.170–5.278), probation proceedings (rules 5.300–5.317), certain special proceedings (rules 5.330–5.337, 5.350–5.399), and other regulatory proceedings (rule 5.400–5.466).
- (B) Specific.** Rules 5.120 (sending disciplinary recommendations to the Supreme Court), 5.128 (reprovals with conditions), 5.129–5.132 (costs), 5.135 (ethics school), and 5.137–5.139 (monetary sanctions).